NEW YORK LAW SCHOOL

NYLS Law Review

Volume 42 | Issue 1 Article 3

January 1998

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John A. Russ IV
Stanford Law School

SHALL WE DANCE? GAY EQUALITY AND RELIGIOUS EXEMPTIONS AT PRIVATE CALIFORNIA HIGH SCHOOL PROMS

JOHN A. RUSS IV*

Every spring, thousands of high school seniors face an often daunting question: whom to take to the prom. Billed as an evening students will remember for years to come, proms serve as a long-standing social tradition in which young men and women pair up, dress up, and have countless photos taken by adoring parents. For straight teenagers, the event represents a dress rehearsal for adult social life, as well as something special on its own.

Gay teenagers, however, confront a different series of questions about the prom. In many high schools, openly gay youth already encounter physical and verbal abuse because of their sexual orientation.[1] The specter of the prom can highlight the difference and alienation gay teenagers feel from their classmates. Some may choose to attend with a date of the opposite sex, even if it is not the person with whom they would rather attend. Others might simply choose to forego the prom altogether, while facing pressure to go from friends and family (who may not know they are gay) lest they "miss out" on this special evening.

A few other brave souls make another decision: to go to the prom, but with a same-sex date. The danger of anti-gay taunts or slurs is worth the risk, when the alternative is to act out a lie or to feel like a second-class student, for whom some high school traditions must be given up. Some schools react positively, recognizing the value of prom is not in the gender-identity of the couples but in the experiences, memories, and fun

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* J.D., Stanford Law School, 1997; BSFS, Georgetown University, School of Foreign Service, 1994. I am grateful to Margaret Crosby, Kelli Evans, Jennifer Pizer, William Rubenstein, and Kathleen Sullivan for their advice, suggestions, and insights on this Article. I would also like to thank the staff of the *New York Law School Law Review*, for their editing, and my parents and family, for their support.

1. In fact, gay people sometimes do not come out to themselves until after high school. Faced with persistent homophobia from their peers, many feel uncomfortable admitting to themselves (or at least labeling as gay) the same-sex sexual attraction they feel. *See, e.g.*, Paul Gibson, *Gay Male and Lesbian Youth Suicide*, *in* 3 U.S. DEP'T OF HEALTH AND HUMAN SERVICES, REPORT OF THE SECRETARY'S TASK FORCE ON YOUTH SUICIDE 112 (1989) ("Many gay youth choose to maintain a facade and hide their true feelings and identity, leading a double life, rather than confront situations too painful for them.").

Throughout this Article, the term "gay" is meant to describe any male or female person who is sexually attracted to members of his or her own sex—including gay men, lesbians, and bisexual individuals.

that students will have. Others attempt to block young gay couples from attending, adding an additional burden to a young teenager who has already made the difficult decision to be "out" as a gay person.

Fortunately, in the public school context, at least one court has recognized that the right to attend prom with the date of one's choosing has constitutional dimensions: Attending prom with a same-sex date has a political and social message about the humanity of gay people and their desire for equal treatment under the law.[2] A more difficult issue arises, however, for young gay couples at a private religious high school: Although gay individuals have the right to expression and to equal treatment, religious schools also have the right to promote their own values at their institutions, even if that means restricting conduct that otherwise would be permissible and possibly even protected in the public school system.

At the heart of this conflict of rights is the idea of religious exemptions from generally applicable laws. These exemptions come in two varieties: those voluntarily granted by legislative branches when writing laws and those mandated by the Constitution.[3] Among the examples of voluntary exemptions are provisions in civil rights laws allowing religious groups to discriminate in contexts in which other, non-religious actors cannot.[4] Legislative bodies grant such exceptions in part to respect the rights of faiths to follow practices and traditions, such as maintaining all-male clergies, that the law might otherwise prohibit.[5] In other cases, courts find that the Free Exercise Clause of the First Amendment mandates an exception to an otherwise generally applicable

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2. *See* Fricke v. Lynch, 491 F. Supp. 381, 385 (D. R.I. 1980).

3. *See* Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 686 (1991).

4. *See* 42 U.S.C. § 2000e-1 (1996) (exempting religious organizations from the Civil Rights Act of 1964). The provision specifically provides that "[t]his subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." *Id. See also* Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 329-30 (1987) (upholding a Civil Rights Act's exemption, allowing religious organizations to discriminate based on religion, as not violating the Establishment Clause).

5. *See* McConnell, *supra* note 3, at 694. Maintaining the identity of the church's leadership may in fact require an exemption under the Free Exercise Clause. *See* Judith C. Miles, *Beyond Bob Jones: Toward the Elimination of Governmental Subsidy of Discrimination by Religious Institutions*, 8 HARV. WOMEN'S L.J. 31, 33 (1985).

law.[6] In cases such as *Sherbert v. Verner*,[7] the Supreme Court recognized that exemptions are sometimes a constitutional necessity, in part to ensure that insensitive legislative majorities do not trample on the rights of politically weak minority faiths.[8] In recent years, the question of constitutionally mandated exemptions has been hotly contested: In 1990, the Supreme Court reversed decades of pro-exemption jurisprudence in *Employment Division, Dep't of Human Resources of Oregon v. Smith*,[9] prompting outrage in Congress that lead directly to the passage of the Religious Freedom and Restoration Act of 1993 (RFRA),[10] which purported to return courts to the old pro-exemption standard. In 1997, the Supreme Court overruled RFRA as exceeding Congress' power.[11]

Against this backdrop, the California Supreme Court came down with an important ruling supporting an anti-discrimination principle over an individual's desire to receive a personalized exemption from a generally applicable housing law. In *Smith v. Fair Employment & Housing Commission* (FEHC), the state supreme court denied the owner of a four-unit rental space the right to discriminate against unmarried couples based on their marital status in violation of the state anti-discrimination statute, even though she believed renting to them and (presumably) facilitating their sexual behavior violated her religious beliefs.[12] Analyzing the case under both the 1990 *Smith* decision and RFRA, the court found that the landlord's personal religious beliefs did not trump the rights of unmarried couples to full participation in the housing market[13]—with potentially important implications for other groups protected by state anti-discrimination laws.

The status of constitutionally compelled exemptions has particular significance for the gay community. In the last decade or so, gay men and lesbians have successfully pushed in several state legislatures and in courts

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6. "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. CONST. amend. I.

7. 374 U.S. 398 (1963); *see also* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1412 (1990) (describing *Sherbert* as "the first and leading case in the Supreme Court's modern free exercise jurisprudence").

8. *See Sherbert*, 374 U.S. at 406; *see also* McConnell, *supra* note 3, at 717 (observing that voluntary religious "accommodations reflect a decision to tolerate dissent from the policies adopted by the political majority").

9. 494 U.S. 872, 890 (1990).

10. 42 U.S.C. § 2000bb (1996).

11. *See* City of Boerne v. Flores, 117 S. Ct. 2157 (1997).

12. 12 Cal. 4th 1143, 1151 (1996) (plurality opinion), *cert. denied* 117 S. Ct. 2531, *reh'g denied*, 118 S. Ct. 20 (1997).

13. *Id.* at 1161.

for laws prohibiting discrimination on the basis of sexual orientation.[14] The success of these endeavors, however, could be undermined by broadly construed exceptions for individuals and organizations who claim their religious beliefs do not favor same-sex relationships. Many religious traditions in this country have shown hostility to the notion of gay equality, believing that their faith mandates antipathy toward gay people or at least same-sex conduct.[15] Although some religious communities have embraced gay people and accepted the validity of their relationships,[16] many others continue to practice and promote discrimination against gay men and lesbians.

Gay students at private schools confront a particular dilemma: Although they may desire equal access to the benefits the school provides (such as access to prom), religious schools will claim that allowing same-sex couples at school functions will undermine their moral teachings regarding sexuality. This conflict between rights raises difficult issues about society's need to promote dignity and self-worth for all its citizens and the rights of religious institutions to maintain their own identity and autonomy.

In California, where civil rights law applies to sexual orientation discrimination,[17] the 1996 *Smith* decision raises an interesting question of whether, in California at least, the balance of rights in free exercise jurisprudence has shifted in favor of the anti-discrimination principle and against granting religious exemptions to it. This Article intends to consider the rights of gay youth to take same-sex dates to private school proms and how both the federal and state supreme courts' jurisprudence affects those rights. Part I considers what rights a young person has to

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14. *See, e.g.*, LESBIANS, GAY MEN, AND THE LAW 262 (William B. Rubenstein ed., 1993).

15. *See, e.g.*, ROBERT A. BERNSTEIN, STRAIGHT PARENTS, GAY CHILDREN: KEEPING FAMILIES TOGETHER 114-45 (1995) (noting that most major American religions still view homosexuality as a sin).

16. *See, e.g., id.* at 42-43; Rabbi Yoel H. Kahn, *The* Kedushah *of Homosexual Relationships, in* SAME-SEX MARRIAGE: PRO AND CON 71-77 (Andrew Sullivan ed., 1997); Gabriel Lampert, *Bamidbar, in* WRESTLING WITH THE ANGEL: FAITH AND RELIGION IN THE LIVES OF GAY MEN 183-86 (Brian Bouldrey ed., 1995) (discussing gay man's acceptance by a Jewish community in New Mexico) [hereinafter WRESTLING WITH THE ANGEL]; MICHAEL S. PIAZZA, HOLY HOMOSEXUALS: THE TRUTH ABOUT BEING GAY OR LESBIAN AND CHRISTIAN (2d ed. 1995); *The Unitarians: Explanations of Unitarianism* (visited Dec. 1, 1996) <http://www.unitarian.org.uk/ unitsec1.htm#aprs> (noting that Unitarians "oppose oppression and discrimination on the grounds of any arbitrary or accidental factor, such as race or gender, [or] sexual orientation").

17. *See* Curran v. Mount Diablo Council of the Boy Scouts of America, 195 Cal. Rptr. 325, 338 (1983) (holding that the Unruh Civil Rights Act applies to sexual orientation discrimination).

take a same-sex date to the prom, absent an exemption for religion. Part II briefly examines the theory and history of modern religious exemptions through the Supreme Court's recent decision to strike down RFRA. Part III evaluates the 1996 *Smith* case's holding on religious exemptions and whether it represents a new direction or a continuation of prior doctrine. Part IV then applies *Smith* and religious exemption doctrine in general to the case of gay teenagers who wish to take the dates of their choice to proms at religious high schools.

I. THE RIGHT TO TAKE A SAME-SEX DATE TO THE SCHOOL PROM

A gay youth's decision to attend prom with a same-sex date generally occurs against a background of persistent homophobia, both in society at large and at the student's own school. High school can be a particularly cruel environment for a young person to come out of the closet, with the constant danger of physical and psychological assault by her peers.[18] As one recent government study found, "[n]owhere are [society's] harshly negative attitudes towards homosexuality more pronounced than in junior high and high school."[19] Gay youth face constant verbal harassment,[20] taking a heavy toll on their self-esteem.[21] Many suffer direct physical attacks: A study of New York gay students found that one in five reported that they were beaten because of their sexual identity.[22] Reflecting cultural and religious biases, parents of gay youth can often be hostile to their

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18. *See* Gibson, *supra* note 1, at 117; *see also* Nabozny v. Podlesny, 92 F.3d 446, 451-52 (7th Cir. 1996) (describing attacks on a gay student and his school's failure to take action to protect him); Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 35-36 (D.C. Ct. App. 1987) (plurality opinion) ("Erupting into violence, social prejudice sometimes takes the form of unprovoked attacks on those perceived to be gay.").

19. Gibson, *supra* note 1, at 117.

20. *See Parents, Schools, and Values: Hearings Before the Subcommittee on Oversight and Investigations of the House Committee on Economic and Educational Opportunities,* 104th Congress, 1st Sess. 121 (1995) (statement of Anne Simon, teacher) (discussing survey results of local high school students in which 98% reported hearing "homophobic remarks" at school).

21. *See* Kat Snow, *Rebels with a Cause: Youthful Gay Leaders Take the Fight for Civil Rights into the Nation's High Schools,* THE ADVOCATE, Jan. 21, 1997, at 57 (quoting Utah high school student who felt she had "no right to protest" early anti-gay attacks because she "hated [herself] so much for being gay").

22. *See* Kelli Kristine Armstrong, *The Silent Minority Within a Minority: Focusing on the Needs of Gay Youth in Our Public Schools,* 24 GOLDEN GATE U. L. REV. 67, 75 (1994); *see also* Gibson, *supra* note 1, at 112 (reporting that "45 percent of gay males and nearly 20 percent of lesbians had experienced verbal or physical assault in secondary schools").

children's sexual orientation, in some cases rejecting them and kicking them out of their homes.[23] Faced with these pressures, about twenty-eight percent of gay young people drop out of high school;[24] gay youth also constitute "up to 30 percent of completed youth suicides annually."[25] As one author noted, "[t]o be young and gay is often to be desperately alone."[26]

Despite these bleak statistics, more and more gay youth come out of the closet during adolescence, as gay people throughout society become more visible.[27] In the last five years, the number of gay high school groups, offering support to gay youth, has grown phenomenally.[28] Some school officials have even begun to offer institutional support for gay teenagers.[29] Many others, however, have responded to tentative efforts to help gay youth with outright hostility.[30]

For many gay teenagers, coming out of the closet during high school is an important part of being true to themselves.[31] Despite the risks of attack and rejection, these youth realize their right to participate in high school life should not be limited by other people's prejudice against their sexual orientation. They may also come to believe, as many supporters of gay rights do, that sexual orientation is a status like race or sex, that it

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23. *See* BERNSTEIN, *supra* note 15, at 9.

24. *See* Don Aucoin, *Weld is Set to Sign Gay Student Rights Bill: Advocates Hail First-in-Nation Legislation*, BOSTON GLOBE, Dec. 10, 1993, at 37.

25. Gibson, *supra* note 1, at 110; *see also* Teen Suicide Fact Sheet (visited Dec. 1, 1996) <http://www.pflag.org/pom/teen.html> (reporting the results of several different studies on the relatively high suicide attempt rates of gay youth).

26. BERNSTEIN, *supra* note 15, at 8.

27. *See* Gibson, *supra* note 1, at 112; Snow, *supra* note 21, at 59.

28. *See* James Brooke, *To Be Young, Gay and Going to High School in Utah*, N.Y. TIMES, Feb. 28, 1996, at B8 (citing statistics by the Gay Lesbian Straight Teachers Network that high school student groups have expanded from "a handful in 1992 to hundreds today").

29. *See generally* THE GOVERNOR'S COMM'N ON GAY & LESBIAN YOUTH, MASS. EDUC. REPORT, MAKING SCHOOLS SAFE FOR GAY AND LESBIAN YOUTH: BREAKING THE SILENCE IN SCHOOLS AND IN FAMILIES (Feb. 25, 1993).

30. *See, e.g.*, Louis Sahagun, *Salt Lake City Schools Forbid All Social Clubs: Action Targets Gay and Lesbian Group*, HOUSTON CHRON., Feb. 22, 1996, at 9A (reporting that a Utah city school board voted to ban all student groups rather than allow one gay-straight support club to form).

31. As one student put it, by going to the prom "I would be showing that my dignity and value as a human being was not affected by my sexual preference." Aaron Fricke, *One Life, One Prom*, THE CHRISTOPHER STREET READER 21 (Michael Denneny et al. eds., 1983), *reprinted in* LESBIANS, GAY MEN, AND THE LAW, *supra* note 14, at 173.

is not a choice,[32] and that efforts to portray same-sex love as a sickness, perversion, or sin simply reflect ingrained cultural biases masquerading as religious[33] or medical[34] truth.

Attending prom with the date of one's choosing can be an important expression of a student's individuality and worth. On a political level, being "out" at school and at prom sends a message about gay equality and the presence of gay people throughout society[35]—in fact, religious schools might argue that they should be permitted to prohibit same-sex dating at the prom precisely because it sends a "message," one they believe is contrary to church teaching.[36] On another level, a gay youth's decision to

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32. *See, e.g.*, Brief Amicus Curiae of the American Psychological Association, et al., at 14, Romer v. Evans, 517 U.S. 620 (1996) (No. 94-1039) (reviewing the development of homosexuality in adolescence and concluding that "[t]he scientific literature thus strongly indicates that sexual orientation is far from being a voluntary choice").

33. *See* JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY 5-6 (1980) (comparing "the confusion of religious beliefs with popular prejudice" against gay people to the rationales used by medieval Christians to justify their anti-Semitism); *see also* Robert MacNeil, *Introduction*, in BERNSTEIN, *supra* note 15, at xiv (arguing that homosexuality "is neither a defect of moral character nor a failure of will"); PIAZZA, *supra* note 16, at 25-45, 46 (discussing Biblical passages often used to condemn homosexuality and concluding that "the Bible does not support [fundamentalists'] condemnation of lesbian and gay Christians").

Regardless of whether a church's hostility toward gay people is truly motivated by a specific religious doctrine or simply reflects ingrained social prejudice, these attitudes can fairly be characterized as anti-gay or homophobic given their serious, negative effects on individual gay people's lives. The fact a person may sincerely believe that her religion forbids interracial dating or marriage does not make her views any less racist than a person holding the same views for non-religious reasons—the same is true for religiously motivated anti-gay prejudice. Religious-based homophobia can be just as destructive, hurtful, and hateful as anti-gay animus based on secular grounds, if not more so.

34. *See, e.g.*, NEIL MILLER, OUT OF THE PAST: GAY AND LESBIAN HISTORY FROM 1869 TO THE PRESENT 247-57 (1995) (tracing "the rise and fall of the 'gay is sick' shrinks"). In 1973, the American Psychiatric Association removed same-sex desire from its "list of disorders." BERNSTEIN, *supra* note 15, at 42; *see also* American Psychological Association, *supra* note 32, at 15 (noting that "[t]he psychiatric, psychological, and social-work professions do not consider homosexual orientation to be a disorder").

35. *See* Bobbi Bernstein, Note, *Power, Prejudice, and the Right to Speak: Litigating "Outness" Under the Equal Protection Clause*, 47 STAN. L. REV. 269, 271 (1995) (discussing the inherent political implications of "coming out" of the closet); *Fricke v. Lynch*, 491 F. Supp. 381, 385 (D. R.I. 1980) (admitting that attending prom with a same-sex date has a political element).

36. *See infra* text accompanying notes 76-77.

be out at prom reflects a desire to be honest with herself and her identity.[37] Proms allow many young gay couples to indicate their commitment and affection for one another, just as it allows straight couples the chance to do the same. Finally, many gay students wish to go to prom for the social interaction and enjoyment that high school events such as this provide and believe that schools should not constrain their right to participate fully in high school life simply because of their sexual orientation. In the next subsections, this Article considers what rights gay students have to attend prom with the date of their choice, first in the public high school context and then in the private school setting.

A. *Gay Adolescents' Legal Rights at Public High Schools*

1. Students' Rights in General

Despite their status as minors, students at public high schools have constitutionally protected rights under both the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.[38] In the landmark *Brown v. Board of Education*, the Supreme Court in 1954 struck down racially segregated public school systems as violating the equal protection rights of students.[39] Later, in 1969, the Supreme Court declared that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[40] Openly gay youth have also found some protection in the courts when school administrators have attempted to deprive them of their rights.

In the realm of free speech, much of the litigation over gay students' rights has involved college groups denied access to university benefits because of official hostility to their pro-gay-rights message.[41] In 1996, an

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37. *See Fricke*, 491 F. Supp. at 385 (noting the testimony of a gay student who said he wanted "to go [to prom] because he feels he has a right to attend and participate just like all the other students and that it would be dishonest to his own sexual identity to take a girl to the dance").

38. *See, e.g.*, Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976) "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights. . . . [However] the State has somewhat broader authority to regulate the activities of children than of adults." *Id.* (citations omitted).

39. 347 U.S. 483 (1954).

40. Tinker v. Des Moines, 393 U.S. 503, 506 (1969).

41. *See* Gay & Lesbian Students Ass'n v. Gohn, 850 F.2d 361 (8th Cir. 1988); Gay Students Servs. v. Texas A & M Univ., 737 F.2d 1317 (5th Cir. 1984); Gay Students Org. of Univ. of N.H. v. Bonner, 509 F.2d 652 (1st Cir. 1974); Gay Lesbian Bisexual

Alabama district court struck down as impermissible viewpoint discrimination a law that forbade college campuses from funding gay rights organizations; the court noted that the statute's goal was to "silence the expression of one, and only one, viewpoint."[42] The fact that the students' speech was "unpopular or offensive" to many individuals did not justify the government's efforts to silence their speech.[43]

The principles of the college group cases also apply in the high school context:[44] Schools generally cannot silence the expression of pro-gay rights sentiments by students simply because they disagree with the message.[45] The Supreme Court has upheld under the free speech doctrine the principle of equal access to high school facilities regardless of viewpoint in the context of religious groups seeking to use classrooms after school to present their message.[46] Likewise, gay teenagers should have equal access to school benefits when exercising their fundamental right to free speech.

Of course, courts have recognized some limits on the rights of high school students. For example, schools can forbid speech that will create "substantial disorder,"[47] although they may not act from an undifferentiated fear of disturbance.[48] In general, courts have also recognized greater restrictions on the rights of high school students than

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Alliance v. Sessions, 917 F. Supp. 1548, 1553 (M.D. Ala. 1996) (holding that prohibition on funding pro-gay student groups constituted "naked viewpoint discrimination"), *aff'd sub nom.* Gay Lesbian Bisexual Alliance v. Pryor, 110 F.3d 1543 (11th Cir. 1997).

42. *Sessions*, 917 F. Supp. at 1553.

43. *Id.* at 1556.

44. *See Tinker*, 393 U.S. at 509 (holding that schools wishing to suppress student speech must demonstrate "more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint"). *But see* Rosenberger v. University of Virginia, 115 S. Ct. 2510, 2519 (1995) (recognizing that a university has a right to its *own* speech outside the limited public forums it creates and that this speech "is controlled by different principles" that are more favorable to the school imposing restrictions on students' speech).

45. *See Tinker* 393 U.S. at 512-13.

46. *See* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 393-94 (1993) (holding that denying access to classrooms after school to a religious group based on its viewpoint constituted impermissible content-based discrimination).

47. *See Tinker* , 393 U.S. at 513 (1969).

48. *See id.* at 509; *see also* Fricke v. Lynch, 491 F. Supp. 381, 388 (D. R.I. 1980) (noting that "[a]ny disturbance that might interfere with the rights of others would be caused by those students who resort to violence" when faced with a same-sex couple and not by the couple itself).

would be tolerated in the college setting.[49] For example, schools can place restrictions on students' lewd speech[50] and on student newspapers published as part of the school's curriculum.[51] Despite these limitations, however, gay teenagers, like any other students, still have free speech rights to support gay equality at school, at least in some, non-curriculum contexts.

In addition to First Amendment rights, gay public high school students arguably also enjoy the right to be free from certain forms of discrimination under the Equal Protection Clause. In 1996, the Seventh Circuit held that a gay teenager could bring a lawsuit against his public high school for violating his Equal Protection rights because it failed to take action to protect him when other students harassed him on account of his sexual orientation.[52] The court, using the relatively weak rational review standard, found that school officials could offer no rational reason why they tolerated students physically assaulting this gay student, while enforcing their anti-harassment policies as to other groups.[53] Interestingly, the court also recognized that the student had a claim of discrimination based on his *sex* (i.e. that school officials treated harassment against him less seriously because his harassers and he were male), thereby invoking heightened court scrutiny of the government's conduct.[54] As we will discuss later, a student wishing to take a same-sex date to the prom may

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49. "We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." Bellotti v. Baird, 443 U.S. 622, 634 (1979) (plurality opinion). The court noted, however, that "[a]lthough the State has considerable latitude in enacting laws affecting minors on the basis of their lesser capacity for mature, affirmative choice, *Tinker* [citations omitted] illustrates that it may not arbitrarily deprive them of their freedom of action altogether." *Id.* at 637 n.15.

50. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (allowing school to punish student's "lewd" speech).

51. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (allowing substantial editorial control by a high school over a school newspaper that was part of a journalism curriculum). The court noted that "[e]ducators are entitled to exercise greater control over . . . student expression [that is part of the school's curriculum] to assure . . . that the views of the individual speaker are not erroneously attributed to the school." *Id.* at 271.

52. *See* Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996) (holding that a gay student harassed by classmates had stated a cause of action under the Equal Protection Clause against public school supervisors who failed to apply their anti-harassment policies to his situation because of his sexual orientation).

53. *See id.* at 454, 458.

54. *See id.* at 454.

have a strong claim of sex-based discrimination in addition to claims based on sexual orientation.[55]

2. The Right to Equal Access to Public School Proms

Although other courts have considered the rights of gay student groups to hold social events, only one case, *Fricke v. Lynch*,[56] deals directly with gay students' right to equal access at proms. Analyzing the case primarily under the First Amendment, a federal district judge in Rhode Island found that efforts to prevent a young man named Aaron Fricke from attending the prom with another man violated his rights under the Constitution. Importantly, the court found that the act of taking a same-sex date to prom constituted "speech" protected by the First Amendment, in part because of the message this form of expression conveyed.[57] From Aaron's perspective, taking a boyfriend to the prom communicated a message about honesty to one's true identity and a political message about equal rights for all people, regardless of sexual orientation.[58] The court recognized, in effect, that for gay people, the prom was more than just a mere dance or social event but could be a potent symbol of either exclusion and isolation for gay youth or inclusion and celebration. The fact the government feared other students' potentially violent reactions could not justify denying Aaron's right to "speak" at the prom.[59] As the court noted, "[t]he first amendment does not tolerate mob rule by unruly school children."[60]

The court also discussed, without deciding, the equal protection principle at stake in the case, observing that although sexual orientation discrimination alone may only elicit rational review, the school's discrimination would trigger "a higher standard of scrutiny" because it impinged on Aaron's fundamental rights under the First Amendment.[61]

Another case recognizing that social events for gay youth raise issues of constitutional importance is the First Circuit's *Bonner* decision.[62] In *Bonner*, university officials attempted to ban all social events by a gay student group after the governor threatened to cut off funding unless the

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55. *See infra* text accompanying notes 116-19.

56. 491 F. Supp. 381 (D. R.I. 1980).

57. *See id.* at 385.

58. *See id.*; *see also* Gay Students Org. of Univ. of N.H. v. Bonner, 509 F.2d 652, 660-61 (1st Cir. 1974).

59. *Fricke*, 491 F. Supp. at 386.

60. *Id.* at 387.

61. *Id.* at 388-89 n.6.

62. 509 F.2d 652.

school took "action to rid [its] campuses of socially abhorrent activities."[63] The court, however, held that under the First Amendment, the ban violated the students' right of association, "[c]onsidering the important role that social events can play in individuals' efforts to associate to further their common beliefs."[64] The court also recognized that behind all of the gay club's activities was one overriding message, protected by the First Amendment: "that homosexuals exist, that they feel repressed by existing laws and attitudes, that they wish to emerge from their isolation, and that public understanding of their attitudes and problems is desirable for society."[65] As in *Fricke*, the court declined to decide the students' equal protection claim, noting however that such a claim was "substantial" in that the university forbade only the gay club from holding social events.[66]

Although lower courts have recognized the political implications for gay students of attending, or creating their own, social events, the Supreme Court in another context refused to recognize a generalized right of teenagers to attend dances. In *City of Dallas v. Stanglin*, the Court allowed a government to place age and hour restrictions on dance halls serving teenage clientele,[67] in part to limit adult-minor interaction. The court held that the Constitution did not recognize "a generalized right of 'social association' that includes chance encounters in dance halls" and that therefore the law did not violate the First Amendment.[68] The prom context for gay students, however, is distinguishable from *Stanglin*. First, the Supreme Court has recognized that dancing contains an expressive element under the First Amendment, even in the case of all nude dancing.[69] Second, the choice of a date for high school prom represents an intimate decision for young people for an event billed as one of the

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63. *Id.* at 654.

64. *Id.* at 659; *see also* Healy v. James, 408 U.S. 169, 181 (1972) ("Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs."). However, this right can apply to anti-gay religious groups as well. *Cf.* Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984) (observing that the Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, *religious*, and cultural ends") (emphasis added).

65. *Bonner*, 509 F.2d at 661.

66. *See id.* at 662 n.6.

67. 490 U.S. 19, 28 (1989).

68. *Id.* at 25. The Court also held that the law survived rational basis review under the Equal Protection Clause. *Id.* at 28.

69. *See* Barnes v. Glen Theatre, 501 U.S. 560, 565-66 (1991) (plurality opinion) (admitting that even "nude dancing . . . is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so").

more memorable in their high school life. Content-neutral age restrictions placed on strangers mingling at public dance halls as in *Stanglin* do not implicate the same fundamental autonomy and self-definition issues that a ban on same-sex dates does for gay youth.

Some public school districts have reacted positively to gay students' requests to take same-sex dates to the prom. In 1993, Massachusetts became the first state in the nation to pass a law explicitly protecting the rights of gay students in public schools;[70] according to the chairman of the governor's Commission on Gay and Lesbian Youth, the new law will allow students to bring a same-sex date to the high school prom.[71] In other cases, school districts and other organizations have provided "alternative" proms specifically for gay teenagers.[72] Billed as a safe place for young gay people to avoid hostile straight reactions,[73] these events allow gay students to experience prom in an accepting environment and help to avoid the feeling of isolation gay students might feel if they are the only couple at their high school's regularly scheduled prom.[74] These events, however, are relatively new phenomena that do not exist in many areas. In addition, they arguably are a second-best option to full participation by gay youth in high school life. Although in a time of continuing anti-gay hostility such proms may serve an important function, a more ideal solution would be for high school events to be friendlier to all students, regardless of sexual orientation.

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70. *See* MASS. GEN. LAWS ch. 76, § 5 (1996). The law provides that "[n]o person shall be excluded from or discriminated against in admission to a public school of any town, or in obtaining the advantages, privileges and courses of study of such public school on account of race, color, sex, religion, national origin or sexual orientation." *Id.*

71. *See* Aucoin, *supra* note 24, at 17; *see also* Armstrong, *supra* note 22, at 97.

72. *See, e.g.*, Tara Shioya, *Gay Prom Makes Proud Return: Party Expected to Draw Larger Crowd Despite Opposition*, S.F. CHRON., June 14, 1996, at A21, *available in* Westlaw, ALLNEWS file (addressing "Northern California's only prom especially for gays and lesbians," sponsored through the city-supported Lambda Youth Project); Bruce DeMara, *Cause for Celebration: Gay and Lesbian Students Just Want to Have Fun at Special Prom Where They Can Be Themselves*, TORONTO STAR, June 6, 1996, at B6 (discussing non-school-sponsored gay youth prom); Jase Pittman-Wells, *Oasis Prom Special 1996* (visited Dec. 9, 1996) <http://www.oasismag.com/Issues/9605/oasis-prom.html>.

73. *See* DeMara, *supra* note 72, at B6 (noting alternative prom offers "a chance to celebrate a prom in an atmosphere of safety and acceptance"). One account described the event as "[j]ust like any high school prom[;] there will be live music and disc jockeys, crepe paper streamers and a king and queen. The only difference is that the boys won't necessarily dance with the girls." Shioya, *supra* note 72, at A21.

74. *See* Shioya, *supra* note 72, at A24 (quoting student who supported the prom because it allowed him "to hav[e] a good time—and not feel[ ] like I'm the only person there who feels the way I do").

B. *The Problem of the Private School*

The constitutional principles that constrain public schools as state actors do not apply to private organizations such as religious schools, unless a statute or other law applies those values to private actors and does not exceed the government's powers or violate the schools' own constitutional rights.[75] In fact, even though the First Amendment forbids public colleges and high schools from banning a viewpoint from the schools' public forums,[76] applying the same principle to a religious school could very well violate its own First Amendment rights.[77] Gay students may have a stronger case, however, to apply anti-discrimination principles to private schools' distribution of benefits (such as access to prom) through states' generally applicable anti-discrimination laws. As one author observed, anti-discrimination laws can present a conflict of rights between "the religious freedom of those whose sincerely held beliefs lead them to discriminate, and the right of gay and lesbian people to be free from discrimination where civil rights laws are in force. In the balance hangs the power of states to legislate to prevent individual and social harms."[78] In California, gay students at private high schools have at least two statutes with which they can try to apply the protections available to public students to themselves: the so-called Leonard Law and the Unruh Civil Rights Act.

The Leonard Law gives students at private schools the same rights to free speech as those enjoyed by public school teenagers.[79] The law provides specifically that "private secondary schools shall not make or enforce any rule subjecting any high school pupil to disciplinary sanctions" for engaging in "conduct that is speech" if that speech would be protected by the First Amendment "when engaged in outside of the campus."[80] In

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75. *See, e.g.*, Lloyd Corp. v. Tanner, 407 U.S. 551, 567 (1972) (declining to apply First Amendment to private-property setting); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (upholding anti-discrimination provisions of the Civil Rights Act of 1964 applying to private businesses).

76. *See* Rosenberger v. Rector of Univ. of Va., 515 U.S. 819 (1995) (at the university level); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (at the high school level).

77. *See* Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 21 (D.C. Ct. App. 1987) (plurality opinion).

78. David B. Cruz, *Piety and Prejudice: Free Exercise Exemption from Laws Prohibiting Sexual Orientation Discrimination*, 69 N.Y.U. L. REV. 1176, 1178 (1994).

79. *See* CAL. EDUC. CODE § 48950(a) (West 1997) (applying to high schools); CAL. EDUC. CODE § 94367(a) (West 1997) (applying to colleges and universities).

80. CAL. EDUC. CODE § 48950(a) (West 1997). The law also grants students a private cause of action. CAL. EDUC. CODE § 48950(b) (West 1997).

1995, a California court upheld the law's application to post-secondary schools[81] and struck down a hate-speech code at a private university in Northern California.[82]

Under the first portion of the statute, a teenager at a private school wishing to take a same-sex date to prom could argue that the principles protected in *Fricke* and *Bonner* apply to her school as well. However, the legislature also included an explicit exemption from the law for high schools "controlled by a religious organization, to the extent that the application of this section would not be consistent with the religious tenets of the organization."[83] Courts arguably would be reluctant to assess whether any given restriction might be "inconsistent" with the religion's doctrine, as judges are not qualified to serve as theological experts on the nations' many different religious traditions.[84] In effect, a court may treat the exception as absolute to avoid messy line-drawing, the statute's qualifying phrase not withstanding.

Even if a student could convince a judge that the limitation to the exemption has any real meaning, she may not necessarily succeed on the merits. Although various religions' attitudes toward homosexuality are complex, arguably those beliefs can be divided into three general categories: those that exclude homosexuals from their religion and condemn homosexual conduct,[85] those that accept homosexuals into their faith but condemn same-sex sexual behavior,[86] and those that accept

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81. *See* CAL. EDUC. CODE § 94367(a) (West 1997) ("No private postsecondary educational institution shall make or enforce any rule subjecting any student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment. . . .").

82. *See* Corry v. Stanford Univ., Cal. Super. Ct. Case No. 740309 (1995), *available in Cal. Super. Ct. Case 740309 Corry v. Stanford* (visited Dec. 9, 1996) <http://www.leland.stanford.edu/group/law/library/what/corrtoc.html>.

83. CAL. EDUC. CODE § 48950(c) (West 1997).

84. *See* Employment Div. Dep't of Human Resources of Or. v. Smith, 494 U.S. 872, 886-87 (1990).

85. *Cf.* Antonio Feliz, *Personal Dichotomies*, *in* WRESTLING WITH THE ANGEL, *supra* note 16, at 285-87 (account by former bishop of the Church of Jesus Christ of Latter-Day Saints about excommunicating a young man accused of a sexual relationship with another man).

86. The Catholic Church, for example, arguably represents this viewpoint. *See, e.g.*, Andrew Holleran, *The Sense of Sin*, *in* WRESTLING WITH THE ANGEL, *supra* note 16, at 87. As one court noted, "[u]nder Catholic doctrine, sexual function has its true meaning and moral rectitude only in heterosexual marriage. Homosexual acts—as distinguished from a homosexual orientation—are morally wrong and must be viewed as 'gravely evil and a disordered use of the sexual faculty.'" Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 15 (D.C. Ct. App. 1987)

homosexuals into the faith and tolerate or approve of same-sex relationships.[87] The first and third categories are arguably straightforward: A religion that expels gay people from its membership would argue that forbidding same-sex dating is certainly "consistent" with the religion's doctrine, as the church could exclude the student from the school altogether under its traditions.[88] A more tolerant faith that accepts gay people and their relationships would probably not oppose a same-sex couple from attending prom and might even violate its own tenets by excluding such couples.

The more difficult scenario is a faith that accepts gay people into its congregations but demands celibacy from them. Arguably, the simple act of going to prom with a same-sex date is consistent with a pro-celibacy policy. By opposing such dating, these churches in effect inject sexuality into an event that need not be described in sexual terms. As many of these religions also demand celibacy from non-married heterosexual couples, the church in effect traps itself into a contradiction. On the one hand, the church would say it forbids same-sex dating because it might lead to sex and thereby violate the pro-celibacy policy. On the other hand, by holding a prom and demanding opposite-sex couples only, the church is encouraging heterosexual dating that may also lead to sexual conduct in violation of its anti-fornication tenet. To remain consistent, the church would have to argue that heterosexual dating will not lead to violations of its anti-fornication policy, while same-sex dating is inherently more sexual[89] and therefore *will* lead to violations of its anti-celibacy beliefs.

(plurality opinion) (quoting Archbishop John R. Quinn, A Pastoral Letter on Homosexuality (May 5, 1980)).

87. *See, e.g.*, PIAZZA, *supra* note 16, at xi-xiii (describing the Metropolitan Community Church); BERNSTEIN, *supra* note 15, at 42-43 (discussing the United Church of Christ, Unitarian-Universalism, and Reform Judaism).

88. *See* Miles, *supra* note 5, at 33-34 (noting that "[c]hurches remain free . . . to deny membership to any group they wish to exclude"). *But see* Roberts v. United States Jaycees, 468 U.S. 609, 621 (1984) (holding that a state's anti-discrimination law applied to the Jaycees, a large non-sectarian organization with "unselective" membership criteria, other than age or sex); Runyon v. McCrary, 427 U.S. 160, 172 (1976) (holding that a non-sectarian private school was subject to a federal anti-discrimination law for excluding students based on their race); Curran v. Mount Diablo Council of the Boy Scouts of Am., 195 Cal. Rptr. 325, 331 (1983) ("[A]n expulsion from an association on the basis of a person's status of homosexuality is both capricious and offensive to public policy. The mere status of homosexuality without more does not connote immorality.").

Of course, a gay person may not want to remain part of a church that fails to respect his basic humanity, yet the decision to leave the religious tradition in which he grows up could be difficult.

89. *But see* BOSWELL, *supra* note 33, at 45 ("There does not seem to be any evidence that gay people are any more or less sexual than others. . . .").

Of course, religious beliefs need not be rational, consistent, or logical to receive protection under the Constitution.[90] A court interpreting the Leonard Law may be unwilling to say allowing same-sex couples at dances is consistent with church doctrine if the church claims that it is not.

Assuming that Leonard's Law would not work for a student pressing for her rights in court, she still has state anti-discrimination laws to rely upon to ensure equal access to benefits. The principle of equal treatment has considerable advantage over free speech analysis because the issue at stake is *identity*, rather than *message*: The school's denial to gay students of access to benefits represents a violation of equal treatment principles, on the grounds of sexual orientation and sex. A school could argue that denying or granting benefits itself sends a message and is therefore tied to the school's free speech rights. As we will see below, however, at least one court has rejected this conflation of the school's role as religious speaker and as distributor of non-religious benefits.[91]

In California, the Unruh Civil Rights Act provides that "[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, or disability are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."[92] Although the Act does not specifically mention sexual orientation, state courts have interpreted the Act to apply to this category of discrimination.[93] A more difficult question involves whether private schools qualify as "business establishments of every kind whatsoever" under the Act.

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90. *See* Thomas v. Review Bd., Ind. Employment Sec. Div., 450 U.S. 707, 714 (1981) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.").

91. *See Georgetown Univ.*, 536 A.2d at 5 (plurality opinion).

92. CAL. CIV. CODE § 51 (1997). Interestingly, the Act does not apply to marital status discrimination, the issue in Smith v. Fair Employment & Housing Comm'n, 12 Cal. 4th 1143 (1996), *cert. denied* 1997 WL 353004. *See* Beaty v. Truck Ins. Exch., 8 Cal. Rptr.2d 593, 597 (Cal. App. 3d 1992) (noting that the Act does not cover marital status discrimination). The court in *Smith* based its decision instead on the Fair Employment and Housing Act, which includes marital status discrimination. 12 Cal. 4th at 1150.

93. *See* Rolon v. Kulwitzky, 200 Cal. Rptr. 217, 219 (Cal. App. 2d 1984) (granting preliminary injunction to lesbian couple unlawfully denied seating in a restaurant booth because of a generalized fear of "'intimacy' between homosexuals"); *Curran*, 195 Cal. Rptr. at 338.

In 1959, a California state court held that the state's contemporary anti-discrimination law did not apply to private schools.[94] Although the case has not been explicitly overruled, several courts have said that the state legislature overturned this case and similar decisions when it adopted the Unruh Act in 1959 to reverse the state judiciary's narrow interpretation of the old anti-discrimination law.[95] In enacting the new version, the legislature intended the Act to have the broadest application possible: As one court noted, "the term 'business establishment' was meant to embrace, rather than reject."[96] As a result, courts have held that non-profit status, such as that held by private religious schools, does not provide a safe harbor from the law's application.[97] And at least one court has held that the Act applies to public schools.[98]

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94. *See* Reed v. Hollywood Professional Sch., 338 P.2d 633, 637 (Cal. App. Dep't Super. Ct. 1959).

95. *See* Sullivan v. Vallejo City Unified Sch. Dist., 731 F. Supp. 947, 953 n.5 (E.D. Cal. 1990) ("I note in passing that one of the pre-Unruh decisions which the Legislature acted to overrule, when it adopted Unruh in 1959, had held that private schools were not subject to the existing public accommodations statute.") (citing *Reed*, 338 P.2d 633 (Cal. App. Dep't Super. Ct. 1959)); *see also* O'Connor v. Village Green Owners Ass'n., 191 Cal. Rptr. 320, 323-24 (1983):

> [A]mong the specific references in the original version of the bill were 'private or public groups, organizations, associations, business establishments, schools, and public facilities.' The broadened scope of business establishments in the final version of the bill, in our view, is indicative of an intent by the Legislature to include therein all formerly specified private and public groups or organizations that may reasonably be found to constitute 'business establishments of every type whatsoever.'

Id. at 323-24; Curran v. Mount Diablo Council of the Boy Scouts, 195 Cal. Rptr. 325, 334 (1983).

96. Isbister v. Boys' Club of Santa Cruz, Inc., 219 Cal. Rptr. 150, 152 (1985) (noting "[t]he Legislature's desire to banish [arbitrary discrimination] from California's community life has led this court to interpret the Act's coverage 'in the broadest sense reasonably possible'") (quoting Burks v. Poppy Construction Co., 20 Cal. Rptr. 609, 612 (1962)).

97. *See, e.g.*, Warfield v. Peninsula Golf & Country Club, 42 Cal. Rptr.2d 50, 67 (1995) (holding that the Unruh Act applied to a nonprofit private country club because of its "involvement . . . in [a] variety of regular business transactions with nonmembers"); *Isbister*, 219 Cal. Rptr. at 152 (holding non-profit boys club as bound by the Act); *O'Connor*, 191 Cal. Rptr. at 321, 324 (holding nonprofit condominium association as bound by the Act) ("Nothing in the language or history [of the Act] calls for excluding an organization from its scope simply because it is nonprofit.").

98. *See Sullivan*, 731 F. Supp. at 953 ("[S]ince public schools were among those organizations listed in the original version of the Unruh Act, it must follow that for purposes of the Act they are business establishments as well.").

Assuming the Act covered private schools, such an institution would likely argue that the Act should not apply to it because it can exclude whomever it wishes whose identity conflicts with its religious values. To require it to accept students regardless of race, sex, or sexual orientation might violate its religious tenets, such as an exclusion against gay people or prohibitions against racial integration.[99] In *Isbister v. Boys' Club*, in which the California Supreme Court held that a private organization had to admit female members, the court noted that its holding would not apply if the group could "demonstrate a compelling need to maintain single-sex facilities."[100] A religious school could argue that protecting its religious precepts regarding sexual morality is such a "need."

However, simply providing benefits of a non-religious nature (such as access to the prom) may not constitute the type of religious practices that deserve a religious exemption.[101] If the school does not have a *per se* ban on gay students as part of its religious beliefs, then its claim that it can treat gay students worse than other students in matters not directly tied to religious practices appears to be arbitrary discrimination of the kind that the Unruh Act was designed to prevent.[102] Arguably, a high school prom is simply a benefit of attending school, rather than a form of religious exercise itself. Allowing religious schools a blanket exception from all civil rights laws might allow them to discriminate among their students in the provision of benefits—denying African-Americans, for example, access to lunch services available to other students. Of course, religious schools may have the right to define their own membership, to determine who can enter and who cannot, based on criterion such as race, gender, or religious beliefs that might violate generally applicable anti-discrimination laws. Assuming, however, that the school does allow certain groups into its ranks, the state may have a compelling interest in some cases to prohibit unequal treatment among students in the provision of benefits. Although requiring equal treatment in the handing out of non-religious benefits might lead some schools simply to exclude certain groups entirely, many schools may face other pressures (from parents, leaders, or other members in their faith) preventing them from changing their theology.

At least one court has held that a generally applicable anti-discrimination law applied to a private religious school's distribution of non-religious benefits. In *Gay Rights Coalition v. Georgetown University*, a D.C. Court of Appeals rejected a Roman Catholic university's attempts

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99. *See* Miles, *supra* note 5, at 33-34.

100. 219 Cal. Rptr. 150, 152 (1985).

101. *See, e.g.*, Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 7-10 (D.C. Ct. App. 1987) (plurality opinion) (discussing secular aspects of education and student life at a Catholic university).

102. *See Isbister*, 219 Cal. Rptr. at 152.

to conflate its right to promote its own message with its decision to discriminate in providing club benefits to a campus organization based on the sexual orientation of its members.[103] In the *Georgetown University* case, a gay student organization wanted access to such tangible club benefits as telephone lines, office space, and the use of computer resources. The group sued Georgetown under the D.C. Human Rights Act, which explicitly forbids an educational institution from denying or restricting "access to[ ] any of its facilities and services to any person otherwise qualified . . . based upon [his or her] . . . sexual orientation."[104] The school, on the other hand, claimed it had a First Amendment right not to endorse speech of which it disapproved[105]—specifically the groups' pro-gay-rights message that the university claimed ran counter to Catholic teaching.[106] The university, in short, wanted an exemption to the Act.

The court recognized that the university had the right to convey its own message,[107] just as the gay group itself did.[108] However, it separated the speech act of recognition from the non-speech act of distributing secular club benefits: "While the Human Rights Act does not require any 'endorsement' [of the gay group] . . . it does require equal access to the 'facilities and services attendant upon that status.'"[109] Although the D.C. government could not force the university to express approval or recognition of any viewpoint with which it disagreed, the government did have a compelling interest in ending anti-gay discrimination and therefore

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103. 536 A.2d at 5.

104. *Id.* at 4 n.1 (quoting the D.C. CODE § 1-2520 (1987)).

105. *See id.* at 20 ("The 'endorsement' is a symbolic gesture, a form of speech by a private, religiously affiliated educational institution, an entity free to adopt partisan public positions on moral and ethical issues.").

106. *See id.* at 15 (citing Archbishop John R. Quinn, A Pastoral Letter on Homosexuality (May 5, 1980)).

107. *See id.* at 23 (noting that a "state measure forcing one to be an instrument for fostering public adherence to a repugnant point of view invades the sphere of intellect and spirit which the First Amendment reserves from all official control"). *Cf. id.* at 40 (Pryor, C.J., concurring) (arguing that "the student groups cannot demand the grant of University funds for the advocacy of its causes. In [these] circumstances, compelled financial support amounts to compelled affirmative support").

108. *See id.* at 25-26 (observing that the state could not force a "Gay University of America" with the goal of "win[ning] understanding and acceptance of gay and bisexual persons . . . to recognize or endorse a Roman Catholic Sexual Ethics Association but [it] could require [the university] to give them benefits").

109. *Id.* at 17.

requiring equal access to benefits and facilities.[110] The court accepted the idea that complying with the law constituted a burden on Georgetown's free exercise, but it found this consideration outweighed by the District's compelling interest in ending anti-gay discrimination.[111] According to the court, protecting gay citizens from discrimination was compelling because it fostered individual dignity, created an environment in which all citizens can "contribute to and benefit from society," and it guaranteed that the equal protection of the laws applied to all.[112] The court also concluded that separating the provision of benefits from the act of "endorsing" certain clubs also passed the requirement that the state's action be the least restrictive means available.[113]

Like the gay student group in *Georgetown University*, gay prom couples can argue that the issue in their case is equal access, rather than the endorsement of particular values. The school is still free to express its disapproval of gay relationships; it simply cannot forbid a gay couple from attending prom together if it allows similarly situated persons (i.e. straight couples) to attend.[114]

Assuming that the Unruh Act, like the D.C. Human Rights Act, applies to private educational institutions, a gay student couple has two arguments regarding the denial of access to the prom: that it constitutes discrimination on the basis of (1) sexual orientation and (2) sex. Under the first challenge, a gay student could argue that she is unable to attend prom with the date of her choice, even though straight teenagers can take whomever they wish. In effect, she only has access to the prom if she is willing to lie about her identity and take a male escort. The school would likely counter that it is not preventing any gay person from attending the prom because everyone, gay or straight, can go as long as they bring a date of the opposite sex. This description of the event assumes *all* the benefits of prom come from simply attending and that most students choose to go for access to lousy punch and loud music by unknown bands.

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110. *See id.* at 5 (holding "that the District of Columbia's compelling interest in the eradication of sexual orientation discrimination outweighs any burden imposed upon Georgetown's exercise of religion by the forced equal provision of tangible benefits").

111. *See id.* at 32 (noting that the city council felt sexual orientation "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 society as a whole").

112. *Id.* at 37.

113. *See id.* at 39.

114. *Cf.* Rosenberger v. University of Virginia, 515 U.S. 819 (1995) (observing that a public university is not endorsing a religious viewpoint when it grants a religious group equal access to student club benefits, particularly when the university publicly disassociates itself from the viewpoints of the clubs it funds).

It ignores the emotional benefits that may flow from attending a major high school event with someone for whom the student cares a great deal. The act of "being" a couple itself has potential significance for both straight and gay teens. Although some students may choose friends as dates so they will not "miss out" on the social interaction prom offers, other students' decisions about whom to take has more serious implications: Such choices themselves can signify the value of the other person and his or her relationship to the student. A gay male student who must pretend to be straight or who must choose a female friend loses the opportunity to express his affection for his boyfriend by *choosing that person* as a date. Prom means more than the benefits a student receives *at* the dance itself: In the student's eyes, free non-alcoholic beverages do not equal the value of expressing his affection for his boyfriend through the act of choosing.

Because of the more intangible nature of these benefits, a school could try to distinguish *Georgetown University* from the present hypothetical, in that the D.C. case involved *tangible* benefits, versus the arguably more symbolic benefits at stake here.[115] However, the Georgetown students did not ask for the tangible club benefits simply for the sake of having them—they asked for office space and a phone line to enable them to meet for support, to organize, and even to convey a message about their presence on campus—i.e., to express the idea that gay people are everywhere, even at institutions where they are not fully welcomed. Although a school may argue that the benefit of attending prom for gay couples has a speech component to it—and a message the school does not support—the same might be said of the university clubs in the *Georgetown* case. The D.C. court, however, reached an appropriate solution by protecting both the gay students' rights to be free from discrimination and the school's right to convey its anti-gay religious message.

An alternative argument is that denying students the right to take same-sex dates to prom constitutes sex discrimination. More specifically, female students cannot choose a female date, while males students can make that choice: The only difference is the gender of the student making the decision. The school could argue that its policy does not discriminate based on sex because its opposite-sex couple rule applies equally to both young men and women. The Hawaiian Supreme Court rejected similar arguments in *Baehr v. Lewin*, in which the court held that the state had to show a compelling reason why it prohibited a woman from marrying a woman while allowing a man to do so.[116] The state's argument paralleled that rejected in *Loving v. Virginia*, a U.S. Supreme Court decision in

115. *See id.* at 5.

116. 852 P.2d 44 (Haw. 1993) (plurality opinion). Under Hawaiian case law, sex discrimination triggers strict scrutiny. *Id.* at 66.

which the state claimed its anti-miscegenation law did not violate Equal Protection because it applied equally to both whites and African Americans.[117] Both high courts rejected the state's argument in their respective cases.[118] In *Bob Jones University v. United States*, the Supreme Court applied similar reasoning when it rejected a religious school's claim that its policy against interracial dating was not discriminatory because it applied to all races.[119] Similarly, a lesbian student can argue that allowing men to date women but not permitting women to do the same also constitutes sex discrimination. In addition, the fact that the rule applies to both men and women serves only as a red herring disguising the school's discriminatory intent: The rule does not affect straight people's choices, but only those made by gay students.

In sum, an anti-discrimination principle may prove a more fruitful avenue for a gay prom couple to pursue than the free speech route, given religious schools' right to express their own moral values and the greater likelihood the couple can succeed if it argues the case as a denial of benefits based on sexual orientation and sex. Assuming that same-sex prom couples can use the Unruh Civil Rights Act in their effort to attend a private religious school's prom, they face an additional hurdle: the possibility that the school could win a religious exemption from this generally applicable anti-discrimination law.[120] To assess this claim, the next two Parts consider the jurisprudence on religious exemptions and its recent application by the California Supreme Court.

II. THE DOCTRINE AND HISTORY OF MODERN RELIGIOUS EXEMPTIONS

The last decade has seen major upheaval in free exercise jurisprudence and law-making, with both the Supreme Court and the Congress taking contradictory stands on what level of scrutiny courts should apply to

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117. 388 U.S. 1, 8 (1967).

118. The Hawaiian high court also criticized as "tautological and circular" the state's argument that members of the same sex could not marry by definition. *Baehr*, 852 P.2d at 63. The same criticism can be made about claims that a prom couple "by definition" is a young man and woman. *See also* MARK STRASSER, LEGALLY WED: SAME-SEX MARRIAGE AND THE CONSTITUTION 45 (1997) ("Just as the statute at issue in *Loving* discriminated on the basis of race, notwithstanding that both whites and blacks would be disadvantaged, the statute at issue in *Baehr* discriminates on the basis of sex, notwithstanding that both sexes are disadvantaged by the law.").

119. 461 U.S. 574, 605 (1983).

120. The school here must rely on a judicial, rather than a legislative, exemption. *See* Isbister v. Boys' Club of Santa Cruz, Inc., 219 Cal. Rptr. 150, 157 (1985) ("The legislature has never added any exemption, exception, or restriction [to Unruh].").

religious requests for exemptions from generally applicable laws like the Unruh Civil Rights Act.[121] Before considering the history and permutations of the doctrine, however, we should consider the theory and justifications behind religious exemptions.

A. *Rationales For and Against Granting Religious Exemptions*

For supporters of government "accommodation" of religion, the vigor and even survival of religious organizations depends upon state actors making some exceptions from otherwise applicable laws.[122] Their arguments can be divided into at least three overlapping categories: the self-actualization needs of believers, the preservation of religious institutions' special character, and process arguments about the need to protect minority faiths against the tyranny of legislative majorities.

For many religious adherents, practicing their religion provides them with a sense of psychological and spiritual fulfillment.[123] Many religious traditions also require practitioners to perform certain duties or to refrain from certain forms of conduct.[124] For example, in the 1996 *Smith* decision, Mrs. Evelyn Smith argued that renting to alleged fornicators violated her religious responsibilities and would prevent her "from meeting her deceased husband in the hereafter."[125] In the view of adherents such as Smith, their eternal salvation depends upon their compliance with their religion's doctrines and beliefs. The state, therefore, could potentially cause damage to a person's sense of autonomy and spiritual development

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121. The issue of exemptions is one of several potential claims that religious parties might bring under the Free Exercise Clause. *See* Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 745-746 (1992) ("The concept of religious freedom is amorphous and abstract, potentially encompassing rights to be let alone, rights of affirmative support, rights of procedural sensitivity, and rights of nondiscrimination.").

122. *See generally* McConnell, *supra* note 3, at 686 ("Accommodation refers to government laws or policies that have the purpose and effect of removing a burden on, or facilitating the exercise of, a person's or an institution's religion.").

123. *See, e.g.*, Lampert, *supra* note 16, at 183-86 (discussing a gay man's efforts to participate in a small Jewish congregation in New Mexico and his increasing level of involvement within the community).

124. *See, e.g.*, McConnell, *supra* note 3, at 692 ("The principle underlying the First Amendment is that the freedom to carry out one's duties to God is an inalienable right, not one dependent on the grace of the legislature.").

125. Smith v. Fair Employment & Hous. Comm'n, 12 Cal. 4th 1143, 1151 (1996) (plurality opinion), *cert. denied* 117 S. Ct. 2531 (1997).

if it forces her to violate or abandon her religious tenets.[126] In the context of gay rights, where many religions condemn gay sexuality (as an orientation or conduct or both), some adherents may believe tolerating or accepting gay people as they are will anger God.[127] Of course, many gay men and women also have spiritual needs and beliefs as well, presenting a dilemma when their claims as individual believers conflict with the doctrine of the religious institutions to which they belong. In general, however, the government seeks to stay out of intra-denominational disputes lest it violate the rights of institutions to determine their own theology.[128]

A second motivation for providing exemptions is to prevent the government from having a disruptive impact on the development and beliefs of religious organizations.[129] The individual's exercise of religion may be closely linked to a larger organization's experience, as the group "may have a desire to exist in a communal atmosphere surrounded only by other believers."[130] Individual believers may also derive value from the associational aspects of worshipping with others who believe in a common set of principles.[131] Using the government to assert an individual's rights over the claims of the group could erode "the group's uniformity [that]

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126. *Cf.* Thomas v. Review Bd., Ind. Employment Sec. Div., 450 U.S. 707, 717-18 (1981) ("Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.").

127. *See* Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 15 (D.C. Ct. App. 1987) (plurality opinion) ("No believer affiliated with the Roman Catholic Church may condone, endorse, approve, or be neutral about homosexual orientation, homosexual lifestyle, or homosexual acts.") (citing Archbishop John R. Quinn, A Pastoral Letter on Homosexuality (May 5, 1980)); *see also* Cruz, *supra* note 78, at 1230-31 ("Where persons face a choice between hiring, serving, or teaching gay men, lesbians, and bisexuals in opposition to their religious beliefs, or giving up their businesses or schools, it is reasonable to perceive a coercive tendency in the application of civil rights laws.").

128. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 603 (1983) ("This Court has long held the Free Exercise Clause of the First Amendment to be an absolute prohibition against governmental regulation of religious beliefs.").

129. *See, e.g.*, McConnell, *supra* note 3, at 692 (advocating that "[t]he effect of applying secular norms to religious entities is simply not the same as applying those norms to secular entities").

130. Duane E. Okamoto, Note, *Religious Discrimination and the Title VII Exemption for Religious Organizations: A Basic Values Analysis for the Proper Allocation of Conflicting Rights*, 60 S. CAL. L. REV. 1375, 1397 (1987); *see also* Roberts v. United States Jaycees, 468 U.S. 609, 619 (1984) (noting that "individuals draw much of their emotional enrichment from close ties with others").

131. *See* Okamoto, *supra* note 130, at 1406.

contribute[s] to its spiritual existence. Hence, it may be that the religious group's unified structure is vital to its well being."[132] However, although courts do not seem to distinguish between the religious beliefs of individuals and of groups,[133] at least one scholar has argued that the government should show greater deference to claims made by "individuals for themselves" than to claims by "large, bureaucratized religious institutions:"

> Individual claims tend to be most compelling, because they are more likely to be true claims of conscience, are most verifiable, and tend to be least threatening to other social goals. As the entity-claimant grows in size and organizational complexity, however, problems of agency costs (who speaks for whom), good faith, financial self-interest, and threats to social cohesion mount.[134]

Under this proposed test, then, a court would show greater sensitivity to a free exercise claim by people like Evelyn Smith than that of an anti-gay religious school, depending on the size and nature of the institution.[135]

A final set of pro-exemption arguments focus on how legislation is passed. Under this view, legislative majorities often reflect the religious preferences of the electorate. As a result, they can be less sensitive to or even ignorant of the claims of minority faiths,[136] either indifferent or unaware of the burdensome effect a general law might have on them.[137] In those circumstances, the courts can act as a protector of minority faith interests by interpreting the Constitution to mandate exemptions.[138] In other circumstances, legislatures may find it necessary to grant voluntarily

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132. *Id.* at 1420.

133. *See* Lupu, *supra* note 121, at 774 (noting that courts have not "explicitly . . . tailored" free exercise jurisprudence to reflect the identity and nature of the entity bringing a claim).

134. *Id.*

135. For example, relevant questions to ask under this standard might include whether it is a small denomination's school or part of a expansive network of schools in a "large, bureaucratized religious institution[ ]." *See id.*

136. *See* McConnell, *supra* note 3, at 693, 716.

137. The court has recognized that seemingly neutral laws that legislatures pass to target and burden specific faiths violate the First Amendment. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 524 (1993).

138. *See* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1129 (1990).

exemptions to ensure the passage of bills that otherwise would be too controversial because of their impact on certain religious communities.[139]

On the other side of the debate are both practical and constitutional concerns about granting religious exemptions. A primary worry is that courts will grant too many exemptions, undermining the effectiveness of generally applicable laws[140] and making every citizen "a law unto himself."[141] Such fears stem in part from a belief that a consistent, workable test for exempting religious adherents from generally applicable laws does not exist.[142] Other opponents charge that granting some exemptions may violate the Establishment Clause because they run the risk of acting as a government subsidy of religion.[143] As with any subsidy, the government may use them to favor one group over another, potentially benefiting majoritarian over minority faiths.[144] Even without the specter of favoritism between sects, religion-only exemptions arguably discriminate against "nonreligious association" while benefiting religion in general. Thus, a person who objects to a law for non-religious reasons,

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139. *See* McConnell, *supra* note 3, at 694 (citing as an example exemptions from employment discrimination laws so that some denominations may maintain their all-male clergies).

140. *See* Employment Div., Dep't of Human Resources of Or. v. Smith, 494 U.S. 872, 888 (1990) (warning that a society with too many constitutionally compelled exemptions "would be courting anarchy"); United States v. Lee, 455 U.S. 252, 259-60 (1982) (referring to the danger of "myriad exceptions flowing from a wide variety of religious beliefs").

141. Reynolds v. United States, 98 U.S. 145, 167 (1879).

142. *See* McConnell, *supra* note 3, at 736 (offering the views of other commentators) (quoting Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J. L. ETHICS & PUB. POL'Y 591, 604 (1990) (arguing that "there is no clear, workable, or fair way of limiting the number and kinds of exemptions to be granted if persons had a recognized constitutional right to disobey for religious reasons whatever laws they chose to disobey")). *But see id.* at 715 ("Much of the historical argument against accommodations is based on a straw man: that proponents of accommodation believe that in every conflict between religious conscience and the law, conscience must prevail, no matter what the consequence.").

143. *See* Lupu, *supra* note 121, at 748 (arguing that "[t]he case against accommodation is at bottom an Establishment Clause case").

144. *See id.* at 777; *see also* McConnell, *supra* note 3, at 706 ("Accommodations should not be allowed to favor one religion over another. For this reason, accommodations should be framed so far as possible in neutral terms, without reference to particular faiths or denominations.").

which are nonetheless deeply and sincerely held, may not take advantage of such an exemption available to their religious-minded neighbor.[145]

From the gay student's perspective, too many religious exemptions might also undermine the efficacy of generally applicable anti-discrimination laws, given the persistence of widespread homophobia in society often justified on religious grounds. Of course, those accommodations that may cut against a gay person's interest in one circumstance may also benefit her in another—for example, churches such as the Metropolitan Community Church that predominantly serve gay Christians would arguably benefit from restrictions on the government's ability to interfere with religious practice through generally applicable laws. Regardless of which side of the debate has the more persuasive argument on exemptions, both of these conflicting sets of views appear at various times in the Supreme Court's jurisprudence over the last few decades.

B. *A Brief History of the Law's Development on Free Exercise Exemptions*

According to Professor Michael McConnell, from this nation's very beginning, legislators voluntarily granted exemptions to religious organizations: "At a minimum, the message of history is that religious accommodations are permissible and desirable, even if not constitutionally compelled."[146] In his view, however, the advent of the welfare state and increased government regulation of many aspects of modern life make the need for religious accommodation even greater today.[147] Until the 1990 *Smith* decision, the Supreme Court arguably agreed, recognizing that coercion can come in many different forms, whether it be a mere five

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145. *See, e.g.*, Thorton v. Caldon, Inc., 472 U.S. 703, 710-11 (1985) (striking down, on Establishment grounds, a law requiring employers to allow workers an "unqualified right not to work on their Sabbath"). The Court observed that "employees who have strong and legitimate, but nonreligious reasons for wanting a weekend day off have no right under the statute." *Id.* at 710 n.9. *See also* Lupu, *supra* note 121, at 779 ("True permissive accommodations—that is, religion-specific action not required by the Constitution—simply should be forbidden.").

146. McConnell, *supra* note 3, at 693 (observing that protecting religious freedom at the nation's beginning required less than it does today, in an era of large government). *Compare* McConnell, *supra* note 7, at 1414-15 (arguing that historical evidence supports a free exercise right to constitutionally compelled exemptions under the First Amendment), *with* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 916 (taking the contrary position).

147. *See* McConnell, *supra* note 3, at 694.

dollar fine[148] or the denial of a government benefit that the state has no constitutional obligation to provide.[149]

Sherbert v. Verner, "the first and leading case in the Supreme Court's modern free exercise jurisprudence,"[150] explicitly recognized this principle, noting that "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."[151] In *Sherbert*, the Court held that denying a woman unemployment benefits because she quit her job rather than work on her Sabbath unconstitutionally "force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other."[152] The Court required the state to show a compelling state interest to justify burdening her free exercise of religion,[153] a test the state failed in the Court's view.[154] Cases such as *Wisconsin v. Yoder*, which allowed Amish parents to remove their children from the last two years of required high school education for religious reasons, continued the compelling interest test.[155] In both cases, the claim of the religious adherent seeking an exemption arguably did not conflict with other individuals' rights, unlike religious schools trying to bar gay couples from prom. *Sherbert* involved an individualized request for unemployment benefits, which did not directly interfere with other participants' rights (other than the possibility of a general strain on the public fisc if too many people sought exemptions).[156] In *Yoder*, the state (and the lone dissenting Justice)[157] attempted to argue that Amish children might have the right to go against their parents' wishes and attend the last two years of compulsory education, but the Court noted that this conflict was not before them and that in this case the parents were the ones facing the criminal fines for failing to comply with the law.[158] The Court made clear that its "holding in no way determines the proper resolution of possible competing interests of parents, children, and the State" in the "appropriate" case, but

148. *See* Wisconsin v. Yoder, 406 U.S. 205, 208 (1972).

149. *See* Sherbert v. Verner, 374 U.S. 398, 410 (1963).

150. McConnell, *supra* note 7, at 1412.

151. *Sherbert*, 374 U.S. at 404.

152. *Id.*

153. *See id.* at 403.

154. *See id.* at 406-07.

155. 406 U.S. 205, 214-29 (1972).

156. *See Sherbert*, 374 U.S. at 406-09.

157. *See Yoder*, 406 U.S. at 241-49 (Douglas, J., dissenting).

158. *See id.* at 230-31 (majority opinion).

it hinted that allowing the State to assert the children's claim would intrude "into family decisions in the area of religious training [and] would give rise to grave questions of religious freedom comparable to those raised here."[159] Arguably, claims brought by the children themselves might present a different case, one similar to that offered by a gay teenager who wants to take a same-sex date to prom.[160]

Employment Division v. Smith,[161] then, represents a dramatic break from these landmark precedents in its rejection of the compelling interest test for most free exercise claims involving neutral, generally applicable laws. One judge wrote that the decision "marked a radical departure from free exercise jurisprudence to the extent its holding redefined the constitutional parameters of religious exemptions."[162] However, in the aftermath of the decision some scholars observed that "the Court in the 1980s already had signalled the impending demise of mandatory accommodations"[163] in a series of decisions in which the plaintiffs lost despite the compelling interest test.[164] Even if earlier precedents hinted a change in the Court's direction, the 1990 *Smith* decision produced a firestorm of criticism, as we will see below.

Employment Division v. Smith involved the claims of two Native American drug counselors seeking unemployment benefits after they were fired from their job for smoking peyote during a religious ceremony.[165] Interestingly, rather than analyze the case under *Sherbert*, the court

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159. *Id.* at 231.

160. *Cf.* Cruz, *supra* note 78, at 1206 (advocating that "*Yoder* also affirmed that religious rights are not absolute and must at times yield when private rights or the public welfare are threatened," including when they conflict with laws against discrimination based on sexual orientation).

161. 494 U.S. 872 (1990).

162. Smith v. Fair Employment & Hous. Comm'n, 12 Cal. 4th 1143, 1226 (1996) (Baxter, J., concurring and dissenting); *see also* McConnell, *supra* note 138, at 1111.

163. Lupu, *supra* note 121, at 756.

164. Professor Lupu suggests three ways in which the Supreme Court's post-*Yoder* jurisprudence limited the potential reach of the compelling interest test to protect free exercise claims: by finding that the government's action did not burden religious practice; by carving out exceptions for "highly regulated spheres of life" such as prisons and the military; and by "water[ing] down the compelling interest test." Ira C. Lupu, *Of Time & the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 178-82 (1995); *see also* Rebecca A. Wistner, Note, *Cohabitation, Fornication and the Free Exercise of Religion: Landlords Seeking Religious Exemptions from Fair Housing Laws*, 46 CASE W. RES. L. REV. 1071, 1077 (1996) (arguing that "pre-[*Employment Division v.*] *Smith* case law shows that *Smith* was not necessarily an aberration, but a culmination of a growing judicial hostility to free exercise claims"); Lupu, *supra* note 121, at 756.

165. 494 U.S. 872, 874.

distinguished its prior unemployment cases and viewed the current case as involving the state's drug laws.[166] The Court began by noting that laws targeting religion for special disabilities violated the Free Exercise Clause.[167] For neutral laws of general applicability, however, the First Amendment did not compel a religious exemption.[168] The court distinguished prior precedents as either hybrid-rights cases in which the law threatened not only free exercise but also another fundamental right (such as parental supervision and control of children in the case of *Yoder*) or cases involving the individualized government review found with unemployment benefits.[169] Justice Antonin Scalia, writing for the majority, recognized that this holding would leave exemptions from generally applicable laws to the political process, potentially disadvantaging minority religious practices. In his view, such as result was preferable to "a system in which each conscience is a law unto itself or which judges weigh the social importance of all laws against the centrality of all religious beliefs."[170]

Criticism of the *Smith* decision was harsh. One commentator lamented the decision's effect on Native American religion, claiming that "*Smith*'s distortion of precedent and evisceration of religious liberty thus accomplishes nothing except the advancement of cultural hegemony."[171] Professor Ira Lupu—who has warned about the Establishment Clause dangers of accommodation of religion and would ban all voluntary, religion-only exemptions—has written that "[t]he Free Exercise Clause sometimes obligates government to afford special treatment to

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166. *See id.* at 876.

167. *See id.* at 877.

168. *See id.* at 879. In fact, the Court stated that "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Id.* at 878-79. *But see* McConnell, *supra* note 138, at 1120 (challenging the Court's statement).

169. *See Employment Division*, 494 U.S. at 881-83 ("We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation. Although we have sometimes purported to apply the *Sherbert* test in contexts other than that, we have always found the test satisfied.").

170. *Id.* at 890.

171. Note, *Religious Exemptions from Generally Applicable Laws*, 104 HARV. L. REV. 198, 208 (1990) [hereinafter *Religious Exemptions*]; *see also id.* at 205 (claiming that *Smith*, when "[i]nterpreted strongly, . . . reduces the free exercise clause to a virtual nullity"). The author also summed up many of the other criticisms of the *Smith* decision: "[It] ignores precedent, contradicts an explicit finding of the federal government, destroys an entire religious faith without any corresponding benefit, and achieves a result contrary to the intent of the framers of the first amendment." *Id.* at 208-09.

religion. . . . I therefore reject *Smith* at every level."[172] Even one of the supporters of *Smith*'s outcome admitted that "[t]he *Smith* opinion itself . . . cannot be readily defended. The decision, as written, is neither persuasive nor well-crafted. It exhibits only a shallow understanding of free exercise jurisprudence and its use of precedent borders on fiction."[173]

Arguments against the *Smith* decision's holding cover a wide spectrum of concerns. First, many observers felt the Court went out of its way to establish its new precedent, even though neither party asked for a reconsideration of the compelling interest test.[174] They also believed the Court misconstrued precedent, including finding *Yoder* to be a hybrid-rights case even though the decision itself does not appear to turn on that issue.[175] The Court was also faulted for assuming that neutral laws are truly neutral in their effect, particularly for minority religions.[176] Rather than a form of "affirmative action," exemptions in these critics' view represent "'nothing more than the governmental obligation of neutrality in the face of religious differences.'"[177]

On a substantive level, *Smith's* critics charge that the Court replaced the old free exercise test with a "toothless rationality review"[178] that abandons that court's role as "protector" of minority religions.[179] In short,

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172. Lupu, *supra* note 121, at 771-72.

173. William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 308-09 (1991).

174. *See* McConnell, *supra* note 138, at 1113.

175. *See id.* at 1120-21 (describing the Court's "use of precedent . . . [as] troubling, bordering on shocking"); *Religious Exemptions*, *supra* note 171, at 208 (arguing that the Court's "revisionist interpretation of *Sherbert* dismantles decades of free exercise jurisprudence without acknowledging that it even tinkers with it").

176. *See* McConnell, *supra* note 138, at 1133.

177. *Id.* (quoting Sherbert v. Verner, 374 U.S. 398, 409 (1963)). Professor McConnell compares religious exemptions to handicap discrimination laws, in which failing to treat handicapped people differently to reflect their special needs (i.e., requiring a "low-cost ramp for access to a building") actually violates their rights. *Id.* at 1140. In a similar fashion, neutrality toward religion does "not mean treating [different religions] the same way" but treating them differently in order to achieve government neutrality. *Id.* at 1148.

178. *Id.* at 1128; *see also* Smith v. Fair Employment & Hous. Comm'n, 12 Cal. 4th 1143, 1227 (1996) (Baxter, J., concurring and dissenting) (quoting Rep. Stephen J. Solarz, RFRA's initial sponsor, as saying that "'[w]ith the stroke of a pen, the Supreme Court has virtually removed religious freedom from the Bill of Rights'").

179. McConnell, *supra* note 138, at 1129, 1132 (arguing that "[p]rior to *Smith*, the Free Exercise Clause functioned as a corrective for this bias, allowing the courts, which are institutionally more attuned to the interests of the less powerful segments of society, to extend to minority religions the same degree of solicitude that more mainstream

critics of *Smith* believed that the Free Exercise Clause requires at least some mandatory exemptions beyond the narrow exceptions that the Court arguably created to avoid overturning *Sherbert* and *Yoder*.

Despite the criticism, some scholars defended *Smith* as the right outcome. In their view, abandoning the compelling interest test avoids messy balancing in which the Court invariably must weigh "the legitimacy of the religious claim" against society's interests.[180] The *Smith* ruling also avoids the slippery slope Justice Scalia feared if courts allowed the compelling interest test to "produce . . . a private right to ignore generally applicable laws," creating the potential for "anarchy" as the government tries to sort through all kinds of religious claims to its laws.[181] Finally, exemptions inherently favor religious-based objections to laws over those of a non-religious nature.[182]

The U.S. Congress overwhelming agreed with the anti-*Smith* side of the debate.[183] Supported by a diverse group of interests from across the political spectrum,[184] the Congress in 1993 passed the Religious Freedom Restoration Act, which purported to return courts to the pre-*Smith* compelling interest test.[185] In June, 1997, the Supreme Court struck down RFRA in the *City of Boerne* decision on the grounds that the statute exceeded Congress' power under the Fourteenth Amendment's § 5

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religions are able to attain through the political process").

180. Marshall, *supra* note 173, at 310; *see also* Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 887 (1990).

181. 494 U.S. at 886, 888; *see also* Marshall, *supra* note 173, at 311-12.

182. *See* Marshall, *supra* note 173, at 319-20. *But see* Michael W. McConnell, *A Response to Professor Marshall*, 58 U. CHI. L. REV. 329, 330 (1991) (arguing that Marshall's theories are not neutral because they lead to increasing secularization of society at the expense of religion).

183. In the House, no representative voted against RFRA; in the Senate, only three members cast a "no" vote. Smith v. Fair Employment & Hous. Comm'n, 12 Cal. 4th 1143, 1196 n.1 (1996) (Kennard, J., concurring and dissenting).

184. *See id.* at 1228 (Baxter, J., concurring and dissenting) (listing such supporters as the American Civil Liberties Union, the Native American Rights Fund, the National Association of Evangelicals, the American Jewish Congress, and Concerned Women for America).

185. 42 U.S.C. § 2000bb-1 (1996). The statute provided the following:

> (a) In General—Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability. . .
> (b) Exception—Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
> (1) is in furtherance of a compelling governmental interest; and
> (2) is the least restrictive means of furthering that compelling governmental interest.

Id.

enforcement powers.[186] Three dissenting justices, however, argued that the Court should reconsider its holding in *Smith*.[187]

Even before RFRA was struck down, however, lower-court judges generally interpreted the statute narrowly to reflect the pre-*Smith* weak application of the compelling interest test rather than the stronger version arguably found in *Sherbert* and *Yoder*.[188] As we will see in the next Part, California's *Smith* decision itself considered RFRA, as well as the 1990 *Smith* decision, in rejecting a religious minded landlord's claim for an exemption to a generally applicable anti-discrimination law.

III. THE CALIFORNIA HIGH COURT WEIGHS IN ON RELIGIOUS EXEMPTIONS TO ANTI-DISCRIMINATION LAWS

A. *Fair Employment & Housing Commission v. Smith*

Like a religious school forbidding same-sex dating at its prom, Evelyn Smith wanted an exemption from the state's anti-discrimination law, in this case the Fair Employment and Housing Act, which specifically prohibits

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186. *See* City of Boerne v. Flores, 117 S. Ct. 2157, 2164 (1997).

Prior to this decision, some scholars and litigants questioned the law's constitutionality on federalism, separation of powers, and even Establishment Clause grounds. For example, Professor Lupu has written that although the law might be constitutional as to actions by the federal government, RFRA's application to state laws might improperly "commandeer" state institutions to adopt policies regarding religious exemptions that the Supreme Court says are not required by the First Amendment. Lupu, *supra* note 164, at 198-99. *See also Smith*, 12 Cal. 4th at 1189 (Mosk, J., concurring) ("Through RFRA, Congress has, in effect, unconstitutionally attempted to empower the courts, state as well as federal, to pass on religious questions."); Lupu, *supra* note 164, at 217 (noting that "[t]he threat [RFRA] presents to the Court's *Marbury* function—declaring the meaning of the Constitution—cannot be blinked away"). *Cf.* Cruz, *supra* note 78, at 1229 ("The Act is vulnerable to challenge on the grounds that it exceeds Congress's power to enforce the fourteenth amendment, that it violates constitutional principles of religious freedom, and that it represents an impermissible legislative attempt to overrule a constitutional judgment of the Supreme Court.").

On the Establishment Clause issue, see William P. Marshall, *The Religious Freedom Restoration Act: Establishment, Equal Protection and Free Speech Concerns*, 56 MONT. L. REV. 227, 235-47 (1995) ("Why should those who base their objection to government actions on deeply-felt moral or philosophical convictions be forced to choose between state law and their consciences, while those who hold only nominal adherence to religious precepts be exempted from the very same law?").

187. *See City of Boerne*, 117 S. Ct. at 2176-86.

188. *See* Lupu, *supra* note 164, at 199.

discrimination based on marital status.[189] Smith claimed that this requirement placed a burden on her religious beliefs because it prohibited her in her capacity as a landlord to refuse renting units to unmarried couples. Under her religious beliefs, not only was fornication a sin, but so was "assisting" unmarried couples in their "sin" by allowing them to cohabitate on land that she owned.[190] Smith feared that renting to "people [who] engage in sex outside of marriage in her rental units" would anger God and prevent her from seeing her deceased husband in heaven.[191] She did not discriminate on any other grounds, including against "single, divorced, widowed or married" individuals.[192] Although she presented, and lost, an argument that marital status discrimination does not apply to cohabiting unmarried couples, in effect Smith wanted an individualized exemption from the anti-discrimination law.[193]

A majority of justices on the California Supreme Court believed that Smith should lose her claim, although they disagreed over the method. The plurality considered her claim under three doctrines: the U.S. Supreme Court's First Amendment jurisprudence including *Employment Division v. Smith*, the Religious Freedom Restoration Act, and the California Constitution's provision protecting the free exercise of religion.[194] Although the *City of Boerne* decision makes clear that courts now cannot apply RFRA's compelling interest test,[195] the California high court's analysis remains relevant if it ever decides that state constitutional law requires a compelling interest in its free exercise jurisprudence or if

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189. "It shall be unlawful: (a) For the owner of any housing accommodation to discriminate against any person because of the race, color, religion, sex, marital status, national origin, ancestry, familial status, or disability of that person." CAL. GOV. CODE § 12955(a) (West 1997). FEHA has two exceptions to its application: (1) if the landlord lives in the house, § 12927(c)(2)(A) (West 1997), or (2) if a "religious organization" wishes to limit "the sale, rental, or occupancy of dwellings that it owns or operates for other than a commercial purpose to persons of the same religion or [to give] preference to those persons, unless membership in that religion is restricted on account of race, color, or national origin." *Id.* § 12955.4 (West 1997).

190. Smith v. Fair Employment & Hous. Comm'n, 12 Cal. 4th 1143, 1221 (1996) (Baxter, J., concurring and dissenting) (quoting Smith's testimony), *cert. denied* 117 S. Ct. 2531 (1997).

191. *Id.* at 1151 (plurality opinion).

192. *Id.*

193. *See id.* at 1155.

194. "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State." CAL. CONST. art. I, § 4.

195. City of Boerne v. Flores, 117 S. Ct. 2157, 2171 (1997).

it is confronted by a so-called "hybrid" rights case, as mentioned in the U.S. Supreme Court's *Smith* decision.

Not surprisingly, under the Supreme Court's pre-RFRA jurisprudence, Smith's claim lost, as the housing statute is a generally applicable, neutral law.[196] The California Supreme Court did not reach the question of whether Smith might have a hybrid-rights claim because the government forced her to post a sign explaining tenants rights under FEHA, possibly violating her right to free speech.[197] Even if the compelling interest test did apply, either under this exception or under RFRA, the court found that Smith's claim failed to meet the threshold requirement that the law pose a "substantial[ ] burden" to her religious practice.[198]

RFRA provides that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless it has a compelling interest and uses "the least restrictive means of furthering that . . . interest."[199] The California high court found three factors relevant in its determination that the state anti-discrimination law did not substantially burden Smith's religious claim under RFRA.[200] First, the court noted that "Smith's religion does not require her to rent apartments, nor is investment in rental units the only available income-producing use of her capital. Thus, she can avoid the burden on her religious exercise without violating her beliefs or threatening her livelihood."[201] In the court's view, Smith could "redeploy[ ]" her capital in other investments that would not require her

196. *See* Smith v. Fair Employment & Hous. Comm'n, 12 Cal. 4th 1143, 1161 (1996) (plurality opinion), *cert. denied* 117 S. Ct. 2531 (1997); *see also* Cruz, *supra* note 78, at 1229 (arguing that "[i]f RFRA is not a constitutional exercise of Congressional authority, *Smith* remains the law of the land, and . . . most laws prohibiting discrimination on the basis of sexual orientation would likely survive free exercise challenge"); Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 B.Y.U. L. REV. 221, 226 (arguing that under the 1990 *Smith* decision "[a]ny well-drafted gay rights ordinance would be a facially neutral law of general applicability, and the Free Exercise Clause will not exempt religious organizations").

197. *See Smith*, 12 Cal. 4th at 1164-65. *See infra* note 223 and accompanying text.

198. According to the court, other threshold requirements include that "[t]he burden must fall on a religious belief rather than on a philosophy or a way of life" and that "[t]he burdened religious belief must be sincerely held." *Id.* at 1165-66 (referring to an analysis synthesized from RFRA, cases interpreting RFRA, and decisions interpreting the Free Exercise Clause prior to *Smith*).

199. 42 U.S.C. § 2000bb-1 (1996).

200. *See* Smith v. Fair Employment & Hous. Comm'n, 12 Cal. 4th 1143, 1175-76 (1996) (plurality opinion) (summarizing why the court should not exempt Smith from FEHA), *cert. denied* 117 S. Ct. 2531 (1997).

201. *Id.* at 1175. The court noted, however, that this factor alone was not "a generally applicable test for identifying substantial burdens." *Id.* at 1171.

to violate her religious beliefs, unlike the case of unemployment-compensation recipients who may have no other alternative to meet their basic physical needs if they are unable to work because of job conditions violating their religious principles.[202] In effect, the court recognized the power landlords have over renters, who may have limited options for finding affordable housing. Landlords, in contrast, have the ability to sell their capital and reinvest in other enterprises, although they may face high transaction costs that limit this option.[203]

The second factor the court considered was the added expense Smith might face because of the law (e.g. the transaction costs of redeploying her capital) but found it did not support her claim that she suffered a substantial burden: "An economic cost . . . does not equate to a substantial burden for purposes of the free exercise clause."[204] The third factor was the rights of the tenants "to have equal access to public accommodations and their legal and dignity interests in freedom from discrimination based on personal characteristics."[205] The court recognized that a conflict of rights existed between the landlord's religious claims and those of the unmarried tenants who were seeking housing together. The importance of Smith's ability to avoid her burden becomes even more relevant, as granting her an exemption would in effect give her "more freedom and greater protection for her own rights and interests, while [the tenants] would have less freedom and less protection" from discrimination based on their marital status.[206] If RFRA's main effect was to wipe the Supreme Court's *Smith* decision off the books yet retain prior precedents that limited the application of the compelling interest test (i.e. by not finding a substantial burden),[207] then the California Supreme Court

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202. *See id.* at 1170.

203. *See id.* at 1175-76. *But see id.* at 1207 (Kennard, J., concurring and dissenting) ("[A] conflict between government laws and an individual's religious beliefs substantially burdens the exercise of religion in cases where the believer cannot avoid the conflict except by abandoning participation in the activity that gives rise to the conflict.") (citing for support, Douglas Laycock, *RFRA, Congress, and the Ratchet,* 56 MONT. L. REV. 145, 151 (1995) ("The legislative history is clear that the conduct does not have to be compelled by religion.")).

204. *Smith,* 12 Cal. 4th, at 1172.

205. *Id.* at 1170; *see also* Okamoto, *supra* note 130, at 1410 (observing that "a business enterprise in the 'stream of commerce' affects the outside secular world directly, so one could argue this scenario should not receive full protection under the exemption").

206. *Smith,* 12 Cal. 4th at 1175.

207. *See supra* text accompanying notes 163-64, *infra* notes 224-28; *cf.* Lupu, *supra* note 164, at 220-21 (arguing that RFRA would "incorporate a narrow view of 'substantial burden,' one that requires a strenuous form of coercion *and* a weighty impact on a matter of religious obligation").

probably was correct in knocking out the plaintiff's claim at the threshold level, given the factors that it cited against recognizing Smith's claim, including the rights of tenants.

The court also briefly considered whether Article I, section 4 of the California Constitution required an exemption. Although it declined to decide if state constitutional free exercise jurisprudence had any independent meaning from federal standards, the court offered that whether section 4 tracked Supreme Court jurisprudence *á la Employment Division v. Smith* or required a compelling interest test *á la Sherbert* and *Yoder*, Smith's claim failed for the same reasons it lost under federal law.[208]

Although the main opinion did not attract a majority of the justices, it may represent a relatively stable "middle" position between the concurrence and the dissents. Justice Stanley Mosk provided the fourth vote needed for a majority, yet he rejected analyzing Smith's claim under RFRA at all because, in his view, the Act clearly violated constitutional separation of powers.[209] Under his opinion, landlords are left with the 1990 *Smith* decision's principle against recognizing exemptions to generally applicable laws, absent overt attempts to disadvantage specific religions or one of *Smith's* narrow exceptions for hybrid rights and unemployment cases.

The three "dissenters" did agree that FEHA applied to unmarried couples, although Justice Marvin Baxter expressed some reservations.[210] The main criticism of the dissenters was that the plurality improperly "conflate[d] the substantial burden inquiry and the compelling interest test" by considering the interests of third parties at the substantial burden stage—whether Smith's religiously motivated conduct burdens other people's rights may be irrelevant to whether the state action burdens her rights.[211] The dissenters found that the civil penalties and transactions costs of redeploying her capital clearly burdened Smith's free exercise of

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208. *See Smith*, 12 Cal. 4th at 1177-79. In addition, the court set *Sherbert* as the outer limit of possible free exercise protection: "No court . . . has articulated a test more protective than the test set out in *Sherbert v. Verner* and *Wisconsin v. Yoder*, and now codified in RFRA." *Id.* at 1179 (citations omitted).

209. *See id.* at 1189-90 (Mosk, J., concurring).

210. *See id.* at 1218, 1242 (Baxter, J., concurring and dissenting) (stating that the state has a "strong interest in the marriage relationship"). *Id.* at 1242.

211. *Id.* at 1204 (Kennard, J., concurring and dissenting).

religion, in that the law required her to choose between abandoning her current economic activities or foregoing her religious principles.[212]

In addition, Justice Joyce Kennard considered the compelling interest prong of the test and criticized the court for "[its] facile equation of all forms of discrimination simply because they are recited side by side in a statute."[213] In this case, the Justice questioned whether preventing discrimination against unmarried couples could constitute a compelling interest given that the state in other areas practiced such discrimination.[214] Even if it were compelling, however, she would have held it ultimately failed the test for not being the least restrictive means possible.[215] Interestingly—and relevant for gay students' rights—Justice Kennard admitted that "eliminating discrimination against homosexual couples may well involve different considerations" rising to the level of a compelling interest, given the history of discrimination they face and the refusal by the state to recognize gay marriage.[216] Assuming for the moment that the plurality's opinion favors the case of gay students seeking to enforce anti-discrimination laws against claims for religious exemptions, Justice Kennard's comments suggest that at least one of the dissenters might agree with the plurality, even under a compelling interest test, if the group suffering from discrimination was the gay community.

B. *How the 1996 Smith Decision Fits into the Doctrine of Religious Exemptions*

Three other state supreme courts have considered the issue of religious exemptions to the state's anti-discrimination policy regarding marital

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212. *See id.* at 1202-07 (Kennard, J., concurring and dissenting); *see also id.* at 1231-34 (Baxter, J., concurring and dissenting).

Justice Kennard offered a four element test to determine if a substantial burden existed:

> (1) a religious adherent engages in a particular activity; (2) a governmental command relating to the activity conflicts with the adherent's religious beliefs concerning the activity; (3) the conflict is irreconcilable (that is, to satisfy the governmental command the adherent must either abandon the activity or violate his or her religious beliefs); and (4) the detriment to the adherent from abandoning the activity creates substantial secular pressure on the adherent to violate his or her religious beliefs rather than abandon the activity.

Id. at 1197-98. Under this test, requiring a religious school to allow same-sex couples at prom might constitute a substantial burden if doing so violated its religious principles.

213. *Id.* at 1210 (Kennard, J., concurring and dissenting).

214. *See id.* at 1211.

215. *See id.* at 1214 (noting the possibility of "case-by-case" review under the current system).

216. *Id.* at 1210 n.7.

status.[217] Each court reached differing conclusions on divided votes, pointing to the difficulty present in assessing these competing interests. Alaska decided its case on similar grounds to the California court: Landlords refusing to rent to unmarried couples violated the state's prohibition on marital status discrimination and were not entitled to a religious exemption under either *Employment Division v. Smith* or the compelling interest test required under state constitutional law.[218] Minnesota, on the other hand, rejected the argument that discriminating against unmarried couples was marital status discrimination;[219] it went on to rule, under the state constitution's compelling interest test, that the government did not have a compelling interest, in part because fornication was still a crime.[220] Massachusetts also used a compelling interest test under its state constitution, but reached a middle position between the other two courts: It accepted this form of discrimination as based on marital status, observing that the state's anti-fornication law was of "doubtful constitutionality,"[221] but remanded to the lower court to determine if the state had a compelling interest.[222]

The California and Alaskan courts' constitutional analysis of the landlords' rights under *Employment Division v. Smith* is most likely correct: The state's housing statute is a generally applicable law, neutrally applied to all landlords regardless of religious belief. Under Scalia's majority opinion, individuals cannot receive constitutionally compelled exemptions absent the narrow exceptions of hybrid rights or unemployment insurance. Whether a landlords' right to free speech is violated when she is forced to post what the law is as to her business may be a closer question as to hybrid rights, although the Supreme Court recently stated that laws that "require[ ] the disclosure of beneficial consumer information . . . justifies less than strict review."[223] Arguably, informing prospective tenants about their housing rights is "beneficial consumer information" receiving a less exacting review under the First Amendment.

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217. *See* Malgorzata Laskowska, *"No Sinners Under My Roof": Can California Landlords Refuse to Rent to Unmarried Couples by Claiming a Religious Freedom of Exercise Exemption from a Statute Which Prohibits Marital Status Discrimination?*, 36 SANTA CLARA L. REV. 219 (1995).

218. *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 276 (Alaska 1994), *cert. denied*, 115 S. Ct. 460 (1994).

219. *See* State *ex rel.* Cooper v. French, 460 N.W.2d 2, 6 (Minn. 1990).

220. *See id.* at 9-10.

221. Attorney General v. Desilets, 636 N.E.2d 233, 235, 240 (Mass. 1994).

222. *See id.* at 241. The court also found that the law substantially burdened the landlord's free exercise rights. *See id.* at 238.

223. 44 Liquormart, Inc. v. Rhode Island, 116 S.Ct. 1495, 1507 (1996) (plurality opinion).

Unlike Justice Scalia's bright-line rule, a compelling interest test similar to RFRA's would involve balancing the state's interests against the free exercise rights of persons seeking an exemption. As with any standard, reasonable minds can disagree about its specific application in any given case. As the trend on the Supreme Court in the 1980s was to read the compelling interest test narrowly, the fact the plurality used a threshold test to deny the plaintiff her claim reflects a pattern consistent with these Supreme Court precedents.[224] If RFRA had restored a strong test similar to *Sherbert*, however, the court's determination regarding the burden might be different. Under *Sherbert*, the Court admitted that the state's welfare scheme burdened the plaintiff's religious beliefs even though the burden was "only an indirect result" of the State's law; the Court contrasted this situation with "criminal sanctions" that would pose a more direct burden.[225] In *Smith*, the landlord lost her claim before a government commission, which then ordered her to pay almost $1000 to her prospective tenants for violating their rights.[226] A landlord could argue that the threat of a civil judgment such as this could be as coercive as a criminal monetary sanction.

The plurality may have a persuasive case, however, that the landlord could avoid the burden while the *Sherbert* plaintiff could not. The *Smith* plurality claims that the landlord can reinvest her capital in pursuits not subject to the state's anti-discrimination law, thereby making an assumption about the mobility of capital and the ability of the relatively better-off to avoid economic endeavors that conflict with their religious beliefs.[227] Arguably, in *Sherbert* the plaintiff could also avoid her conflict by not applying for unemployment benefits. The *Sherbert* court, however, rejected this argument, reflecting the correct intuition that those seeking unemployment benefits often have no alternative but to accept the benefits if they want to survive.[228]

Even if the plurality is correct that the landlord can avoid her burden, Justice Kennard's criticism of the plurality's use of third-party interests at the threshold of its inquiry, rather than at the compelling interest stage, is

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224. *See, e.g.*, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 447 (1988); *see also* Wistner, *supra* note 164, at 1077 (noting that the *Smith* case was "a culmination" of judicial hostility to free exercise claims); Lupu, *supra* note 164, at 178-80.

225. 374 U.S. 398, 403 (1963).

226. Smith v. Fair Employment & Hous. Comm'n, 12 Cal. 4th 1143, 1154 (1996) (plurality opinion), *cert. denied*, 117 S. Ct. 2531 (1997).

227. *See id.* at 1170 (indicating that giving up work *and* unemployment benefits because of one's religious beliefs "is not a realistic solution for someone who lives on the wages earned through personal labor").

228. 374 U.S. at 404.

probably justified: The rights of third parties who would be victims of discrimination are closely tied to the state's interest in compelling landlords to stop discriminating. Regardless of the effects of Smith's actions on prospective tenants, requiring her to rent to unmarried couples places her in a dilemma—she must either give up her current livelihood or violate her religion. The relative ease from which she can remove herself from the burden might be relevant to whether it constitutes a "substantial" burden, but she nonetheless still faces a difficult choice.

If the court should have found that FEHA substantially burdened Smith's free exercise, its reasoning regarding the rights of others suggest that it reached the right result anyway, as Smith would not overcome the state's compelling interest in opposing all forms of arbitrary discrimination, including that based on marital status. In *Bob Jones University v. United States*, the U.S. Supreme Court explicitly recognized that ending racial discrimination in education was a compelling state interest the could justify denying tax-exempt status to a religious university for its prohibition against mixed-race dating.[229] The court noted that "a firm national policy" against racial discrimination at public schools had been set starting with *Brown v. Board of Education*, and that whatever the rationale for the private school's policies (religious or otherwise), "racial discrimination in education is contrary to public policy."[230] Similarly, in *Georgetown University*, the court held that the District of Columbia could determine that ending discrimination based on sexual orientation in education was also a compelling state interest.[231] A state could legitimately assume that marital status, like race or sexual orientation, is a category that is irrelevant to whether a person should have access to public

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229. 461 U.S. 574, 605 (1983).

230. *Id.* at 593-95 (citing 347 U.S. 483 (1954)).

231. Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 5 (D.C. Ct. App. 1987) (plurality opinion); *see also* Wistner, *supra* note 164, at 1094. Wistner offers four reasons courts might find protecting certain categories of people from discrimination a compelling state interest:

> [where] (1) there is a clear, national policy of protecting the group from discrimination; (2) the particular group has suffered from a history of discrimination or stereotyping that must be remedied; (3) the act of discrimination against an individual in the protected class creates a stigma, stereotype, or loss of equal opportunity; and (4) acts of discrimination in general are evils, so the government has a more general compelling interest in eradicating invidious discrimination and promoting civil rights.

Id.

accommodations or the benefits of being a member of society.[232] Although Justice Baxter correctly pointed out that the state is not always consistent in enforcing its anti-discrimination laws (e.g. by allowing state universities to deny housing to unmarried couples),[233] this inconsistency may suggest that the state in other areas is violating its own public policy rather than undermining the compelling interest of ending marital status discrimination.[234] Whether that goal itself is compelling, however, does not answer whether anti-discrimination laws protecting gay people represent a state interest that can override religious objections.[235]

In general, *Smith* seems consistent with the Supreme Court's recent jurisprudence under *Employment Division v. Smith* or the earlier, post-*Yoder* cases that began to cut back on the compelling interest test. Although the California decision may have downplayed the burden faced by Smith, its recognition that ending marital status discrimination constitutes a compelling state interest bodes well for claims by gay people to apply generally applicable laws even in cases where individuals object on religious grounds. Combined with *City of Boerne*'s reaffirmation of the *Smith* peyote case, gay advocates in California are in a stronger position to protect the rights of gay students under laws of general applicability: these decisions reduce the threat that many individuals, motivated by religious-based homophobia, will try to "opt out" of anti-discrimination laws and cases protecting gay people.

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232. A person's status as single has no bearing on his ability to be a good tenant. *See, e.g.*, Laskowska, *supra* note 217, at 254 (noting that a person's marital status is irrelevant as to whether she can pay her rent). Also, allowing landlords to impose their values on tenants may unfairly infringe on the tenants' interests in privacy in their home. *See* Wistner, *supra* note 164, at 1104.

On the other hand, unlike identities based on race, sex, or sexual orientation, an unmarried couple can opt out of its disfavored status—specifically, by getting married. *Id.* at 1097.

233. Smith v. Fair Employment & Hous. Comm'n, 12 Cal. 4th 1143, 1243 (1996) (Baxter, J., concurring and dissenting); *see also* Laskowska, *supra* note 217, at 248 (noting the "privileged position of married couples which pervades state law").

234. *Cf. Smith*, 12 Cal. 4th at 1156 (plurality opinion) (listing statutes in which the legislature "wished to treat married and unmarried couples identically"); *Georgetown University*, 536 A.2d at 46 (Newman, J., concurring) (observing that "an interest need not be identical in weight to some other compelling interest to be compelling itself").

235. *See* Part IV, *infra*; *see also* Cruz, *supra* note 78, at 1231 ("[I]t is unlikely that the mere *existence* of a law prohibiting sexual orientation discrimination can constitute a substantial burden on religion."); *Smith*, 12 Cal. 4th at 1210 n.7 (Kennard, J., concurring and dissenting) (suggesting that protecting gay couples from discrimination might be a compelling state interest).

IV. APPLYING *SMITH V. FEHC* TO PRIVATE HIGH SCHOOL PROMS

Assuming that the Unruh Act or other anti-discrimination legislation protecting gay citizens applies to private religious schools, the question remains: Does requiring a religious school to allow same-sex dating at school functions substantially burden its religious practice? To answer this question, this Part considers a gay student's rights using the two approaches laid out in *Smith v. Fair Employment & Housing Commission.*

Under the more restrictive U.S. Supreme Court jurisprudence, recently reaffirmed by the *City of Boerne* decision, a religious school probably would lose its claim and have to allow a same-sex couple to attend prom or suffer the consequences under the law. As an access-to-benefits case, the state's anti-discrimination law would be a general law applying to "all business establishments of every kind whatsoever,"[236] here defined to include private schools. Religious schools might successfully claim, however, that their case involves a hybrid right, specifically their right to freedom of speech. Because so much of the prom's value to the young gay students may lie in the "message" that their attendance conveys,[237] the school could argue that it has its own free speech rights to subsidize only the speech it wants. The fact that courts in *Fricke* and *Bonner* decided their cases on First Amendment grounds, without reaching the Equal Protection issue,[238] suggests that attending school-sponsored social events as an out gay person inherently involves a message—one that

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236. CAL. CIV. CODE § 51 (1997).

237. *See supra* text accompanying notes 56-66, 115.

This scenario differs from the parade at issue in *Hurley v. Irish-American Gay Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995). In that case, the Court allowed the exclusion of a pro-gay message from a private parade. Unlike handing out benefits such as access to prom, parades are inherently "a form of expression, not just motion." *Id.* at 568. Distributing benefits to students as part of their attendance at school does not convey a message in and of itself. *See* Rosenberger v. University of Virginia, 115 S. Ct. 2510, 2523 (1995) (observing that providing club benefits to a religious student group did not mean the university was endorsing a religious viewpoint).

In addition, the *Hurley* Court did not address whether the parade could exclude participants solely on the basis of sexual orientation. *Hurley*, 515 U.S. at 564-67, 572-73. A school preventing a gay couple from attending prom, however, is discriminating against these students on the basis of sex and sexual orientation. *See supra* text accompanying notes 115-19. *See also Hurley*, 515 U.S. at 572 (observing that state public accommodation laws "do not, as a general matter, violate the First . . . Amendment[ ]"); *id.* at 580 (noting that its prior decision, *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988), held that the "compelled access to [a] benefit" offered by a dining club "did not trespass on the organization's message itself").

238. *See Fricke*, 491 F. Supp. at 388 n.6 (D. R.I. 1980); *Bonner*, 509 F.2d 652, 662 n.6 (1st Cir. 1974).

a religious-minded school might argue it should be allowed to avoid. *Georgetown University*, however, held that the provision of benefits can be separated from endorsement or recognition, areas in which the school retains its full free speech rights.[239] Even so, the D.C. court considered its case under the pre-*Employment Division v. Smith* compelling interest test. If a court found a hybrid rights case here, it too might assess the case under this test. Assuming that a hybrid-rights case applies, a court must ask two questions: Does the law substantially burden the school's free exercise of religion, and if so, does the government have a compelling interest that it pursues with the least restrictive means possible?

Tracking the analysis in the California *Smith* case, a court might first ask if the school could easily avoid the burden that it faces. In most cases, the school's religious beliefs will not compel it to hold proms, which serve as a cultural or social tradition rather than as an exercise of religious practice. Because prom is usually not a part of religious expression, a court can characterize it as an access-to-benefits situation—a case of conduct not motivated by religion rather than a case of the school "speaking" on matters of faith.[240] As one author noted, "[s]ome activities are objectively classifiable as religious, such as communicative and associative activities engaged in solely for purposes of worship or proselytizing."[241] Prom arguably is not one of those activities in most faiths. Protecting gay teens' access to the prom, then, involves promoting access to facilities or services, at most an "indirect infringement" on the school's free exercise rights.[242]

Schools, of course, are different from other businesses, such as rental housing, because one of the goals of a religious school is to proselytize, and therefore the nature of the potential burden may be more substantial and harder to avoid.[243] The school has a First Amendment interest in

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239. *See* Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 17 (D.C. Ct. App. 1987) (plurality opinion).

240. *See* Cruz, *supra* note 78, at 1194 (citing Braunfeld v. Brown, 366 U.S. 599, 605 (1961)); *Georgetown Univ.*, 536 A.2d at 22 ("[T]he [First] Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.") (quoting Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940)).

241. Cruz, *supra* note 78, at 1200.

242. *See Georgetown Univ.*, 536 A.2d at 45 (Newman, J., concurring).

243. *See id.* at 24 (plurality opinion) ("Georgetown's stock-in-trade is in ideas; as a private, nonprofit, religiously affiliated educational institution seeking to implement its own vision of education, it is entitled to favor particular views on moral, ethical, philosophical, political and social issues.").

transmitting its doctrine, a job it might argue is hindered by requiring it to allow same-sex couples at dances despite its anti-gay stance.[244]

As noted earlier, allowing gay students to attend prom with same-sex dates arguably does not violate the anti-celibacy or anti-fornication rules of religious faiths that do not ban gay students outright; to assume that same-sex prom dating leads to sex calls into question the school's tolerance of heterosexual dating at proms, as well.[245] However, schools may be too blinded by reflexive homophobia to see the inconsistencies in their position, and courts are, understandably, unwilling to investigate how consistent certain policies or practices are—such as banning gay couples from prom—to the religion's belief system.[246]

Assuming courts accept that a religious belief is violated by allowing same-sex couples at prom, the question of whether schools can avoid the burden they face could be a two-edged sword for gay students. Precisely because proms are not an exercise of religious practice, schools might be willing to forego them altogether rather than allow one gay couple to attend. This possibility is one of the most serious obstacles to forcing religious schools to recognize same-sex couples: Even if a student could successfully argue that the anti-discrimination law applies to the private school *and* that its application does not violate the Free Exercise Clause, she may ultimately lose if the school simply stops holding proms that it is under no obligation to provide.[247] A total ban could breed resentment

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244. *See* Cruz, *supra* note 78, at 1201 (suggesting that the Supreme Court's jurisprudence recognizes "a 'zone of doctrinal transmission' . . . embrac[ing] a range of activities necessary for the transmission of religious belief and doctrine: prayer, preaching, proselytizing, and group worship"). Cruz also notes that discrimination occurring "in the confines of an exclusive religious community that imposes rigorous doctrinal demands on its adherents" may raise "constitutional privacy concerns" countering a state's compelling interest. *Id.* at 1237.

245. *See* text accompanying note 89-90, *supra.*

246. *See* Employment Div. Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 887 (1990). The Supreme Court has ruled that churches could fire an employee on religious grounds even if his job did not entail religious duties or functions, but this exemption was pursuant to a legislative exception under the Civil Rights Act of 1964. *See* Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 329 (1987). Arguably, this situation does not apply to our hypothetical gay student's case because it involves the legislature's voluntary accommodation of religious belief, rather than an exemption mandated by the Constitution.

247. *Cf.* Sahagun, *supra* note 30, at 9A (reporting the Salt Lake City Board of Education decision to ban all high school clubs rather than allow one gay student group). The public school in Utah, however, may face constitutional restrictions on barring all clubs that the private school would not face. *Cf.* Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 870-71 (1982) (plurality) (forbidding a

among many straight students, already unsympathetic to the gay teenager's plight, as they blame her for the end to prom rather than their school's homophobia.[248] For the student, however, a prom without the date of her choice may be the same as no prom at all, although she would probably not want to end the event for everyone else. She might find allies within the religious community, including friends and parents, to oppose shutting down the prom, although this strategy may prove futile if much of the community supports the school's policies. For any student pursuing this course, the chance that the school will shut down prom altogether is a serious threat.

In sum, a religious school arguably can avoid the burden altogether, principally by not holding a prom at all. Many schools may be more flexible, however, as with the case of Georgetown University, which decided to provide access to benefits to the gay rights group, rather than denying benefits to all clubs.

The second element the *Smith* court considered was the landlord's added expense argument. Arguably, that concern does not apply to the prom context, because one additional couple will add negligibly to the cost of the event. In addition, in many cases students must pay a fee for access, so allowing a same-sex couple will actually increase the school's revenues for holding the event. Avoiding the burden (i.e. not holding the prom) will even save the school money, unlike the landlord context in which redeploying capital entails transaction costs. In some ways, this situation presents a better case than *Georgetown University*, because here no funds are going to support a disfavored message—unlike in the *Georgetown* case in which the university expends money to pay for phone lines, office space, and computers that every club, including the gay group, could use.[249]

Finally, denying gay couples access to prom has a serious impact on the rights of third parties; namely, the students who are treated as less than full students because of their sex and sexual orientation. As discussed earlier, however, assessing the school's impact on the students may be more appropriate at the compelling interest stage, rather than in determining whether a substantial burden exists.[250] Even so, the school might try to argue that it is not burdening the rights of students at all because, by choosing to attend a religious institution, the students are implicitly agreeing to be subject to whatever rules and doctrines the school

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public school from removing library books in a "narrowly partisan or political manner" if its intent is "to deny [students] access to ideas with which [the school] disagreed").

248. *See* Brooke, *supra* note 28, at B8 (quoting student who felt that the government should ban "homosexuality," rather than all student clubs).

249. *See Georgetown Univ.*, 536 A.2d at 40 (Pryor, C.J., concurring).

250. *See supra* text after note 228.

chooses to apply. *Georgetown University* and similar cases, however, recognize a limit to this argument: Private organizations, including religious ones, can still be subject to the state's anti-discrimination laws, regardless of whether most students (or at least their parents) agree with church doctrine.[251] The social harms that flow from discrimination affect people outside the institution and undermine the quality of life for the affected group in society at large.[252] Even though an African American might choose to attend Bob Jones University, fully aware of its anti-interracial-dating policy, it does not mean that the U.S. government no longer has an interest in denying the school tax exempt status for practicing racial discrimination.[253]

The issue of consent also may not be as clear cut as many schools would care to admit. Many religious schools are relatively open to the public and present themselves as places where people of all faiths can attain a solid, secular education "informed" by strong moral teachings.[254] A student might legitimately attend such an institution without expecting that the minutia of the particular faith's theological doctrine will be imposed on all students attending. In addition, parents often have a tremendous say in where their children will attend, even though their youngsters may develop their own ideas about religion or homosexuality that conflict with church teaching. This problem may be particularly acute for gay students, who may not fully discover their sexuality until after they have begun attending schools for several years and then face the choice of staying at an anti-gay institution or severing the ties they have established for a new school that may be just as homophobic as the one they are leaving.[255] Professor Lupu has argued that courts should show less deference to institutions' claims for exemptions versus those of individuals, suggesting that a school's claim should be weaker than that of individual

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251. *See generally Georgetown Univ.*, 536 A.2d 1.

252. *See, e.g.*, Lupu, *supra* note 121, at 750-51.

253. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 605 (1983).

254. *See Georgetown Univ.*, 536 A.2d at 7-8.

255. *See* Lupu, *supra* note 121, at 751 n.31 ("The consent of subjugated group members to such practices, taught to them from early ages as natural and divinely inspired, is highly questionable.").

In extreme enough cases, a gay student may wish to leave a school where he faces constant verbal and physical harassment. *See* Nabozny v. Podlesny, 92 F.3d 446, 452 (7th Cir. 1996) (noting that Nabozny eventually left the school where officials failed to protect him from harassment by his fellow students). This option, however, is arguably second-best to being treated equally and fairly under the law at the school at which he has established ties and made friends.

landlords when balancing religious rights against those of third parties.[256] Even the Supreme Court has recognized that a school's claim for an exemption to an anti-discrimination law carries less weight than that of a purely religious institution.[257]

In general, based on the California *Smith* decision's three factors, the religious school might not suffer a *substantial* burden by following the state's anti-discrimination law: It can avoid the burden, it suffers no additional economic cost, and its actions infringe on the rights of others. However, these factors might also apply to the *Georgetown* case, in which the court found that requiring the university to give benefits (but not recognition) still constituted a burden triggering the compelling interest test.[258] The anti-discrimination law would place the school in a difficult choice of continuing a cherished social tradition (i.e. holding proms) and complying with a mandate to stop discriminating based on sexual orientation. Coupled with the free speech aspects present in the *message* that attendance by gay couples at the prom sends, a court may be reluctant to say that no burden exists for the school.[259]

Assuming a substantial burden does exist, a gay student could argue that the government has a compelling state interest in fighting discrimination against gay people, given the long and persistent homophobia they have faced throughout this nation's history.[260] The

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256. *See* Lupu, *supra* note 121, at 774; *see also supra* text accompanying notes 133-35.

257. *See Bob Jones Univ.*, 461 U.S. at 604 n.29 ("We deal here only with religious *schools*—not with churches or other purely religious institutions; here, the governmental interest is in denying public support to racial discrimination in education. . . . [R]acially discriminatory schools 'exer[t] a pervasive influence on the entire educational process,' outweighing any public benefit that they might otherwise provide. . . .") (citations omitted).

258. *Georgetown Univ.*, 536 A.2d at 31 (plurality opinion). *Cf.* Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 336 (1987) (noting that "it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious").

259. *See* Cruz, *supra* note 78, at 1230-31.

260. *See generally* MILLER, *supra* note 34. *See also* Smith v. Fair Employment & Hous. Comm'n, 12 Cal. 4th 1143, 1210 n.7 (Kennard, J., concurring and dissenting); *see also* Lupu, *supra* note 164, on sexual orientation discrimination:

> In the case of discrimination based on sexual orientation, which may be more widespread than discrimination [based on marital status], . . . graver questions of stigmatic injury may arise, and the likelihood that such discrimination will cause a real problem of access to housing seems significantly greater. Moreover, renting an apartment to those engaging in conduct thought "sinful" by the property owner or rental agent is a far cry

rationales behind ending anti-gay discrimination in society cover a wide range. Perhaps most importantly, anti-discrimination laws implicate self-worth and dignity arguments for gay people: After being despised and mistreated by "mainstream" society, religion, and politics, gay people can use these laws to assert their status as first-class citizens entitled to the same rights as anyone else.[261] The state has an interest in ending discrimination that denies citizens goods, services, and benefits based on a characteristic that is irrelevant to their individual worthiness to receive those benefits.[262] To that end, the state, as protector of the public good, should be able to promote "an egalitarian public order"[263] that includes full access to public accommodations.[264]

> from engaging in the conduct itself, so the religious interests advanced in these cases may be rather weak.

Id. at 210. *Cf.* Lumpkin v. Brown, 109 F.3d 1498, 1501 (9th Cir. 1997) (holding that a city had a compelling governmental interest in preserving its anti-discrimination policies when it removed a member of the city's human rights commission after he made homophobic statements to the public).

261. *See, e.g.*, Roberts v. United States Jaycees, 468 U.S. 609, 625 (1984) (referring to racial and sex-based discrimination as a "stigmatizing injury"); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964) (observing that these laws can help "vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments'") (quoting S. Rep. No. 872, 88th Cong., 2d Sess. at 16 (1964)); *Smith*, 12 Cal. 4th at 1192 (Kennard, J., concurring and dissenting) (noting that "the act of discrimination itself demeans basic human dignity"); *Georgetown Univ.*, 536 A.2d at 32 (plurality opinion); Cruz, *supra* note 78, at 1187 (arguing that "the harm to the victim, including the perpetuation of inferior status, forms a central rationale for anti-discrimination laws"); Lupu, *supra* note 164, at 210 ("Discrimination has both instrumental and symbolic consequences. . . . But [also] discrimination is about insult and psychic injury as well as access to goods, and the state's interest in avoiding those harms may be very strong indeed.").

262. *See Georgetown Univ.*, 536 A.2d at 33 (plurality opinion) ("After careful reflection, we cannot conclude that one's sexual orientation is a characteristic reflecting upon individual merit.").

263. Cruz, *supra* note 78, at 1221 (noting that outside of "facilities restricted to members of a particular religious community," the state should be able to enforce its anti-discrimination laws); *see also* Lupu, *supra* note 121, at 751 (noting how discrimination laws "speak to relations of power and status as reflected in the workplace").

264. *See, e.g.*, Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 283 (Alaska 1994), *cert. denied*, 115 S. Ct. 460 (1994) (arguing that the government has a "transactional interest" in treating "acts of discrimination as independent social evils"); *Georgetown Univ.*, 536 A.2d at 32 (plurality opinion) (observing that the city council felt "[e]very individual should have an equal opportunity to participate fully in the economic, cultural and intellectual life of the District") (quoting D.C. CODE § 1-2511 (1987)); Cruz, *supra* note 78, at 1233 (noting that "[a]ny law prohibiting some form of discrimination in education, employment, housing, or public accommodations furthers the governmental

The school, in turn, would argue that, unlike racial discrimination, no national policy or consensus exists that discrimination based on sexual orientation is wrong;[265] in fact, in federal cases, sexual orientation discrimination often receives only rational review.[266] The *Georgetown* court, however, recognized that discrimination can come in many forms, and that the list of categories that a state may legitimately decide to protect, even in the private sphere, is not limited to race.[267] Even Justice Kennard, who dissented in *Smith*, recognized that because gay people have suffered a long history of discrimination, a state may determine that they deserve the utmost protection in gaining access to the benefits of society.[268] In California, sexual orientation is protected under the state's anti-discrimination laws. Assuming one of these statutes applies, the state has a compelling interest in ending anti-gay discrimination, even in the context of religious schools giving out non-religious benefits such as access to prom.

The final aspect of the compelling interest test, that the law be "the least restrictive means" available, arguably is met in our student's case, as well. Given the pervasive nature of anti-gay discrimination, an anti-discrimination law applying throughout the education context is needed to make sure gay youth are not treated as second-class citizens.[269] Unlike other cases of free exercise claims, this situation involves the rights of third parties—namely, the gay students seeking to take the date of their choice to the prom. At the same time, the school's interest in condemning same-sex relationships is preserved, as it is free to say whatever it wants about homosexuality in its classrooms and church services. In short, even under a compelling interest test, a gay student has a strong argument that the state can apply the Unruh Civil Rights Act to a religious high school's prom.

V. CONCLUSION

As this Article has tried to demonstrate, gay youth at religious high schools can make a strong case that California's anti-discrimination law

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interest in ensuring that its citizenry has full access to publicly available goods, services, and opportunities").

265. *Cf.* Bob Jones Univ. v. United States, 461 U.S. 574, 592-93 (1983). *But see* Wistner, *supra* note 164, at 1099.

266. *See* Romer v. Evans, 116 S. Ct. 1620, 1627 (1996); Nabozny v. Podlesny, 92 F.3d 446, 458 (7th Cir. 1996).

267. *Georgetown Univ.*, 536 A.2d at 32 (plurality opinion).

268. Smith v. Fair Employment & Hous. Comm'n, 12 Cal. 4th 1143, 1210 n.7 (1996) (Kennard, J., concurring and dissenting).

269. *See Georgetown Univ.*, 536 A.2d at 32; Cruz, *supra* note 78, at 1235-36.

applies to their schools and protects their access to benefits. The law is complicated, however, with potential legal pitfalls that an unsympathetic court could use to derail the student's claim: by finding that the state's anti-discrimination laws do not apply to private schools, for example, or by holding that the state's interest in ending anti-gay discrimination is not compelling enough under state constitutional law or under a hybrid-rights test.

In addition, for the teenagers involved in such a suit, the non-legal stakes could be high. The school may decide to forgo prom altogether rather than allow a gay couple to attend, sparking bitter resentment from other students. A teenager pursuing such a case would also have to make the difficult decision to be "out" as a gay person—a hard enough decision even without the school's religious authorities condemning same-sex identity or relationships as immoral. In such a hostile climate, a gay teen may decide to stay "in the closet" at her religious school, or she may decide to leave her friends and ties behind at the old school for an uncertain future at a new one. Ultimately, the decision to pursue a lawsuit might be too much for many teenagers already frightened into silence about their identity lest they experience ostracism from their parents or so-called friends.

Staying in the closet has its own costs, though, for a young person's self-esteem and sense of worth.[270] First loves, dating, and other common adolescent experiences may have to be delayed until it is safer for the young person to be honest about his true identity, or he may have to "disguise" who he is by dating someone to whom he is not attracted simply to "keep up appearances." He may also feel compelled to remain silent when he hears anti-gay taunts or slurs; otherwise, his friends might think he is "one of them." Ultimately, the decision to come out of the closet is a personal one, in which individuals decide when the time is right for themselves. Yet delay has its consequences, potentially leading to feelings of bitterness or poor self-image.

Standing up for one's right to attend prom, whether by trying to negotiate with school officials or through legal means, is a very brave thing for any young person to do even in today's relatively more tolerant environment. Aaron Fricke made the decision over 15 years ago to challenge his school's homophobia; he refused to be a second-class student at his school and insisted that he and his date be allowed to attend the prom. The principles of equal access and individual dignity also apply to religious schools that open their doors to the public to attend: Although schools have their right to advocate their religious principles, some limits should exist on their ability to discriminate on the basis of sexual orientation when handing out secular benefits. The prom is just one of

270. *See, e.g.*, Snow, *supra* note 21, at 57.

many examples in which gay youth are made to feel less than full participants in society; perhaps one day, all schools will voluntarily recognize that attending prom can mean a lot not just to straight couples but to gay youth as well.