Michigan Journal of Gender & Law

Volume 17 | Issue 2

2011

Tango or More - From California's Lesson 9 to the Constitutionality of a Gay-Friendly Curriculum in Public Elementary Schools

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TANGO OR MORE?
FROM CALIFORNIA'S *LESSON 9* TO THE CONSTITUTIONALITY OF A GAY-FRIENDLY CURRICULUM IN PUBLIC ELEMENTARY SCHOOLS

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INTRODUCTION

In August 2009, a group of parents in California filed a lawsuit, *Balde v. Alameda Unified School District*, in the Superior Court of California, County of Alameda.[1] They alleged that the Alameda Unified School District refused them the right to excuse their children from a new curriculum, *Lesson 9*, that would teach public elementary school children about gay, lesbian, bisexual and transgender (GLBT) families.[2] The proposed curriculum included short sessions about GLBT people, incorporated into more general lessons about family and health, once a year from kindergarten through fifth grade.[3] Kindergarteners would learn the harms of teasing, while fifth graders would study sexual orientation stereotypes.[4] One parent alleged that, although an overwhelming majority of parents spoke out against GLBT instruction at numerous school board meetings, the board chairman repeatedly told the public that the curriculum was evenly supported and opposed. Parents suspected the board had a preconceived political agenda behind the proposal.[5] Other parents expressed their full support for the proposed curriculum because, noting that the school is a reflection of the community and the world, children from a very early age should see what the world is like.[6]

The implementation of a gay-friendly curriculum in public schools often leads to a conflict between the power of the state to oversee the education of school children and the rights of parents to instill their children with their own beliefs and values.[7] Over the past decade, numerous commentators have advocated introducing gay positive materials

1. Balde v. Alameda Unified Sch. Dist., No. 09-468037 (Super. Ct. Cal. Alameda County Dec. 1, 2009).
2. *Angry Parents Suing California Schools Over Mandatory Gay-Friendly Classes*, FOX NEWS, (Sept. 3, 2009), http://www.foxnews.com/story/0,2933,546280,00.html?mep.
3. *See* Brief (Amended) of Petitioner-Plaintiffs at 5, 9–11, Balde v. Alameda Unified Sch. Dist., No. 09-468037 (Super. Ct. Cal. Alameda Cnty. denied Dec. 1, 2009).
4. Katie Landan, *Gay Curriculum Proposal Riles Elementary School Parents*, FOX NEWS, (May 22, 2009), http://www.foxnews.com/story/0,2933,521209,00.html.
5. *Id.*
6. *Id.*
7. *See, e.g.*, Parker v. Hurley, 514 F.3d 87, 101–02 (1st Cir. 2008).

to school children.[8] Arthur Lipkin, for instance, debunks the myth that classrooms "have always been 'sexuality-free'" and stresses that "they have always been both sexualized and heterosexist."[9] Lipkin argues that a gay-friendly curriculum would increase students' understanding of diversity and combat antigay bigotry,[10] and a "complete, honest curriculum is more powerful than a censored one."[11] Lipkin concurs with Kathy Bickmore that GLBT issues can be raised in the elementary school curriculum, because "students in any classroom represent a range of sexual knowledge and maturity that cannot be predicted by grade level."[12] Nevertheless, parents' concern over the subtle influence of material taught to their children is not unjustified. Not only do the values and beliefs endorsed by these materials often conflict with their own, but the impressionability of young children also makes them susceptible to persuasion and confusion by conflicting messages from the adult world.[13]

The parents' petition for a writ of mandamus to require the school district to excuse their children from *Lesson 9* was denied by the Court on December 1, 2009,[14] and the pleadings filed do not claim any violation of the children's rights under the Constitution.[15]

This Article studies the constitutionality of *Lesson 9* in California public elementary schools. Parts I and II look at recent court decisions on gay-friendly curricula to unravel potential Constitutional claims. Part I looks at *Parker v. Hurley* to see why the First Circuit dismissed the plaintiffs' First Amendment free exercise and Fourteenth Amendment due process claims. It also criticizes a very recent law review article that attacks the soundness of the First Circuit's holding. Part II studies *Montgomery County Public School v. Citizens for a Responsible Curriculum*, to address how a gay-friendly curriculum can still violate the First Amendment Establishment Clause and Free Speech Clause in some cases.

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8. *See, e.g.*, ARTHUR LIPKIN, BEYOND DIVERSITY DAY: A Q & A ON GAY AND LESBIAN ISSUES IN SCHOOLS (James T. Sears ed., 2004).
9. *See id.* at 209.
10. *Id.* at 195.
11. *Id.* at 195.
12. *See id.* at 220; Kathy Bickmore, *Why Discuss Sexuality in Elementary School?*, *in* QUEERING ELEMENTARY EDUCATION 15, 15–25 (William J. Letts IV & James T. Sears eds., 1999). These commentators attribute children's uninformed sexual interests and pleasures to a media that is saturated with explicitly sexual images and messages.
13. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 592 (1992).
14. Balde v. Alameda Unified Sch. Dist., No. 09-468037 (Super. Ct. Cal. Alameda Cnty. Dec. 1, 2009) (order denying petitioner's petition for writ of mandamus).
15. *Balde*, No. 09-468037.

Part III explores *Lesson 9* in detail, including its course materials and instructions to teachers, to see why it does not implicate the rights of the plaintiffs or their children's rights under the First Amendment. With regard to a potential due process claim, this part makes use of *Fields v. Palmdale School District*, a Ninth Circuit case, to affirm the *Parker* court's holding that parents do not have the right to control public school curriculum or exempt children from it. Part III also cites to the Ninth Circuit to introduce a rational basis test for a potential due process claim, where parents do not concede that the disputed curriculum satisfies any state purposes. In addition, the Ninth Circuit gave a broader example of "legitimate state interest" than the First Circuit did by not relying on California's current state law and instead stressing the "broad ends of education" in serving "higher civic functions."[16] Under this broad definition, *Lesson 9* is constitutional both because it complies with California's laws on marriage and education, and because California's legalization of gay marriage for a brief period in 2008 and the district court's subsequent overturning of Proposition 8 in 2010 created a legitimate educational objective in educating young children about married gay couples who still reside in California.

Finally, Part IV discusses the implications of the foregoing discussion for implementing a gay-friendly curriculum in other states. It argues that a curriculum like *Lesson 9*, which promotes "safety and tolerance" of GLBT people and alternative families, would be Constitutional in all states. In states that do not permit same-sex marriage, certain storybooks that explicitly endorse same-sex marriage, not merely a tolerance for diversity, might be deemed unrelated to any legitimate state purposes, and hence the use of the books would be deemed unconstitutional.

I. *PARKER V. HURLEY*: THE FIRST CIRCUIT'S SOUND HOLDING

A. Due Process and Free Exercise Claims

In *Parker v. Hurley*, two sets of devout Judeo-Christian parents, the Parkers and the Wirthlins, sued the School District in Lexington, Massachusetts, in which their young children were enrolled, for not giving them prior notice and the opportunity to exempt their children from exposure to gay-positive storybooks that they found repugnant in a reli-

16. Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1209 (9th Cir. 2005).

gious sense.[17] While the Parkers objected to their child being presented in kindergarten and first grade with *Who's in a Family?* and *Molly's Family*, both portraying diverse families,[18] the Wirthlins complained that their son's second-grade teacher read to his class *King and King*, which depicts and celebrates a gay marriage.[19] They asserted violations of their own and their children's First Amendment right to the free exercise of religion and of their Fourteenth Amendment due process right to parental autonomy in the upbringing of their children. In addition, they claimed a violation of the Massachusetts parental notification ("opt out") statute.[20] The First Circuit found the use of the storybooks constitutional and therefore affirmed the district court's dismissal of the plaintiffs' claims.[21]

On the due process claim, the plaintiffs alleged that the defendants interfered with their substantive due process right "to make decisions concerning the care, custody, and control of their children" and "systematically indoctrinated" their children with gay-positive ideas.[22] On their free exercise claims, the plaintiffs asserted that the important influence teachers have on young children undercuts the plaintiffs' ability to influence their children toward the family's religious views, particularly since the parents "were given no notice that such curricular materials were in use."[23] The parents also feared that the curriculum forced their children to affirm beliefs "inconsistent with and prohibited by their religion."[24] The plaintiffs argued that their request for notice and exemption from the curriculum was a logical extension of their parental rights to direct the upbringing of their children, "as reinforced by their free exercise rights."[25] They further argued that they had pled a "hybrid claim," one involving free exercise claims brought in conjunction with other claims of violations of constitutional protections; this "hybrid claim" entitled them to strict scrutiny review, which required the defendants to demonstrate a compelling state interest in the choice of the storybooks.[26]

In its opinion, the *Parker* court referred to the Massachusetts Supreme Judicial Court's recognition of same-sex marriage in *Goodridge v.*

17. Parker v. Hurley, 514 F.3d 87, 90 (1st Cir. 2008).
18. *Parker*, 514 F.3d at 92–93.
19. *Parker*, 514 F.3d at 93.
20. *Parker*, 514 F.3d at 90.
21. *Parker*, 514 F.3d at 107.
22. *Parker*, 514 F.3d at 93, 101.
23. *Parker*, 514 F.3d at 94.
24. *Parker*, 514 F.3d at 94.
25. *Parker*, 514 F.3d at 102.
26. *Parker*, 514 F.3d at 98.

Department of Public Health on November 18, 2003.[27] The court also described the state's comprehensive education reform bill, enacted in 1993, that requires the "State Board of Education (SBE) to establish academic standards for core subjects . . . designed to include respect for the cultural, ethnic and racial diversity of the commonwealth . . . to avoid perpetuating gender, cultural, ethnic or racial stereotypes."[28] The Comprehensive Health Curriculum Framework, set up by the SBE in 1999, consists of different goals and measurements, called "strands." Under the Social and Emotional Health Strand are a Family Life component and an Interpersonal Relationships component: the former states that elementary school children should be able to "[d]escribe different types of families"; the latter recommends that children from pre-kindergarten through grade five be able to "[d]escribe the concepts of prejudice and discrimination."[29] In grades six to eight, the Interpersonal Relationships component addresses "the detrimental effect of prejudice (such as prejudice on the basis of race, gender, sexual orientation, class, or religion) on individual relationships and society as a whole."[30] In addition, the Physical Health Strand contains a Reproduction/Sexuality component providing that by grade five, students should be able to "[d]efine sexual orientation using the correct terminology (such as heterosexual, and gay and lesbian)."[31]

The First Circuit then considered the plaintiffs' due process and free exercise claims interdependently, given that those two sets of interests informed one another. Without subjecting the curriculum to any applicable standard of review, the court confirmed the district court's dismissal of the two claims.[32]

27. *Parker*, 514 F.3d at 92 (citing Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003)).

28. *Parker*, 514 F.3d at 91 (quoting MASS. ANN. LAWS ch. 69, § 1D (LexisNexis 1993)).

29. *Parker*, 514 F.3d at 91.

30. *Parker*, 514 F.3d at 91 (quoting MASS. DEPT. OF EDUC., MASS. COMPREHENSIVE HEALTH CURRICULUM FRAMEWORK (1999)).

31. *Parker*, 514 F.3d at 91 (quoting MASS. DEPT. OF EDUC., MASS. COMPREHENSIVE HEALTH CURRICULUM FRAMEWORK (1999)).

32. *Parker*, 514 F.3d at 87. The First Circuit noted that, since courts have disagreed on what makes a "hybrid claim" and how strong the companion claim must be to establish a "hybrid" situation with the Free Exercise claim, the plaintiffs' claim might or might not belong to the category of "hybrid situations." *Parker*, 514 F.3d at 97. Nonetheless, it noted that, whether the plaintiffs had raised a "hybrid claim" was not dispositive of the case, because no published circuit court opinion had ever subjected such a claim to strict scrutiny review. *Parker*, 514 F.3d at 98.

B. Fourteenth Amendment Due Process Claim

The First Circuit narrowly defined the parents' due process rights with regard to their children's education.[33] Given the parents' concession that Massachusetts legitimately used a gay-positive curriculum, the court held that the defendants had not violated the parents' due process rights, without even addressing the applicable standard of review.[34] It acknowledged that the plaintiffs were correct that the Supreme Court recognized a "substantive due process right of parents 'to make decisions concerning the care, custody, and control of their children,' which may be considered a subset of a broader substantive due process right of familial privacy."[35] Nevertheless, the First Circuit cited *Blau v. Fort Thomas Public School District*, a Supreme Court decision, for the proposition that "while parents can choose between public and private schools, they do not have a constitutional right to 'direct how public schools teach their children.' "[36] The court relied upon *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, two other Supreme Court decisions, to support its holding that parental rights should not interfere with " 'the state's power to prescribe a curriculum for institutions which it supports.' "[37] In addition, there was "no federal case under the Due Process Clause which [had] permitted parents to demand an exemption for their children from exposure to certain books used in public schools."[38] Therefore, the Due Process Clause, either in its parental control or its privacy focus, did not give the plaintiffs the degree of control over their children's education that they sought.[39]

C. First Amendment Free Exercise Claim

The First Circuit, having decided that the parents did not have a Due Process Right to control their children's curriculum, further explained why the combination of substantive due process and free

33. *See Parker*, 514 F.3d at 101–03.
34. *See Parker*, 514 F.3d at 101–03.
35. *Parker*, 514 F.3d at 101–02 (quoting Troxel v. Granville, 530 U.S. 57, 66 (2000) (plurality opinion)).
36. *Parker*, 514 F.3d at 102 (quoting Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 395 (6th Cir. 2005)).
37. *Parker*, 514 F.3d at 102 (quoting Meyer v. Neb., 262 U.S. 390, 402 (1923); citing Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925)).
38. *Parker*, 514 F.3d at 102.
39. *Parker*, 514 F.3d at 102–03.

exercise interests did not give the plaintiffs a cause of action.[40] Given that the free exercise of religion means "'the right to believe and profess whatever religious doctrine one desires,'" the "government may not, for example, (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."[41] Because the Free Exercise Clause is not a general protection of religion or religious belief, but has a more limited reach of protecting the free exercise of religion, it is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government. To prevail on a free exercise claim, it would be necessary for the plaintiffs to show the coercive effect of the curriculum as it operated against them in the practice of their religion.[42]

1. Coercion/Compulsion Versus Indoctrination

In holding that the defendants did not violate the plaintiffs' free exercise rights, the First Circuit relied heavily upon *Mozert v. Hawkins County Board of Education*, which was factually similar to *Parker*, to explain the dispositive significance of "compulsion/coercion" in a free exercise claim.[43] In *Mozert*, the Sixth Circuit held that "exposure to [allegedly offensive ideas] through required reading did not constitute a constitutionally significant burden on the plaintiffs' free exercise of religion."[44] The Free Exercise Clause prohibits "governmental compulsion either to do or refrain from doing an act forbidden or required, respectively, by one's religion, or to affirm or disavow a belief forbidden or required, respectively, by one's religion."[45] Because the plaintiffs in *Parker*, like those in *Mozert*, did not "allege coercion in the form of a direct interference with their religious beliefs, nor of compulsion in the form of punishment for their beliefs," their free exercise rights were not violated.[46]

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40. *Parker*, 514 F.3d at 103.
41. *Parker*, 514 F.3d at 103 (quoting Emp't Div. v. Smith, 494 U.S. 872, 877 (1990)).
42. *Parker*, 514 F.3d at 103.
43. *See Parker*, 514 F.3d at 105.
44. *Parker*, 514 F.3d at 105 (citing Mozert v. Hawkins Cnty. Bd. of Educ., 827 F.2d 1058, 1065 (6th Cir. 1987)).
45. *Parker*, 514 F.3d at 105 (quoting *Mozert*, 827 F.2d at 1069).
46. *Parker*, 514 F.3d at 105.

The First Circuit then distinguished "coercion" from "indoctrination" and asserted that the plaintiffs' claim is essentially a claim of "indoctrination," namely, that the "state strongly encouraged their children to endorse an affirmative view of gay marriage and thus undercut their efforts to inculcate their children with their opposing religious views."[47] The court relied upon *West Virginia State Board of Education v. Barnette* in noting that the Supreme Court had never utilized an indoctrination test under the Free Exercise Clause.[48] The *Barnette* Court "held that the state could not coerce acquiescence through compelled statements of belief, such as the mandatory recital of the pledge of allegiance in public schools"; nevertheless, it did not say that "the state could not attempt to instill values in school children by instruction," which it carefully distinguished from coercion.[49]

2. A Continuum of Influence

The First Circuit instead conceived "indoctrination" as a continuum and decided that the use of the storybooks as falling short of "extreme indoctrination" and was therefore constitutional.[50] It rejected the plaintiffs' indoctrination argument by refusing to address whether or not an indoctrination theory under the Free Exercise Clause is sound.[51] In doing so, the court explained why the plaintiffs' pleadings did not establish a viable case of indoctrination, even assuming that "extreme indoctrination" can be a form of coercion.[52] First, that the plaintiffs' children were merely exposed on occasion in public schools to allegedly offensive ideas would not stop them from instructing their children as they saw fit.[53] Since the parents had notice of the books and of the school's overall intent to promote tolerance of same-sex marriage, they retained their ability to discuss the material and subject matter with their children.[54] In the case of the Parkers, since the two books were merely found in the bag and not read to him, his free exercise rights were not violated.[55] As for the Wirthlins' child, even assuming that the

47. *Parker*, 514 F.3d at 105.
48. *See Parker*, 514 F.3d at 105.
49. *Parker*, 514 F.3d at 105 (citing W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 631, 634, 640, 642 (1943)).
50. *Parker*, 514 F.3d at 105.
51. *Parker*, 514 F.3d at 105.
52. *Parker*, 514 F.3d at 105.
53. *Parker*, 514 F.3d at 105.
54. *Parker*, 514 F.3d at 106.
55. *Parker*, 514 F.3d at 106.

defendants intended to use the reading of *King and King* to influence him and that there is a continuum along which an intent to influence could become an attempt to indoctrinate, the defendants' intent could only be to influence the child toward tolerance.[56] Because evidence of "systemic indoctrination" was lacking, the Court dismissed the plaintiffs' free exercise claim.[57]

D. Rebutting Russo's "Uneven Approach" Criticism

Charles J. Russo published an article expressing what, at first glance, appear to be legitimate concerns regarding *Parker*'s holding.[58] First, he is highly skeptical of the First Circuit's opinion that the defendants did not indoctrinate the plaintiffs' children with ideas about gay marriage.[59] By criticizing the First Circuit for failing to address adequately the "undue influence" of educators in "shaping the minds of children," and what he deems the "uneven approach" undertaken by courts "with respect to what students can be exposed to in school settings," he suggests that plaintiffs had a viable indoctrination claim.[60]

Russo directs his second criticism against the First Circuit's acknowledgment of age as a factor in Free Exercise Clause cases and its failure to directly resolve this issue for the rest of its opinion.[61] He argues that the plaintiffs' children might likely have "experienced confusion when they were exposed to ideas . . . that they could not fully comprehend either because the materials differed from values espoused in their homes or were beyond their developmental needs or abilities."[62]

Russo refers to *Lee v. Weisman*[63] and *Roberts v. Madigan*[64] to "criticize the uneven . . . approach by courts toward what educators may or may not teach children.[65] His references are legitimate: while both *Weisman* and *Roberts* are Establishment Clause cases, the courts' holdings relied significantly upon their definitions of "coercion" and "indoctrination," which is the heart of the First Circuit's holding in *Par-*

56. *Parker*, 514 F.3d at 106.
57. *Parker*, 514 F.3d at 106.
58. *See* Charles J. Russo, *"The Child is Not the Mere Creature of the State": Controversy Over Teaching About Same-Sex Marriage in Public Schools*, 232 EDUC. L. REP. 1, 13–14 (2008) [hereinafter Russo].
59. *See id.*
60. *Id.* at 13.
61. *Id.* at 12.
62. *Id.* at 12.
63. 505 U.S. 577 (1992).
64. 921 F.2d 1047 (10th Cir. 1990).
65. *See id.* at 13–14.

ker.[66] *Weisman* is a Supreme Court decision that prohibites a rabbi from conducting a prayer at a public school graduation ceremony on the grounds that the prayer could have resulted in the psychological coercion of students who were required to participate in the ceremony, and therefore coerced to participate in the prayer.[67] *Roberts* is a Tenth Circuit decision that prohibits a fifth-grade schoolteacher from proselytizing to his students with Christianity.[68] Russo argues that the First Circuit could not justifiably treat school officials in *Parker* as being any less capable of shaping the attitudes of students than were the school officials in these two cases.[69] However, Russo's arguments are incorrect, based upon highly cursory analyses of these two cases.[70] Upon closer reading, the facts of these decisions were different than those in *Parker*, and such differences allow for differing conclusions about whether the plaintiffs were indoctrinated or coerced.

Russo does not mention the *Weisman* court's "delicate and fact-sensitive" inquiry that identified multiple factors contributing to the coercive nature of the rabbi's prayer. By this significant omission, he obscures how Weisman is different from *Parker*.[71] First, according to the *Weisman* Court, the pressure that the teachers, principals and friends imposed upon students to attend the ceremony could be as real as overt coercion;[72] second, the graduation ceremony is "one of life's most significant occasions,"[73] third, the students had to maintain "respectful silence" during the ceremony;[74] and fourth, they were likely to view their standing and remaining silent as participating in the prayer, rather than just respect for the act.[75] The *Weisman* court's determination was based on these specific facts, none of which are present in *Parker*.

The differences between *Weisman* and *Parker* are clear. The plaintiffs in *Parker* did not allege that the school officials imposed pressure upon their children.[76] The Parkers' child was merely in the presence of a

66. *See* Parker v. Hurley, 514 F.3d 87, 103, 105–06 (1st.Cir. 2008).
67. Russo, *supra* note 58, at 13; *see* Charles J. Russo, *Same-sex Marriage and Public School Curricular: Preserving Parental Rights to Direct the Education of their Children*, 32 U. DAYTON L. REV. 361, 372 (2007). Russo's 2007 article obviously came before *Parker*'s holding, although the author addresses more generally his concern regarding the possible indoctrination of public school students by a gay-friendly curriculum.
68. Russo, *supra* note 58, at 13–14.
69. *Id.* at 14.
70. *See, e.g.*, *id.* at 13–14.
71. *Weisman*, 505 U.S. at 593, 595; Russo, *supra* note 58, at 13.
72. *Weisman*, 505 U.S. at 593.
73. *Weisman*, 505 U.S. at 595.
74. *Weisman*, 505 U.S. at 593.
75. *Weisman*, 505 U.S. at 593.
76. *See* Parker v. Hurley, 514 F.3d 87, 105 (1st Cir. 2008).

bag and a library, both containing the allegedly offensive books.[77] Russo would argue that the Wirthlins' child was obligated to attend the class in which his teacher read *King and King* to him.[78] Yet, unlike in a graduation ceremony, not only was there no acquiescence to a "group ritual" in a class, but there was also no allegation that the child could not protest or criticize the story.[79] In fact, the Wirthlins' child did protest and criticize. While the Wirthlins did not allege what their child did or did not do in class, they did allege that on the same day, the child freely and readily protested to his parents, calling the story "so silly."[80] Thus, there was no coercion in *Parker*.

Russo likewise provides a cursory analysis of *Roberts*, which leaves out crucial facts and obscures the significant differences between *Roberts* and *Parker*, in that there was no indoctrination in *Parker*. In this Tenth Circuit case, the fifth-grade school teacher devoted fifteen minutes each day to a "silent reading period," during which students were allowed to choose their own reading materials, or materials from his classroom library which contained, among others, two Christian religious books.[81] Purportedly to set an example for his students, the teacher silently read his own materials during the reading time and frequently chose the Bible, which he kept on his desk throughout the school day. He also displayed a poster in his classroom that read, "You have only to open your eyes to see the hand of God."[82] Maintaining the "difference between teaching about religion, which is acceptable, and teaching religion, which is not,"[83] the Tenth Circuit found that his actions, when viewed in their entirety, communicated a Christian message to his class.[84] The trial court also argued that the danger of indoctrinating students with religious beliefs is much greater in a classroom than in a library.[85] "Attendance [was] compulsory in the classroom," where the defendant stood "in a position of power as the disciplinarian, role model and educator," and students became a "captive audience vulnerable to even silent forms of religious indoctrination."[86] The Tenth Circuit did

77. *Parker*, 514 F.3d at 92–93
78. *See Parker*, 514 F.3d at 93.
79. *See Parker*, 514 F.3d at 93, 105.
80. *Parker*, 514 F.3d at 93.
81. Roberts v. Madigan, 921 F.2d 1047, 1049 (10th Cir. 1990).
82. *Roberts*, 921 F.2d at 1049.
83. *Roberts*, 921 F.2d at 1055.
84. *Roberts*, 921 F.2d at 1057 (citing Roberts v. Madigan, 702 F. Supp. 1505, 1517 (D. Colo. 1989)).
85. *See Roberts*, 921 F.2d at 1055.
86. *Roberts*, 702 F. Supp. at 1513.

not dispute this point.[87] Such differences become significant as they help to differentiate between *Roberts* and *Parker*.

The differences between *Roberts* and *Parker* are obvious. The Parkers' child, who was only provided some books, was not subjected to an oppressive classroom environment conducive to indoctrination.[88] Russo would argue that the Wirthlins' child, being read the offensive book in the classroom, was forced into a situation similar to the students in *Roberts*.[89] Nevertheless, he was read the book only once and was not subjected to continuous exposure as were the *Roberts* students to the Bible.[90] Most significantly, the teacher did not display in the classroom any posters, let alone one that explicitly endorses a religion.[91] The teacher in *Parker* was, at most, teaching about gay marriage, which is acacceptable in Massachusetts, but not teaching gay marriage, which, like teaching religion, is indoctrination and therefore unacceptable.[92]

E. Rebutting Russo's "Age" Criticism

Russo criticizes the First Circuit for mentioning the ages of the children, thus acknowledging age as a factor in Free Exercise Clause cases but failing to deal with this factor for the rest of its opinion.[93] He asserts that young children are most susceptible to confusion when they are exposed to materials that discuss intimate issues without parental consent or input.[94] He accuses the First Circuit of blithely ignoring how school officials might have manipulated the situation in order to pursue pro-gay state propaganda.[95] Russo's criticism is nonetheless dubious for two reasons.

First, it was not really necessary for the First Circuit to address the age factor, because the gay-friendly curriculum in *Parker* strictly complied with the state law of Massachusetts.[96] As already discussed, the Family Life component under the Social and Emotional Health Strand of the Comprehensive Health Curriculum Framework states that elementary school children should be able to "[d]escribe different types of

87. *See Roberts*, 921 F.2d at 1055.
88. *See* Parker v. Hurley, 514 F.3d 87, 92–93 (1st Cir. 2008).
89. *See Roberts*, 921 F.2d at 1055.
90. *See Parker*, 514 F.3d at 93.
91. *See Parker*, 514 F.3d at 93.
92. *See Parker*, 514 F.3d at 93; *Roberts*, 921 F.2d at 1055.
93. *See Parker*, 514 F.3d at 101; Russo, *supra* note 58, at 12.
94. Russo, *supra* note 58, at 12.
95. *Id.* at 12–13.
96. *See Parker*, 514 F.3d at 91.

families," whereas its Interpersonal Relationships component recommends that children from pre-kindergarten through grade five be able to "[d]escribe the concepts of prejudice and discrimination."[97] Accordingly, teachers and school officials acted within the scope of their power to introduce *Who's in a Family?* and *Molly's Family*, both portraying diverse families, to kindergarteners and grade-one students.[98] Likewise, to further the state objectives of helping students learn about diverse families and of combating discrimination, introducing *King and King* to second-grade students was by no means premature.[99]

Second, the First Circuit's opinion that the defendants used the storybooks to teach students about "tolerance" also made it unnecessary to address the age factor, because "tolerance" is an attitude that can be learned by young children.[100] While *Chamberlain v. Surrey School District No. 36*, a Canadian case, has no precedential force on *Parker*, its comment regarding age and tolerance can serve to address what might seem like an inadequacy in the First Circuit's opinion.[101] In *Chamberlain*, the school board of Surrey District in British Columbia of Canada refused to permit an elementary school teacher to teach three books that approvingly described same-sex parenting in his kindergarten and grade-one classes.[102] The Supreme Court of Canada, addressing the concern that students would receive conflicting messages at home and get confused, held that this kind of "cognitive dissonance" "is simply a part of living in a diverse society. It is also part of growing up."[103] The Court added that, if the message of the three books at issue was one of respectful tolerance, then "tolerance is always age appropriate."[104]

II. *Montgomery County Public Schools*: Establishment Clause and Free Speech Violations

Citizens for a Responsible Curriculum v. Montgomery County Public Schools, a Maryland case, helps to unravel further the potential issues raised by a gay-positive curriculum. The Montgomery County Public

97. *See Parker*, 514 F.3d at 91.
98. *See Parker*, 514 F.3d at 91.
99. *See Parker*, 514 F.3d at 91.
100. *See Parker*, 514 F.3d at 106.
101. Chamberlain v. Surrey Sch. Dist. No. 36, [2003] 221 D.L.R. 4th 56, para. 67–69 (Can.).
102. *Chamberlain*, 221 D.L.R. 4th 56, para. 1 (Can.).
103. *Chamberlain*, 221 D.L.R. 4th para. 65; David Schneiderman, *Canada: Supreme Court Addresses Gay-Positive Readers in Public Schools*, 3 Int'l J. Const. L. 77, 80 (2005).
104. *Chamberlain*, 221 D.L.R. 4th para. 69.

Schools Board implemented a curriculum (the "Revised Curriculum") that discusses sexual orientation and sexual identity among grade-eight to grade-ten students in its public schools.[105] The plaintiffs, including a non-profit organization formed by students and parents to oppose the curriculum, filed for a temporary restraining order against the defendants.[106] Unlike the *Parker* Court, the United States District Court for the District of Maryland found that the curriculum posed an imminent threat to the plaintiffs' liberties under the First Amendment Establishment Clause and the Free Speech Clause.[107]

The Revised Curriculum described various terms, including "heterosexual," "homosexual," "lesbian," "bisexual," "transgendered," and "coming out," with a content outline explaining that "[t]he definitions are to be presented to students as stated below—no additional information, interpretation or examples are to be provided by the teacher."[108] The Grade Eight Revised Curriculum contained a "Myths and Facts" worksheet, which asked students to answer whether a given statement was true or false and then provided them with the answer.[109] One of the Myths stated: "Loving people of the same sex is immoral (sinful)," and its Fact then clarified that "many religious denominations" do not believe this, citing the Anglican Church of Canada as an example.[110] In its "Myths and Facts" handout, a Myth stated: "Homosexuality is a sin," and the Fact emphasized how "[r]eligion has often been misused to justify hatred and oppression."[111] It then picked out Baptist Churches as an example, stating how, "[l]ess than half a century ago," they "defended racial segregation on the basis that it was condoned by the Bible."[112] The Fact further contrasted Baptist Churches with other religious institutions: "Fortunately, many within organized religions are beginning to

105. Citizens for a Responsible Curriculum v. Montgomery Cnty. Pub. Sch., No. 05-1194, 2005 WL 1075634, at *2–5 (D. Md. May 5, 2005).

106. *Montgomery Cnty. Pub. Sch.*, 2005 WL 1075634, at *5.

107. Besides the Establishment Clause and the Free Speech claims, the plaintiffs alleged violations of the Equal Protection Clause, Substantive Due Process, Procedural Due Process, Maryland Constitution Art. 24 Due Process, and a claim of *ultra vires* against the defendants. *Montgomery Cnty. Pub. Sch.*, 2005 WL 1075634, at *5. Because each claim, if successful, was individually sufficient to prevent the defendants from going forward with the curriculum, the court only evaluated those First Amendment claims at the heart of this case. *Montgomery Cnty. Pub. Sch.*, 2005 WL 1075634, at *9.

108. *Montgomery Cnty. Pub. Sch.*, 2005 WL 1075634, at *2.

109. *Montgomery Cnty. Pub. Sch.*, 2005 WL 1075634, at *2.

110. *See Montgomery Cnty. Pub. Sch.*, 2005 WL 1075634, at *3.

111. *See Montgomery Cnty. Pub. Sch.*, 2005 WL 1075634, at *4.

112. *See Montgomery Cnty. Pub. Sch.*, 2005 WL 1075634, at *4.

address the homophobia of the church" and "support full civil rights for gay men and lesbians, as they do for everyone else."[113]

A. First Amendment Establishment Clause Claim

The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion . . . ,"[114] and it serves to protect the integrity of both churches and the state by keeping the two at arm's length.[115] There are several alleged reasons for the application of free exercise limitations in schools. The preservation of the community from divisive conflicts, of government from irreconcilable pressures by religious groups, and of religion from censorship and coercion (however subtly exercised), requires strict confinement of the state to non-religious instruction.[116] Hence, the public school must be scrupulously free from entanglement in the strife of sects.[117] The Court in *Montgomery County Public Schools* cited to the three-part test used by the Supreme Court in *Lemon v. Kurtzman*[118] to decide whether a statute or state initiative violates the Establishment Clause. "To pass muster under the *Lemon* test: (1) the government's action must have a secular purpose; (2) the principal and primary effect of the government's action must be one that neither advances nor inhibits religion; and (3) the government's action must not foster an "excessive government entanglement with religion."[119]

The Court subjected the allegation that the Revised Curriculum violated the Establishment Clause to strict scrutiny. The Supreme Court had held that, since religious freedom is a fundamental right, laws that discriminate among religions and that do not pass the *Lemon* test are subject to strict scrutiny review and must be narrowly tailored to satisfy a compelling government interest.[120] The Revised Curriculum failed the *Lemon* test, as it discriminated between religious sects by preferring those sects that are friendly to the homosexual lifestyle and by portray-

113. *See Montgomery Cnty. Pub. Sch.*, 2005 WL 1075634, at *4.
114. U.S. CONST. amend. I.
115. *Montgomery Cnty. Pub. Sch.*, 2005 WL 1075634, at *8.
116. *Montgomery Cnty. Pub. Sch.*, 2005 WL 1075634, at *8.
117. *See Montgomery Cnty. Pub. Sch.*, 2005 WL 1075634, at *8.
118. 403 U.S. 602 (1971).
119. *Montgomery Cnty. Pub. Sch.*, 2005 WL 1075634, at *10 (citing Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971)).
120. Larson v. Valente, 456 U.S. 228, 246 (1982); *Montgomery Cnty. Pub. Sch.*, 2005 WL 1075634, at *10.

ing Baptist Churches as unenlightened and biblically misguided.[121] The court was skeptical that the Revised Curriculum, which unnecessarily offered opinions on controversial topics in providing health-related information, was narrowly tailored to serve a compelling government interest.[122]

B. First Amendment Free Speech Claim

The First Amendment of the Constitution declares that "Congress shall make no law . . . abridging the freedom of speech."[123] The teacher's delivery of curriculum in a public school classroom is government speech that occurs in a non-public forum.[124] Thus the government may regulate the content of this speech as long as such regulations are (1) reasonable and (2) viewpoint neutral.[125] Viewpoint discrimination, consisting of state action in which "there is no ban on a general subject matter, but only on one or more prohibited perspectives," is a blatant form of First Amendment violation.[126]

The court in *Montgomery County Public Schools* held that the defendants violated the Free Speech Clause because they opened up the classroom to the subject of homosexuality and, furthermore, claimed that the homosexual lifestyle is morally right; nevertheless, defendants presented only one view on the subject, which is the naturalness and moral correctness of such a lifestyle, to the exclusion of different perspectives.[127] Moreover, the court was concerned that the Revised Curriculum's advice that information concerning homosexuality is to be presented to students as facts and that "no additional information, interpretation or examples are to be provided by the teacher," would violate the plaintiffs' free speech rights.[128]

121. *Montgomery Cnty. Pub. Sch.*, 2005 WL 1075634, at *4, *10–11.
122. *Montgomery Cnty. Pub. Sch.*, 2005 WL 1075634, at *11.
123. U.S. CONST. amend. I.
124. *Montgomery Cnty. Pub. Sch.*, 2005 WL 1075634, at *11.
125. *Montgomery Cnty. Pub. Sch.*, 2005 WL 1075634, at *11 (citing Warren v. Fairfax Cnty., 988 F. Supp. 957, 962 (E.D. Va. 1997)).
126. *Montgomery Cnty. Pub. Sch.*, 2005 WL 1075634, at *12 (citing Rosenberger v. Rector of the Univ. of Va., 515 U.S. 819, 829 (1995)).
127. *Montgomery Cnty. Pub. Sch.*, 2005 WL 1075634, at *12.
128. *Montgomery Cnty. Pub. Sch.*, 2005 WL 1075634, at *12.

C. The Irrelevance of Maryland Laws to MCPS Holding

The Maryland court did not address the relevance of its laws on marriage and education to its holding, let alone describe these two issues in detail as did the *Parker* Court, when it expressed skepticism that the Revised Curriculum was narrowly tailored to any compelling state interest.[129] Interestingly, the Court mentioned that, prior to the Revised Curriculum, the School District had the policy of not discussing homosexuality within its health education curriculum, and, if a student asked a question regarding sexual orientation, the staff had to respond in "only a perfunctory manner."[130] To understand why the court held that the curriculum posed an imminent threat to the plaintiffs' liberties under the First Amendment Establishment and Free Speech Clauses, it is necessary to look at Maryland's laws on marriage and education.

Same-sex marriage is prohibited in Maryland, and the Maryland Court of Appeals in *Conaway v. Deane* rejected a challenge to Maryland's 1973 statute that defines marriage as "a union of a man and a woman."[131] Moreover, neither civil union nor domestic partnership is legally recognized.[132] Maryland's education codes do not mandate the discussion of sexual orientation, prejudice or discrimination. While one of the sub-goals under its *Comprehensive Health Education Program* is to "[e]xamine differences in family structures, customs, and values," there is no mention of whether the family structures include co-habiting relationships of same-sex couples.[133] Such non-specificity applies to the Family Life and Human Sexuality Standard of the *Maryland Health Education Voluntary State Curriculum.*[134] This standard stipulates that kindergarten students learn to define a family unit, and students from grade one to three identify what is special about their families and what makes a healthy family.[135] Fifth and sixth graders study puberty, the reproductive process, and gender stereotypes, while eighth graders study

129. *See Montgomery Cnty. Pub. Sch.*, 2005 WL 1075634, at *11.
130. *See Montgomery Cnty. Pub. Sch.*, 2005 WL 1075634, at *1.
131. Conaway v. Deane, 932 A.2d 571 (Md. 2007).
132. WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 136 (Thomson Reuters/Foundation Press 2d ed. Supp. 2009).
133. *See* Maryland Office of the Secretary of State, Maryland Comprehensive Health Education Program, http://www.dsd.state.md.us/comar/comarhtml/13a/13a.04.18.02.htm.
134. *See* Maryland State Department of Education, Comprehensive Health Education, http://www.marylandpublicschools.org/MSDE/divisions/instruction/CompHeal.htm?WBCMODE=present%25%3E%25%25%25.
135. School Improvement In Maryland, Voluntary State Curriculum—Health Education: Grades PK-3, http://www.mdk12.org/instruction/curriculum/health/vsc_health_grprek3.pdf.

teen pregnancy and methods of contraception.[136] High school students continue to learn about puberty, reproduction, sexuality and culture.[137] Given that Maryland does not allow same-sex marriage and does not recognize any form of same-sex relationship, and that matters like sexual orientation and stereotypes are absent throughout its health education program, the "family" concept probably does not encompass diverse and alternative families. Thus, it would be reasonable to infer that the school district merely followed its state's laws on marriage and education by adopting a policy not to discuss sexual orientation and sexual identity prior to the Revised Curriculum.[138]

Because Maryland law prohibits gay marriage, civil union and domestic partnership, and matters like sexual orientation and sexual identity are absent from its school program, the court was rightly skeptical that the Revised Curriculum was tailored to any compelling state interest under strict scrutiny review.[139] However, the court would have rendered the same ruling upon the plaintiffs' Establishment Clause claim regardless of the state's laws on marriage and education. Even if Maryland, like Massachusetts, had recognized same-sex marriage and had an education reform statute that mandated the teaching of diverse families, the Revised Curriculum's attack of Baptist churches could not have served any compelling government interest and therefore would not have survived strict scrutiny review.[140]

This Article now turns to *Lesson 9*, the proposed curriculum in California, and explains why it is constitutional. Through a detailed discussion of its course materials, teaching instructions and classroom activities, this section argues that *Lesson 9* does not violate any of the First Amendment Clauses discussed. It then supplements *Parker*'s opinion on the due process claim with *Fields v. Palmdale School District*, a Ninth Circuit opinion, which subjected the disputed material to a rational basis test and defined "legitimate state interest" in a broader way than did the *Parker* court. By contextualizing *Lesson 9* in California's unique history of gay marriage and its law on education, this section

136. School Improvement In Maryland, Voluntary State Curriculum—Health Education: Grades 3–8, http://www.mdk12.org/instruction/curriculum/health/vsc_health_grprek3.pdf.

137. School Improvement In Maryland, Voluntary State Curriculum—Health Education: High School, http://www.mdk12.org/instruction/curriculum/health/vsc_health_grprek3.pdf.

138. *See* Citizens for a Responsible Curriculum v. Montgomery Cnty. Pub. Sch., No. 05-1194, 2005 WL 1075634, at *1 (D. Md. May 5, 2005); ESKRIDGE & HUNTER, *supra* note 132, at 136.

139. *See Montgomery Cnty. Pub. Sch.*, 2005 WL 1075634, at *11; ESKRIDGE & HUNTER, *supra* note 132, at 136.

140. *See Montgomery Cnty. Pub. Sch.*, 2005 WL 1075634, at *4.

argues that this new curriculum passes the rational basis test by fulfilling official educational objectives of the state. Even including more controversial story books like *King and King*, which endorse same-sex marriage, will not make *Lesson 9* unconstitutional, as such materials will help to fulfill both California's official educational objectives as well as its "higher civil function" to help students learn and adapt to their society.

III. CALIFORNIA'S *LESSON 9*: A POTENTIAL LAWSUIT

On May 26, 2009, the Alameda Unified School District Board of Education adopted the *Safe School Community Curriculum—Lesson 9*, also known as the *Caring School Community Supplement, Lesson 9*, for the 2009–2010 school year to teach safety and tolerance in the classroom.[141] While the Grades K-2 portion of the *Lesson 9* curriculum begins with instructions on how to teach students to make others feel welcome in a new school, the Grades K-3 portion moves on to a discussion about what constitutes a family.[142] Its stated objectives are for students to be able to (1) "identify what makes a family"; (2) "identify and describe a variety of families" and (3) "understand that families have some similarities and some differences."[143] In grades one to three, students are asked to "discuss different family structures inclusive of gay and lesbian parents," and to "identify the shared attributes of healthy families."[144]

A. What Is Lesson 9*?*

Although *Lesson 9*'s initial proposal introduced students to *Who's in a Family?* in kindergarten, its revised proposal includes the book in the first grade lesson.[145] During a single-class period, teachers read this book to students and ask them to describe a family.[146] Teachers are instructed that, if some students describe a family as having a mother, a father and two children, they can acknowledge that some families look like this, but they should also ask for other examples of what a family can look like, so as to teach the students that "every person gets to decide who

141. Brief for Petitioners-Plaintiffs, *supra* note 3, at 3–4.
142. *Id.* at 4.
143. *Id.* at 16.
144. *Id.* at 8–10.
145. Brief (Amended) for Petitioners-Plaintiffs, *supra* note 3, at 5–6 (Exhibit 1); Brief for Petitioners-Plaintiffs, *supra* note 3, at 65–66 (Exhibit 1).
146. Brief (Amended) for Petitioners-Plaintiffs, *supra* note 3, at 5–6 (Exhibit 1).

their family is."[147] In the grade two lesson, which lasts for forty-five minutes, students read *And Tango Makes Three*, a book about two male penguins, who "fall in love and with the help of their keeper become fathers to Tango (another male penguin)."[148] By asking students to draw two pictures, one of the penguin couple and one of their own families, teachers help students identify alternative types of family structures.[149] Students also learn new vocabulary, including "caretaker" and "couple," and the message that "what is most important in a family is not who makes up the family but how the family cares for and loves each other just like Roy and Silo's family."[150] The third grade lesson, entitled "Talking about Families," contains four thirty-minute segments, from which students learn that "respect and tolerance for every type of family is important and expected."[151] After showing a film called *That's a Family*, teachers give each student a "Family Chart" and ask them individually or in pairs to describe each family by the vocabulary introduced by the teacher or the film, including "adoptive parents," "adopted children," "two moms," and "two dads."[152]

The fourth grade lesson, "Developing Empathy and Being an Ally," contains two thirty- to forty-minute sessions.[153] Teachers ask students to read a schoolboy's article about bullying and discrimination to help them "identify ways in which name-calling is hurtful," and "learn the importance of being an ally in order to interrupt or stop name-calling."[154] The fifth grade lesson, "Discussing Stereotypes, including LGBT," has two forty-minute sessions, and aims to "increase their awareness of all stereotypes, including lesbian, gay, bisexual and transgender people."[155] Through describing a list of famous GLBT people, teachers help students learn that these people "have made important contributions within [the] U.S. and beyond," and that "a stereotype can not only be inaccurate but can be hurtful and unkind."[156]

147. *Id.* at 7 (Exhibit 1).
148. *Id.* at 9–10 (Exhibit 1); Brief for Petitioners-Plaintiffs, *supra* note 3, at 68 (Exhibit 1).
149. Brief (Amended) for Petitioners-Plaintiffs, *supra* note 3, at 9 (Exhibit 1).
150. *Id.* at 9, 12 (Exhibit 1).
151. *Id.* at 13 (Exhibit 1).
152. *Id.* at 14 (Exhibit 1).
153. *Id.* at 17 (Exhibit 1).
154. *Id.*
155. *Id.* at 23 (Exhibit 1).
156. *Id.* at 25–29 (Exhibit 1).

B. What Are the Potential Claims?

The plaintiffs in *Balde v. Alameda Unified School District* claimed that their religious and moral beliefs were inconsistent with the curriculum's instructions on the characteristics of families.[157] As such, *Lesson 9* would serve to undermine their ability to provide moral and religious training to their children according to their own beliefs.[158] When their request to be excused from *Lesson 9* was denied, they petitioned the Alameda Superior Court to issue a writ of mandamus to require the school district to excuse their children from it.[159] The Court denied their petition in December 2009.[160] Interestingly, unlike the plaintiffs in *Parker* and *Montgomery County Public School*, these plaintiffs have not yet claimed violations of their rights under the Constitution. This Article now moves on to argue that *Lesson 9* is constitutional on its face, and that any claim to the contrary should be dismissed by the court.

C. Lesson 9 *Does Not Violate the First Amendment Clauses*

Lesson 9 does not violate any of the parents' or their children's First Amendment rights. It does not violate the parents' or their children's free exercise rights, because the proposed course materials and instructions to teachers do not indicate an attempt to coerce anyone.[161] Given that the free exercise of religion means "the right to believe and profess whatever religious doctrine one desires," the parents must show the coercive effect of *Lesson 9* as it operates against them and their children in the practice of their religion.[162] There is no "coercion" in the form of a direct interference with parents' or their children's religious beliefs, nor of "compulsion" in the form of punishment for their beliefs.[163] As the curriculum shows, teachers merely instruct their children about diverse families, bullying and stereotypes, and the proposed classroom activities revolve around group discussions.[164] Thus, California students only have to attend lessons, but do not have to participate silently in a group ritual, like the students in *Weisman* had to remain in respectful silence while

157. Brief for Petitioners-Plaintiffs, *supra* note 3, at 4.
158. *Id.*
159. *Id.* at 5–6.
160. Balde v. Alameda Unified Sch. Dist., No. 09-468037 (Super. Ct. Cal. Alameda Cnty. Dec. 1, 2009).
161. Parker v. Hurley, 514 F.3d 87, 105 (1st Cir. 2008).
162. *See Parker*, 514 F.3d at 103.
163. *See Parker*, 514 F.3d at 105.
164. *See* Brief (Amended) for Petitioners-Plaintiffs, *supra* note 3, at 1–29 (Exhibit 1).

the rabbi recited the prayer at the school ceremony.[165] Because *Lesson 9* is not coercive, the free exercise rights of the parents and their children are not violated.[166]

Likewise, *Lesson 9* does not implicate the free exercise rights of the California parents and their children because it does not indicate "extreme indoctrination," which the First Circuit in *Parker* assumed, in the plaintiffs' favor, to be a form of "coercion."[167] All sessions under *Lesson 9* run only once a year, each lasting no longer than two hours. As a result, students are not continuously exposed to allegedly offensive ideas.[168] As in *Parker*, the mere fact that the children in California are exposed once a year to ideas contrary to their beliefs and values would not inhibit their parents, who have had notice of the books and the school's intent to promote tolerance and safety, from instructing their children differently.[169] In addition, unlike the teacher in *Roberts*, who indoctrinated students by continuously exposing them to religious storybooks and the religious poster, *Lesson 9* does not prefer any particular religion or lifestyle over others.[170] Even presuming a real attempt to indoctrinate, the Alameda Unified School District's intent behind *Lesson 9* could only be to indoctrinate students with "respect and tolerance for every type of family," attitudes that can be learned by the children regardless of their age.[171] Hence, should there really be an "indoctrination test" in a free exercise claim, *Lesson 9* would easily pass the test.

Along the same line, *Lesson 9* does not violate the Establishment Clause because it passes every prong of the *Lemon* test.[172] First, entitled "*Safe School Community Curriculum—Lesson 9*," or "*Caring School Community Supplement, Lesson 9*," it has a clear, secular purpose of building up a safe, caring and supportive school environment.[173] Second, even presuming that the purpose of *Lesson 9* cannot be established solely from its title, *Lesson 9* does not include any religious texts, and teachers' instructions focus solely upon instructing about different family structures and the negative effects of stereotypes and bullying, without

165. *See* Lee v. Weisman, 505 U.S. 577, 593, 595 (1992).

166. *See Parker*, 514 F.3d at 103, 105.

167. *See Parker*, 514 F.3d at 105.

168. *See* Brief (Amended) for Petitioners-Plaintiffs, *supra* note 3, at 5, 9, 13, 17, 23 (Exhibit 1); Brief for Petitioners-Plaintiffs, *supra* note 3, at 65 (Exhibit 1).

169. *See Parker*, 514 F.3d at 106.

170. *See* Roberts v. Madigan, 921 F.2d 1047, 1049 (10th Cir. 1990); Brief (Amended) for Petitioners-Plaintiffs, *supra* note 3, at 1–19 (Exhibit 1).

171. *See* Chamberlain v. Surrey Sch. Dist. No. 36, (2003) 221 D.L.R. 4th 56, para. 69 (Can.).

172. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

173. *See* Brief (Amended) for Petitioners-Plaintiffs, *supra* note 3, at 3–4; Brief for Petitioners-Plaintiffs, *supra* note 3, at 4.

making any mention of religion.[174] Thus, *Lesson 9*'s principal and primary effect neither advances nor inhibits religion.[175] The curriculum, therefore, does not foster an "excessive entanglement with religion."[176] Because *Lesson 9* has no trouble passing the *Lemon* test and is facially neutral, strict scrutiny review does not even apply.[177]

Finally, *Lesson 9* does not violate the Free Speech Clause, under which the government may regulate the content of public school instructions, provided that such regulations are reasonable and viewpoint neutral.[178] Regulating the California public school curriculum to promote "safety and tolerance" of GLBT people and alternative families would be reasonable. Moreover, *Lesson 9*'s instructions to teachers grant them much latitude in delivering the lessons, and group discussions among students play an important part in the learning process.[179] It therefore does not endorse certain viewpoints to the exclusion of others.[180] As such, it is different from the Revised Curriculum in *Montgomery County Public Schools*, which discriminated against certain religious sects and which stated that materials are to be presented to students as facts and teachers could not provide any form of supplement.[181] Hence, state regulation of school curriculum through *Lesson 9*, being both reasonable and viewpoint neutral, does not implicate the Free Speech Clause.[182]

D. Lesson 9 *and the Fourteenth Amendment Due Process Clause*

Following *Parker*, which in turn relied upon *Blau*, *Meyer* and *Pierce*, it is clear that *Lesson 9* does not violate parents' due process rights under the Fourteenth Amendment, even without subjecting it to its applicable standard of review.[183] Although the Supreme Court has recognized a substantive due process right of parents to make decisions concerning the education of their children, it has not recognized parents' right to direct

174. *See id.* at 1–29 (Exhibit 1).
175. *See id.*
176. *Lemon*, 403 U.S. at 613; *see id.*
177. *See* Larson v. Valente, 456 U.S. 228, 246 (1982); Citizens for a Responsible Curriculum v. Montgomery Cnty. Pub. Sch., No. 05-1194, 2005 WL 1075634, at *10 (D. Md. May 5, 2005).
178. *See Montgomery Cnty. Pub. Sch.*, 2005 WL 1075634, at *11.
179. *See* Brief (Amended) for Petitioners-Plaintiffs, *supra* note 1, 1–29 (Exhibit 1).
180. *See id.*
181. *See Montgomery Cnty. Pub. Sch.*, 2005 WL 1075634, at *4–5, *12.
182. *See Montgomery Cnty. Pub. Sch.*, 2005 WL 1075634, at *11–12.
183. *See* Parker v. Hurley, 514 F.3d 87, 101–02 (1st Cir. 2008).

how public schools teach their children.[184] California, therefore, retains full control over designing its gay-friendly curriculum to promote a safe and tolerant school environment.[185] Moreover, since there has been no federal case under the Due Process Clause which permits parents to demand an exemption for their children from exposure to certain books used in public schools, the parents probably would not be able to exempt their children from *Lesson 9*.[186] Nevertheless, because *Lesson 9* is a California public elementary school curriculum, to examine whether it violates the Due Process Clause, it is helpful to look at *Fields v. Palmdale School District*, a recent Ninth Circuit opinion, which articulates both narrow and broad "legitimate education objectives" under the Constitution.

1. *Fields v. Palmdale School District* and "Legitimate Educational Objective"

In *Fields*, the plaintiffs' children were questioned in their public elementary school about sexual topics in a psychological assessment survey with the announced goal of "establish[ing] a community baseline measure of children's exposure to early trauma (for example, violence)."[187] The plaintiffs brought a due process claim against the Palmdale School District and two of its officials for violating their right to privacy to make intimate familial decisions and their right to control the upbringing of their children by introducing them to matters of and relating to sex in accordance with their personal and religious values and beliefs.[188] Like the court in *Parker*, the Ninth Circuit held that the liberty interest in the custody and care of children does not reside exclusively in their parents, nor is it beyond regulation by the state.[189] Therefore, the plaintiffs had no due process or privacy right to override the determinations of public schools regarding the information to which their children would be exposed.[190] In addition, neither their fundamental right to direct the upbringing and education of their children, nor their privacy right, encompassed the right to introduce them to sexual topics in accordance with their values and beliefs.[191]

184. *Parker*, 514 F.3d at 101–02.
185. *Parker*, 514 F.3d at 101–02.
186. *Parker*, 514 F.3d at 102.
187. Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1200 (9th Cir. 2005).
188. *Fields*, 427 F.3d at 1202.
189. *See Fields*, 427 F.3d at 1204.
190. *Fields*, 427 F.3d at 1200, 1205–07.
191. *See Fields*, 427 F.3d at 1205–06, 1208.

The *Fields* court, unlike the *Parker* court, did not merely circumscribe the parents' right concerning their children's education before dismissing the plaintiffs' Fourteenth Amendment claim.[192] Unlike the plaintiffs in *Parker*, the plaintiffs in *Fields* did not believe that the survey served any legitimate state interest.[193] The Ninth Circuit therefore went a step further by subjecting the survey to the applicable standard of review. Since the survey did not infringe the parents' fundamental right and did not involve suspect classifications, the rational basis test applied.[194] The Court then rejected the plaintiffs' two arguments against the rational basis review.[195]

First, the Ninth Circuit responded to the plaintiffs' claim that the defendants' survey could not pass the rational basis test because there was no legitimate governmental purpose to the survey and it was undertaken in order to benefit the academic career of one of the officials.[196] The court found this argument to be speculative and conclusory, because there was detailed information setting forth the survey's legitimate governmental purposes and explaining with specificity how the information obtained would be used for education purposes.[197]

The Ninth Circuit's response to the plaintiffs' second argument, namely, that the survey was not a part of the school's curriculum, served to clarify the scope of "legitimate state interest" in the rational basis test.[198] Its approach was different from that adopted by the First Circuit. While the *Parker* court did not use the rational basis test to dismiss the plaintiffs' due process claim, it described briefly how it would have applied to the case, stating that it would have relied heavily upon existing state law to define the scope of "legitimate state interest," in that case, legitimate educational objectives of Massachusetts.[199] It reasoned that, because Massachusetts recognized gay marriage under its state constitution, it would be "entirely rational for its schools to educate their students regarding that recognition" by teaching storybooks like *King and King* that endorse gay marriage.[200] The court implied that if Massachusetts had not recognized gay marriage, then it might not be rational

192. *See Fields*, 427 F.3d at 1208–11.
193. *See Fields*, 427 F.3d at 1203.
194. *Fields*, 427 F.3d at 1208.
195. *Fields*, 427 F.3d at 1208–11.
196. *Fields*, 427 F.3d at 1208–09.
197. *Fields*, 427 F.3d at 1209.
198. *See Fields*, 427 F.3d at 1209–11.
199. *See* Parker v. Hurley, 514 F.3d 87, 94–95 (1st Cir. 2008).
200. *See Parker*, 514 F.3d at 95.

for schools to educate their students about gay marriage through the curriculum.[201]

The Ninth Circuit, however, articulated a broader "legitimate state interest" and its educational objective and did not reference state law in its discussion.[202] Responding to the plaintiffs' second argument that the survey was not a part of the school curriculum and therefore cannot pass rational basis review, the court stated that their contention "construe[d] too narrowly the aims of education and fails to recognize the unique role that it plays in American society."[203] The court then cited the Supreme Court's unanimous holding in *Brown v. Board of Education* as a reminder of the government's "compelling interest in the broad ends of educa-education."[204] In *Brown*, the Court stressed that education is important to a democratic society, being "the very foundation of good citizenship" and "a principal instrument" in helping a child, among other things, to "adjust normally to his environment."[205] Thus, the Ninth Circuit clarified that the "broad ends of education" serve "higher civic and social functions, including the rearing of children into healthy, productive, and responsible adults and the cultivation of talented and qualified leaders of diverse backgrounds."[206] Because the defendants had prepared the psychological survey with the aim of protecting the mental health of children and facilitating their education, the survey fulfilled a "legitimate educational objective" and fell squarely within the state's "broad interest in education."[207] As the Ninth Circuit made no reference to state law, such a "broad interest in education" is by no means confined to what are designated by existing law.[208]

To gauge whether *Lesson 9* passes rational review, one can follow the narrow definition by looking to California law on gay marriage and domestic partnership as well as its education reform. In addition, the *Fields* court's broader view of a "legitimate educational objective" can be used to confirm the argument that Lesson 9 is constitutional, and to draw inferences on what materials can be legitimately used in a gay-friendly curriculum in California public schools.[209]

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201. *See Parker*, 514 F.3d at 95.
202. *Fields*, 427 F.3d at 1209.
203. *Fields*, 427 F.3d at 1209.
204. *Fields*, 427 F.3d at 1209.
205. *Fields*, 427 F.3d at 1209 (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).
206. *Fields*, 427 F.3d at 1209.
207. *Fields*, 427 F.3d at 1209–10.
208. *See Fields*, 427 F.3d at 1209–10.
209. *See Fields*, 427 F.3d at 1209–11.

2. California's Unique History of Marriage Law and Education Reform

Pursuant to California Family Code Section 297.5, enacted in 1999, domestic partners in California "shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law . . . "as married spouses.[210] On May 15, 2008, the California Supreme Court struck down the limitation on marriage to "between a man and a woman"[211] in *In re Marriage Cases*, holding that the California Constitution guarantees to all people the fundamental right to marry regardless of their sexual orientation.[212] One month later, county clerks in California started to issue marriage licenses to same-sex couples,[213] while conservative and religious-affiliated groups began to denounce the court's decision,[214] leading to Proposition 8, which stated that "[o]nly marriage between a man and a woman is valid or recognized in California" and which was approved by voters on November 4, 2008.[215] On the following day, California stopped issuing marriage licenses to same-sex couples.[216] The 18,000 same-sex marriages granted by California from June 16 to November 4, 2008, as well as by other jurisdictions before the end of this period, remain legally recognized and retain full state-level marriage rights.[217] However, same-sex couples who intended to get married after this period could only enter into domestic partnerships.[218] On August 4, 2010, the district court's held that Proposition 8 was unconstitutional because it discriminated against gay men and women, and one would expect this legal battle to continue until it is settled by the Supreme Court.[219]

California's *Comprehensive Health Education Programs* offered in kindergarten and grades one through twelve were designed to ensure that public school students receive instructions in matters of personal,

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210. CAL. FAM. CODE § 297.5(a) (West 2009).
211. CAL. FAM. CODE §§ 300(a), 308.5 (West 2009).
212. *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008).
213. Richard Salas, In Re *Marriage Cases: The Fundamental Right to Marry and Equal Protection Under the California Constitution and the Effects of Proposition 8*, 36 HASTINGS CONST. L.Q. 545, 545 (2009).
214. Clay Rehrig, *California Bans Gay Marriage by Simple Majority Vote*, 14 PUB. INT. L. REP. 152, 153 (2009).
215. Salas, *supra* note 213, at 559, 559–60.
216. Salas, *supra* note 213, at 546.
217. John Schwartz, *California High Court Upholds Gay Marriage Ban*, N.Y. TIMES, May 27, 2009, *available at* http://www.nytimes.com/2009/05/27/us/27marriage.html.
218. *Id.*
219. CAL. EDUC. CODE § 51890(a)(1) (West 2009).

family, and community health.[220] The California State Board of Education adopted *Health Education Content Standards for California Public Schools, Kindergarten Through Grade Twelve* on March 12, 2008, which includes minimum recommended grade-level assignments for six content areas, ranging from growth and development, to mental, emotional, and social health.[221] Kindergarten students learn how people are similar and different, and how to recognize the characteristics of bullying[222] and how to describe the characteristics of families.[223] Themes of family and individual differences continue to run through the curriculum from grade one through five. First-graders study the various roles, responsibilities and needs of family members,[224] and second-graders learn to respect individual differences.[225] While third-graders learn healthy social behavior to promote a positive school environment,[226] fourth-graders study different types of bullying and harassment and their effects upon other people, and how courtesy, compassion, and respect reduce conflicts.[227] In grade five, students learn to appreciate individual differences in physical appearance and gender roles.[228]

Senator Sheila Kuehl introduced Senate Bill 1437 on February 2, 2006 to enlarge provisions in Education Code §§ 51500, 51501, and 60044, so that instructional materials containing matters that "reflect adversely" upon people because of their sexual orientation would be prohibited.[229] On September 6, 2006, the Governor vetoed the bill on the grounds that it attempted to offer vague protection and that Education Code §§ 200, 220 and 60044 and Penal Code § 422.55 already provided clear protection against discrimination based upon sexual orientation.[230] Kuehl introduced Senate Bill 777 on February 23, 2007,

220. CAL. DEP'T OF EDUC., HEALTH EDUC. AND CONTENT STANDARDS FOR CAL. PUB. SCH., KINDERGARTEN THROUGH GRADE TWELVE, http://www.cde.ca.gov/BE/ST/SS/documents/healthstandmar08.pdf.

221. CAL. DEP'T OF EDUC., *supra* note 220, at 2, 4.

222. CAL. DEP'T OF EDUC., *supra* note 220, at 2.

223. CAL. DEP'T OF EDUC., *supra* note 220, at 4.

224. CAL. DEP'T OF EDUC., *supra* note 220, at 13.

225. CAL. DEP'T OF EDUC., *supra* note 220, at 14–15.

226. CAL. DEP'T OF EDUC., *supra* note 220, at 19–20.

227. CAL. DEP'T OF EDUC., *supra* note 220, at 25.

228. S.B. 1437, 2006 Leg., Reg. Sess. (Cal. 2006), *vetoed by* Governor Schwarzenegger on Sept. 6, 2006, *in* OFFICIAL CALIFORNIA LEGISLATIVE INFORMATION, http://www.leginfo.ca.gov/pub/05-06/bill/sen/sb_1401-1450/sb_1437_bill_20060222_introduced.html.

229. Governor Arnold Schwarzenegger's Veto Message, Official California Legislative Information (Sept. 6, 2006), *in* OFFICIAL CALIFORNIA LEGISLATIVE INFORMATION, *available at* http://www.leginfo.ca.gov/pub/05-06/bill/sen/sb_1401-1450/sb_1437_vt_20060906.html.

230. *See* S.B. 777, 2007 Leg., Reg. Sess. (Cal. 2007), *available at* http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_0751-0800/sb_777_bill_20070223_introduced.html.

revising the prohibited bases of discrimination in §§ 200, 220, 51500, 51501 and 60044 by more directly referencing the definition of hate crimes contained in Penal Code § 422.55.[231] On October 12, 2007, this bill was approved by the Governor and signed into law.[232] Thus, teaching materials that "adversely reflect" upon people because of their sexual orientation is now prohibited.[233]

3. *Lesson 9*'s Rational Relation to California Law and Education Objectives

Lesson 9's purported overall objective to promote "safety and tolerance" in school settings is no doubt rationally related to California law on public school education in general.[234] More specifically, given that kindergarten children should learn about the characteristics of families under California law, K-3 grades objectives to teach students to "identify what makes a family," "identify and describe a variety of families" and "understand that families have some similarities and some differences" are all rationally related to this goal.[235] Similarly, California's educational policy stipulates that students in grades one to three continue learn about different families and respect for individual differences.[236] Thus, it is entirely rational for *Lesson 9* to make use of books similar to *Who's in a Family, That's a Family*, and *And Tango Makes Three* from grade one to three to instruct students about gay and lesbian parents and the shared attributes of healthy families.[237]

Lesson 9's fourth and fifth grade lesson objectives also comply with California law on education.[238] Its grade four lesson objectives of "developing empathy and being an ally" serve to advance the official educational goal of teaching different types of bullying and harassment, and how compassion and respect reduce conflicts.[239] The fifth grade lesson objective to discuss the harmful effects of stereotyping GLBT people, particularly its use of a list of famous gay and lesbian people, is

231. S.B. 777, 2007 Leg., Reg. Sess. (Cal. 2007) (enacted), *available at* http://info.sen.ca.gov/pub/07-08/bill/sen/sb_0751-0800/sb_777_bill_20071012_chaptered.html.

232. *See* 2007 Cal. Stat. ch. 569 (S.B. 777).

233. *See* Brief (Amended) for Petitioners-Plaintiffs, *supra* note 3, at 4; CAL. EDUC. CODE § 51890(a)(1)(B)(D).

234. *See* Brief for Petitioners-Plaintiffs, *supra* note 3, at 4; EDUC. § 51890(a)(1)(B)(D).

235. CAL. EDUC. CODE § 51890(a)(1)(B)(D) (West 2009).

236. *See* Brief (Amended) for Petitioners-Plaintiffs, *supra* note 3, at 5-14 (Exhibit 1).

237. *See* CAL. EDUC.CODE § 51890(a)(1)(B)(D).

238. *See* Brief (Amended) for Petitioners- Plaintiffs, *supra* note 3, at 17 (Exhibit 1).

239. *See* 2007 Cal. Stat. ch. 569 (S.B. 777); Brief (Amended) for Petitioners-Plaintiffs, *supra* note 3, at 23, 25–29 (Exhibit 1).

rationally related to Senate Bill 777, now signed into law, which prohibits teaching materials that "adversely reflect" upon people because of their sexual orientation.[240]

If the court articulates California's legitimate educational objective with reference to its current law on marriage, then *Lesson 9* would serve a legitimate educational interest by educating children regarding California's recognition of domestic partnership, but does not say anything at all about gay marriage.[241] *Lesson 9* instructs teachers to teach words like "caretaker" and "couple" to second-graders, and terms like "adoptive parents," "adopted children," "two moms" and "two dads" to third-graders. In contrast, "gay marriage" is not on any vocabulary list.[242] While *Who's in a Family* and *And Tango Makes Three* portray diverse families, and *And Tango Makes Three* even portrays a gay couple, they neither mention nor endorse gay marriage.[243] Teaching about alternative families, therefore, does not encompass teaching about "gay marriage."[244] After the overturning of Proposition 8, same-sex marriage may be legalized again in the future. Because Lesson 9 would serve a legitimate interest when gay marriage is outlawed, it would no doubt serve a legitimate interest and be constitutional if gay marriage is made legal again.

4. *Lesson 9*'s Rational Relation to California's "Broad Ends of Education"

Lesson 9, which complies with California law on marriage and education, also serves the "broad ends of education" identified by the Ninth Circuit in *Fields*.[245] The *Fields* court, citing language from the Supreme Court's decision in *Brown*, described education as "a principal instrument" in helping a child to "adjust normally to his environment."[246] Teaching children about diverse families, as well as the harms of name-calling and stereotyping, serves the "higher civic social functions" of "rearing of children into healthy, productive, and responsible adults and

240. *See* Brief (Amended) for Petitioners-Plaintiffs, *supra* note 3, at 5, 9–11.

241. *See* Brief (Amended) for Petitioners-Plaintiffs, *supra* note 3, at 9, 12 (Exhibit 1).

242. *See* PETER PARNELL & JUSTIN RICHARDSON, AND TANGO MAKES THREE (Simon & Schuster Children's Publ'g 2005); ROBERT SKUTCH & LAURA LINHAUS, WHO'S IN A FAMILY? (Tricycle Press 2004).

243. *See* Brief (Amended) for Petitioners-Plaintiffs, *supra* note 3, at 5, 9–11.

244. *See* Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1209 (9th Cir. 2005).

245. *Fields*, 427 F.3d at 1209 (citing Brown v. Bd. of Educ., 347 U.S. 493 (1954)).

246. *Fields*, 427 F.3d at 1209 (quoting *Brown*, 347 U.S. at 493).

the cultivation of talented and qualified leaders of diverse backgrounds."[247]

Interestingly, *Lesson 9* does not include *King and King*, one of the disputed texts in *Parker*, which is more controversial than *Who's in a Family* and *And Tango Makes Three* in that it portrays the marriage of two princes. Before the overturning of Proposition 8, even including this book would not make *Lesson 9* unconstitutional. Gay marriage was legalized for a five-month period in 2007, during which many gay couples got married and are still living in the state.[248] At least some of the couples who got married in the brief five-month period will have children attending public elementary schools in the near future.[249] Teaching *King and King*, or storybooks that more explicitly endorse gay marriage, will both enhance the stated objective of the curriculum by promoting safety and tolerance in school settings, and serve a "higher civic function" by helping young children to learn about and adjust to the Californian society.[250] If same-sex marriage is made legal again in California, *Lesson 9*, be it inclusive of storybooks of *King and King* or not, will be constitutional in California.

IV. GAY-FRIENDLY CURRICULUM IN OTHER JURISDICTIONS: *TANGO* OR MORE?

Ideally, children should learn to embrace diversity at a young age, and a gay-positive curriculum can properly be used to teach them about different types of family structures not only in their home states but also in other states.[251] Courts nonetheless look to state legislatures to determine whether the use of certain gay-friendly materials is constitutional.[252] There is no doubt that in states that have legalized gay marriage, including not only Massachusetts but also Connecticut, Iowa, New Hampshire, Vermont, and Washington, D.C., teaching a gay-friendly curriculum, even using *King and King*, will not violate the Constitution.[253] In all other states, a gay-friendly curriculum like *Lesson 9*, aimed at promoting safety and tolerance, will also be constitutional, provided that the state constitution does not limit the teaching of gay-

247. *Fields*, 427 F.3d at 1209.
248. *See, e.g.*, Schwartz, *supra* note 217.
249. *See, e.g., id.*
250. *See Fields*, 427 F.3d at 1209.
251. *See, e.g.* LIPKIN, *supra* note 8.
252. *See, e.g.*, Parker v. Hurley, 514 F.3d 87, 95 (1st Cir. 2008).
253. ESKRIDGE, JR. & HUNTER, *supra* note 132, at 135–37.

friendly curriculum.[254] Storybooks like *King and King*, which portray same-sex marriages, will remain highly controversial and could raise a due process claim on the grounds that they serve neither a narrowly defined legitimate state interest, nor a broad educational objective, in states that do not allow gay marriage.[255]

The study of the constitutionality of *Lesson 9* also carries implications for the repeal of the Maine law that allowed for same-sex marriage and the public school curriculum in Maine. Before Maine voters repealed the law on November 4, 2009, opponents of same-sex marriage expressed their fear about "immoral gay-marriage lectures" in public schools.[256] Maine's Attorney General, as well as the campaigners who defended gay marriage, countered that Maine's state curriculum guidelines contain no reference to marriage and that such fear was "baseless."[257] However, even if the law had not been repealed, introducing children to same-sex marriage in a family and health education curriculum would have fallen squarely within the legitimate educational objectives of the state.[258] The repeal of the law, on the other hand, gives the Maine conservatives a strong reason not to mention same-sex marriage in its public school curriculum.[259]

CONCLUSION

Introducing a gay-friendly curriculum in public elementary schools creates a conflict of rights between parents who desire to control the upbringing of their children and state governments with a gay-friendly orientation desiring to educate children according to their educational objectives and public interests. This Article has shown that *Lesson 9* does not violate the Fourteenth Amendment Due Process Clause or any part of the First Amendment. Exposing young children to alternative families might cause them temporary confusion. Yet, a gay-positive curriculum like *Lesson 9* does not impose any constitutionally significant burden on

254. *See, e.g.*, *Fields*, 427 F.3d at 1209.

255. *See, e.g.*, *Fields*, 427 F.3d at 1209.

256. *See, e.g.*, Posting of Ryan to Eagleionline.com, *Professor Fitzgibbon Featured in Maine Campaign Ad*, (Sept. 15, 2009), http://eagleionline.com/2009/09/15/professor-fitzgibbon-featured-in-maine-ad-campaign/.

257. *See, e.g.* Press Release, Office of the Maine Attorney General, Attorney General Mills Issues Opinion on the Implications of LD 1020 on Maine School Curricula, (Oct. 15, 2009), *available at* http://www.maine.gov/tools/whatsnew/index.php?topic=AGOffice_Press&id=82932&v=article.

258. *See, e.g.*, *Parker*, 514 F.3d at 95.

259. *See, e.g.*, *Parker*, 514 F.3d at 95.

the rights of children and their parents, and is a good way to promote safety and tolerance at schools and to help children learn about their complex, diverse society. ♣