BYU Law Review

Volume 2016 | Issue 4 Article 4

October 2016

The Accreditation of Religious Law Schools in Canada and the United States

John Boersma

The Accreditation of Religious Law Schools in Canada and the United States

John Boersma *

Ongoing litigation in Canada suggests that the legal status of religiously affiliated law schools could be in jeopardy. In Canada, regulatory authorities have sought to deny accreditation status to a religiously affiliated law school (Trinity Western University) due to its commitment to a traditional Christian understanding of marriage. According to Canadian provincial authorities, this commitment has a discriminatory effect on LGBT students. Similar events could potentially occur in the United States. It is possible that American regulatory bodies could seek either to rescind or withhold accreditation from a religiously affiliated law school because of the discriminatory effects of its policies.

This comparative Article argues that as a matter both of public policy and law, the regulatory bodies concerned with the accreditation of law schools in both Canada and the United States have ample reason to accredit religiously affiliated law schools. First, as a matter of public policy, diversity in the type of law schools is beneficial due to the pluralism it engenders. Pluralism has long been recognized as a force for social stability in liberal democracies and is continually cited as beneficial by both Canadian and American courts. Furthermore, as a matter of law, both Canada and the United States provide for a robust protection of religious freedom that encompasses religiously affiliated law schools. This Article concludes that, as a result, regulatory authorities in Canada and the United States ought to encourage the proliferation of religiously affiliated law schools.

* Ph.D. Candidate, Department of Political Science, Louisiana State University; J.D. & M.A. Class of 2015, St. John's Law School; B.A. 2011, Ave Maria University. I am grateful to Mark Movsesian and Marc DeGirolami of the Center for Law and Religion at St. John's School of Law for their guidance and insight.

CONTENTS

INTRODUCTION

In the United States, tensions have long existed between religiously affiliated law schools and their accrediting bodies.[1] Indeed, the issue of how academic freedom and labor laws apply to religiously affiliated law schools has often been litigated in American courts.[2] In contrast, Canada has, until recently, seen no such litigation; the simple reason being that no religious organization in Canada has, until

1. *See* Robert A. Destro, *ABA and AALS Accreditation: What's "Religious Diversity" Got to do with It?*, 78 MARQ. L. REV. 427, 428 (1995) ("[T]here are tensions in the accreditation process between religiously affiliated law schools, the ABA, and the AALS . . . . Given the perennially controversial nature of the issues involved in the accreditation process, it would be surprising if such tensions did *not* exist.").

2. *See, e.g.*, Va. Coll. Bldg. Auth. v. Lynn, 538 S.E.2d 682 (Va. 2000); Broderick v. Catholic Univ. of Am., 365 F. Supp. 147 (D.D.C. 1973); Granfield v. Catholic Univ. of Am., 530 F.2d 1035 (D.C. Cir. 1976).

recently, attempted to establish a religiously affiliated law school.[3] However, litigation is currently before a number of Canadian courts regarding the accreditation of Trinity Western University's (TWU) proposed School of Law.[4]

TWU is a liberal arts university situated in Langley, British Columbia (BC). It was founded in 1962 by the Evangelical Free Church of America and currently "exists under the authority of the Evangelical Free Churches of Canada and the United States."[5] In June 2012, TWU submitted a proposal for its law school to BC's Minister of Advanced Education and to the Federation of Law Societies of Canada (FLSC).[6] After TWU secured permission from both these authorities, the individual law societies of the various provinces and territories reviewed the FLSC's approval, and while a majority of the law societies approved TWU's School of Law, both the Law Society of Upper Canada (LSUC) and Nova Scotia's Barrister's Society (NSBS) rejected TWU's proposed law school.[7] Half a year later, the Law Society of British Columbia (LSBC) reversed its approval "based on a referendum of the Province's lawyers."[8] As a result of this reversal, the Minister of Advanced Education in BC "revoke[d] his consent for the TWU School of Law."[9]

Each of the law societies that refused to approve TWU's School of Law indicated that the school's Community Covenant was the reason

3. *See* Matthew Block, *A Victory for Religious Freedom in Canada*, FIRST THOUGHTS BLOG (Jan. 29, 2015), http://www.firstthings.com/blogs/firstthoughts/2015/01/a-victory-for-religious-freedom-in-canada.

4. *See* Emily Zmak, *Nova Scotia Barristers' Society Files Appeal*, TWU.CA, http://www.twu.ca/news/2015/089-nsbs-appeal.html (last updated Apr. 27, 2015); *see also* The Law Soc'y of B.C., *Law Society Appeals Decision in* TWU v. Law Society of BC (Jan. 5, 2016), https://www.lawsociety.bc.ca/page.cfm?cid=4185&t=Law-Society-appeals-decision-in-TWU-v.-Law-Society-of-BC.

5. Trinity W. Univ. v. N.S. Barristers' Soc'y, [2015] NSSC 25, para. 28, 32 (Can.) ("[The connection between TWU and the Evangelical Free Churches of Canada] is not merely an historical connection or a nominal one. The religious denominations involved very much control what happens at TWU.").

6. Trinity W. Univ., *Timeline*, http://www.twu.ca/proposed-school-law/timeline (last visited Oct. 22, 2016).

7. *Id.*

8. *Id.*

9. *Id.*

for its denial.[10] TWU's Community Covenant commits students to a "code of behaviour that TWU says is in keeping with Christian principles as they are interpreted in the evangelical tradition."[11] Included in this code are a variety of Christian practices, including the pledge to "cultivate Christian virtues," to "live exemplary lives," and to "treat all persons with respect and dignity."[12] The provision that prompted several law societies to reject TWU's School of Law prohibits "sexual intimacy that violates the sacredness of marriage between a man and a woman."[13] According to the law societies, while this provision is neutrally phrased, it has the effect of discriminating against LGBT students.[14] The provision, by its terms, limits the sexual activity of all students in the same manner. In practice, however, the provision allows married heterosexual students to engage in sexually intimate behavior, while prohibiting married LGBT students from engaging in such behavior. In response to the law societies' refusal to approve TWU's proposed law school, TWU filed lawsuits against the LSUC, the NSBS, and the LSBC.[15]

At issue in the TWU lawsuits is the constitutionality of denying accreditation to a religious law school that restricts admission to those

10. Law Soc'y of Upper Can., *Treasurer's Statement Regarding Vote on TWU Law School*, http://www.lsuc.on.ca/newsarchives.aspx?id=2147485737&cid=2147498273 (last visited Oct. 4, 2016); N.S. Barrister's Soc'y, *Council Votes for Option C in Trinity Western University Law School Decision*, http://nsbs.org/news/2014/04/council-votes-option-c-trinity-western-university-law-school-decision (last visited Oct. 11, 2016); LAW SOC'Y OF B.C., APRIL 11, 2014 BENCHER MEETING MINUTES 7 (2014), http://www.lawsociety.bc.ca/docs/about/minutes/2014-04-11.pdf.

11. Trinity W. Univ. v. N.S. Barristers' Soc., [2015] NSSC 25, para. 33 (Can.).

12. Trinity W. Univ., *Community Covenant Agreement*, http://twu.ca/student handbook/twu-community-covenant-agreement.pdf (last visited Oct. 11, 2016).

13. *Id.*

14. Respondent's Brief at 4–6, Trinity W. Univ. v. N.S. Barrister's Soc'y, [2015] NSSC 100 (Can.) (No. 427840), http://nsbs.org/sites/default/files/ftp/TWU_Submissions/RespondentsBrief_18-11-2014.pdf; Written Argument of the Law Society of British Columbia at 20, Trinity W. Univ. v. Law Soc'y of B.C., [2015] BCSC 2326 (Can.) (No. 149837), http://www.lawsociety.bc.ca/docs/newsroom/TWU-argument-LSBC.pdf; Factum of the Respondent at 9–10, Trinity W. Univ. v. Law Soc'y of Upper Can., [2016] ONCA 518 (Can.) (No. C61116), http://www.lsuc.on.ca/uploadedFiles/Factum%20of%20the%20Respondent%20LSUC%20-%202016.pdf.

15. *Trinity Western Launches Court Action to Defend Law School*, CBC NEWS (May 6, 2014, 4:07 PM), http://www.cbc.ca/news/canada/nova-scotia/trinity-western-launches-court-action-to-defend-law-school-1.2633816.

who sign its community covenant,[16] which contains arguably discriminatory provisions. At bottom, these lawsuits do not concern a new issue, as religious law schools in the United States often require members to sign various community covenants.[17] What is new with regard to this litigation, however, is that accrediting agencies and state regulatory bodies, in response to revolutionary changes in societal attitudes to sexual orientation,[18] are seeking to deny a religious law school access to various benefits as a result of its community covenant. This litigation has implications far wider than TWU's capacity to open a law school (although to TWU this is, no doubt, a significant implication). Indeed, the societal changes that have preceded this litigation are, of course, well under way in the United States,[19] and it is conceivable that American religious law schools may face legal challenges to their accreditation as well. In addition, this litigation touches upon the role we expect independent associations to play in liberal democratic societies.

This Article will argue that as a matter of public policy and law religiously affiliated law schools should not be denied accreditation in either Canada or America based on their admissions policies, provided such admissions policies are reasonably related to the faith commitments with which the university is allied. Part I will provide a brief preface to the legal analysis by explaining the importance of the

16. Notice for Judicial Review at 2, N.S. Barristers' Soc'y v. Trinity W. Univ., [2015] NSSC 100 (Can.) (No. 427840), http://nsbs.org/sites/default/files/ftp/TWU_Submissions/Notice_JudicialReviewTWU_May2014.pdf; Petition to the Court at 3, Law Soc'y of B.C. v. Trinity W. Univ., 2015 BCSC 2326 (Can.) (No. 149837), https://www.lawsociety.bc.ca/docs/newsroom/TWU-Petition%20LSBC.pdf; Notice of Application to Divisional Court for Judicial Review at 8–9, Trinity W. Univ. v. Law Soc'y of Upper Can., [2015] ONSC 4250 (Can.) (No. 250/14), http://www.lsuc.on.ca/uploadedFiles/For_the_Public/News/News_Archive/2014/notice-to-the-public-re-interventions-and-application(1).pdf.

17. *See, e.g.*, Fritz Snyder & Shirley Goza, *Law School Honor Codes*, 76 L. LIBR. J. 585, 585 (1983) (showing that students at Emory University School of Law, which is formally affiliated with the United Methodist Church, must acknowledge that they agree to the honor code by signing).

18. Bob Gallagher, *LGBT Progress is a Canadian Success Story*, THESTAR.COM (June 2, 2016), https://www.thestar.com/opinion/commentary/2016/06/02/lgbt-progress-is-a-canadian-success-story.html (stating that "we can be amazed at how far Canada has come in such a short time" with respect to the rights of LGBT people).

19. Peter Baker, *Same-Sex Marriage Support Shows Pace of Social Change Accelerating*, N.Y. TIMES (May, 11, 2012), http://www.nytimes.com/2012/05/11/us/same-sex-marriage-support-shows-pace-of-social-change-accelerating.html?_r=0.

issue and why accreditation agencies should adopt a pluralistic approach in the accreditation of law schools that allows for the teaching of law from a variety of different religious viewpoints. Part II will explain why the relevant law in both Canada and the United States favors the accreditation of religiously affiliated law schools.[20]

I. PUBLIC POLICY JUSTIFICATIONS FOR RELIGIOUS LAW SCHOOLS

The accreditation of religious law schools may appear, at first glance, to be purely a legal matter. Indeed, a legal justification made within the confines of the Canadian or American legal paradigm will without doubt be the most influential justification for any decision that is made regarding the accreditation of religious law schools in those countries. Nevertheless, public policy and social theory will likely play an ancillary role in any judicial decisions. In fact, it could even be argued that the legal justifications are secondary to the social theory or public policy justifications, given the fact that legal theory is concerned with instantiating various social norms into a coherent and binding schematic.[21] As will be made clear, this is particularly the case with regards to the accreditation of religious law schools, as the decision as to whether such institutions merit accreditation will have social consequences. In light of this recognition, this Article will begin with a brief discussion of public policy justifications in favor of the accreditation of religious law schools before turning to legal justifications.

As a matter of public policy, the American Bar Association (ABA) and the Canadian law societies—both of which are involved in the process of

20. For an analysis of religious law schools' right to expressive association in the United States, see Kristin B. Gerdy, *"The Irresistible Force Meets the Immovable Object": When Antidiscrimination Standards and Religious Belief Collide in ABA-Accredited Law Schools*, 85 OR. L. REV. 943 (2006). While Kristin Gerdy makes the case that religious law schools are protected in the United States by way of a First Amendment right to expressive association, this Article argues that such law schools are protected by way of the hybrid right articulated in *Employment Division v. Smith*, 494 U.S. 872 (1990).

21. *See* Craig Calhoun, Commentary, *Social Theory and the Law: Systems Theory, Normative Justification, and Postmodernism*, 83 NW. U. L. REV. 398, 398 (1989) ("[J]ust as law is a part of society, not something separate to be related to society, so legal theory is part of the same enterprise with social theory. Legal theorists must inevitably work with implicit accounts of what social life is like, of what the range of possibilities open for its change may be, of how individual action relates to social structure, and of what holds society together.").

law school accreditation[22]—have ample reason to endorse the proliferation of religiously affiliated law schools. This is due to the fact that as independent, voluntary legal associations the ABA and the Canadian law societies are uniquely positioned to help their respective countries to foster the pluralism necessary for a healthy liberal democracy.

Both the American and the Canadian Supreme Court have recognized the important role religious pluralism plays in a liberal democracy. For example, in *Walz*,[23] Justice Brennan of the American Supreme Court writes, "[R]eligious organizations . . . uniquely contribute to the pluralism of American society."[24] Justice Brennan further writes that a "diversity of association, viewpoint, and enterprise [is] essential to a vigorous, pluralistic society."[25] Similarly, in *Loyola High School*,[26] the Canadian Supreme Court cited the European Court of Human Rights' recognition of "the relationship between religious freedom, secularism and pluralism" approvingly[27] and, as a consequence, concluded that "a secular state . . . supports pluralism . . .[b]ecause it allows communities with different values and practices to peacefully co-exist."[28] Furthermore, section 27 of the Canadian Charter of Rights and Freedoms states that the Charter is to be interpreted in such a way that enhances Canada's multicultural heritage[29]—a heritage that has been recognized by the Supreme Court to include religious pluralism.[30] Thus, the legal systems of both

22. The Canadian law societies have the broad power to regulate the practice of law in their respective provinces or territories. *See, e.g.*, Law Soc'y of Upper Can., *About the Law Society*, http://www.lsuc.on.ca/with.aspx?id=905 (last visited Oct. 6, 2016). In contrast, the American Bar Association has the explicit power to accredit law schools. *See* 2015–2016 ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, at v (A.B.A. 2015) [hereinafter A.B.A. Standards].

23. Walz v. Tax Comm. N.Y., 397 U.S. 664 (1970).

24. *Id*. at 689 (Brennan, J., concurring).

25. *Id*.

26. Loyola High Sch. v. Quebec, [2015] 1 S.C.R. 613 (Can.).

27. *Id*. at para. 45.

28. *Id*. The Court went on to note, however, "that religious differences [do not] trump core national values" and that core national values are essential to ensuring that "pluralism work[s]." *Id*. at para. 46–47. Thus, the Court found that both pluralism and a commitment to core national values are necessary for a democratic, liberal state. *See id*. at para. 48.

29. Canadian Charter of Rights and Freedoms, s 27, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

30. *See* R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, 296–97 (Can.).

countries see religious pluralism as a policy that ought to be supported for the health of liberal democracies.

The field of education in both countries has also long stressed diversity's role in preparing students for the workforce.[31] The academy's commitment to diversity is perhaps nowhere more evident than in the realm of legal education.[32] Indeed, both the ABA and the Canadian law societies have taken it upon themselves to actively promote diversity.[33] In light of this commitment to diversity, what are we to make of the stated positions of the Canadian and American regulators of legal education concerning religious law schools? Specifically, what are we to make of ABA Standard 205—which prohibits American law schools from precluding students' admission on the basis of religion[34]—and the obstacles facing TWU's proposed school of law?

At first glance, the relatively hostile position of the ABA and the Canadian law societies towards religious law schools seems to make a great deal of sense.[35] Indeed, it is quite possible that religious law schools may inhibit diversity, as students of particular religious backgrounds will naturally gravitate towards law schools with whose mission statements they can identify. As Robert Destro has noted in Marquette's *Symposium on Religiously Affiliated Law Schools*, concerns

31. Assn. of Am. Univs., *On the Importance of Diversity in University Admissions*, N.Y. TIMES, Apr. 24, 1997, at A27 ("A very substantial portion of our curriculum is enhanced by the discourse made possible by the heterogeneous backgrounds of our students.").

32. *See, e.g.*, Ann Mallatt Killenbeck, Bakke*, with Teeth?: The Implications of* Grutter v. Bollinger *in an Outcomes-Based World*, 36 J.C. & U.L. 1, 39 (2009).

33. A.B.A. Standards, *supra* note 22, at ch. 2, stand. 206; Faisal Bhabha, *Towards a Pedagogy of Diversity in Legal Education*, 52 OSGOODE HALL L.J. 59, 65 (2014) ("[A]ll of the provincial and territorial regulatory bodies have adopted some form of diversity policy . . . .").

34. A.B.A. Standards, *supra* note 22, at ch. 2, stand. 205(c) (precluding student admission on the basis of religion, but noting that "religious affiliation or purpose policies as to admission, retention, and employment [are allowed] only to the extent that these policies are protected by the United States Constitution").

35. *See, e.g.*, SUSAN K. BOYD, THE ABA'S FIRST SECTION: ASSURING A QUALIFIED BAR 109 (1993) (noting that during the revision of Standard 211, following the *Oral Roberts University* case, "Henry Ramsey, Jr., chairman of the Accreditation Committee, said he opposed the Standard as presented because he felt it could be used by schools to discriminate against non-believers . . . . Council members modified the proposal further by inserting a new paragraph stating that law schools 'should not use admission policies that preclude a diverse student body in terms of race, color, religion, national origin, and sex.' The Council felt this was an important addition considering the Supreme Court's opinion in *Bakke* that diversity of a student body has important educational value.").

"that the beliefs or cultural backgrounds of the professors and students might affect either the substantive content of teaching or the tenor of the classroom environment . . . are not misplaced. They can and do."[36]

However, religious law schools can also serve to maintain diversity in the legal profession. While such law schools may reinforce the particular cultures and religious viewpoints of the students that attend them, this tends to ensure that such students maintain their diverse religious identities. The maintenance of such religious diversity has been held to have a positive impact on liberal democracy due to the unique viewpoints they offer to the democratic experience. For example, Brady argues that religious groups function as "training grounds for the exercise of democratic skills and responsibilities, they are 'schools for democracy.'"[37] Accordingly, the "political process is . . . enriched as religious individuals band together in groups to develop their beliefs and contribute to the democratic process."[38]

In contrast, a hostile stance towards religious law schools may lead to a homogenization of legal education that has negative effects on diversity. Such a hostile stance would ensure that students are educated, not in accordance with their traditional religious backgrounds, but instead in accordance with the mainstream of American or Canadian culture. As a result, while the ABA and Canadian law societies' approach to achieving diversity may ensure that every race, creed, and nation is represented in the classroom, it is not clear that after three years of law school every race, creed, and nation will walk at the graduation ceremony. Instead, it is possible that the persons leaving law school will be shorn of their identifying characteristics and will instead represent the homogeneous mainstream of American or Canadian culture. Given the benefits of pluralism, accrediting agencies ought to adopt an approach to accreditation that recognizes "the value of innovation and diversity in the teaching of law."[39] Allowing for diversity in the *type* of law schools

36. Destro, *supra* note 1, at 452.

37. Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of* Smith, 2004 BYU L. REV. 1633, 1700–01.

38. Leilani N. Fisher, *Institutional Religious Exemptions: A Balancing Approach*, 2014 BYU L. REV. 415, 424.

39. Fed'n of Law Soc'ys of Can., *National Requirement for Approving Canadian Common Law Degree Programs*, https://web.archive.org/web/20141218183131/

ensures diversity to a much greater extent than enforcing diversity in the *composition* of law schools.

Of course, a pluralistic approach to the accreditation of law schools could potentially foster a divisive sectarianism in a manner that threatens social cohesion. For example, Steven R. Smith, writing in Marquette's *Symposium on Religiously Affiliated Law School*s, argues that "while diversity is generally a positive value, there are some kinds of diversity we do not seek. For example, legal education is not worse off because there are no law schools that refuse to admit members of minority groups."[40] As a result of this danger, a pluralistic approach to the accreditation of law schools would necessarily have to be circumscribed by reasonable limits so as to avoid such undue discrimination.[41]

Despite the validity of concern regarding divisive sectarianism, democratic countries generally have more to fear from excessive social cohesion. Indeed, in his early nineteenth-century book *Democracy in America*, Alexis de Tocqueville famously argued that the degree of social cohesion or egalitarianism inherent in democracies could lead to despotism.[42] While Tocqueville was writing with direct reference only to the United States, his writings have implications for liberal democracies in general and, in particular, for Canada, due to the historical and cultural affinities between the United States and Canada.[43]

According to Tocqueville, the egalitarianism of democracy has the potential to lead to tyranny in two ways. First, egalitarian democracy's

http://www.flsc.ca/en/national-requirement-for-approving-canadian-common-law-degree-programs/ (last visited Nov. 3, 2016).

40. Steven R. Smith, *Accreditation and Religiously Affiliated Law Schools*, 78 MARQ. L. REV. 361, 363 (1995).

41. While a detailed analysis of such reasonable limits is beyond the scope of this Article, an approach that may be feasible is one that distinguishes between status and conduct. By means of this distinction, religiously affiliated law schools would be able to use their admissions policies to discriminate based on conduct (such as sexual relations), but would not be able to discriminate based on status (such as race or gender).

42. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 641 (Harvey C. Mansfield & Delba Winthrop eds., Univ. Chi. Press 2000) (1835 & 1840).

43. *See* David Schneiderman, *Edmund Burke, John Whyte and Themes in Canadian Constitutional Culture*, 31 QUEEN'S L.J. 578, 596 (2006) (arguing that the foundational values of Canada's constitutional order "are largely liberal, founded upon a desire for both liberty and security," and suggesting that "there is little to distinguish [Canada] from other operative liberal political cultures, including the United States").

tendency toward majority rule[44] can lead to a tyranny of the majority, whereby individuals are placed at the mercy of the majority.[45] Second, the assumption of individualism in egalitarianism may lead to tyranny. According to Tocqueville, egalitarianism tends to produce individualism, which compounds the threat of tyranny posed by majority rule,[46] because individuals will be incapable of joining forces to counter the threat of tyranny.[47] As a result, Tocqueville saw democracy's insistence on majority rule, coupled with its tendency towards individualism, as creating the conditions for tyranny to flourish.

Despite this potential for despotism, Harvey Mansfield argues that "Tocqueville did not despair of democracy. He neither scorned it nor opposed it. On the whole, he approved of it."[48] This positive appraisal was owed in part to the prominent role played by two forces in American society: independent, voluntary associations and law. Ralph Hancock notes that Tocqueville saw the wide variety of independent associations as countering the individualism to which democracies tend.[49] Associations, by their very nature, compel people to come together and focus on goods beyond themselves, thus tempering the individualism inherent in democracy.[50] In addition, associations formed "for moral and intellectual ends" (e.g., religiously affiliated law schools) bring "to the public eye new, uncommon sentiments and

44. TOCQUEVILLE, *supra* note 42, at 236 ("The moral empire of the majority is founded in part on the idea that there is more enlightenment and wisdom in many men united than in one alone, in the number of legislators than in their choice. It is the theory of equality applied to intellects.").

45. *Id.* at 241 ("When a man or a party suffers from an injustice in the United States, whom do you want him to address? Public opinion? that is what forms the majority; the legislative body? it represents the majority and obeys it blindly; the executive power? it is named by the majority and serves as its passive instrument . . . .").

46. *Id.* at 483–84 (explaining that the equality of conditions prevalent in democratic countries ensures that there are a great number of individuals who are self-sufficient. This self-sufficiency causes them to believe that they "owe nothing to anyone, they expect so to speak nothing from anyone; they are in the habit of always considering themselves in isolation").

47. *See id.* at 485 (writing, concerning the connection between individualism and tyranny, that "[d]espotism . . . sees the most certain guarantee of its own duration in the isolation of men").

48. Harvey C. Mansfield & Delba Winthrop, *Introduction* to TOCQUEVILLE, *supra* note 42, at xx.

49. *See* Ralph Hancock, *Tocqueville on the Good of American Federalism*, 20 PUBLIUS 89, 103–04 (1990).

50. *Id.* at 104.

ideas."[51] Thus, the pluralism provided by such associations serves to both temper individualism and bring alternative viewpoints to bear on public affairs.

Law similarly counteracts the negative aspects otherwise entailed by majority rule. Tocqueville saw the authority "given to lawyers . . . [as] the most powerful barrier today against the lapses of democracy."[52] Law serves to temper the passions of the people, in particular majority factions, thereby allowing rational discourse to prevail.[53] Thus, both independent associations and the law play a role in protecting democracies from tyranny.

The ABA and the law societies of Canada are among the more significant independent associations that can counteract potential threats to the vitality of North American democracy, and thereby can help prevent its lapse into despotism. As noted, a hostile position to religious law schools can have a homogenizing effect on legal education. This approach to education is inherently egalitarian, as people of all cultures and religions will be educated in the same manner and all cultures and religions will be held to be of equal value. As a result of such egalitarianism, the pre-existing value judgments of these cultures and religions also come under equal scrutiny and critique. The danger of this approach is that it can be used to substitute pre-existing attitudes, loyalties, and values with those favored by the state, thereby destroying diversity and contributing to the establishment of despotism.

The law societies of Canada and the ABA, in their role as the accrediting agencies of law schools, are uniquely positioned to counteract the homogenization of legal education. Indeed, these accrediting agencies have the very characteristics that Tocqueville argued serve to counteract democracy's tendency towards tyranny. They are not only voluntary and independent associations but also consist entirely of legal professionals. Their associational character protects against democracy's tendency towards individualism, while their legal aspect counteracts democracy's tendency towards majoritarianism. Thus, these institutions have the potential to act as

51. Mansfield & Winthrop, *supra* note 48, at xxiii.

52. TOCQUEVILLE, *supra* note 42, at 251.

53. *Id*. at 256 ("When the American people let themselves be intoxicated by their passions or become so self-indulgent as to be carried away by their ideas, the lawyers make them feel an almost invisible brake that moderates and arrests them.").

powerful counter-majoritarian institutions, thereby safeguarding civil liberty.[54] As a result, when accrediting law schools, the ABA and the law societies of Canada should adopt a pluralistic approach. Rather than ensuring that only law schools conforming to the dictates of majoritarian morality receive accreditation,[55] these institutions should promote alternative law schools so as to ensure that social cohesion does not devolve into the tyranny of the majority.

II. LEGAL PROTECTION OF RELIGIOUSLY AFFILIATED LAW SCHOOLS

The pluralistic approach to the accreditation of religious law schools is not only sound public policy, but, as will be made clear, is required as a matter of law in both Canada and the United States. This Part will proceed in two sections. Section A will analyze the protections afforded religious law schools under Canadian law. Specifically, it will argue that the Canadian law societies do not have the jurisdiction to regulate legal education in Canada. Furthermore, it will show that religious law schools that employ arguably discriminatory admissions policies are protected under a proper balancing of the right to religious freedom and the right of equality articulated in the Canadian Charter of Rights and Freedoms. It will then conclude with a brief discussion of the current status of the ongoing litigation involving TWU's proposed school of law.

Section B will turn to the American context and examine the legislation and jurisprudence that protects religious law schools in the United States. First, this section will briefly discuss the standards the ABA has adopted for accreditation. Next it will examine the rights of religious law schools in light of the Supreme Court's First Amendment jurisprudence. It will argue that religious law schools are free from

54. The ABA was expressly set up as a self-governing body out of an acknowledgement that the legal profession should be independent from domination by the government. *See, e.g.*, ELLEN J. BENNETT ET AL, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 2 (7th ed. 2011) ("An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.").

55. Polls suggest that there is a growing trend in the acceptance of gay rights in general and, in particular, of gay marriage. *See, e.g.*, *Changing Attitudes on Gay Marriage*, PEW RES. CTR. (May 12, 2016), http://www.pewforum.org/2016/05/12/changing-attitudes-on-gay-marriage/ (showing that "[b]ased on polling in 2016, a majority of Americans (55%) support same-sex marriage, compared with 37% who oppose it," while polling in 2001 found that "Americans opposed same-sex marriage by a margin of 57% to 35%").

complying with neutrally phrased anti-discrimination legislation because they enjoy a "hybrid right" consisting of both the right to freedom of religion and the right to freedom of association. This section will then conclude with a brief discussion of the current status of the legal realm *vis à vis* religious freedom and homosexual rights.

A. Legal Analysis Under Canadian Law

There are a number of factors in the Canadian legal system that weigh in favor of the accreditation of TWU. This section will begin by explaining the basic requirements a law school must meet in order to receive accreditation. Next, this section will discuss the jurisdiction of the law societies and suggest that they do not have the legal mandate to regulate legal education in Canada. Last, it will explain the state of the law in the realm of religious freedom and in the realm of equality rights under the Canadian Charter of Rights and Freedoms. As will be made clear, the Supreme Court has rejected a hierarchical approach to rights, whereby certain rights would be privileged over others, and has instead opted for a balancing approach. Applying such a balancing approach to the religious freedom rights of religious law schools and the equality rights of LGBT individuals weighs in favor of religious law schools.

1. National requirement

The regulation of the practice of law in Canada is undertaken by the law societies of Canada. Each Canadian province and territory has its own law society, which is mandated by provincial and territorial statute to regulate the practice of law in the public interest.[56] These law societies have the monopolistic power to determine which law school graduates they will admit to their society—a prerequisite to practicing law in each province and territory.[57] That the law societies have the sole power to regulate an industry on behalf of the state suggests that they are state actors and must comply with the Canadian Charter of Rights and Freedoms; although the Supreme Court has

56. *See, e.g.*, Law Soc'y of Upper Can., *supra* note 22.

57. Geoff Plant, *Law Society Benchers Put in a Tough Spot with Trinity Western Debate*, GLOBE AND MAIL (June 13, 2014, 7:35 PM), http://www.theglobeandmail.com/news/british-columbia/law-society-benchers-put-in-a-tough-spot-with-trinity-western-debate/article19167527/.

never directly stated that the law societies must comply with the Charter, case law strongly suggests that rules promulgated and the decisions made by the law societies must comply with the Charter.[58]

In 2010, the law societies of Canada "agreed on a uniform national requirement that graduates of Canadian common law programs must meet to enter law society admission programs," which would be governed by the FLSC.[59] As part of this agreement, the FLSC created the Canadian Common Law Program Approval Committee, which is responsible for ensuring that the various common law programs of Canada meet the National Requirement.[60]

The National Requirement stipulates that in order to be approved, law schools must offer a curriculum that covers certain substantive legal courses and skills, including "the core principles of public law in Canada," such as constitutional law, criminal law, and administrative law, and "the foundational legal principles that apply to private relationships," such as "contracts, torts and property law."[61] However, in establishing the National Requirement, the FLSC took a decidedly Tocquevillian stance in favor of pluralism and "determined that it would be neither necessary nor appropriate to dictate how individual law schools choose to teach the required competencies" because "[t]he Federation and its member law societies recognize the importance of academic freedom and the value of innovation and diversity in the teaching of law."[62] As a result of this position in favor of pluralism, the Approval Committee did not view TWU School of

58. Trinity W. Univ. v. N.S. Barristers' Soc'y, [2015] NSSC 25, para. 9 (Can.) ("The NSBS as a state actor has to comply with the *Charter*."); *see* Black v. Law Soc'y of Alberta, [1989] 1 S.C.R. 591, 634–35 (Can.) (finding that two rules of the Law Society of Alberta violated section 6 of the *Charter*); Eldridge v. British Columbia (Att'y Gen.), [1997] 3 S.C.R. 624, 654 (Can.) (noting that "it is a basic principle of constitutional theory that since legislatures may not enact laws that infringe the *Charter*, they cannot authorize or empower another person or entity to do so"). *But see id.* ("It is possible, however, for a legislature to give authority to a body that is not subject to the *Charter*.").

59. Kent Kuran, *Law Societies Introduce New Requirements*, ULTRA VIRES (Oct. 30, 2013), http://ultravires.ca/2013/10/law-societies-introduce-new-requirements/.

60. Fed'n of Law Soc'ys of Can., *Canadian Common Law Program Approval Status*, http://flsc.ca/resources/canadian-common-law-program-approval-status/ (last visited Sept. 16, 2016).

61. Fed'n of Law Soc'ys of Can., *National Requirement*, http://docs.flsc.ca/National-Requirement-ENG.pdf (last visited Oct. 13, 2016).

62. Fed'n of Law Soc'ys of Can., *supra* note 39.

Law's community covenant as a hindrance to its application for accreditation.[63]

2. Law societies' jurisdiction and the public interest

While Canada's law societies agreed to implement the National Requirement,[64] they also have the statutory duty "to regulate the legal profession in the public interest."[65] As a result, Canada's law societies have the authority to maintain certain standards for an individual seeking admission to the law society. This raises the question as to whether the law societies have the jurisdiction to refuse to admit individuals to their law society merely because they received their degree from a school that employs an arguably discriminatory admission policy, such as the one at issue in the TWU litigation. The answer to this question may depend, in part, on the specific statutory language that grants each law society its mandate. For example, the statute governing the NSBS provides that "[t]he purpose of the Society is to uphold and protect the public interest *in the practice of law*,"[66] suggesting that the Society's jurisdiction is limited. In contrast, the statute governing the LSUC provides that "[t]he Society has a duty to protect the public interest,"[67] suggesting a more expansive jurisdiction.

The Supreme Court's well-known 2001 decision, *British Columbia College of Teachers*,[68] seems to imply that the phrase "in the public interest," which confers a more expansive jurisdiction, allows a regulatory body to consider the admissions policies of an institution when making a regulatory decision.[69] In this case, the Court had to decide whether the British Columbia College of Teachers (BCCT) could constitutionally refuse to certify teachers who were set to graduate from TWU on the basis of TWU's allegedly discriminatory Community Standards (the predecessor to the current Community

63. FED'N OF L. SOC'YS OF CAN., SPECIAL ADVISORY COMMITTEE ON TRINITY WESTERN'S PROPOSED SCHOOL OF LAW: FINAL REPORT 10–12 (DEC. 2013), http://docs.flsc.ca/SpecialAdvisoryReportFinal.pdf.

64. Kuran, *supra* note 59.

65. Fed'n of Law Soc'ys of Can., *supra* note 39.

66. Legal Profession Act, S.N.S. 2004, c 28 (Can.) (emphasis added).

67. Law Society Act, R.S.O. 1990, c L.8 (Can.).

68. Trinity W. Univ. v. B.C. Coll. of Teachers, [2001] 1 S.C.R. 772 (Can.).

69. *Id*. at 774.

Covenant).[70] The Supreme Court noted that the mandate to regulate in "the public interest" should not be interpreted as merely conferring the authority to regulate "skills and knowledge" but should be interpreted in a more comprehensive manner.[71] The Supreme Court's decision seems to imply that law societies would be acting within their jurisdiction if they refused to admit individuals graduating from a university with an arguably discriminatory admission policy, as long as they did so in the public interest.

Despite its expansive interpretation of "the public interest," however, the Court suggested that this interpretation was limited to the particular context involved in the *British Columbia College of Teachers* case. Indeed, the Court specifically stated that the BCCT's role in the regulation of teachers was unique. "[T]eachers," the Court stated, "are a medium for the transmission of values" and have the responsibility of teaching in schools, which "are meant to develop civic virtue and responsible citizenship."[72] As a result, the Court held that "[i]t would not be correct, *in this context*, to limit the scope of [the regulatory body] to a determination of skills and knowledge."[73] Having determined that the phrase "the public interest" ought to have an expansive interpretation due to teachers' unique role in society, the Court went on to hold that "[a]bsent concrete evidence that training teachers at TWU fosters discrimination in the public schools of BC, the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected."[74] Thus, even though the Court acknowledged the legitimacy of considering "the public interest" in this particular case, the Court nevertheless sided with TWU against the BCCT.

Of course, lawyers perform a vastly different task than teachers. Lawyers are not tasked with transmitting values or developing civic virtue in impressionable children. Rather, they are called to be zealous advocates of their clients. Given lawyers' vastly different role, allegedly discriminatory admissions practices do not have the potential to

70. *See* Written Argument of Trinity Western University and Brayden Volkenant at 35–36, Trinity W. Univ. v. Law Soc'y of B.C., 2015 BCSC 2326 (Can.) (No. 149837), https://www.lawsociety.bc.ca/docs/newsroom/TWU-argument.pdf.

71. B.C. Coll. of Teachers, [2001] 1 S.C.R. at 774.

72. *Id*. at 774, 800.

73. *Id*. at 774 (emphasis added).

74. *Id*. at 775.

impact the practice of lawyers in the same way that they might impact the practice of public school teachers. As a result, it is not clear that the expansive interpretation of the phrase "in the public interest," as used in the *British Columbia College of Teachers* case, is warranted in litigation involving law societies.

Furthermore, Justice Campbell's admonition of the NSBS in *Nova Scotia Barristers' Society*,[75] the first Provincial Supreme Court decision on the matter relating to TWU's proposed law school, suggests that any attempt by a law society to change the admissions policies of a law school would infringe on the jurisdiction of other regulatory bodies and would violate the independence law schools have traditionally enjoyed.[76] Justice Campbell's reasoning evinces a Tocquevillian belief in the importance of independent institutions that mediate between the individual and the government:

> The NSBS of course has no statutory authority to regulate a law school or university outside Nova Scotia or inside Nova Scotia for that matter. There are other regulators . . . who have the authority to determine how degree-granting institutions function . . . . An interpretation of the *Legal Profession Act* that supported NSBS general regulatory power over every law school in Canada would undoubtedly prompt a deluge of articles in learned legal journals in support of the traditional independence of those institutions.[77]

The logic of Justice Campbell's judgment implies that no law society has the right to refuse admission to individuals who have attended law schools that have enacted policies with which the law society disagrees. Not only would such a refusal infringe on the jurisdiction of other regulatory bodies, it would also impermissibly pressure certain law schools to change their policies and violate their "traditional independence."[78]

3. Religious freedom and community covenants

Supposing that individual law societies *do* have jurisdiction to refuse admission to individuals based on where they received their law degree, could the exercise of such jurisdiction against a religiously

75. Trinity W. Univ. v. N.S. Barristers' Soc'y, [2015] NSSC 25 (Can.).
76. *Id.* at para. 173.
77. *Id.*
78. *Id.*

affiliated law school with a mandatory community covenant, such as the one involved in the TWU litigation, violate the school's right to freedom of religion under the Charter? Because the law societies are likely considered to be state actors, the answer depends, in large part, on the interpretation of section 2(a) of the Charter of Rights and Freedoms.[79] Section 2(a) guarantees everyone the "freedom of conscience and religion."[80] The first case in which the Supreme Court interpreted section 2(a) was *Big M Drug Mart*,[81] in which the Court provided a robust definition of the freedom of religion. The court held,

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.[82]

As a result of this judgment, section 2(a) of the Charter is to be interpreted broadly and can be assumed to cover religiously affiliated schools.

It might be argued that the act of conditioning the recognition of a school's law degree on the removal of that school's community covenant does not affect a religious belief or practice. According to this line of reasoning, unless it can be established that there is a tenet of the religion that requires the study of law to be done in the company of other people who comply with the covenant, there is no infringement of section 2(a) of the Charter. However, this argument is not grounded in law.

In *Syndicat Northcrest v. Amselem,*[83] the Court further interpreted section 2(a) to find that freedom of religion includes "the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a

79. Canadian Charter of Rights and Freedoms, s 2, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

80. *Id*.

81. R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 (Can.).

82. *Id*. at 336.

83. Syndicat Northcrest v. Amselem, [2004] 2 S.C.R. 551 (Can.).

function of his or her spiritual faith."[84] Moreover, this freedom is not required to conform to an "official religious dogma or . . . the position of religious officials."[85]

The Supreme Court's jurisprudence does not require a religious practice to conform to any set of doctrines or societal beliefs in order to receive protection. Therefore, if it can be established that (1) a community covenant has a *nexus* with religion and (2) individuals attending the school sincerely believe that studying in the company of those who comply with the community covenant is a function of their spiritual faith, then a law society's refusal to recognize the law degree of such a school would violate that school's religious freedom rights under the Charter.

The above-mentioned test would ordinarily resolve the question as to whether the religious rights of an individual or entity have been infringed. However, section 1 of the Charter states that the freedoms guaranteed in the Charter are not absolute, but are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[86] In the case of TWU's proposed law school, the manner in which TWU exercises its right to freedom of religion may infringe on the fundamental right of equality, which is enshrined in section 15 of Canada's Charter.[87] Section 15 holds that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination."[88] According to critics of TWU, the discriminatory effect of TWU's admissions policy violates section 15 of the Charter and, as a result, the law societies are acting in accordance with section 1 of the Charter in restricting TWU's right to freedom of religion.

However, a hierarchical approach that advances certain rights over and above other rights is contrary to the Supreme Court's jurisprudence. In the event that religious freedom rights conflict with the fundamental rights and freedoms of others, the Supreme Court has adopted a balancing approach whereby religious rights are

84. *Id*. at 553.

85. *Id*.

86. Canadian Charter of Rights and Freedoms, s 1, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

87. *See id*. at s 15.

88. *Id*.

"accommodate[d] and balance[d] . . . against other interests,"[89] according to the test articulated in *Oakes*.[90] The *Oakes* test holds that the infringement of a fundamental right will be upheld only if it meets two criteria: "First, the objective [of the infringement] . . . must relate to societal concerns which are pressing and substantial in a free and democratic society";[91] second, the party seeking to limit a fundamental right "must show the means to be . . . fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective."[92] This includes an inquiry both into whether the means "impair the right in question as little as possible" and into whether there is "a proportionality between the effects of the limiting measure and the objective."[93]

Some scholars have maintained that the Canadian judiciary has not always properly balanced fundamental rights against the interest of eradicating sexual orientation discrimination. For example, Hans Clausen notes that the Canadian judiciary has failed to adequately protect the fundamental rights of freedom of religion and freedom of speech in situations in which anti-discriminatory interests are raised.[94] Similarly, Iain Benson notes that in the face of equality claims raised by gay rights proponents, many religious communities feel they "are often not being accorded the respect they deserve and to which they are entitled."[95] Thus, significant concerns have been raised regarding the application of the *Oakes* balancing test.

In the realm of accreditation, however, the *Oakes* test has been employed in a manner favorable to the fundamental right to freedom of religion. The balancing approach articulated in *Oakes* was employed in *British Columbia College of Teachers*,[96] which involved not only the same school, but also legal issues similar to those in the present controversy. In this latter case, the BCCT refused to certify teachers

89. R. v. N.S., [2012] 3 S.C.R. 726, para. 54 (Can.).

90. R. v. Oakes, [1986] 1 S.C.R. 103, 105–06 (Can.).

91. *Id*. at 105.

92. *Id*. at 106.

93. *Id*.

94. Hans C. Clausen, Note, *The "Privilege of Speech" in a "Pleasantly Authoritarian Country": How Canada's Judiciary Allowed Laws Proscribing Discourse Critical of Homosexuality to Trump Free Speech and Religious Liberty*, 38 VAND. J. TRANSNAT'L L. 443, 486–500 (2005).

95. Iain T. Benson, *The Freedom of Conscience and Religion in Canada: Challenges and Opportunities*, 21 EMORY INT'L L. REV.111, 151 (2007).

96. *See supra* notes 68–75 and accompanying text.

from TWU's education program over concerns that these teachers would act in an intolerant manner while teaching in the public school system.[97] The fear was that teachers trained at TWU would act in a discriminatory fashion against homosexual students[98] in contravention of the equality provisions of section 15 of the Charter.[99]

The *British Columbia College of Teachers* Court sought to balance the right of TWU students to receive their teaching degree from a religiously affiliated university "with the equality concerns of students in BC's public school system"[100] in light of Canada's commitment to pluralism.[101] Indeed, the Court noted that "[t]he diversity of Canadian society is partly reflected in the multiple religious organizations that mark the societal landscape and this diversity of views should be respected."[102] The proper balance, the Court held, lay in favor of allowing TWU students to receive their teaching degrees from a religiously affiliated university because the BCCT's infringement of TWU's right to freedom of religion was not factually related to its concerns about discriminatory practices in the public school system.[103] Indeed, the BCCT had provided no evidence that graduates from TWU's program would act intolerantly.[104] The Court concluded that the "tolerance of divergent beliefs is a hallmark of a democratic society."[105] Thus, the *British Columbia College of Teachers* case implies that under a proper balancing of sections 2(a) and 15(1) of the Charter, accrediting agencies are not permitted to deny graduates of a religious institution the opportunity to practice their trade on the mere speculation that they may engage in a discriminatory manner.

While the legal issues in the *British Columbia College of Teachers* case are similar to those in the present controversy, they are

97. Trinity W. Univ. v. B.C. Coll. of Teachers, [2001] 1 S.C.R. 772, 786, 799–801 (Can.).

98. *Id.*

99. Section 15 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.), states: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination."

100. B.C. Coll. of Teachers, [2001] 1 S.C.R. at 810.

101. *Id.* at 800.

102. *Id.* at 812.

103. *Id.* at 814.

104. *Id.*

105. *Id.* at 815.

distinguishable. As a result, the *British Columbia College of Teachers* case is not *conclusively* binding on the present case. In the latter, the law societies do not claim that TWU graduates would act in a discriminatory fashion; rather, they state that by recognizing the law degrees conferred by TWU, they would be endorsing or condoning TWU's discriminatory action, a claim that was not raised in the *British Columbia College of Teachers* litigation. Thus, in the present controversy, the right to freedom of religion needs to be balanced against the law society's legislative objective of combating discrimination.

In *Nova Scotia Barristers' Society*,[106] Justice Campbell recognized that the NSBS's objective of combating discrimination and encouraging "diversity in the legal profession [was] a pressing and substantial purpose."[107] However, Justice Campbell held that the NSBS's refusal to recognize TWU's degree was not rationally related to its objective, as the graduates of the proposed law school would only have a negligible impact on the legal profession in Nova Scotia.[108] Campbell maintained that "[i]t is a stretch to speculate that [this measure] . . . will help to improve the proportion of LGBT lawyers."[109]

Furthermore, the measure adopted by NSBS "was not designed to minimally impair" TWU's rights to religious freedom.[110] While the NSBS did not require TWU to remove its Community Covenant in its entirety, but sought only to free law students from the obligation to abide by the Covenant,[111] Justice Campbell noted that this "effort only points to the illogic of the position."[112] The NSBS ostensibly attempted to avoid the appearance of hypocrisy that attaches to condoning a discriminatory law school while advocating for equal rights. However, the appearance of hypocrisy is not diminished if the law students are "being taught by professors, surrounded by other students, and subject

106. Trinity W. Univ. v. N.S. Barristers' Soc'y, [2015] NSSC 25 (Can.).
107. *Id*. at para. 241.
108. *Id*. at para. 247.
109. *Id*.
110. *Id*. at para. 266.
111. *Id*.
112. *Id*. at para. 267.

to administrators, who would be subject to what [the NSBS] considers to be unlawfully discriminatory treatment."[113]

Lastly, in his analysis of the proportionality of the effects of the NSBS's decision to its objective, Justice Campbell found that the NSBS's decision had a direct impact upon TWU's religious freedom and that it did "nothing whatsoever to improve the status of LGBT people in [Nova Scotia]."[114] As a result, Justice Campbell found that a proper balancing of TWU's religious freedom rights with the NSBS's principled opposition to discrimination weighed in favor of TWU's religious freedom rights.[115]

The balancing approach employed by both Justice Campbell and the Supreme Court in the *British Columbia College of Teachers* case have the benefit of maintaining the pluralism and multiculturalism required by section 27 of the Charter of Rights and Freedoms. Section 27 implicitly endorses the Tocquevillian recognition of the importance of diversity and pluralism in liberal democracies: the "Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."[116] A number of Supreme Court cases have recognized that religious diversity is a significant component of multi-culturalism, and have built upon section 27's Tocquevillian implications. For example, in *Big M Drug Mart*, in which the Court struck down provincial legislation mandating a universal observance of a day of rest, the Court held that "[t]he power to compel, on religious grounds, the universal observance of the day of rest preferred by one religion is not consistent with the preservation and enhancement of the multi-cultural heritage of Canadians recognized in [section] 27 of the *Charter*"[117] and that the purpose of the Charter is to "safeguard[ ] religious minorities from the threat of 'the tyranny of the majority.'"[118] The balancing analyses conducted by the Supreme Court in the *British Columbia College of Teachers* case and by Justice Campbell comport with this interpretation of section 27 of the Charter. By providing a space for the flourishing of a plurality of religious schools, these balancing analyses enhance

113. *Id.*

114. *Id.* at para. 269.

115. *Id.* at para. 270.

116. Canadian Charter of Rights and Freedoms, s 27, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

117. R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, 297 (Can.)

118. *Id.* at 337.

Canada's multi-cultural heritage and safeguard religious minorities from the tyranny of the majority.

As the above analysis indicates, religiously affiliated law schools in Canada should not be denied accreditation due to the discriminatory effects of their admissions policies. Indeed, the FLSC's guidelines dictate that it will not inquire into either the admissions practices of law schools or the philosophical principles undergirding the approaches to teaching law taken by various law schools. Furthermore, as a matter of Canadian law, as long as a religiously affiliated law school's discriminatory admissions policy has a nexus with religion, and as long as the admissions policy is sincerely believed to be a function of spiritual growth, it receives protection from section 2(a) of the Charter. While section 1 of the Charter indicates that this right is not absolute, any attempt to limit this right must (1) be pressing and substantial and (2) only minimally impair the right. As a result, religiously affiliated law schools should not be denied accreditation on the basis of their admissions policies.

4. Current legal battles

Justice Campbell's decision in *Nova Scotia Barristers' Society* elucidates many of the legal issues surrounding TWU's proposed law school. However, his decision is far from the final word on the topic. While Justice Campbell's decision stands in Nova Scotia,[119] TWU's challenges to both the LSBC and the LSUC decisions to deny accreditation to its proposed law school are ongoing.[120]

TWU's challenge of the LSBC decision involved somewhat different factual issues from the case brought against the NSBS, as the LSBC had originally granted accreditation to TWU's proposed school of law but afterwards reversed that decision following a referendum by the society's members.[121] The British Columbia Supreme Court not

119. N.S. Barristers' Soc'y, *Update on the Trinity Western University Matter* (Aug. 15, 2016), http://nsbs.org/news/2016/08/update-trinity-western-university-matter.

120. Law Soc'y of B.C. v. Trinity W. Univ., No. CA43367 (Can. B.C.C.A. argued June 1–3, 2016); Trinity W. Univ. v. Law Soc'y of Upper Can., [2016] ONCA 518 (Can.) (dismissing the appeal); Trinity W. Univ., *TWU to go Back to Court after Negative Ruling from Ontario Court of Appeal* (June 30, 2016, 9:52 AM), http://twu.ca/news/2016/048-ontario-appeal-decision.html ("[Trinity Western University] will take the Ontario decision to the Supreme Court of Canada.").

121. Trinity W. Univ v. Law Soc'y of B.C., [2015] BCSC 2326, para. 48 (Can.).

only held that the LSBC improperly delegated the decision to its members,[122] but also held that the decision infringed on TWU's religious freedom.[123] As a result, the British Columbia Supreme Court reinstated the LSBC's original decision.[124] In response, the LSBC filed an appeal to the British Columbia Court of Appeal, which affirmed the lower court's decision.[125] The court noted that its decision rested, in part, on the importance of pluralism in a liberal democratic society.[126]

The Ontario Divisional Court, which heard TWU's challenge of the LSUC's denial of accreditation, found that while the LSUC did infringe on TWU's religious freedom rights, a proper balancing of religious freedom and the LSUC's commitment to combating discrimination weighed in favor of the LSUC's decision to deny accreditation.[127] Indeed, the Court noted that the LSUC's decision "does not, in fact, preclude TWU from opening a law school" but merely denies accreditation to TWU.[128] The fact that TWU would be financially prohibited from opening its law school without accreditation from the LSUC was inconsequential to the Court, as that position would be using freedom of religion "as a mechanism to compel state support."[129]

In response to this decision, TWU filed an appeal to the Ontario Court of Appeal.[130] The Court of Appeal dismissed the appeal, finding that the LSUC "has an obligation to govern the legal profession in the public interest"[131] and that the LSUC's consideration of the discriminatory effects of TWU's admissions policies was warranted.[132] Furthermore, it held that the LSUC had engaged in a proper balancing of TWU's religious freedom rights and the equality rights

122. *Id*. at para. 152.

123. *Id*. at para. 138.

124. *Id*. at para. 156.

125. Trinity W. Univ. v. Law Soc'y of B.C., [2016] BCCA 423, para. 190–94 (Can.).

126. *Id*. at para. 186–87.

127. Trinity W. Univ. v. Law Soc'y of Upper Can., [2015] ONSC 4250, para. 124 (Can.).

128. *Id*. at para. 120.

129. *Id*.

130. Law Soc'y of Upper Can., *Trinity Western University (TWU) Accreditation*, http://www.lsuc.on.ca/twu/ (last visited Oct. 13, 2016).

131. Trinity W. Univ. v. Law Soc'y of Upper Can., [2016] ONCA 518, para. 108 (Can.).

132. *Id*. at para. 112.

of the LGBT community.[133] Specifically, the Court of Appeal noted that the decision was proper on the basis of four reasons: (1) the LSUC act as gatekeepers that have a role in "ensuring equality of admission to the legal profession"[134]; (2) "the LSUC could attach weight to its obligations under [section] 6 of the [Human Rights Code]", which provides every person with "equal treatment with respect to membership in any . . . self-governing profession without discrimination"[135]; (3) there is a distinction to be made "when a religious institution and its members seek to exercise their religious beliefs in a manner that discriminates against others"[136]; and (4) the LSUC's decision was in accordance with international law.[137] The court concluded on the basis of these reasons that the LSUC had engaged in a proper balancing of the right to religious freedom and the right to equality.[138]

However, the reasons articulated by the Ontario Court of Appeal do not warrant the conclusion that a proper balancing of the right to religious freedom and the right to equality weigh in favor of upholding the LSUC's decision to deny accreditation to TWU. Rather, all the reasons listed by the Court of Appeal merely suggest that a balancing approach is required. For example, the court's assertion that the law societies, as the gatekeepers to entry of the legal profession, have a role "in ensuring equality of admission to the legal profession,"[139] neither supports nor undermines the LSUC's decision. Rather, it simply suggests that the LSUC has to ensure equality of admission to both LGBT individuals and to graduates of TWU's proposed program. By refusing to allow TWU graduates to practice based on the *speculation* that this would have a negative effect on the population of LGBT lawyers, the LSUC is inflicting an *actual* negative effect on TWU.[140]

133. *Id*. at para. 129

134. *Id*. at para. 132.

135. *Id*. at para. 133.

136. *Id*. at para. 134.

137. *Id*. at para. 139–40.

138. *Id*. at para. 143.

139. *Id*. at para. 132.

140. The Ontario Court of Appeal applies the same faulty logic in the other three reasons listed in support of the LSUC's balancing approach. The second reason listed in support of the LSUC's balancing approach is that

On appeal to the Supreme Court of Canada, it is likely that the Supreme Court will find, as have all the courts that have thus far analyzed the issue, that TWU's religious freedom rights were infringed. While religious freedom rights are not absolute and may be subject to limitations, the Supreme Court will likely find—if previous jurisprudence is properly taken into account—that the blanket refusal to recognize graduates from TWU's proposed school of law is disproportionate.[141] While the negative effects of the accreditation of TWU on the population of LGBT lawyers in any particular province is speculative, the refusal to accredit TWU would have an actual and direct effect on TWU's ability to establish a law school. As a result, the Supreme Court of Canada will likely find that a proper balancing of the right to religious freedom and the right to equality weighs in favor of TWU.

> in balancing the various rights at issue, the LSUC could attach weight to its obligations under s. 6 of the *HRC*, which provides: "Every person has a right to equal treatment with respect to membership in any trade union, trade or occupational association or self-governing profession without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability." [Emphasis added.].

Id. at para. 133. However, because section 6 of the *HRC* provides for equal treatment without discrimination based on both sexual orientation *and* creed, the LSUC's obligations under this legislation neither support nor undermine the LSUC's decision. The third reason listed in support of the LSUC's balancing approach is that "there is an important distinction to be made when a religious institution and its members seek to exercise their religious beliefs in a manner that discriminates against others." *Id.* at para. 134. Of course, this merely suggests that a balancing approach is required and, as a result, it also neither supports nor undermines the LSUC's decision. The last reason articulated by the Court in favor of the LSUC's balancing approach is that the LSUC's approach takes into account international human rights law and "international treaties and other documents that bind Canada." *Id.* at para. 139. Specifically, the Court noted that "Article 18(3) of the *International Covenant on Civil and Political Rights*, 19 Dec. 1966, 999 U.N.Y.S. 171, Can. T.S. 1976, provides: 'Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.' [Emphasis added.]." *Id.* The Court concludes that "the LSUC's balancing in its accreditation decision was faithful to this article of an important international law document to which Canada is a signatory." *Id.* at para. 140. This international treaty, however, has no bearing on whether the balancing approach employed by the LSUC was proper. Rather, it merely suggests that a balancing approach is required.

141. See Clausen, *supra* note 94, at 443, for an argument suggesting that Canada's judiciary seeks to promote homosexual acceptance in Canadian culture and that this has had, and will continue to have, troubling implications for the right to freedom of speech and the right to freedom of religion in Canada.

B. Legal Analysis Under American Law

American jurisprudence provides for a robust protection of the right to religious freedom. This section will begin by identifying the political and administrative actors involved in the regulation of legal education and the requirements a law school must meet in order to receive accreditation in the United States. As will be made clear, the extent to which a religious law school is able to reflect its religious affiliation by way of mandatory honor codes is dependent both on the Supreme Court's First Amendment jurisprudence and on federal and state legislation. This section will then analyze the Supreme Court's First Amendment jurisprudence and conclude that religious law schools are able to enact mandatory honor codes that run afoul of neutrally phrased anti-discrimination legislation. The basis of religious law schools' exemption from such legislation is the hybrid right articulated by the United States Supreme Court in *Employment Division v. Smith*. This hybrid right consists of both the right to freedom of religion and the right to freedom of association. This section will conclude with a brief discussion of the current status of the legal realm *vis à vis* religious freedom and homosexual rights.

1. ABA requirements for admitting law schools

In America, the United States Department of Education has approved the Council of the Section of Legal Education and Admissions to the Bar (the Council) of the American Bar Association (ABA) as the "recognized national agency for the accreditation of programs leading to the J.D. degree."[142] While it is up to the various states to determine what requirements are necessary for an individual to sit for the state bar exam, "[a]lmost all rely exclusively on ABA approval of a law school to determine whether the jurisdiction's legal education requirement for admission to the bar is satisfied."[143] Thus, the ABA has significant power in determining the ability of individuals to be admitted to the various state bars.

As noted, the ABA's practice of accrediting law schools is governed by the *ABA Standards and Rules of Procedure for Approval of Law Schools*. This handbook lists the "requirements a law school

142. A.B.A. Standards, *supra* note 22, at v.

143. *Id.*

must meet to obtain and retain ABA approval."[144] In contrast to the FLSC, the handbook maintains that the ABA *does* inquire into the admissions aspects of law schools in its accreditation procedures.[145] Indeed, ABA Standard 205(a) mandates that "[a] law school shall not use admission policies or take other action to preclude admission of applicants or retention of students on the basis of race, color, religion, national origin, gender, sexual orientation, age or disability."[146] The question of whether this standard violates religious freedom rights was first raised in *Oral Roberts University*.[147] In *Oral Roberts*, Oral Roberts University (ORU) sought to establish a law school, but was denied accreditation by the ABA because it "required all entering students to sign a pledge regarding their commitment to Christian religious beliefs."[148] According to the ABA, the ORU admissions policy violated the *ABA Standards and Rules of Procedure for Approval of Law Schools*, as it denied admission to ORU based on religious beliefs.[149] ORU brought suit maintaining that this violated their First Amendment Rights.[150] The issue of whether Standard 211(b)[151] violated ORU's religious freedom rights, however, was never settled as ORU voluntarily dismissed the complaint after the ABA granted it provisional accreditation.[152]

As a result of the ORU controversy, the ABA amended the Standards to include what is currently known as Standard 205(c).[153]

144. *Id*.

145. *See id*. at ch. 2, stand. 205(a).

146. *Id*.

147. Oral Roberts Univ. v. ABA, No. 81 C 3171, 1981 U.S. Dist. LEXIS 18628 (N.D. Ill. July 17, 1981).

148. BOYD, *supra* note 35, at 108.

149. *Id*. at 107–08.

150. *Id*. at 108; *see also* Destro, *supra* note 1, at 446–49 (discussing the Oral Roberts University controversy and noting that ORU and the ABA have different understandings of the term "diversity").

151. In previous editions of the *ABA Standards and Rules of Procedure for the Approval of Law Schools*, the substantive contents of Standard 205 were listed as Standard 211. The provisions of Standard 211 remain identical in the current edition of the *ABA Standards*, with the exception that subsections (a) and (b) have been listed in reverse order. Thus Standard 211(b) of the previous editions of the *ABA Standards* are, under the current edition, listed as Standard 205(a).

152. Thomas L. Shaffer, *Erastian and Sectarian Arguments in Religiously Affiliated American Law Schools*, 45 STAN. L. REV. 1859, 1861 n.5 (1993).

153. BOYD, *supra* note 35, at 109.

Standard 205(c) states that "[t]his Standard does not prevent a law school from having a religious affiliation or purpose and adopting and applying policies of admission of students . . . that directly relate to this affiliation or purpose."[154] Standard 205(c) continues with the somewhat opaque statement that

> [t]hese [admissions] policies may provide a preference for persons adhering to the religious affiliation or purpose of the law school, but may not be applied to use admission policies or take other action to preclude admission of applicants or retention of students on the basis of race, color, religion, national origin, gender, sexual orientation, age, or disability.[155]

As Douglas Laycock has noted, Standard 211(c), which is now known as Standard 205(c), seems to state contradictorily that while law schools may have an admissions policy that prefers applicants who adhere to the religious affiliation of the school, they may not use such an admissions policy to preclude admission of applicants based on religion.[156] Perhaps in recognition of this apparent contradiction, the ABA ends this Standard by deferring to the Constitution: "[R]eligious affiliation or purpose policies as to admission" are permitted "only to the extent that these policies are protected by the United States Constitution. It is administered as though the First Amendment of the United States Constitution governs its application."[157] In sum, the ABA defers to First Amendment jurisprudence in determining whether a law school with an admissions policy based on religious affiliation will be accredited.[158]

154. A.B.A. Standards, *supra* note 22, at ch. 2, stand. 205(c).

155. *Id.*

156. Douglas Laycock, *Academic Freedom, Religious Commitment, and Religious Integrity*, 78 MARQ. L. REV. 297, 302–03 (1995) (describing Standard 211(c) as a "circumlocution" and suggesting that this circumlocution means that a religious law school "can maintain a critical mass of students and faculty of [its] own faith, but [it] cannot insist on a faculty or a student body that is entirely of [its] own faith").

157. A.B.A. Standards, *supra* note 22, at ch. 2, stand. 205(c).

158. Whether the Supreme Court's First Amendment jurisprudence applies irrespective of ABA Standard 205(c) depends on the status of the ABA as a state actor. Despite the fact that the ABA has been approved by the Department of Education as the national agency responsible for accrediting law schools, the ABA may not be a state actor and, consequently, would be free from complying with constitutional provisions. *See* Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 194 (1988) (holding that although a State Supreme Court might enforce rules that it has "adopted *in toto* from the American Bar Association Code of Professional Responsibility[,] [i]t does not follow . . . that the ABA's formulation of those disciplinary rules was state action");

2. First amendment and honor codes

Whether the ABA is able to use its power to deny accreditation to religiously affiliated law schools that have discriminatory admissions policies depends largely, although not exclusively, on the manner in which the Supreme Court has interpreted the First Amendment. The relevant First Amendment jurisprudence begins with *Smith*.[159] At issue in *Smith* was whether or not plaintiffs ought to be granted a religious exemption from a general criminal prohibition of drug use.[160] According to the plaintiffs, who had ingested peyote "for sacramental purposes at a ceremony of their Native American Church,"[161] the State of Oregon's inclusion of "religiously inspired peyote use within . . . its general criminal prohibition . . . of that drug"[162] violated their First Amendment free exercise rights.[163]

The plaintiffs put forward two arguments. First, they argued that "'prohibiting the free exercise [of religion]' includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires)."[164] In the alternative, the plaintiffs argued that the "claim for a religious exemption must be evaluated under the balancing test set forth in *Sherbert v. Verner*."[165] The Court rejected both arguments.[166]

In response to the first argument, the Court held that a free exercise claim on its own was insufficient to place an individual beyond a neutral, generally applicable law. While free exercise claims had, in the past, required the state to provide an exemption, these claims had always taken the form of "hybrid claims," or claims involving the "Free Exercise Clause in conjunction with other constitutional protections,

see also Hu v. Am. Bar Ass'n, 334 F. App'x 17, 19 (7th Cir. 2009) (holding that the ABA is not a state actor because the State Supreme Court, not the ABA, "[d]ecides whether graduation from an ABA-accredited school is necessary to practice law in Illinois"). Whether the ABA is a state actor is, however, largely moot for the purposes of this Article, as the ABA has stipulated that the First Amendment governs the application of Standard 205(c).

159. Emp't Div. v. Smith, 494 U.S. 872 (1990).

160. *Id*. at 874.

161. *Id*. at 872.

162. *Id*. at 874.

163. *Id*. at 878.

164. *Id*.

165. *Id*. at 882–83.

166. *Id*. at 878, 882–85.

such as freedom of speech and of the press."[167] As a result, a free exercise claim raised in response to a neutral, generally applicable law, such as the one in *Smith*, was held to be insufficient to require the State to provide an exemption.[168]

The Court similarly rejected the plaintiffs' claim that the statute be evaluated under the strict scrutiny test articulated in *Sherbert v. Verner*.[169] In *Sherbert*, the Court had held that "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest."[170] The Supreme Court refused to apply the *Sherbert* test to the facts of the *Smith* case.[171] Instead, the Court held the *Sherbert* test to be applicable only in cases involving unemployment compensation and not in cases involving "generally applicable criminal law[s]."[172] As a result, the plaintiffs in *Smith* were not entitled to an exemption.[173] After *Smith*, the general rule is that the First Amendment no longer requires government actors to grant exemptions from neutral, generally applicable laws to individuals whose free exercise of religion is inhibited by such laws.

Smith may have implications for religiously affiliated law schools in the United States. Indeed, seven such law schools have community covenants similar to the one TWU requires its students to sign.[174] For

167. *Id*. at 881 (citations omitted).

168. *Id*. at 890.

169. *Id*. at 885.

170. *Id*. at 883 (citing Sherbert v. Verner, 374 U.S. 398, 402–03 (1963)).

171. *Id*. at 883–84.

172. *Id*. at 884.

173. *Id*. at 890.

174. Bos. Coll., *2016–2017 Student Guide*, § 4.6.8, http://www.bc.edu/publications/studentguide/behavioralpolicies.html (last updated Aug. 29, 2016) ("All students have a responsibility to respect the values and traditions of Boston College as a Jesuit, Catholic institution, including adhering to the Church's teachings with respect to sexual activity."); BRIGHAM YOUNG UNIV., CHURCH EDUCATIONAL SYSTEM HONOR CODE 3 (2015), https://policy.byu.edu/content/managed/26/ChurchEducationalSystemHonorCode.pdf ("Homosexual behavior is inappropriate and violates the Honor Code. Homosexual behavior includes not only sexual relations between members of the same sex, but all forms of physical intimacy that give expression to homosexual feelings."); Catholic Univ. of Am., *Code of Student Conduct* § III(R)(1) (June 23, 2015), http://policies.cua.edu/studentlife/studentconduct/conduct-full.cfm ("Sexual acts of any kind outside the confines of marriage are contrary to the teachings and moral values of the Catholic Church and are prohibited. The University affirms that sexual relationships are designed by God to be expressed solely within a marriage between husband and wife."); LIBERTY UNIV., THE LIBERTY WAY 11, https://www.liberty.edu/media/1210/Student_Honor_Code.pdf ("Sexual relations outside

example, Boston College has a code of conduct that states that "incidents of sexual intercourse outside the bonds of matrimony may be referred to the Student Conduct System."[175] More pointedly, the honor code at Brigham Young University's law school states that "[h]omosexual behavior is inappropriate and violates the Honor Code."[176] In the event that a state passes a neutral, generally applicable statute aimed at eradicating discrimination, would a religious law school that has chosen to enact such a code of conduct be exempt from complying with such legislation? Put another way, can the ABA refuse to accredit a religiously affiliated school because of the discriminatory effects of its code of conduct without infringing on that school's free exercise rights?

The general rule articulated in *Smith* seems to work to the disadvantage of religiously affiliated law schools. As noted, in *Smith* the Court found the *Sherbert* balancing test to be inapplicable to neutral, generally applicable laws.[177] As a result, in the event that a state were to enact anti-discrimination legislation aimed at ensuring that private actors accord homosexuals equal treatment, *Smith* seems to provide little protection for religiously affiliated law schools that have chosen to reflect their religious purposes in their admissions policies. Thus, it seems that unless the state legislature has *chosen* to grant an exemption, a religiously affiliated law school would be required to comply with such anti-discrimination statutes.

---

of a biblically ordained marriage between a natural-born man and a natural-born woman are not permissible at Liberty University. In personal relationships, students are encouraged to know and abide by common-sense guidelines to avoid the appearance of impropriety."); MISS. COLL., STUDENT CODE OF CONDUCT 10 (2016–2017), https://www.mc.edu/tomahawk/files/2314/7189/1885/Mississippi_College_Student_Code_of_Conduct_2016-2017.pdf (defining sexual impropriety to include "participation in, advocacy for, or appearance of engaging in premarital sex, extramarital sex, or homosexual activities, or other sexual expression that may conflict with the Christian identity or faith mission of Mississippi College"); Pepperdine Univ., *Sexual Relationships*, under *Student Policies and Procedures*, http://www.pepperdine.edu/admission/student-life/policies/policies-and-procedures.htm (last visited Oct. 6, 2016) ("[A]ffirm[ing] that sexual relationships are designed by God to be expressed solely within a marriage between husband and wife"); REGENT UNIV., STUDENT HANDBOOK § 2.3.4.2.2 (2016), http://www.regent.edu/admin/stusrv/docs/StudentHandbook.pdf (prohibiting "disorderly conduct or lewd, indecent, or obscene conduct or expression, involvement with pornography, premarital sex, adultery, homosexual conduct or any other conduct that violates Biblical standards").

175. Bos. Coll., *supra* note 174, at § 4.6.8.

176. BRIGHAM YOUNG UNIV., *supra* note 174, at 3.

177. *See supra* note 172.

Despite the Court's decision in *Smith*, there are two avenues by which a religious law school may be able to subject an anti-discrimination statute to strict scrutiny in the hopes of receiving a religious exemption from such a statute. The first is by way of the various Restoration of Religious Freedom Acts (RFRAs) that have been enacted at the federal and state level. The effect of these pieces of legislation has been "to restore the compelling interest test" articulated in *Sherbert* and "to guarantee its application in all cases where free exercise of religion is substantially burdened."[178] Currently, both the federal government and twenty-one states have RFRAs.[179] Thus, it is possible that religiously affiliated law schools' accreditation status is protected by either the RFRA legislation enacted at the federal level or by the RFRA legislation of the state in which they are located.[180]

The second way a religious law school could challenge a neutral anti-discrimination statute is by way of the *Smith* decision itself. As may be recalled, in *Smith* the plaintiffs' primary contention was that the right to free exercise includes the right to be exempt from a

178. 42 U.S.C. § 2000bb(b) (1994).

179. 42 U.S.C. §§ 2000bb–bb4 (1994); ALA. CONST. art. I, § 3.01 (amended 1999); ARIZ. REV. STAT. ANN. § 41-1493.01 (1999); ARK. CODE ANN. § 16-123-402 (2015); CONN. GEN. STAT. § 52-571b (1993); FLA. STAT. § 761.01–.05 (1998); IDAHO CODE § 73-402 (2000); 775 ILL. COMP. STAT. 35/1–/30 (1998); KAN. STAT. ANN. §§ 60-5301 to -5305 (2013); KY. REV. STAT. ANN. § 446.350 (West 2013); LA. STAT. ANN. § 13:5231–:5242 (2010); MISS. CODE ANN. § 11-61-1 (2014); MO. REV. STAT. § 1.302 (2003); N.M. STAT. ANN. § 28-22-1 to -5 (2000); OKLA. STAT. tit. 51, §§ 251–258. (2000); 71 PA. CONS. STAT. § 2401–2407 (2002); 42 R.I. GEN. LAWS § 42-80.1-1 (1993); S.C. CODE ANN. § 1-32-10 to -60 (1999); TENN. CODE ANN. § 4-1-407 (2009); TEX. CIV. PRAC. & REM. CODE ANN. § 110.003 (1999); VA. CODE ANN. § 57-1 to -2.1 (2007).

180. Whether Federal or State RFRAs protect the accreditation status of religious law schools from action taken by the ABA depends on whether the ABA is considered a state actor. *See supra* note 158. In addition, should the ABA be considered to be a state actor, the question of whether the Federal or State RFRA governs will depend on whether the ABA is a Federal government actor or a State government actor. On the one hand, the fact that the rules for admission to the practice of law are a matter of state concern suggests that the ABA is a State government actor. On the other hand, both the fact that the federal government has recognized the ABA as the national organization for the accreditation of law schools, as well as the fact that a law school's receipt of certain federal funds is contingent on ABA accreditation, suggests that the ABA is a Federal government actor. Of the seven American law schools that have honor codes or admissions policies that could potentially be found to be in contravention of state anti-discrimination legislation, three (Columbus Law School, Pepperdine University School of Law, and J. Reuben Clark Law School) are located in jurisdictions that do not have State RFRA legislation.

"generally applicable law that requires (or forbids) the performance of an act" that is forbidden (or required) by one's religious belief.[181] According to this claim, an exemption from a generally applicable law is required when such a law compels individuals to act in a manner contrary to their religious beliefs. While it is true that the Court rejected this claim as applied to the facts in *Smith*, the Court nevertheless indicated that when combined with other constitutional protections, such as the "freedom of speech and of the press, or the rights of parents . . . to direct the education of their children,"[182] the right to the free exercise of religion would need to be analyzed under the *Sherbert* balancing test.

Furthermore, the Court speculated, without deciding, that the free exercise of religion would be as expansive as the plaintiffs claimed when combined with the freedom of association. Indeed, the Court stated, "[I]t is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns."[183] Thus, when combined with a freedom of association claim, a free exercise claim would likely constitute a hybrid right that is guaranteed an exemption from a neutral, generally applicable statute, absent a compelling state interest. Because the admissions policies of religiously affiliated law schools necessarily involve the right to association, it is likely that such a law school would be protected by the combination of the Free Exercise Clause and the right to freedom of association.

A number of circuit courts have addressed hybrid rights claims, and a majority of these courts have found that when a free exercise claim is raised in conjunction with another claim, these claims do give rise to a hybrid right that is entitled to a higher standard of review.[184]

181. Emp't Div. v. Smith, 494 U.S. 872, 878 (1990).

182. *Id*. at 881 (citations omitted).

183. *Id*. at 882.

184. Brown v. Hot, Sexy & Safer Prod., Inc., 68 F.3d 525, 539 (1st Cir. 1995), *cert. denied*, 516 U.S. 1159 (1996); Miller v. Reed, 176 F.3d 1202 (9th Cir. 1999); Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694 (10th Cir. 1998); EEOC v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996). In contrast, a minority of circuit courts have held that the Court's discussion of hybrid rights in *Smith* is simply dicta. *See* Knight v. Conn. Dep't of Pub. Health, 275 F.3d 156 (2d Cir. 2001); Leebaert v. Harrington, 332 F.3d 134 (2d Cir. 2003); Combs v. Homer-Center Sch. Dist., 540 F.3d 231 (3d Cir. 2008); Kissinger v. Bd. of Tr. of the Ohio State Univ. Coll. of Vet. Med., 5 F.3d 177 (6th Cir. 1993). The minority position, however, is at odds with the reasoning provided in *Smith*. The *Smith* Court distinguished itself

The Ninth and Tenth Circuits have articulated the standard that ought to be employed in assessing whether a piece of legislation should be subjected to a heightened standard of review. Specifically, the Tenth Circuit has stated that the hybrid rights theory requires a free exercise claim to be raised in conjunction with "a colorable showing of infringement of recognized and specific constitutional rights."[185] The Ninth Circuit has clarified that a colorable claim is one that has "a 'fair probability' or a 'likelihood,' but not a certitude, of success on the merits."[186] According to the Ninth Circuit, a plaintiff cannot "allege a hybrid-rights claim entitled to strict scrutiny analysis merely by combining a free exercise claim with an utterly meritless claim of the violation of another alleged fundamental right."[187] Thus, the hybrid rights theory requires that in order to subject a neutral, generally applicable law to strict scrutiny, one ought to raise both a free exercise claim as well as another constitutional claim that has a reasonable chance of success on the merits.

In the event that a state passed a neutral, generally applicable anti-discrimination statute aimed at ensuring that all private actors accord citizens equal treatment, regardless of sexual orientation, *Smith* suggests that a religiously affiliated law school would be able to seek an exemption. This exemption would be based on a hybrid right consisting of the right to freedom of association and the right to the free exercise of religion. As will be made clear, granting religious law schools such an exemption would serve to encourage the viewpoint pluralism Tocqueville saw as crucial to liberal democracy.

The Supreme Court's opinion in *Dale*[188] suggests that the right to freedom of association would present a religious law school with, at

from previous cases in which strict scrutiny had applied, noting that the previous cases had involved the Free Exercise Clause "in conjunction with other constitutional protections." *Smith*, 494 U.S. at 881. The fact that the Court distinguished these previous cases rather than simply overruling them suggests that they are still good law and that it is the hybrid rights theory that makes them such. Furthermore, since the *Smith* case, the Court has referenced the hybrid rights theory approvingly in *City of Boerne v. Flores*, 521 U.S. 507 (1997). Thus, Supreme Court precedent suggests that the approach adopted by the majority of the circuit courts is the correct approach.

185. *Swanson*, 135 F.3d at 700.

186. *Miller*, 176 F.3d at 1207 (quoting Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 703, 707 (9th Cir. 1999)).

187. *Id*. at 1208.

188. Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

the very least, a colorable claim (a claim with a reasonable chance of success on the merits) to an exemption from a neutral, generally applicable anti-discrimination statute.[189] In *Dale*, the Court held that the Boy Scouts of America were exempt from a state statute that had the effect of requiring them to accept an openly homosexual individual as an assistant scoutmaster.[190] According to the Court, the Boy Scouts were exempt from this public accommodations statute because it met two requirements: (1) it was a group engaged in expressive association; and (2) the forced inclusion of the respondent "would significantly affect the [group's] ability to advocate public or private viewpoints."[191] The Court adopted a Tocquevillian stance in its position, noting that the fact that "homosexuality has gained greater societal acceptance" was no reason to "deny[] First Amendment protection to those who refuse to accept those views."[192] Indeed, the Court stated that "the fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view."[193] Thus, the Court recognized, in accordance with Tocqueville, both the value of pluralism and the dangers posed by the tyranny of the majority.

A religious law school that seeks to ensure that its students abide by certain moral stipulations would likely meet the two requirements listed in *Dale*. According to *Dale*, "[A]n association that seeks to transmit . . . a system of values engages in expressive activity."[194] Thus, provided the law school had a stated goal of educating its students in accordance with certain values or religious tenets, it would be considered to be engaging in expressive association.[195] Furthermore,

189. *Id.* at 656. The Court found the Boy Scouts of America to be an expressive association entitled to First Amendment protection despite the fact that it "does not revoke the membership of heterosexual Scout leaders that openly disagree with the Boy Scouts' policy on sexual orientation." *Id.* at 655. This suggests that a religious law school *requiring* its members to adhere to certain religious tenets would almost certainly be entitled to First Amendment protection as well.

190. *Id.* at 659.

191. *Id.* at 650.

192. *Id.* at 660.

193. *Id.*

194. *Id.* at 650.

195. *See* Gerdy, *supra* note 20, at 978–79 ("[T]o law professors and law students of faith, their religious belief and commitments are connected to everything else that they do . . . . [Law schools] are at least as expressive as that of the Boy Scouts . . . .").

Dale holds that the inclusion of individuals that openly disagree with an organization's system of values would impair that organization's ability to advocate private or public viewpoints. In the event that an individual openly disagrees with a religious law school's moral stipulations, including stipulations regarding sexual conduct, the forced inclusion of such an individual would likely be found to affect the school's ability to advocate its viewpoints. Lastly, a religious law school would contribute to viewpoint diversity, which, as noted, the Court saw as an important contributing factor to its decision in *Dale*. As a result, religious law schools would likely be exempt from any anti-discrimination statutes such as the one at issue in *Dale*.

However, a religiously affiliated law school would not be required to prevail on the grounds of freedom of association alone. Rather, so long as there is a *colorable* claim to freedom of association, such a law school would be able to raise a hybrid rights claim comprising both the colorable freedom of association claim and a free exercise claim. Such a hybrid rights claim would be analyzed under the strict scrutiny standard that existed prior to *Smith*. The mechanical operations of this standard are identical to the standard articulated in both *Sherbert* and in the federal RFRA legislation, which, as noted,[196] was passed by Congress after the *Smith* decision in order to restore the strict scrutiny standard that had existed prior to *Smith*.

According to the strict scrutiny standard articulated in both *Sherbert* and RFRA, a neutral, generally applicable law that infringes upon an individual's free exercise rights[197] will survive a free exercise

196. *See supra* note 178 and accompanying text.

197. Some judicial decisions have suggested that the *Sherbert* balancing test is inapplicable as applied to organizations because the free exercise of religion is fundamentally an individual right. *See, e.g.*, Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., 724 F.3d 377, 385 (3d Cir. 2013) ("[T]he purpose of the Free Exercise Clause is to secure religious liberty *in the individual* by prohibiting any invasions thereof by civil authority." (citations omitted)). We need not, however, resolve the ambiguity surrounding organizational rights to determine that the *Sherbert* balancing test is applicable as applied to organizations when a hybrid rights claim has been raised. In its articulation of the hybrid rights claim in *Smith*, the Court referenced *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). In *Pierce*, the Society of Sisters, a corporation, challenged the constitutionality of the Compulsory Education Act, which "require[d] every parent, guardian or other person having control or charge or custody of a child between eight and sixteen years to send him to a public school." *Id.* at 530 (alteration in original). The Court held that despite the fact that, as a corporation, the Society of Sisters could not claim that its constitutional rights were being infringed, it could, nevertheless, seek "protection against arbitrary, unreasonable, and unlawful interference with [its] patrons and the

challenge only if it is "justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate.'"[198] This raises the question as to whether the effect of the anti-discrimination statute would infringe on a law school's free exercise of religion, and whether such an infringement might be justified by a compelling state interest.

In *Sherbert*, the Court held that state action that forces an individual to choose between forfeiting a state-provided benefit, on the one hand, and abandoning one's religious precepts, on the other hand, constitutes a burden on the free exercise of religion.[199] In light of the Court's unfavorable view of such state action, an anti-discrimination statute that has the effect of forcing a religiously affiliated law school to make such a choice would likely be considered an infringement on the free exercise of religion. Indeed, were an anti-discrimination statute phrased in such a way that the religiously based admissions policy of a law school would be in violation of the statute, such a law school would be faced with a choice: (1) follow the precepts of the religion with which it is affiliated and forgo establishing a religious law school; or (2) alter its admissions policy in a manner that would be contrary to its religious teachings. Such a choice would likely be considered an infringement of such an institution's free exercise rights.

Thus, an infringement on a religiously affiliated law school's free exercise rights can be justified only if the infringement serves to further a "compelling state interest."[200] The compelling state interest test is "the most demanding test known to constitutional law,"[201] and "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."[202] Furthermore, the Court has held that the means adopted to further such a compelling state interest

consequent destruction of [its] business and property." *Id*. at 536. This suggests that organizations, including law schools, are able to bring suit on behalf of their patrons in order to seek an exemption from a neutral, generally applicable law.

198. Sherbert v. Verner, 374 U.S. 398, 403 (1963) (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

199. *Id*. at 404 (finding that forcing an individual "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 hand" is a burden).

200. *Id*. at 403 (quoting *Button*, 371 U.S. at 438).

201. City of Boerne v. Flores, 521 U.S. 507, 534 (1997).

202. *Sherbert*, 374 U.S. at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

must be such that they restrict the right to free exercise of religion in as minimal a way as possible.[203]

In the present case, the state would undoubtedly defend its interest in combatting discrimination as a compelling state interest. However, past precedent suggests that this interest would not be sufficiently compelling.[204] In *Dale*, the state's interest in combatting discrimination was insufficiently compelling as applied against the Boy Scouts of America—a secular organization.[205] Furthermore, in *Hosanna-Tabor Evangelical Lutheran Church and School*,[206] the Court found that a group's free exercise rights serve to bolster its rights to freedom of association.[207] Indeed, the Court stated that the "view that the [freedom of association] analysis should be the same, whether the association in question is the Lutheran Church, a labor union, or a social club . . . is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations."[208] Together, these two cases suggest that a state's interest in combatting discrimination will almost certainly be found to be insufficient as applied against a religious organization—including a religious law school.

Furthermore, even if a state's interest in combatting discrimination is found to be compelling, the state would have to show that there are no other means of achieving this interest that have a less restrictive effect on the right to free exercise of religion. In the present case, it is unlikely that anti-discrimination legislation is the least

203. *Flores*, 521 U.S. at 534.

204. Although the Supreme Court found the interest of combatting racial discrimination to be a compelling state interest in *Bob Jones University v. United States*, the Court emphasized that it was "the stress and anguish of the history of efforts to escape from the shackles of the 'separate but equal' doctrine of *Plessy v. Ferguson*," 163 U.S. 537 (1896), that served to make this interest compelling. 461 U.S. 574, 595, 604 (1983). Numerous commentators have argued, on this basis, that a state interest in eradicating sexual-orientation discrimination would likely be insufficiently compelling. *See, e.g.*, Amy Moore, *Rife with Latent Power: Exploring the Reach of the IRS to Determine Tax-Exempt Status According to Public Policy Rationale in an Era of Judicial Deference*, 56 S. TEX. L. REV. 117 (2014); Douglas W. Kmiec, *Same-Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 109–11 (Douglas Laycock et al. eds., 2008).

205. Boy Scouts of Am. v. Dale, 530 U.S. 640, 659 (2000).

206. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012).

207. *Id.* at 706.

208. *Id.*

restrictive means of combatting discrimination. Indeed, because there are a vast number of law schools that do not have religiously-based admissions policies, any restriction of admission due to such policies would be slight. Furthermore, as lower courts have remarked, "market forces . . . tend to discourage" business entities from restricting the class of patrons with whom they will do business.[209] As a result, there would be more than a sufficient number of law schools available for LGBT students. Legislation that has the effect of forcing a religiously affiliated law school to amend its admissions policy in a way that contravenes its religious precepts would not be seen as the least restrictive means of combatting discrimination.

In summary, the free exercise of religion in America is robustly protected by various RFRA statutes and the First Amendment. Under the Supreme Court's First Amendment jurisprudence, the free exercise of religion includes the right to an exemption from a neutral, generally applicable law that inhibits the free exercise of religion, as long as it is combined with another constitutionally protected right. Because the admissions policies of religiously affiliated law schools ordinarily involve both a free exercise component and a freedom of association component, religiously affiliated law schools should be able to seek an exemption from non-discrimination statutes within the context of their admissions policies. Such law schools will be able to assert, on behalf of their students, that such anti-discrimination statutes interfere with both their free exercise of religion and their freedom of association.

The various RFRA statutes and the Court's First Amendment jurisprudence allow for the interference of an individual's free exercise of religion only if the state can show that it has a compelling interest for doing so and that the means used to further this interests are the means that least restrict the free exercise of religion. Given that the Court has recognized few interests as sufficiently compelling to justify an infringement on the free exercise of religion, it is unlikely that a state's general interest in combatting discrimination will be found sufficiently compelling. Furthermore, it is not clear that anti-discrimination legislation would be the most narrowly tailored means available to further this state interest. As a result, religious law schools would likely be exempt from having to comply with anti-

209. Att'y Gen. v. Desilets, 636 N.E.2d 233, 240 (Mass. 1994).

discrimination statutes that interfere with their students' right to free exercise of religion and freedom of association.

3. Current legal battles

The dispute over the admissions policies of religiously affiliated law schools is, of course, but a microcosm of the larger debate that is currently embroiling the United States: How can the right to religious freedom coexist with anti-discrimination legislation designed to protect LGBT individuals? As societal norms and attitudes continue to evolve,[210] it is likely that the intensity of these debates will increase. This section will provide an overview of the state of the law with regard to the rights to religious freedom *vis à vis* the rights of LGBT individuals. It will conclude with a brief examination of the legislation passed in the state of Utah, which has expressly sought to balance these rights.

As noted, twenty-one states have enacted RFRA legislation.[211] These pieces of legislation generally seek to protect religious believers by stating that any governmental infringement of the right to religious freedom must be (1) in furtherance of a compelling governmental interest; and (2) the least restrictive means of achieving that interest.[212] At the same time, twenty-two states and the District of Columbia have passed anti-discrimination legislation,[213] the majority of which makes it illegal to discriminate on the basis of sexual orientation and gender identity.[214] The difficulty with much of the legislation that seeks to protect either the rights of religious believers or the rights of LGBT individuals is that such legislation appears threatening when enacted. For example, as the recent fracas in Indiana suggests, RFRAs can be seen as polarizing when enacted without any protections for LGBT individuals.[215] Similarly, when California proposed anti-discrimination legislation that sought to mandate accommodation of LGBT

210. *See supra* note 55.

211. *See supra* note 179.

212. *See supra* text accompanying notes 200–203.

213. *See* Am. Civil Liberties Union, *Non-Discrimination Laws: State by State Information-Map*, https://www.aclu.org/map/non-discrimination-laws-state-state-information-map (last visited Oct. 3, 2016).

214. *Id.*

215. *See* Adam B. Lerner, *Mike Pence Reaps the Whirlwind*, POLITICO (Mar. 31, 2015, 10:04 PM), http://www.politico.com/story/2015/03/mike-pence-indiana-gay-rights-116532.

individuals without exempting religious institutions, many religious adherents saw this as a threat to their religious freedom rights.[216]

Utah has attempted to avoid such polarization by expressly including both rights in a single piece of legislation. Indeed, the Utah Antidiscrimination Act was recently amended to include sexual orientation and gender identity as distinct classes, on the basis of which employers are prohibited from discriminating.[217] At the same time, the Utah Antidiscrimination Act exempts various religious institutions and provides for a robust protection of religious liberty.[218] This approach has, thus far, been met with approval by advocates of both religious liberty rights and advocates of LGBT rights.[219] While it is too early to discern whether this approach will eliminate future conflicts between the rights of religious liberty and anti-discrimination legislation, Utah's approach seems to have had the effect of reducing some of acrimony surrounding the conflict of these rights.

CONCLUSION

Both Canada and America provide constitutional protection to religiously affiliated law schools that seek to reflect their purpose or character in their admissions policies. Under the Canadian Charter of Rights and Freedoms, religiously affiliated law schools are protected from legislation or action from accrediting agencies that interferes with their right to freedom of religion as long as their admissions policies have a nexus to religion and the individuals attending the school sincerely believe that the admissions policy acts as a function of their spiritual faith. While this right is not absolute and may be subject to limitations, a blanket refusal to recognize graduates of such law schools will likely be seen as disproportionate—so long as previous jurisprudence is properly taken into account.

In the American context, religiously affiliated law schools are protected from any action by the ABA that would interfere with their

216. *See* Patrick McGreevy, *Faith-Based Colleges Say Anti-Discrimination Bill Would Infringe on Their Religious Freedom*, L.A. TIMES (June 22, 2016, 12:05 AM), http://www.latimes.com/politics/la-pol-sac-religious-freedom-bill-20160622-snap-story.html.

217. UTAH CODE ANN. § 34A-5-106(1)(a)(i)(I)–(J) (West 2016).

218. *Id.* § 34A-5-102(1)(i)(ii)(A)–(B).

219. *See* Laurie Goodstein, *Utah Passes Antidiscrimination Bill Backed by Mormon Leaders*, N.Y. TIMES (Mar. 12, 2015), http://www.nytimes.com/2015/03/12/us/politics/utah-passes-antidiscrimination-bill-backed-by-mormon-leaders.html?_r=0.

free exercise of religion. Indeed, both the federal government and a number of state governments have enacted RFRA legislation that grants religious actors exemptions from neutral, generally applicable laws. Furthermore, under the American Bill of Rights, the Free Exercise Clause likely grants religiously affiliated law schools an exemption—subject to the *Sherbert* balancing test—from generally applicable laws, so long as the free exercise claim is raised in conjunction with another guaranteed right.

The legal protections guaranteed to religiously affiliated law schools help to ensure that both Canada and the United States maintain the viewpoint pluralism to which they are committed. Viewpoint pluralism is crucial in democratic countries as such countries are particularly prone to succumbing to the tyranny of the majority. As voluntary, independent associations, the ABA and the Canadian law societies are uniquely positioned to counteract this tendency. In order to maximize their capacity to counteract the potential of despotism in their respective countries, the ABA and the law societies of Canada should promote alternative law schools that propagate viewpoints different from that of mainstream American and Canadian culture.