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Jose M. Gabilondo

FIU College of Law, jose.gabilondo@fiu.edu

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Institutional Pluralism from the Standpoint of Its Victims: Calling the Question on Indiscriminate (In)Tolerance

By José Gabilondo¹

Abstract. Borrowing from postmodernity, new Right intellectuals have become adept at plucking core terms from the liberal register, stripping away their history and social context, and making them do the conceptual work of backlash. A recent example is the theme of the 2009 annual meeting of the AALS: institutional pluralism. The phrase has a surface resemblance to traditional liberal values but, in truth, acts as a Trojan horse for discrimination projects that many may find troubling. By putting the phrase in its social context, this essay reveals the ideological interests at work in the idea.

Keywords: backlash, heterosexuality, institutional pluralism, religiously affiliated law schools, sexual minorities, thumós

Rabinow's essay describes his role as an anthropologist on an interdisciplinary research project—SynBERC—examining synthetic biology, an emerging scientific discipline that examines “the intentional design of artificial biological systems.”² An anthropologist, Rabinow works on the part of the project—the Human Practices initiative—that examines the ethical and social dimensions of synthetic biology.³ One of the working premises of Human Practices is that conceptual “equipment platforms” can be designed and that an important function of such equipment is to give shape to human affect.⁴ He distinguishes himself from what he calls “the social suffering mode of anthropology.”⁵ Nevertheless, he admits that the scientific subgroup to which he belongs on the SynBERC project belongs to a “dominated position.”⁶

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He concludes his essay with an example of how the social scientists in Human Practices are dominated by the natural scientists.⁷ This is ironic because his account becomes a form of human practice itself as it leads him to reflect on the wider implications of the unequal power relations between the social and natural scientists. This reflection turns on a type of affect that bears directly on many of the interests protected by law: *thumós*. Translated roughly as “indignation,” it is a Hellenistic concept that refers to self-protective reactions in response to attacks on one’s self-regard.⁸ In the common image of the day, *logos* (knowledge) was the charioteer reining in and directing *eros* (physical arousal toward others) and *thumós* (moral regard for oneself).

Rabinow feels *thumós* because he suspects that some scientists on the SynBERC project are treated differently from others.⁹ He wonders:

I pose the question of what affect is appropriate in such a situation [of being dominated]? Surely anger, or more accurately the Greek *thumós* is a plausible candidate. Why so? *Thumós* is the capacity of the soul to manifest anger and zeal. *Thumós* is closely connected to the value one sets on oneself as well as the manner in which others respond to that self-esteem. These conditions lead directly to considerations of justice, politics, and ethics.¹⁰

The feeling of indignation triggers invocation of a wider realm of moral concern about justice and the dignity of others. This essay attempts to do the same. The triggering indignation was my response to the 2009 annual meeting theme of the Association of American Law Schools (AALS)—*institutional pluralism*. On its face, the theme seems harmless enough. When read in a social and historical context, though, a more troubling aspect of institutional pluralism emerges: it provides a disguise for retrograde values in the legal academy. The one I mean is the institutional arrangements that make heterosexual dominance seem legitimate.

I start by showing how conservative and ultraconservative intellectuals—learning from postmodernists—have managed to reappropriate the language and forms of the liberal register, all the while disemboweling its underlying values. One of the chief ways of doing this is by stripping ideas and institutions of their historical and social context. As an example of this strategy, I examine the 2009 AALS meeting theme of institutional pluralism. Stripped of context, it is an innocent-sounding phrase. Returned to its social context, though, it forms part of a history of how the religiously affiliated law schools came to be constituted as a special interest group as backlash to the efforts of

the ABA and the AALS to protect sexual minority students, staff, and faculty from discrimination in the legal academy. Reading in context, through rather than in spite of this social history, leads to a disturbing question about the liberal register: is it too mealy to stand up to certain social wrongs, in this case discrimination against gays, lesbians, and other sexual minorities? That is what I mean about “calling the question.” I conclude by suggesting that schism is a better model for this question than is institutional pluralism.

THE ENABLING RHETORIC OF POSTMODERN REACTIONARIES

The AALS 2009 meeting theme must be seen as part of the conservative and reactionary ideology that has insinuated itself into the political and academic imagination using liberal forms as cover. Sidney Blumenthal tells the beginning of the story in his account of the early Republican mobilization, *The Rise of the Counter-Establishment: The Conservative Ascent to Power*.¹¹ He traces the movement from an ultraright backlash against the New Deal that would not begin to mature until Richard Nixon’s 1968 election as President. Blumenthal continues the story through the presidencies of Ronald Reagan and the Bushes, but it stops short of the most recent culture wars against the academy. This war includes David Horowitz’s Academic Bill of Rights, the American Council of Trustees and Alumnae, and the movement for “conservative” diversity promoted by these forces as an antidote to rampant liberalism on U.S. campuses. It is the humanities and social science departments at universities that have borne the brunt of reactionary and conservative backlash, but its influence has been felt in the legal academy too. Here its most visible examples include the Christian Legal Society’s litigation campaign against the nondiscrimination policies (especially of public law schools) and the spectacular successes of the Federalist Society, with chapters in law schools and national placement networks that have seeded the federal judiciary.

In this most current chapter of the new Right’s efforts, it has learned to project the social anxiety of religious conservatives and social reactionaries when faced with the substantive openness of the university by displacing and restating that anxiety in the familiar liberal and progressive terms of “discrimination.” Stanley Fish said as much in a 1995 editorial in the *New York Times*: “Liberals and progressives have been slow to realize that their

preferred vocabulary has been hijacked and that when they respond to once-hallowed phrases [and words like ‘discrimination’] they are responding to a ghost now animated by a new machine.”¹² This is so because backlash needed a conceptual interface with the liberal institutions that were its natural targets. In effect, the Right has gone postmodern by deconstructing offending liberal categories such that they no longer have any political valence or rhetorical impact.¹³ Much as gay activists reappropriated “queer” and “fag” into badges of identity, the Right has digested the epithets most offensive to it, words like “diversity,” “difference,” and “pluralism.”¹⁴

Not all sectors of the reactionary and conservative mobilization are equal, though. The claims of strong religion enjoy a special status. One powerful expression of this special status is the way that discrimination against sexual minorities in the name of God has been restated as a celebration of religious liberty. In the new discrimination, the religiously justified straight supremacist accuses liberals of precisely the very bad act (discrimination) that the conservative seeks to be authorized to do. It is a gutsy move on the part of conservatives and reactionaries, one that has left real liberals conceptually defenseless, especially if they go along with the strategic decontextualization that is the hallmark of so much of backlash logic and rhetoric. Indeed, as Fish has pointed out, it is precisely by stripping words and values from their historical context that the Right has succeeded in co-opting the liberal register of forms and values.¹⁵ Because arguments based on religious liberty enjoy this special status in our legal system, the proponents of religious liberty can act on behalf of other reactionary constituencies as proxy combatants, hacking through civil society and clearing a path for reactionary movements not linked to religions. Decontextualizing has let the Right shoehorn itself into what had previously been a more liberal mainstream, including the 2009 AALS meeting. As I explain below, “institutional pluralism” is another of these Trojan horses that masks radically anti-plural projects as ideologically defensible positions worthy of tolerance and, indeed, furthering diversity. The appendix to this Essay reproduces the text of the meeting theme.¹⁶

ORWELL AT THE AALS

Like all good high ideology, the statement uses ennobling language to articulate its conception of legal education and the AALS’s role. The AALS is

made up of “self-governing intellectual communities”; the goal is a “healthy intellectual life” that supports students; the good values here are “institutional variety” and “distinctive identities”; and the wicked values are “uniformity” and “conformity.” The reader must move from text to context—defeating the Right’s reading instructions—to appreciate the rhetorical work done by the concept. First, institutional pluralism’s bedfellows make an odd (polygamous?) quartet. As an umbrella concept, institutional pluralism is said to bring together four major types of law schools: state schools, religiously affiliated law schools, historically black schools, and schools with methodological commitments. It is troubling to suggest that a single institution may not be institutionally pluralist enough within its walls such that difference counts only when it is inflected at the level of institutional form; but appreciating how the statement on institutional pluralism works as an occlusive, strategic tool of ideology involves more than this.

Second, the overall goal of the statement is to undermine the legitimacy of the AALS by situating it in a field of forces and institutions that—in the aggregate—diminish the stature of the AALS as legal education’s chief regulator. (This is a classic right-wing move.) Of course, market dynamics are one check on the function and value of the AALS. Running through the statement is a neoliberal assumption that celebrates a market framing for legal education. Institutional pluralism is likened to the virtues of consumer choice, a poignant comparison for formerly publicly supported universities that realize that they are now only “publicly assisted” or for educators who refuse to see students as clients. Even in this framing, though, the market is not all good as it is part of a combination of forces—“powerful market and regulatory norms”—that run the risk of undermining the localized freedom to create. Ironically enough for a statement issued by the AALS, the unwelcome regulator that is holding back all of this institutional richness is, of course, the AALS itself and, more specifically, its accreditation standards (about which I say more later). The statement also seems to reject—or at least to question—the value of ordinal fixations caused by the *U.S. News and World Report* system. That would seem to be a good thing, of interest to the vast majority of law schools that find themselves holding up the bottom of the pyramid.

I see several valid objections to this reading of institutional pluralism. First, not all religious schools promote discrimination. Indeed, many of them go out of their way to be inclusive of sexual minorities. Second, the question of whether to give effect to religiously based rejection of sexual minorities is

only one of the points of divergence between some of the religiously affiliated schools and the secularizing expectations of accrediting agencies. Granted, rising tolerance for sexual minorities is only one form of secular provocation for some religiously affiliated schools, but it is an important one that is likely to intensify with time. Taken as a whole, though, the statement on institutional pluralism works a highly stylized interest convergence, combining enough surface elements of liberalism with latent reactionary elements to be acceptable to a still liberal institution like the AALS that—when push comes to shove—will look no deeper than the surface forms. To do otherwise would be to use methods more critical than typically associated with the AALS. Though appealing on the surface, this move needs to be seen as part of an overall attack on the presumptuousness of a secularizing national authority like the AALS to dictate governance norms that may conflict with those at religiously affiliated schools.

For those who do like deep or critical analysis, though, what is really going on here is that the religiously affiliated schools and their natural (rather than pluralist) allies have found a new shell. Consider the extent to which the three signature panels emphasized the interests of the religiously affiliated law schools.¹⁷ All three of the panels had explored related facets of the religiously affiliated law schools or their fellow travelers: one of the three presidential sessions was devoted entirely to the interests of the religiously affiliated law schools; the panel on institutional pluralism discussed religion at length; and the panel on associational pluralism involved separate organizations that are complementary to the religiously affiliated law schools.

GODLY SCHOOLS AND THE GAYS: RENOUNCING THE OTHER (AND VICE VERSA)

If the religiously affiliated schools are using institutional pluralism as a shield to promote sectarian ends, it should come as no surprise since they have been in cahoots to resist the profession's antidiscrimination norms for nearly two decades, beginning when the American Bar Association (ABA) and the AALS decided to extend these norms to include gays and lesbians in the legal academy. Of course, most people are heterosexuals but many of them make the unjustified leap of reaching moral and normative conclusions from their object choice preferences.

This history starts in 1990, when the AALS House of Representatives voted unanimously to amend its Bylaw 6-4 to add “sexual orientation” to the list of protected categories under the Association’s nondiscrimination provisions.¹⁸ Many religiously affiliated schools objected and, to appease them, the AALS Executive Committee adopted an Interpretive Principle in August 1993 letting these schools take into account a prospective faculty member’s religious orientation in promotion and tenure.¹⁹ A parallel process of accommodation to employment discrimination against sexual minority faculty in the name of God took place when the ABA decided to include sexual orientation as a prohibited basis of discrimination in law schools. This it did in 1992, when its Standards Review Committee added “sexual orientation” to the list of categories in Standard 211 of prohibited discrimination. Following (and no doubt avoiding) suit, the ABA, at the same time, introduced a religious exception to Standard 211 preventing the religiously affiliated law schools from falling into noncompliance with the standard on antidiscrimination.

These processes helped galvanize the religiously affiliated law schools into collective action around efforts to resist aspects of the ABA accreditation standards and the AALS membership standards deemed inimical to sectarian missions. In 1994, the first conference of the Association of Religiously Affiliated Law Schools took place in Milwaukee.²⁰ The second conference took place at Regent University in 1998.²¹ Most recently, in a conference at Baylor Law School in April 2006, twenty-eight religiously affiliated law schools agreed unanimously to form a sponsoring organization known at first as the Association of Religiously Affiliated Law Schools.²² Part of what animates this collective action is figuring out how to implement religious visions about sexual orientation whose secular expression faces rising scrutiny. For example, Kristin Gerdy’s 2006 article in the *Oregon Law Review* argued that religiously affiliated law schools have a First Amendment associational right to bar employment to “practicing” homosexuals.²³ Not all religiously affiliated law schools openly discriminate against sexual minorities but the most egregious examples in the legal academy of this type of discrimination have occurred only at religious law schools. Gay and lesbian law students at Georgetown Law School had to sue in court under the District of Columbia’s human rights ordinance in order to compel the school to recognize the law school’s gay and lesbian student group.²⁴ Despite organized action on the part of students and faculty at Notre Dame, the school still refuses to permit the formation of a gay and lesbian student group.²⁵ As recently as 2007, Notre Dame refused to welcome

on campus the Soulforce Equality Ride, a nationwide mission of youth leaders who address religion-based discrimination against sexual minorities.²⁶

Again, as noted earlier, religiously based hostility to rising tolerance in the secular world for sexual minorities was only one of the triggers that led the religiously affiliated law schools to circle the wagons; but this provocation did seem to trigger a chain reaction whose effects continue to reverberate, even into the structure of the AALS annual meeting. So it does seem that the antidiscrimination efforts of the ABA and the AALS moved the religiously affiliated law schools (that might otherwise compete for religious students) to join forces. That should come as no surprise because a fundamental value was at stake for both sides. (Indeed, anti-gay animus seems to be one of the few transcendent elements that can bring together the different sects.²⁷) Moreover, the decisions of the ABA and the AALS to codify antidiscrimination norms to protect sexual minorities similarly led the religiously affiliated schools to codify their own opposition to these norms, much as the possibility of gay marriage has led the most ardent proponents of normative heterosexuality to textualize their opposition to antidiscrimination norms by enacting Defense of Marriage initiatives and the like. Granted, not all religions or even religious fundamentalists endorse normative heterosexuality. Many religiously affiliated law schools treat gay and lesbian student groups splendidly, Seattle University Law School being a prominent example. The heterogeneity of positions of sexual minorities at Catholic and other religiously affiliated institutions does not rebut my basic claim, though, that religious freedom lets some law schools openly discriminate against sexual minorities in the name of God and that, relatedly, the only support for anti-gay animus that continues to get any real traction in the United States is when it is offered in the name of God.²⁸

The San Diego annual meeting was an especially poignant background for this issue because a state referendum—Proposition 8—had just revived the legal disability on homosexuals with respect to civil marriage. Some panels addressed legal aspects of Proposition 8, but they did not seem to explore institutional pluralism's relationship to Proposition 8. This is too bad because institutional pluralism and Proposition 8 are two peas in a pod. For example, the moderator of the signature panel on institutional pluralism, Pepperdine Dean Kenneth Starr, leads the effort to have the California Supreme Court strip the existing marriage rights of those gays and lesbians who married before Proposition 8 was passed.

Liberal institutions may not exclude applicants who reject the values of antidiscrimination but religiously affiliated schools may do just this by preferring to hire those in tune with their school's religious mission, an employment practice permitted both by law and the accreditation standards of the ABA and the AALS. This kind of variety involves a Gresham's law about the reproduction (and subsidy) of minority religious fundamentalist views. The most overt forms of anti-gay violence continue, in the sense that being physically victimized and, in the most extreme case, threatened with death, continues to be the case for many sexual minorities. But marginal improvements in social conditions for some sexual minorities have activated a backlash, including formulations—like institutional pluralism—with a surface similarity to liberal values.

SCHISM AS REDEMPTION

Returning to Rabinow—what is needed is a better framework for animating sexual minority *thumós*. No mere dyspepsia, *thumós* is a practice of self-cultivation to deal with a threatening world by giving an account of it that rehabilitates one's sense of injured dignity. This project should not be confused with neurosis, which situates the problem inside the person rather than in an illegitimate social condition. Neurosis also privatizes the harm by framing relief in individual terms.²⁹ In contrast, the direction in *thumós* starts with the legitimacy of the injury and moves outward against the injuring world. The goal is to revive the expectation by directing one's hostility outward against the aggressor. This can provide a public framework for remediating collective harms. So *thumós* is more socially constructive than the superficially related idea of resentment.³⁰ Indeed, *thumós* is one of the few ways keep one's wits while in a dominated present. This became clear to many after Proposition 8, when several demonstrations took place against the Mormon Church because of its pivotal role in enabling the initiative.³¹ For the demonstrators, Proposition 8 may have clarified where they actually stand in heterosexual society.

So institutional pluralism may mask differences that are so constitutive that they should be framed more overtly (and honestly) as schism. Schism lets institutions take sides in a social controversy and bear costs from doing so, that way helping—or hindering—social justice. Schism avoids the smarminess

that Stanley Fish criticizes when he writes that “neutrality” is often a front for immoral behavior:

Those who stand on neutral principles often wish to be neutral in the political sense, and they avoid taking sides in deference to the pluralism of the forces in the field. It is for them that Machiavelli reserves his greatest scorn: “As a general thing, anyone who is not your friend will advise neutrality, while anyone who is your friend will ask you to join him, weapon in hand.” Taking sides, weapon in hand, is not a sign of zealotry or base partisanship; it is the sign of morality; and it is the morality of taking sides.³²

Calling the question on normative heterosexuality invites persons and institutions to take a stand. Because one’s reputation is at stake in this position, it is also a wager, one that proponents of normative heterosexuality fear losing. In the short run, draping religiously framed overinvestment in heterosexuality in the language of institutional pluralism gives these views cover in a social world that, increasingly, sees such views as it sees blacksmiths, an artifact that had a function only in a past long overtaken by technological and social developments.³³ Eventually, a new consensus will emerge (history may absolve us, but who wants to wait?) that relates back to the morality of this moment and that will lead to proper adjustments to reputation. In the meantime, maintaining one’s own moral clarity in the present—regardless of the lags in other persons and institutions—is a way to manage one’s own force impact, channeling it as much as one can by conforming one’s speech, conduct, and being to one’s own sense of moral certainty, although it may be contested in social space.

We would no longer entertain arguments about institutional pluralism when it came to whether racial discrimination is legitimate because a normative determination is already in place that such arguments are unacceptable. We have reached no such normative determination when it comes to anti-gay discrimination, so we can entertain pluralist defenses of normative heterosexuality. And this is not to say that normative heterosexuality is anywhere near losing effective, ongoing control over social institutions such as courts, schools, and government. Its coup de grace is still far away. What is happening, though, is that, for the first time in such a serious and persistent way, a reasoned challenge is being mounted to the traditional order of normative heterosexuality. Just this trend is alarming enough to those who would have hoped for generations more of unquestioned and, in effect, invisible normative heterosexuality.

So these trends are calling the question. And it leads to another set of questions about professional relations between sexual minorities and others: where does the liberal situate himself in this conflict? How ought the sexual minority academic and her allies think about heterosexual acquiescence with straight supremacy? We lack the kind of moral clarity that develops after a morally contested issue has been resolved. The direct stakeholders of this conflict are sexual minorities and those committed to normative heterosexuality, but the conflict also reveals another conflict of liberalism, in the sense used by Stanley Fish. If liberals cannot see their way to some degree of substantive commitment to equality—in this case for sexual minorities—they should rethink whether they are really liberals.

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**Association of American Law Schools 2009
Statement on Institutional Pluralism**

The AALS is an association of self-governing intellectual communities. Member schools are expected to adhere to our core values of teaching, scholarship, academic freedom, and diversity. But within the wide space bounded by those values our members are very different kinds of institutions. There are 72 state schools that play special roles in the legal communities of their sponsoring states. There are 49 religiously affiliated law schools whose missions are defined or influenced by particular faiths. There are law schools at historically black colleges and universities that have their own special commitments; and schools whose intellectual efforts are governed by a particular point of view (like law and economics) or directed at a particular subject matter (environmental law, or intellectual property). This year's theme focuses on the value of our institutional differences.

Institutional pluralism is a good thing for our students in the same way choices are good for consumers in other fields. It may also contribute in an important way to a healthy intellectual life. Progress in the life of the mind is a cultural achievement. A community of scholars working on the same problem, or in the same idiom, may accomplish things a group of disconnected individuals could not. (Think of the Manhattan Project, or *fin de siècle* Vienna.) The Association should cherish the interests of its members in pursuing these ends.

At the same time there are powerful market and regulatory norms that push law schools toward uniformity. The ABA accreditation process uses one set of standards that it asks all institutions to conform to. The *U.S. News* ranking system uses another linear measure. Law firms who hire our graduates rely on simple tools like rankings as an index of quality. These forces may impede, or even frustrate, schools' efforts to cultivate their own distinctive identities.

The AALS might also want to reflect on the issue of institutional variety in its own affairs. We now see, around AALS annual meetings, a number of parallel organizations concerned with particular points of view. The Federalist Society and the Society of American Law Teachers are just two examples. Should the Association (like some of its members) cultivate a particular set of interests or values, and leave it to other organizations to develop opposing points of view? Or is the proper analogy something more like Congress—a single body comprising different members but representing all possible approaches?

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1. My grateful thanks go to Penelope Pether for her ongoing support for this type of work and to Charles Pouncy and Jorge Esquirol for their comments on earlier drafts. My title paraphrases Edward Said's "Zionism from the Standpoint of Its Victims," 1 *Social Text* 7 (Winter 1979).
 2. Paul Rabinow, "Prosperity, Amelioration, Flourishing: From a Logic of Practical Judgment to Reconstruction," 21 *Law & Literature* 301, 302 (2009).
 3. *Id.* at 311–14.
 4. "The forging of affect is a component in the construction of contemporary equipment." Rabinow, *supra* note 2, at 319. "Equipment is a technical term referring to a practice situated between the traditional terms of method and technology." *Id.* at 306. See also *id.* at 307–08. A platform helps to generate solutions to a variety of problems. "An equipmental platform can be distinguished from equipmental activities and from specific instances of equipment." *Id.* at 308.
 5. *Id.* at 317.
 6. *Id.* at 315.
 7. *Id.* at 317–18.
 8. *Id.* at 319.
 9. *Id.* at 318.
 10. *Id.*
 11. Sidney Blumenthal, *The Rise of the Counter-Establishment: The Conservative Ascent to Political Power* (New York: Union Square Press, 1986).
 12. Reproduced in Stanley Fish, *The Trouble with Principle* (Cambridge: Harvard University Press, 1999), 309–12.
 13. Fish points out how much the same was accomplished by Michael McConnell in successfully challenging the University of Virginia's refusal to fund a religious student paper as a form of viewpoint discrimination. One could object that "[i]f viewpoint discrimination is to be an incisive category, there must be some forms of regulation that do not fall within. As cogent as it is, however, the objection is

unlikely to make McConnell pause because all it does is name his strategy. He *wants* the category of viewpoint discrimination to lose its edge and become so capacious that nothing falls outside it. If he succeeds in making everything viewpoint discrimination, his clients will be successful in their course of action; and to that end he is willing to employ a form of analysis (practiced by poststructuralists and postmodernists) he may personally deplore, the corrosive interrogation of anything and everything.” Fish, *supra* note 12, at 226.

14. The New Right has developed several generative assumptions as the building blocks for its arguments in favor of more religion in public life. See José Gabilondo, “When God Hates: How Liberal Guilt Lets the New Right Get Away with Murder,” 44 *Wake Forest L. Rev.* 101 (2009) (analyzing and countering reactionary rhetorical moves in favor of more religion in university life).
15. Fish explains how and why it works: “Well, first of all, by sleight of hand. The eye is deflected away from the whole—history, culture, habitats, society—and the parts, now freed from any stabilizing context, can be described in any way one likes. But why is the sleight of hand successful? Why don’t more people see through it? Because it is performed with the vocabulary of America’s civic religion—the vocabulary of equal opportunity, color-blindness, race neutrality, and, above all, individual rights. This was also the vocabulary of civil rights activists, anti-McCarthyites, and liberals in general, many of whom are now puzzled and even defensive when they hear their own words coming out of the mouths of their traditional opponents.” Fish, *supra* note 12, at 312.
16. Association of American Law Schools, Program, 2009 Annual Meeting (San Diego, Cal., Jan. 6–10, 2009).
17. The annual meeting featured three signature panels on Thursday, January 8. The panel on Institutional Pluralism was moderated by Kenneth Starr. The other panelists were Heather Gerken (Yale Law School), R. K. Greenawalt (Columbia University School of Law), Sanford Levinson (University of Texas School of Law), and Daniel Polsby (George Mason University School of Law). Two other panels ran concurrently. One on Religiously Affiliated Law Schools was moderated by Patricia O’Hara, Dean of Notre Dame Law School. The other panelists included James Gordon (Brigham Young University J. Reuben Clark Law School), Michael Herz (Yeshiva University Cardozo School of Law), Mark Sargent (Villanova University School of Law), and Bradley Toben (Baylor University School of Law). The panel on Associational Pluralism was moderated by Gail Heriot (San Diego School of Law). The other panelists were Margaret Martin Barry (Catholic University of America School of Law), Michael Brintnall (American Political Science Association), Goodwin Liu (Berkeley School of Law), and John McGinnis (Northwestern University School of Law).
18. Interpretive Principle to Guide Religiously Affiliated Member Schools as They Implement By-Laws § 6.3(a) and Executive Committee Regulation 6-3.1.
19. *Id.*
20. The conference proceedings were published in 78 *Marquette Law Review* 247. (There was no official title for the proceedings.)
21. See 11 *Regent University Law Review* 1(1998–99). The third took place in Queens, New York, in 2000. See 74 *St. John’s Law Review* 565 (2000).
22. See the announcement of the group’s formation at Baylor University, “New Association Will Link Religiously Affiliated Law Schools,” April 3, 2006, <http://www.baylor.edu/pr/news.php?action=story&story=40002> (last accessed on June 15, 2009).
23. Kristin Gerdy, “The Irresistible Force Meets the Immovable Object: When Antidiscrimination Standards and Religious Belief Collide in ABA-Accredited Law Schools,” 85 *Oregon Law Review* 943, 984 (“Forcing a religiously affiliated law school with opposing doctrinal views to employ practicing homosexuals and others who are unwilling to abide by its moral conduct code would significantly burden its ability to model the values it seeks to express.”). See also *id.* at 982–87 (2006).
24. Gay Rights Coalition of Georgetown University Law Center v. Georgetown University, 536 A.2d 1 (D.C. 1987).

25. In 1995, an *ad hoc* committee of staff, faculty, and administrators requested that the school allow its students and faculty to form an on-campus group. Notre Dame still refuses to do so. See Notre Dame response, Core Council for Gay and Lesbian Students at http://corecouncil.nd.edu/nd_response/index.shtml (last accessed on June 15, 2009).
26. See Soulforce Press Release, available at <http://www.soulforce.org/article/1194> (referencing a Princeton Review survey listing Notre Dame as one of the least gay-friendly schools in the country) (last accessed on June 15, 2009).
27. It was such an alliance between fundamentalist Christian, Jewish, and Muslim groups in Jerusalem that succeeded in blocking a gay rights rally there in 2006. In this context, anti-gay animus creates a unity of purpose within the Abrahamic traditions, as noted about the Jerusalem coalition: "Jerusalem's lesbian and gay community has unintentionally succeeded in doing something that has eluded the world's greatest thinkers: unite many members of the three major monotheistic religions. Orthodox Jews, conservative Muslims, and prominent Christian leaders are united in their opposition to a gay pride march in Jerusalem, a city that's holy to all three religions. The pope called for today's march to be canceled. Muslim leaders called it a disgrace. Orthodox Jews organized weeks of violent demonstrations." Dion Nissenbaum, "Gay Pride Parade is Now a Rally," *Miami Herald*, Nov. 10, 2006, at 20A. Security concerns about the march led to its cancellation, pleasing some who would have preferred a more complete form of conceptual liquidation. As one Israeli Deputy Prime Minister in the governing coalition noted: "If it was up to me, I would send the gay community, who insisted on celebrating in Jerusalem, to Sodom and Gomorrah . . ." Greg Myre, "Under Heavy Police Guard, Gay Rights Advocates Rally in Jerusalem," *New York Times*, Nov. 11, 2006, at A23 (quoting deputy prime minister Eli Yishai of the Shas party).
28. In a passage suggesting that religious power receded after the Enlightenment, Fish notes how gay marriage has helped to reactivate religious factors in society: When John Milton and others debated divorce in the seventeenth century, their proof texts were scriptural even though what was at stake was a change in the civil law. The example shows not only that the prestige and scope of a vocabulary is a function of historical change rather than an indication of a natural epistemological divide but that changes in history can be reversed. Now that gay marriage is a possibility (or a specter) on the public scene, theological considerations are once again being urged in the public sphere and I have recently heard radio talk-show conversations that might well have occurred in the 1640s. Fish, *supra* note 12, at 217.
29. This process should not be confused with sublimation, in which the essential antagonism and injury are buried so as to achieve a smoothness of psychic purpose. Sublimation leads to making one's peace with the irritant. *Thumós* suggests a permanent structure of oppositional awareness. The two are palpably different.
30. Popularized by Friedrich Nietzsche in *On the Genealogy of Morals* (1887) and elaborated on by his student Max Scheler in *Ressentiment* (1912), resentment, like *thumós*, involves an injury to self-regard that is blamed on another and that gives rise to a moralized frame of one's situation. Resentment, however, frames libidinal rage as a neurotic response that is unjustified. As Scheler puts it:

Resentment is an incurable, persistent feeling of hating and despising which occurs in certain individuals and groups. It takes its root in equally incurable *impotencies* or weaknesses that those subjects constantly suffer from. The feeling of resentment leads to false moral judgments made on other people who are devoid of this feeling. Such judgments are not infrequently accompanied by rash, at times fanatical claims of truth generated by the impotency this feeling comes from.

Scheler, *Ressentiment* 5.

Richard Weisberg suggests much the same: "In its frequent appearance among literary characters, resentment reveals its literal meaning, 'resensing.' The resentient man lives through, again and

again, the event that proves his passivity, resenses and intellectualizes it to the point of creating a false ethic from it.” Richard H. Weisberg, *The Failure of the Word: The Protagonist as Lawyer in Modern Fiction* (New Haven: Yale University Press, 1984), 20 (analyzing the symbolic function of lawyers in eight modern works of fiction).

31. Placards said things like “No more Mrs. Nice Gay” and “Fight back! Remove the tax exemption from the Church of the Latter Day Saints Now!”
32. Fish, *supra* note 12, at 14 (citation omitted).
33. Straight talk about the religiously affiliated law schools is complicated by many factors. Personal factors like friendship and careerist investment have impacts on how the debate is framed in the legal academy. Many sexual minority academics and their allies serve or have served on religiously affiliated faculties. And friendships in the academy span differences of identity, generation, and values. Insofar as we have blended our professional destinies with religious schools, we may have a careerist interest in defending religiously affiliated schools.