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# SAME-SEX MARRIAGE AND EDUCATION: IMPLICATIONS FOR SCHOOLS, STUDENTS, AND PARENTS

*E. Vance Randall\**

## I. INTRODUCTION

In Marian County, located in Northern California, students from the Pleasant Valley Elementary School gathered around their family dinner tables. When asked the usual question of how school went today, many parents were surprised by the responses from their children. For example, one school boy responded, "We had an assembly today. We learned that there are all kinds of families [including] two mommies [and] two daddies." He also shared with his parents new words he had learned such as homosexual, lesbian, and faggot. At the school assembly, skits had been performed. In one skit, one of the girls cut off her hair and ran off with her girl friend. One elementary girl asked her father, "Daddy, am I a lesbian? I like girls better than boys."<sup>1</sup>

It was a beautiful fall day in San Francisco, less than a month away from the state-wide vote on Proposition 8 which would determine the legality of same-sex marriage in California. Some eighteen first-graders attending the Creative Arts Charter School went on a field trip to City Hall. As they arrived at the appointed hour of high noon, they tossed flower petals and blew soap bubbles as their first grade teacher descended down the steps of City Hall with her new wife. One 6-year old youngster wore a political campaign button on her shirt proclaiming, "No on 8." The outing was the idea of one of

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1. Barbara Curtis, *(Gay) School Days*, CITIZEN MAGAZINE (2001), available at [http://www.apfn.net/home\\_school41.htm](http://www.apfn.net/home_school41.htm).

the student's parents who wanted to surprise the children's teacher. The school administrator, Liz Jarofflow, justified the unusual outing as an academic experience in light of the same-sex marriage controversy in the larger context of the ongoing battle for civil rights for all. She considered the field trip a "teachable moment" and that she was "well within the parameters" of providing an appropriate educational experience.<sup>2</sup> Others thought quite differently about the appropriateness of the first-grade field trip to a same-sex wedding during class time. Two parents with children in the same class exercised their right under California law to have their children opt out of the field trip because the nature of the field trip fell under the curriculum area of sex education. A spokesman for the Yes on 8 campaign argued that "it is utterly unreasonable that a public school field trip would be to a same-sex wedding. This is overt indoctrination of children who are too young to have an understanding of its purpose."<sup>3</sup>

Some observers considered this small incident as playing a major role in the passage of Proposition 8 that consequently outlawed same-sex marriage in California. A major argument for the passage of Proposition 8 was that if same-sex marriage became lawful, it would be taught in the public schools as an equally acceptable and legitimate marriage as heterosexual marriage. This field trip was provided proof that supported the argument of those opposing same-sex marriages. It served to illustrate the negative impact that the legitimization of same-sex marriage would have on the both the public schools and comprehensive sex education curriculum being taught to students in grades K-12. Indeed, the field trip was a "teachable moment" for more than just 18 first-graders.<sup>4</sup>

Since the *Roe v. Wade* decision in 1974 which granted a privacy right to women to abort a fetus,<sup>5</sup> it is difficult to find another social issue that is as polarizing and divisive in American society than the issue of same-sex-marriage.

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2. *School Kids Taken to "Gay Wedding,"* TOUCHSTONE: A JOURNAL OF MERE CHRISTIANITY, Dec. 2008, at 45, 45.

3. Jill Tucker, *Class Surprises Lesbian Teacher on Wedding Day*, S.F. CHRON., Oct. 11, 2008, at A1, available at [http://articles.sfgate.com/2008-10-11/news/17134486\\_1\\_field-trip-same-sex-marriage-public-school](http://articles.sfgate.com/2008-10-11/news/17134486_1_field-trip-same-sex-marriage-public-school).

4. John Diaz, *A Lesson in Political Naivete*, S.F. CHRON., Oct. 14, 2008, at B6, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/10/14/EDGE13G80Q.DTL>.

5. *Roe v. Wade*, 410 U.S. 113 (1973).

Reacting primarily to the *Baehr v. Lewin*<sup>6</sup> case where three same-sex couples in Hawaii applied for a marriage license, the U.S. Congress passed the Defense of Marriage Act (DOMA) in 1996 which defined marriage as between a man and a woman.<sup>7</sup>

DOMA has been the subject of several cases in federal courts and in 2009 Democratic congressmen failed in their attempt to repeal DOMA. Since the passage of DOMA, same-sex marriage proposals have failed in referendums held in thirty-one states. Thirty states have passed amendments to state constitutions and another thirteen states have passed statutory language prohibiting same-sex marriage. Five states currently allow same-sex marriages (Connecticut and Vermont—by legislation; Massachusetts, Iowa and New Hampshire by judicial rulings), Washington, D.C. and the Coquilla Indian tribe in Oregon.<sup>8</sup> In addition to the flurry of legislative and judicial activity surrounding same-sex marriage, the collateral damage from the fallout from the passage of Proposition 8 in California has stoked fires of intimidation, threats, and violence.<sup>9</sup> The bitter fight over Proposition 8 in California highlights the intensity and depth of feelings on both sides of the issue. Advocates and opponents of Proposition 8 raised \$39.9 million and \$43.3 million in their efforts to persuade voters to adopt their position.<sup>10</sup> After the passage of Proposition 8 in November 2008 which amended the California state constitution to define marriage as between a man and a woman, same-sex marriage advocates filed suit in district court where on August 4, 2010, Judge Vaughan Walker overturned the results of the Prop 8 referendum.<sup>11</sup> His ruling has been appealed to the Ninth Circuit Court of Appeals. Regardless of the outcome of the Ninth Circuit Court, this case is headed for the U.S. Supreme Court for final adjudication.

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6. 852 P.2d 41 (1993).

7. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. § 7 & 28 U.S.C. § 1738C (1996)).

8. Bill Graves, *Gay Marriage in Oregon? Tribe Says Yes*, THE OREGONIAN, Aug. 20, 2008, [http://www.oregonlive.com/news/index.ssf/2008/08/coquille\\_tribe\\_will\\_sanction\\_s.html](http://www.oregonlive.com/news/index.ssf/2008/08/coquille_tribe_will_sanction_s.html).

9. *Prop 8 Supporters Suffer Vandalism and Violence*, ONENEWSNOW.COM, Nov. 3, 2008, <http://www.onenewsnw.com/Politics/Default.aspx?id=308506>.

10. Ruth Butterfield Isaacson, Comment, *"Teachable Moments": The Use of Child-Centered Arguments in the Same-Sex Marriage Debate*, 98 CALIF. L. REV. 121, 148 (2010) (citing John Wildermuth, *Prop 8 Opponents Unhappy with Campaign Leaders*, S.F. CHRON., Jan. 25, 2008, at B1).

11. *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010).

The only thing that could make same-sex marriage an even more divisive issue would be to introduce it into the education arena, an arena already super-sensitive to curricular content and socialization.

This paper examines the implications of same-sex marriage for K-12 education and is comprised of four sections. The first section presents a framework for understanding better the bitterness of the divide between advocates and opponents of same-sex marriage and lays the foundation for why the issue of same-sex marriage is an especially volatile issue in the education arena. The second section addresses the unique nature of education and why key social issues and education provide a volatile mix. The third section examines same-sex marriage curriculum and its implication for the educational process. Concluding comments and observations round out the paper.

## II. WORLDVIEWS, POLITICAL THEORY AND THE MORAL ORDER

The issue of same-sex marriage, like those of abortion and sex education, continues to generate a fierce debate between advocates and opponents. While vigorous debate is part of the democratic political system, the profound intensity and personal passion associated with this debate more than exceeds the usual vigorous discussions surrounding other key policy issues. An important question to be asked is why this is the case. Why do debates about same-sex marriage find themselves drenched in emotion with fervid supporters on both sides of the issue ready to invest enormous amounts of time, energy and money to win the hearts and minds of the undecided, in order to win the battle? The answer to this question is vital to our collective efforts to better understand the nature and character of the same-sex marriage controversy. The hope that it can point us in a productive direction to resolve, or at least, turn down the heat of emotive responses and brighten the light of reasoned discourse motivates us to continue our search for a solution. The challenge before us is analogous to the metaphor of the iceberg. The heated debate observed in private and public quarters as well as the flurry of legislative and judicial actions represent the visible part of the same-sex marriage iceberg. What is often not seen or noticed at all are the assumptions, values, and belief systems of proponents and

opponents of same-sex marriage that lie hidden, much like the bulk of an iceberg lies under water, from view but providing foundational support for the visible component of the iceberg. Unless the entire iceberg can be seen for what it is, then our view and understanding of such a phenomenon is incomplete, leading to superficial suppositions and ill-informed conclusions about its nature.<sup>12</sup> Note that “[g]roups . . . differ morally in how they view being, knowledge, and values. Moral differences tend to be expressed on surface issues such as abortion, sexual orientation, and school curriculum, but the differences that lie deep in the moral order are rarely expressed directly.”<sup>13</sup>

There are at least two major elements which comprise the hidden, less obvious part of the same-sex marriage iceberg which generates or sustains the visible social clashes and confrontations. These two elements are: (1) an ongoing culture war fueled by different worldviews, and (2) the morally deficient nature of modern day liberalism.

#### A. *Culture Wars and Worldviews*

Culture is a way of life and not merely possessing educated thoughts and genteel tastes. It is, as Edward Burnett Tylor proposed, “that complex whole” which embraces all social aspects and human interactions with others and the environment, all the while imposing order on what would otherwise be existential chaos.<sup>14</sup> Culture, in short, is a grand world view of reality and those who accept a particular culture embrace its particular view of reality, a view of things as they were, as they are, and as they will be. Culture provides answers to cosmological, ontological, and teleological questions about the nature of man, reality, and the purpose and meaning of life. Culture deals with epistemological questions of how we obtain knowledge and know what we know. It legitimates and privileges certain kinds of knowledge and ways of knowing, whether intuitive, instinctive, rational, revelatory or just plain physical sensations. It determines what counts for facts and what is considered mere fantasy. Culture also addresses

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12. See W. BARNETT PEARCE & STEPHEN W. LITTLEJOHN, *MORAL CONFLICT: WHEN SOCIAL WORLDS COLLIDE* 51 (1997).

13. *Id.*

14. 1 EDWARD BURNETT TYLOR, *PRIMITIVE CULTURE: RESEARCHES INTO THE DEVELOPMENT OF MYTHOLOGY, PHILOSOPHY, RELIGION, LANGUAGE, ART, AND CUSTOM* 1 (Gordon Press 1976) (1874).

axiological issues of values and morals by delineating boundaries of true belief and proper conduct.<sup>15</sup>

Through the establishment of culturally established norms, individuals learn a moral system of ethical behavior and what constitutes legitimate social and political institutions.<sup>16</sup> Culture also identifies and defines specifically fundamental social structures and relationships such as marriage, family, and kinship. Culture creates its own universe with its own internal moral order. Every individual lives in a cultural setting and has a worldview, a system of values and beliefs through which a person makes decisions and functions in society. Though worldviews may not always be completely articulated or explicit, they do serve to define how we think about the purpose of life, what is truth, what is right and wrong, our self-identity, and what and how we know what we know.

Cultural conflict arises when competing world views or cultural systems offer alternative systems of meaning-making and normative behavior. Along with each alternative worldview comes its own normative system of how the world is and how human relationships should function. Rival viewpoints compete for the loyalty and commitment of individuals, social acceptance, and argue for the legitimacy of different moral orders and social arrangements. Alternative worldviews threaten the vested interests of the status quo and the personal and collective losses could be immense. The common result is often a culture war, an apt description of an ideological conflict to determine which worldview will emerge as the dominant and normative one in a society. The fervent and deep passions aroused on both sides, the “political and social hostility” of a culture war is “rooted in different systems of moral understanding. The end to which these hostilities tend is the domination of one cultural and moral ethos over all others . . . . [Worldviews provide a] basic commitment and beliefs that provide a source of identity, purpose, and togetherness for the people who live by them. It is precisely this reason that political action rooted in these principles and

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15. BARBARA B. GADDY ET AL., SCHOOL WARS: RESOLVING OUR CONFLICTS OVER RELIGION & VALUES 137–38 (1996).

16. PEARCE & LITTLEJOHN, *supra* note 12, at 51.

ideals tends to be so passionate.”<sup>17</sup> Hunter observes that “[w]hen these social worlds collide, whether in casual conversation or in political activity, each finds that the other constitutes a repudiation of that which it holds most dear. This finding is not merely epistemic but also moral. That which each side holds most sacred compels it to oppose the other.”<sup>18</sup>

The term “culture war” comes from the German word “*Kulturkampf*” (literally “culture struggle”) and was first used in 1873 to describe the conflict between the German chancellor Otto von Bismarck and the Roman Catholics in Germany. Bismarck, a devout Protestant, and Roman Catholic Church leaders were locked in a struggle over the role of the Catholic Church in what was emerging as a united but more ideologically diverse Germany. Bismarck did not trust the Catholics with their primary loyalty to the Pope in Rome. Gradually Bismarck, with his allies of fellow religionists and the “liberal intelligentsia,” was able to wrest political power from the Roman Catholics and place them under state control by closing Catholic departments in the government, placing schools under the control of the state and requiring civil ceremonies for marriages. Although this culture war was a conflict between church and state and between two powerful religions, it was much more than this. This political/religious clash was the visible part of the German culture war. At its roots was a battle over worldviews and the nature of German society and soul. It was a struggle to determine which competing worldview, the Old Catholic social order that had characterized German society for some centuries or the new Bismarckian worldview, would emerge as the dominant and defining reality with its own moral order and authority reining supreme.<sup>19</sup> It was “a cultural struggle without end, because each side to the dispute claimed an absolute monopoly on truth.”<sup>20</sup> And at the heart of this culture war were the schools, the institutional means of passing on whichever worldview

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17. JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* 42 (1991). See also PEARCE & LITTLEJOHN, *supra* note 12, at 14.

18. HUNTER, *supra* note 17, at 42.

19. *Kulturkampf*, ENCYCLOPEDIA.COM, <http://www.encyclopedia.com/doc/1E1-Kulturka.html> (quoting THE COLUMBIA ENCYCLOPEDIA (6th ed. 2008)); Martin Spahn, *Kulturkampf*, 8 THE CATHOLIC ENCYCLOPEDIA (1910), available at <http://www.newadvent.org/cathen/08703b.htm>.

20. JONATHAN ZIMMERMAN, *WHOSE AMERICA?: CULTURE WARS IN THE PUBLIC SCHOOLS* 214 (2003).



gained ascendancy. Hunter rightly observes that in this Kulturkampf “more was involved than meets the modern eye. Education was a symbol of German unity and national identity. German Protestants and Catholics were battling over the moral character of the nation—as it would be passed on to future generations in the schools.”<sup>21</sup> What was ultimately at stake in the nineteenth century German culture war as well as all other culture wars was “how we will order [and live] our lives.”<sup>22</sup>

Cultural conflicts in America are also a part of our history. In his book, *Culture Wars: The Struggle to Define America*, James Hunter contends that the arena for the old culture wars in America was denominational or housed in various religious traditions.<sup>23</sup> With the growing pluralism in America, these major religious traditions (Protestant, Catholic, and Jew) have made peace with each other as they recognized common ground and the social and political benefits or disadvantages associated with any particular religious affiliation have become inconsequential. The loci of current culture wars have shifted from a denominational venue to competition between two contrasting worldviews: a theistic and secular world view, each with their own claim to moral authority and superiority. Hunter uses the categories of orthodox for the theistic world view and progressive for the secular worldview.<sup>24</sup>

In the theistic or orthodox worldview, there are universal rights and wrongs regardless of cultural contexts and truth with capital “T” has an objective reality. The transcendental nature of the orthodox or theistic worldview posits an objective, discoverable reality functioning independent of human social constructions. This worldview is grounded on natural and supernatural realities, the material as well as the spiritual. The source of moral authority rests with an omniscient and omnipotent divine being who reveals universal moral mores, codes of conduct, and transcendental truths to his children. This theistic worldview functions as a “sacred canopy” or “sacred cosmos”<sup>25</sup> with its own internal system of normative

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21. HUNTER, *supra* note 17, at xii.

22. *Id.* at 34.

23. *Id.*

24. *Id.* at 43–44.

25. PETER L. BERGER, *THE SACRED CANOPY: ELEMENTS OF A SOCIOLOGICAL THEORY OF RELIGION* 25 (1967).

thinking, behavior, and roles for individuals, families and nations. For the orthodox, “[m]oral sanity’ consists of submitting one’s own thinking to divinely ordained principles.”<sup>26</sup>

Secularization was first used during the period of “wars of religion” in the sixteenth and seventeenth centuries to describe the wresting of political and social control from religious authorities.<sup>27</sup> The definition has since continued to broaden to include the process of removing religion from public life and discourse. For the secularist or the progressive worldview, right and wrong are contextualized within a particular culture and there are many truths with a small “t.” Moral authority rests with social convention and is a cultural construction. Reality is a social construction, subjective and ever changing and evolving. The key operative concepts in the secular worldview are “[r]eason and intelligence”<sup>28</sup> and are imbued with the “spirit of the modern age, a spirit of rationalism and subjectivism.”<sup>29</sup> Moral sanity consists of submitting your thinking and judgment to the tenets of empiricism and rationalism. Under the secular canopy, man is the sole creator of reality, the ultimate source of moral authority, and the definitive measure of all things. However, as Hunter reminds us, we should not put too fine a point on using the presence or absence of religion as the distinguishing characteristic between orthodox and progressive worldviews because worldviews or cultures are “belief systems, which we call faiths . . . [and] [a]t the heart of culture, though, is religion, or systems of faith. And at the heart of religion are its claims to truth about the world.”<sup>30</sup>

These two opposing alternative worldviews, theistic and non-theistic, provide a framework for understanding better the source of conflict over a variety of social issues such as same-sex marriage. Each canopy with its own system of beliefs and values enshrouds its adherents so that it is a way of seeing and a way of not seeing the world. Hunter points out that:

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26. PEARCE & LITTLEJOHN, *supra* note 12, at 13.

27. BERGER, *supra* note 25, at 112–13.

28. PEARCE & LITTLEJOHN, *supra* note 12, at 14.

29. HUNTER, *supra* note 17, at 45.

30. *Id.* at 57.

[b]ecause this is a culture war, the nub of political disagreement today on the range of issues debated—whether abortion, child care, funding for the arts, affirmative action and quotas, gay rights, values in public education, or multiculturalism—can be traced ultimately and finally to the matter of moral authority. By moral authority I mean the basis by which people determine whether something is good or bad, right or wrong, acceptable or unacceptable, and so on.<sup>31</sup>

When a social issue strikes at the heart of a fundamental belief or moral teaching of competing worldviews, there is little, if any, ground for understanding, much less compromise.

A citizen who views fornication as an abomination before the Lord may have little to share—or even do discuss—with a sex educator who wishes to teach children about contraception. “What have you been reading,” a flustered New Jersey resident asked her state school board in 1980, blasting sex education. “I don’t understand you. I can’t even hold a conversation with you.”<sup>32</sup>

In the current American culture war there is a collision between two very different views of moral authority stemming from two incommensurable worldviews.<sup>33</sup> As Hunter points out,

The central dynamic of the cultural realignment is not merely that different public philosophies create diverse public opinions. These instances, rather, reflect the *institutionalization and politicization of two fundamentally different cultural systems*. Each side operates from within its own constellation of values, interests, and assumptions. At the center of each are two distinct conceptions of moral authority—two different ways of apprehending reality, of ordering experience, of making moral judgments. Each side of the cultural divide then speaks with a different moral vocabulary. Each side operates out of a different mode of debate and persuasion. Each side represents the tendencies of a separate and competing moral galaxy. They are, indeed, “worlds apart.”<sup>34</sup>

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31. *Id.* at 42.

32. ZIMMERMAN, *supra* note 20, at 7–8.

33. GADDY ET AL., *supra* note 15, at 9. See also THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 16–17 (1962).

34. HUNTER, *supra* note 17, at 128.

The bitter controversy over same-sex marriage can be illuminated by this framework of incommensurate worldviews, each with its competing beliefs, value systems, and moral authorities. In addition, what makes the controversy even more complex and impassioned is that marriage, a fundamental and central component of any worldview, is also attached at the hip so to speak with other essential constructs in a worldview such as what constitutes a family, appropriate sexual conduct, and proper roles for men and women.<sup>35</sup> It is in the morally sensitive area of sexuality where the

family more than any other institution that establishes the rules for sexual intimacy—the codes that define the persons with whom, the time when, and the conditions under which sexual intimacy is acceptable. How the family enacts these rules also implies a judgment upon what ‘nature’ will allow or should allow . . . . How parents view nature in matters of sexuality, therefore, is reflected in the ways they teach children about right and wrong. How the actors in the contemporary culture war view nature in matters of sexuality, in turn, will be reflected in their different ideals of how the moral order of a society will take shape in the future.<sup>36</sup>

In picking up the stick of same-sex marriage at one end, you also automatically pick up the other end of the stick with family definitions, sexual mores, and gender roles. These additional issues, when combined with the issue of marriage, all act together synergistically and posing a very formidable social policy challenge. Thus, efforts to redefine marriage simultaneously enter into redefinitions of family life and sexual morality. The converse is also true. A redefinition of what comprises a family or sexual conduct also redefines marriage. It was a prescient Justice Scalia in his dissent in the *Lawrence v. Texas* case who declared that “[i]f moral disapprobation of homosexual conduct is ‘no legitimate state interest’ for purposes of proscribing that conduct . . . what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising ‘the liberty protected by the Constitution?’”<sup>37</sup> Same-sex marriage with its inherent

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35. *Id.* at 181, 189.

36. *Id.*

37. 539 U.S. 558, 604–05 (2003) (Scalia, J., dissenting) (quoting majority opinion).

homosexual morality is a an attempt to radically redefine not only marriage and the roles of father and mother but also to broaden notions of what constitutes proper or right sexual conduct.

From a theistic or orthodox worldview, the traditional view of the family is the nuclear family. Marriage is considered as a sacred sacrament, ordained by God, the bringing together of a man and a woman in a state where they can now use their procreative powers to create life and a family.<sup>38</sup> The family, defined at least as the union between a man and a woman is considered the basic unit of society and civilization and defines the gender roles of a man and a woman. A central value and expectation in a marriage is complete premarital abstinence and marital fidelity. At stake with same-sex marriage is a redefining as well as a restructuring of the family and, by extension, society as we know it and the moral code for proper sexual conduct. In a nutshell, same-sex marriage goes against the fundamental moral order of the universe of those who hold a theistic worldview. Opponents not only find such a position morally reprehensible but fear that advocates of same-sex marriage will indoctrinate the young with same-sex curriculum in schools. They fear that state approval lends public approval to same-sex marriages and makes this particular marriage configuration with its own family life and homosexual conduct of equal moral value to heterosexual marriage and heterosexual conduct. The two opposing world views with diametrically opposed systems of moral order would now occupy the same public square as equals in moral force and character. This sets up a profound dilemma and clash of values in terms of what should be taught in schools and how it should be taught.

The secular or progressive worldview greatly expands the scope of what constitutes marriage, gender roles, and appropriate sexual conduct.<sup>39</sup> Hunter notes that the progressives “define the family not in terms of a particular configuration of biological relationships but more broadly as companionship. Such a definition recognizes the ‘validity of

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See also Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004).

38. See JAMES Q. WILSON, *THE MORAL SENSE* 202 (1993).

39. See HUNTER, *supra* note 17, at 177–80.

different family types' not accounted for by the nuclear family ideal—single parents, nonmarital cohabitation, homosexual and lesbian unions, as so on."<sup>40</sup> But it is the secularist sexual moral code condoning, if not celebrating, sexual promiscuity, marital infidelity, and, most importantly, homosexual conduct that really crosses the moral line for those with an orthodox worldview.

[F]ew other issues [besides homosexuality] challenge the traditional assumption of what nature will allow, the boundaries of the moral order, and finally the ideals of middle-class families more radically. Homosexuality symbolizes either an absolute and fundamental perversion of nature, of the social order, and of American family life, or it is simply another way in which nature can evolve and be expressed, another way of ordering society, and an alternative way of conducting family life.<sup>41</sup>

As one grandmother told a state school board regarding a proposed family life curriculum: "We keep talking about family life, family life, family life . . . There is no way you're going to teach [my] grandchild that homosexuals make a family. The sin of homosexuality is forbidden."<sup>42</sup>

### B. *Dilemmas of the Liberal Democracy*

Although incommensurate worldviews about marriage, family, gender roles, and sexuality account for most of the intense disagreement and ardent controversy surrounding same-sex marriage, modern liberal democratic theory exacerbates rather than helps ameliorate the political and social conflict. Liberal political theory, informed by the ideas of political theorists such as John Locke, John Stuart Mill, John Rawls and even libertarians like Robert Nozick, posits that men, as individuals, are rational creatures who are equally endowed with certain fundamental rights to chart their own course and pursue their own vision of the good life.<sup>43</sup> The role of the state is to ensure that these inalienable rights of

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40. *Id.* at 181.

41. *Id.* at 191.

42. ZIMMERMAN, *supra* note 20, at 208.

43. See generally JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); JOHN STUART MILL, ON LIBERTY (Electric Book Co. 1998) (1869); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974); JOHN RAWLS, A THEORY OF JUSTICE (1971); WILSON, *supra* note 38.

personal liberty and equality are protected from unwarranted outside interference and that the rules of society and contractual arrangements are followed. The state uses a system of laws created by elected officials and a judicial system to adjudicate conflicts over rights and decisions. The outcome of this conflict over rights is determined by which rights trump or have a higher value or rank of importance than other rights. In its role of a social referee, the liberal state cannot declare or determine what constitutes the good life or what comprises the end or ultimate purpose of life. Its role is procedural, not teleological.<sup>44</sup> The state is neutral in the debate over competing worldviews. Only citizens possess the rights and are free to determine the meaning of their own lives and pursue their own notion of the good, given that in doing so they do not interfere or inhibit others from doing the same thing. Individualism, rights, and neutrality are the hallmarks of modern liberal political theory.<sup>45</sup>

In the liberal state, the state cannot determine what ideal is best or preferred in terms of what constitutes the good life. If its actions are aligned with its professed political principles, the liberal state cannot declare which type of family among a constellation of family configurations is the best and the one which all individuals should adopt. It cannot prescribe what is proper sexual conduct between consenting adults.<sup>46</sup> It cannot do so unless it enters the realm of morality, proper ends, and defining what constitutes the good life for everyone, such as one definition for what constitutes a family. As the 1980 White House Conference on families showed, even thirty years ago, we as a nation could come to an agreement on what constitutes the family but only what could constitute a family. Family pluralism ruled the day in defining a family.<sup>47</sup>

The same political dilemma and social quandary confronts the controversy over same-sex marriage. If there is one definition of marriage do the principles of our liberal democracy

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44. ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 181–203, 244–55 (2d ed. 1984); MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 3–51, 274–315 (1996) [hereinafter SANDEL, *DEMOCRACY*]; MICHAEL J. SANDEL, *JUSTICE: WHAT'S THE RIGHT THING TO DO?* 244–69 (2009) [hereinafter SANDEL, *JUSTICE*].

45. SANDEL, *DEMOCRACY*, *supra* note 44, at 4–5.

46. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

47. HUNTER, *supra* note 17, at 178–79. See also WILSON, *supra* note 38.

require state neutrality and profusion of different types and definitions of marriage? In the matter of marriage, the state has four options. It can sanction or approve marriage as between a man and a woman. It can approve marriage as a heterosexual or homosexual couple. It could decide not to regulate or make marriage any part of state action or approval and simply allow religious organizations to perform marriage ceremonies for couples. And last, states could get out of the marriage business entirely; “privatize” marriage if you will. Individuals would be completely free to determine the type of “marriage arrangement,” if any, they want to be in. Neither gender nor number of companions would be of any consideration. Marriages could range from heterosexual couples to multiple genders, same or different, to even self. In this regard, Michael Kinsley argues that the state should get out of the marriage business and just

[l]et churches and other religious institutions continue to offer marriage ceremonies. Let department stores and casinos get into the act if they want. Let each organization decide for itself what kinds of couples it wants to offer marriage to. Let couples celebrate their union in any way they choose and consider themselves married whenever they want. Let others be free to consider them not married, under rules these others may prefer. And, yes, if three people want to get married, or one person wants to marry herself, and someone else wants to conduct a ceremony and declare them married, let ‘em.<sup>48</sup>

It is this last option that seems to correspond most closely with the tenets of the modern liberal state.

The central problem for the liberal state, however, is how to adjudicate between competing claims for how marriage should be defined and still maintain its neutrality without moving into the realm of defining part of the universal good life. There are two major arguments advanced by proponents of same-sex marriage—a liberty argument and a nondiscrimination argument.<sup>49</sup> Both positions are grounded in the concept of rights.<sup>50</sup> The liberty argument contends they should be free to choose who they want to marry and the denial of that right to choose violates a fundamental right of liberty. The

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48. Michael Kinsley, *Abolish Marriage*, SLATE (July 2, 2003, 11:25 a.m.), <http://www.slate.com/id/2085127/>. See also SANDEL, *JUSTICE*, *supra* note 44, at 254–56.

49. See Isaacson, *supra* note 10, at 128, 155.

50. See *id.*



discriminatory argument holds that only allowing heterosexual marriages is discriminatory and violates the Equal Protection Clause of the Fourteenth Amendment. Those in favor of same-sex marriage assert a position that is allegedly morally neutral, “to avoid passing judgment on the moral meaning of marriage . . . [through] ideas of nondiscrimination and freedom of choice. But these ideas cannot by themselves justify a right to same-sex marriage.”<sup>51</sup> But the same-sex marriage debate is not only a debate about rights, at a more fundamental level it is a contest between competing moral authorities and worldviews, a profound dispute over moral values about proper sexual conduct, the nature of family, gender roles, and the essence of marriage. It is at its heart, a question about moral premises and assumptions grounded in different worldviews.

The major problem with only using the adjudicating apparatus of the state within the context of individual rights to settle this issue is that it is impossible to resolve moral issues such as abortion or same-sex marriage by only focusing on rights and without discussing the purposes or ends of human life or the nature and essence of marriage.<sup>52</sup> Michael Sandel poses the central question: “Can you decide whether the state should recognize same-sex marriage without entering into moral and religious controversies about the purpose of marriage and the moral status of homosexuality?”<sup>53</sup> Sandel answers his own question stating that:

the case for same-sex marriage can't be made on nonjudgmental grounds. It depends on a certain conception of the telos of marriage—its purpose or point. And, as Aristotle reminds us, to argue about the purpose of a social institution is to argue about the virtues it honors and rewards. The debate over same-sex marriage is fundamentally a debate about whether gay and lesbian unions are worthy of the honor and recognition, that, in our society, state-sanctioned marriage confers. So the underlying moral question is unavoidable.<sup>54</sup>

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51. SANDEL, *JUSTICE*, *supra* note 44, at 256.

52. Robert Sokolowski, *The Threat of Same-Sex Marriage*, *AM. MAG.*, June 7, 2004, at 12, 12–16, available at [http://www.americamagazine.org/content/article.cfm?article\\_id=3627](http://www.americamagazine.org/content/article.cfm?article_id=3627).

53. SANDEL, *JUSTICE*, *supra* note 44, at 253.

54. *Id.* at 253–54.

To illustrate his point, Sandel refers to the 2003 ruling by the Massachusetts Supreme Court which ruled in favor of same-sex marriage, *Goodridge v. Department of Public Health*, written by Chief Justice Margaret Marshall.<sup>55</sup> Justice Marshall begins her opinion recognizing that “[m]any people hold deep-seated religious, moral and ethical convictions” that marriage should be between a man and a woman or that two people of the same gender should be allowed to marry.<sup>56</sup> Justice Marshall continues indicating that these moral viewpoints held by both sides are irrelevant to the issue at hand which she then frames as a personal liberty issue and a discrimination issue.<sup>57</sup> Justice Marshall then concludes that the state must expand its definition of marriage to include same-sex couples.<sup>58</sup> Sandel argues that

[i]n doing so, she steps outside the bounds of liberal neutrality to affirm the moral worth of same-sex unions, and to offer a view about the purpose of marriage, properly conceived. More than a private arrangement between two consenting adults, she observes, marriage is a form of public recognition and approval. “In a real sense, there are three partners to every civil marriage: two willing spouses and an approving State.” . . . She does not pretend to be neutral on the purpose of marriage, but offers a rival interpretation of it. The essence of marriage, she maintains, is not procreation but an exclusive, loving commitment between two partners—be they straight or gay.<sup>59</sup>

The fundamental dilemma for the state is that it cannot enter into these types of moral discussions and what constitutes the good life without violating a basic premise of modern liberal political philosophy. How, then, can it choose which side of the same-sex marriage debate is right? This dilemma points to a fundamental “flaw” in liberal democratic theory. Wilson explains that

we have come face to face with a fatally flawed assumption of many Enlightenment thinkers, namely, that autonomous individuals can freely choose, or will, their moral life. Believing that individuals are everything, rights are trumps,

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55. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941(Mass. 2003).

56. *Id.* at 948.

57. *Id.*

58. *Id.* at 969.

59. SANDEL, *JUSTICE*, *supra* note 44, at 258–59.

and morality is relative to time and place, such thinkers have been led to design laws, practices, and institutions that leave nothing between the state and the individual save choices, contracts, and entitlements. Fourth-grade children being told how to use condoms is only one of the more perverse of the results.<sup>60</sup>

The particular case of same-sex marriage suggests a generic problem for our liberal democratic society. If individual rights rule the day, then a pluralistic and morally relativistic society is the ultimate outcome. This condition then begs the questions of how much pluralism can, or should be tolerated. In the case of same-sex marriage, once there is more than one definition of marriage legally accepted by the state, what rationale is there to stop here rather than embrace a variety of different marriage definitions and configurations. If the major argument for same-sex marriage is one of being in a loving and committed relationship recognized by the state, then why should this type of relationship be limited in gender or number or configuration of the relationship. This “slippery slope” argument simply asks if there are any limits to pluralism, and if so, how are these limits to be determined without stepping into the messy and forbidden realm of belief systems and values and the composition of a state defined and approved good life?<sup>61</sup> As Hunter asks,

The dilemma we face is two-pronged and can be posed as a series of questions. Are there any limits to pluralism? Is there anything, in other words, that we will not view as acceptable behavior or lifestyle? Should there be any limits? And on what grounds can a community justify the imposition of limits to pluralism? What compelling reasons, acceptable to all, are there for establishing boundaries between what is acceptable and what is not?<sup>62</sup>

In case of same-sex marriage, “[i]f government were truly neutral on the moral worth of all voluntary intimate relationships, the state would have no grounds for limiting marriage to two persons, consensual polygamous partnerships would also qualify.”<sup>63</sup>

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60. WILSON, *supra* note 38, at 250.

61. Sokolowski, *supra* note 52, at 12–16.

62. HUNTER, *supra* note 17, at 308.

63. SANDEL, JUSTICE, *supra* note 44, at 257. See also David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 *HOSTRA L. REV.* 52 (1997–1998); Elizabeth F.

What is being proposed with same-sex marriage is a wholesale reordering of the traditional moral order, a moral revolution. The fundamental unit in the society, the family, is being redefined to include almost any configuration with interchangeable members regardless of gender and or number. The traditional biological and social roles of father and mother are being blurred into indistinguishable, irrelevant categories. Children do not need fathers nor mothers per se, except in a biological sense. The concept of marriage, a key social institution, is being transformed from a union of a man and a woman committed to each other and coming together to bear children and raise a family to a civil arrangement to guarantee social benefits and public acceptability. The very idea of moral behavior and the notion of sexual immorality are being changed to moral relativism. In short, the moral universe for those with the theistic worldview is being threatened at its very foundation.

This section outlined the two basic factors or forces underlying the often acrimonious public debate over same-sex marriage, a debate reflecting a culture war. Proponents and opponents of same-sex marriage approach the same issue from very different perspectives. These perspectives, labeled theistic and secular, or, orthodox and progressive are worldviews and each contains its own internal moral authority comprised of a particular set of values and beliefs. These belief and value systems are incommensurable, thus making any resolution acceptable to both parties nearly impossible. The other major and related factor is that the current mechanism for adjudicating this dispute, the courts, is unable to do so without entering into the forbidden territory of selecting which moral position is the superior one. The judicial conflict is ostensibly about fundamental rights but the root of the conflict is in the realm of competing value systems which define the good life. With this section, the contextual background is laid for the discussing the implications of same-sex marriage in education.

### III. EDUCATION AND SCHOOL WARS

Every child is born without a culture, without a worldview, without a developed personality. Education is socialization or the creative process through which an individual is fashioned and a culture or worldview is passed on from one generation to another.<sup>64</sup> Socialization is the acquisition of culture. The issue is not whether socialization will occur but what kind of socialization a child will experience or into which culture a child will be enculturated. The acquisition of language, values, norms, development or personality, notions of right and wrong are all elements of being socialized into a particular worldview. Socialization involves both an informal and formal process. For example, a child learns to understand and speak a language just by being in a home with parents and siblings. The child can also learn how to be literate in a specific language through a formal education experience in a school with a teacher and curriculum having the explicit objective of teaching a language. The entire process of socialization, of informal and formal education, is value laden. There is no neutrality in socialization and education is not, has never been, nor never will be neutral. It is inherently, by its very nature, saturated with values.

The type of education one receives influences how one perceives reality, what meanings are attached to these perceptions, which social arrangements are to be regarded as legitimate, which personal relationships are deemed proper, which family configurations are considered ideal, and what constitutes moral or unethical behavior. As cultural flashpoints, schools often become battle grounds over which private values, beliefs, and world views will be considered normative for society as a whole. There is much at stake, for the determination of both the specific content and process of education ultimately reflects and reinforces cultural and ontological perspectives more than it does others.

There are two important factors to consider in determining both content and process of formal education. First, parents have the primary responsibility for the education of their children. The responsibility and right is supported by cultural

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64. E. Vance Randall, *Culture, Religion and Education*, in *CONFRONTING OUR CULTURAL PLURALISM: RELIGION AND SCHOOLING IN CONTEMPORARY AMERICA* 59, 71 (Thomas C. Hunt & James C. Carper eds., 1997).

tradition and a long line of U. S. cases including *Pierce v. Society of the Sisters*,<sup>65</sup> *Meyer v. Nebraska*,<sup>66</sup> and *Wisconsin v. Yoder*.<sup>67</sup> Even the Universal Declaration of Human Rights acknowledges that “parents have a prior right to choose the kind of education that shall be given to their children.”<sup>68</sup>

Parents see the family and home as the key socializing agents for their children. The home is the family school and parents view the public or private schools as providing assistance to parents and as extensions of the family school. Parental authority is delegated to teachers and they are thus viewed as substitute parents in terms of their professional responsibilities to teach children and parents expect and trust that teachers will act on their behalf in presenting the same socializing content that children receive in the home. Few things create or stir the passions and anger of parents more quickly and fervently than having teachers and schools teach ideas and values that are foreign or in opposition those taught in the family.

The second major factor that educators and policy-makers need to keep foremost in their minds is children in public schools are a relatively immature and very impressionable audience with incomplete ways of thinking about ideas and with limited ability to engage in an open moral debate with adults. These potentially vulnerable children are brought together under the auspices of the state as a captive audience through the medium of compulsory attendance laws. Because the school is a public, government institution, it carries immense moral authority in promoting which particular set of values from a universe of values are to be held up, supported, and idealized as the right or correct ones to hold. Whatever is presented and taught to children in public schools, whether it be the three Rs, personal virtue, good citizenship, or moral codes of behavior, it tends to take on the imprimatur of the state in the minds of many students and thus becomes a social norm. It becomes “state speech” and state socialization. Schools, public or private, are a very powerful socializing

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65. 268 U.S. 510 (1925).

66. 262 U.S. 390 (1923).

67. 406 U.S. 205 (1972).

68. Universal Declaration of Human Rights, art. 26, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/index.shtml#a26>.

institution in our culture and this requires the state to exercise great caution so as to not advocate, even implicitly, values and beliefs that run contrary to the fundamental rights of its citizens or violate the basic elements of a common or public morality. To be sure, all children must be protected and educated, but not all ideas and practices need be, or should be, promoted in the curriculum. The ultimate question in politics and education is what private values are to be selected and raised to publicly endorsed and socially supported values and which particular worldview will be the principal viewpoint. These are critical questions because

[t]hese world views are made up of people's most basic assumptions about life. These assumptions define their values, their sense of right and wrong, and their definitions and standards of justice. The stakes in this struggle are high because the school environment is viewed as the place where the knowledge, historical perspectives, and values that are the basis for our culture are passed from one generation to the next. The stakes are even higher for parents, especially those who believe schools are promoting values—perhaps religious values—that are antithetical to their own.<sup>69</sup>

The implications of same-sex marriage for public schools and the family schools could be profound. In a general sense, the ongoing culture war over same-sex marriage will only intensify as the bitter debate spills beyond the general public square into the highly sensitive education arena. Adults with a theocratic or orthodox worldview may be able to look past or allow consenting individuals to engage in what they consider immoral sexual behavior if it is done discretely and in private but will respond with open opposition and deep disapproval if such behavior is advocated openly and, especially, if their children are deliberately exposed to such ideas in the course of their public, state-sponsored education.<sup>70</sup> The protective instincts of parents in preserving and passing on their particular worldview with its own moral authority to their children will ignite an acrimonious school war between the orthodox and the secular worldviews in our public schools. The Prop 8 campaign in California is a good example of how the

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69. GADDY ET AL., *supra* note 15, at xi.

70. Daniel Villarreal, *Can We Please Just Start Admitting that We Do Actually Want to Indoctrinate Kids*, QUEERTY (May 12, 2011), <http://www.queerty.com/can-we-please-just-start-admitting-that-we-do-actually-want-to-indoctrinate-kids-20110512/>.

powerfully persuasive argument was that children would be taught in school about same-sex education if Prop 8 failed, helped carry the day for the passage of Prop 8.

Specifically, the teaching of same-sex marriage in schools would have two major effects. The first effect would be in the relationships between parents and teachers, teachers and students, and parents and children. The second major effect would be with the curriculum of the school in terms of curricular content as well as the “hidden curriculum” or the attitudes, values, norms and perspectives that are not explicitly or formally taught such as safe schools policies, anti-bullying policies, hate speech policies, annual Day of Silence events, assemblies with only speakers with one point of view, and policies equating homosexuality and same-sex marriage as civil rights issues such as racial discrimination promoted by national gay and lesbian advocate organizations such as the Human Rights Campaign. Specific curricular areas include health or sex education, family life, multiculturalism and courses dealing with social issues or current events.<sup>71</sup>

The inclusion of same-sex marriage in schools will instantly create an adversarial relationship between parents and teachers. Parents will feel their trust in teachers and the educational system to help them prepare their children to live moral and productive lives according to their worldview is being violated. Teachers will be teaching children, either directly or indirectly, that homosexual conduct is okay and socially acceptable as is same-sex marriage and that they represent but one of many equally good ways of expressing sexuality, marriage, gender roles, and family configurations.<sup>72</sup> Parents from an orthodox perspective will have taught or will be teaching their children just the opposite moral viewpoint. Teachers may be openly challenged by students in the classroom which pits the moral authority of the teacher against the moral authority of the parents. This could undermine the authority and trust of the teachers by students in other areas

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71. See *Citizens for a Responsible Curriculum v. Montgomery Cnty. Pub. Schs.*, No. Civ.A. AW-05-1194, 2005 WL 1075634, at \*2-\*5 (D. Md. May 5, 2005).

72. See Elizabeth H. Rowell, *Missing!: Picture Books Reflecting Gay and Lesbian Families*, *YOUNG CHILD.*, May 2007, at 24, available at <http://www.naeyc.org/files/yc/file/200705/Missing-Rowell.pdf>; *Same-Sex Marriage and the School Curriculum*, EDWATCH, ISSUES AND ACTION IN EDUCATION, April 11, 2005, <http://www.crossroad.to/articles2/05/ed-watch/4-11-same-sex.htm>.



unrelated to same-sex education. The same kind of tension is generated as the child goes home to hear a different point of view from his or her parents which could undermine the moral authority of the parent and distrust of the moral authority of the parent. This places the child in difficult dilemma of having to choose between people who are powerful role models in their lives, leading to confusion, uncertainty, moral and cognitive dissonance. The example of the school wars between the Catholics and the Protestants in the latter half of the nineteenth century is a good historical analog for what could happen with same-sex marriage instruction in twenty-first century schools. School children from Catholic households who attended public schools were bombarded daily in school with anti-Catholic teachings and propaganda. One of the major objectives of the common school movement or early public schools was to rescue Catholic children from false religious beliefs and ideology. The institutional response by Catholics to the Protestant hegemony of public schools in the nineteenth century was to create their own separate system of Catholic schools.<sup>73</sup> What the ultimate response of parents with a theistic or orthodox worldview would do in response to same-sex marriage instruction in public schools remains to be seen but if history serves as any indication, many parents may abandon public schools for private schools which promote a moral teachings more in harmony with their belief system.

Curriculum is the content, the knowledge and skills, courses of study, taught to children in schools. Curriculum both helps frame worldviews and provides for its content. What should or should not be taught is a question that has been answered in a variety of ways since the days of Aristotle and ancient Greece. Herbert Spencer captures the curriculum question best with the title of his essay written in 1884, *What Knowledge Is of the Most Worth?*<sup>74</sup> His answer was science because it best fosters “self-preservation, or the maintenance of life” of any body of knowledge.<sup>75</sup> However, many are the opinions, such as those of Herbert Spencer, which advocate for

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73. JAMES C. CARPER & THOMAS C. HUNT, *THE DISSENTING TRADITION IN AMERICAN EDUCATION* 11–157 (2007); E. VANCE RANDALL, *PRIVATE SCHOOLS AND PUBLIC POWER: A CASE FOR PLURALISM* 27–36 (1994).

74. HERBERT SPENCER, *What Knowledge Is of the Most Worth?*, in *EDUCATION: INTELLECTUAL, MORAL, AND PHYSICAL* 5 (1910).

75. *Id.* at 64.

certain bodies of knowledge or ideas in the school curriculum. The answer to Spencer's question is not self-evident or obvious. Indeed, answers to the question of what should be taught in schools will ultimately be based on one's worldview or system of beliefs and values. Spencer's perennial question is a normative question, a question whose answer is based on personal values and worldviews. The resolution of this question is often accomplished through a political process, either through legislative or judicial means, a process we have seen repeated many times with many subjects such as evolution, religion, prayer, historical narratives, sex education, and now same-sex marriage. The decision to include or exclude same-sex marriage in the school curriculum, like the other topics just mentioned, has generated a powerful controversy of its own. Consider, for example, the heated debated that erupted in the New York City school system in 1992 with the "Children of the Rainbow" curriculum.<sup>76</sup> The curriculum was written to promoted multiculturalism in New York City schools and greater understanding and appreciation for different cultures and ethnic groups. Of the 443 page curriculum, only three pages dealt with alternative family structures which also include homosexual families.<sup>77</sup> Suggested reading for first-graders was "Daddy's Roommate," a story of a young boy whose parents were divorced and whose father lived with a new roommate, Frank. The boy's father and Frank eat and work and also "sleep together." Older elementary children could read that "Heather Has Two Mommies" and "Gloria Goes to Gay Pride." Other book titles included as resource material were "Jennifer Has Two Daddies," and "Jenny Lives with Eric and Martin."<sup>78</sup>

A local school board in the borough of Queens refused to adopt the curriculum. The board president branded parts of the curriculum as "dangerously misleading homosexual/lesbian

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76. Stephanie Gutmann, *The Curriculum That Ate New York—Controversy Over New York New York's First Grade Teaching Guide that Encourages Lessons about Different Lifestyles and Multicultural Diversity*, INSIGHT ON THE NEWS, March 15, 1993, [http://findarticles.com/p/articles/mi\\_m1571/is\\_n11\\_y9/ai\\_13623751/?tag=content:col1](http://findarticles.com/p/articles/mi_m1571/is_n11_y9/ai_13623751/?tag=content:col1).

77. Steven Lee Myers, *How a "Rainbow Curriculum" Turned Into Fighting Words*, N.Y. TIMES, Dec. 13, 1992, at E6, available at <http://www.nytimes.com/1992/12/13/weekinreview/ideas-trends-how-a-rainbow-curriculum-turned-into-fighting-words.html?pagewanted=all&src=pm>.

78. Gutmann, *supra* note 76.

propaganda.”<sup>79</sup> The chancellor over the New York City school system, Joseph Fernandez, then responded by firing the entire school board in Queens for refusing to use the books, but subsequently reinstated them.<sup>80</sup> Chancellor Fernandez later lost his job over the uproar caused by the homosexual component of the curriculum.<sup>81</sup> The fact that only a minute portion of the curriculum in terms of number of pages, 2 out of 443, ignited this controversy which led to the ouster of the chancellor of New York City schools underscores the extreme sensitivity of the public at large over same-sex marriage in a school setting.

Another example of curriculum material used to promote homosexuality as an acceptable alternative lifestyle of equal value to any other lifestyle is a video entitled *It's Elementary*. Technically, the video is an excellent production, a very slick and smooth presentation with a sophisticated and moving script. The video is designed for use in elementary classrooms as well as for professional development of educators and for parent and community groups. The stated purpose of the film is to “encourage all adults who care about children’s safety, self-worth, and innate capacity for compassion and fairness to take a fresh look at why and how schools should address gay issues.”<sup>82</sup> These are laudable goals but they are not realized in the video. Issues are presented from a very one-sided point of view. Equal time is not given to a reasoned presentation of an alternative viewpoint about the role of homosexuality, the health dangers of a homosexual lifestyle, or homosexual sex.<sup>83</sup> Much is made in the video of the need to avoid stereotyping people, yet the video stereotypes people with differing viewpoints as raging bigots with religion implicated as part of this bigotry.

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79. Richard Lacayo, *Jack and Jack and Jill and Jill*, TIME MAG., Dec. 14, 1992, at 52, available at <http://www.time.com/time/magazine/article/0,9171,977237,00.html>.

80. *Id.* See also *New York's Schools: A Class Full of Unions*, ECONOMIST, Dec. 19, 1992, at 24.

81. Gutmann, *supra* note 76.

82. DEBRA CHASNOFF & HELEN COHEN, *IT'S ELEMENTARY: TALKING ABOUT GAY ISSUES IN SCHOOL VIEWING GUIDE 1* (1997).

83. See, e.g., Paul Cameron, Kirk Cameron & William Playfair, *Does Homosexual Activity Shorten Life?*, 83 PSYCHOL. BULL. 847 (1998); Robert S. Hogg et al., *Modeling the Impact of HIV Disease on Mortality in Gay and Bisexual Men*, 26 INT'L J. EPIDEMIOLOGY 657 (1997).

A second video by the same authors was also produced. The focus of this video, *That's a Family!*, is about the various types of family configurations in our society. Like the first video, its intended audience included elementary students, teachers, and parents. The central purpose of this video is to "help children understand and respect differences of all kinds,"<sup>84</sup> particularly "family diversity." While there are elements in the film that are useful in appreciating the diversity of family arrangements, there are two important points that are glossed over or left unsaid. First, the film rests upon the assumption that any family arrangement or structure is as good as any other. "All families are 'normal' families, even though there may be more of some kinds than others."<sup>85</sup> A major problem with this perspective is where to stop, if anywhere, in accepting the idea that all families are normal families and that, therefore implies that all types of families are good for children.<sup>86</sup> Once we get on this slippery slope, it will be very hard to get off. For example, there are polyamory organizations.<sup>87</sup> Members of this group believe that the ideal "family" consists of multiple adult partners "living in a committed sexual relationship." They describe themselves as the "new gay" and that they are just several decades behind the gay movement with their own demands for social acceptance and multiple partner marriages. This group has its own magazine, *Loving More*, and often participate in annual Pride Day marches throughout the country. So will it be acceptable in the call for diversity to speak in our schools not only about Heather's two mommies and Steve's two daddies but also about Susan's three mommies and two daddies and John's one mommy and four daddies? The potential combinations of family configurations boggle the mind.<sup>88</sup> Second, gay and lesbian families are included as part of the diversity without a discussion of what this really means. In addition, of the six different types of family arrangements, only the Gay and Lesbian Parents section has a special note to the

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84. DEBRA CHASNOFF & HELEN COHEN, *THAT'S A FAMILY!: DISCUSSION AND TEACHING GUIDE 4* (2000).

85. *Id.* at 19.

86. See *Citizens for a Responsible Curriculum v. Montgomery Cnty Pub. Schs.*, No. Civ.A. AW-05-1194, 2005 WL 1075634, at \*2-\*5 (D. Md. May 5, 2005).

87. Reid J. Epstein, *Whole Lotta Love: "Polyamorists" Go Beyond Monogamy*, MILWAUKEE J. SENTINEL, Sept. 12, 2004, at B3.

88. See Chambers, *supra* note 63; Emens, *supra* note 63.

teacher about the persecution gays and lesbians have experienced over the centuries. True enough, but where are the ways in which society has stigmatized mixed marriages, divorcees, blended families, and single parents as outside of the norm? Both videos have been widely distributed to public schools across the nation.

In a 2004, a broadcast on National Public Radio illustrated the growing controversy of the nature of sex education in schools along with the state supreme court approval of same sex marriages in Massachusetts. The following are excerpts from this broadcast.

**TOVIA SMITH:** But many teachers say they're less afraid now since the high court decision legalizing gay marriage. Deb Allen teaches eighth-grade sex ed in Brookline. She keeps a picture of her lesbian partner and their kids on her desk and gay equality signs on the wall. Allen says she's already been teaching a gay-friendly curriculum for nearly a decade, but she says she does begin this year feeling a bit more emboldened.

**DEB ALLEN (Eighth-Grade Teacher):** In my mind, I know that, "OK, this is legal now." If somebody wants to challenge me, I'll say, "Give me a break. It's legal now."

**TOVIA SMITH:** And, Allen says, teaching about homosexuality is also more important now. She says the debate around gay marriage is prompting kids to ask a lot more questions, like what is gay sex, which Allen answers thoroughly and explicitly with a chart.

**DEB ALLEN:** And on the side, I'm going to draw some different activities, like kissing and hugging, and different kinds of intercourse. All right?

**TOVIA SMITH:** Allen asks her students to fill in the chart with yeses and nos.

**DEB ALLEN:** All right. So, can a woman and a woman kiss and hug? Yes. Can a woman and a woman have vaginal intercourse, and they will all say no. And I'll say, "Hold it. Of course, they can. They can use a sex toy. They could use"—and we talk—and we discuss that. So the answer there is yes.

**TOVIA SMITH:** In Massachusetts, local districts have broad discretion when it comes to sex ed, and schools range from this one in Brookline to many others that teach abstinence only or offer no sex ed at all. But teachers say gay and lesbian

issues come up all day; not just in sex ed, but everywhere from gym class to social studies or biology. And many teachers say they don't want to go there.

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**TOVIA SMITH:** As [Brian] Camenker sees it, homosexuality should be treated like divorce. Yes, it's legal and, yes, it happens, but when his own parents divorced, Camenker says, none of his teachers celebrated it. But gay rights advocates say that would violate the spirit of the gay marriage law, as well as long-standing anti-discrimination laws. Pam Geramo is with PFLAG, or Parents and Friends of Lesbians and Gays. She says teachers have to acknowledge reality.

**PAM GERAMO (Parents and Friends of Lesbians and Gays):** A child could say, "My parents are gay. Where's my family in this picture?" I mean, you can't teach as if black people don't exist. You can't teach as if, you know, any other group doesn't exist.

**TOVIA SMITH:** With school just now beginning, it's hard to say exactly how much the new gay marriage law will really change what schools teach. Conservatives tend to overstate the point, just as gay rights advocates prefer to downplay it. Both sides know the stakes are high. States around the country are watching Massachusetts as they debate their own marriage laws. And even here, the issue is far from settled. The final word may come in a few years, when voters decide whether to amend the Massachusetts Constitution to ban gay marriage.<sup>89</sup>

A more recent example of the growing impact of same-sex marriage on the school curriculum is the Health Maintenance and Enhancement curriculum proposed this past summer by the Helena Board of Education in Helena, Montana.<sup>90</sup> A part this seventy page document proposes a sex education and family life curriculum starting from kindergarten up through twelfth grade.<sup>91</sup> Part of the criticism surrounding this proposed

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89. *All Things Considered: Massachusetts Schools Weigh Gay Topics*, National Public Radio (Sept. 13, 2004), available at <http://www.npr.org/templates/story/story.php?storyId=3915906>.

90. Matt Gouras, *Helena Revises Sex Ed Curriculum After Intense Criticism*, MISSOULIAN, Sept. 14, 2010, [http://missoulian.com/news/state-and-regional/article\\_43e2608c-c087-11df-ac01-001cc4c03286.html](http://missoulian.com/news/state-and-regional/article_43e2608c-c087-11df-ac01-001cc4c03286.html).

91. Jennifer Hartline, *Reviewing the New "Sex-ed" Agenda: Battle is On in Montana and Across America*, CATHOLIC ONLINE, July 15, 2010,

curriculum are questions about developmentally age appropriate curriculum such as the need for children in kindergarten to be taught what are a penis, scrotum, vagina and nipples. The guide proposed that first graders “understand people of the same gender can love people of the same gender & people of another gender.”<sup>92</sup> Depending on the context or perspective in which this is taught, it could be a very positive statement about the need to love and care about others regardless of their gender or it could be used to set the stage to promote later on in their education the moral equivalency of homosexual and heterosexual relationships and marriage. Second graders are to “understand that making fun of people by calling them gay (e.g. ‘homo,’ ‘fag,’ ‘queer’) is disrespectful and hurtful.” This, too, is a laudable goal but why is making fun of people because of their sexual orientation the only category of name calling that is specifically listed “disrespectful and hurtful”? What about making fun of people because they look funny, are stupid or smart, are a boy or a girl, dress shabby or out of style, too fat or too thin, racial or ethnic background, live on the wrong side of the tracks, speak funny because English is their second language, come from a single parent family, religious beliefs or political persuasions and the list goes on. What message is the school communicating to second graders when sexual orientation is singled out for special attention?

In grade four, children are to understand what is meant by the term “stereotype” through using the example of “the belief that all people of the same gender should behave in the same way.” Again, on its face, addressing the problem of stereotypes is an important idea but why select this example of same gender? This example and the verb “should,” a normative verb, could easily be used as segue into later instruction that promotes the idea that homosexual conduct is okay. In grade five, students are to “understand that sexual intercourse includes but is not limited to vaginal, oral or anal penetration” as well as “[u]nderstand sexual orientation refers to a person’s physical and/or romantic attraction to an individual of the

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[http://www.catholic.org/national/national\\_story.php?id=37368&page=1](http://www.catholic.org/national/national_story.php?id=37368&page=1).

92. HELENA PUBLIC SCHOOLS, HEALTH ENHANCEMENT K-12 CRITICAL COMPETENCIES (DRAFT) 45 (2010), available at <http://www.chicagonow.com/blogs/everyday-thoughts-everyday-questions/K12FinalHealth.pdf>.

same and/or different gender, and is one part of one's personality." First question raised here is whether fifth graders need to be taught about anal intercourse and second, when they are instructed, what will be the context of such instruction and will it lead to the approbation of homosexual intercourse as just another acceptable way of expressing one's sexuality. Grade six students are to "[u]nderstand that sexual intercourse includes but is not limited to vaginal, oral, or anal penetration; using the penis, fingers, tongue or objects." Again, is this type of content age appropriate? They are also to "[u]nderstand that marriage is considered a commitment by two people to love, help, and support one another." On the surface, this appears to be a reasonable and positive concept to teach. It sounds like this came out of Justice Marshall's opinion in the Massachusetts same-sex marriage case. Is marriage only about commitment by two people? What about having children and raising a family? And, more to the point, what is meant by "two people"? Is this an indirect way of defining marriage as a commitment between any two people of the same or different genders? If a student raises the question about the legal or moral debate on same-sex marriage, how will the teacher respond?

Students in grade seven are to "recognize that acceptance of gender role stereotypes can limit a person's life." A good idea as far as it goes here but how will it play out in a potential discussion about homosexuality and same-sex marriage. By eighth grade, the instruction of moral equivalency of homosexual and heterosexual lifestyle, and by logical extension, same-sex and hetero-sex marriage becomes explicit. Students are to "acknowledge that gay men, lesbians, bisexuals, and heterosexuals can establish lifelong committed relationships."<sup>93</sup> In grades nine through twelve, students are to "[u]nderstand erotic images in art reflect society's views about sexuality & help people understand sexuality." Should this topic even be taught in high school and how would the instructor teach this section and at the same time help students distinguish between erotic and pornography? Also in grades nine through twelve, students are to "[u]nderstand sexual orientation is determined by a variety of factors." A seemingly positive approach to fairly discuss the competing

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93. *Id.* at 38.



claims about the origin or causes of sexual orientation. Again, the devil is in the details of how the issue is framed and taught. Under the disease prevention and control section of the curriculum guide, HIV/AIDS receives prominent attention at several grade levels but no mention is made of homosexual conduct as by far the major avenue for the transmission of HIV/AIDS. Although there is much to admire in this comprehensive reform of health curriculum for Helena, Montana, public schools, there are also features that raise concerns about age appropriate topics, the singling out of topics relating to sexual orientation and its role in our society, indirect references to homosexual behavior, what counts and does not count for proper sexual conduct and the potentially hot topics relating to same-sex marriage and what counts as a family.<sup>94</sup> The key will be how teachers and administrators choose to approach the issues and provide a balanced perspective.<sup>95</sup>

A major question facing parents, educators, and policymakers is what is to be done when parents find objectionable curricular material in schools concerning homosexuality and same-sex marriage? A provocative case is found in a controversy between the parents of a child in an elementary school and local school officials. David Parker and his wife Tonia had enrolled their five-year-old son in the Estabrook Elementary School in Lexington, Massachusetts. Their son began bringing home books from school that talked about different kinds of families such as families with same-sex parents. Mr. Parker had approached school officials three times about his concern about the books which promoted a lifestyle and concept of marriage and families that went against their family's personal beliefs and values. Finally in April of 2005, Mr. Parker again went to the school to discuss his concerns about the advocacy of same-sex marriage in the curriculum. He asked the school officials to advise him in advance when such a topic was to be taught so he could remove his son from class

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94. Due to the public outcry based on these concerns, many of the objectionable elements contained in the curriculum draft were deleted in the final 2010 curriculum guide. Gouras, *supra* note 90. The final draft is available at <http://www.helena.k12.mt.us/images/documents/Curriculum/HealthCurriculum/HCFinalDraft.pdf>.

95. Diana Hess, *Teaching about Same-Sex Marriage as a Policy and Constitutional Issue*, 73 SOCIAL EDUC. 344, 349 (2009).

until the topic had been covered. In the course of the meeting, school officials refused Mr. Parker's request about advanced notification and pulling his son from class.<sup>96</sup> In response, Mr. Parker refused to leave the meeting until his request was accepted.<sup>97</sup> He was then charged with trespassing and spent the night in jail.<sup>98</sup> Upon his release from jail the following day, he was banned from the grounds of the elementary school.<sup>99</sup>

Mr. Parker subsequently sued the school district and town officials in district court in April of 2006, alleging violation of rights guaranteed under the First Amendment of religious liberty and the parental right to direct the education of their children under the Fourteenth Amendment. The defendants, school and town officials, asked that the case be dismissed on procedural grounds that the plaintiffs did not "state a claim upon which relief may be granted," which was granted by Judge Mark L. Wolf. Judge Wolf held that public schools can "teach anything that is reasonably related to the goals of preparing students to become engaged and productive citizens in our democracy."<sup>100</sup> This included instruction the importance of diversity in our society and about same-sex orientation and same-sex families. The Parkers choose to send their children to this public elementary school but they do not have the right to dictate what is taught at the school. If they are dissatisfied, Judge Wolf ruled that they could place their children in a private school, home school their children or work to replace school board members who would then change the school policy and curriculum.

The parents then filed an appeal with the First Circuit Court of Appeals. The Court of Appeals affirmed the decision of the district court that the alleged burdens on the First and Fourteenth Amendment rights of the parents were not substantially significant to warrant judicial intervention in the decisions of the school officials.<sup>101</sup> Even though the parents

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96. Press Release, Lexington Public Schools, Regarding Mr. Parker (May 2, 2005), available at [http://www.massresistance.org/docs/parker/images/supt\\_press\\_release.pdf](http://www.massresistance.org/docs/parker/images/supt_press_release.pdf).

97. *Id.*

98. *Id.*

99. Letter to Mr. Parker from Superintendent William J. Hurley, Superintendent of Lexington Public Schools (April 27, 2005), available at [http://www.massresistance.org/docs/parker/images/supt\\_tresspass\\_notice.pdf](http://www.massresistance.org/docs/parker/images/supt_tresspass_notice.pdf)

100. *Parker v. Hurley*, 474 F. Supp. 2d 261, 263 (D. Mass. 2007).

101. See *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008).

found the curricular materials about same-sex couples and families objectionable to their deeply held religious beliefs, school officials did not have to provide advance notice to parents when the topics of same-sex marriage were taught in schools nor did school officials have to provide any opt out provisions.<sup>102</sup>

The challenge such a judicial ruling and the uncooperative posture by school officials to try and accommodate the parental request, presents a significant obstacle to parents who find school curriculum at odds with their deeply held religious beliefs. The attitude of “leave if you don’t like it” creates a wall instead of a bridge between parents and school officials. In addition, the calls for respecting diversity and different viewpoints do not seem to apply to certain viewpoints, especially religious viewpoints. In the name of tolerance, diversity, and respect for different perspectives, schools can teach approvingly about homosexuality and same-sex marriage but refuse to accommodate those which find such ideas morally wrong or refuse to provide equal time to perspectives with opposing viewpoints.

One last look at same-sex marriage curriculum comes from curriculum developed by the Gay, Lesbian, Straight Educators Network (GLSEN).<sup>103</sup> Despite disclaimers to the contrary, GLSEN is a very vocal and ardent advocate for gay and lesbian issues including same-sex marriage. GLSEN’s same-sex marriage curriculum for high school students, *At Issue: Marriage, Exploring the Debate Over Marriage Rights for Same-Sex Couples*, was published in 2003. An evaluation was done of this curriculum by Throckmorton, Welton, and Ingram to ascertain whether the same-sex curriculum by GLSEN was accurate, fair, and balanced.<sup>104</sup> The review produced four major findings. First, the GLSEN curriculum is heavily biased in

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102. *Id.* See also Emily J. Brown, Note, *When Insiders Become Outsiders: Parental Objections to Public School Sex Education Programs*, 59 DUKE L.J. 109 (2009); Danielle Dube, Comment, King and King: *Learning to Treat Others Royally through Diversity Education*, 31 U. LA VERNE L. REV. 109 (2009); Gabriel T. Thornton, Comment, *School’s Use of Books Depicting Same-Sex Couples Does Not Violate Parents’ Constitutional Rights*, 42 SUFFOLK U. L. REV. 329 (2009) (discussing *Parker*).

103. GLSEN, *AT ISSUE: MARRIAGE, EXPLORING THE DEBATE OVER MARRIAGE RIGHTS FOR SAME-SEX COUPLES: A CURRICULUM GUIDE FOR HIGH SCHOOL EDUCATORS* (2003), available at <http://www.eric.ed.gov/PDFS/ED441204.pdf>.

104. WARREN THROCKMORTON, GARY WELTON & MIKE INGRAM, *SAME-SEX “MARRIAGE” AND SCHOOLS* (2004).

favor of same-sex marriage. Except for one lesson, all the materials used only presented a favorable and positive view of same-sex marriage. Second, the curriculum was “coercive” in the sense that it “attempts to employ group or teacher pressure on students to support same-sex marriage.”<sup>105</sup> For example, the curriculum instructs teachers that “when discussing the issue, help students move past preoccupations with the ‘rightness’ or ‘wrongness’ of same-sex coupling or homosexuality in general. Place the debate over marriage within the context of human rights, thereby expanding the dialogue beyond the realm of morality.”<sup>106</sup> In addition, the curriculum directs that “[s]tudents should understand the historical parallels to marriage prohibition against same-sex couples as well as similarities among racism, homophobia, and all other oppression.”<sup>107</sup>

Third, the GLSEN same-sex marriage curriculum is criticized in the review for containing “inaccurate or misleading information.”<sup>108</sup> Some misleading or inaccurate information in the curriculum include assertions that gay relationships are very similar to heterosexual relationships in terms of “commitment and endurance” and that in other countries there is no negative impact in society from same-sex marriages or relationships.<sup>109</sup> And last, the amount of time to cover the curriculum is estimate to take two to three weeks. It just is not practical. The authors of the review offer some constructive suggestions if schools decide to devote instructional time to the issue of same-sex marriage, the best approach would be in the context of an elective class such as sociology, current events, history of religions, etc. The overall assessment of the GLSEN same-sex curriculum was that much more of an advocacy for same-sex marriage than a balanced and accurate study of key social issue in our society.

#### IV. CONCLUSION

This paper has argued three main points. First, the explosive issue of same-sex marriage in schools cannot be well

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105. *Id.* at 6.

106. *Id.* at 7.

107. *Id.*

108. *Id.* at 10.

109. *Id.*

understood without understanding that the education side of the school wars is part of a larger and more profound cultural war. This ongoing cultural war is a competition between two major worldviews, a theistic or orthodox worldview which is religious and transcendental in nature and a secular or progressive worldview rooted in the intellectual dogma of the Enlightenment. Second, this culture war is fought within a political system of modern liberal democratic theory which elevates individual rights and autonomy as the *sine qua non* of a just society along with a state supposedly neutral as to defining notions of the good life. However, it is impossible for the state to adjudicate disagreements between individuals or between individuals and institutions, such as state approval of same-sex marriage, without stepping into the realm of moral and religious beliefs. Thus, a substantial faces dilemma the modern democratic liberal state.

The third major point is to acknowledge that education is inherently value laden, political, and complex. It is the vehicle which provides for the transit of cultures with its worldviews, belief systems and values. The specific nature of the education process and content is not self-evident and whose substance is determined by a particular cultural context and a political process. The fundamental assumptions and positions of competing moral authorities undergird the issue of same-sex marriage as it is introduced in our nation's schools. The hypersensitive nature of the education arena where schools provide a substantial part the socialization of children into a particular worldview sets the backdrop for an intense school war over the place of homosexuality and same-sex marriage in our current and future society. Parents are far less tolerant of what goes on in schools than they are of society in general. For parents with a theistic or orthodox worldview, the issues of same-sex marriage and the attendant issue of homosexuality violates a fundamental moral norm of sexual conduct and definition of a family. On the other side of the divide of the secular or progressive worldview are parents and individuals who consider the social acceptance and state approval of homosexuality and same-sex marriage as benchmarks of a truly liberal, moral and just state. How school curriculum will or should present these opposing positions on same-sex marriage is far from clear. What is clear is that no matter which approach is taken by the public schools, it is bound to

generate heated debate and opposition about the curricular scope, content, and age-appropriateness of same-sex marriage and related issues such as homosexuality and what constitutes a family. These contentious issues and the ways in which they are handled in the public schools have the potential of alienating a substantial segment of public school patrons. If provisions that allow parents and students to opt out of portions of class discussions and curriculum that are considered morally offensive, many parents may leave the public school system and place their children in private education settings such as private or home schools. The stakes of the same-sex marriage issue are extremely high for both the courts and the schools.