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KRISTIN B. GERDY*

“The Irresistible Force Meets the
Immovable Object”: When
Antidiscrimination Standards and
Religious Belief Collide in
ABA-Accredited Law Schools**

What happens when an irresistible force meets an immovable object? So goes the classic paradox. Most people’s initial reaction is to conclude that “something’s got to give.” Either the force has to stop or the object has to move, but which one? In reality, logic dictates that there cannot be such things as irresistible forces or immovable objects in the same universe; there simply are not such absolutes. But even without the absolutes, there are things—both physical and ideological—that are so formidable, steady, and unbending that a collision between two of them can significantly and permanently change the environment.

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** The idea for this Article was sparked by a discussion of the conflict between antidiscrimination and religious belief with the Board of Directors of the Legal Writing Institute as we addressed a delicate situation facing our institution’s job-posting policy. I would like to thank the other board members, Dan Barnett, Kenneth Chestek, Linda Edwards, Anne Enquist, Steve Johansen, Susan Kosse, Tracy McGaugh, Carol Parker, Ruth Anne Robbins, Judy Rosenbaum, Suzanne Rowe, Terry Seligmann, Michael Smith, and Cliff Zimmerman for their insights and thoughts on this sensitive subject. Their comments in our ongoing board meetings have expanded my vision and added to my understanding of both the theoretical arguments and the very personal feelings of those involved on all sides of this debate.

To many, religion is nearly an immovable object. Those with deeply and sincerely held religious beliefs often see them as firm, unbending, and inflexible, and rightly so. For without that firm foundation, religion would not provide the constant anchor and unwavering moral compass that give it its strength. But is religion really immovable? Or should it be forced to bend when it collides with other ideological forces?

Legal theorists, philosophers, and the courts themselves have long grappled with the question of whether it is fair to afford religion special treatment when other interests are not similarly privileged. Courts and scholars seem to be split between those that conclude that “religion is such a distinctive sphere of human concern that special treatment is justified,”¹ and those who appear to believe that it is improper to privilege religion over what they see as “other, equally valuable, human concerns.”²

It seems nearly impossible to define religion because its meaning differs according to the personal beliefs of the adherent. Truly,

[r]eligion is a special phenomenon, in part, because it plays such a wide variety of roles in human life: it is an institution,

¹ Andrew Koppelman, *Is It Fair to Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571, 572 (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 855 (1995) (Thomas, J., concurring); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 400 (1993) (Scalia, J., concurring in the judgment); *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting); and John H. Garvey, *An Anti-Liberal Argument for Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 275 (1996)).

² *Id.* at 572-73 (citing *City of Boerne v. Flores*, 521 U.S. 507, 536-37 (1997) (Stevens, J., concurring); PHILIP B. KURLAND, *RELIGION AND THE LAW: OF CHURCH AND STATE AND THE SUPREME COURT* (1962); Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555 (1998); Steven G. Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75 (1990); and Philip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3 (1979)). To illustrate the analysis of those scholars who reject religious accommodation or privilege for religion, Professor Koppelman summarizes the theory of Christopher Eisgruber and Lawrence Sager. See *id.* at 574-83 (citing Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994)). According to Koppelman, Eisgruber and Sager argue the unfair and arbitrary nature of privileging religion over other deep human commitments. *Id.* at 575. Koppelman quotes the following passage from Eisgruber and Sager: “To single out one of the ways that persons come to understand what is important in life, and grant those who choose that way a license to disregard legal norms that the rest of us are obliged to obey, is to defeat rather than fulfill our commitment to toleration.” *Id.* at 575 (quoting Eisgruber & Sager, *supra*, at 1315).

but it is more than that; it is an ideology or worldview, but it is more than that; it is a set of personal loyalties and locus of community, akin to family ties, but it is more than that; it is an aspect of identity, but it is more than that; it provides answers to questions of ultimate reality, and offers a connection to the transcendent; but it is more than that. Religion cannot be reduced to a subset of any larger category. In any particular context, religion may appear to be analogous to some other aspect of human activity—to another institution, worldview, personal loyalty, basis of personal identity, or answer to ultimate and transcendent questions. However, there is no other human phenomenon that combines all of these aspects; if there were such a concept, it would probably be viewed as a religion.³

But when religion comes into conflict with movements, even laws, that prohibit discrimination based on sexual orientation, two questions arise: First, is there any way to reconcile the two concepts? And second, if not, which should prevail—the First Amendment freedoms of religious organizations to govern their own associations and messages, or the general interest in eradicating discrimination? Attorney David French, president of the Foundation for Individual Rights in Education (FIRE), a group that advocates free speech on college campuses, characterized the conflict this way:

The issues . . . involve not so much a clash of constitutional doctrines as a clash between constitutional doctrine and an ideology of nondiscrimination that says that certain kinds of “exclusion” should never be permitted. Given the momentum that this ideology has in higher education, [it is a classic case of] “the irresistible ideological force (nondiscrimination) meets the immovable constitutional object (the First Amendment).”⁴

While the conflict between nondiscrimination and religious belief is not new⁵ and occurs in numerous contexts,⁶ the recent surge of interest in prohibiting discrimination based on sexual

³ *Id.* at 593 (quoting Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 42 (2000)).

⁴ Colloquy, *Religious Freedom vs. Civil Rights*, CHRON. HIGHER EDUC. (Wash., D.C.), Jan. 27, 2005, <http://chronicle.com/colloquy/2005/01/studentgroups> (discussing, in an Internet chat forum, then-pending lawsuits against four public universities where student groups claimed that the schools' antidiscrimination policies infringed upon their rights of religious expression and association).

⁵ See, e.g., Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514 (1979); Linda J. Lacey, *Gay Rights Coalition v. Georgetown University: Constitutional Values on a Collision Course*, 64 OR. L. REV. 409 (1986); Shelley K. Wessels,

orientation within American law schools by advocates both inside and outside the gay, lesbian, bisexual, and transgender (GLBT) community makes it likely that the two interests will soon collide head-on and demand formal resolution.

During the last forty years, several religiously affiliated law schools have opened their doors to students who wish to gain a high-quality legal education within a community of faith. For example, Pepperdine University School of Law, affiliated with the Churches of Christ, was accredited by the American Bar Association (ABA) in 1972.⁷ The J. Reuben Clark Law School at Brigham Young University (BYU), affiliated with The Church of Jesus Christ of Latter-day Saints, received its accreditation in 1974.⁸ And the Benjamin N. Cardozo School of Law at the Yeshiva University, a Jewish school, was accredited in 1978.⁹ In recent years, new religious law schools have been created such as Ave Maria (Catholic)¹⁰ and St. Thomas (Catholic),¹¹ while others that had operated as unaccredited schools have sought official approval by the ABA, such as Faulkner University's Thomas Goode Jones School of Law (Church of Christ), which received its provisional accreditation on June 10, 2006.¹² Each of these schools has been, or will be, required to satisfy the ABA standards in order to maintain or receive its ongoing accreditation, and at least one of those standards may be in conflict with the

Note, *The Collision of Religious Exercise and Governmental Nondiscrimination Policies*, 41 STAN. L. REV. 1201 (1989).

⁶ For example, although the interplay between these two interests with regard to general employment is outside the scope of this Article, in Title VII cases courts are also confronting the tension between the interests of avoiding discrimination based on sexual orientation and avoiding discrimination based on religion. See, e.g., *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 608 (9th Cir. 2004) (affirming district court's order granting summary judgment in favor of the employer in a religious discrimination claim brought under Title VII).

⁷ Am. Bar Ass'n, ABA Approved Law Schools, <http://www.abanet.org/legaled/approvedlawschools/year.html> (last visited Mar. 10, 2007).

⁸ *Id.*

⁹ *Id.*

¹⁰ Press Release, Ave Maria Sch. of Law, Ave Maria School of Law Opens to First Class (Aug. 22, 2000), available at <http://www.avemarialaw.edu/news/newsEvents/fullView.cfm?newsid=350&pyear=2000>.

¹¹ Univ. of St. Thomas, A History of the University of St. Thomas School of Law, <http://www.stthomas.edu/law/about/history.asp> (last visited Mar. 4, 2007) (noting that the university's board of trustees announced on May 16, 1999 that the law school would be reopened after having been closed for approximately sixty-six years).

¹² Faulkner Univ., Thomas Goode Jones Sch. of Law, Accreditation Statement, <http://www.faulkner.edu/jsl/info/accreditation.asp> (last visited Mar. 4, 2007).

schools' religious purpose and even the doctrinal foundation of their sponsoring churches.

Tension between the ABA standards and religiously affiliated law schools is not new.¹³ In fact, in 1981, Professor Carl S. Hawkins, speaking at a Christian Legal Society Conference at Notre Dame University, commented: "Tension will continue between the accreditation agencies and any church-related law schools that take their religious heritage seriously enough to depart from the established secular model."¹⁴ Also not new is the potential conflict over sexual orientation;¹⁵ however, while this conflict has remained mainly theoretical, increased political activism on the part of the GLBT community makes it likely that this theoretical conflict may soon play out in a very real, and possibly very public, way.

The ABA standards that govern accreditation of American law schools expressly prohibit discrimination based on sexual orientation in both admissions and employment.¹⁶ The policies of several religiously affiliated law schools, including Columbus School of Law at the Catholic University of America,¹⁷ the J. Reuben

¹³ For an earlier discussion on the potential conflicts between ABA accreditation and religiously affiliated law schools, see Robert A. Destro, *ABA and AALS Accreditation: What's "Religious Diversity" Got to Do with It?*, 78 MARQ. L. REV. 427, 478 (1995) (examining these tensions and arguing that religiously affiliated schools are unfairly, if not unconstitutionally, disadvantaged as a result of the accrediting bodies' "zeal to prohibit discrimination" and "to open up the profession").

¹⁴ Carl S. Hawkins, Professor, J. Reuben Clark Law Sch., Brigham Young Univ., *Credenda, Credibility and the Accreditation of Christian Law Schools* 15 (Apr. 25, 1981) (transcript available in the Robert S. Marx Law Library, University of Cincinnati).

¹⁵ See Douglas Laycock, *The Rights of Religious Academic Communities*, 20 J.C. & U.L. 15, 22 (1993) (noting the conflict between the ABA Standards and some religiously affiliated law schools over sexual orientation).

¹⁶ See discussion *infra* Part I. The Association of American Law Schools (AALS) bylaws also address discrimination based on sexual orientation and give guidance to religiously affiliated law schools to ensure compliance, but because AALS bylaws simply govern membership within the organization rather than professional accreditation, this Article will not address them except as they help to illustrate the creation and interpretation of the ABA Standards.

¹⁷ Catholic Univ. of Am., Columbus Sch. of Law, Statement of Nondiscrimination as Accepted by the Association of American Law Schools (2005), <http://law.cua.edu/admissions/CSL/nondiscrimination.cfm> ("The Columbus School of Law, motivated by the Catholic identity of The Catholic University of America, of which it is an integral part, recognizes the inherent value and dignity of all members of the human family. . . . The university fully accepts the teachings of the Catholic Church with regard to homosexual conduct and sexual conduct outside the bonds of matrimony, as set forth by the Magisterium of the Catholic Church. Consistent with those teachings, the university does not discriminate purely on the basis of an individual's sex-

Clark Law School at Brigham Young University,¹⁸ and the Pepperdine School of Law,¹⁹ which are currently accredited by the ABA, among others, could be subject to increased scrutiny, especially as GLBT advocates argue that their current policies prohibiting pre- and extramarital sexual relations constitute improper discrimination based on sexual orientation. It is unlikely that a challenge would be mounted against a law school with a respected history, such as BYU; rather, such a challenge would likely be raised with regard to a new law school seeking its initial full accreditation. Challenging the accreditation of a new school would not only be less likely to create political tension within the legal academy, but may also be more likely to succeed because a new school does not have a history of “compliance” like a long-accredited school. Thus, with the possibility of the full accreditation of Faulkner’s Jones School of Law in the near future,²⁰ the time is ripe to fully resolve the tension. Such resolution would not only make it easier to decide the Faulkner case, but also

ual orientation without regard to homosexual conduct or other actions that undermine the university’s Catholic Identity.”).

¹⁸ Brigham Young Univ., J. Reuben Clark Law Sch., Non-Discrimination Policy, <http://www.law2.byu.edu/Policiesandprocedures/equalopp.php> (last visited Feb. 25, 2007) (“[A]s a member of the Association of American Law Schools (AALS), the J. Reuben Clark Law School provides equal opportunity in legal education for all persons, including faculty and employees with respect to hiring, continuation, promotion and continuing faculty status, applicants for admission, enrolled students, and graduates, without discrimination or segregation on the basis of race, color, religion, national origin, gender, sexual orientation, age, or disability. Because of the Law School’s religious affiliation and purpose, ABA standards and AALS regulations as applied to the Law School require equal opportunity on the basis of sexual orientation but not on the basis of conduct. All members of the Law School community are required to comply with the Brigham Young University Honor Code, which requires chastity outside of marriage and fidelity in marriage. The Law School, as is permitted by ABA standards and AALS regulations, also prefers faithful members of the Church of Jesus Christ of Latter-day Saints in employment.”).

¹⁹ Pepperdine Univ. Sch. of Law, Student Life Policies and Regulations, http://law.pepperdine.edu/academics/student_handbook/studentlife.html (last visited Feb. 25, 2007) [hereinafter Pepperdine Student Life Policies and Regulations] (“Out of concern for the health and safety of members of the university community, and to uphold the moral character of the educational environment, students are expected to make decisions regarding their sexual relationships consistent with the university’s Christian philosophy. The School of Law does not discriminate against any person on the basis of any sexual orientation which such person may have. However, sexual conduct outside of marriage is inconsistent with the school’s religious traditions and values. Therefore, as a matter of moral and faith witness, the faculty, staff, and students of the School of Law are expected to avoid such conduct themselves and the encouraging of it in others.”).

²⁰ See *supra* note 12 and accompanying text.

would allow religiously affiliated law schools to continue to operate without worrying about potential challenges that could be raised in the course of future reaccreditation visits.

It is important to understand that most religiously affiliated law schools place limits on sexual conduct, usually not distinguishing between heterosexual and homosexual conduct, rather than on sexual orientation itself.²¹ Many require abstinence for all single members, without distinguishing between gay and straight members, and fidelity for all married members of the law school community.²² Religiously affiliated law schools forcefully note that this policy applies to all and does not single out homosexuals,²³ but critics are quick to point out the disparate impact resulting from the fact that gays and lesbians cannot marry people of their own gender and so can never escape the requirement for abstinence.²⁴

Although the conduct/orientation distinction has been important in the past, as law schools have attempted to justify their policies, it is no longer likely that religiously affiliated law schools would be able to save their policies with the mere fact that they target conduct rather than orientation. In her concur-

²¹ See *supra* notes 17-19.

²² See, e.g., Pepperdine Student Life Policies and Regulations, *supra* note 19 (“[S]exual conduct outside of marriage is inconsistent with the school’s religious traditions and values.”).

²³ For example, BYU’s Honor Code emphasizes the broad applicability of the school’s policies. See Brigham Young Univ., Selecting and Implementing Actions, <http://campuslife.byu.edu/HONORCODE/chaste.htm> (last visited Mar. 4, 2007) (“The Church of Jesus Christ of Latter-day Saints and BYU affirm that sexual relationships outside the covenant of marriage are inappropriate. Examples include but are not limited to the following: a. Extra-marital relations, b. Promiscuity or predatory behavior, c. Aberrant behavior, d. Solicitation of sex, e. Homosexual conduct, and f. Cross-dressing. *Any level of sexual or similar misconduct at BYU is significant and may lead to a separation from the university.*”) (emphasis added); Brigham Young University, Honor Code Statement, http://campuslife.byu.edu/HONORCODE/honor_code.htm (last visited Mar. 4, 2007) (“As a matter of personal commitment, students, faculty, and staff of Brigham Young University . . . are expected to demonstrate in daily living on and off campus those moral virtues encompassed in the gospel of Jesus Christ, and will . . . live a chaste and virtuous life . . .”).

²⁴ See, e.g., James McGrath, *Abstinence-Only Adolescent Education: Ineffective, Unpopular, and Unconstitutional*, 38 U.S.F. L. REV. 665, 668 (2004) (“[A]bstinence-only-until-marriage programs should also be scrutinized for their failure to address the interests of gay and lesbian adolescents. Further, these programs teach abstinence until *marriage*—although this is not always the best approach for young people in general, it is particularly ineffective for lesbian and gay youth. Because there is generally no possibility of marriage for gays and lesbians, and Congress appears to be doing everything it can to prevent the future possibility of it, these young people are being told, in effect, to sustain a life of celibacy.”) (footnotes omitted).

ring opinion in *Lawrence v. Texas*, Justice O'Connor rejected the State's attempt to distinguish between discriminating against "homosexual conduct" and discriminating on the basis of sexual orientation.²⁵ She wrote, "While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the State's] sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class."²⁶ Similarly, the Ninth Circuit concluded that there was "no appreciable difference between an individual . . . being persecuted for being a homosexual and being persecuted for engaging in homosexual acts."²⁷ Therefore, the justification many religiously affiliated law schools have used successfully in the past is unlikely to hold under future scrutiny, leaving the tension to be resolved in some other way.

This Article provides an overview of the conflict between religiously affiliated law schools and the nondiscrimination ideals espoused by the ABA standards and the GLBT community with regard to sexual orientation. In addition, it considers whether both interests can be fully served within a law school community or whether one interest must take precedence. Part I introduces the applicable ABA Standards that govern accreditation of American law schools and gives a brief overview of the creation and evolution of the antidiscrimination standard. Part II explores the First Amendment's implied right of expressive association—a right that religiously affiliated law schools will likely invoke in adjudication of the conflict. Part III attempts to answer the question of whether the implied right of expressive association permits a religiously affiliated law school to adopt codes of conduct for students and faculty that might exclude practicing homosexuals from employment, and concludes that the First Amendment would protect such action.

I

THE ABA'S REGULATION OF DISCRIMINATION IN LAW SCHOOLS

American law schools are accredited by the American Bar Association Council of the Section of Legal Education and Admis-

²⁵ 539 U.S. 558, 583 (2003) (O'Connor, J., concurring).

²⁶ *Id.*

²⁷ *Karouni v. Gonzales*, 399 F.3d 1163, 1173 (9th Cir. 2005).

sions to the Bar (the Council) under the approval of the U.S. Department of Education.²⁸ Perhaps the most important reason why law schools seek ABA accreditation is that nearly every state's high court has adopted ABA accreditation as the standard by which to determine whether a law school's students have met the educational requirements necessary for admission to the state bar.²⁹ As part of its role in assuring the competence of lawyers entering the profession, the Council crafts "standards" for legal education that law schools must satisfy in order to gain and sustain their accreditation. The first set of these standards was created in 1921,³⁰ and since that time, the standards have undergone periodic revision under the direction of Council members with significant input from practitioners, judges, and members of the legal academy.³¹ According to the Council, "[t]he Standards recognize and encourage diversity in curriculum, methods of instruction, and among students, faculty, and staff. The Association believes that this diversity advances the course of quality legal education."³²

A. *Background and History of Law School Nondiscrimination Policies*

The original nondiscrimination standard prohibited both discrimination and segregation on the basis of race or color. In 1970, "sex," "religion," and "national origin" were added to the standard as additional nondiscrimination categories.³³ The standard remained in that form for the next eleven years.³⁴

The antidiscrimination provisions in the standard contain an exception for religiously affiliated law schools;³⁵ however, that exception did not come without considerable debate and disagreement among legal academicians. The debate started before

²⁸ ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS foreword at 4 (2004).

²⁹ *See id.*

³⁰ *Id.*

³¹ *Id.* foreword at 4-5.

³² *Id.* foreword at 5.

³³ Final Report of the AALS Executive Committee, Regulation 6.17 Working Group (Sept. 14, 1993), in Carl C. Monk, *Remarks Delivered at the Conference of Religiously Affiliated Law Schools: Commentary on Destro*, 78 MARQ. L. REV. 377, 382 (1995).

³⁴ *See* ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS standard 211 (1981) (prohibiting discrimination on the basis of race, color, sex, religion, and national origin).

³⁵ *See infra* note 61 and accompanying text.

the inclusion of sexual orientation in the nondiscrimination category. As early as 1981, leaders of both the ABA and the Association of American Law Schools (AALS) recognized that the issue of how best to accommodate religiously affiliated law schools while furthering general principles embodied in both the AALS bylaws and the ABA standards had become an important issue worthy of discussion.³⁶ In November of 1981, AALS member schools were informed that “[a] general discussion of the use of religious considerations by law schools with religious affiliations” was placed on the AALS House of Representatives agenda for its annual meeting.³⁷ Although no action was proposed and none taken, this signaled the beginning of the formation of a religious exemption to both the AALS bylaws and the ABA standards specifically with regard to nondiscrimination.

As part of this general discussion on religious law schools, the AALS Executive Committee was forced to decide if the AALS bylaw prohibiting discrimination, section 6-4, should be interpreted to allow religiously affiliated law schools to consider religious factors in admissions and hiring decisions. Rather than adopting a binding interpretation, “[t]he Committee decided that for the while a case-by-case approach was to be preferred to a legislative one.”³⁸

At the same time as the AALS was discussing the applicability of its antidiscrimination bylaw to religious law schools, the ABA Section of Legal Education and Admissions to the Bar was considering an amendment to its antidiscrimination standard.³⁹ An amendment to standard 211 was proposed that would allow religiously affiliated law schools to have programs and policies that were related to a school’s religious tradition if they “did not invidiously discriminate in admissions or employment, did not infringe academic freedom or the free exercise of religion and were consistent with sound educational policy.”⁴⁰ This proposed amendment was replaced by a substitute amendment that would allow religiously affiliated schools to circumvent the nondiscrimi-

³⁶ See Memorandum from Carl Hawkins to the Law Sch. Faculty of Brigham Young Univ. 1-2 (Nov. 16, 1981) (on file with author); Memorandum 81-43 from Sanford H. Kadish, AALS President-Elect, to Deans of Member Schs. and Members of the House of Representatives 1 (Nov. 3, 1981) (on file with author).

³⁷ Memorandum 81-43 from Sanford H. Kadish, *supra* note 36, at 1.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 2.

nation policy in standard 211 as long as potential students and employees were given sufficient notice of the school's policies.⁴¹ The amendment read: "Nothing herein shall be construed to prevent a law school from having a religious affiliation and purpose and adopting policies of admission and employment that directly relate to such affiliation and purpose so long as notice of such policies has been provided to applicants, students, faculty and employees."⁴² Over the opposition of the AALS Executive Committee and in a very close vote, the substitute amendment was adopted in August 1981.⁴³

Ten years later, in 1991, the ABA Section of Individual Rights and Responsibilities and the ABA Diversity in Legal Education Committee requested that the Council consider adding sexual orientation to the list of categories against which discrimination was prohibited by standard 211.⁴⁴ The Standards Review Committee (SRC) took up the matter in January of 1992.⁴⁵

During its review process, the SRC noted that all of the other classes included within the antidiscrimination provisions in standard 211 were afforded similar protection under federal law, and questioned "whether discrimination based on sexual orientation was a subject properly addressed in educational accreditation standards, as opposed to in other institutions making public policy."⁴⁶ The SRC and ultimately the Council itself decided that such action was proper "because American Bar Association accredited law schools are the gatekeepers controlling access to the profession. . . . Protection of an individual student's ability to obtain a J.D. degree from an accredited school is a legitimate con-

⁴¹ *Id.*

⁴² Memorandum D8182-5 from James P. White, Consultant on Legal Educ. to the ABA, to Deans of ABA Approved Law Schs. 1 (Aug. 19, 1981) (on file with author).

⁴³ *Id.* at 2.

⁴⁴ ABA Section of Legal Educ. and Admissions to the Bar, Report to the House of Delegates 3 (Aug. 1994) (on file with author) [hereinafter Aug. 1994 Report].

⁴⁵ *Id.* Concurrent with the ABA's examination of the issue, the AALS also underwent an examination of its bylaws to add sexual orientation as a protected category. As part of that process, the organization formed a Working Group charged to assist the AALS in "striking a fair and sensitive balance between the values of religious liberty and nondiscrimination based upon sexual orientation," Final Report of the AALS Executive Committee, *supra* note 33, at 382, and to explore whether the proposed revision to the bylaw that included no exceptions "might not be sufficiently textured to guide a member school in the specific instances where the principles of religious liberty and nondiscrimination seem[] to clash," *id.* at 383.

⁴⁶ Aug. 1994 Report, *supra* note 44, at 3.

cern of accreditation standards.”⁴⁷

As they worked through the proposed addition of sexual orientation language to the standard, the SRC and the Council foresaw two issues they felt they must address: first, the application of such a provision in religiously affiliated law schools, and second, the application of such a provision to a school’s choice of whether to allow governmental, especially military, recruiters on its campus.⁴⁸ The Council decided to address both of these concerns in official interpretations to accompany the revised standard.⁴⁹

In determining how to craft the religious exception both in the language of the standard and in its accompanying interpretation, the Council noted that the existing standard addressed the freedom of religion in the accreditation process.⁵⁰ Further, the Council recognized that some religious organizations, including several that sponsored long-accredited ABA law schools, have strong feelings about sexual orientation and may see homosexuality as contrary to their doctrinal foundations.⁵¹ Thus, the Council concluded that its official interpretation would conclude that “[a]s long as proper notice is given to those potentially concerned and access is not barred to individual students from obtaining a J.D. degree because of sexual orientation, it was . . . appropriate not to compel such institutions to violate long held religious beliefs to maintain accreditation.”⁵² The proposed interpretation read: “As long as a school complies with the requirements of Standard 211(e), the prohibition based on sexual orientation does not require a religiously affiliated school to act inconsistently with the essential elements of its religious values and beliefs.”⁵³

As part of the review process, the SRC and the Council conducted several hearings and solicited comments from interested parties.⁵⁴ Among the respondents were the deans of several religiously affiliated law schools, including Dean H. Reese Hansen,

⁴⁷ *Id.*

⁴⁸ *Id.* at 4. The U.S. Supreme Court recently upheld the Solomon Amendment, which does put some limitations on a law school’s ability to ban government recruiters from campus. See *infra* notes 164-68 and accompanying text.

⁴⁹ Aug. 1994 Report, *supra* note 44, at 4.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 5.

⁵⁴ *Id.*

then dean of the J. Reuben Clark School of Law at Brigham Young University. He commented:

A relatively small group of American law schools is committed to both conventional excellence in legal education and the fostering of teacher/student communities which adhere to conduct required by the tenets of their sponsoring religious institutions. These schools provide a valuable element of diversity in an overwhelmingly secular pattern without compromising in any way the ABA's concern for quality training of law students. Present Standard 211(d) was promulgated in recognition of this fact.

The proposals in question support the basic purpose of present Standard 211(d) by permitting religiously affiliated law schools to continue organizing themselves as communities which practice important behavioral teachings, including traditional notions of chastity, of their sponsoring churches. Proposed Interpretation 1 of proposed Standard 211(e) is critical to achieving this end. Without the Interpretation, proposed Standard 211(e) would be significantly ambiguous on an important point; and if the Interpretation were now abandoned or significantly altered, a negative implication would be created that would undermine the freedom otherwise granted to church sponsored law schools by proposed Standard 211(e).⁵⁵

At its meeting in February 1994, the Council recommended the amendment of the standard to the ABA House of Delegates.⁵⁶ The ABA House of Delegates approved the amendment in August of 1994.⁵⁷ Between 1994 and 2005, no substantive changes were made to the standard's language, although a few technical corrections were made. In 2005, the Council's SRC examined standards 210 to 212⁵⁸ and made some changes, most notably

⁵⁵ Letter from H. Reese Hansen, Dean, J. Reuben Clark Law Sch., Brigham Young Univ., to Dean James P. White, Consultant on Legal Educ. to the ABA (June 29, 1993) (on file with author).

⁵⁶ Aug. 1994 Report, *supra* note 44, at 4.

⁵⁷ See Brief of the American Bar Ass'n as Amicus Curiae Supporting Petitioners app. at 5a, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), <http://www.abanet.org/amicus/lawrence.pdf> (listing standard 211 as a policy adopted by the ABA House of Delegates in August 1994); Aug. 1994 Report, *supra* note 44, at 6 (submitting the recommended amendments to the House of Delegates for adoption in August 1994).

⁵⁸ As of February 2006, these standards were as follows: standard 210—"Equality of Opportunity"; standard 211—"Equality of Opportunity Effort"; and standard 212—"Individuals with Disabilities." See Memorandum from John Sebert, Consultant on Legal Educ., to Deans of ABA-Approved Law Schs. 2-4 (Feb. 16, 2006), available at http://www.abanet.org/legaled/standards/adoptedstandards2006/standards210_212.pdf [hereinafter Memorandum from John Sebert] (discussing the approved revisions of standards 210 to 212, as well as the associated interpretations). Upon publication of the 2006–2007 standards, the standards were renamed and re-

eliminating two sections of standard 210 and including them instead as interpretations.⁵⁹ These changes did not impact the definition of discrimination or the categories against which discrimination is prohibited.

B. Standard 211

As approved by the ABA House of Delegates, the text of the current nondiscrimination standard, located in standard 211 and entitled “Non-Discrimination and Equality of Opportunity,” provides:

(a) A law school shall foster and maintain equality of opportunity in legal education, including employment of faculty and staff, without discrimination or segregation on the basis of race, color, religion, national origin, gender or sexual orientation, age or disability.

(b) A law school shall not use admission policies or take other action to preclude admission of applicants or retention of students on the basis of race, color, religion, national origin, gender, sexual orientation, age or disability.

...
 (d) Non-discrimination and equality of opportunity in legal education includes equal opportunity to obtain employment. A law school shall communicate to every employer to whom it furnishes assistance and facilities for interviewing and other placement functions the school’s firm expectation that the employer will observe the principles of non-discrimination and equality of opportunity on the basis of race, color, religion, national origin, gender, sexual orientation, age and disability in regard to hiring, promotion, retention and conditions of employment.⁶⁰

The religious exemption, which is located in section (c) of standard 211, provides:

(c) This Standard does not prevent a law school from having a religious affiliation or purpose and adopting and applying policies of admission of students and employment of faculty

numbered to the following: standard 211—“Non-Discrimination and Equality of Opportunity”; standard 212—“Equal Opportunity and Diversity”; and standard 213—“Reasonable Accommodation for Qualified Individuals with Disabilities.” ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS standards 211-213 (2006).

⁵⁹ Memorandum from John Sebert, *supra* note 58, at 2-3 (noting that the text of sections (c) and (d) of section 210 would be retained as interpretations to 210 because some commentators on the proposal expressed concern that deleting these subsections would demonstrate a lack of commitment to prohibiting discrimination); *see also* ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS interpretations 211-4, 211-5.

⁶⁰ ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS standard 211(a)-(b), (d).

and staff that directly relate to this affiliation or purpose so long as (i) notice of these policies has been given to applicants, students, faculty, and staff before their affiliation with the law school, and (ii) the religious affiliation, purpose, or policies do not contravene any other Standard, including Standard 405(b) concerning academic freedom. These policies may provide a preference for persons adhering to the religious affiliation or purpose of the law school, but shall not be applied to use admission policies or take other action to preclude admission of applicants or retention of students on the basis of race, color, religion, national origin, gender, sexual orientation, age or disability. This Standard permits religious affiliation or purpose policies as to admission, retention, and employment only to the extent that these policies are protected by the United States Constitution. It is administered as though the First Amendment of the United States Constitution governs its application.⁶¹

To aid law schools and accreditation teams in their application of the standards, the ABA has also issued official interpretations relevant to standard 211. For example, interpretation 211-1 states: "Schools may not require applicants, students, faculty, or employees to disclose their sexual orientation, although they may provide opportunities for them to do so voluntarily."⁶² Further, the official interpretation clarifies the applicability of standard 211(c):

As long as a school complies with the requirements of Standard 211(c), the prohibition concerning sexual orientation does not require a religiously affiliated school to act inconsistently with the essential elements of its religious values and beliefs. For example, it does not require a school to recognize or fund organizations whose purposes or objectives with respect to sexual orientation conflict with the essential elements of the religious values and beliefs held by the school.⁶³

Thus, religiously affiliated law schools can exercise a religious preference or exercise other religiously motivated policies in hiring if they: (1) notify potential applicants of their intent to do so, (2) do not contravene academic freedom or any other standard (including standard 211 on nondiscrimination and equality of opportunity), and (3) do not use their policies and preferences to discriminate against applicants based on certain categories, including sexual orientation.

As clear as the Council has tried to be in drafting this standard,

⁶¹ *Id.* standard 211(c).

⁶² *Id.* interpretation 211-1.

⁶³ *Id.* interpretation 211-2.

it remains unclear whether the hiring practices of religiously affiliated schools are limited to exercising a religious “preference” or a “preference” for those whose values are in line with the school’s religious purpose, or if they can actually adopt codes of moral conduct that would effectively exclude practicing homosexuals under the “religious purpose” language in the exception. Although interpretation 211-2 does state that “the prohibition concerning sexual orientation does not require a religiously affiliated school to act inconsistently with the essential elements of its religious values and beliefs,”⁶⁴ the example given in the interpretation—not requiring schools “to recognize or fund organizations whose purposes or objectives with respect to sexual orientation conflict with the essential elements of the religious values and beliefs held by the school”⁶⁵—seems to presuppose that practicing GLBT persons have a right to be hired by or admitted to the law school. Thus, the question of whether a law school could proactively exclude practicing GLBT persons is unclear. If the answer cannot be discerned from the language in standard 211, then, under the standard, the question is left to the First Amendment. Thus, the question is whether the school has a First Amendment associational right to discriminate against practicing GLBT persons in hiring. That question is addressed in the following parts.

II

THE FIRST AMENDMENT RIGHT OF EXPRESSIVE ASSOCIATION

As stated in standard 211(c), the ABA “permits religious affiliation or purpose policies as to admission, retention, and employment *only to the extent* that these policies are protected by the United States Constitution.”⁶⁶ Further, the ABA has decided that in making its determinations about compliance, religiously affiliated law schools can rely on First Amendment protection to defend their policies despite the fact that the ABA is not a state actor.⁶⁷ Therefore, in order to determine whether a religiously affiliated law school may impose hiring guidelines or other policies that discriminate, either directly or indirectly, against per-

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* standard 211(c) (emphasis added).

⁶⁷ *Id.* (stating that the standard “is administered as though the First Amendment to the United States Constitution governs its application”).

sons based on their sexual orientation and conduct—and still comply with the ABA standards and hence obtain or maintain accreditation—the evaluators must look to the relevant First Amendment rights and see if they apply. While it is possible that a religiously affiliated law school may be able to use the Religion Clauses of the First Amendment to defend its incompatibility with standard 211's antidiscrimination provision with regard to sexual orientation, such schools could also assert protection under the Free Speech Clause through the implied right of expressive association.

This right to freedom of association for the purpose of expressing ideas and advancing beliefs falls under the penumbra of other First Amendment rights and exists, in part, to ensure that other First Amendment rights are secure.⁶⁸ The ability to associate with others holding similar views and together advance those views is a powerful tool to ensure the freedoms the First Amendment has guaranteed individuals as against the government.⁶⁹ The Supreme Court has held that the individual's freedom to engage in free speech requires a "corresponding right" to associate with others for those ends.⁷⁰ Indeed, the right to expressive association is, in the words of the Court's opinion in *Roberts v. United States Jaycees*, "an indispensable means of preserving other individual liberties."⁷¹ As such, the Court stated that "implicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."⁷² This right of association "is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority."⁷³ In *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, decided in the Court's 2005 term, the Court again explained the First Amendment right of expressive association: "The reason we have extended First Amendment protection in this way is clear: The right to speak is often exercised most effectively by combining one's voice with the voices of others."⁷⁴ Further, the

⁶⁸ See *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 233 (1977).

⁶⁹ *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988).

⁷⁰ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

⁷¹ *Id.* at 618.

⁷² *Id.* at 622.

⁷³ *Id.*

⁷⁴ 126 S. Ct. 1297, 1312 (2006) (citing *Roberts*, 468 U.S. at 622).

Court explained that “[i]f the government were free to restrict individuals’ ability to join together and speak, it could essentially silence views that the First Amendment is intended to protect.”⁷⁵

The First Amendment right of expressive association can be infringed upon in numerous ways, but several are most common. These occur when the government seeks either to impose penalties or to withhold benefits from individuals because they are members of a disfavored group or organization, when the government seeks to require that a group or organization disclose its membership when it would prefer to remain anonymous, or when the government tries to interfere with the group’s internal affairs or organization.⁷⁶ This third type of interference, which arguably would apply to the forced inclusion of GLBT persons in ABA-accredited, religiously affiliated law schools, is particularly egregious:

There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate.⁷⁷

Despite its importance and the protection it provides, the First Amendment right of expressive association is not absolute.⁷⁸ The right must bow to regulations or other laws that are “adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”⁷⁹

The following sections examine foundational expressive association cases that could be used to determine the rights of religiously affiliated law schools.

A. *Expressive Association: The Boy Scouts of America v. Dale Analysis*

In 2000, the U.S. Supreme Court decided a landmark case regarding expressive association when it handed down its five-to-

⁷⁵ *Id.* (citing *Roberts*, 468 U.S. at 622).

⁷⁶ *Roberts*, 468 U.S. at 622-23.

⁷⁷ *Id.* at 623.

⁷⁸ *Id.*

⁷⁹ *Id.*

four opinion in *Boy Scouts of America v. Dale (BSA)*.⁸⁰ At the heart of the decision is the Court's recognition that the right of expressive association can be violated by regulating both membership and leadership criteria—in other words, by “forc[ing] the group to accept members it does not desire.”⁸¹ This is particularly so when the inclusion of those persons would “impair the ability of the group to express those views, and only those views, that it intends to express.”⁸² At the heart of the case was the conflict between a New Jersey state law that prohibited discrimination on the basis of sexual orientation and a Boy Scout policy prohibiting homosexual conduct on the part of scout leaders.⁸³ The Boy Scouts' potential expressive association right centered on the assertion that homosexual conduct was inconsistent with the values the organization sought to instill in the young men and boys that participated in its programs.⁸⁴ After considering both the expressive association rights of the Boy Scouts and the state's compelling interest in prohibiting discrimination within the public sector, the Court held that applying the state's antidiscrimination law so as to require the Boy Scouts to retain an openly gay leader violated the organization's First Amendment right of expressive association.⁸⁵

In so doing, the Court set forth a three-step analysis to determine whether a group is protected by the First Amendment's expressive association right.⁸⁶ Under the three-step analysis, the court must first conclude that the group actually engages in “expressive association”;⁸⁷ second, in order to assert the constitutional protection, the court must conclude that the forced inclusion of excluded potential members would “significantly affect” the group's ability “to advocate public or private viewpoints”;⁸⁸ and third, the court must determine whether the state's interest justifies the burden imposed.⁸⁹

First, the group seeking to exercise the expressive association

⁸⁰ 530 U.S. 640 (2000).

⁸¹ *Id.* at 648 (quoting *Roberts*, 468 U.S. at 623) (internal quotation marks omitted).

⁸² *Id.*

⁸³ *Id.* at 645-46.

⁸⁴ *Id.* at 644.

⁸⁵ *Id.*

⁸⁶ *See id.* at 648-53.

⁸⁷ *Id.* at 648.

⁸⁸ *Id.* at 650.

⁸⁹ *Id.* at 653.

right must actually engage in “expressive association.” In other words, the “group must engage in some form of expression, whether it be public or private.”⁹⁰ In *BSA*, the Court examined the Boy Scouts’ mission statement and concluded that the association was intended to instill values in its leaders and youth participants, and as a result, the Court concluded that “[i]t seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity.”⁹¹

Before leaving its discussion of the Boy Scouts as an expressive association, the Court outlined what the Boy Scouts believed it was advocating. Here, the Court recognized the Boy Scouts’ assertion that “homosexual conduct [was] inconsistent with the values embodied in the Scout Oath and Law, particularly with the values represented by the terms ‘morally straight’ and ‘clean.’”⁹² The Court also acknowledged that the lower court had found the exclusion of openly homosexual leaders and youth to be “antithetical to the organization’s goals and philosophy,”⁹³ but concluded that “it is not the role of the courts to reject a group’s expressed values because they disagree with those values or find them internally inconsistent.”⁹⁴ Therefore, the group’s expression may be considered unwise, irrational, unacceptable, illogical, inconsistent, or incomprehensible to others, and still merit First Amendment protection.⁹⁵ Further, with specific reference to the greater acceptance of homosexuality within society, the Court stated, “[T]his [acceptance] is scarcely an argument for denying First Amendment protection to those who refuse to accept these views. The First Amendment protects expression, be it of the popular variety or not.”⁹⁶ In fact, the Court concluded that “the fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view.”⁹⁷ Moreover, the Court reasoned that even if the group

⁹⁰ *Id.* at 648.

⁹¹ *Id.* at 650.

⁹² *Id.*

⁹³ *Id.* at 651 (quoting *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1226 (N.J. 1999)).

⁹⁴ *Id.*

⁹⁵ *See id.* (quoting *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 714 (1981); and *Democratic Party v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 124 (1981)).

⁹⁶ *Id.* at 660 (refuting Justice Stevens’s dissent regarding this point).

⁹⁷ *Id.*

discouraged members from voicing views on a particular subject, the First Amendment protected that expression.⁹⁸

Further, the Court wrote that “the First Amendment simply does not require that every member of a group agree on every issue in order for the group’s policy to be ‘expressive association.’”⁹⁹ Therefore, in the Boy Scouts’ context, it did not matter that there may have been heterosexual scoutmasters who openly disagreed with the organization’s policy—an official statement on behalf of the organization was sufficient for First Amendment purposes.¹⁰⁰

After concluding that the Boy Scouts did engage in expressive association, the Court examined whether the forced inclusion of an openly gay scoutmaster would “significantly affect the Boy Scouts’ ability to advocate public or private viewpoints.”¹⁰¹ In its analysis, the Court gave deference to the Boy Scouts’ view, stating, “As we give deference to an association’s assertions regarding the nature of its expression, we must also give deference to an association’s view of what would impair its expression.”¹⁰² While giving this deference, the Court was clear in its explanation that such deference would not allow an expressive association to use its “message” to create a “shield against antidiscrimination laws” without showing specifically how enforcement of that law would harm its ability to send its message.¹⁰³ The Court opined that forcing the Boy Scouts to accept an openly gay scoutmaster would “send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.”¹⁰⁴ Thus, the Court concluded that the Boy Scouts did in fact engage in expressive association and that the application of the state antidiscrimination law would infringe upon that expressive association.

The Court went on to refute several of the lower court’s conclusions. The Court disagreed with the New Jersey Supreme Court’s holding that the expressive message involved must be the

⁹⁸ *Id.* at 655.

⁹⁹ *Id.* at 655.

¹⁰⁰ *Id.* at 655-56 (“The fact that the organization does not trumpet its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection.”).

¹⁰¹ *Id.* at 650.

¹⁰² *Id.* at 653.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

sole or primary “purpose” of the association for the application of an antidiscrimination law to impose a significant burden on the organization’s expression.¹⁰⁵ Here, the Court illustrated its reasoning with the facts of *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*,¹⁰⁶ wherein the Court upheld the prohibition of a GLBT group in a St. Patrick’s Day parade based on expressive association grounds. The Court in *BSA* noted that “the purpose of the St. Patrick’s Day parade . . . was not to espouse any views about sexual orientation, but we held that the parade organizers had a right to exclude certain participants nonetheless.”¹⁰⁷ Similarly, the Court concluded that the imposition of an openly gay leader would significantly burden the Boy Scouts’ ability to express its message.¹⁰⁸ But, such a showing alone was not sufficient to invoke First Amendment protection in either case.

Finally, the Court scrutinized the New Jersey antidiscrimination law and the interests it was enacted to protect, and analyzed whether the State’s interest was sufficient to override the burden imposed on the expressive association of the Boy Scouts.¹⁰⁹ Of course, the right of expressive association is not absolute; it can “be overridden by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”¹¹⁰ Thus, the Court examined whether the imposition of the antidiscrimination statute would pose a “serious burden” on the Boy Scouts’ expressive association.¹¹¹ Without fully explaining its analysis, the Court concluded that the State’s interest did not justify the serious burden on the Boy Scouts’ right to oppose or disfavor homosexual conduct.¹¹²

As *BSA* was a five-to-four decision, the analysis of the minority, led by Justice Stevens, is relevant. In his dissent, which was joined by Justices Souter, Ginsburg, and Breyer, Justice Stevens argued that the majority incorrectly applied the expressive asso-

¹⁰⁵ *Id.* at 655.

¹⁰⁶ 515 U.S. 557 (1995).

¹⁰⁷ *BSA*, 530 U.S. at 655.

¹⁰⁸ *Id.* at 656.

¹⁰⁹ *Id.* at 656-659.

¹¹⁰ *Id.* at 648 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)) (internal quotation marks omitted).

¹¹¹ *Id.* at 658-59.

¹¹² *Id.* at 659.

ciation analysis to the Boy Scouts' discrimination against homosexual leaders.¹¹³

Setting forth a slightly different analytical framework for expressive association protection,¹¹⁴ but basing his analysis on the same precedent, Justice Stevens asserted that First Amendment protection requires more than "*some kind* of expressive activity" engaged in by a group with exclusive membership that could "articulate *some* connection between the group's expressive activities and its exclusionary policy."¹¹⁵ Instead, his analysis would require the organization seeking to invoke First Amendment protection to show that "the mere inclusion of the person at issue would impose any serious burden, affect in any significant way, or be a substantial restraint upon the organization's shared goals, basic goals, or collective effort to foster beliefs."¹¹⁶

Justice Stevens also took exception to the majority's deference to the organization's claims regarding the nature of its expression and the potential impact of the challenged antidiscrimination measure.¹¹⁷ In his view, while there are instances where organizations hold beliefs that are at odds with a state's antidiscrimination laws, the right to expressive association protection is

not a freedom to discriminate at will, nor is it a right to maintain an exclusionary membership policy simply out of fear of what the public reaction would be if the group's membership were opened up. It is an implicit right designed to protect the enumerated rights of the First Amendment, not a license to act on any discriminatory impulse. To prevail in asserting a right of expressive association as a defense to a charge of violating an antidiscrimination law, the organization must at least show it has adopted and advocated an unequivocal position inconsistent with a position advocated or epitomized by the person whom the organization seeks to exclude.¹¹⁸

Thus, Justice Stevens would have the Court conduct an independent analysis.¹¹⁹ Such independent analysis would allow the Court to "mark the proper boundary between genuine exercises of the right to associate, on the one hand, and sham claims that

¹¹³ *See id.* at 682-85 (Stevens, J., dissenting) ("The majority preterms this entire analysis.").

¹¹⁴ *See id.* at 682-88.

¹¹⁵ *Id.* at 682.

¹¹⁶ *Id.* at 683 (internal quotation marks omitted).

¹¹⁷ *Id.* at 686.

¹¹⁸ *Id.* at 686-87.

¹¹⁹ *Id.* at 686.

are simply attempts to insulate nonexpressive private discrimination, on the other hand."¹²⁰ However, as it stands, *BSA* simply requires courts to follow the three-step analysis: (1) decide whether the group actually engages in "expressive association,"¹²¹ (2) assess whether the forced inclusion of excluded potential members would "significantly affect" the group's ability "to advocate public or private viewpoints,"¹²² and (3) determine whether the state's interest justifies the burden imposed.¹²³

B. Expanding the Analysis: Expressive Association in Runyon and Bob Jones University

When confronting the potential tension between ABA standards prohibiting discrimination and religiously affiliated law schools' policies against homosexual and other pre- or extramarital sexual conduct, it is likely that evaluators would look beyond the Court's analysis in *BSA* to other cases that addressed the First Amendment right of expressive association, particularly those that arose in educational contexts. Such cases as *Runyon v. McCrary*¹²⁴ and *Bob Jones University v. United States*¹²⁵ would be particularly informative as they address whether a state's interest in preventing discrimination would be sufficiently compelling to restrict expressive association rights. In addition, the analysis of the compelling interest in *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*¹²⁶ may prove instructive.

In *Runyon*, the Court held that requiring a private school to admit African-American students did not violate the school's right of expressive association.¹²⁷ While the Court recognized (as an "assumption" without further analysis) that parents had an associative right to enroll their children in schools that promoted racial segregation and that children had a right to attend such institutions, those rights were not sufficient to overcome the State's interest in desegregating educational institutions.¹²⁸ Cit-

¹²⁰ *Id.* at 687.

¹²¹ *Id.* at 648 (majority opinion).

¹²² *Id.* at 650.

¹²³ *Id.* at 653.

¹²⁴ 427 U.S. 160 (1976).

¹²⁵ 461 U.S. 574 (1983).

¹²⁶ 536 A.2d 1 (D.C. 1987).

¹²⁷ 427 U.S. at 176.

¹²⁸ *Id.*

ing earlier Supreme Court precedent, the Court agreed that although “[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protections.”¹²⁹ Further, the Court agreed with the court of appeals that “there [was] no showing that discontinuance of [the] discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma.”¹³⁰

Although classified as a Free Exercise claim, the Court’s reasoning in *Bob Jones University v. United States* could place that case in the expressive association arena, where it provides useful analysis of the balance between a state’s compelling interest in preventing discrimination and a private entity’s First Amendment rights.¹³¹ In *Bob Jones University*, the Court held that the Internal Revenue Service acted within its authority when it revoked the university’s tax-exempt status because the university’s prohibition on interracial dating constituted indefensible racial discrimination.¹³² The Court concluded that the government’s interest in eradicating racial discrimination was sufficiently compelling to overcome the university’s First Amendment right.¹³³ The Court supported its conclusion by stating that “there can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice,”¹³⁴ and further, that “[o]ver the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education.”¹³⁵ When considering whether the State’s interest and the resulting revocation of tax-exempt status would unjustifiably burden the university, the Court stated: “Denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets.”¹³⁶ Furthermore, the Court concluded that the govern-

¹²⁹ *Id.* (quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1973)) (internal quotation marks omitted) (alteration and omission in original).

¹³⁰ *Id.* (quoting *McCrary v. Runyon*, 515 F.2d 1082, 1087 (4th Cir. 1975)) (internal quotation marks omitted) (second alteration in original).

¹³¹ 461 U.S. 574 (1983).

¹³² *See id.* at 595-96.

¹³³ *Id.* at 604.

¹³⁴ *Id.* at 592.

¹³⁵ *Id.* at 593.

¹³⁶ *Id.* at 603-04.

ment's interest in eliminating discrimination "substantially outweigh[ed]" the burden on the university's religious beliefs, which could not be accommodated in light of the government's interest.¹³⁷ Finally, the Court concluded that no "less restrictive means" were available to achieve the government's interest.¹³⁸

Lastly, in *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University (Gay Rights Coalition)*, which involved an assertion of free exercise rather than expressive association rights, the District of Columbia Court of Appeals concluded that the District of Columbia's interest in eradicating discrimination on the basis of sexual orientation was sufficiently compelling to overcome the burden that compliance with the regulation would have placed on the religious university.¹³⁹ In *Gay Rights Coalition*, two student gay rights groups sued Georgetown University for violating the District of Columbia's Human Rights Act, which prohibited educational institutions from discriminating against any individual based on his or her sexual orientation.¹⁴⁰ The students argued that the university illegally discriminated against their groups when it refused them "University Recognition" and the additional access to facilities and services associated with that status.¹⁴¹ While the court decided the case on statutory rather than constitutional grounds, it did "hold that the District of Columbia's compelling interest in the eradication of sexual orientation discrimination outweigh[ed] any burden imposed upon Georgetown's exercise of religion by the forced equal provision of tangible benefits."¹⁴²

In determining whether the District of Columbia's interest was sufficiently compelling, the court recognized the District of Columbia Council's view that "all forms of discrimination based on anything other than individual merit are equally injurious, to the immediate victims and to society as a whole."¹⁴³ According to the Council, the harm in discrimination based on sexual orientation is that "[i]t is a false measure of individual worth, one unfair and oppressive to the person concerned, one harmful to others because discrimination inflicts a grave and recurring injury upon

¹³⁷ *Id.* at 604.

¹³⁸ *Id.*

¹³⁹ 536 A.2d 1 (D.C. 1987).

¹⁴⁰ *Id.* at 4.

¹⁴¹ *Id.*

¹⁴² *Id.* at 5.

¹⁴³ *Id.* at 32.

society as a whole.”¹⁴⁴ Eliminating this harm was critical to the Council because “[o]nly by eradicating discrimination based on sexual orientation, along with all other forms of discrimination unrelated to individual merit, could the District eliminate recurrent personal injustice and build a society which encourages and expects the full contribution of *every* member of the community in all their diversity and potential.”¹⁴⁵

The court then considered the fact that no other appellate court had yet concluded that the eradication of discrimination based on sexual orientation was a compelling interest and acknowledged the “heterosexual model” upon which U.S. society is built, supported by “centuries of attitudinal thinking, often colored by sincerely held religious beliefs.”¹⁴⁶

The court went on to recount and summarize social science research on sexual orientation and the history of discrimination based on sexual orientation in both employment and education.¹⁴⁷ Finally, the court determined that sexual orientation shares many if not all of the characteristics of race and gender, which have required higher constitutional scrutiny.¹⁴⁸ It concluded that like race and gender, sexual orientation is not within the individual’s control, is generally not subject to change, “bears no relation to the individual’s ability to participate in and contribute to society,” and is the subject of a “long and unfortunate history of discrimination.”¹⁴⁹ The Court further stated that “due to the legal and social penalties commonly triggered by public acknowledgement of homosexuality . . . persons so oriented may constitute ‘discrete and insular minorities’ whose interests have traditionally been neglected by ‘the operation of those political processes ordinarily to be relied upon to protect minorities.’”¹⁵⁰ As a result, the court concluded that the District of Columbia’s interest in eradicating such discrimination was compelling.

After balancing the burden on Georgetown’s religious expression with the compelling interest in eliminating discrimination, the court concluded that the burden was not sufficient to over-

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 33.

¹⁴⁷ *Id.* at 33-36.

¹⁴⁸ *See id.* at 36.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 37 (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938)).

come the application of the Human Rights Act.¹⁵¹

*C. Recent Application of the Expressive Association Right:
Circle School, FAIR, and Hastings Christian
Legal Society*

Three recent cases—two from U.S. District Courts and one from the U.S. Supreme Court—illustrate the continuing evolution of the implied right of expressive association.

In *Circle School v. Phillips*,¹⁵² a 2003 U.S. District Court case arising in Pennsylvania, the court applied the *BSA* analysis of expressive association to a private school's objection to a state statute mandating that schools lead students in a recitation of either the Pledge of Allegiance or the National Anthem at the beginning of each school day. In its analysis, the court examined both the issue of conflicting messages and the narrow tailoring of the State's regulation.

The private school argued that the First Amendment prohibited the state from requiring the school to engage in expression it believed to be contrary to its views and contrary to the views that it wished to express.¹⁵³ As support for its contention, the school cited *BSA*'s prohibition against regulations that "impair the ability of the group to express those views, and only those views[,] that it intends to express."¹⁵⁴ The school argued that its charter and other foundational documents centered on the individual rights and choices of its students—allowing each student both autonomy and the ability to direct his or her own educational pursuits.¹⁵⁵ As such, the school plaintiffs argued that the statute would require them "to affirm and have their students affirm the Commonwealth's view on patriotism in the manner prescribed by the Commonwealth, impairing their ability to express certain values and philosophies which they wish to express."¹⁵⁶

In response, the state argued that its statute requiring schools to participate in patriotic exercises did not limit private schools' right to free expression because it did not prevent "private schools from disavowing the policy underlying the Act and from

¹⁵¹ *Id.* at 38.

¹⁵² 270 F. Supp. 2d 616 (E.D. Pa. 2003), *aff'd*, 381 F.3d 172 (3d Cir. 2004).

¹⁵³ *Id.* at 627.

¹⁵⁴ *Id.* (quoting *Boy Scouts of Am. v. Dale (BSA)*, 530 U.S. 640, 648 (2000)) (internal quotation marks omitted).

¹⁵⁵ *Id.* at 628.

¹⁵⁶ *Id.*

making it clear to their students that they do not share or endorse the viewpoint of the Commonwealth.”¹⁵⁷ Further, the state contended that “private schools retain not only the right, but the capability to make a general disclaimer before [the recitation of the Pledge or Anthem] and may teach their own message regarding the wisdom of the Commonwealth’s policy.”¹⁵⁸

In determining whether the statute did indeed infringe upon the school’s First Amendment expressive association right, the court quoted the *BSA* holding acknowledging that “implicit in the right to engage in activities protected by the First Amendment is a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”¹⁵⁹ In response to the state’s arguments, the court observed that the Court in *BSA*

did not hold that the Boy Scouts were required to accept homosexuals because they could make it clear that they do not endorse [the state’s] homosexual inclusive view. On the contrary, the Court held that [the state] could not force the Boy Scouts to accept homosexuals because such a requirement would interfere with their beliefs.¹⁶⁰

Thus, applying the *BSA* holding to the private school’s case, the court concluded that requiring the school to lead compelled patriotic observances was fundamentally inconsistent with its mission and message.¹⁶¹ The court was careful to explain that its holding did not mean that the state could never regulate private schools in ways that might infringe upon their freedom of expression, but rather that any such infringement must be based on a compelling state interest and must be narrowly tailored.¹⁶² Thus, the ultimate problem with the state’s requirement was that it was not narrowly tailored. Its “stated interest in the teaching of patriotism and civics and the [state’s] goal may be achieved through less restrictive means.”¹⁶³

During its 2005 term, the U.S. Supreme Court encountered the

¹⁵⁷ *Id.* (quoting Defendants’ Motion for Summary Judgment at 31, *Circle School*, 270 F. Supp. 2d 616 (No. 03-CV-763)) (internal quotation marks omitted).

¹⁵⁸ *Id.* at 628-29 (quoting Defendants’ Motion for Summary Judgment, *supra* note 157, at 33) (internal quotation marks omitted) (alteration in original).

¹⁵⁹ *Id.* at 627 (quoting *BSA*, 530 U.S. at 647-48) (internal quotation marks omitted).

¹⁶⁰ *Id.* at 629 (citing *BSA*, 530 U.S. at 654-55).

¹⁶¹ *See id.*

¹⁶² *Id.*

¹⁶³ *Id.*

First Amendment right to expressive association again in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*,¹⁶⁴ this time addressing the issue raised by a group of law schools who believed that their rights were violated by the Solomon Amendment, a federal law that made certain federal funding contingent upon a law school's willingness to accept military recruiters on campus. The law schools, represented collectively as the Forum for Academic and Institutional Rights (FAIR), argued that the Solomon Amendment violated their freedom of expressive association because it limited their "ability to express their message that discrimination on the basis of sexual orientation is wrong [and] is significantly affected by the presence of military recruiters on campus and the schools' obligation to assist them."¹⁶⁵

While FAIR argued that the law schools' position was similar to that of the Boy Scouts in *BSA*, the Court disagreed. Noting that while the forced inclusion of an openly homosexual leader would have significantly affected the Boy Scouts' ability to express its disapproval of homosexuality and that the state's interest did not justify such a significant intrusion, the Court concluded that the same could not be said with regard to the Solomon Amendment's effect on the law schools.¹⁶⁶ The Court explained what it saw as a difference between merely requiring law schools to allow military recruiters to come on campus and to provide them the same assistance offered other employers—a mere "interaction"—and requiring an organization like the Boy Scouts to offer membership and leadership opportunities to individuals fundamentally opposed to its values.¹⁶⁷ Thus, the "critical" distinction is that the Solomon Amendment did not force an organization engaged in expressive association "to accept members it does not desire."¹⁶⁸

In May 2006, the United States District Court for the Northern District of California denied summary judgment to a religious student group that sought to compel a state university to provide funding and other accommodations when that group excluded

¹⁶⁴ 126 S. Ct. 1297 (2006).

¹⁶⁵ *Id.* at 1312.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* (quoting *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000)) (internal quotation marks omitted).

members and officers on the basis of their sexual orientation.¹⁶⁹ The Christian Legal Society (CLS) chapter at the University of California Hastings College of the Law challenged the condition imposed upon all university-approved student organizations that they comply with the law school's nondiscrimination policy, which prohibits discrimination based on sexual orientation and also requires approved organizations to accept any interested student as a member regardless of the student's status or beliefs.¹⁷⁰

The CLS chapter at Hastings decided at the end of the 2003–2004 academic year to affiliate with the national CLS, which required that all members and officers sign a “Statement of Faith” as a prerequisite for membership.¹⁷¹ In addition, the bylaws required by the national CLS organization barred membership to any students who participated in “unrepentant homosexual conduct” or who were members of religions whose tenets were considered inconsistent with the “Statement of Faith.”¹⁷² Therefore, when CLS applied for recognition by the law school, its request was denied.¹⁷³ CLS filed suit against the law school, alleging that forced compliance with the nondiscrimination policy violated, among other things, its First Amendment right to expressive association.¹⁷⁴ After cross-motions for summary judgment, the court concluded that the law school's “uniform enforcement of its Nondiscrimination Policy” did not infringe upon CLS's First Amendment rights.¹⁷⁵

In its decision that the enforcement of the policy did not implicate CLS's right to expressive association, the court first explained that the policy targeted conduct in the form of discrimination rather than speech because conforming with the policy merely affected the steps that CLS must take in order to be an approved student organization rather than affecting what CLS could or could not profess about its beliefs.¹⁷⁶ In other words, the court found it critical that the policy told CLS it could

¹⁶⁹ *Christian Legal Soc'y v. Kane*, No. C 04-04484 JSW, 2006 WL 997217 (N.D. Cal. May 19, 2006).

¹⁷⁰ *See id.* at *1-2.

¹⁷¹ *Id.* at *3.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at *4.

¹⁷⁵ *Id.* at *5.

¹⁷⁶ *Id.* at *7.

“not engage in discrimination—not what CLS may or may not say regarding its beliefs on non-orthodox Christianity or homosexuality.”¹⁷⁷

When addressing the First Amendment right of expressive association, specifically, the court was clear to distinguish CLS’s situation from cases like *BSA* and *Roberts*, where the Court addressed the validity of forcing an organization to accept a member who held views that were inconsistent with the organization’s foundational tenets.¹⁷⁸ Instead, the court compared CLS to the organizations in *Boy Scouts of America v. Wyman*¹⁷⁹ and *Pi Lambda Phi Fraternity, Inc. v. University of Pittsburgh*,¹⁸⁰ wherein the courts held that forcing organizations to meet certain conditions in order to participate in some limited benefit (like a fundraising campaign or university recognition) was not the same as mandating that those groups accept members or leaders with whom they did not wish to associate.¹⁸¹ Thus, the court concluded that the law school was not forcing CLS to admit members with whom it did not wish to associate.¹⁸² Instead, the law school had “merely placed conditions on using aspects of its campus as a forum and providing subsidies to organizations.”¹⁸³ The court noted that if CLS wished, it could continue to operate as an unrecognized student organization and “exclud[e] any students they wish, and may continue to communicate its beliefs.”¹⁸⁴

Although the court found that *BSA* and *Roberts* did not apply to CLS’s case, it still examined CLS’s right under the expressive association analysis and found that the analysis did not warrant a finding that the law school’s actions were unconstitutional.¹⁸⁵ While the court did find that CLS engaged in expressive activities, it concluded that compelled compliance with the nondiscrimination policy in order to receive official university recognition did not sufficiently impair CLS’s ability to advocate its position.¹⁸⁶ Not insignificant to the court’s analysis was the fact that CLS did not show how the inclusion of homosexual or

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at *15.

¹⁷⁹ 335 F.3d 80, 91 (2d Cir. 2003).

¹⁸⁰ 229 F.3d 435, 445-46 (3d Cir. 2000).

¹⁸¹ See *Kane*, 2006 WL 997217, at *15-16.

¹⁸² *Id.* at *16.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at *20.

¹⁸⁶ *Id.*

“non-orthodox” Christian students would affect its mission.¹⁸⁷ Specifically the court found that

CLS has not submitted any evidence demonstrating that teaching certain values to other students is part of the organization’s mission or purpose, or that it seeks to do so by example, such that the mere presence of someone who does not fully comply with the prescribed code of conduct would force CLS to send a message contrary to its mission.¹⁸⁸

Hence, the court concluded that there was no significant infringement on CLS’s ability to express its views.¹⁸⁹ Because of this conclusion, the court did not thoroughly analyze whether such an infringement would be justified, but it did conclude that “even if there was some infringement, [the law school’s] interest in protecting its students from discrimination provides sufficient justification.”¹⁹⁰

Instead of applying the expressive association analysis from *BSA* or *Roberts*, the court found the analysis in *Healy v. James*¹⁹¹ to be directly applicable to the CLS claim because the law school denied official recognition based on CLS’s conduct rather than its philosophies or beliefs.¹⁹² Under *Healy*, the court focused its analysis on “whether the Nondiscrimination Policy [was] within the state’s constitutional power, the policy furthers an important or substantial government interest that is unrelated to the suppression of expression, and the incidental restriction on the alleged First Amendment freedoms [was] no greater than is essential to the furtherance of that interest.”¹⁹³ In applying this analysis to CLS’s claim, the court concluded that the law school’s nondiscrimination policy did not violate CLS’s rights.¹⁹⁴

III

DOES THE FIRST AMENDMENT ALLOW RELIGIOUSLY AFFILIATED LAW SCHOOLS TO EFFECTIVELY EXCLUDE PRACTICING HOMOSEXUALS?

Because the ABA has expressly adopted the First Amendment

¹⁸⁷ *Id.* at *22.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at *23.

¹⁹⁰ *Id.*

¹⁹¹ 408 U.S. 169 (1972).

¹⁹² *Kane*, 2006 WL 997217, at *16.

¹⁹³ *Id.* at *17.

¹⁹⁴ *Id.*

as the governing law for interpreting the religious exception to standard 211, whether it would allow religiously affiliated law schools to adopt codes of moral conduct that would effectively exclude practicing homosexuals in spite of the nondiscrimination provisions in standard 211 would depend on a law school's ability to satisfy the three-part expressive association test. This part discusses the application of that test and concludes that at least in the hypothetical case, a religiously affiliated law school would be able to show that it is engaged in expressive association and thus deserving of First Amendment protection in spite of the compelling interests behind the ABA nondiscrimination standard.

A. Is a Religiously Affiliated Law School an Expressive Organization?

In determining whether a religiously affiliated law school qualifies for First Amendment protection, evaluators must first find that the school engages in "expressive association," that is, the "group must engage in some form of expression, whether it be public or private."¹⁹⁵

A religious group such as a church or synagogue's congregation is almost certainly engaged in expressive association. It is within the context of a religious association with others that doctrine is developed; in other words, individuals in a religious group who share common values together define and develop their religious ideas and beliefs.¹⁹⁶ Thus, religious groups initially associate to create and express particular messages about their doctrinal beliefs and also continue to transmit those beliefs to others and ensure that the beliefs are exercised appropriately.¹⁹⁷ Religious groups do not merely express their convictions within the confines of the group, but they also often share those beliefs with others outside of the faith community either by proselytizing efforts or by speaking out on issues that confront society.¹⁹⁸ As

¹⁹⁵ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

¹⁹⁶ Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of Smith*, 2004 BYU L. REV. 1633, 1676.

¹⁹⁷ *See id.*

¹⁹⁸ For example, The Church of Jesus Christ of Latter-day Saints has gone on record opposing same-sex marriage because it would conflict directly with the church's view on the sanctity of marriage between a man and a woman. *See* News Release, The Church of Jesus Christ of Latter-day Saints, First Presidency Statement on Same-Gender Marriage (Oct. 19, 2004) (on file with author). Elder Russell Nelson of the church's Quorum of the Twelve Apostles represented the church in supporting a federal constitutional amendment that would limit recognized marriages to

such, religious organizations themselves clearly engage in expressive association that could be entitled to First Amendment protection. The more difficult question arises when the entity claiming protection is not the religious organization itself, but rather a religiously affiliated organization whose primary purpose is arguably secular, such as a law school.

It could be argued that even for a religiously affiliated law school, the institution's first priority is providing an excellent secular legal education to students who choose to enroll. This priority could irreconcilably conflict with any religious message the school could send, perhaps defeating any claim of expressive purpose. In effect, the law school would be more invested in teaching its students—this objective almost certainly being enhanced by a diversity of viewpoints and experiences—than in spreading its ideological message. Certainly law schools exist that either are or at one point were religiously affiliated that fit this description. For example, Boston University, the University of Chicago, Harvard, Northwestern, Vanderbilt, Yale, and others exemplify the law school that no longer views itself as an expressive association for any type of religious purpose despite any historic affiliation.

Contrary to the idea that even a religious law school should have a secular focus that would override its ability to engage in expressive association, Professor Douglas Laycock explains the character and mission of religiously affiliated law schools as an opportunity for people of faith, as “part of the individual exercise of religion . . . to form and join in communities of faith exercising the same religion.”¹⁹⁹ Further, Professor Laycock notes that for many if not most persons of faith, separating the religious and nonreligious aspects of their lives—including their professional work—is not possible.²⁰⁰ One of the many examples of the integration between religion and education in a religiously affiliated university is found in a statement made by Brigham Young, then President of The Church of Jesus Christ of Latter-day Saints, to Professor Karl G. Maeser in the early days of Brigham Young

those between a single man and a single woman. Julia Duin, *Believers Push for Marriage Measure*, WASH. TIMES, June 4, 2006, at A1. Elder Nelson was joined by a multitude of other religious representatives, including representatives of eight U.S. Catholic cardinals, the Southern Baptist Convention, the Church of God in Christ, and the Union of Orthodox Jewish Congregations of America. *Id.*

¹⁹⁹ Laycock, *supra* note 15, at 15.

²⁰⁰ *See id.* at 16.

University: “Brother Maeser, I want you to remember that you ought not to teach even the alphabet or the multiplication tables without the Spirit of God.”²⁰¹ This founding charge is still evident today at BYU where every faculty member is expected to “teach every subject with the Spirit. It is not intended ‘that all . . . faculty should be categorically teaching religion constantly in their classes, but . . . that every . . . teacher in this institution would keep his subject matter bathed in the light and color of the restored gospel.’”²⁰²

Thus, to law professors and law students of faith, their religious belief and commitments are connected to everything else that they do. As Professor Laycock observed: “They reject the model of religion as something private, reserved for Sunday morning or Friday night, and irrelevant to the rest of the week.”²⁰³ Understandably, if not predictably, “[t]he combined effect of the commitment to religious communities and the commitment to integrate religion with all aspects of life is that some of the religious individuals in academia will be attracted to religiously affiliated institutions of higher education.”²⁰⁴ Thus, as law schools are made up at least in part of persons who chose the school *because* of its religious affiliation, these law schools are engaged in expressive association—dedicated not only to providing excellent legal education for students, but also to upholding and furthering their religious missions and values. As Professor Laycock rightly concludes:

It follows that schools such as Brigham Young, Notre Dame, Baylor, Pepperdine, Valparaiso, and Cardozo are, in significant part, exercises of religion. Each of them is a faith community in pursuit of a common project. The nature of that community is both religious and academic, and the balance between the two commitments is both delicate and precarious.²⁰⁵

In fact, many religiously affiliated law schools view part of their mission as furthering the religious understanding and ser-

²⁰¹ REINHARD MAESER, KARL G. MAESER: A BIOGRAPHY 79 (1928) (internal quotation marks omitted).

²⁰² Brigham Young Univ., Aims of a BYU Education: Spiritual Strengthening, <http://unicomm.byu.edu/about/aims/spiritual.aspx?lms=2> (last visited Feb. 28, 2007) (quoting Spencer W. Kimball, Member of the Council of the Twelve Apostles, The Church of Jesus Christ of Latter-day Saints, Address to BYU Faculty and Staff: Education for Eternity 11 (Sept. 12, 1967)) (omissions in original).

²⁰³ Laycock, *supra* note 15, at 16.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

vice of their students and faculty. For example, Notre Dame Law School aspires to “broaden and deepen [its] academic and practical understanding by drawing upon the unique resources of [the Catholic] religious tradition and the traditions of other faiths,” and furthermore, it “seek[s] to illustrate the possibilities of dialogue between and integration of reason and faith.”²⁰⁶ Similarly, the Columbus School of Law at the Catholic University of America professes that it is

committed to excellence in legal education within the profound intellectual tradition of the Church. Giving priority to the sacred dignity and uniqueness of each human person, the law school program is a standing invitation for men and women to pursue a professional calling fully informed by faith, moral inquiry and respect for the rule of law. The rigorous course of study embodies, in the words of the university’s first rector, “the harmony between reason and revelation . . . [and] the genius of America.”²⁰⁷

Certainly these missions are at least as expressive as that of the Boy Scouts, which the Court concluded was intended to instill values in its members and constituted expressive activity worthy of constitutional protection.²⁰⁸ However, unlike the Boy Scouts, whose governing materials were essentially silent with regard to the organization’s stance on homosexuality, many religiously affiliated law schools have official policies regarding sexual conduct, in addition to their general mission statements. These policies are usually applicable to both heterosexual and homo-

²⁰⁶ Univ. of Notre Dame Law Sch., Mission Statement, <http://law.nd.edu/visitors/mission.html> (last visited Feb. 28, 2007).

²⁰⁷ Catholic Univ. of Am., Columbus Sch. of Law, About CUA Law, <http://law.cua.edu/about> (last visited Feb. 28, 2007) (quoting “the university’s first rector”) (alteration and omission in original); cf. Brigham Young Univ., BYU Mission Statement, <http://unicomm.byu.edu/about/mission> (last visited Feb. 28, 2007) (“The mission of Brigham Young University—founded, supported, and guided by The Church of Jesus Christ of Latter-day Saints—is to assist individuals in their quest for perfection and eternal life. That assistance should provide a period of intensive learning in a stimulating setting where a commitment to excellence is expected and the full realization of human potential is pursued. All instruction, programs, and services at BYU, including a wide variety of extracurricular experiences, should make their own contribution toward the balanced development of the total person. Such a broadly prepared individual will not only be capable of meeting personal challenge and change but will also bring strength to others in the tasks of home and family life, social relationships, civic duty, and service to mankind. To succeed in this mission the university must provide an environment enlightened by living prophets and sustained by those moral virtues which characterize the life and teachings of the Son of God.”).

²⁰⁸ See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 650 (2000).

sexual constituents. For example, the Columbus School of Law at the Catholic University of America,²⁰⁹ the J. Reuben Clark Law School at Brigham Young University,²¹⁰ and the Pepperdine School of Law²¹¹ all have policies prohibiting pre- and extramarital sexual relations. Reading these policies in conjunction with the schools' mission statements, which directly reference religious conviction, it is likely that the ABA evaluators would conclude that a religiously affiliated law school is indeed engaged in expressive association.

While each law school would explain the connection differently, a possible connection between the Pepperdine policy and its mission serves as a typical example. The Pepperdine Law School mission statement provides:

The faculty and administration of the School of Law are committed to the proposition that the way in which they approach students, both personally and professionally, will shape the student's perception of the law and the role of lawyers. Both faculty and administration must, therefore, adhere to the highest standards of moral and ethical conduct²¹²

To ensure such standards, the law school expects that students make decisions regarding their sexual relationships consistent with the university's Christian philosophy.

The School of Law does not discriminate against any person on the basis of any sexual orientation which such person may have. However, sexual conduct outside of marriage is inconsistent with the school's religious traditions and values. Therefore, as a matter of moral and faith witness, the faculty, staff, and students of the School of Law are expected to avoid such conduct themselves and the encouraging of it in others.²¹³

So the policy regarding pre- and extramarital sexual conduct directly advances the law school's desire to exhibit the "highest standard of moral and ethical behavior,"²¹⁴ in a conventional Christian tradition, thereby fulfilling the "connection" requirement.

Like many similar debates between religious beliefs and secu-

²⁰⁹ Catholic Univ. of Am., *supra* note 17.

²¹⁰ Brigham Young Univ., *supra* note 18.

²¹¹ Pepperdine Student Life Policies and Regulations, *supra* note 19.

²¹² Pepperdine Univ. Sch. of Law, Mission Statement, <http://law.pepperdine.edu/welcome/mission.html> (last visited Feb. 28, 2007) [hereinafter Pepperdine Mission Statement].

²¹³ Pepperdine Student Life Policies and Regulations, *supra* note 19.

²¹⁴ See Pepperdine Mission Statement, *supra* note 212.

lar interests, hostility from the secular side is common. This hostility often flows from a conviction that religious belief is simply irrational, indefensible, and incompatible with intellectual inquiry and analysis.²¹⁵ In addition to outright hostility, some opponents of the expressive association rights of religiously affiliated law schools could argue that while they generally support religious freedom, law schools are not the proper venue for the exercise of such religious expression. These persons might well justify their position with the hypothetical response posed by Professor Laycock: “Of course I respect your religious liberty, but this is not a religious institution. This is a law school.”²¹⁶ They could argue that faculty and students at religiously affiliated law schools can practice their religion in their “personal lives,” but not as part of their “professional lives” as legal scholars, administrators, or students.²¹⁷ According to Professor Laycock, this is equivalent to saying: “You cannot practice your religion as you understand it. Rather, you can practice it only as I think I would understand it, if I understood it at all.”²¹⁸

Despite the hostilities against religious views toward homosexuality and other pre- or extramarital sexual relations, a religiously affiliated law school’s status as an expressive association with regard to moral issues does not turn on whether the general public views its policies as unwise or irrational, or even unacceptable, illogical, inconsistent, or incomprehensible.²¹⁹ As the Court in *BSA* found, greater societal acceptance of homosexual conduct does not justify “denying First Amendment protection to those who refuse to accept these views.”²²⁰

Therefore, it is likely that most, if not all, religiously affiliated law schools would qualify as being engaged in expressive association; however, that is not enough to afford protection and exception from the antidiscrimination policies embodied in standard 211.

²¹⁵ See Laycock, *supra* note 15, at 26 (citing, for example, Suzanna Sherry, *Outlaw Blues*, 87 MICH. L. REV. 1418, 1427 (1989) (reviewing Mark Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* (1988)) (“[D]ivine revelation and biblical literalism are irrational superstitious nonsense . . .”).

²¹⁶ *Id.* (internal quotation marks omitted).

²¹⁷ *Id.*

²¹⁸ *Id.* (internal quotation marks omitted).

²¹⁹ *Boy Scouts of Am. v. Dale (BSA)*, 530 U.S. 640, 651 (2000) (quoting *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 714 (1981); and *Democratic Party v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 124 (1981)).

²²⁰ *Id.* at 660 (refuting Justice Stevens’s dissent regarding this point).

B. Would Imposing the Antidiscrimination Rules in Standard 211 Significantly Burden the Religiously Affiliated Law School?

Even if a religiously affiliated law school is deemed to be engaged in expressive association, in order to receive First Amendment protection, the evaluators must also conclude that requiring the law school to comply with the standard imposes a significant burden on the law school's ability to express the values and ideals it wishes to express.

When deciding whether the imposition of the nondiscrimination requirements in standard 211 with regard to sexual orientation would significantly burden a religiously affiliated law school, the evaluators would need to decide whether to adopt the BSA majority's conclusion that it should give deference to the law school's "view of what would impair its expression."²²¹ In the alternative, evaluators could choose to adopt Justice Stevens's view and require an affirmative showing that "the mere inclusion of the person at issue would impose any serious burden, affect in any significant way, or be a substantial restraint upon the organization's shared goals, basic goals, or collective effort to foster beliefs."²²² Religiously affiliated law schools would prevail under either formulation of the test.

Statements made by Dean James P. White, who was then Consultant on Legal Education to the ABA shortly after the addition of the sexual orientation language to the standard, imply that at least he believed that religiously affiliated law schools should be given extreme deference with regard to policies the ABA saw as furthering their religious missions and safeguarding their expressions.²²³ At the first Symposium of Religiously Affiliated Law Schools, he said:

Perhaps the best policy is to leave it to each law school to define itself and the role of its religious affiliation. Clearly, in my view, law schools with a religious affiliation must determine their own destiny. An accrediting agency should not attempt to dictate the extent to which their religious affiliation should guide their institutional direction. A law school must provide a sound legal education to enable persons to successfully enter the practice of law. That is our primary concern as

²²¹ *Id.* at 653.

²²² *Id.* at 683 (Stevens, J., dissenting) (internal quotation marks omitted).

²²³ James P. White, *Religiously Affiliated Law Schools: Their Role in American Legal Education*, 78 MARQ. L. REV. 371 (1995).

an accrediting agency, and only if the religious affiliation of the school impedes or distorts that basic mission, should the accrediting agency have concerns about the school's programmatic mission.²²⁴

Even if evaluators adopt Dean White's position, they would wisely adopt at least a compromise position. By adopting at least a minimal requirement that a law school show specific ways in which the inclusion of practicing homosexuals and others who are unwilling to abide by the school's prohibitions on pre- and extramarital sexual relations would affect its ability to send its message ensures that the law school cannot use the existence of its message alone as a way to evade the antidiscrimination standard.

Religiously affiliated law schools would be significantly impacted by the forced inclusion of practicing homosexuals in the same way that the Boy Scouts would have been—and in some cases, even more so. Imposing the antidiscrimination policy embodied in standard 211 on a law school whose religious foundation views such conduct as contrary to divine edict would indicate to its students and those outside the law school that it legitimizes homosexual conduct.²²⁵

A significant burden on expression likely exists any time an external regulation conflicts with religious doctrines or practices.²²⁶ One way that burden is imposed is by injecting the outside entity into possible disagreements and decision-making within the religious circle.²²⁷ For example, an external requirement that prohibits discrimination based on sexual orientation and conduct addresses a difficult moral issue for many persons of faith and divides members of many churches. Requiring the religious association (in this case, the law school) to adopt the secular standards that a homosexual lifestyle is appropriate and that pre- and extramarital sexual relations are acceptable, if not desirable, potentially disrupts the religious group's ability to determine its own doctrine and beliefs.²²⁸

Faculty, staff, and administration in religious law schools do

²²⁴ *Id.* at 372.

²²⁵ See *BSA*, 530 U.S. at 653 (“Dale’s presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.”).

²²⁶ See Brady, *supra* note 196, at 1679.

²²⁷ See *id.*

²²⁸ See *id.*

more than just teach classes, conduct research, and fulfill the necessary day-to-day functions that keep the law school running; they also serve as role models and mentors for the students. Some of that modeling function relates directly to their ability to reconcile and balance their religious identity with their professional identity. Students recognize this relationship and often look directly to their professors for examples and even direct advice about how to function as a person of faith in the law. This mentoring and modeling pattern is typical of all religious organizations, which not only teach doctrine, but also seek to apply that doctrine to the activities of everyday life.²²⁹ Imposing practicing homosexual faculty or staff on a religiously affiliated law school goes far beyond requiring a law school to “interact” with persons whose message fundamentally conflicts with the law school’s mission and values. This is precisely the kind of situation the Supreme Court envisioned when it concluded that a group engaged in expressive association could not be forced “to accept members it does not desire.”²³⁰

Forcing a religiously affiliated law school with opposing doctrinal views to employ practicing homosexuals and others who are unwilling to abide by its moral conduct code would significantly burden its ability to model the values it seeks to express. Further, it would detract from the law school’s ability to put its beliefs into practice and to maintain its commitments and convictions.²³¹ It is certainly true that even those with religious convictions must conform to restrictions on their individual actions in many contexts. Simply having a religious belief does not excuse a person from obeying laws and other regulations. But, placing such restrictions on a religiously affiliated law school significantly and directly undermines the religious beliefs of community members and decreases the ability of the law school to express its core beliefs. Forcing a religiously affiliated law school to accept persons who are unwilling to abide by codes of conduct that relate directly and specifically to core doctrinal teachings of the sponsoring church certainly satisfies even Justice Stevens’s requirement that

[t]o prevail in asserting a right of expressive association as a

²²⁹ See *id.* at 1676.

²³⁰ *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. 1297, 1312 (2006) (quoting *BSA*, 530 U.S. at 648) (internal quotation marks omitted).

²³¹ *Brady*, *supra* note 196, at 1676.

defense to a charge of violating an antidiscrimination law, the organization must at least show it has adopted and advocated an unequivocal position inconsistent with a position advocated or epitomized by the person whom the organization seeks to exclude.²³²

Just as the *Circle School* court concluded that requiring the school to lead compelled patriotic observances was fundamentally inconsistent with its mission and message and therefore imposed a significant burden on its expressive association,²³³ requiring a religiously affiliated law school to include practicing homosexuals and others who are unwilling to abide by the school's moral conduct code when such is fundamentally inconsistent with its mission and message imposes a significant burden on that law school. Unlike the discontinuance of racially discriminatory admissions practices in *Runyon*, which the Court concluded would not "inhibit in any way the teachings in these schools of any ideas or dogma,"²³⁴ the forced acceptance of persons who are unwilling to abide by its moral conduct code inhibits the religiously affiliated law school's ability to teach and model for its students the way that lawyers of faith should live, both personally and professionally.

Such a burden could itself be viewed as discrimination based on religion, which is specifically prohibited by the same section of standard 211. Thus, the evenhanded application of the moral conduct standard really is the least discriminatory solution that allows the religiously affiliated law school to further its mission.

The potential impact on a religiously affiliated law school's ability to maintain its religious character is evident by the large number of American law schools that have failed to maintain their religious character. The balance is difficult to maintain because if a law school becomes too religious, it can lose its academic reputation, but if it becomes too secular (by abandoning policies and practices that relate directly to its religious tradition), it can lose its religious identity and become simply another secular law school.²³⁵ While it is true that religiously affiliated law schools that adopt more secular policies may still retain some of their original religious commitment, to outsiders (and even to

²³² *BSA*, 530 U.S. at 687 (Stevens, J., dissenting).

²³³ 270 F. Supp. 2d 616, 629 (E.D. Pa. 2003), *aff'd*, 381 F.3d 172 (3d Cir. 2004).

²³⁴ *Runyon v. McCrary*, 427 U.S. 160, 176 (1976) (quoting *McCrary v. Runyon*, 515 F.2d 1082, 1087 (4th Cir. 1975)).

²³⁵ See Laycock, *supra* note 15, at 17.

insiders), they do not “appear to remain religious institutions in any sense that affects the daily lives of students and faculty.”²³⁶ The likely effect of such is larger than its impact on a single religiously affiliated law school. The forced secularization of religiously affiliated law schools would stamp out diversity among the range of American law schools, limiting the choice, background, and experience of law students throughout the country. Such a consequence can hardly be called insignificant.

Further, the denial or revocation of the ABA accreditation of a religiously affiliated law school that refuses to comply with standard 211’s stance on sexual orientation would impose a significant and serious burden on the law school. Unlike the situation where an organization is forced to meet certain conditions in order to participate in some limited benefit (like a fundraising campaign or university recognition),²³⁷ requiring religiously affiliated law schools to comply with the sexual orientation provision in standard 211 fundamentally affects the character and nature of the law school. Neither would it compare to the situation in *Bob Jones University* involving interracial dating policies where denying tax benefits would “have a substantial impact on the operation of private religious schools, but [would] not prevent those schools from observing their religious tenets.”²³⁸ Rather, denying accreditation either would prevent schools from observing their religious tenets (in order to reclaim accreditation) or, more likely, would cause the law school to go out of business. Unlike student organizations that could continue to operate without official recognition, excluding students as they wish and continuing to communicate their beliefs,²³⁹ withholding accreditation would be disastrous to a religiously affiliated law school. Because ABA accreditation is a prerequisite for bar admission in nearly every state, a law school would hardly be able to survive without it. It would be an unreasonable burden to place on a law school to require it to approach each and every state’s supreme court to seek, with little likelihood of success, a special dispensation for its graduates.

In summary, religiously affiliated law schools have a special interest in furthering their religious identity and mission while at

²³⁶ *Id.*

²³⁷ See, e.g., *Christian Legal Soc’y v. Kane*, No. C 04-04484 JSW, 2006 WL 997217 (N.D. Cal. May 19, 2006).

²³⁸ *Bob Jones Univ. v. United States*, 461 U.S. 574, 603-04 (1983).

²³⁹ *Kane*, 2006 WL 997217, at *16.

the same time providing an excellent legal education to their students. As Thomas L. Shaffer eloquently stated,

A religiously affiliated law school cannot account for itself theologically by being or aspiring to be like law schools maintained by the state or by non-religious private sponsors. It cannot be faithful to itself and also be secular. To the extent that a religiously affiliated law school is content with being secular, it denies its heritage and its purpose.²⁴⁰

Therefore, because the impact on a religiously affiliated law school would be to require it to take on such a secular stance, thus imposing a significant and serious burden, evaluators would likely conclude that the imposition of the sexual orientation non-discrimination provisions of standard 211 satisfy the test for constitutional protection.

C. Is the ABA's Interest in Antidiscrimination Compelling and Narrowly Tailored to Justify the Burden Imposed?

Even after religiously affiliated law schools establish that they are expressive organizations and that imposing the antidiscrimination provision in standard 211 would significantly affect their ability to express their message, the provision could still apply if it has been "adopted to serve [a] compelling . . . interest[], unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."²⁴¹ In addition to the Court's opinion in *BSA*, its decision in *Employment Division, Department of Human Resources of Oregon v. Smith*²⁴² supports the interpretation that religious schools cannot be forced to abandon their religious commitments unless the regulation with which they are forced to comply serves a compelling governmental interest.²⁴³ Although the interest in eradicating discrimination based on sexual orientation is important, it fails to meet the compelling standard necessary to overcome the religious school's expressive association right.

The compelling interest behind standard 211 is the same as the

²⁴⁰ Thomas L. Shaffer, *Erastian and Sectarian Arguments in Religiously Affiliated American Law Schools*, 45 *STAN. L. REV.* 1859, 1878 (1993).

²⁴¹ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

²⁴² 494 U.S. 872 (1990).

²⁴³ See *id.* at 886 (asserting that the compelling government interest standard should only be applied where "it produces . . . equality of treatment and an unrestricted flow of contending speech"); *id.* at 903 (O'Connor, J., concurring) ("The compelling interest test reflects the First Amendment's mandate of preserving religious liberty to the fullest extent possible in a pluralistic society.").

interest behind other antidiscrimination laws: the desire to eliminate discrimination against GLBT persons or, in other words, a desire to abolish hatred, bigotry, and homophobia.²⁴⁴ Such interests are generally considered to be compelling.²⁴⁵

GLBT advocates would argue that the interest in eradicating discrimination based on sexual orientation is similar to that in eradicating discrimination based on race and gender because, like race and gender, sexual orientation is an immutable characteristic, is subject to stigmatization, and has faced a long history of pervasive discrimination. The court's analysis in *Gay Rights Coalition* would provide persuasive evidence that an interest in eradicating discrimination based on sexual orientation is compelling.²⁴⁶ Further, the elimination of such discrimination could be

²⁴⁴ See ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS standard 211(a) (2006) ("A law school shall foster and maintain equality of opportunity in legal education, including employment of faculty and staff, without discrimination or segregation on the basis of race, color, religion, national origin, gender or sexual orientation, age or disability."); Aug. 1994 Report, *supra* note 44, at 3 ("The first question considered both by the Standards Review Committee and the Council was whether discrimination based on sexual orientation was a subject properly addressed in educational accreditation standards, as opposed to in other institutions making public policy. The decision was in the affirmative, because American Bar Association accredited schools are the gatekeepers controlling access to the profession. . . . Protection of an individual student's ability to obtain a J.D. degree from an accredited school is a legitimate concern of accreditation standards."); *cf.* Gay and Lesbian Humanist Ass'n, Response to the Consultation Document: "Getting Equal: Proposals to Outlaw Sexual Orientation Discrimination in the Provision of Goods and Services" (May 2006), http://www.galha.org/submission/2006_05.html (arguing against a proposal for sexual orientation regulations to be enacted under Great Britain's Equality Act 2006). GALHA agreed with the overall purpose of the regulations, which would make it illegal for providers of goods, services, facilities, premises, education, or public functions to discriminate against recipients on the basis of their sexual orientation. *Id.* ("We concur entirely . . . that 'in a modern and diverse society, it is not acceptable for someone to be discriminated against because of their sexual orientation,' and we welcome the intention, legislated for in the Equality Act, to prohibit such discrimination."). However, the proposal permitted certain religious exemptions that GALHA deemed objectionable. *Id.* ("[W]e are disturbed by proposals . . . to exempt some activities of religious groups and of faith schools from the prohibition on discrimination. We strongly object to any such exemptions.").

²⁴⁵ See, e.g., *Lumpkin v. Brown*, 109 F.3d 1498, 1501 (9th Cir. 1997) (holding that a city had a compelling governmental interest in preserving its antidiscrimination policies when it removed a member of the city's human rights commission after he made homophobic statements to the public).

²⁴⁶ *Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 5 (D.C. 1987) (holding that the District of Columbia had a compelling interest in eradicating discrimination based on sexual orientation and that that interest outweighed any burden imposed on the university's exercise of religion by forced compliance with antidiscrimination laws).

viewed as compelling because of the effect it has on both the victims of discrimination and on society as a whole. Amy D. Ronner concluded: “[T]he effects of homophobia [and its attending discrimination] do more than impair the lives of gay men and lesbian women; they actually injure society as a whole.”²⁴⁷ Such discrimination manifests itself in restrictions on domestic partnerships and marriage, problems obtaining custody or visitation rights with respect to children, getting or keeping jobs or leadership positions, inheriting property, and ultimately, hate crimes.²⁴⁸ Specifically referring to the effects of sexual orientation discrimination in the employment context, “[s]urveys indicate that between sixteen percent and forty-four percent of gay men and lesbians have experienced employment discrimination on the basis of their sexuality and that prejudice manifests itself in harassment, wrongful termination, pay discrepancy, and the refusal to extend employment benefits to same-sex partners.”²⁴⁹ Certainly an interest in eliminating these effects is important.²⁵⁰

But in the end, rightly or wrongly, an interest in eliminating discrimination based on sexual orientation and homosexual conduct has not yet reached the compelling level that the elimination of racial discrimination had reached at the time of the *Bob Jones University* decision—the level sufficient to overcome the religious expressive association rights. Although the majority of Americans likely believe that discrimination based on sexual orientation is wrong and even morally reprehensible, such discrimination has not yet been recognized by the Supreme Court as the type that “violates deeply and widely accepted views of elementary justice.”²⁵¹ And it is not the case that there is “a firm national policy to prohibit . . . discrimination [based on sexual orientation] in public education.”²⁵² As a result, the interest in eliminating discrimination based on sexual orientation and ho-

²⁴⁷ AMY D. RONNER, *HOMOPHOBIA AND THE LAW* 3-4 (2005).

²⁴⁸ *See id.* at 6-8.

²⁴⁹ *Id.* at 117 (quoting Alex Turner, Note, *The Denial of Benefits to the Same-Sex Domestic Partners of State Employees: How Do Claims of Discrimination Fare Outside the Shadow of ERISA Exemption*, 4 U. PA. J. LAB. & EMP. L. 669, 669 (2002)) (internal quotation marks omitted).

²⁵⁰ For an expanded view of the compelling interest in eradicating discrimination based on sexual orientation, see ANDREW KOPPELMAN, *THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW* (2002) (arguing that discrimination against GLBT persons is never justified).

²⁵¹ *Bob Jones Univ. v. United States*, 461 U.S. 574, 592 (1983).

²⁵² *Id.* at 593.

mosexual conduct is not sufficiently compelling to overcome religiously based expressive association rights.

In addition to being compelling, the restriction must be narrowly tailored or no more restrictive than necessary in order to overcome the expressive association right. Antidiscrimination advocates would argue that a blanket prohibition without a religious exemption (except for actual religious “preference”) is no more restrictive than necessary because anything broader would allow religious institutions to circumvent the policy based solely on their belief. This would seem to be the “shield against antidiscrimination laws”²⁵³ that the Court in *BSA* rejected when it required a specific showing of harm to the expressive association rights of the affected entity. When the justification for a religious exception to the law is based on a religious school’s “need to preserve their ‘ethos,’” that ethos and the antidiscrimination law would only come into conflict if “the ethos in question were to be homophobic in nature.”²⁵⁴ And because the very purpose of an antidiscrimination provision is arguably to “challenge the manifestation of homophobia,” such an exception for religious institutions would be inconsistent with that purpose and would actually result in no restriction at all.²⁵⁵ Further, a religious exemption to a general antidiscrimination law not only directly disadvantages GLBT persons, but also is offensive to all persons regardless of religious affiliation who “do not want to see exemptions from the general law made for people on the grounds of their prejudices, just because their prejudices are endorsed by a religious doctrine.”²⁵⁶ In other words, “if . . . discriminat[ion] should be unlawful, then it should be unlawful no matter what the motivation of the one who is discriminating, religious or not.”²⁵⁷

GLBT advocates seem to think that religiously affiliated law schools could comply with the antidiscrimination provision in standard 211 by making what they see as only modest departures from their religious commitments.²⁵⁸ Such a “compromise,” they argue, would be both appropriate and fair in light of the fundamental interests involved.

²⁵³ *Boy Scouts of Am. v. Dale (BSA)*, 530 U.S. 640, 653 (2000).

²⁵⁴ Gay and Lesbian Humanist Ass’n, *supra* note 244.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ See Laycock, *supra* note 15, at 25 (making a similar argument with regard to religious schools and accreditation generally).

Unfortunately, this “compromise” is not really a compromise at all. It requires religiously affiliated law schools to compromise their religious beliefs, but requires no compromise at all on the other side.²⁵⁹ Professor Laycock translated: “[Religious law schools] can keep their religious commitment so long as it does not interfere with . . . secular standards, but they cannot depart from . . . secular standards in any way. . . . The secular authorities will compromise by letting religious schools exist if they submit to all the secular authorities’ demands.”²⁶⁰ Because it requires complete abandonment of religious conviction, the standard is not sufficiently tailored to satisfy the *BSA* test.

CONCLUSION

If it should become necessary to assert it, religiously affiliated law schools have a First Amendment associational right to exclude practicing GLBT persons from their faculties should they choose to do so, despite the prohibition found in standard 211. Whether such law schools will actually continue to enforce their sexual conduct policies in light of the public outcry and criticism that will almost certainly escalate as time goes on is an open question. Some schools will probably abandon their policies as other formerly religious institutions have done in other circumstances and simply become part of the mass of secular law schools. Others will probably choose to forgo ABA accreditation or even to go out of business because their sponsoring churches will refuse to change their doctrinal foundation simply to retain a law school for students who could, for all practical purposes, be educated elsewhere. But those religiously affiliated schools that desire to remain steadfast to their religious beliefs and values and also benefit from continued ABA accreditation should find the protection they need in the First Amendment.

²⁵⁹ *See id.*

²⁶⁰ *Id.*

