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Squaring Faith and Sexuality: Religious Institutions and the Unique Challenge of Sports

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Squaring Faith and Sexuality: Religious Institutions and the Unique Challenge of Sports

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In 2014, the Minnesota Vikings released punter Chris Kluwe from the team for, in his words, his "activism for same-sex marriage rights."[1] Imagine instead that Kluwe was kicked off the team while playing college football at one of the more than 1000

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1. Chris Kluwe, *I Was an NFL Player Until I Was Fired by Two Cowards and a Bigot*, DEADSPIN (Jan. 2, 2014), http://deadspin.com/i-was-an-nfl-player-until-i-was-fired-by-two-cowards-an-1493208214. For a full accounts of events leading up to the Vikings' decision to cut Kluwe from the team, see Memorandum from Donald S. Prophete to Zygmunt Wilf, Chairman and Owner, and Mark Wilf, President and Owner, Minn. Vikings (July 18, 2014), http://prod.preview.vikings.clubs.nfl.com/assets/docs/2014/july/full-kluwe-report.pdf.

This Article does not discuss speech interests separate from religious freedom claims, although free speech claims may exist for both LGBT students and religious institutions. In recent years, whether to protect corporate speech or corporate religious freedom with the same fervor as individual speech or free exercise has become controversial. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310 (2010); Ronald Dworkin, *The Decision That Threatens Democracy*, N.Y. REV. BOOKS (May 13, 2010), http://www.nybooks.com/articles/2010/05/13/decision-threatens-democracy/; *see also* THE RISE OF CORPORATE RELIGIOUS LIBERTY (Micah Schwartzman, Chad Flanders, & Zoë Robinson, eds., 2016).

religious universities and colleges in the United States.[2] And imagine that the religious university expelled Kluwe not because he supported same-sex marriage, but because he came out as gay while playing for the school—much like Michael Sam, the first openly gay player drafted into the National Football League, came out while at the University of Missouri.[3] Imagine further that Kluwe and another male teammate became an item and coaches asked intrusive questions like "do you guys push your beds together in the dorm room? Do you guys sleep together?"[4] And imagine that Kluwe answered truthfully, "Yes, we do."

Some would see all of these scenarios as nothing more than rank discrimination against a player for living out his sexuality.[5] Others would say a commercial enterprise like the Minnesota Vikings[6] has a much greater interest in controlling the public image and conduct of the athletes it employs than a religious university has in its student-athletes,[7] and would make no

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2. Daniel Frost, *Sexually Conservative Religious Universities and Tax Exemption*, J. CHURCH & STATE (forthcoming 2016) (manuscript at 4), http://jcs.oxfordjournals.org/content/early/2016/07/07/jcs.csw049.full.pdf+html?sid=e83aeebd-dc9d-4b74-aaa0-9a971377c25f (estimating that there are 1,014 religious universities in the United States).

3. Bill Beacon, *Michael Sam, NFL's 1st Openly Gay Draft Pick, Signs with CFL*, CTV NEWS (May 22, 2015, 2:48 PM), http://www.ctvnews.ca/sports/michael-sam-nfl-s-1st-openly-gay-draft-pick-signs-with-cfl-1.2385993.

4. This hypothetical is adapted from allegations in the lawsuit filed against Pepperdine University. *See* Nathan Fenno, *Former Basketball Players Sue Pepperdine, Coach for Discrimination*, L.A. TIMES (Dec. 17, 2014, 5:10 PM), http://www.latimes.com/sports/sportsnow/la-sp-sn-pepperdine-coach-sued-for-discrimination-20141217-story.html. This case is discussed further *infra* Part I.A.

5. Cyd Zeigler, *Southern Christian College Bullies Another Gay Athlete Into Silence*, OUTSPORTS (Apr. 22, 2015, 9:07 AM), http://www.outsports.com/2015/4/22/8459617/christian-college-gay-athlete-lgbt-silence. OutSports argues: "It is time to give these schools a choice: Discontinue your practice of forcing employees and students to sign any anti-LGBT lifestyle contract or have your membership in the NCAA or [National Association of Intercollegiate Athletics] revoked." *Id.*; *see also* Morgan Mitchell, *How Christian Universities Are Becoming a Battleground for LGBT Rights*, NEWSWEEK (Feb. 3, 2016, 12:00 PM), http://www.newsweek.com/how-christian-universities-are-becoming-battleground-lgbt-rights-422354 (quoting the Human Rights Campaign as contending that there should be no exemptions to duties not to discriminate on the basis of gender identity or sexual orientation).

6. Individual National Football League (NFL) teams operate for a profit. After significant controversy, in 2015 the NFL voluntarily gave up its tax-exempt status. *See* Andy Kroll, *The NFL Is About To Pay Taxes for the First Time in More than 70 Years*, MOTHER JONES (Apr. 28, 2015, 5:54 PM), http://www.motherjones.com/politics/2015/04/nfl-roger-goodell-tax-exempt-change.

7. Sanctions of professional sportsmen for heinous acts underline the interest that the NFL and its teams have in controlling players' behaviors, both on and off the field. *See, e.g.*, Danielle Paquette, *Johnny Manziel Is the NFL's First Domestic Violence Case in 2016. He Won't Be the Last.*, WASH. POST (Feb. 9, 2016),

distinctions.[8] However, many Americans would see religious institutions as being wholly different because these institutions play a role in shaping the lives of students who follow a particular faith tradition.[9] Some would say religious institutions legitimately can "cultivate a community oriented around one particular worldview," and they can ask students to live a life consistent with that faith tradition.[10]

The intuition that religious organizations should often be given the freedom to operate within the tenets of their faiths has been reflected throughout the law. Every state that has banned discrimination on the basis of sexual orientation in hiring makes

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https://www.washingtonpost.com/news/wonk/wp/2016/02/09/johnny-manziel-is-the-nfls-first-domestic-violence-case-in-2016-he-wont-be-the-last/; *NFL Arrests and Charges*, POINTAFTER, http://nfl-arrests.pointafter.com/ (last visited Mar. 10, 2016) (listing violent crimes committed by NFL players); *Shocking Video Shows Baltimore Ravens Star Ray Rice 'Dragging His Unconscious Girlfriend Out of an Atlantic City Casino Elevator,'* DAILY MAIL (Feb. 19, 2014, 9:49 PM), http://www.dailymail.co.uk/news/article-2563240/Shocking-video-footage-shows-Baltimore-Ravens-running-Ray-Rice-drag-girlfriend-Atlantic-City-casino-elevator-legs.html.

8. Some oppose protections for LGBT individuals in any context, whether religious or not. *See* Ryan T. Anderson, *Sexual Orientation and Gender Identity (SOGI) Laws Threaten Freedom*, HERITAGE FOUND. (Nov. 30, 2015), http://www.heritage.org/research/reports/2015/11/sexual-orientation-and-gender-identity-sogi-laws-threaten-freedom ("SOGI laws are bad public policy."). Some who oppose protections believe homosexuality violates natural law and, as a consequence, they believe that governments should not protect what they understand as "choices" or "behavior," rather than orientation or identity. *See* John Finnis, *Law, Morality, and "Sexual Orientation,"* 69 NOTRE DAME L. REV. 1049 (1994); *see also* Romer v. Evans, 517 U.S. 620, 642 (1996) (Scalia, J., dissenting) ("[W]here criminal sanctions are not involved, homosexual 'orientation' is an acceptable stand-in for homosexual conduct.").

Certainly, opposition to marriage equality has receded significantly over the last decade and will likely drop off as older individuals opposed to same-sex marriage pass away. *See* Robin Fretwell Wilson, *Marriage of Necessity: Same-Sex Marriage and Religious Liberty Protections*, 64 CASE W. RES. L. REV. 1161 (2014). In addition, within some major religious denominations, there are signs of increasing acceptance of LGBT families. In a recent exhortation, Pope Francis recognized the need to embrace all families, whether traditional "real" families or "irregular" cohabitating and same-sex families. *See* Pope Francis, *Amoris Laetitia* [On Love in the Family], VATICAN PRESS 225–45 (Feb. 12, 2015), https://w2.vatican.va/content/dam/francesco/pdf/apost_exhortations/documents/papa-francesco_esortazione-ap_20160319_amoris-laetitia_en.pdf.

9. *See* KAYE COOK & CYNTHIA NEAL KIMBALL, IS A CHRISTIAN COLLEGE EDUCATION 'WORTH IT'? WORLDVIEW DEVELOPMENT AMONG CHRISTIAN COLLEGE STUDENTS AS A MODEL FOR THE LARGER ACADEMY (2011), http://www.gordon.edu/download/pages/Is%20a%20Christian%20College%20Education%20Worth%20it.pdf.

10. Ruth Graham, *The Professor Suspended for Saying Muslims and Christians Worship One God*, ATLANTIC (Dec. 17, 2015), http://www.theatlantic.com/politics/archive/2015/12/christian-college-suspend-professor/421029/.

some accommodation for religious employers.[11] Indeed, religious liberty protections appear in over two thousand federal and state laws,[12] including federal laws that prohibit discrimination in hiring, housing, and education.[13] While some of those federal laws date back decades and might be taken to reflect a now-discarded respect for religion, the Obama Administration's significant concessions for faith organizations opposed to the contraceptive coverage mandate under the Patient Protection and Affordable Care Act attests to a continuing space for faith organizations to follow their religious convictions while abiding by the law.[14]

This special solicitude for religion, however, has come under increasing scrutiny and pushback, particularly in higher

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11. Douglas Laycock, *The Campaign Against Religious Liberty*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY, *supra* note 1, at 231, 251 n.91 (citing JEROME HUNT, CTR. FOR AM. PROGRESS, A STATE-BY-STATE EXAMINATION OF NON-DISCRIMINATION LAWS AND POLICIES 3–4 (2012), https://www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state_non-discrimination.pdf).

12. James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1445 (1992).

13. *See* Title IX, 20 U.S.C. §§ 1681–88 (2014); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (2014); Fair Housing Act, 42 U.S.C. §§ 3601–31 (2014); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1 (2010) (listing hundreds of laws with accommodations for religious believers). A legislature may accommodate religion without running afoul of the First Amendment's prohibition on establishment of religion. *See, e.g.,* Corp. of the Presiding Bishop v. Amos, 483 U.S. 327, 338 (1987) ("[The Court] has never indicated that statutes that give special consideration to religious groups are per se invalid. That would run contrary to the teaching of our cases that there is ample room for accommodation of religion under the Establishment Clause."). However, naked preferences for religion without consideration of the interests of others can violate the Establishment Clause. *See* Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985).

14. *See* Robin Fretwell Wilson, *When Governments Insulate Dissenters from Social Change: What* Hobby Lobby *and Abortion Conscience Clauses Teach About Specific Exemptions*, 48 U.C. DAVIS L. REV. 703, 726 (2014) [hereinafter Wilson, *When Governments Insulate Dissenters from Social Change*]; *see also* Douglas Laycock, *Neither Side Got What It Wanted: What Obama's Non-Discrimination Executive Order Means Going Forward*, FIRST THINGS (July 31, 2014), http://www.firstthings.com/web-exclusives/2014/07/neither-side-got-what-it-wanted [hereinafter Laycock, *Neither Side*] (describing the Obama Administration's record on protecting religious freedom as mixed, and noting that the Obama "Administration has often chosen to protect religious liberty by quietly doing nothing"). The Supreme Court's remand in *Zubik v. Burwell*, 136 S. Ct. 1557 (2016), to the circuit courts of appeals with instructions to "arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans 'receive full and equal health coverage, including contraceptive coverage,'" demonstrates that compromise over religious accommodations remains within reach even as to the most divisive obligations. *Id.* at 1560.

education.[15] Moreover, all claims for religious protection face more skepticism now than in the past.[16] The public overwhelmingly sees distinctions based on sexual orientation as illegitimate.[17] Moreover, with the rise of the "nones"—individuals with no religious affiliation[18]—many now find the desire of religious institutions to inscribe a faith-driven ethos on the institution to be a source of "bafflement and mockery."[19]

Exacerbating matters, universities are deeply intertwined with government because of the financial support they and their students receive from state and federal sources.[20] An increasing

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15. Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., to Ron Wyden, U.S. Senator (Jan. 20, 2016), https://www.wyden.senate.gov/download/?id=49301FF8-076D-4F95-A138-23C7247DAF2B&download=1.

16. As one example, after *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), "[b]attle lines . . . form[ed] around whether" the federal Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb–2000bb-4 (2014), which was at the heart of *Hobby Lobby*, "should be amended or even repealed." Times Editorial Board, *Hobby Lobby Ruling: Bad for Women's Rights, Bad for the Religious Freedom Restoration Act*, L.A. TIMES (July 1, 2014), http://www.latimes.com/opinion/editorials/la-ed-hobby-lobby-contraception-coverage-supreme-c-20140701-story.html ("[T]he decision threatens to fracture what has been a bipartisan support for reasonable accommodation of religious beliefs."). A bill circulating in Congress, but not yet introduced, would sweepingly make RFRA unavailable for discrimination claims, labor and employment claims, child-protection claims, health care claims, claims to benefits under any government program, and in all suits when the government is not a party. *See* Do No Harm Act, H.R. 5272, 114th Cong. (2015). When Congress enacted RFRA in 1993, it did so with overwhelming bipartisan support, passing unanimously in the House and in the Senate with a vote of ninety-seven to three before being signed into law by President Bill Clinton. *See* Katie Sanders, *Did Barack Obama Vote for Religious Freedom Restoration Act With 'Very Same' Wording as Indiana's?*, POLITIFACT (Mar. 29, 2015, 6:57 PM), www.politifact.com/truth-o-meter/statements/2015/mar/29/mike-pence/did-barack-obama-vote-religious-freedom-restoratio.

17. *See* ANDREW R. FLORES, WILLIAMS INST., NATIONAL TRENDS IN PUBLIC OPINION ON LGBT RIGHTS IN THE UNITED STATES 9–10 (2014), http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/natl-trends-nov-2014/. Seventy-five percent of Americans think it is already illegal to discriminate on the basis of sexual orientation, which may contribute to high levels of support for non-discrimination bans. *Id.* For a discussion of bipartisan support for non-discrimination laws, see *infra* note 120 and accompanying text.

18. *See* Michael Lipka, *A Closer Look at America's Rapidly Growing Religious 'Nones,'* PEW RES. CTR. (May 13, 2015), http://www.pewresearch.org/fact-tank/2015/05/13/a-closer-look-at-americas-rapidly-growing-religious-nones/. "Nones" make up 23% of our population, up from 16% in 2007. *Id.* Being a "none" does not mean being an atheist—a significant fraction of "nones" are spiritual, even though they do not identify with a formal religion. *Id.*

19. Graham, *supra* note 10.

20. PEW CHARITABLE CTR., FEDERAL AND STATE FUNDING OF HIGHER EDUCATION: A CHANGING LANDSCAPE 9, 11–12 (2015),

number of municipal and state governments ban discrimination on the basis of sexual orientation or gender identity, and religious organizations are accommodated to varying extents within that patchwork of laws.[21] Together, the significant financial tethers and the large number of regulations imposed upon religious universities give governments incredible power to influence

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http://www.pewtrusts.org/~/media/assets/2015/06/federal_state_funding_higher_education_final.pdf; Thomas G. Mortenson, *State Funding: A Race to the Bottom*, AM. COUNCIL ON EDUC., http://www.acenet.edu/the-presidency/columns-and-features/Pages/state-funding-a-race-to-the-bottom.aspx (last visited Feb. 11, 2016). Consider student aid under Title IV of the Civil Rights Act of 1964, 42 U.S.C. 2000d (2012), which bars "discrimination on the basis of race, color, sex, religion or national origin" by "public elementary and secondary schools and public institutions of higher learning." *See Types of Educational Opportunities Discrimination*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/crt/types-educational-opportunities-discrimination (last visited June 19, 2016) [hereinafter *Types of Educational Opportunities Discrimination*]. One can conceive of the Pell Grant program under Title IV as a kind of voucher that students may use at any university that qualifies under Title IV. U.S. DEP'T EDUC., *Federal Pell Grants Are Usually Awarded Only to Undergraduate Students*.https://studentaid.ed.gov/sa/types/grants-scholarships/pell (last visited July 15, 2016). Students elect where they go to school and, therefore, where they will spend their Pell Grants. *Id.* This "private choice" complicates the notion that facilities receive government support when accepting Pell grants. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002) (holding that school vouchers paid with public funds did not violate the Establishment Clause even when used disproportionately to pay for private religious schools because where to spend the voucher was the student's private choice).

Title IX applies in the primary and secondary education context as well, where parents' interests in raising children in particular faith traditions are also implicated. *See* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) (discussing religious interests of parents in the primary and secondary education context). The unique considerations animating religious schooling for children are beyond the scope of this Article. However, the treatment of transgender and gay students in religious primary and secondary schools has sparked considerable controversy. *See, e.g.*, Eder Campuzzano, *Lutheran School Tried To Discourage Gay, Transgender Students from Enrolling: Report*, OREGONIAN (May 20, 2016, 7:30PM), http://www.oregonlive.com/today/index.ssf/2016/05/lutheran_school_discourages_lgbt_enrollment.html#incart_email. Like Pell Grants for students, "free" lunches for qualifying students also trigger Title IX duties, even though the lunch program directly benefits students rather than the school itself. *See* Russo v. Diocese of Greensburg, No. 09-1169 (W.D. Pa. Sept. 15, 2010) (memorandum and order granting in part and denying in part defendants' motion to dismiss) (finding that Title IX applied to a private Catholic high school when another school in the same diocese accepted federal lunch program assistance); Beth Scott, *Title IX Applies to Private Schools*, AM. ASS'N U. WOMEN (Oct. 12, 2010), http://www.aauw.org/2010/10/12/private-schools/. Of course, schools may receive more federal aid than just participating in the National School Lunch Program. See Letter from Craig Breitkreutz, Principal, St. John's Lutheran Sch., to Parents (Feb. 29, 2016), http://www.wiscnews.com/pdf_6f8f4c2d-53d3-538e-bf62-b4126bb5807f.html?utm_medium=social&utm_source=email&utm_campaign=user-share (noting that the Lutheran school received "public funding through the lunch program, busing, and through NCLB (No Child Left Behind)").

21. *See infra* Part I.

religiously affiliated schools, possibly even by punishing them for adhering to disfavored views on marriage and sexuality.

Private accrediting and certification bodies also exert significant influence because their approval is often the difference between economic viability and closure.[22] Compounding all of this, institutions are now open to unprecedented scrutiny as a result of efforts to shed light on practices that, in the past, remained outside the public eye.[23] Some predict that negative media coverage itself could prove "disastrous for religious colleges already struggling with tight budgets and uncertain futures."[24]

Two recent developments highlight these risks. First, on December 18, 2015, the Human Rights Campaign (HRC) published a report on Title IX of the Education Amendments of 1972 (Title IX) entitled *Hidden Discrimination: Title IX Religious Exemptions Putting LGBT Students at Risk*. The report profiles fifty-six colleges and universities across twenty-six states that have sought waivers to act in accord with "specific tenets of the[ir] religion[s]."[25] More than 73,000 students attend schools that have received waivers, some specifically related to LGBT students, although enrolled students may not realize this.[26] The report ultimately called on the agency charged with enforcing Title IX, the Department of Education (ED),[27] "to take action."[28]

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22. *See Things to Consider: Accreditation*, FED. STUDENT AID, https://studentaid.ed.gov/sa/prepare-for-college/choosing-schools/consider#accreditation (last visited June 19, 2016).

23. *See* David R. Wheeler, *Gay Marriage and the Future of Evangical Colleges*, ATLANTIC (July 14, 2015), http://www.theatlantic.com/education/archive/2015/07/evangelical-colleges-struggle-gay-marriage-ruling/398306/.; *infra* Part II.A (describing publicity around Title IX waivers).

24. Wheeler, *supra* note 23.

25. SARAH WARBELOW & REMINGTON GREGG, HIDDEN DISCRIMINATION: TITLE IX RELIGIOUS EXEMPTIONS PUTTING LGBT STUDENTS AT RISK 5 (2015), http://hrc-assets.s3-website-us-east-1.amazonaws.com//files/assets/resources/Title_IX_Exemptions_Report.pdf; *see HRC Calls on Department of Education To Take Action Following Anti-LGBT Religious Exemption Requests*, HUM. RTS. CAMPAIGN (Dec. 18, 2015), http://www.hrc.org/blog/hrc-calls-on-department-of-education-to-take-action-following-anti-lgbt [hereinafter *HRC Calls on Department of Education*].

26. WARBELOW & GREGG , *supra* note 25, at 3.

27. *Title IX and Sex Discrimination*, OFF. CIV. RTS. (Apr. 29, 2015), http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html [hereinafter *Title IX and Sex Discrimination*].

28. *HRC Calls on Department of Education*, *supra* note 25. HRC urged ED to require schools that have requested exemptions to inform their prospective students and communities and to release a report to the public every year listing all the schools that received exemptions. *Id.* Copies of letters requesting waivers are posted online. *See* Andy Birkey, *Dozens of Christian Schools Win Title IX Waivers to Ban LGBT Students*, COLUMN (Dec. 1, 2015),

Second, private accreditors are applying pressure. The collegiate sports conference that encompasses North Carolina, has said it will not host future collegiate sporting events in North Carolina if the state's legislature does not repeal its controversial "transgender bathroom" law.[29] Similarly, the National Conference of Collegiate Athletics (NCAA) now requires cities bidding for NCAA championship events to show "how they will provide an environment that is safe, healthy, and free of discrimination, plus safeguards the dignity of everyone involved in the event," which include policies protective of sexual orientation and gender identity.[30]

Religious universities unquestionably have an interest in transmitting certain moral values, fostering a common ethos, and modeling behaviors consistent with their faith teachings. However, because most faiths speak extensively on sexuality and marriage, steps taken to cultivate a faith-infused community risk operating as a backdoor way of excluding LGBT students, faculty, and staff. A university with no LGBT members loses an important source of diversity, undercutting its role as an educator to all students, gay and straight. Thus, the challenge becomes how to inscribe central faith commitments without excluding LGBT persons.

Nowhere is this challenge more difficult than with student-athletes.[31] Since student-athletes are part of the public face of a

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http://thecolu.mn/21270/dozens-christian-schools-win-title-ix-waivers-ban-lgbt-students.

29. Andrew Carter, *HB2 Could Affect Whether NC Gets Future ACC Championships, Commissioner Swofford Says*, NEWS & OBSERVER (May 12, 2016, 3:38 PM), http://www.newsobserver.com/sports/college/acc/unc/unc-now/article77237677.html (quoting Atlantic Coast Conference Commissioner John Swofford). North Carolina's House Bill 2 bars a municipality from (a) setting a minimum wage, (b) enacting non-discrimination protections based on sexual orientation or gender identity, and (c) restricts a person's use of restrooms to the facility matching the person's gender at birth. Public Facilities Privacy & Security Act, H.B. 2, Gen. Assemb., 2d Extra Sess. (N.C. 2016). For a review of North Carolina's controversial measure, see Phil Ciciora, *Why Laws Restricting Bathroom Access to Transgender People Won't Work*, ILL. NEWS BUREAU (May 26, 2016, 11:30 AM), https://news.illinois.edu/blog/view/6367/366409; David A. Graham, *North Carolina Overturns LGBT-Discrimination Bans*, ATLANTIC (Mar. 24, 2016), http://www.theatlantic.com/politics/archive/2016/03/north-carolina-lgbt-discrimination-transgender-bathrooms/475125/.

30. Brian Hendrickson, *Board of Governors Approves Anti-Discrimination Process for Championships Bids*, NCAA (Apr. 27, 2016, 9:40 PM), http://www.ncaa.org/about/resources/media-center/news/board-governors-approves-anti-discrimination-process-championships-bids.

31. Some argue that a university has no interest in student-athletes' conduct because it chooses to have sports programs, which bolster revenue and the university's profile, and therefore its ability to attract students. *See* Frank D. Lo

university, student-athlete conduct raises questions that simply do not arise with ordinary students.[32] For example, a religious university may be concerned that, because it arranges accommodations for student-athletes when they travel for competitions and it provides locker rooms and other facilities that bring players into close physical proximity, it may facilitate or appear to condone a relationship that violates its faith tenets.

This Article does two things. First, it examines the latitude religious universities have under existing law to infuse faith into their operations.[33] Different bodies of law apply depending on how and where a university chooses to promote its faith—whether it seeks to exclude students who do not share its faith convictions, to hire and retain only those who publicly affirm its faith tenets, or to require all members in its community, students and faculty alike, to adhere to a conduct code mirroring its faith tenets. This Article asks whether universities can legally enforce such policies. Second, this Article explores how religious universities can craft communities of faith which affirm their religious tenets through conduct codes and other devices *without being exclusionary*. This Article maintains that a faith institution's interest in fostering a community of like-minded believers changes depending on when and how it seeks to express its religious beliefs while fulfilling its educational mission. Universities should never say "no gay students or faculty need apply." Even if such a policy is legal in parts of the country, it is impossible to defend such a prerogative while accepting significant government funding. Moreover, asserting religion as an acceptable grounds for excluding LGBT students, faculty, and staff can only weaken our country's commitment to respecting religion over time. Instead, universities should build communities of like-minded believers by distilling faith commitments into rules of conduct that all students—gay or

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Monte, *Fouling the First Amendment: Why Colleges Can't, and Shouldn't, Control Student Athletes' Speech on Social Media*, 9 J. BUS. & TECH. L. 1, 4 (2014). Under this view, student-athletes should be treated no differently than other students. As Part III, *infra*, explains, even if one does not believe that student-athletes publicly represent their universities, some universities may see their role in putting student-athletes in certain situations, such as in arranging travel accommodations, as making them complicit in underlying conduct.

32. Other students may also be seen as representing their universities, such as members of club sports teams, marching bands, debate teams, or other official university activities. *See, e.g.*, *Marching Band*, UNIV. BUFFALO, http://marchingband.buffalo.edu/ (last visited July 15, 2016) Many wear university insignia when performing or competing. *See id.*

33. Whether and to what extent private organizations like the NCAA can impose standards beyond what Title IX, Title VII, or state law requires of religious organizations merits attention but is beyond the scope of this Article.

straight—must follow. Universities can treat LGBT student-athletes with dignity through common sense approaches that "reasonably accommodate" *all* student-athletes—borrowing the standard from Title VII of the Civil Rights Act of 1964 (Title VII), which requires employers to make "reasonable accommodation" for an employee's religious belief or practice.[34]

Part I of this Article sketches the very important—if incomplete—safeguards that insulate LGBT students and faculty from discrimination in higher education. This Part canvasses four legal sources of such protection: (1) Title IX's ban on sex discrimination by federally funded institutions, (2) recent ED guidance extending that ban to sexual orientation and gender identity discrimination, (3) Title VII's ban on sex discrimination and recent guidance extending those protections to LGBT individuals by the U.S. Equal Employment Opportunity Commission (EEOC), and (4) parallel state laws. Part I also briefly describes the solicitude with which the federal law treats faith institutions, highlighting the ability under Title IX to follow the organization's "religious tenets"[35] and under Title VII, to "employ only persons whose *beliefs and conduct* are consistent with the employer's religious precepts."[36]

Parts II and III seek to demonstrate the unique challenges posed by LGBT athletes playing for religious universities by taking a "walk" across a typical campus—examining the chapel, the front gate (i.e., school admissions policies), the residence halls, the student commons, the staff lounge, and culminating at the athletic facilities, including the locker rooms. These Parts show how a faith institution's interests change in varying contexts.

Part II argues that universities have almost unlimited autonomy over quintessentially religious questions, such as who can marry in their chapels and who counts as "married" for

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34. 42 U.S.C. § 2000e (2012). Others commentators have discussed the parity between Title VII's accommodation for an employee's religious belief or practice and the need to treat same-sex couples with dignity. *See* Alan Brownstein, *Gays, Jews, and Other Strangers in a Strange Land: The Case for Reciprocal Accommodation of Religious Liberty and the Right of Same-Sex Couples to Marry*, 45 U. S.F. L. REV. 389, 411–12, 425 (2010).

35. 20 U.S.C. § 1687 (2012).

36. Little v. Wuerl, 929 F.2d 944, 951 (3d Cir. 1991) (emphasis added); *see* Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc., 450 F.3d 130, 138–42 (3d Cir. 2006); Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 622–24 (6th Cir. 2000); Killinger v. Samford Univ., 113 F.3d 196, 200 (11th Cir. 1997); Carl Esbeck, *Federal Contractors, Title VII, and LGBT Employment Discrimination: Can Religious Organizations Continue To Staff on a Religious Basis?*, 2015 OXFORD J.L. & REL. 368, 389.

purposes of married student housing. A number of states explicitly protect religious entities from punishment for refusing to solemnize or host marriages when doing so would violate their faiths' beliefs or for choosing to limit married student housing to couples that the entity sees as married. Part II also demonstrates that universities currently have considerable autonomy over admissions—autonomy that, over time, may be called into question given the significant tax benefits enjoyed by religious universities. It further addresses how exclusion defeats the university's own educational mission, harming both those excluded and the university community as a whole. Part II then explores the student commons and faculty lounge. This Part contends that universities can foster a common ethos through conduct codes for students and faculty. Universities can and should rely on "equal opportunity" proscriptions that all students, gay or straight, must follow—such as a commitment to remain chaste until married.

However, Part II discusses how even "facially neutral" proscriptions can operate to exclude LGBT students and faculty. If universities are allowed to define "marriage" according to their faith traditions (i.e., recognizing heterosexual marriages only), married same-sex couples who could never meet that religious tenet may be barred from working at or attending the university.[37] Here, EEOC policy and some court decisions conclude that Title VII's ban on sex discrimination extends to sexual orientation and gender identity. Religious employers have latitude to make employment decisions guided by faith. But to avoid liability under Title VII, a conduct code must be applied equally to employees and student employees and not independently discriminate on the protected basis.[38] By contrast, Title IX, both textually and through an exemption process, affords religious universities a categorical prerogative to follow faith tenets.[39] Some universities have sweeping conduct codes that restrict many types of conduct, from drinking alcohol to engaging in extramarital sex, fornication, and homosexuality.

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37. Certain faith traditions also would not recognize interfaith marriages or second marriages (even those that are civilly recognized), and no major Western faith tradition would recognize polygamous marriages. *See generally* Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417, 1440 (2012).

38. 42 U.S.C. § 2000e.

39. *See* Birkey, *supra* note 28.

Still, universities misstep if they use conduct codes as a backdoor means to ban gay faculty and staff. One overarching goal of higher education is to challenge our own preconceptions about those who are not like us.[40] Diversity advances rather than defeats a first-rate education. More fundamentally, the driving impetus for conduct codes—to build communities of like-minded believers witnessing to a faith belief—can be achieved by requiring all community members to live by the same standards before marriage. If a gay student or employee marries, the university's beliefs that the couple is not in fact married can be given voice by prohibiting those couples from living in university married student housing or engaging in same-sex intimacy on grounds.

With this framing in mind, Part IV takes up the particularly thorny question of student-athletes at religious universities. Recognizing that student-athletes represent the university publicly and that universities facilitate their conduct in important ways, this Part contends that religious universities' unique interests in the conduct of their student-athletes do not necessitate their banning LGBT students from their athletics programs. If religious universities wish to control student-athletes' conduct, they can adopt policies that discipline all students who engage in premarital or extramarital sex, including unmarried students who engage in same-sex intimacy. Should an LGBT student-athlete marry, the university can respectfully distance itself from that choice.

Part IV turns to the question of close physical proximity and argues that it has been blown out of proportion in recent debates over the North Carolina "transgender bathroom" law and the Houston HERO ordinance,[41] and that such quandaries can be solved with duties to "reasonably accommodate" all students in a respectful way. Part V concludes that faith and sexuality need not be in tension when carefully crafted laws account for the interests of all.

I. Non-discrimination Protections for LGBT Individuals

40. *See* Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 HARV. EDUC. REV. 330, 337 (2002); *see also* Richard P. Larrick et al., *The Social Psychology of the Wisdom of Crowds*, *in* SOCIAL JUDGMENT AND DECISION MAKING 227 (Joachim I. Krueger ed., 2012) (discussing the benefits of diversity in decisionmaking groups).

41. *See* Manny Fernandez & Mitch Smith, *Houston Voters Reject Broad Anti-Discrimination Ordinance*, N.Y. TIMES (Nov. 3, 2015), http://www.nytimes.com/2015/11/04/us/houston-voters-repeal-anti-bias-measure.html?_r=0.

in Higher Education

In this Volume, Professor Erin Buzuvis and others amply describe the protections enjoyed by LGBT students in higher education.[42] This Part briefly recaps select federal and state-level protections because they form the background from which certain actions of religious educational institutions are carved out.[43]

A. Title IX's protection for LGBT Students

This Section explores whether Title IX's ban on sex discrimination in education covers sexual orientation or gender identity, and it shows how policy positions from ED's Office for Civil Rights (OCR) construe Title IX's ban to include transgender and gay students. Part II's walk across the campus explores in detail the latitude given to religious educational organizations under Title IX to nonetheless follow their faith convictions.

Title IX bans discrimination based only on "sex . . . under any education program or activity receiving federal financial assistance."[44] A school receives "federal financial assistance" when

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42. Erin E. Buzuvis, *"As Who They Really Are": Expanding Opportunities for Transgender Athletes to Participate in Youth and Scholastic Sports*, 34 LAW & INEQ. 341 (2016).

43. In addition to Title IV, *see supra* note 20, Title VII, Title IX, and Title VI prevent recipients of federal funds from discriminating on the basis of race or national origin, but do not prohibit sex discrimination. *See Types of Educational Opportunities Discrimination*, *supra* note 20. Similarly, Title II, which covers public accommodations, does not protect against discrimination on the basis of sex. *Id.*

Municipal bans on discrimination provide an important source of redress for LGBT individuals, but vary in their coverage in a given state. *See* HUMAN RIGHTS CAMPAIGN, MUNICIPAL EQUALITY INDEX: A NATIONWIDE EVALUATION OF MUNICIPAL LAW (2013), http://www.hrc.org/files/assets/resources/MEI_2013_report.pdf. For example, in Arizona, non-discrimination bans cover only Phoenix and Tucson, *see id.* at 41; in Nevada, they cover all major cities, *see id.* at 47. Some states do not ban discrimination on the basis of sexual orientation or gender identity but provide special protection in state hate crime laws. *See, e.g.*, Act of June 19, 1993, ch. 987, 1993 Tex. Gen. Laws § 4 (codified as amended in scattered sections of the Texas Penal Code and the Texas Code of Criminal Procedure); Act of May 11, 2001, ch. 85, 2001 Tex. Gen. Laws § 85 (codified as amended in scattered sections of the Texas Penal Code and the Texas Code of Criminal Procedure); TEX. CODE CRIM. PRO. ANN. art 42.014 (West 2015).

Part II will more fully explore how different background laws affect specific questions that arise when faith and sexuality intersect.

44. 20 U.S.C. § 1681(a) (2014) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."). Title IX governs all

> institutions that receive federal financial assistance from [ED], including state and local educational agencies. . . . [These include] 16,500 local school districts, 7,000 postsecondary institutions . . . charter schools, for-

employee salaries are federally funded[45] or when students use federal loan dollars to pay for tuition and expenses.[46] Title IX protects students, student-employees, and applicants for admission and student-employment.[47] If any part of a covered entity receives *any* federal funds for *any* purpose, then *all* of the institution's operations are covered by Title IX.[48] The ban implicates a number of areas, including "recruitment, admissions, and counseling; financial assistance; athletics; sex-based harassment;[49] treatment of pregnant and parenting students; discipline; single-sex education; and employment."[50]

While Title IX bans discrimination based on sex, it does not expressly encompass sexual orientation or gender identity

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> profit schools, libraries, and museums. Also included are vocational rehabilitation agencies and education agencies of [all] states, the District of Columbia, and territories and possessions of the United States.

Title IX and Sex Discrimination, *supra* note 27. Thus, Title IX spans everything from elementary schools to universities and vocational programs. *See Title IX Legal Manual*, U.S. DEP'T JUST. (Aug. 6, 2015), https://www.justice.gov/crt/title-ix [hereinafter *Title IX Legal Manual*]. A recipient may not retaliate against any person who opposes an unlawful educational practice or policy or who makes charges, testifies, or participates in any complaint action under Title IX. *Id.* As an additional responsibility, Title IX recipients must "designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities . . . including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part." 34 C.F.R. § 106.8(a) (2015).

45. *Title IX Legal Manual*, *supra* note 44.

46. *See* Grove City College v. Bell, 465 U.S. 555, 564 (1984); *Title IX Legal Manual*, *supra note* 44; *supra* note 20.

47. *See* OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., TITLE IX RESOURCE GUIDE 1 (2015), http://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf. Non-student "[e]mployees are also protected from discrimination on the basis of sex, including sexual harassment, by Title VII of the Civil Rights Act of 1964 . . . ." *Id.* at 26 n.10.

48. *Id.*

49. In 2011, the Office for Civil Rights (OCR) released a "Dear Colleague" letter specifying needed steps to prevent sex-based harassment, violence, and assault. Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., to colleague (Apr. 4, 2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf. Although not binding, such letters have considerable force with administrators. *See Top of the Mind with Julie Rose: Religion and Horror, Title IX and Education*, BYU RADIO (May 20, 2016), http://www.byuradio.org/episode/6fab7809-eab2-4fb5-a67a-fea0077aa3db/top-of-mind-with-julie-rose-religion-and-horror-title-ix-and-education?playhead=3124&autoplay=true.

50. *Title IX and Sex Discrimination*, *supra* note 27. Title IX allows for separate, comparable changing and restroom facilities for each gender. *See* 44 C.F.R. § 106.33 (2012) ("A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.").

discrimination.[51] However, in April 2014, OCR interpreted Title IX's ban on sex discrimination as "extend[ing] to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity . . . ."[52] OCR policy guidance issued in May 2016 reemphasized that Title IX "encompasses discrimination based on a student's gender identity," and went further, stating that Title IX protects "a student's transgender status."[53] According to OCR, Title IX "requires schools to provide transgender students equal access to educational programs and activities even in circumstances in which other students, parents, or community members raise objections or concerns."[54] OCR's guidance regarding separate changing and restroom facilities was unequivocal: "A school may provide separate facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identity."[55]

Courts give considerable deference to OCR's interpretations.[56] For example, in 2015, a federal district court judge for the Central District of California denied summary judgment to Pepperdine University in a Title IX case filed by two former members of the women's basketball team alleging sexual

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51. 20 U.S.C. § 1681 (2014); *see* WARBELOW & GREGG, *supra* note 25, at 3.

52. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 5 (2014), http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf; *see* T. Rees Shapiro, *For Transgender Teens and Teachers, Acceptance Could Be Two Words Away*, WASH. POST (May 6, 2015), https://www.washingtonpost.com/local/education/fairfax-county-weighs-protections-for-transgender-students-and-teachers/2015/05/06/71b3cb76-f3cd-11e4-84a6-6d7c67c50db0_story.html; Ian S. Thompson, *Victory! Title IX Protects Transgender Students*, ACLU (May 1, 2014, 11:43 AM), https://www.aclu.org/blog/victory-title-ix-protects-transgender-students.

53. Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., & Vanita Gupta, Principal Deputy Assistant Attorney Gen. for Civil Rights, U.S. Dep't of Justice, to colleague 1 (May 13, 2016), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.

54. *Id.* at 2.

55. *Id.* at 3. The guidance does, however, allow for schools to "make individual-user options available to all students who voluntarily seek additional privacy." *Id.*

56. Dionne L. Koller, *Not Just One of the Boys: A Post-Feminist Critique of Title IX's Vision for Gender Equity in Sports*, 43 CONN. L. REV. 401, 411 (2010) ("Every court to consider the issue has held that [ED] regulations and Policy Interpretation are entitled to deference. Courts have stated that '[t]he degree of deference is particularly high in Title IX cases because Congress explicitly delegated to the agency the task of prescribing standards for athletic programs under Title IX.'" (citing McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck, 370 F.3d 275, 288 (2d Cir. 2004)).

orientation discrimination.[57] The women asserted that Pepperdine and its employees discriminated against them because of their "dating relationship."[58] The coaches allegedly asked intrusive questions about their sleeping arrangements "to determine [their] sexual orientation"[59] and "demanded that [they] provide unlimited access to [their] gynecology medical records."[60] For one player, the discrimination was so severe that it caused her to "attempt suicide . . . [,] to leave Pepperdine, and to give up [her] basketball scholarship."[61]

The court, after reviewing how Title IX's ban on sex discrimination has been previously interpreted, concluded that the plaintiffs raised a material question of fact.[62] Historically, under federal law, only discrimination based on noncompliance with sexual stereotypes was actionable.[63] Courts reasoned that "[h]arassment that relies 'upon stereotypical notions about how men and women should appear and behave' . . . reasonably suggests that it can be attributed to sex."[64] This sex-stereotyping theory made it easier for transgender plaintiffs to recover, but discrimination based on sexual orientation was still generally not actionable.[65] Judge Pregerson, however, observed that:

57. Videckis v. Pepperdine Univ., 100 F. Supp. 3d 927, 936 (C.D. Cal. 2015).

58. *Id.* at 929–30.

59. *Id.* at 930.

60. *Id.* at 933.

61. *Id.* at 934.

62. Videckis v. Pepperdine Univ., No. 15-00298, 2015 WL 8916764, at *8 (C.D. Cal. Dec. 15, 2015).

63. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) ("Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." (citation omitted)); Hoffman v. Saginaw Pub. Sch., No. 12-10354, 2012 WL 2450805, at *8 (E.D. Mich. June 27, 2012); *infra* Part II.E.

64. Howell v. N. Cent. Coll., 320 F. Supp. 2d 717, 722 (N.D. Ill. 2004).

65. *Hoffman*, 2012 WL 2450805, at *8.

> [T]he line between discrimination based on gender stereotyping and discrimination based on sexual orientation is blurry, at best, and thus a claim that Plaintiffs were discriminated against on the basis of their relationship and their sexual orientation may fall within the bounds of Title IX.[66]

This appears to be the first time a federal judge had ruled that sexual orientation discrimination may be encompassed by Title IX.[67] More recently, in *Grimm v. Gloucester City School Board*,[68] the United States Court of Appeals for the Fourth Circuit ruled that a trial court should reconsider its decision to reject a transgender boy's request for a preliminary injunction under Title IX against Gloucester High School in Virginia, which would compel the school to allow him to use the boys, rather than girls, restroom. In reversing the lower court's dismissal of the claim, the Fourth Circuit emphasized that OCR's January 2015 guidance permitting transgender students to use the restroom conforming to their gender identification controlled.[69] If the Fourth Circuit had interpreted Title IX to exclude gender identity claims, Grimm's suit would not have gone forward.[70]

Notwithstanding the OCR policy interpretations and court decisions, the question of whether Title IX in fact bans gender identity and sexual orientation discrimination has not been definitively decided. While a school that is found to have violated Title IX risks losing its federal funds, no school has actually lost federal funding to date, in part because of the considerable

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66. *Videckis*, 100 F. Supp. 3d at 937.

67. *See* Chris Geidner, *Federal Judge Rules That Sexual Orientation Discrimination Is Sex Discrimination*, BUZZFEED (Dec. 20, 2015, 6:01 PM), http://www.buzzfeed.com/chrisgeidner/federal-judge-rules-that-sexual-orientation-discrimination-i?utm_term=.vqZxJRNPy#.qn887r6BJ; *cf.* Velma Cheri Gay, *"50 Years Later . . . Still Interpreting the Meaning of 'Because of Sex' Within Title VII and Whether It Prohibits Sexual Orientation Discrimination,"* 73 A.F. L. REV. 61 (2015) (discussing how courts have interpreted "because of sex" in Title VII in regard to sexual orientation discrimination claims); Samuel A. Marcosson, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1 (1992) (same).

68. G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., No. 15-2056, 2016 WL 1567467, at *1 (4th Cir. Apr. 19, 2016).

69. *Id.* at *8 ("[T]he Department's interpretation of its own regulation, § 106.33, as it relates to restroom access by transgender individuals . . . is to be accorded controlling weight in this case.").

70. The Fourth Circuit rejected the school's petition for a rehearing en banc, G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., No. 15-2056, slip op. at 2 (4th Cir. May 31, 2016), despite a strident dissent by Judge Paul Niemeyer, *id.* at 3–5 (Neimeyer, J., dissenting).

latitude Title IX grants religious educational organizations.[71] Congress specified in the text of Title IX that it does "not apply to an educational institution which is controlled by a religious organization if [its] application . . . would not be consistent with the religious tenets of such organization."[72]

OCR requires schools to seek and receive express "waivers" for those specific activities that will be guided by their faith tenets.[73] As one example, Oklahoma Wesleyan University (OKWU), a 900-student evangelical Christian university, requested a waiver from Title IX regulations in, among other areas, admissions, recruitment, educational programs or activities, housing, comparable facilities, financial assistance, athletics, and employment.[74] University officials explained that "compliance

71. Katie Thomas, *Law Fights for Sports Equity, Even with a Law*, N.Y. TIMES (July 28, 2011), http://www.nytimes.com/2011/07/29/sports/review-shows-title-ix-is-not-significantly-enforced.html (showing that OCR has never stripped a religious university of Title IX funding); Kif Augustine-Adams, *Religious Exemptions to Title IX* (forthcoming 2016) (manuscript at 5–6), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2735173. Of course, there is a structural impediment to Title IX's enforcement even when a waiver is not implicated. Students do not want to jeopardize their scholarships by bringing facts to light that may result in investigations and subsequent loss of federal funds by the schools giving them scholarships. Kate Fagan, *Why The Iowa Field Hockey Title IX Complaint Is a Huge Deal*, ESPN (Feb. 5, 2015), http://espn.go.com/espnw/news-commentary/article/12283119/why-iowa-field-hockey-title-ix-complaint-huge-deal ("Rarely will active student-athletes file a claim against the school still paying for their education for fear of jeopardizing their scholarship status.").

72. 20 U.S.C. § 1681(a)(3) (2014); *see infra* Part II.B.

73. See 34 C.F.R. § 106.12 (b) (2015) ("An educational institution which wishes to claim the exemption set forth in paragraph (a) of this section, shall do so by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization."). ED's choice to operationalize the exemption through a waiver process receives *Chevron* deference. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."). Sometimes a regulation is ambiguous, in which case an agency's interpretation of its own regulation will also receive *Auer* deference. *See* Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1339–40 (2013) (Scalia, J., concurring in part and dissenting in part) ("In practice, *Auer* deference is *Chevron* deference applied to regulations rather than statutes. . . . The agency's interpretation will be accepted if, though not the fairest reading of the regulation, it is a plausible reading—within the scope of the ambiguity that the regulation contains." (citing Auer v. Robbins, 519 U.S. 452 (1997))).

74. Letter from Everett Piper, President, Okla. Wesleyan Univ., to Catherine E. Lhamon, Assistant Sec'y, Office for Civil Rights, U.S. Dep't of Educ. 3 (Nov. 14, 2014) [hereinafter Letter from Everett Piper], http://thecolu.mn/wp-content/uploads/2015/11/OklahomaWesleyanUniversity.pdf; *see* John Riley, *OWU President "Proud" To Ask for Religious Exemption to Title IX*, METROWEEKLY (Jan.

with Title IX, as interpreted by . . . OCR to reach transgender 'discrimination' would be inconsistent with the tenets of OKWU and The Wesleyan Church."[75] Although Title IX categorically authorizes religious universities to follow religious strictures, other laws like Title VII co-govern some questions, such as employment and conduct codes for student and non-student employees, which can cut back significantly on Title IX's blanket authorization.[76]

B. Federal Title VII Protections Against Discrimination for University Employees

No federal law expressly protects LGBT individuals from discrimination in employment on the basis of sexual orientation or gender identity. However, Title VII's ban on sex discrimination may provide some protection. Title VII makes it unlawful for employers to discriminate against their employees because of their race, color, religion, sex, or national origin, but it does not explicitly ban sexual orientation or gender identity discrimination.[77] Since 2012, EEOC, the body responsible for enforcing federal employment discrimination laws banning discrimination on these grounds as well as pregnancy, age (40 or older), disability or genetic information,[78] has taken the position that discrimination based on sexual orientation and on gender identity constitute sex discrimination,[79] which would permit LGBT plaintiffs to recover for employment discrimination under Title VII. According to EEOC, "'[s]exual orientation' [and 'gender

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8, 2016), http://www.metroweekly.com/2016/01/owu-president-proud-to-ask-for-religious-exemption-waiver/.

75. Letter from Everett Piper, *supra* note 74, at 2.

76. *See infra* Part II.

77. 42 U.S.C. § 2000e-2(a) (2012).

78. *Overview*, EEOC, http://www.eeoc.gov/eeoc/index.cfm (last visited Feb. 13, 2016). The Equal Employment Opportunity Commission (EEOC) promulgates rules and policies that regulate discrimination in employment, including under Title VII. *EEOC Regulations*, EEOC, http://www.eeoc.gov/laws/regulations/index.cfm (last visited Feb. 13, 2016).

79. *See Macy v. Holder*, EEOC Appeal No. 0120120821 (Apr. 20, 2012) (gender identity). In 2015, the EEOC decided that consistent with case law from the Supreme Court and other courts, "allegations of discrimination on the basis of . . . sexual orientation state a claim of discrimination on the basis of sex within the meaning of Title VII." Baldwin v. Foxx, EEOC Appeal No. 0120133080 (July 15, 2015), https://www.eeoc.gov/decisions/0120133080.pdf. Transgender employees have been able to claim protection since the "2012 EEOC ruling that incorporated gender identity-based discrimination." *See* Nicandro Iannacci, *Federal Agency Says Sexual Orientation Discrimination at Work Is Illegal*, CONST. DAILY (July 20, 2015), http://blog.constitutioncenter.org/2015/07/federal-agency-says-sexual-orientation-discrimination-at-work-is-illegal/.

identity'] as a concept cannot be defined or understood without reference to sex."[80] EEOC is litigating a raft of cases involving transgender and gay employees as a kind of sex discrimination.[81]

While EEOC has enforcement power, Title VII does not explicitly give EEOC formal rulemaking authority.[82] Nonetheless, EEOC's positions typically receive some deference, but not as much as they would under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[83] Thus, EEOC's interpretation of the scope of sex discrimination under Title VII is considered persuasive, but not binding, authority on courts.[84] EEOC's interpretations of anti-discrimination laws often fare poorly in courts.[85]

As with Title IX, courts have grappled with whether the ban on "sex" discrimination encompasses sexual orientation or gender identity. Although to date the "federal courts of appeals have uniformly held that Title VII does not [directly] forbid discrimination on the basis of sexual orientation,"[86] some courts

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80. Kevin McGowan, *EEOC Suits Allege Title VII Covers Sex Orientation Bias*, BLOOMBERG BNA (Mar. 1, 2016), http://www.bna.com/eeoc-suits-allege-n57982068201/.

81. *Fact Sheet: Recent EEOC Litigation Regarding Title VII and LGBT-Related Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (Mar 1, 2016), https://www1.eeoc.gov//eeoc/litigation/selected/lgbt_facts.cfm?renderforprint=1; *see* McGowan, *supra* note 80.

82. Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 FORDHAM L. REV. 1937, 1944–45 (2006).

83. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984). "[C]ourts have a duty to defer to reasonable agency interpretations not only when Congress expressly delegates interpretative authority to an agency, but also when Congress is silent or leaves ambiguity in a statute that an agency is charged with administering." Thomas W. Merrill & Kristen E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 833 (2001). When an agency is not charged with administering a statute, courts analyze the agency's policies using a multipart test under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), which includes "the thoroughness evident in the agency's interpretation, the validity of its reasoning, the interpretation's consistency with earlier and later pronouncements, 'and all those factors which give it power to persuade.'" Bradley George Hubbard, *Deference to Agency Statutory Interpretations First Advanced in Litigation? The* Chevron *Two-Step and the* Skidmore *Shuffle*, 80 U. CHI. L. REV. 447, 454–55 (2013) (internal citations omitted); *see* Hart, *supra* note 82, at 1944–45.

84. Dale Carpenter, *Anti-Gay Discrimination Is Sex Discrimination, Says the EEOC*, WASH. POST (July 16, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/16/anti-gay-discrimination-is-sex-discrimination-says-the-eeoc/.

85. *See* Hart, *supra* note 82, at 1941–49, 1945 ("Most cases considering EEOC interpretations have applied the *Skidmore* standard, and the agency's views have, perhaps not surprisingly, often fared poorly in these cases.").

86. Esbeck, *supra* note 36, at 389 n.80; *see* Larson v. United Air Lines, 482 F. App'x. 344 (10th Cir. 2012); Gilbert v. Country Music Ass'n, Inc., 432 F. App'x 516 (6th Cir. 2011); Pagan v. Gonzales 430 Fed. App'x 170 (3d Cir. 2011); Dawson v.

have permitted claims of discrimination based on sex stereotypes—that is, how much an "individual conforms to traditional notions of what is appropriate for one's gender"[87]— to be pursued under Title VII. Claims brought on the basis of sex stereotypes are actionable under Title VII because, as the U.S. Supreme Court explained in *Price Waterhouse v. Hopkins*, "gender must be irrelevant to employment decisions."[88]

Relying on *Price Waterhouse*, several lower federal courts have allowed transgender plaintiffs to show sex discrimination using sex stereotyping theories.[89] At least one federal district court has held that a gay man sufficiently pled sex discrimination by showing that his employer did not agree with his gender role.[90] Further, in *Smith v. City of Salem*, the Sixth Circuit found a male employee made out a *prima facie* case for "sex stereotyping" gender discrimination because he "was qualified for the position in question" and "would not have been treated differently, on account of his non-masculine behavior and GID [gender identity disorder], had he been a woman instead of a man."[91] Although older cases understood Title VII as "barring discrimination based only on 'sex' (referring to an individual's anatomical and biological characteristics), but not on 'gender' (referring to socially-constructed norms associated with a person's sex)," that approach has been "eviscerated by *Price Waterhouse*": "the Supreme Court established that Title VII's reference to 'sex' encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms."[92] Significantly, at least one plaintiff has recovered under this theory.[93]

Bumble & Bumble 398 F.3d 211 (2d Cir. 2005); Osborne v. Gordon & Schwenkmeyer, 10 Fed. App'x 554 (9th Cir. 2001).

87. *Gilbert*, 432 F. App'x at 519.

88. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989).

89. Five federal courts of appeals have allowed claims to go forward based at least in part on a sexual orientation or gender identity theory of sex stereotyping. *See* Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011); Smith v. City of Salem, Ohio, 378 F.3d 566 (6th Cir. 2004); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 262–63 (3rd Cir. 2001); Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864 (9th Cir. 2001); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252 (1st Cir. 1999). The Seventh Circuit construed sex discrimination to encompass gender identity in a decision later vacated on other grounds and has not revisited the question. *See* McGowan, *supra* note 80.

90. Terveer v. Billington, 34 F. Supp. 3d 100 (D.D.C. 2014).

91. Smith v. City of Salem, 378 F.3d 566, 567 (6th Cir. 2004).

92. *Id.* at 569–70.

93. In *Glenn v. Brumby*, a transgender woman recovered against her employer, the Georgia General Assembly's Office of Legislative Counsel, which had fired her

A handful of courts have rejected an expansive reading, reasoning that neither gender identity nor sexual orientation is "among the list of prohibited bases for employment action, that Congress did not intend to eliminate anti-gay discrimination when it enacted Title VII, and that Congress has repeatedly refused to add 'sexual orientation' or gender identity to employment protections."[94] Indeed, in late 2013, the U.S. Senate passed the federal Employment Non-Discrimination Act (ENDA), which would have banned employment discrimination on the basis of gender identity and sexual orientation,[95] after ENDA had languished in committees for nearly two decades.[96] The U.S. House of Representatives ultimately blocked ENDA, after prominent gay rights groups pulled their support for the bill, based in part on the United States Supreme Court's decision in *Burwell v. Hobby Lobby*.[97]

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for gender nonconformity. 663 F.3d 1312, 1313 (11th Cir. 2011). On cross-motions for summary judgment, she recovered her costs and got permanent injunctive relief against her employer. *Id.*; Christian Boone, *Transgender Employee Rehired But Won't Be Working*, ATLANTA J. CONST. (Aug. 6, 2010, 10:06 PM), http://www.ajc.com/news/news/local/transgender-employee-rehired-but-wont-be-working/nQjC9/.

94. Carpenter, *supra* note 84.

95. *See* Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 4 (as passed by Senate, Nov. 7, 2013).

96. The Senate passed the Employment Non-Discrimination Act (ENDA) on November 7, 2013, due in part to its specific exemption for religious employers, which was broader in scope than the current religious exemptions under Title VII. *See* S. 815, § 6; Lauren Fox, *Senate Passes ENDA in Bipartisan Vote*, U.S. NEWS & WORLD REP. (Nov. 7, 2013), http://www.usnews.com/news/articles/2013/11/07/senate-passes-enda-in-bipartisan-vote. The enlarged latitude for religious employers helped ENDA to garner eight Republican votes and pass the Senate. *U.S. Senate Roll Call Votes 113th Congress—1st Session: S. 815*, U.S. SENATE, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?&congress=113&session=1&vote=00232#position (last visited Feb. 18, 2016) (reporting a final vote count for the 2013 ENDA of 64–32, with four senators not taking part in the vote).

After the exemption's scope drew fire, a small group of legislators attempted to narrow the suddenly controversial exemption, but failed. *See* S. 815, § 6; Fox, *supra*. John Boehner, the Speaker of the House of Representatives, however, would not allow the amended bill to reach the House floor for a vote, even though it likely had majority support. ERIC S. DREIBAND & BRETT SWEARINGEN, THE EVOLUTION OF TITLE VII—SEXUAL ORIENTATION, GENDER IDENTITY, AND THE CIVIL RIGHTS ACT OF 1964, at 12 (2015), http://www.jonesday.com/files/Publication/07f7db13-4b8c-44c3-a89b-6dcfe4a9e2al/Presentation/PublicationAttachment/74a116bc-2cfe-42d2-92a5-787b40ee0567/dreiband_lgbt.authcheckdam.pdf. This is the closest that Congress has come to passing federal legislation that would ban LGBT employment discrimination.

97. *See* Lauren Fox, *House Won't Take Up ENDA*, U.S. NEWS (Nov. 4, 2013, 12:45 PM), http://www.usnews.com/news/articles/2013/11/04/house-wont-take-up-

If courts adopt the EEOC's interpretation, employees may pursue sexual orientation and gender identity discrimination under Title VII. Religious employers, however, will continue to receive the same protections they have always been granted under Title VII, described in Part II.E(1) below.[98] Universities that

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lgbt-protections; Press Release, Am. Civil Liberties Union, Gay & Lesbian Advocates & Defs., Lambda Legal, Nat'l Ctr. for Lesbian Rights & Transgender Law Ctr., Joint Statement on Withdrawal of Support for ENDA and Call for Equal Workplace Protections for LGBT People (July 8, 2014), http://www.nclrights.org/press-room/press-release/joint-statement-on-withdrawal-of-support-for-enda-and-call-for-equal-workplace-protections-for-lgbt-people/ [hereinafter Joint Statement]. Since 1974, federal legislators have consistently proposed bills to ban employment discrimination against LGBT workers, beginning with the Equality Act of 1974, H.R. 14752, 93d Cong. (1974), which would have banned sexual orientation discrimination in hiring, housing, and public accommodations. Jerome Hunt, *A History of the Employment Non-Discrimination Act*, CTR. AM. PROGRESS (July 19, 2011), https://www.americanprogress.org/issues/lgbt/news/2011/07/19/10006/a-history-of-the-employment-non-discrimination-act/. After twenty years of political failure, proponents abandoned the Equality Act and drafted ENDA as the vehicle for change. *Id.* Stand-alone legislation modeled on the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964), ENDA would have added sexual orientation and gender identity as prohibited bases for employment discrimination. Hunt, *supra*. In an ironic turn of events, in 2015, legislators turned once again to the Equality Act as the vehicle for banning LGBT discrimination in hiring—as well as in a host of other specified realms, including public accommodations, housing, jury duty, and credit. Equality Act, H.R. 3185, 114th Cong. § 9(a)(4) (2015). In January 2016, Republican Congressman Robert Dold joined the House version of the Equality Act as a co-sponsor. *Cosponsors: H.R.3185—114th Congress (2015–2016)*, CONGRESS.GOV, https://www.congress.gov/bill/114th-congress/house-bill/3185/cosponsors (last visited June 19, 2016). Republican Senator Mark Kirk joined the Senate version. *Cosponsors: S.1858—114th Congress (2015–2016)*, CONGRESS.GOV, https://www.congress.gov/bill/114th-congress/senate-bill/1858/cosponsors (last visited June 19, 2016). Congressman Dold explained that "[w]hile this bill is not perfect in its current form, it marks an important first step in the process of crafting a bipartisan bill that ensures equal rights for all Americans while also fully protecting the religious freedoms our Constitution guarantees." Steve Lee, *Rep. Bob Dold Becomes First Republican To Co-Sponsor the Equality Act*, LGBT WKLY. (Jan. 15, 2016), http://lgbtweekly.com/2016/01/15/rep-bob-dold-becomes-first-republican-to-co-sponsor-the-equality-act/. However, with Republicans in control of both chambers of Congress, there is little chance the far-ranging and controversial measure will pass without additional protections for faith organizations. Juliet Eilperin, *Obama Supports Altering Civil Rights Act To Ban LGBT Discrimination*, WASH. POST (Nov. 10, 2015), https://www.washingtonpost.com/politics/obama-supports-altering-civil-rights-act-to-include-gender-discrimination/2015/11/10/3a05107e-87c8-11e5-9a07-453018f9a0ec_story.html. Obviously, those prospects could change significantly after the 2016 elections.

98. Many universities, private and public, contract with the federal government or accept grants conditioned on compliance with non-discrimination protections. *See E-Verify: Compliance for College and University Federal Contractors*, NACUA NOTES (Jan. 20, 2010), http://counsel.cua.edu/employment/publications/nacuanotejan10.cfm [hereinafter *E-Verify*]; Kevin Theriot, *Protecting Catholic Colleges from External Threats to*

contract with the federal government cannot discriminate on the basis of sexual orientation or gender identity but have the benefit of Title VII's accommodations for religious employers.[99] Some

Their Religious Liberty, STUD. CATH. HIGHER EDUC., Jan. 2011, at 4 (discussing conditions in federal direct grants, and cautioning that "religious educational institutions must carefully examine the procurement criteria for any particular research grant in order to determine whether accepting the federal funds will adversely affect their particular religious mission"). However, merely receiving grants from the federal government does not trigger the non-discrimination bans in the executive order. Office of Fed. Contract Compliance Programs, *Frequently Asked Questions: EO 13672 Final Rule*, U.S. DEP'T LAB., http://www.dol.gov/ofccp/lgbt/lgbt_faqs.html#Q27 (last visited Feb. 14, 2016) ("The Final Rule does not apply to grant recipients or non–construction recipients of federal financial assistance.").

As Part II.E(1) notes, federal law bans discrimination based on religion in hiring, unless specifically exempted. The federal government has provided guidance about the hiring prerogatives of religious non-profits that receive federal grants. In 2007, the Department of Justice issued an opinion that the federal Religious Freedom Restoration Act would permit a religious non-profit that received a $1.5 million federal grant, World Vision, Inc., to hire on the basis of religion, as Part II.E(2) describes. *See* Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice & Delinquency Prevention Act, 31 Op. O.L.C. 162, 162 (2007).

99. LGBT employees of federal contractors receive protection against discrimination as a result of President Obama's executive order protecting LGBT individuals from discrimination in federal contracting. Exec. Order No. 13672, 79 Fed. Reg. 42,971 (July 23, 2014); *see* Jonathan Capehart, *Obama Moves To Protect LGBT Federal Contractors and Employees*, WASH. POST (July 21, 2014), https://www.washingtonpost.com/blogs/post-partisan/wp/2014/07/21/obama-moves-to-protect-lgbt-federal-contractors-and-employees/. The executive order amends two prior orders—Executive Order 11,246 and Executive Order 11,478—which bar federal contractors "from discriminating in employment decisions on the basis of race, color, religion, sex, or national origin." Office of Fed. Contract Compliance Programs, *supra* note 98 ("[The] Final Rule, like Executive Order 11246, generally applies to employers who are contractors or subcontractors with the Federal government, as well as construction contractors working on federally–assisted construction projects, with covered contracts in excess of $10,000."). While "there is no exemption for religious organizations with government contracts," the executive order left in place existing protections under Title VII for religious employers, despite President Obama's own campaign promises to eliminate the exemptions. *See* Laycock, *Neither Side*, *supra* note 14; Sarah Posner, *Obama's Faith-Based Failure*, SALON (May 4, 2012, 10:46 AM), http://www.salon.com/2012/05/04/obamas_faith_based_failure/ (quoting the President as pledging "if you get a federal grant, you can't use that grant money to proselytize to the people you help and you can't discriminate against them—or against the people you hire—on the basis of their religion"). Recently, House Republicans narrowly blocked an amendment that would have made the Executive Order's non-discrimination protections legally binding on federal contractors; at the last moment, several legislators switched their votes, resulting in chaos in the House chamber. *See* Rachael Bade, Ben Weyl & John Bresnahan, *House Erupts in Chaos After LGBT Vote*, POLITICO (May 19, 2016, 12:50 PM), http://www.politico.com/story/2016/05/house-lgbt-amendment-discrimination-fight-223366.

universities accept grants conditioned on compliance with non-discrimination protections.[100]

C. State Law Bans on Discrimination in Higher Education and Employment

The District of Columbia and fifteen states have enacted laws to protect LGBT students in higher education.[101] However, the scope of these protections vary from state to state. For example, Connecticut bars discrimination on the basis of sexual orientation, gender, and gender identity in "educational, counseling, and vocational guidance programs and all apprenticeship and on-the-job training programs,"[102] whereas Washington bans only "sexual orientation" discrimination, but does so in all places of public accommodation,[103] which includes educational institutions.[104] Some penalties for violating these discrimination bans are substantial and can include fines[105] and jail time.[106]

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100. *See E-Verify*, *supra* note 98; Theriot, *supra* note 98; Office of Fed. Contract Compliance Programs, *supra* note 98.

101. *See* Wheeler, *supra* note 24.

102. CONN GEN. STAT. § 46a-75(a) (2015) ("All educational, counseling, and vocational guidance programs and all apprenticeship and on-the-job training programs of state agencies, or in which state agencies participate, shall be open to all qualified persons, without regard to race, color, religious creed, sex, gender identity or expression, marital status, age, national origin, ancestry, intellectual disability, mental disability, learning disability or physical disability, including, but not limited to, blindness.").

103. WASH. REV. CODE § 49.60.030 (2015). Under Washington's law,

> [t]he right to be free from discrimination because of race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability is recognized as and declared to be a civil right. This right shall include, but not be limited to . . . [t]he right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement.

Id.

104. *Id.* § 49.60.040 (2015) ("'Any place of public resort, accommodation, assemblage, or amusement' includes, but is not limited to . . . any . . . educational institution, or schools of special instruction . . . .").

105. In Massachusetts, a person violating the law can be forced to pay penalties to the city, starting with a $10,000 maximum penalty for the first violation, a $25,000 maximum penalty for a second offense in a five-year period, and $50,000 maximum penalty for a third offense in a seven-year period. MASS. GEN. LAWS ch. 151B, § 5 (2015). In Washington, a florist who turned away a same-sex couple who needed flowers for their upcoming wedding was fined $1,000. Curtis M. Wong, *Barronelle Stutzman, Washington Florist Who Discriminated Against Gay Couple, Ordered To Pay Fine*, HUFFINGTON POST (Mar. 30, 2015, 4:08 PM), http://www.huffingtonpost.com/2015/03/30/barronelle-stutzman-fined_n_6971122.html.

Like Title IX, state non-discrimination laws exempt religious institutions, though some exemptions are broader than others.[107] Washington's broad exemption carves out all religious educational institutions from its non-discrimination statute.[108] On the other hand, Connecticut limits its exemption to employment by religious schools, as well as to matters of "discipline, faith, internal organization or ecclesiastical rule, custom or law."[109]

Twenty-two states ban discrimination against LGBT individuals in hiring and employment.[110] All of these states provide various religious exemptions, although these exemptions vary in scope.[111] Most commonly, states borrow language from

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106. In Connecticut, business owners found to violate discrimination laws may be found guilty of a Class D misdemeanor, CONN. GEN. STAT. § 46a-81d(b), which carries penalties including up to thirty days in jail, *id.* § 53a-26(d)(4); *cf.* Comm'n on Human Rights & Opportunities v. Bd. of Educ. of the Town of Cheshire, 855 A.2d 212, 215–17 (Conn. 2004) (determining definitions in CONN. GEN. STAT. § 46a-58 applied to public accommodation law violations).

107. Wheeler, *supra* note 24.

108. WASH. REV. CODE ANN. § 49.60.040 ("[N]or shall anything contained in this definition apply to any educational facility . . . maintained by a bona fide religious or sectarian institution.").

109. CONN. GEN. STAT. § 46a-81aa ("The provisions of . . . subsection (a) of section 46a-75 . . . that prohibit discrimination on the basis of gender identity or expression shall not apply to a religious corporation, entity, association, educational institution or society with respect to the employment of individuals to perform work connected with the carrying on by such corporation, entity, association, educational institution or society of its activities, or with respect to matters of discipline, faith, internal organization or ecclesiastical rule, custom or law which are established by such corporation, entity, association, educational institution or society.").

110. Emma Green, *Can States Protect LGBT Rights Without Compromising Religious Freedom?*, ATLANTIC (Jan. 6, 2016), http://www.theatlantic.com/politics/archive/2016/01/lgbt-discrimination-protection-states-religion/422730/. The District of Columbia also bans employment discrimination on the basis of sexual orientation, gender identity, and gender expression. D.C. CODE § 2-1402.11 (2016). The following states do not prohibit employment discrimination on the basis of sexual orientation or gender identity: Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia, and Wyoming. *See* Green, *supra*.

If federal courts ultimately agree that Title VII's sex-discrimination ban protects individuals from gender identity and sexual orientation discrimination, state courts and agencies might apply that broader interpretation to comparable state laws; as a result, states could enforce existing sex discrimination statutes to protect individuals from sexual-orientation and gender-identity discrimination in employment.

111. *See* UTAH CODE ANN. § 34A-5-112 (2015); Letter from Dayna K. Shah, Managing Assoc. Gen. Counsel, U.S. Gov't Accountability Office, to Sen. Tom Harkin, Chairman, Comm. on Health, Educ., Labor, and Pensions, et al. (Oct. 1, 2009) [hereinafter Letter from Dayna K. Shah],

Title VII's treatment of religious institutions,[112] which permits religious organizations to give preference to people of their same religion in hiring.[113] However, a fraction of states, including Iowa and Minnesota, allow religious employers to hire employees to meet bona fide occupational qualifications without violating non-discrimination duties.[114]

D. Examining Anew Settled Compromises

It is worth briefly noting that the legislative compromises around faith and sexuality in Title IX and Title VII occurred long before the recent successes of the LGBT rights movement. Importantly, these compromises are sure to be revisited in coming years, both at the state and federal level.

Gay rights advocates have expended considerable resources in their quest to secure rights for all people to "live authentically," free from discrimination.[115] In addition, gay rights advocates

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http://www.gao.gov/assets/100/96410.pdf.

112. *Cf. infra* Part II.E.

113. Ralph D. Mawdsley, *Employment, Sexual Orientation, and Religious Beliefs: Do Religious Educational Institutions Have a Protected Right To Discriminate in the Selection and Discharge of Employees?*, 2011 BYU EDUC. & L.J. 279, 288; Letter from Dayna K. Shah, *supra* note 111, at 3.

114. *See, e.g.*, IOWA CODE § 216.6(6)(d) (2016) ("Any bona fide religious institution or its educational facility, association, corporation, or society with respect to any qualifications based on religion, sexual orientation, or gender identity when such qualifications are related to a bona fide religious purpose. A religious qualification for instructional personnel or an administrative officer, serving in a supervisory capacity of a bona fide religious educational facility or religious institution, shall be presumed to be a bona fide occupational qualification."); MINN. STAT. § 363A.20, subd. 2 (2015) ("The provisions of section 363A.08 shall not apply to a religious or fraternal corporation, association, or society, with respect to qualifications based on religion or sexual orientation, when religion or sexual orientation shall be a bona fide occupational qualification for employment."); *see also* Letter from Dayna K. Shah, *supra* note 111, at 5–30. Bona fide occupational qualifications must relate to the "essence" of a job or to "the central mission of the employer's business." Huisenga v. Opus Corp., 494 N.W.2d 469, 473 (Minn. 1992) (citation omitted). Thus, in this context, a bona fide occupational qualification might be that the CEO of Catholic Charities needs to be Catholic.

115. Kelsey Harkness, *Meet 7 Big Businesses Behind the Houston Ballot Measure*, DAILY SIGNAL (Nov. 2, 2015), http://dailysignal.com/2015/11/02/meet-7-big-businesses-behind-the-houston-ballot-measure/; Matt Simonette, *Victory Fund CEO Talks Organizing, Post Marriage Decision*, WINDY CITY TIMES (Oct. 14, 2015), http://www.windycitymediagroup.com/lgbt/Victory-Fund-CEO-talks-organizing-post-marriage-decision/53132.html; Steve Weatherbe, *Foundations Pouring Millions into Campaign To Eradicate Religious Exemption on Gay 'Marriage,'* LIFE SITE NEWS (July 31, 2015), https://www.lifesitenews.com/news/foundations-pouring-millions-into-campaign-to-eradicate-religious-exemption. Advancing gay rights has figured prominently in the 2016 Presidential campaign. *See* Ramona Cramer Tucker, *No More Mud-Slinging*, U.S. NEWS (Oct. 21, 2015, 12:45 PM),

recognize the importance of continuing their activism. As Tim Gill of the Gill Foundation has noted, "'[o]ther [civil rights] movements have . . . won something and then sat back and relaxed,' only to find themselves with their work still undone many years later."[116] Thus, the movement for LGBT rights has pressed on[117] after securing marriage equality.[118]

Some assume that a Republican-controlled Congress will push back against national campaigns to "add the words."[119] Yet the nation overwhelmingly "support[s] non-discrimination protections for LGBT Americans."[120] Furthermore, a recent HRC-commissioned poll found "strong support among Republican voters for the Equality Act's non-discrimination protections."[121] Sixty-four percent "of all likely Republican voters support protecting LGBT people from discrimination."[122] Conservatives are increasingly joining the conversation about why "all Americans—including gay and transgender Americans—must be protected equally under the law."[123] In addition, support for non-

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http://www.usnews.com/opinion/blogs/faith-matters/2015/10/21/gay-marriage-debate-in-religious-circles-must-move-beyond-mud-slinging.

116. David Callahan, *No One Left Behind: Tim Gill and the New Quest for Full LGBT Equality*, INSIDE PHILANTHROPY (Aug. 25, 2015, 11:57 AM), http://www.insidephilanthropy.com/home/2015/8/25/no-one-left-behind-tim-gill-and-the-new-quest-for-full-lgbt.html.

117. *Id.*

118. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

119. These campaigns seek to add the words "sexual orientation" and "gender identity" to existing state human rights laws. *E.g.*, *What Is Add the Words?*, ADD WORDS IDAHO, http://www.addthewords.org/#!about/aboutPage (last visited June 20, 2016) (describing the work of Add the Words, Idaho, which seeks to add "sexual orientation" and "gender identity" to the Idaho Human Rights Act).

120. Brandon Lorenz, *Illinois Senator Mark Kirk Becomes First Senate Republican To Co-Sponsor the Equality Act*, HUM. RTS. CAMPAIGN (Jan. 19, 2016), http://www.hrc.org/blog/mark-kirk-becomes-first-senate-republican-to-co-sponsor-the-equality-act; *accord* Press Release, Human Rights Campaign, New Poll: 59% of Voters Less Likely To Support Candidates Who Oppose Non-Discrimination Protections (July 22, 2015), http://www.hrc.org/press/new-poll-59-of-voters-less-likely-to-support-candidates-who-oppose-non-disc.

121. ROBERT P. JONES ET AL., PUB. RELIGION RESEARCH INST., BEYOND SAME-SEX MARRIAGE: ATTITUDES ON LGBT NON-DISCRIMINATION LAWS AND RELIGIOUS EXEMPTIONS 10 (2016), http://publicreligion.org/site/wp-content/uploads/2016/02/PRRI-AVA-2015-LGBT-Report.pdf ("There is bipartisan support for non-discrimination laws for LGBT people, with more than six in ten Republicans (61%), and more than seven in ten independents (73%) and Democrats (78%), in favor of such laws."); Lorenz, *supra* note 120.

122. Lorenz, *supra* note 120; Human Rights Campaign, *supra* note 120.

123. FREEDOM FOR ALL AMS., WHY CONSERVATIVES SUPPORT NON-DISCRIMINATION PROTECTIONS FOR LGBT AMERICANS 1 (2015), http://www.freedomforallamericans.org/wp-content/uploads/2015/04/Conservatives.pdf. As gay rights advocates explain, non-discrimination measures are consistent with conservative values of "individual

discrimination measures has been building among Republican legislators. Following *Obergefell v. Hodges*,[124] moderate-Republican Representative Charlie Dent spoke of the need for "compromise legislation" that "would prohibit anti-LGBT employment and housing discrimination" while simultaneously "ensur[ing] non-profits won't have their tax-exempt status revoked for opposing same-sex marriage."[125]

The Equality Act's sweeping protections received key bipartisan support from Senator Mark Kirk and Representative Robert Dold, the Act's first Republicans co-sponsors.[126] For Matt McTighe, Executive Director of Freedom for All Americans, Republican co-sponsorship of the Equality Act has

> shown us that non-discrimination isn't just a Democratic issue or a Republican issue, but it is an American issue. The vast majority of Republicans, Democrats and independents all agree that discrimination is not an American value. That's why we are seeing conservative leaders across the nation fighting to ensure that every American, regardless of sexual orientation or gender identity, are protected from discrimination.[127]

According to McTighe, Senator Kirk's and Representative Dold's support of the Equality Act "is consistent with the majority of conservatives in the country who already are strong supporters of LGBT non-discrimination laws."[128]

Other Republicans back the First Amendment Defense Act (FADA), which would prohibit "the federal government from penalizing individuals or institutions on the basis that they act in accordance with a religious belief that marriage is a union between one man and one woman."[129] Thus, FADA would

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freedom and working hard to care for your family," "fairness for all hardworking Americans," "respecting . . . coworkers and serving customers, and getting the job done," and enacting laws that "are good for business." *Id.*

124. 135 S. Ct. 2584 (2015).

125. Chris Johnson, *Equality Act Introduced with Great Fanfare*, WASH. BLADE (July 23, 2015, 1:40 PM), http://www.washingtonblade.com/2015/07/23/equality-act-introduced-with-great-fanfare/. However, Representative Dent has yet to file such a bill. *See Bill Summary and Status*, U.S. HOUSE REPRESENTATIVES, http://dent.house.gov/index.cfm?p=SponsoredLegislationSponsored Legislation (last visited Apr. 11, 2016).

126. Adam Polaski, *Senator Mark Kirk Is First Republican Senator To Sponsor Equality Act*, FREEDOM FOR ALL AMS. (Jan. 20, 2016, 11:10 AM), http://www.freedomforallamericans.org/senator-mark-kirk-is-first-republican-senator-to-sponsor-equality-act/?mc_cid=5c70ed2256&mc_eid=2bd3be8f3e.

127. *Id.*

128. *Id.*

129. Mike Lee, *Sen. Mike Lee: First Amendment Defense Act Protects Critical 'Space of Freedom,'* DESERET NEWS (June 18, 2015, 12:00 AM),

proactively address one concern that arose in the aftermath of *Obergefell*: whether a tax-exempt university or other organization could be stripped of its tax exemption for adhering to a traditional view of marriage.[130] However, because FADA would not extend any new rights to the LGBT community, some have argued that it "enable[s] anti-LGBT discrimination."[131] In a divided Congress, FADA is "competing for passage with" the Equality Act.[132]

Recent scraps over budget riders show that public support may not lead inexorably to definitive federal legislation.[133] To be sure, the extent of bipartisan support for federal LGBT protections will rest heavily on whether and how protections for faith and sexual orientation are balanced. As the next Part shows, a "walk" across a typical university campus reveals the limits of existing law in providing guidance on a range of questions post *Obergefell*—subjects that will certainly be included in any legislative fixes going forward.

II. A "Walk" Across Campus

To grasp how a university's interest in adhering and witnessing to its faith beliefs intersects with protections for LGBT students, staff, and faculty, this Part "walks" across a university campus—beginning at its chapel, traveling through its front gate, residence halls, student commons, and staff lounge.[134]

Before making this trek, it is worth noting that the degree to which faith influences each institution's character and day-to-day operations varies. Religious universities span a spectrum: Some

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http://www.deseretnews.com/article/865630939/First-Amendment-Defense-Act-protects-critical-space-of-freedom.html?pg=all [hereinafter Lee, *Sen. Mike Lee*]; *see Maggie Gallagher, Why I Support a Viewpoint-Neutral First Amendment Defense Act*, NAT. REV. (Jul. 29, 2016, 3:10 PM), http://www.nationalreview.com/article/438520/ame-sex-marriage-viewpoint-neutral-first-amendment-defense-act-makes-sense.

130. *See infra* Part II.

131. Johnson, *supra* note 131.

132. *Id.*

133. For example, in May 2016, House Republicans blocked a measure that would have banned federal contracts from going to groups that discriminate on LGBT status. Karoun Demirjian, *House Turns into Battleground over LGBT Rights*, WASH. POST (May 19, 2016), https://www.washingtonpost.com/news/powerpost/wp/2016/05/19/house-turns-into-battleground-over-lgbt-rights/.

133. Lee, *Sen. Mike Lee*, *supra* note 129.

134. An exploration of athletic facilities can be found in Part III, *infra*.

train students to minister to the faithful.[135] Others are covenantal schools that "agree with parents to provide a consistent, Christ-centered education" firmly rooted in Scripture and "strive to admit only Christian families."[136] For example, Harding University prohibits all kinds of "sexual immorality," such as sharing hotel rooms with single members of the opposite sex, visiting such persons' residences, and frequenting dance clubs.[137] Other schools, though religiously affiliated, are less religiously infused, and have few or no stringent requirements for faculty and students. Some might see themselves as religious in name only. Figure 1 graphically represents the different archetypal institutions, with the most religiously infused at the core. As this Part will show, the extent to which a school is religiously infused sometimes matters to the degree of insulation it receives.

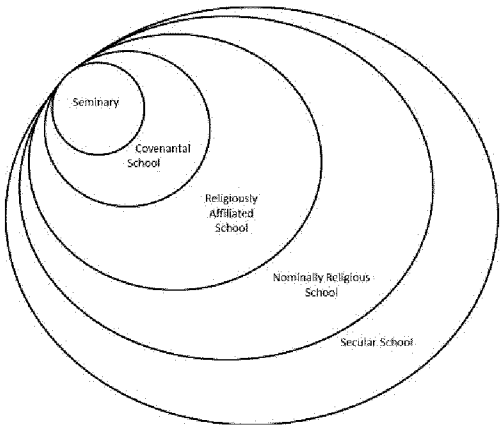

Figure 1. Degrees of Religious Infusion

135. For example, seminaries train religious leaders, such as priests, ministers, and rabbis. *Seminary*, OED ONLINE, http://www.oed.com/view/Entry/175684?rskey=afTceN&result=1&isAdvanced=false#eid (last visited June 20, 2016).

136. Michael W. Lee, *What Is a Christian School?*, PERSPECTIVE (Jan. 11, 2006), http://www.cherokeechristian.org/wp-content/uploads/2010/12/BadMyth-whatisachristianschool.pdf.

137. HARDING UNIV., STUDENT HANDBOOK 2015–16, at 11 (2015), http://www.harding.edu/assets/www/student-life/pdf/student_handbook.pdf ("Sexual immorality in any form will result in suspension from the University. Visiting in the residence of a single member of the opposite gender, even though others are present, without permission is prohibited. Staying overnight in a motel, hotel, residence or any such arrangement with a member of the opposite gender will result in suspension, although explicit sexual immorality may not have been observed. Students are prohibited from possessing or displaying pornographic materials of any type. . . . Students are not allowed to social dance or go to dance clubs, bars, or other inappropriate places of entertainment.").

A. The Chapel

A religious university's religious autonomy is at its zenith in its chapel, so this Article begins there. In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, the U.S. Supreme Court unanimously held that "strictly ecclesiastical" matters are "the church's alone."[138] In that case, Cheryl Perich worked as a "called" teacher for Hosanna-Tabor Evangelical Lutheran Church, affiliated with the Lutheran Church–Missouri Synod (LCMS).[139] When Perich developed narcolepsy, she requested and was granted disability leave, and the Church hired a substitute teacher to take on her duties.[140] When Perich asked to return to work earlier than expected, Church leadership questioned whether she was ready to resume teaching and, further, whether it could accommodate her narcolepsy.[141] Perich filed a complaint with EEOC, which authorized her to sue under the Americans with Disabilities Act (ADA).[142] As a religious matter, LCMSadherents do not believe in litigation; church leaders wished to mediate with Perich.[143] The question before the Court was whether Perich's ADA suit could proceed or whether the First Amendment, under a "ministerial exception," insulated the church's decision.[144]

While many would not have classified Perich as a "minister," the Court found that her "job duties reflected a role in conveying the Church's message and carrying out its mission."[145] Acknowledging that non-discrimination laws are "undoubtedly important,"[146] the Court concluded that a religious organization's choice about who should deliver its message and beliefs belonged

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138. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC., 132 S. Ct. 694, 709 (2012) (citing Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 119 (1952)).

139. *Id.* at 700. "Called" teachers, as opposed to "lay" teachers, must satisfy certain academic requirements, including theological study. *Id.* at 699. "Once called, a teacher receives the formal title 'Minister of Religion, Commissioned.'" *Id.*

140. *Id.* at 700–01.

141. *Id.*

142. *Id.* at 701.

143. *See id.* at 701; *see also* COMM'N ON THEOLOGY & CHURCH RELATIONS, 1 CORINTHIANS 6:1-11: AN EXEGETICAL STUDY (1991) (detailing the Lutheran Church–Missouri Synod's stance on litigation), http://www.lcms.org/Document.fdoc?src=lcm&id=415.

144. *Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 132 S. Ct. at 701.

145. *Id.* at 708.

146. *Id.* at 710.

to it alone—making this a decision into which the government may not intrude.[147]

The significant sphere of autonomy given to religion rested in part on the Court's view of the Establishment Clause as restricting the government from interfering in ecclesiastical matters.[148] But the Court was careful to narrowly cabin its decision: "The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her. Today we hold only that the ministerial exception bars such a suit."[149]

Like the power to choose its ministers, the question of who may be married in a particular faith tradition is quintessentially religious. Marriage has always been a religious sacrament.[150] Religious couples who marry are not simply entering ordinary civil contracts with one another: they believe they are entering into a covenant with God.[151] In fact, many couples experience their marriages as "sojourning together on a religious journey" with God.[152]

Recognizing the inherently religious nature of decisions about who may marry in a particular faith tradition, all states that voluntarily embraced same-sex marriage exempted clergy and all but one exempted religious non-profits from any duty to host or facilitate such marriages.[153] Similarly, in his majority opinion in *Obergefell*, Justice Kennedy

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147. *Id.*

148. *Id.*; *see* Douglas Laycock, Hosanna-Tabor *and the Ministerial Exception*, 35 HARV. J.L. & PUB. POL'Y 839, 859–62 (2012).

149. *Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 132 S. Ct. at 710. The Court expressly reserved the question of whether contract breaches or tort suits for injuries would also be barred. *Id.*

150. *See* Charles J. Reid, Jr., *Marriage: Its Relationship to Religion, Law, and the State*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 157, 176–78 (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson eds., 2008) ("For many people . . . marriage is a religious institution and wedding ceremonies are a religious sacrament within American society.").

151. For more on this subject, see MARGARET F. BRINIG, FROM COVENANT TO CONTRACT (2000).

152. Robin Fretwell Wilson, *"Getting the Government Out of Marriage" Post Obergefell: The Ill-Considered Consequences of Transforming the State's Relationship to Marriage*, 2016 U. ILL. L. REV. (forthcoming) (manuscript at n.222) (quoting Rachel Lile Colbert, Scale Development of the Religious Marital Factor-26 (Mar. 13, 2007) (unpublished Ph.D. dissertation, Regent University) (on file with author)).

153. Clergy exemptions appear in CONN. GEN. STAT. § 46b-22b (2015); DEL. CODE ANN. tit. 13, § 106 (2016); D.C. CODE § 46-406(c) (2016); HAW. REV. STAT. § 572-12.1 (2016); 750 ILL. COMP. STAT. 5/209 (2016); MD. CODE ANN., FAM. LAW §§ 2-201, 2-202 (West 2012); MINN. STAT. § 517.09 (2015); N.H. REV. STAT. ANN.

> emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.[154]

In keeping with generally accepted notions of religious autonomy over religious marriage, religious universities often restrict who may marry in their chapels. The University of Notre Dame, for example, provides that to marry in the Basilica, couples must secure "the permission of the bride's pastor," one of the two to be married must be a member in good standing of the Catholic Church,[155] and couples must complete a "marriage preparation program" prior to the ceremony.[156] Nothing explicitly limits marriages in Notre Dame's Basilica to couples in opposite-sex marriages,[157] but given the Church's present teachings on marriage as a union of one man and one woman, presumably no same-sex couple could meet Notre Dame's listed requirements for marrying there.[158]

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§ 457:37(II) (West 2013); N.Y. DOM. REL. LAW § 11(1) (McKinney 2014); 15 R.I. GEN. LAWS § 15-3-6.1(b) (2013); VT. STAT. ANN. tit. 18, § 5144(b) (2016); WASH. REV. CODE § 26.04.010(4) (2016). Clergy are also exempted in the states that embraced marriage equality by public vote, *see, e.g.*, ME. STAT. tit. 19-A, § 655(3) (2013), as well as in states that combined LGBT rights with marriage conscience protections in a single legislative package, like the Utah Compromise, *see* Antidiscrimination and Religious Freedom Amendments, ch. 46, 2015 Utah Laws 214. Exemptions for religious organizations appear in CONN. GEN. STAT. §§ 46b-22b, 46b-35a (2015); D.C. CODE § 46-406(e) (2016); HAW. REV. STAT. § 572-12.1 (2016); 750 ILL. COMP. STAT. 5/209 (2016); ME. REV. STAT. ANN. tit. 19-A, § 655 (2013); MD. CODE ANN., FAM. LAW §§ 2-201, 2-202 (West 2012); MINN. STAT. § 363A.26(3) (2015); N.H. REV. STAT. ANN. § 457:37(III) (West 2013); N.Y. DOM. REL. LAW § 10-b(1) (McKinney 2014); 15 R.I. GEN. LAWS ANN. § 15-3-6.1(c) (2013); Antidiscrimination and Religious Freedom Amendments, ch. 46, 2015 Utah Laws 214 ; VT. STAT. ANN. tit. 9, § 4502(l) (2016); WASH. REV. CODE § 26.04.010(5) (2016).

154. Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015).

155. *Marriage at the Basilica, Step 1: Schedule Your Wedding*, UNIV. NOTRE DAME, http://campusministry.nd.edu/basilica-of-the-sacred-heart/marriage-at-the-basilica/step-1-schedule-your-wedding/ (last visited Feb. 11, 2016).

156. *Id.*

157. However, couples seeking to reserve the Basilica for a wedding ceremony are told to have the "[n]ames of the bride and groom" available, *id.*, which suggests that only opposite-sex marriages may take place there.

158. *See* Anthony Faiola, *Pope Lectures Catholic Elders at Closing of Synod on Family*, WASH. POST (Oct. 25, 2015), https://www.washingtonpost.com/world/europe/vatican-synod-calls-for-a-more-welcoming-catholic-church/2015/10/24/f98c83b6-71b9-11e5-ba14-318f8e87a2fc_story.html.

A majority of Americans do not oppose such exemptions.[159] What is more, "[n]o one seriously believes that clergy will be . . . even asked[] to perform marriages that are anathema to them."[160] But if they are, there is near-universal agreement that neither a clergy member nor a church could or should be forced to solemnize a marriage when doing so would violate their religious convictions.[161] Religious organizations may, however, open themselves to litigation and may potentially violate state and municipal non-discrimination laws if they have permitted non-members to rent their facilities in the past but deny access to gay couples alone. For example, in *Bernstein v. Ocean Grove Camp Meeting Ass'n*, a Methodist-affiliated non-profit group in New Jersey was found to have violated a state non-discrimination law when it denied a pair of same-sex couples the use of its boardwalk and pavilion for their commitment ceremonies.[162] This was the first such request that had been denied for anything other than scheduling reasons.[163] The group paid substantial fines; lost its

159. *See* SARAH TRUMBLE & LANAE ERICKSON HATALSKY, THIRD WAY, AMERICANS AGREE: MARRIAGE FOR GAY COUPLES DOESN'T THREATEN RELIGIOUS LIBERTY 7 (2013), http://s3.amazonaws.com/content.thirdway.org/publishing/documents/pdfs/000/000/157/americans-agree-marriage-for-gay-couples-doesnt-threaten-religious-liberty.pdf?1462825557 ("The only situation in which respondents felt someone *should* be allowed to refuse to provide a wedding-related service for a gay couple was when the provider was a church or clergy member and that service was the religious solemnization of that marriage—the actual performance of the wedding ceremony. In that case, 61% of voters felt the clergy member or church should be able to refuse to perform the ceremony, compared to 28% who felt they should not.").

160. Marc Stern, *Same-Sex Marriage and the Churches*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 1 (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson eds., 2008).

161. *See* John Corvino, *The Slippery Slope of Religious Exemptions*, JOHNCORVINO (Nov. 22, 2009), http://johncorvino.com/2009/11/the-slippery-slope-of-religious-exemptions/ ("No serious participant argues that the government should force religions to perform gay weddings (or ordinations or baptisms or other religious functions) against their will."). *But see* TRUMBLE & HATALSKY, *supra* note 159, at 7 (reporting that 28% of respondents believed that clergy members and churches should not be able to refuse to perform a same-sex wedding ceremony because of religious beliefs).

162. *See* Bernstein v. Ocean Grove Camp Meeting Ass'n, CRT 6145-09, 2012 WL 169302, at *2 (N.J. Office of Admin. Law, Jan. 12, 2012) ("The Green Acres program is designed to preserve open space and the statutory scheme authorizes a tax exemption for non-profit corporations utilizing property for conservation or recreational purposes. One condition of the exemption is that the property be 'open for public use on an equal basis.'"); Robin Fretwell Wilson & Anthony Michael Kreis, *Embracing Compromise: Marriage Equality and Religious Liberty in the Political Process*, 15 GEO. J. GENDER & L. 485, 494 (2014).

163. *Judge Rules in Favor of Same-Sex Couple in Discrimination* Case, ACLU N.J. (Jan. 13, 2012), https://www.aclu-nj.org/news/2012/01/13/judge-rules-in-favor-

ability to participate in a state program exempting "public lands" from taxes; and lost its "exemption from ad valorem property taxes on the pavilion,"[164] which was made possible "by the group's own decision to hinge its tax exemption on continued participation in the public lands program."[165]

As the next sub-Part explains, a religious university's claims for religious autonomy also ebb in strength when a university seeks to open admission to some, but not all, people otherwise qualified for admission. And while ED has authorized waivers under Title IX as to admissions, the *Obergefell* Court gave no assurances about a university's tax-exempt status if the university excludes LGBT students.[166]

B. The Front Gate (or Admissions)

Title IX's carve-out for religious institutions is central to religious schools' prerogative to limit admissions to specific types of applicants while accepting funding. At Title IX's inception, Congress specified that it shall "not apply to an educational institution which is controlled by a religious organization if [its] application . . . would not be consistent with the religious tenets of such organization."[167] Although religious universities are expressly carved out from Title IX's prohibitions,[168] the ED created an administrative process to grant express "waivers" to religious universities controlled by religious organizations.[169] Universities must follow ED regulations in order to rely on Title IX's categorical exemption.[170]

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of-same-sex-couple-in-discrimination-case/.

164. Wilson & Kreis, *supra* note 162, at 494.

165. *Id.* The group later regained its tax exemption on the pavilion as a religious organization. *Id.*

166. *See* Laurie Goodstein & Adam Liptak, *Schools Fear Gay Marriage Ruling Could End Tax Exemptions*, N.Y. TIMES (June 24, 2015), http://www.nytimes.com/2015/06/25/us/schools-fear-impact-of-gay-marriage-ruling-on-tax-status.html?_r=0.

167. Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235, 373 (codified as amended at 20 U.S.C. § 1681(a)(3) (2014)); *see also* 34 C.F.R. § 106.12(a) (2015) ("[Regulations promulgated under Title IX] do[] not apply to an educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization."). This categorical exemption differs in important ways from Title VII's more cabined exemptions. *See infra* note 248 and accompanying text.

168. Wilson, *When Governments Insulate Dissenters from Social Change*, *supra* note 14 (discussing differences between specific, tailored carve-outs from specific statutes and generalized protections, like RFRA).

169. *See* 34 C.F.R. § 106.12(b).

170. *See supra* note 73 and accompanying text.

Schools have sought and received waivers in areas such as admissions and recruitment, educational programs and activities, athletics, employment, housing, and financial aid.[171] Since 2013, more than four dozen schools have requested waivers to portions of Title IX that might apply to students and staff who are transgender or in same-sex relationships.[172] Of these, twenty-three schools have asked for and received a Title IX exemption for sexual orientation, and thirty-three schools have asked and received an exemption for gender identity.[173]

Nonetheless, few universities appear to bar admission to LGBT students.[174] In fact, the vast majority of universities "want to be viewed as safe and welcoming places to all students, and they are happy to go the extra mile to ensure that they are" by "continuously working to improve . . . safety concerns, recruitment, awareness and education both in and outside of the LGBTQ community."[175] Still, many universities desire to build an intentional orthodox community of believers. Some require students to attend Bible studies or church.[176] To forge this

171. Together, these schools serve more than 73,000 students. WARBELOW & GREGG, *supra* note 25. To date, ED has not denied any school a requested waiver. Augustine-Adams, *supra* note 71, at 3 (reporting 253 exemptions granted as of January 6, 2016, with no denials).

172. *Id.*

173. Mitchell, *supra* note 5.

174. Some institutions have undergone an evolution in their stance on inclusivity of LGBT individuals. For example, in 2015, Goshen College, a Christian liberal arts college in Indiana, and Eastern Mennonite University in Virginia added "sexual orientation" to their non-discrimination policies. Bob Smietana et al., *Two CCCU Colleges To Allow Same-Sex Married Faculty*, CHRISTIANITY TODAY (July 28, 2015, 3:41 PM), http://www.christianitytoday.com/gleanings/2015/july/cccu-goshen-college-eastern-mennonite-university-same-sex-m.html. Importantly, not all religions oppose same-sex marriage. *See* David Masci & Michael Lipka, *Where Christian Churches, Other Religions Stand on Gay Marriage*, PEW RES. CTR. (Dec. 21, 2015), http://www.pewresearch.org/fact-tank/2015/12/21/where-christian-churches-stand-on-gay-marriage/ (listing several religious institutions that have embraced same-sex marriage, including the Reform and Conservative Jewish movements, the Unitarian Universalist Association, and the United Church of Christ); *see also, e.g.*, Shaila Dewan, *True to Episcopal Church's Past, Bishops Split on Gay Weddings*, N.Y. TIMES (July 18, 2011), http://www.nytimes.com/2011/07/19/nyregion/new-episcopal-split-priests-role-in-ny-gay-weddings.html (noting that, in New York City, two out of five Episcopalian dioceses allow same-sex couples to be wed in the Church).

175. Gabrielle Kratsas, *50 Great LGBTQ-Friendly Colleges*, GREAT VALUE CS., http://www.greatvaluecolleges.net/50-great-lgbtq-friendly-colleges/ (last visited Feb. 17, 2016).

176. At public non-religious universities, mandating church attendance may intrude on the student's countervailing First Amendment rights. For example, a former Delaware State University volleyball player, Natalia Mendieta, lost her athletic scholarship because she refused to participate in Bible studies or attend

identity, some universities close their ranks to all kinds of students—not just LGBT students—whom they believe do not conform to their religious tenets. For example, Carson-Newman University, a private Baptist College in Tennessee, drew fire for an alleged admissions ban on "gay students, unwed mothers, women [who have] had an abortion and even students who may be pregnant."[177] Asked to explain the choice to limit admissions in this way, the university's president responded "[t]his is who we are."[178]

As this illustrates, some religious universities are closing their doors to LGBT students by denying them admission or, later, by expelling them.[179] Because of Title IX's categorical exemption, excluding students who are in same-sex relationships or who identify as LGBT is permitted if admission would be inconsistent with the school's faith tenets and the school has received a waiver from ED.[180] However, if a university seeks to avoid *hiring* LGBT employees, it may court Title VII liability.[181] In any event, both

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church, optional activities which her coach had made mandatory. Complaint at 5–11, Mendieta v. Killingsworth, No. 1:15-cv-00472-GMS (D. Del. June 9, 2015). Mendieta subsequently sued the coach, Delaware State University, and its athletic director for violating her First Amendment rights. *Id.* at 11–21; *see* John Rawlins, *DSU Student's Lawsuit Claims Scholarship Lost After Refusing To Attend Church*, 6 ABC ACTION NEWS (June 19, 2015), http://6abc.com/news/lawsuit-students-scholarship-lost-after-refusing-to-attend-church/793247/.

177. Lauren Davis, *Carson-Newman University Granted Exemption from Discrimination Laws*, LOCAL8 NEWS (Dec. 14, 2015, 12:25 PM), http://www.local8now.com/home/headlines/Carson-Newman-University-granted-exemption-from-discrimination-laws-360521761.html; *cf.* Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., to J. Randall O'Brien, President, Carson-Newman Univ. 3 (July 10, 2015) [hereinafter Letter from Catherine E. Lhamon to J. Randall O'Brien], http://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/carson-newman-response-07102015.pdf ("The University is exempt from [Title IX] to the extent that [it] prohibit[s] discrimination on the basis of marital status, sex outside of marriage, sexual orientation, gender identity, pregnancy, or abortion and compliance would conflict with the controlling organization's religious tenets.").

178. Davis, *supra* note 177.

179. As Part II.D explains, it is not necessary to exclude categories of students in order to create and maintain a faith-centered community. For example, under an equal-opportunity proscription that read, "The University further holds to the biblical principle that sexual relationships are unacceptable to God outside the context of marriage," admission would not open to unmarried, pregnant student. HARDING UNIV., *supra* note 137, at 11. As Part II.E(4) shows, using pregnancy as a decisional tool is especially problematic because only biological women can become pregnant; thus, if such a policy is used to enforce bans on sex outside marriage without taking measures to enforce those bans against men, the practice may violate Title VII's ban on sex and pregnancy discrimination. *See infra*.

180. *See* Letter from Catherine E. Lhamon to J. Randall O'Brien, *supra* note 177.

181. *See infra* Part II.D.

choices may violate state and municipal sexual orientation non-discrimination laws in particular parts of the country.[182]

Yet, the more religious universities close in on themselves, the more contested the government's subsidy will be—whether through Title IX and other funding or through indirect supports like tax exemption. Nearly every university in the United States, public or private, is federally tax exempt.[183] Thus, a question of grave importance to religious universities is whether they can exclude LGBT individuals and retain their tax-exempt status.

While it would once have been unthinkable that a university's religious tenets regarding marriage and sexuality would bear on its tax-exempt status, this possibility arose during oral argument in *Obergefell*.[184] Justice Alito asked Solicitor General Donald Verrilli whether a university or college that opposed same-sex marriage would be at risk of meeting the same fate as Bob Jones University,[185] referencing the Court's decision that a university "was not entitled to tax-exempt status if it opposed interracial marriage or interracial dating."[186] General Verrilli responded frankly: "You know, I—I don't think I can answer that question without knowing more specifics, but it's certainly going to be an issue. I—I don't deny that. I don't deny that, Justice Alito. It is—it is going to be an issue."[187] In his dissent, Chief Justice John Roberts returned to this colloquy. Chief Justice Roberts noted:

> [H]ard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples. Indeed, the Solicitor General candidly acknowledged that the tax exemptions of some

182. *See infra* Part II.D.

183. The Internal Revenue Code exempts universities "because of their educational purposes—purposes that the Federal government has long recognized as fundamental to fostering the productive and civic capacities of citizens—and/or the fact that they are State governmental entities." ASS'N OF AM. UNIVS., TAX EXEMPTION FOR UNIVERSITIES & COLLEGES: INTERNAL REVENUE CODE SECTION 501(C)(3) AND SECTION 115, at 1 (2013), http://www.aau.edu/WorkArea/DownloadAsset.aspx?id=14246.

184. *See* Transcript of Oral Argument at 38, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14-556) [hereinafter Transcript of Oral Argument], http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-556q1_7l48.pdf.

185. *Id.*; *see* Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

186. Transcript of Oral Argument, *supra* note 184, at 38.

187. *Id.*

> religious institutions would be in question if they opposed same-sex marriage.[188]

Obergefell left many universities that adhere to a traditional view of marriage wondering how the decision would affect them.[189] It seems unlikely that an administration would attempt to strip a university of its tax exemption on these grounds, at least until "gay rights looks like race does today, where you have a handful of crackpots still resisting."[190] Nonetheless, guidance from IRS Commissioner John Koskinen provided little comfort. He stated that, while "[t]he IRS has absolutely no plans or intention to take away the tax exempt status of religious schools, colleges, or universities that practice discrimination against LGBT people," if the IRS were to make such a move, "[t]he public would have plenty of notice and plenty of opportunity to comment, and that's not going to happen in the next two and a half years."[191]

The major challenge for religious colleges and universities, then, is how best to adhere to the deeply held convictions of their faiths without risking their funding and/or tax-exemption and without violating federal, state, or local law. The most decent course—in both the immediate future and long term—is to welcome LGBT students and faculty into the educational community. A principal aim and benefit of higher education is that it brings together people who are different. "Neither individuals nor society as a whole will function effectively without mutual respect, knowledge, and comfort in our dealings with people who are different from us."[192] Ideally, one's education "proactively teach[es one] to tolerate, interact with, and, hopefully, enjoy people who are different" from oneself.[193] When someone different from us expresses a view that diverges from our own, "it provokes more thought than when it comes from someone who

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188. *Obergefell*, 135 S. Ct. at 2626 (Roberts, C.J., dissenting).

189. Emma Green, *How Will the U.S. Supreme Court's Same-Sex-Marriage Decision Affect Religious Liberty?*, ATLANTIC (June 26, 2015), http://www.theatlantic.com/politics/archive/2015/06/how-will-the-us-supreme-courts-same-sex-marriage-decision-affect-religious-liberty/396986/.

190. Goodstein & Liptak, *supra* note 166 (quoting Professor Douglas Laycock).

191. David Badash, *IRS: Religious Colleges Can Still Keep Tax-Exempt Status While Discriminating Against Gays*, NEW C.R. MOVEMENT (Aug. 3, 2015, 9:38 AM), http://www.thenewcivilrightsmovement.com/davidbadash/irs_commits_to_allowing_religious_colleges_keep_tax_exempt_status_while_discriminating_against_gays.

192. Michael A. Resnick, *An American Imperative: Public Education*, CTR. FOR PUB. EDUC. (Apr. 27, 2006), http://www.centerforpubliceducation.org/Main-Menu/Public-education/An-American-imperative-Public-education-.

193. *Id.*

looks like us."[194] To serve these ends, educational institutions "cannot advocate the value of one racial, ethnic, or [other] group over another, nor can they engage in practices that would discriminate against any such group."[195]

Accepting LGBT students and faculty into a community does not mean that a university could not transmit its values around sexuality and marriage both within the university community and to the public. Religious universities that hold traditional views of marriage and sexuality could express those views to the community and to the world by affirming their religious tenets—even if this means leaving some feeling "no longer welcome at their own college."[196] As the next Section explains, religious universities can also work to actively instill a common ethos and norms around sexuality and marriage by using "equal opportunity" conduct proscriptions.

C. Student Housing

One place where universities realize the benefits of bringing together those of different backgrounds is through residential life and housing, and student housing is a fundamental part of university life. Much as in the admissions context, universities defeat their own educational missions and thwart their own educational goals in denying transgender or same-sex individuals student housing. Many universities, secular and sectarian, have LGBT-inclusive housing policies.[197] Unfortunately, gay and

194. Katherine W. Phillips, *How Diversity Makes Us Smarter: Being Around People Who Are Different from Us Makes Us More Creative, More Diligent, and Harder-Working*, SCI. AM. (Oct. 1, 2014), http://www.scientificamerican.com/article/how-diversity-makes-us-smarter/; *accord* Gurin et al., *supra* note 40; Larrick et al., *supra* note 40.

195. Resnick, *supra* note 192; *see also* Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 705 (2010) (discussing the benefits of diversity in education).

196. Abby Ohlheiser, *Another Christian College Faces Backlash for Student-Athlete Policy on LGBT Issues*, WASH. POST, (May 21, 2015), https://www.washingtonpost.com/news/acts-of-faith/wp/2015/05/21/another-christian-college-faces-backlash-for-student-athlete-policy-on-lgbt-issues/ ("Erskine College, a Christian university in South Carolina, condemned same-sex relationships as sinful, a year after two members of the school's men's volleyball team came out as gay. Erskine emphasized that its statement was not a policy banning LGBT behavior. However, it left many LGBT students there wondering whether the school's stance meant they were no longer welcome at their own college.").

197. For example, at the University of Illinois Springfield, "Family Housing . . . is available to enrolled students or visiting scholars who will be residing with their legal spouse, . . . a domestic partner, . . . and/or legally dependent children . . . ." *Family Housing at UIS*, U. ILL. SPRINGFIELD,

transgender students report denial of "gender-appropriate housing," in addition to "outright denial of campus housing."[198]

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http://www.uis.edu/residencelife/livingatuis/family-housing-at-uis/ (last visited June 25, 2016).

The policies of other schools are more opaque. In some instances, a school's married student housing policy simply references "marriage," as opposed to one's legal or religious marriage, requiring specific inquiry of the school's housing policy. The University of Notre Dame's website, for example, says it offers "[o]ne-bedroom apartments . . . to *married* full-time students without children. . . . *A copy of a marriage certificate* is needed as proof of marriage." *Office of Housing: Cripe Street*, UNIV. NOTRE DAME (emphasis added), http://housing.nd.edu/graduate/cripe-street/ (last visited Apr. 11, 2016). Upon further inquiry, Notre Dame officials confirmed that university housing is open to anyone in a marriage that is legally recognized in Indiana. E-mail from Karen Kennedy, Dir. of Hous., Univ. of Notre Dame, to Robin Fretwell Wilson, Professor of Law, Univ. of Ill. Coll. of Law (June 7, 2016, 07:07 CST) (on file with author) ("In order for full-time students and their spouses to be eligible to live together in University Village, our residential community for married students and students with children, we require a valid marriage license recognized by the State of Indiana.").

LeTourneau University's website provides that "[o]n-campus housing is available for married students and their families . . . ." *Family and Married Student Apartments*, LETOURNEAU UNIV., http://www.letu.edu/_Student-Life/residence-life/living-options/MSHGallery.html (last visited Mar. 14, 2016). Upon inquiry, LeTourneau's Director of Housing and Operations stated that the school has yet to receive a request from a same-sex couple for married student housing and did not wish to speculate what actions it might take if a legally married same-sex couple were to apply. *See* Email from Tony Zappasodi, Dir. Of Hous. & Operations, LeTourneau Univ., to Robin Fretwell Wilson, Professor of Law, Univ. of Ill. Coll. of Law (June 2, 2016, 12:51 CDT) (on file with author). Clarity is important because availability of housing affects the choice to enroll for some students.

198. WARBELOW & GREGG, *supra* note 25, at 5 ("In the 2011 National Transgender Discrimination Survey, one-fifth of transgender students reported that they were denied gender-appropriate housing, and five percent reported outright denial of campus housing."). This issue likewise applies to regular dorms. In 2013, a transgender male student at George Fox University, a school affiliated with the Religious Society of Friends (Quakers), requested to be moved to male on-campus housing for the following academic year. Joshua Hunt & Richard Pérez-Peña, *Housing Dispute Puts Quaker University at Front of Fight Over Transgender Issues*, N.Y. TIMES (July 24, 2014), http://www.nytimes.com/2014/07/25/us/transgender-student-fights-for-housing-rights-at-george-fox-university.html. The school offered the student a single apartment on-campus or the option to live off-campus. *Id.* In response, the student filed a complaint with the Department of Education. *Id.* In March 2014, the University requested a Title IX exemption regarding transgender housing and bathrooms. Letter from Robin Baker, President, George Fox Univ., to Catherine E. Lhamon, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ. 2 (Mar. 31, 2014), http://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/george-fox-university-request-03312014.pdf. OCR granted the exemption in May 2014. Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., to Robin Baker, President, George Fox Univ. 2 (May 23, 2014), http://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/george-fox-university-response-05232014.pdf. Although the student lived off-campus for the 2014–2015 and 2015–2016 academic years, George Fox has since changed its policy towards transgender students. *Students Identifying as Transgender*, GEORGE FOX UNIV., http://www.georgefox.edu/transgender/ (last

To be sure, in some states like Washington, religious universities are wholly exempt from duties not to discriminate on the basis of sexual orientation in public accommodations—meaning they do not have a legal duty to be inclusive in housing.[199] Outright exclusion of gay students, however, suffers from a basic normative problem: it is wholly unnecessary. By combining reasonable accommodations with student conduct codes requiring chastity outside marriage for *everyone*, a religious university can transmit its tenets without excluding anyone—engendering respect from the community, as well as from its own LGBT students. The fact that a student is transgender does not necessitate exclusion either. Reasonable accommodations can be made in dormitory bathrooms to effectively balance the privacy interests of students and their dorm-mates,[200] much as occurs with athletes in locker rooms.[201]

Married student housing is different.[202] Married student housing implicates the university's own understanding of and faith witness to the religious sacrament of marriage.[203] So, while a university might limit married student housing to those in traditional heterosexual relationships, it might also require a couple to be married in the faith, rather than just civilly, in order to allow them to reside in married housing.[204] By providing

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visited June 26, 2016) ("Given the varying circumstances of students identifying as transgender, addressing their particular needs will be evaluated on a case-by-case basis, prioritizing the well-being of the individual and community alike. As an example, care is thus given to ensure that gender-neutral bathrooms are provided in academic and other facilities when possible.").

199. *See* WASH. REV. CODE §§ 49.60.030, 49.60.040 (2015).

200. *See infra* Part II.D.

201. *See infra* Part II.D. A requirement that all students refrain from sexually intimate activities in university housing or on university grounds is an "equal opportunity" prohibition that would not treat LGBT students differently (assuming that the university would enforce the prohibition equally as to both homosexual and heterosexual students). *See infra* Part II.D.

202. The housing policies of any given university are not always obvious. *See supra* note 197 (comparing various housing policies). As with other policies covering typical student housing, universities should provide clarity to students about married student housing because availability of such housing may affect a student's choice to enroll.

203. *See supra* Part II.A.

204. If a university thinks of marriage as a matter for the secular state, as some Lutherans do, JOHN W. KLEINER, HOW DO LUTHERANS VIEW MARRIAGE? 1 (2004), http://elcic.ca/Same-Sex-Blessings/documents/kleiner.pdf (analyzing the works of Martin Luther to assist the Evangelical Lutheran Church of Canada "in considering the matter of the blessing of same-sex relationships"), the university would treat all legally married couples as alike. On the other hand, if a university thinks of marriage as a sacrament, the university would likely not recognize all legally valid marriages, presenting the difficult questions raised here.

housing, universities can support students who choose to marry in the school's faith; thus, in a sense, universities can channel couples into marriage as they envision that union.

As *Obergefell* recognized, what counts as a religious marriage is an inherently religious question.[205] Religious universities need space to advance conceptions of marriage consistent with their faith, through action and speech. Unsurprisingly, many states that voluntarily embraced same-sex marriage or that have enacted protections against housing discrimination for LGBT individuals included specific statutory protections so that religious universities may restrict access to married student housing to reflect their religious beliefs.[206]

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205. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015).

206. *See* N.H. REV. STAT. ANN. § 457:37(III) (West 2013); *see also* MINN. STAT. § 363A.26 (2015) ("Nothing in this chapter prohibits any religious association . . . from . . . in matters relating to sexual orientation, taking any action with respect to . . . housing and real property . . . ."); N.Y. DOM. REL. LAW § 10-b(2) (McKinney 2014) ("[N]othing in this article shall limit or diminish the right . . . of any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, to limit employment or sales or rental of housing accommodations or admission to or give preference to persons of the same religion or denomination.").

Some state non-discrimination laws make allowances for religious organizations to restrict housing to "persons of the same religion." *E.g.*, N.M. STAT. ANN. § 28-1-9 (2012). The New Mexico Human Rights Act, for example, states that nothing shall

> B. bar any religious or denominational institution or organization that is operated, supervised or controlled by or that is operated in connection with a religious or denominational organization from limiting admission to or giving preference to persons of the same religion or denomination or from making selections of buyers, lessees or tenants as are calculated by the organization or denomination to promote the religious or denominational principles for which it is established or maintained, unless membership in the religious or denominational organization is restricted on account of race, color, national origin or ancestry;
>
> C. bar any religious or denominational institution or organization that is operated, supervised or controlled by or that is operated in connection with a religious or denominational organization from imposing discriminatory employment or renting practices that are based upon sexual orientation or gender identity; provided, that the provisions of the Human Rights Act with respect to sexual orientation and gender identity shall apply to any other:
>
> > (1) for-profit activities of a religious or denominational institution or religious organization subject to the provisions of Section 511(a) of the Internal Revenue Code of 1986, as amended; or
> >
> > (2) non-profit activities of a religious or denominational institution or religious organization subject to the provisions of Section 501(c)(3) of the Internal Revenue Code of 1986, as amended.

Id.

When Utah extended its prohibitions on discrimination to include sexual orientation and gender identity, it continued to exempt religious entities from the non-discrimination law's scope:

D. Student Commons and Conduct Codes Shaping Student Life

"The life blood of religious educational institutions [are] their doctrinal statements and codes of conduct that set standards for employee and student life."[207] Such conduct codes are a valuable way for a religious university to instill its faith into the scholastic community, so long as they apply equally.

Baylor University, a Baptist University in Waco, Texas, is an exemplar of just such an equal-opportunity proscription. In 2012, Baylor updated its conduct code, which previously included a ban on "homosexual acts."[208] Under the current policy, Baylor students are directed to be "guided by the biblical understanding that human sexuality is a gift from God and that physical sexual intimacy is to be expressed in the context of marital fidelity. Thus, it is expected that Baylor students, faculty and staff will engage in behaviors consistent with this understanding of human sexuality."[209] As Baylor's new code shows, religious universities can institute policies that maintain a common ethos and transmit their religious values around sexuality without prohibiting gay sexuality alone.

> This chapter does not apply to a dwelling or a temporary or permanent residence facility if . . . the discrimination is by sex, sexual orientation, gender identity, or familial status for reasons of personal modesty or privacy, or in the furtherance of a religious institution's free exercise of religious rights under the First Amendment of the United States Constitution or the Utah Constitution; and (b) the dwelling or the temporary or permanent residence facility is: (i) operated by a non-profit or charitable organization; (ii) owned by, operated by, or under contract with a religious organization, a religious association, a religious educational institution, or a religious society; (iii) owned by, operated by, or under contract with an affiliate of an entity described in Subsection (2)(b)(ii); or (iv) owned by or operated by a person under contract with an entity described in Subsection (2)(b)(ii).

UTAH CODE ANN. § 57-21-3 (West 2015); Antidiscrimination and Religious Freedom Amendments, ch. 13, 2015 Utah Laws 68; S. .B. 296, Reg. Sess. at lines 812–28 (Utah 2015), http://le.utah.gov/~2015/bills/static/sb0296.html.

207. Mawdsley, *supra* note 113, at 279.

208. Abby Ohlheiser, *Why Baylor University's Sexual Conduct Policy No Longer Calls Out "Homosexual Acts,"* WASH. POST (July 8, 2015), https://www.washingtonpost.com/news/acts-of-faith/wp/2015/07/08/why-baylor-universitys-sexual-conduct-policy-no-longer-calls-out-homosexual-acts/.

209. *Id.* ("In a document outlining how the school will apply the new policy, Baylor says that it will 'be interpreted by the Baptist University in a manner consistent with the Baptist Faith and Message of 1963,' a reference to a doctrinal document from the Southern Baptist Convention. That document, among other things, defines marriage as 'the uniting of one man and one woman in covenant commitment for a lifetime.'").

Equal-opportunity conduct codes can do the work of transmitting core values. Consider, for example, the honor code at Brigham Young University (BYU), which binds students to a pledge to live a "chaste and virtuous life" and forbids sexual activity prior to marriage.[210] In accordance with that provision, BYU, a wholly owned subsidiary of the Church of Jesus Christ of the Latter Saints (also known as the LDS or Mormon Church), "suspended star basketball player Brandon Davies for admitting to having premarital sex with his girlfriend."[211]

Contrast this equal-opportunity proscription with a conduct code that speaks exclusively in terms of gay sexuality, such as one "prohibit[ing] same-sex dating behaviors."[212] Some schools extend such restrictions to students, staff and faculty.[213] These policies tread very close to excluding outright those LGBT individuals who do not intend to be celibate. Although codes framed in this way would be permitted under Title IX, such policies impoverish the

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210. BYU's Honor Code requires

> [s]tudents [to] abstain from the use of alcohol, tobacco, and illegal substances and from the intentional misuse or abuse of any substance. Sexual misconduct; obscene or indecent conduct or expressions; disorderly or disruptive conduct; participation in gambling activities; involvement with pornographic, erotic, indecent, or offensive material; and any other conduct or action inconsistent with the principles of The Church of Jesus Christ of Latter-day Saints and the Honor Code is not permitted.

BRIGHAM YOUNG UNIV., CHURCH EDUCATIONAL SYSTEM HONOR CODE 2 (2015) [hereinafter BYU HONOR CODE], https://policy.byu.edu/content/managed/26/ChurchEducationalSystemHonorCode.pdf.

211. Jim Buzinski, *Gay at BYU: A Former Athlete Tells His Story*, OUTSPORTS (Apr. 3, 2011, 10:35 PM), http://www.outsports.com/2011/4/3/3863458/gay-at-byu-a-former-athlete-tells-his-story.

212. *E.g.*, LETOURNEAU UNIV., LETU STUDENT HANDBOOK 2015–16, at 34 (2015), http://www.letu.edu/opencms/export/sites/default/_Student-Life/studenthandbook/LETUStudentHandbook2015-16.pdf. All of these policies have received media scrutiny. *See* Philip Francis & Mark Longhurst, *How LGBT Students Are Changing Christian Colleges*, ATLANTIC (July 23, 2014), http://www.theatlantic.com/education/archive/2014/07/gordon-college-the-new-frontier-of-gay-rights/374861/; Aubrey Hoeppner, *Private Universities and LGBT: A Comparative Survey*, PEPP. UNIV. GRAPHIC (Jan. 19, 2012), http://pepperdine-graphic.com/private-universities-and-lgbt-a-comparative-survey/; *State of the Gay, Queer Zine, Banned by Harding University*, HUFFINGTON POST (Mar. 4, 2011, 1:54 PM), http://www.huffingtonpost.com/2011/03/04/state-of-the-gay_n_830846.html [hereinafter *State of the Gay*].

213. *E.g.*, OKLA. CHRISTIAN UNIV., UNDERGRADUATE ACADEMIC CATALOG 2014–2015, at 9, https://www.oc.edu/academics/documents/catalog/Catalog-2014-2015.pdf ("By choosing to be a part of the Oklahoma Christian community, every member of the student body, staff, faculty, and Board of Trustees affirms his or her understanding of, respect for, and commitment to abide by the principles and standards of conduct set forth in this covenant."). For an analysis of the law surrounding these codes when applied to faculty, see Part II.E, *infra*. (discussing Title VII's religious university exemption).

community and deny LGBT individuals access to quality educational institutions. And as an exclusionary rule, the proscription likely would be impermissible as to employees under Title VII *if courts agree* that sex discrimination includes sexual orientation discrimination, and may violate state and local laws across the country.[214]

As Baylor's code illustrates, additional prohibitions on homosexuality are wholly unnecessary when *all* students—gay and straight alike—must be chaste. Commanding chastity before marriage gives witness to one's faith tenets and demands the same fidelity of all students. So, for example, when a student is expelled for having sex with a same-sex partner, no one is being treated differently so long as the university is prepared to—and actually does—expel any students who have sexually intimate relationships outside marriage, as BYU did.[215]

Singling out homosexual behavior serves no purpose that is not already served through a policy requiring chastity.[216] For students of faith struggling with their sexuality, codes that specifically prohibit homosexuality risk pushing the student away or making the student feel unwelcome, rather than bringing the student into the faith.[217] In this respect, a code that proscribes all sexual activity prior to marriage applies equally to all students, gay or straight, at least until a student marries. Setting aside those pursuing graduate degrees, in a world of delayed marriage,[218] a conduct code that reserves sex to marriage does not

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214. *See, e.g.*, Macy, EEOC DOC 0120120821, at *1, *16 (E.E.O.C. 2012); U.S. DEP'T OF EDUC., *supra* note 47; *see also* Part II.E, *supra*.

215. For example, Danielle Powell, a student at a small Bible college in Omaha, says she was expelled during her final semester for being in a same-sex relationship, which was a violation of the university's student handbook. Tyler Kingkade, *Danielle Powell, Grace University Student Kicked Out for Being Lesbian, Must Repay Thousands*, HUFFINGTON POST (June 12, 2013, 3:05 PM), http://www.huffingtonpost.com/2013/06/12/danielle-powell-grace-university_n_3428514.html; *State of the Gay*, *supra* note 212.

216. If the purpose is to police public displays of affection by gays and not straights, then it would not be an equal opportunity prohibition, as explained later in this Part. *See infra*.

217. Buzinski, *supra* note 211.

218. *See* Robin Fretwell Wilson, *Keeping Women in Business (and Family)*, *in* RETHINKING BUSINESS MANAGEMENT: EXAMINING THE FOUNDATIONS OF BUSINESS EDUCATION 95 (Samuel Gregg & James R. Stoner, Jr. eds., 2d ed. 2008). Although religious schools might be more likely to have a lot of married students, marriage rates are typically low among college students. *Compare Y Facts: University Marriage Status Totals, 1980–2014*, BYU http://yfacts.byu.edu/Article?id=188 (last visited June 20, 2016) (reporting that, in 2008, 25% of BYU undergraduate students were married), *with* Stephanie Steinberg, *Saying 'I Do' While Studying at the 'U,'* CNN (Aug. 8, 2011, 3:14 PM),

make it impossible for LGBT students to attend a given university any more than it makes it impossible for *any student* who wants to have sex in college but is not yet ready to marry to do so.

A harder question bedeviling religious universities in the wake of *Obergefell* is whether religious universities can proscribe same-sex marriage, rather than sexuality alone. Some universities bar admission to applicants in same-sex marriages,[219] and others expel students despite the hardship this entails.[220] Binding students and faculty to a promise that all "physical sexual intimacy" will be confined to marriage *as the university recognizes it* operates as backdoor exclusion of gay married students and employees. When a straight couple marries, that couple can satisfy the conduct rule because the school recognizes their marriage. However, because same-sex marriage would not be recognized religiously by many faith traditions likely to have such a conduct code, a legally married gay couple could never come into compliance.[221] Indeed, in these faith traditions, couples in unrecognized marriages may violate dual proscriptions: The

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http://www.cnn.com/2011/08/04/living/married-college-students/ (reporting that 18% of all undergraduate students in 2008 were married).

219. For example, Harding University's student handbook reads in part that "Harding University holds to the biblical principle that God instituted marriage as a relationship between one man and one woman," and that "[s]tudents are prohibited from being married to any person of the same sex." HARDING UNIV., *supra* note 137, at 11. Likewise, Oklahoma Christian University's student handbook reads: "We strive to treat our bodies with the honor due the temple of the Holy Spirit—honoring God's plan that sexual relations be a part of a marriage between a man and a woman . . . . By choosing to be a part of the Oklahoma Christian community, every member of the student body, staff, faculty, and Board of Trustees affirms his or her understanding of, respect for, and commitment to abide by the principles and standards of conduct set forth in this covenant." OKLA. CHRISTIAN UNIV., *supra* note 213, at 9. Again, all of these policies have received media scrutiny. *See* Francis & Longhurst, *supra* note 212; Hoeppner, *supra* note 212; *State of the Gay*, *supra* note 212.

220. The hardship to legally married students who are expelled is especially poignant, even if they had "notice" of the proscription. Christian Minard, an honor-roll student at Southwestern Christian University, a religious university in Oklahoma, says she was expelled after marrying another woman, a violation of the lifestyle covenant the University asked all students to sign and follow. Dave Stewart, *Student Expelled After Same-Sex Marriage Accepted at Another School*, CNN (July 23, 2014, 7:52 PM) http://www.cnn.com/2014/07/23/us/expelled-lesbian-student-new-college-oklahoma/; *see* Justin Tinder, *SCU Issues Preliminary Statement on Student's Dismissal*, SW. CHRISTIAN UNIV. (July 14, 2014), http://swcu.edu/scu-issues-preliminary-statement-on-students-dismissal.

221. It is important to note that not all members of certain denominations agree as to whether their faith should recognize same-sex marriages. *See* Mark Woods, *Primates Act Against US Episcopal Church over Homosexuality*, CHRISTIANITY TODAY (Jan. 14, 2016), http://www.christiantoday.com/article/primates.meeting.suspends.us.episcopal.church.over.same.sex.marriage.policy/76611.htm.

couple's intimacy violates a school's proscription on premarital sex because, in the university's view, the couple never married and, in addition, entering into a same-sex marriage violates the separate prohibition on same-sex marriage.[222] In that context, marriage is a double negative: It does not solve the chastity problem, and it may incur church discipline for a separate violation.

Conduct codes prohibiting same-sex marriage present a much more difficult question than an outright ban on LGBT students. Because marriage is a sacrament—a quintessential religious question—universities must have the autonomy to decide what counts as a "marriage" on their grounds.[223] The harder question is whether that religious conviction can—or should—be used to expel a member of the community.

Imagine a male student, Scott, who, after enrolling at "Religious U," discovers that he is sexually attracted to men. Once on campus, Scott meets and falls in love with Steve. If Religious U has a sexual-orientation-neutral chastity policy, Scott would be bound by that policy irrespective of the fact that he is in a relationship with Steve, another man. Thus, if Scott is intimate with Steve, Religious U could expel him or otherwise distance itself from Scott's relationship and reaffirm a central faith tenet. Religious U should be able to enforce this policy—*as long as* the school would expel Scott if he had been intimate with Sue.

Religious U may also inform Scott that he cannot be sexually intimate on university grounds, including in his dorm, with Steve *or* with Sue. Further, if Scott marries Steve, Religious U could reserve its married student housing for those in opposite-sex marriages and could prohibit Scott and Steve from sharing a dorm room in non-married housing.[224]

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222. Harding University, for example, includes dual prohibitions: "Students are prohibited from being married to any person of the same sex. The University further holds to the biblical principle that sexual relationships are unacceptable to God outside the context of marriage." HARDING UNIV., *supra* note 137, at 11.

223. *See supra* Part II.A.

224. More precisely, under the posited hypothetical Religious U can reserve its married student housing for those in traditional marriages. Scott and Steve are not in a traditional marriage as defined by Religious U. Therefore, Scott and Steve may not live in Religious U's married student housing. Further, Scott and Steve may not live in Religious U's single person dorms together as a way around the restriction on living in Religious U's married student housing. The result of such a policy is that Scott and Steve are excluded from campus housing, and Religious U is able to preserve its traditional view of marriage without being seen as condoning same-sex marriage. Thus, Scott may continue to reside in single person dorm alone; so too may Steve continue to reside in single person dorm alone. Scott and Steve could also choose to move into off-campus housing, where they could live together without losing access to educational opportunities at Religious U.

Though many conduct codes dictate both on- and off-campus behavior,[225] Religious U's conduct code should not reach Scott's married intimacy with Steve if they move off university grounds.[226] If conduct codes did reach such conduct, religious institutions could effectively exclude a category of people—legally married LGBT couples—through their conduct codes. Religious U's interest in Scott's off-campus same-sex marital intimacy is at its lowest ebb. If such conduct took place, Religious U would not be seen as "endorsing" it since it occurred off campus. Marital intimacy is deeply private and occurs within a legally recognized marriage, thus setting it apart from raucous, licentious off-campus conduct that a university may rightly want to prohibit, such as public drunkenness.[227] Even if some perceived Religious U as "endorsing" Scott and Steve's relationship, the school could adequately distance itself from their marriage by publicly reaffirming its faith commitments around marriage. However, claiming a categorical right to exclude in order to signal a faith commitment goes too far and undervalues Scott's interest vis-à-vis that of the university.

It appears that, under Title IX, Religious U would be authorized to exclude or expel Scott if it was acting "consistent[ly] with the religious tenets" of the school and if Religious U secured an explicit waiver.[228] Schools' edifice of immunity was even thicker until OCR recently began interpreting the Title IX ban on

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225. GORDON COLL., GORDON COLLEGE STUDENT HANDBOOK 2015–2016 , 6–7 (2015) ("Those acts which are expressly forbidden in Scripture . . . will not be tolerated in the lives of Gordon community members, either on or off campus.").

226. However, some universities require students to live on campus for a number of years or until they reach a specific age. *See, e.g.*, *Residence Life*, TRINITY CHRISTIAN C., http://studentlife.trnty.edu/residence-life.html (last visited June 26, 2016) ("We are committed to a Christ-centered residential experience that emphasizes the total development of each student. We are committed to an engaging residential experience and we know that students who reside in campus living communities are more likely to persist and graduate, therefore *all students who leave home to attend Trinity are expected to live in college owned housing until the age of 22 or successful completion of their junior year (90 credit hours).*" (emphasis added)). Such schools would need to waive the rule as to Steve after the couple married so they could move off campus.

227. *See, e.g.*, HARDING UNIV., *supra* note 137, at 11 (prohibiting students from visiting dance clubs or engaging in "immoral" behavior); *cf. supra* note 7 and accompanying text (noting NFL policies that regulate player behavior).

228. Title IX "shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization." 20 U.S.C. § 1681(a)(3); *see also* 34 C.F.R. § 106.12(a) (Regulations promulgated under Title IX do "not apply to an educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization.").

sex discrimination to include gender identity and sexual orientation discrimination.[229] If courts follow the EEOC's lead and find that sex discrimination includes sexual orientation discrimination,[230] a religious university's conduct rule which excluded only gay married couples would likely violate Title VII as applied to student-employees, faculty, and staff.[231] EEOC would surely argue that a rule that no legally married gay person could ever satisfy constitutes discrimination against a protected class.[232] In this sense, a chastity rule that similarly singles out only those individuals who are attracted to members of the same sex is no different than restrictions on pregnancy, which is an illegal basis for employment decisions under Title VII.[233] Restrictions on pregnancy "are not permitted because they are gender discriminatory by definition,"[234] even when religiously motivated.

What is more, preventing religious universities from wholly excluding LGBT students serves the interests of religious universities themselves—imagine the public relations nightmare that will follow from expelling legally married gay students.[235] Thus, whether the law presently allows such policies or not, a school's right to exclude or expel legally married students while also accepting federal or state funding may prove difficult to defend over time. Stories of students who awaken to their sexuality or who unexpectedly fall in love members of the same sex after beginning college will resonate with the public, as will the students' countervailing interests, including the costs they sunk into their education at that university or their inability to transfer elsewhere if their records are marred by honor code violations.[236]

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229. *See supra* Part I.A (discussing how OCR's interpretations of Title IX precluded summary judgment in a suit filed by two former women's basketball team members against Pepperdine University).

230. *See What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, EEOC, http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm.

231. *See infra* Part II.E; App. A.

232. *See id.*

233. *See e.g.*, Ganzy v. Allen Christian Sch., 995 F. Supp. 340 (E.D.N.Y. 1998).

234. *Ganzy*, 995 F. Supp. at 349 (citing Dolter v. Wahlert High Sch., 483 F. Supp. 266, 270 (N.D. Iowa 1980) (stating that a school has violated Title VII if it terminates a plaintiff for pregnancy alone)).

235. *E.g.*, WARBELOW & GREGG , *supra* note 25.

236. As noted earlier, the nature of "federal financial assistance" that brings Title IX into operation—including federal loans that give *students* the individual choice where to attend school—makes it unlikely that that federal laws expanding LGBT protections will strip funding entirely. *See supra* Part II.D. Removal of Title IX funding would damage religious educational institutions, but it would hurt

Both critics and defenders of conduct codes focus on "notice" and its important role in reducing unfair surprise and hardship.[237] Without more notice, some students or athletes may have chosen instead to attend a different educational institution that offered them a scholarship or attractive educational package.[238] Defenders of conduct codes would say that students, by enrolling, have accepted the prohibitions contained within. In this view, to the extent that a conduct code prohibiting same-sex marriage is clear on its face, already married same-sex students violate it upon entry, making the student to blame for the resulting hardship of being expelled. Likewise, in this view, students who marry after enrolling also have notice and accept the prohibition.[239] But, as noted above, some norms are easier to discover on the school's website than others,[240] although a university's reputation in the community may also provide notice.[241]

Nonetheless, notice cannot completely erase unfair results. [242] Expelling only gay students who marry while enrolled at Religious U is a deeply troubling result, and such a policy is made

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students most of all. Far more likely in the near term are state efforts to bar state higher education grants from bein spent at universities that adhere to certain faith tenants around sexuality or marriage. *See* California S.B. 1146. Reg. Sess. (2016).

237. Religious institutions may balk at laws they see as frustrating their ability to have conduct codes that reflect their religious beliefs because religion is infused into every aspect of their operation. *See* Fig.1 and accompanying notes, *supra.* Students and/or their parents might have a negative reaction if the conduct code is "liberalized" and perhaps may even choose to withdraw. Of course, if such changes arose due to a federal law, all religious schools would need to comply, and there would be no competition between them on this basis.

238. WARBELOW & GREGG , *supra* note 25, at 11–13

239. Presumptive knowledge based on the website and the code of conduct may not signify actual knowledge. This is in contrast to the employment context, where employees must sign upon receipt and review of the employer's handbook after receiving training on the employer's policies, and therefore are far more likely to have actual knowledge. *See, e.g*, *Faculty*, MILWAUKEE MONTESSORI SCH., http://www.milwaukee-montessori.org/Faculty.htm (last visited June 26, 2016) ("Each year, all employees must read the [the employee and operations handbooks], print the last page, sign and submit the form . . . .").

240. *See supra* note 197 and accompanying text (discussing housing policies).

241. *Cf.* Wilson, *When Governments Insulate Dissenters from Social Change*, *supra* note 14, at 749 (noting that, in the abortion context, "[s]ome exemptions seep into the public consciousness").

242. Some schools explicitly discuss homosexuality in their student handbooks. For example, Gordon College's student handbook reads: "Those acts which are expressly forbidden in Scripture, including but not limited to . . . homosexual practice [sic], will not be tolerated in the lives of Gordon community members, either on or off campus." GORDON COLL., *supra* note 225, at 5. As before, these policies have received media scrutiny. *E.g.*, Francis & Longhurst, *supra* note 212; Hoeppner, *supra* note 212; *State of the Gay*, *supra* note 212.

even more unfair when applied to students who may be unaware or still grappling with their sexualities when entering college. A university should not use its conduct code as an ever-present "bubble"—punishing intimacy between same-sex married students, wherever that intimacy occurs.

At the end of the day, a university's interest in maintaining a coherent identity should be respected up to the point at which its policies would operate to exclude an entire class of people, instead of policing the specific conduct of *every member* of its community. It does not matter to this analysis whether Scott and Steve have a legal right to marry. Of course Scott does,[243] just as he has a legal right to have sex before marriage[244]—or for that matter to drink alcohol (if he over the drinking age) or to go to a dance club. But if Religious U does not recognize lawful civil same-sex marriages, Religious U's prohibition on sex outside marriage cannot be satisfied by its legally married gay students.[245]

Thus, what matters is that Religious U has a policy prohibiting premarital sex and other behavior that does not comport with its religious tenets that can be satisfied by gay students *and* straight students.[246] When a school's prohibition is an equal-opportunity rule, it can be applied to everyone, defending the school against the charge that its policy is nothing more than naked discrimination on the basis of sex or any other prohibited characteristic.

E. Staff and Faculty Lounge

When it comes to faculty and staff employment policies, Title VII's accommodation for religious employers is pivotal to the degree of latitude religious universities have to shape communities of like-minded believers through employee conduct codes. Title VII expressly permits certain religious organizations to hire

243. Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015).

244. *See* Lawrence v. Texas, 539 U.S. 558 (2002).

245. Some student conduct codes also prohibit students from "public advocacy for the position that sex outside of a biblically-defined marriage is morally acceptable." LETOURNEAU UNIV., *supra* note 212, at 34. For a discussion of such bans, see *infra* Part II.E.

246. Many religious proscriptions are written in these equal-opportunity terms. *See* 1 *Thessalonians* 4:3–6 (English Standard Version) ("For this is the will of God, your sanctification: that you abstain from sexual immorality; that each one of you know how to control his own body in holiness and honor, not in the passion of lust like who do not know God; that no man transgress and wrong his brother in this matter, because the Lord is an avenger in all these things, as we told you beforehand and solemnly.").

"individuals of a particular religion" to fulfill their mission.[247] This Part first reviews who qualifies for Title VII's protection and then examines how far this authorization to hire on a religious basis carries religious universities.

1. Entities Covered by Sections 702(a) and 703(e)(2)

Under 42 U.S.C. Section 2000e-1(a), also known as Section 702(a), "religious corporation[s], association[s], educational institution[s], or societ[ies]" receive protection, while under 42 U.S.C. § 2000e-2(e)(2), also known as Section 703(e)(2), "school[s], college[s], university[ies], or other educational institution[s] or institution[s] of learning" receive protection.[248] Both exemptions are "intended to protect religious organizations from unconstitutional government intrusions into their religious affairs."[249]

To qualify under Section 702(a), religious corporations must in fact be "religious."[250] Federal appellate courts have split, however, on what organizations qualify as "religious."[251] As one

247. Religious universities may hire employees of a particular religion; religious organizations may do so to "to perform work connected with the carrying on . . . of [their] activities." *See infra* Part II.E.1.

248. Section 702(a) provides that Title VII "shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." 42 U.S.C. § 2000e-1(a) (2012).

Section 703(e)(2) provides that for religious universities:

> [I]t shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

Id. § 2000e-2(e)(2).

249. *See* Roger W. Dyer, Jr., *Qualifying for the Title VII Religious Organization Exemption: Federal Circuits Split over Proper Test*, 76 MO. L. REV. 545, 546–47, 554–60 (2010).

250. 42 U.S.C. § 2000e-1(a).

251. In drafting Title VII, Congress provided little guidance about how to determine whether an entity qualifies as a religious organization under Section 702(a). Federal courts of appeal have developed four different tests to determine whether an organization is religious under Section 702(a): (1) the secularization test, (2) the sufficiently religious test, (3) the primarily religious test, and (3) the *LeBoon* Test. *See* Dyer, *supra* note 249, at 546–47, 554–60. Appendix A describes how facets of an organization—such as whether it was founded by a religious organization or engages in religious training—can affect whether an organization

example, the Ninth Circuit asks if an organization has "a religious purpose, is engaged primarily in carrying out that religious purpose, holds itself out to the public as an entity for carrying out that religious purpose, and is not engage[d] primarily or substantially in the exchange of goods or services for money beyond nominal amounts."[252] Under this test, a "humanitarian" organization devoted to eradicating poverty qualified under Section 702(a), permitting it to prevail on summary judgment against a claim of religious discrimination.[253] Other circuit courts of appeal focus on whether an entity produces a secular product for a profit; states a religious purpose in its organizing documents; is owned, controlled, or financially supported by a formally religious entity like a church or synagogue; holds itself out as sectarian; regularly includes worship in its activities or religious instruction in any curriculum; and whether only coreligionists are members.[254]

To qualify under the second exemption, Section 703(e)(2), religious schools must be "in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society," or alternatively, have a "curriculum . . . directed toward the propagation of a particular religion."[255] Wholly owned religious educational institutions clearly qualify for protection, but freestanding institutions must show that they are "religious" or propagate a particular religion.[256]

To see how a religious school might claim protection under either provision, consider *Hall v. Baptist Memorial Health Care*

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qualifies as religious and therefore whether it legally can make distinctions on the basis of religion when hiring.

252. *See* Spencer v. World Vision, Inc., 633 F.3d 723, 724 (9th Cir. 2011) (per curiam); *see also* Marty Lederman, *Why the Law Does Not (and Should Not) Allow Religiously Motivated Contractors to Discriminate Against Their LGBT Employees*, BALKINIZATION (July 31, 2014), http://balkin.blogspot.com/2014/07/why-law-does-not-and-should-not-allow.html; *see also,* Dyer, *supra* note 249, at 546–47 (criticizing *Spencer* for "fail[ing] to develop a standard that adequately protects the religious liberty of all religious organizations").

253. *Spencer*, 633 F.3d at 741.

254. *See* App. A; Leboon v. Lancaster Jewish Comty. Ctr. Ass'n, 503 F.3d 217, 226 (3rd Cir. 2007) (citations omitted).

255. 42 U.S.C. § 2000e-2(e)(2) (2012). Title VII also allows employers, labor organizations, and others to "employ any individual . . . on the basis of his religion, sex, or national origin in those "certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." *Id.*; *see* 42 U.S.C. §2000e-2(e)(1).

256. Hall v. Baptist Mem'l Health Care Corp., 27 F. Supp. 2d 1029, 1037 (W.D. Tenn. 1998), *aff'd*, 215 F.3d 618 (6th Cir. 2000).

Corp.[257] This case involved a nonprofit corporation, Baptist Memorial Health Care ("Baptist Memorial"), that was established "for carrying out a health care mission consistent with the traditional and on-going health care missions . . . [consistent with the] Baptist church[]" and owned and operated a nursing college ("College").[258] A lesbian employee of the College sued, saying she was fired for being gay.[259] The court dismissed her employment discrimination suit on summary judgment, holding that Baptist Memorial qualified as a religious organization under Section 702(a).[260] The court found that:

> [t]he purposes and programs of [Baptist Memorial's College] are permeated with a conviction to adhere to Christian principles while providing education in Nursing and Health Sciences. . . . [The] [C]ollege has a clear relationship with the Baptist church. In light of the overwhelming evidence of the College's religious activities and nature, the mere fact that the College only requires one three-hour course in religion is not sufficient to deprive it of its appropriate classification as a religious educational institution.[261]

Importantly, the plaintiff also never presented evidence of actual discrimination in response to the motion for summary judgment. If an entity qualifies as religious, some employment choices, but not all, are protected. As the next Section explains, unlike Title IX, Title VII does not give a categorical exemption to religious employers.

2. Scope of Protected Conduct

Even if a group qualifies under Sections 702 or 703, the question remains: what conduct is protected under Sections 702 and 703? Section 702 permits religious organizations to make decisions on the basis of religion itself—to prefer or employ only "individuals of a particular religion to perform work connected with the [organization's] activities."[262] Section 703 allows religious

257. *See id.*

258. *Id.* at 1031.

259. *Id.* at 1034.

260. *Id.* at 1040.

261. *See id.* at 1033. The court did not reach the question of whether the college would also receive protection as a free-standing religious school under Section 703 (e)(2). *Id.*; *see also id.* at 1037 ("Because Defendant is exempt from Title VII liability under § 2000e-1(a), there is no need for the court to address Defendant's assertion that it is also exempt from Title VII liability under 42 U.S.C. § 2000e-2(e)(2).").

262. 42 U.S.C. § 2000e-1(a).

education institutions to "hire and employ employees of a particular religion."[263]

Academics and commentators read these protections to encompass a vastly different scope of authorized conduct.[264] Some read Title VII's exemptions narrowly to allow religious organizations only to employ persons of the same faith denomination.[265] Cases clearly show, however, that religious organizations can do more: they sometimes can require employees to adhere to certain conduct standards informed by the employer's faith.[266]

Hard questions arise about whether employing individuals of a "particular religion" operates to "excuse discrimination on the basis of race, sex, or national origin just because that discrimination happens to be motivated by religious belief."[267] While some flatly reject this reading,[268] others contend Title VII authorizes religious organizations "to maintain a conduct standard that reflects their religions' sincerely held beliefs, which include deep convictions about human sexuality" and to "make decisions based on faith" even when those beliefs implicate otherwise protected classes under Title VII.[269]

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263. *Id.* § 2000e-2(e)(2).

264. *Compare* Letter from Katherine Franke, Professor of Law, Columbia Law Sch., et al., to Barack Obama, President of the U.S. (July 14, 2014), https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/executive_order_letter_final_0.pdf [hereinafter Letter from Katherine Franke], *with* Letter from Stanley Carlson-Thies, President, Inst. Religious Freedom All. et al., to Barack Obama, President of the U.S. (June 25, 2014), http://www.irfalliance.org/wp-content/uploads/2014/06/LGBT-EO-letter-to-President-6-25-2014-w-additional-signatures.pdf [hereinafter Carlson-Thies Letter] (positing a "Title VII right to have religiously grounded employee belief and conduct requirements" and contending that the exemptions allow religious organizations "to maintain a conduct standard that reflects their religions' sincerely held beliefs, which include deep convictions about human sexuality").

265. Letter from Katherine Franke, *supra* note 264. In cases where a religious employer says it was expressing a clear preference for individuals of a particular faith, and an employee does not allege discrimination on another ground, the religious employer simply wins on summary judgment. *See* Corp. of the Presiding Bishop v. Amos, 483 U.S. 327, 338 (1987). Summary dismissal serves an important protective function. If religious universities that hire co-religionists had to defend their choices even in the face of the thinnest evidence that they acted on an impermissible ground, then Title VII's protections would be eviscerated. By contrast, when a religious employer says it was hiring based on faith and an employee alleges some other protected ground as a basis for discrimination, Sections 702 and 703 do not operate as categorical exemptions the way Title IX's protection does. *See* Part II.E(4) discussed *infra*.

266. *See* Part II.E(4).;App. A.

267. Letter from Katherine Franke, *supra* note 264.

268. *Id.*

269. Esbeck, *supra* note 36; *see* Carlson-Thies Letter, *supra* note 264.

As this discussion and Appendix A show, Title VII provides different insulation to religious employers depending on whether the employer makes employment decisions on the basis of (a) a religious status ("We prefer Catholics, not Protestants."); (b) a religious belief ("We think it is not acceptable to advocate for abortion."); (c) conduct ("We fired the employee because she had sex outside of marriage."); or (d) a status other than religion ("We prefer men, not women; straights, not gays."). To date, no case directly grapples with protection for the fourth type of decision: a religious employer applying a policy that "by its very terms" discriminates on the basis of a protected ground other than religion[270] to someone other than those who "preach their beliefs [or] teach their faith."[271] Nonetheless, how courts resolve the first three archetypal cases helps to locate the outer boundaries of protection for employment decisions that spill over to illicit grounds for decision making under Title VII.

3. Religious Status or Belief Cases Alleging Only Religious Discrimination

Cases alleging discrimination on the basis of religion affirm that basic thrust of Sections 702 and 703: Religious employers can hire people who share the same faith. Consider the case that upheld Title VII's religious employer exemption against an Establishment Clause challenge, *Corp. of the Presiding Bishop v. Amos*.[272] In *Amos*, Arthur Frank Mayson worked as a building engineer for a nonprofit gymnasium operated by nonprofit groups affiliated with the Mormon Church.[273] Mayson failed to qualify for a "temple recommend" certifying him as a member of the Church. The Deseret Gymnasium subsequently terminated Mayson.[274] Mayson alleged religious discrimination under Title VII.

In upholding Section 702(a)'s exemption for religious employers against Mayson's Establishment Clause challenge, the majority explained that when the "government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, . . . the exemption [need not] come packaged with benefits to secular entities."[275] Without such protection, "[f]ear of potential

270. Esbeck, *supra* note 36, at 389.

271. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 710, (2012).

272. 483 U.S. 327, 338 (1987).

273. *Id.* at 330.

274. *Id.*

275. *Id.*

liability might affect the way an organization carried out what it understood to be its religious mission[,]"chilling religious practice.[276]

Importantly, in *Amos* the Court grappled with, and limited its holding to, only Title VII's "statutory ban on religious discrimination,"[277] never reaching the question of whether religious employers may legally discriminate on a grounds other than religion.

But the decisions construing Section 702 and 703's protections go further and illustrate that religious employers may legally prefer employees who also conform to their core religious tenets.

As Appendix A shows, when the employee sues *on the basis of religious discrimination* alone, religious schools handily defeat challenges to such codes. For instance, in *Little v. Wuerl*, a Catholic school did not renew the employment contract of a Protestant teacher who divorced her first husband and remarried a second one "without pursuing the 'proper canonical process available from the Roman Catholic Church.'"[278] The school's employment contract stated:

> Teacher recognizes the religious nature of the Catholic School and agrees that Employer has the right to dismiss a teacher for serious public immorality, public scandal, or public rejection of the official teachings, doctrine or laws of the Roman Catholic Church, thereby terminating any and all rights that the Teacher may have hereunder, subject, however, to the personal due process rights promulgated by the Roman Catholic Church.[279]

The teacher sued under Title VII, alleging *only* religious discrimination; she lost on summary judgment. Squarely grappling with a "legislative history [that] never directly addresses the question of whether being 'of a particular religion' applies to conduct as well as formal affiliation," the court read an exchange with the exemption's sponsor as "solicitous of religious organizations' desire to create communities faithful to their religious principles."[280] Thus, "the permission to employ persons 'of a particular religion' includes permission to employ only

276. *Id.*
277. *Id.* at 339.
278. Little v. Wuerl, 929 F.2d 944, 946 (3d Cir. 1991).
279. *Id.* at 945.
280. *Id.* at 950.

persons whose *beliefs and conduct* are consistent with the employer's religious precepts."[281]

Claims by a theology professor at Samford University, alleging he was religiously discriminated against after a theological disagreement with the dean of the divinity school and by a female professor who sued Marquette for not hiring her as a professor of theology that alleged only religious discrimination, also resulted in summary judgment for the schools.[282]

The explicit authorization for religious entities to hire on the basis of religion is a recognition that the government should not wade into religious questions. Concerns about entangling the court in religion have supported dismissal of lawsuits alleging discrimination on grounds other than religion. Foreshadowing the result in *Hosanna-Tabor*, for instance, the Fourth Circuit dismissed race and sex discrimination claims by a pastoral care worker who "introduce[d] children to the life of the church[,]" citing religious entanglement.[283]

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281. *Id.* at 951 (emphasis added).

282. Killenger v. Samford Univ., 113 F.3d 196, 197 (11th Cir. 1997) (granting summary judgment in the school's favor after it raised Section 702 as a defense); Maguire v. Marquette Univ., 814 F.2d 1213, 1218 (7th Cir. 1987); *see* Hall v. Baptist Memorial Healthcare Corp., 215 F.3d 618, 625 (6th Cir. 2000) ("determin[ing] that the College was exempt from the Title VII prohibition against discrimination based on religion"). Today, one can imagine Killinger's and Maguire's suits also being barred by the ministerial exemption under *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC.* 132 S. Ct. 694, 710 (2012).

283. Rayburn v. Gen. Conference of Seventh–Day Adventists, 772 F.2d 1164, 1166, 1168 (4th Cir. 1985). Forcing the employer to litigate would "infringe substantially on the church's free exercise of religion and would constitute impermissible government entanglement with church authority." *Id.* at 1165.
Other suits in the era before *Hosanna-Tabor* also resulted in dismissal. Consider *Scharon v. St. Luke's Episcopal Presbyterian Hospital*, where an ordained female chaplain alleged sex discrimination in violation of Title VII and age discrimination in violation of the Age Discrimination in Employment Act (ADEA), which has no religious exemption. Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360, 361 (8th Cir. 1991). Concluding that the "very process of inquiry" would too entangle the courts in questions of religious leadership and doctrine, the Eight Circuit dismissed the suit.

By contrast, a 1993 suit by a lay teacher with religious duties against a Catholic high school, alleging age discrimination, proceeded to trial because it presented no "serious risk of offending the Establishment Clause." DeMarco v. Holy Cross High Sch., 4 F.3d 166, 172 (2d Cir. 1993) ("There may be cases involving lay employees in which the relationship between employee and employer is so pervasively religious that it is impossible to engage in an age-discrimination inquiry without serious risk of offending the Establishment Clause. This is not such a case."). Analogizing the ADEA suit to Title VII, the court observed that religious institutions that otherwise qualify as "'employer[s]' are subject to Title VII provisions relating to discrimination based on race, gender and national origin . . . the legislative history of Title VII makes clear that Congress formulated the limited exemptions for religious institutions to discrimination based on religion

Similarly, in *Curray-Cramer v. Ursiline Academy of Wilmington, Delaware Inc.*, a teacher at a Catholic school alleged she was fired after signing a pro-choice statement published in the newspaper.[284] She sued for gender discrimination, saying that male employees were not fired after engaging in anti-war speech that she said also violated Church doctrine. The court dismissed her suit. Determining how the Church regards speech about quite different topics (abortion and war) would require the court to determine Catholic doctrine. "We conclude that if we were to consider whether . . . opposing the war in Iraq is as serious a challenge to Church doctrine as is promoting a woman's right to abortion, we would infringe upon the First Amendment Religion clauses."[285] Yet, the court distinguished cases in which

> truly comparable employees were treated differently following substantially similar conduct . . . . Requiring a religious employer to explain why it has treated two employees who have committed essentially the same offense differently poses no threat to the employer's ability to create and maintain communities of the faithful.[286]

Importantly, claims of religious entanglement may shield decisions as to ministers and other key employees from review by the courts; it is unlikely, however, that every employee at a large institution will fall within the protective ambit of *Hosanna-Tabor*. As the Fifth Circuit explained in a gender discrimination case against Mississippi College:

> The College is not a church. The College's faculty and staff do not function as ministers. The faculty members are not intermediaries between a church and its congregation. They neither attend to the religious needs of the faithful nor instruct students in the whole of religious doctrine. That faculty members are expected to serve as exemplars of

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with the understanding that provisions relating to non-religious discrimination would apply to such institutions." (citations omitted).

In *Geary v. Visitation of the Blessed Virgin Mary Parish School*, a teacher at a religious school claimed discrimination under the ADEA when she was fired—and that her salary and age were the reasons for her dismissal. Geary v. Visitation of the Blessed Virgin Mother Par. Sch., 7 F.3d 324, 327, 330 (3d Cir. 1993). The school, on the other hand, claimed she violated its conduct code when she married a divorced man. The Third Circuit found that the teacher presented enough evidence to defeat the school's motion for summary judgment and proceed to the pretext inquiry. *Id.*

Depending on the teachers' duties, courts might reach a different outcome after *Hosanna-Tabor*. *See* App. A for select religious autonomy cases.

284. Curray-Cramer v. Ursuline Acad. of Wilmington, Del., Inc., 450 F.3d 130, 140 (3d Cir. 2006).

285. *Id.*

286. *Id.* at 141.

> practicing Christians does not serve to make the terms and conditions of their employment matters . . . [of] purely ecclesiastical concern.[287]

Thus, most colleges and universities cannot take themselves outside Title VII's prohibitions on discrimination on the basis of "race, color, . . . sex, or national origin" by claiming that *every* employee is a "minister."[288]

Like the *Curray-Cramer* court, judges in *Little* and other cases raising religious discrimination claims alone have observed that Section 702(a) "does not exempt religious organizations from Title VII's provisions barring discrimination on the basis of race, gender, or national origin."[289] As the Fourth Circuit baldly declared, "nothing in Title VII confers upon religious organizations a license to make [hiring decisions] on the basis of race, sex, or national origin."[290]

It is true that these observations about the limits of Title VII's religious employer protections are dicta—the parties did not need to argue over scope and so the judges did not have the benefit of extensive briefing on the question.[291] Indeed, because each of

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287. EEOC v. Miss. Coll., 626 F.2d 477, 489 (5th Cir. 1980).

288. Many universities employ thousands of people. For example, University of Notre Dame, one of the largest Catholic universities in the United States, had 17,800 employees during the fiscal year ending in June 2013. A university could not seriously suggest that each of them had religious duties worthy of the ministerial exemption and thereby avoid application of the employment laws. *See Tax Documents*, CITIZEN AUDIT, https://www.citizenaudit.org/organization/350868188/UNIVERSITY%20OF%20NOTRE%20DAME%20DU%20LAC/ (last visited July 15, 2016).. Every employee at a small seminary might qualify, however, depending on assigned duties.

289. Kennedy v. St. Joseph's Ministries, Inc., 657 F.3d 189 (4th Cir. 2011); Little v. Wuerl, 929 F.2d 946 (3rd Cir. 1991) ("Title VII has been interpreted to bar race and sex discrimination by religious organizations towards their non-minister employees.").

290. Rayburn v. Gen. Conference of Seventh–Day Adventists, 772 F.2d 1164, 1166 (4th Cir. 1985).

291. Some contend that "[Title VII] exempts [the religious employer]" when discrimination on a protected ground is "motivated by religious belief or practice," relying on two interpretative arguments. Esbeck, *supra* note 36, at 385. First, cases have construed the exemptions for religious organizations to "encompass[] all employment decisions with respect to *religious* discrimination," including retaliation claims. Kennedy v. St. Joseph's Ministries, Inc., 657 F.3d 189 (4th Cir. 2011). In *Kennedy*, a nursing assistant claimed she was retaliated against for violations of a religious hospital's dress code and sued alleging religious discrimination. Construing "employment" broadly to reach all employment actions, the court found Section 702(a) barred the employee's retaliation suit. *Id.*

Professor Esbeck argues that "the logic of *Kennedy* necessarily applies to claims for discrimination on the basis of race, colour, sex, or national origin." Esbeck, *supra* note 36, at 380. Yet, in *Kennedy*, religious discrimination *alone* was alleged. Further, the *Kennedy* court itself explained that religious employers may not discriminate on other protected grounds—a bar presumably not lifted by

these cases involved "claim[s] of [only] religious discrimination . . . [they] say[] nothing about whether Title VII permits religiously-motivated discrimination on any other grounds."[292] As the next Section shows, courts have read title VII's protections not to insulate from scrutiny religious employer's employment decisions when the decisions implicate another protected ground.[293]

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religious belief. *See supra* note 289 and accompanying text.

Second, Esbeck says "the plain language of 702(a) . . . [and] of 703(e)(2) . . . resolve this apparent ambiguity [regarding whether the exemption covers discrimination based on a protected ground other than religion] in favor of the employer." Esbeck, *supra* note 36, at 393. Esbeck leverages specific words in each provision: Section 702(a) begins, "This subchapter shall not apply . . . ." while Section 703 begins, "Notwithstanding any other provision of this subchapter . . . ."

Yet, both provisions also contain limiting terms. Section 702(a) authorizes decisions "*with respect to* . . . the employment of *individuals of a particular religion* to perform work connected with the carrying on by such corporation, association, [or] educational institution." 42 USC 2000e-1(a) (emphasis added). Emphasizing the words "with respect to," courts in dicta have flatly concluded: "The exemptions do not simply exempt religious organizations from Title VII. On the contrary, they show[ ] that although Congress permitted religious organizations to discriminate in favor of members of their faith, religious employers are not immune from liability for discrimination based on race, sex, national origin, or for retaliatory actions against employees who exercise their rights under the statute." *Vigars v. Valley Christian Ctr. of Dublin, Cal.*, 805 F. Supp. 802, 807 (N.D. Cal. 1992) (citing EEOC v. Pac. Press Pub. Ass'n, 676 F.2d 1272,1276 (9th Cir. 1982).

Likewise, Section 703's assurance that "it shall not be an unlawful employment practice" encompasses the "hir[ing] and employ[ment of] employees *of a particular religion* . . . ." Here, courts have said "of a particular religion" exempts religious organizations from religious discrimination and no more: "Title VII does not confer upon religious organizations a license to make [hiring decisions] on the basis of race, sex, or national origin. Because discrimination based on pregnancy is a clear form of discrimination based on sex, religious schools cannot discriminate based on pregnancy." Cline v. Catholic Diocese of Toledo, 206 F.3d 651, 658 (6th Cir. 1999). The key difficulty with reading either provision as a categorical exemption is that if Congress had meant to exempt religious employers entirely, it could have simply stated "[t]his subchapter shall not apply to the employment of individuals of a particular religion, regardless of any protected ground under this subtitle . . . ." Title VII contains a categorical exemption for small employers. *See* 42 U.S.C. § 2000e(b) (2012).

292. Rose Saxe, *The Truth About Religious Employers and Civil Rights Law*, GEO. UNIV. (July 28, 2014), http://berkleycenter.georgetown.edu/responses/the-truth-about-religious-employers-and-civil-rights-laws.

293. Some assert that the ample latitude given to religious employers in *Little* and similar cases should govern when employees allege discrimination on a basis *other than* religion because "that is a distinction without a difference." Esbeck, *supra* note 36, at 383. As Appendix A shows, cases alleging only religious discrimination fall squarely within the exemption, insulating religious employers, while cases implicating other protected grounds—which test the exemptions' limits—are not nearly so protective. In the latter cases, judges have said that the distinction makes *all* the difference.

4. Conduct Cases Alleging Discrimination of Grounds Other Than Religion

The burning question is not whether religious employers can make decisions guided by their faith tenets but whether they will be protected even when decisions spill over to a protected class, like pregnant women who are protected explicitly from discrimination by Title VII.[294] As this Section and Appendix A show, Title VII provides far less insulation in cases where the plaintiff says he or she was discriminated against on a basis other than religion.

In divining the outer limits of Section 702 and 703's protections for religious employers, suits brought by women for pregnancy discrimination are illuminating. In these cases, the employee alleges that she was fired because of her pregnancy and the employer "maintain[s] that [it] acted not on the [prohibited] basis, but in accord with [its] religion,"[295] specifically, a religious ban on premarital sex.[296]

Outside of suits alleging straight religious discrimination, dueling claims about why an employee was fired go to trial, where a battle of facts will determine whether "the real motive was prejudice"[297] or the employer's religious policy. In such "pretext" cases, religious employers do not win on summary judgment; rather, cases are often "prolonged, expensive and entangling, with expensive pretrial discovery and a highly publicized public trial" [298] because, as Professor Esbeck notes, "that is the balance between liberty and equality that Congress has struck [in] Title VII."[299]

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294. *See* 42 U.S.C. § 2000e(k) (2012).

295. Esbeck, *supra* note 36, at 385.

296. Many religious universities ban sex outside of marriage in the host of moral commands that they ask employees to adhere to. *See* Frost, *supra* note 3, at 6–7 (collecting school policies banning premarital sex, adultery, bestiality, prostitution, cohabitation prior to marriage, transgenderism, and other "sexual immorality" along with many other sexual morality based commands).

297. Esbeck, *supra* note 36, at 388.

298. *Id.* In the early stages of a "pretext" case, the employer often asks for summary judgment, citing its religious precepts as the reason for acting. To get summary judgment and proceed to trial, a plaintiff may not "rely on bald allegations of discrimination," but must show that there is evidence of discrimination on the protected ground. *Id.* As explained below, the employee may prevail even after the religious employer asserts its affirmative defense that it acted on a religious tenet.

299. Esbeck, *supra* note 36, at 383.

After submitting evidence of its religious defense, religious employers do not necessarily prevail on the merits either.[300] The employee can show unlawful discrimination through two routes, by demonstrating that: (1) an employer's stated reason for dismissing the employee (e.g., her premarital sex) was mere "pretext" for actually firing her on the protected ground (e.g., pregnancy or her sex); or (2) the employer applied its religious rule unequally only to certain employees, like women, based on a protected ground, like gender.[301] In neither instance does the religious employer prevail, even if it shows its stated policy reflects a religious belief.

Consider, for example, *Herx v. Diocese of Fort Wayne South Bend.*[302] A language arts teacher at a religious school owned by the Diocese of Fort Wayne South Bend alleged that she was fired due to her pregnancy after using in-vitro fertilization ("IVF"); the school countered that it dismissed her because of its religious opposition to IVF.[303] The district court allowed the case to go forward despite both Title VII exemptions.[304] Even if the school's IVF policy reflected a good faith religious belief and was not a pretext for discrimination, "a jury wouldn't be compelled to accept [the Diocese's] avowed gender-neutrality."[305] Although the Diocese presented evidence that it applied the policy in a gender-neutral way, it was not entitled to summary judgment because "a jury that resolved every factual dispute, and drew every reasonable inference[] in Mrs. Herx's favor could infer that Mrs. Herx's contract would have been renewed had she been male and everything else remained the same."[306] As the court explained, "Title VII doesn't give religious organizations freedom to make discriminatory decisions on the basis of race, sex, or national origin."[307] At trial, the jury found in Herx's favor and awarded her $1.9 million for sex discrimination, which was reduced on remittitur to slightly more than $300,000 dollars, the statutory cap on damages.[308] As *Herx* makes clear, religious proscriptions by

300. *Id.* at 386–93.

301. Cline v. Catholic Diocese of Toledo, 206 F.3d 651, 658 (6th Cir. 1999).

302. Herx v. Diocese of Ft. Wayne-S. Bend, Inc. 48 F. Supp. 3d 1168 (N.D. Ind. 2014), *dismissed on other grounds*, 772 F.3d 1085 (7th Cir. 2014).

303. *Id.* at 1171–72.

304. *Id.* at 1183.

305. *Id.* at 1178.

306. *Id.* at 1179.

307. *Id.* at 1175.

308. Herx v. Diocese of Ft. Wayne-S. Bend, Inc., No. 1:12-cv-122 RCM, 2015 U.S. Dist. Lexis 3047, at *1 (N.D. Ind. Jan. 12, 2015).

themselves do not insulate religious employers from liability when making adverse decisions *if* the decision goes beyond membership in the faith or spills over to a protected ground.

Other cases are equally unforgiving when a religiously motivated employment decision implicates a protected ground other than religion—running the gamut from pregnancy discrimination claims brought by teachers who became pregnant after using IVF[309] or as result of premarital sex,[310] which brought their violations of the school's conduct codes to the school's attention to cases alleging race and gender discrimination.[311] As

309. See App. A.

310. See App. A. In *Cline* v. *Catholic Diocese of Toledo*, a religious school did not renew an unmarried teacher's contract after she became pregnant in violation of the school's conduct code barring premarital sex. 206 F.3d 651, 657 (6th Cir. 1999). She sued under Title VII, which bans pregnancy discrimination. *See* 42 U.S.C. § 2000e(k) (2012) ("The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy."). The school countered that its conduct code reflects its religious values. *Cline*, 206 F.3d at 651–52.

The district court dismissed the teacher's claim on summary judgment, finding that she failed to make her prima facie case. *Id.* at 655,658. Reversing, the United States Court of Appeals for the Sixth Circuit permitted the teacher's case to proceed to trial. As the Sixth Circuit put it, "[t]he central question in this case . . . is whether St. Paul's nonrenewal of Cline's contract constituted discrimination based on her pregnancy as opposed to a *gender-neutral enforcement* of the school's premarital sex policy. While the former violates Title VII, the latter does not." *Id.* at 658 (emphasis added). Summary judgment for the school was not appropriate because, while "Title VII exempts religious organizations for 'discrimination based on religion,' it does not exempt them 'with respect to all discrimination . . . Title VII still applies . . . to a religious institution charged with sex discrimination.'" *Id.* (*citing* Boyd v. Harding Acad. of Memphis, Inc., 88 F.3d 410, 413 (6th Cir. 1996)).

The Sixth Circuit explained that, at trial, Cline could show illegal discrimination in a number of ways. "First, she can show intentional discrimination directly by showing 'that a discriminatory reason more likely motivated the employer' than the reason the employer proffered." *Id.* Cline could "indirectly show 'pretext' by showing "that the employer's proffered explanation is unworthy of credence." *Id.* Further, "Cline also may show that St. Paul enforced its premarital sex policy in a discriminatory manner—against only pregnant women, or against only women." *Id.* Importantly, the school could not "use the mere observation or knowledge of pregnancy as its sole method of detecting violations of its premarital sex policy" without violating Title VII. *Id.* The case later settled. *See* Stipulation of Dismissal by All Parties, Cline v. Catholic Diocese of Toledo, No. 3:197-cv-07472 (N.D. Ohio Dec. 27, 2000) (No. 70) (showing that the case was dismissed by both parties on December 27, 2000—likely with terms of settlement).

311. In *EEOC v. Mississippi College*, a female professor at a Baptist university alleged she was not hired for a specific position because of her gender. 626 F.2d 477, 486 (5th Cir. 1980). The university sought summary judgment, claiming that they selected another person because the professor was not a Baptist, clearly permissible religious discrimination. The court summarized the university's position this way: "The College argues first that once it showed (1) an established policy of preferring Baptists in its hiring decisions, (2) that the individual hired for the position was Baptist, and (3) that the charging party was not a Baptist, § 702

one court explained in allowing a pregnancy discrimination case to go to trial:

> "[t]he exemptions do not simply exempt religious organizations from Title VII. On the contrary, they 'show[] that although Congress permitted religious organizations to discriminate in favor of members of their faith, religious employers are not immune from liability for discrimination based on race, sex, national origin, or for retaliatory actions against employees who exercise their rights under the statute.'"[312]

Court after court has made the same observation in suits brought under other protected grounds.[313]

Courts have also concluded that the unequal application of facially neutral rules to a subset of all employees who are protected from discrimination under Title VII may result in liability, notwithstanding a proffered religious explanation. In *Vigars v. Valley Christian Ctr. of Dublin, California*, a librarian at a religious elementary school was fired after she "informed the administration she was pregnant."[314] She sued, alleging pregnancy discrimination. The court allowed the suit to go to trial, notwithstanding the fact that the school's policy was grounded in a religious belief: "[W]omen would be subject to termination for something that men would not be, and that is sex

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prevented the EEOC from investigating further the charge of discrimination."

As the court explained, this argument fails if the "College applied its policy of preferring Baptists over non-Baptists in granting the faculty positions, . . . then § 702 exempts that decision from the application of Title VII and would preclude any investigation by the EEOC to determine whether the College used the preference policy as a guise to hide some other form of discrimination." *Id.* However, if the evidence showed "only that the College's preference policy could have been applied, but in fact it was not considered by the College in determining which applicant to hire, § 702 does not bar the EEOC's investigation of Summers' individual sex discrimination claim." *Id.* One way to read *Mississippi College* is that the plaintiff cannot continue past summary judgment if she does not show enough evidence to suggest that something other than religious discrimination contributed to the challenged employment action.

312. Vigars v. Valley Christian Ctr. of Dublin, 805 F. Supp. 802, 807 (N.D. Cal. 1992).

313. *See, e.g.*, Herx v. Diocese of Ft. Wayne-S. Bend Inc., 48 F. Supp. 3d 1168, 1175 (N.D. Ind. 2014), dismissed on other grounds, 772 F.3d 1085 (7th Cir. 2014) ("Title VII doesn't give religious organizations freedom to make discriminatory decisions on the basis of race, sex, or national origin."); Geary v. Visitation of the Blessed Virgin Mary Par. Sch., 7 F.3d 324, 331 (3d Cir. 1993) ("Religious institutions are not exempt from Title VII's prohibitions of discrimination on the basis of race, color, sex and national origin."); *Miss. Coll.*, 626 F.2d at 477 ("The employment relationship between Mississippi College and its faculty and staff is one intended by Congress to be regulated by Title VII.").

314. Vigars v. Valley Christan Ctr. Of Dublin, 805 F. Supp. 802, 807 (N.D. Cal. 1992).

discrimination, regardless of the justification put forth for the disparity."[315]

To be sure, employees have failed to produce sufficient evidence that an illicit ground actually motivated the employee's dismissal. For instance, where a religious employer shows that it applied a ban on premarital sex to *everyone*, religious employers have prevailed. [316]

As this discussion and Appendix A show, in cases asserting that a religiously motivated conduct rules spills over to a *protected ground other than religion,* courts simply reject the idea that Sections 702 and 703 confer broad immunity. Congress allowed religious employers wide latitude to hire employees who can carry out their faith tenets—but tempered this latitude, these courts say, by not allowing discrimination on any other protected ground. As the next Section explains, an even harder set of cases arises when a religious rule that directly maps onto a protected ground, such as refusing to hire women because religiously they are bound to be in the home.

5. When Religious Policies Directly Implicate a Protected Ground

The hardest questions arise when a religious view concerns a protected class—for instance, the view that "women properly belong in the home" and so should not be hired.[317] One can imagine any number of religious convictions overlapping protected classes: Suppose a seminary that employs women forbids

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315. *Id.*

316. In *Boyd v. Harding Acad. of Memphis, Inc.*, a preschool teacher claimed she was dismissed because of her pregnancy. 88 F.3d 410, 414–15 (6th Cir. 1996). Her employer, a religious college, countered that it dismissed her for having sex outside marriage in violation of its policies. At a bench trial, the college showed that "at least six married women who became pregnant while working [there] remained employed there during and after their pregnancies." *Id.* The college's president also testified that the college fired every employee that it learned had engaged in sex outside of marriage, male and female alike. *Id.* The district court found against the teacher. The Sixth Circuit affirmed, concluding that district court judge

> was correct in holding that defendant articulated a legitimate, non-discriminatory reason by stating that it fired plaintiff Boyd not because she was pregnant, but for engaging in sex outside of marriage, and that plaintiff Boyd did not meet her burden to prove by a preponderance of the evidence that this articulated reason was actually a pretext for illegal discrimination.

Id. at 412.

In short, pregnancy did not account for Boyd's firing and neither did selective application of the college's conduct code to women.

317. Esbeck, *supra* note 36, at 394.

pregnancy, a protected ground under Title VII. Or suppose a church loosely allied with the White Supremacist movement refuses to hire anyone others than Aryans.[318] Or suppose after *Obergefell* that a religious university forbids its employees from marrying a person of the same sex—not a protected ground per se but one that restricts only gay employees (who would be protected if a court construes sex under Title VII to include sex stereotypes or sexual orientation).[319]

Such cases test the limits of Section 702 and 703's protections differently than proscriptions on premarital sex discussed above because here the Title VII protected ground and a religious employer's ban are one and the same. Intuitively, it seems implausible that Congress intended—when it gave authority under Sections 702 and 703 to hire with religion in mind —to condone the kinds of exclusionary choices that led to Title VII's enactment; the whole point of Title VII was to ensure that, among other purposes, women and Blacks would not be excluded from opportunity based on irrelevant characteristics.[320] To understand Sections 702 and 703 as authorizing religious employers not hire to the very categories of people protected by Title VII from discrimination would allow the exemption to swallow the rule.

While some argue that the plain text of Sections 702 and 703 support that prerogative when premised on a faith tenet, both provisions textually limit their application to decisions "*with respect to* . . . the employment of *individuals of a particular religion*" or the "hir[ing] and employ[ment of] employees *of a particular religion* . . . ." [321] The key difficulty with reading either

318. *E.g.*, *About Our Church*, CREATIVITY ALLIANCE, http://creativityalliance.com/about-our-church/ (last visited July 16, 2016) ("**CREATIVITY is a LEGALLY RECOGNISED Professional, Non-Violent, Progressive Pro-White Religion** for White people, by White people. We object to amongst other things, Christianity, multiculturalism and Marxism. **Creators do not believe in gods or devils, an after-life, heaven or hell.** WE BELIEVE in maintaining a balance with nature while keeping a Sound mind, in a Sound Body, in a Sound Society, in a Sound Environment. **Our church is called the Church of Creativity**."); KINSMAN REDEEMER MINISTRIES, http://kinsmanredeemer.com/ (last visited July 16, 2016) ("Kinsman Redeemer Ministries is a calling to White people to gather together and worship the one true God; to rightly divide and discern God's Word; to proclaim the righteousness of the Laws of God and His judgements; to live the truth, the way and the life according to God's will.").

319. *See* Part II.E(4), *supra*. Some contend that the religious exemptions should "override and avoid the potential conflict" between the conduct code and Title VII. Esbeck, *supra* note 36, at 391. As noted above, neither common sense nor a close textual reading supports that conclusion.

320. *See* Ricci v. Destefano, 557 U.S. 557, 580 (2009).

321. *See supra* note 291 and accompanying text.

provision as a categorical exemption is that if Congress had meant to exempt religious employers entirely, it could have simply stated "[t]his subchapter shall not apply to the employment of individuals of a particular religion, regardless of any protected ground under this subtitle . . . ." Title VII contains a categorical exemption for small employers.[322]

The few cases in which women have sued religious employers under Title VII over unequal pay, and won, are not terribly illuminating. In *EEOC v. Pacific Press Publication Ass'n*, for example, the plaintiff recovered over $26,000 plus interest against her employer, a religious publishing house that she proved paid her less because of her gender.[323] Yet, the organization did not justify its decisions in religious terms.[324] Despite this fact, later courts cite *Pacific Press* for the proposition that "Church organizations have been held liable under Title VII for benefit and employment decisions which they contended were based upon religious grounds but *which also discriminated* against women based upon sex."[325]

As Appendix A amply demonstrates, even if the exemptions are available as a defense, the religious employer will not prevail on summary judgment and may well lose at trial. Many settle out to avoid publicity or the risk of a worse outcome at trial.

6. Striving for Conduct Codes that Do Not Operate to Exclude LGBT People

Faith institutions transmit their values through university employees, including professors, coaches, and staff—as many schools affirm publicly.[326] Putting aside faculty who have tenure and receive considerable protection for espousing ideas under the umbrella of academic freedom, in the absence of a contract, the

322. *See* 42 U.S.C. §2000e(b) (2012).

323. In fact, "the Church proclaim[ed] that it does not believe in discriminating against women or minority groups, and that its policy is to pay wages without discrimination on the basis of race, religion, sex, age, or national origin." EEOC v. Pac. Press Pub. Ass'n, 676 F.2d 1272, 1282 (9th Cir. 1982).

324. *Id.* at 1279.

325. Vigars v. Valley Christian Ctr. of Dublin, 805 F. Supp. 802, 806 (N.D. Cal. 1992)

326. For example, Regent University's Academic and Faculty Handbook states: "Regent's Christian community is *represented* by all of Regent's trustees, officers, employees[,] and student or volunteer leaders, each of whom serves Regent's mission and is an integral part of the community . . . ." REGENT UNIV., FACULTY & ACADEMIC POLICY HANDBOOK 9 (2016), http://www.regent.edu/academics/academic_affairs/faculty_handbook.cfm (emphasis added).

background rule in the employment context is that employers can fire employees "for any reason or no reason."[327] So, when a religious university's values do not align with the employee's, ordinary at-will employment means that the university can let the employee go without repercussion—unless that firing is based on a protected characteristic.[328]

As Chris Kluwe's account of why he was released from the Minnesota Vikings illustrates, a clash of values is not unique to religious universities.[329] But the religious identity of a university does amplify its concerns about endorsing an employee's conduct. For instance, a Baptist school in Tennessee, Belmont University, allegedly fired its head women's soccer coach, Lisa Howe, after she told her team that she and her lesbian partner were having a baby.[330] Coach Howe said she asked Belmont if she could share the news with her team since rumors were swirling; when Belmont nixed the idea, Coach Howe told her team anyway. [331]

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327. *See* Gregory M. Saltzman, *Dismissals, Layoffs, and Tenure Denials in Colleges and Universities*, *in* THE NEA 2008 ALMANAC OF HIGHER EDUCATION 51, 52, 57–61, http://www.nea.org/assets/img/PubAlmanac/ALM_08_05.pdf ("Under [employment-at-will], an employer or an employee may terminate an employment relationship at any time for any reason or for no reason . . . . The broad exceptions [to the general at will rule] cover four employee groups: (1) employees with individual contracts restricting dismissal; (2) employees covered by collective bargaining agreements permitting discipline only for just cause; (3) public employees covered by civil service or K-12 teacher tenure laws; and (4) residents of Montana, protected by that state's Wrongful Discharge from Employment Act . . . .").

328. *See, e.g.*, 42 U.S.C. § 2000e(k) (2012) (defining "because of sex" or "on the basis of sex" for purposes of Title VII to include pregnancy, childbirth, and related conditions).

329. *See* Colleen Flaherty, *Cal State Northridge Professor Says He's Being Targeted for His Conservative Social Views*, INSIDE HIGHER ED (Nov. 24, 2015, 3:00 AM), https://www.insidehighered.com/news/2015/11/24/cal-state-northridge-professor-says-hes-being-targeted-his-conservative-social-views.

330. *Lisa Howe, Former Belmont Coach, Allegedly Fired for Being Gay*, HUFFINGTON POST (Dec. 06, 2010, 12:48 PM), http://www.huffingtonpost.com/2010/12/06/lisa-howe-former-belmont-_n_792526.html. LGBT coaches at other universities have successfully sued for discrimination. *See* Pat Griffin, Helen Carroll & Cyd Ziegler, *LGBTQ Sports History Timeline*, CAMPUS PRIDE (Oct. 24, 2012), https://www.campuspride.org/resources/lgbt-sports-history-timeline/ ("2009—Women's basketball coach Lori Sulpizio, who is lesbian, wins a lawsuit against Mesa Community College for being fired without just cause."). But there is still a chilling effect on LGBT individuals in sports. *See* Zeigler, *supra* note 5 ("This story comes on the heels of my lengthy feature last week in which I talked to five gay college basketball coaches—in Divisions I & II—all of whom feel they have to stay in the closet for their own futures in the NCAA. One of those coaches had to sign an anti-gay 'lifestyle contract' to stay at his school, just as faculty and coaches have to do at this athlete's university and many others like it.").

331. Mike Organ, *Belmont Disputes Gay Coach Was Fired*, KNOXVILLE NEWS

Coach Howe and Belmont parted ways—Belmont says Coach Howe resigned on her own; her players said "athletics department officials [gave Coach Howe] the choice to resign or be terminated . . . ."[332]

How should we think about Coach Howe's departure if it was precipitated by disclosing her family's impending child—or for disclosing her sexuality?

Practical concerns can explain a university's preference for employee discretion. Some universities may fear that an openly gay coach will hurt their recruiting chances. As one women's basketball coach with a forty-year tenure explained, parents often fear "that if their son or daughter is around a gay person, it is going to make them gay, like it's a contagious disease."[333] Clearly, even if "homophobia remains as much a problem today as it was decades ago" in women's sports,[334] refusing to hire or retain a person because of such stereotypes is wrong—and may well be illegal if local, state, or federal law bans discrimination based on

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SENTINEL (Dec. 3, 2010), http://www.knoxnews.com/news/state/belmont-disputes-gay-coach-was-fired-ep-407045781-358280991.html.

332. *Id.* Like Kluwe's departure from the Vikings, resignations and even firings almost always raise factual questions about *why* the employment relationship ended. For example, after ESPN reported that the University of Iowa's athletic director "forced out" five female coaches in two years, Kate Fagan, *What the Heck Is Going on with the Iowa Athletic Department?*, ESPN (Nov. 5, 2014), http://espn.go.com/espnw/news-commentary/article/11773583/what-the-heck-going-iowa-athletic-department), Iowa Civil Rights Commission investigator Benjamin Flickenger queried whether the firings were based on "gender or anti-gay discrimination." Ryan J. Foley, *Investigator Sees Possibility of Bias in Iowa Coach's Firing*, ASSOCIATED PRESS (Jan 21, 2016, 3:36 PM), http://bigstory.ap.org/article/6c6b429bac8c49acb66fb8882e1d38bb/investigator-sees-possibility-bias-iowa-coachs-firing. As noted above, factual questions can arise when anyone with a protected characteristic is fired. Thus, when a female coach is fired, she may have been terminated for poor performance or because of gender, sexual orientation, race, and/or other any other personal characteristic. If the employer proffers a nondiscriminatory reason or legal prerogative to act of an otherwise protected basis, factfinders will assess whether an illegal basis for acting actually accounted for the adverse decisions. *See supra* Part II.E(4).

333. Michelle Kaufman, *Prejudice Against Gays and Lesbians Hurts Women's College Basketball*, MIAMI HERALD (Nov. 22, 2014, 8:55 PM), http://www.miamiherald.com/sports/college/article4071422.html.

334. *Id.*; *accord* Luke Cyphers & Kate Fagan, *Unhealthy Climate*, ESPN (Jan. 26, 2011), http://espn.go.com/womens-college-basketball/news/story?page=Mag15unhealthyclimate ("Fears of 'converting' straight girls into lesbians have long bedeviled women's sports. The high-profile case of Pam Parsons, who in 1982 resigned as coach of South Carolina amid accusations that she had a sexual relationship with a player, made those fears public."). Both religious and nonreligious universities may be concerned about losing recruits, or students in general, if faculty, coaches, or athletic staff are open about their LGBT status. As a result, universities may pressure coaches to be closeted, which may be illegal or constitute a hostile workplace. *See supra* Part I.B.

sexual orientation, as Part I and Part II.D explained, and carve-outs do not apply.[335]

As for Title IX, recruiting students more effectively would not seem to be explainable as a religious value. But transmitting values consistent with the University's values almost certainly is. Some institutions bind employees to their Articles of Faith, which forbid the "teaching or support of [any] position inconsistent" with the university's—including support for same-sex relationships.[336] The question then becomes whether the existence of Coach Howe's new family, which was connected to the university system only through the coach's employment, acted to support same-sex relationships. Unsurprisingly, Coach Howe was not married to her partner when her child was born[337] because gay marriage was not then allowed in most of the United States.[338]

As Part II.E(3) shows, a conduct code that binds employees to promises to confine sexual relationships to the university's definition of biblical marriage would operate as back-door means of excluding gay married employees. It may also violate the laws of many states and localities, as well as federal law if Title VII is interpreted by courts to ban sexual orientation discrimination and

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335. Where state employment laws ban discrimination on a protected basis, the state-law carve-outs received by some religious employers may immunize them. In Iowa, for example, it is illegal for both public and private employers to discriminate on the basis of sexual orientation and/or gender identity. IOWA CODE ANN. § 216.6 (West 2009). But religious institutions and their educational facilities are exempt from those bans "with respect to any qualifications for employment based on religion, sexual orientation, or gender identity when such qualifications are related to a bona fide religious purpose." *Id.* § 216.6(6)(d). Schools without religious affiliations must show that termination occurred for reasons other than the protected characteristic. Thus, when a former women's field hockey coach sued the University of Iowa alleging "gender or anti-gay discrimination played a role in her firing," and the University maintained she was terminated because of player complaints, a factual claim arose. Foley, *supra* note 332.

336. BIOLA UNIV., BIOLA UNIVERSITY EMPLOYEE HANDBOOK § 1.2 (2014), http://offices.biola.edu/hr/ehandbook/static/media/pdf/1.2.pdf. Biola University, a Christian college in southern California, requires

> [e]very employee of the University [to] agree and support [its] Articles of Faith and . . . to subscribe annually to the Articles of Faith. Any employee ceasing to believe the above Articles of Faith shall by that fact cease to be an employee of the University. No teaching or support of a position inconsistent with these Articles of Faith will be tolerated on the part of any employee of the University.

Id.

337. Adam Tamburin, *Former Belmont Coach Lisa Howe Has Historic Wedding Day*, TENNESSEAN (June 26, 2015, 6:42 PM), http://www.tennesseean.com/story/news/2015/06/26/lisa-howe-same-sex-marriage-former-belmont-coach/29362957/.

338. *See Same-Sex Marriage, State by State*, PEW RES. CTR. (June 26, 2015), http://www.pewforum.org/2015/06/26/same-sex-marriage-state-by-state/.

if the Sections 702 and 703's protections are not read as categorical exemptions.[339] Such a strict conduct code would deprive the university of diversity, reduce the pool of highly-qualified faculty members and staff from which the school can hire, and diminish the institution's educational enterprise.

Ideally, religious universities will examine their own suppositions about the value of having diverse faculty members and staff, as some religious universities have done. For example, Eastern Mennonite University and Goshen College "have added 'sexual orientation' to their non-discrimination policies, opening the door for the schools to hire staff and faculty who are in same-sex marriages."[340] After the "uproar" at Belmont University after Coach Howe's departure, Belmont's board voted to officially bar "discrimination on the basis of sexual orientation."[341] Belmont "added a new preamble . . . stating that Belmont is a Christian university and that the university strives to uphold Christian standards of morality, ethics and conduct."[342] For many like Coach Howe, Belmont's approach signals not only "values of inclusion, human dignity, and respect," but it affirms "that being gay and being Christian are not mutually exclusive."[343]

Religious universities that welcome LGBT employees and staff may worry that the decision to employ LGBT individuals will signal the University's acceptance of same-sex marriages if the employee later enters into a same-sex marriage and is open about that.[344] Yet questions of endorsement are not new to religious

339. *See supra* Part II.E(3). Restrictions on only sex inside marriage also make it difficult for single employees to work for the university, whether gay or straight. The difference is that straight employees can marry to sanctify a sexual relationship in the university's eyes, while a gay employee can never meet the university's rule unless celibate.

340. Smietana et al., *supra* note 174.

341. Scott Jaschik, *Change of Heart at Belmont*, INSIDE HIGHER ED (Jan. 27, 2011, 3:00 AM), https://www.insidehighered.com/news/2011/01/27/belmont_bars_discrimination_based_on_sexual_orientation.

342. *Id.* (quotation ommited).

343. *Id.* (quoting Howe's statement about Belmont's policy change). Of course, as Howe cautioned, University leaders must take steps to ensure that "acceptance of LGBT students and staff is not just a written policy but is also reflected in practice, attitude, and behavior." *Id.*

344. Some churches and religious organizations have terminated employees they may have known to be gay after the employee entered a legal marriage, which the employer saw as an affirmation of marriages that the organization could not recognize. *See* Lauren Gambino, *Fired for Being Gay: Church Pantry Worker Sues Kansas City Diocese*, GUARDIAN (July 17, 2014), https://www.theguardian.com/world/2014/jul/17/lawsuit-kansas-city-catholic-diocese-gay-marriage (noting "a growing list of gay employees fired in recent years by Catholic institutions for marrying, announcing plans to wed, or in some way

educational institutions. For instance, questions of endorsement animated *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, the pioneering decision that ensured equal access to facilities for a student group that advocated a different moral vision than the university did on gay right.[345] Georgetown University vigorously opposed providing equal access, arguing it would create the appearance that Georgetown endorsed the student group—"an endorsement [that] would be inappropriate for a Catholic University."[346] The group sought not only the tangible benefits that Georgetown afforded to other groups but "official recognition" from Georgetown, too.[347] Construing the District of Columbia's Human Rights Act, which prohibited all educational institutions from discriminating on the basis of sexual orientation,[348] the United States Court of Appeals for the District of Columbia vindicated the interests of both sides.[349] The group ultimately received all of the tangible benefits provided to other student groups, but Georgetown retained the ability to decide which organizations to "endorse[]" through official "University Recognition."[350] The decision illustrates that treating LGBT students and employees in the same manner as other groups does not require a faith institution to endorse positions antithetical to their faith.

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making public their sexual orientation").

345. Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 5 (D.C. 1987).

346. *Id.* at 11–12 (citation omitted).

347. *Id.* at 12, 13–14 (citations omitted).

348. D.C. CODE § 1-2520 (1987). D.C. Code § 1-2520 prohibits discrimination based on sexual orientation. However, under D.C. Code § 2-1402.41, also known as the "Armstrong Amendment," educational institutions affiliated with a religious organization were permitted "to deny, restrict, abridge, or condition—(A) the use of any fund, service, facility, or benefit; or (B) the granting of any endorsement, approval, or recognition, to any person or persons that are organized for, or engaged in, promoting, encouraging, or condoning any homosexual act, lifestyle, orientation, or belief." D.C. Code § 2-1402.41, repealed, 2015. In 2015, the D.C Council passed the Human Rights Amendment Act of 2014. 62 D.C. Reg. 1540 (Feb. 6, 2015). This amendment effectively repealed the Armstrong Amendment, subjecting religious educational institutions to the same prohibition on discrimination based on sexual orientation as other entities. *Id.*; *see also* Mike DiBonis, *Conservative and Catholic Groups Urge Members of Congress to Overturn D.C. Bills*, THE WASH. POST (Feb. 6, 2015) ("[T]he Human Rights Amendment Act of 2014, repeals a longstanding, congressionally imposed measure exempting religious educational institutions from the city's gay non-discrimination law.").

349. *Gay Rights Coal. of Georgetown Univ. Law Ctr.*, 536 A.2d at 5.

350. *Id.* at 38. These tangible benefits included "office space, supplies and equipment, a telephone, computer label and mailing services, student advertising privileges, financial counseling, and the opportunity to apply for lecture fund privileges and for other funding." *Id.* at 47 (Pryor, J., concurring).

As in *Georgetown University*, the interests of LGBT individuals in being able to openly live out their sexual orientation or gender identity does not erase a university's countervailing interest in distancing itself from the moral and sexual choices of its employees. In Coach Howe's case, had Belmont discovered that she and her legally married wife were beginning a family, it could have avoided endorsing the union by simply stating that Belmont values Coach Howe as an employee and believes that her private choices off school grounds within a legally married relationship are hers alone. Ideally, the Belmont University would also wish Coach Howe and her family well. But the university could just as well have chosen to stridently condemn Coach Howe's choice to have a child outside (its view of) a Biblical marriage,[351] which may have made Coach Howe, LGBT students, and students struggling with their sexualities feel unwelcome. As Professor Laycock has pointed out, however, same-sex couples cannot escape "the pointed reminder that some fellow citizens vehemently disapprove of what they are doing. But same-sex couples know that anyway, and the American commitment to freedom of speech ensures that they will be reminded of it from time to time."[352] Whether openly condemning the relationship or respectfully disavowing it, religious universities must be able to distance themselves from a marriage or family structure that conflict with their faith—whether that right is grounded in freedom, free speech, or expressive association.[353]

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351. There are competing views among denominations whether such marriages are indeed Biblical. Justin Lee, *Homosexuality & Christianity*, GAY CHRISTIAN NETWORK, https://www.gaychristian.net/justins_view.php (last visited July 16, 2016). Some faith communities are leave the question up to individual faith leaders. *See, e.g.*, Dewan, *supra* note 174 (noting that, in New York City, two out of five Episcopalian dioceses allow same-sex couples to be wed by priests in the church).

352. Douglas Laycock, *Afterword*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 189, 198 (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson eds., 2008).

Faced with the possibility of moral condemnation from their employer, some employees may feel the need to stay closeted. *See* Cyd Zeigler, *Southern Christian College Bullies Another Gay Athlete into Silence*, SB NATION (Apr. 22, 2015, 9:07 AM), http://www.outsports.com/2015/4/22/8459617/christian-college-gay-athlete-lgbt-silence (discussing interviews with "five gay college basketball coaches - in Divisions I & II - all of whom feel they have to stay in the closet for their own futures in the NCAA" but not clarifying whether state or local law protected those coaches from discrimination on the basis of sexual orientation). In localities that protect LGBT people from overt discrimination based on their sexuality, employees have legal recourse if treated differently, which for some should mute, if not erase the need to hide one's sexuality.

353. For a thoughtful treatment of associational claims, see John D. Inazu, *The*

III. The Locker Room and the Question of Student-Athletes

Discrimination against LGBT student-athletes is real [354]: "One in four LGBTQ student athletes said they were pressured to be silent about their sexual identity among teammates"—at religious and non-religious universities alike.[355] Arguably, no story captures the difficulties faced by student-athletes more poignantly than that of three-time all-American Brittney Griner.[356] Often regarded as the "world's most famous female basketball player,"[357] in April 2013, Griner described coming out to

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Forgotten Freedom of Assembly, 84 Tul. L. Rev. 565 (2010). Questions of when a university's expression of moral sentiments slips over into an illegal hostile workplace are difficult and deserve attention but are beyond the scope of this Article. *See* Frost, *supra* note 2.

354. The 2009 Student-Athlete Climate Study (SACS), done by Campus Pride in 2012, examined data on campus climate and the climate in athletic departments and teams gathered from 8,481 student-athletes enrolled in United States representing all intercollegiate divisions and all NCAA National Athletic Association sports. SUSAN RANKIN & DANIEL MERSON, CAMPUS PRIDE, 2012 LGBTQ NATIONAL COLLEGE ATHLETE REPORT 5, https://www.campuspride.org/wp-content/uploads/CampusPride-Athlete-Report-Exec-Summary.pdf. It found that

> LGBTQ student-athletes generally experienced a more negative climate than their heterosexual peers, which adversely influenced their athletic identities and reports of academic success . . . . They reported being deliberately ignored or excluded (51%) more so than their heterosexual counterparts (41%). They also reported being the target of derogatory remarks via electronic means almost twice as frequently (21% vs. 12%), [and] being pressured to be silent about their identity over four times as much (25% vs. 6%) . . . .

Id. at 6–7.

ESPN Magazine's seven-month look at women's basketball recruitment found that 55% of women's college basketball recruits indicated that recruiters asked about sexual orientation. Cyphers & Fagan, *supra* note 334. Some coaches "talk about 'family values,' then put a definition on what families look like," which "becomes code for 'We reflect a straight program.'" *Id.* (quoting Heather Barber, a sports psychology professor at the University of New Hampshire).

355. *Campus Pride's 2012 LGBQT National College Athlete Report's Key Findings Revealed*, HUFFINGTON POST (Mar. 18, 2013, 3:31 PM), http://www.huffingtonpost.com/2013/03/18/lgbtq-college-report-campus-pride-_n_2902427.html. The NCAA, which oversees 1,281 institutions' athletic programs, only "recently has started to focus on LGBT inclusion." *Id.* But as Karen Morrison, the NCAA's director of inclusion, admitted, "[the NCAA] has no power to enforce sanctions over homophobic behavior" by institutions. Barbara Frankel, *Why Are Gay College Athletes in the Closet?*, DIVERSITYINC (Apr. 17, 2013), http://www.diversityinc.com/diversity-and-inclusion/why-are-gay-college-athletes-in-the-closet/ (advising "[t]hose who believe they have been discriminated against can go through their university administrative process or take legal action.").

356. *WNBA Prospect Profile: Brittney Griner—Baylor*, WNBA, http://www.wnba.com/archive/wnba/draft/2013/profiles/prospect_griner_brittney.html (last visited Mar. 27, 2016).

357. Scott Gleeson, *Brittney Griner Book: Baylor's Stance on Homosexuality Caused 'Pain,'* USA TODAY (Feb. 27, 2014, 1:51 PM), http://www.usatoday.com/story/sports/wnba/2014/02/26/brittney-griner-talks-homosexuality-baylor-animosity-in-tell-all-book/5840791/ [hereinafter Gleeson,

her parents as a lesbian during an interview in her last year playing for Baylor University.[358] The media treated her revelation with "nonchalance."[359] At the time, Baylor's policy prohibited "homosexual acts,"[360] which Griner's disclosure would not have violated. But had Griner played for a school that but also bans "promotion of sexually immoral behavior,"[361] that disclosure may have landed her in hot water. Griner says Baylor's head coach urged "players not to be open publicly about their sexuality because it would hurt recruiting and look bad for the program.[362] In her book, *In My Skin*, Griner encapsulated her experience during her last year as a student-athlete at as "one big struggle"[363]:

> Even though I was open about being gay, I couldn't be open on Baylor's time, which is why I have a lot of mixed emotions about my four years there . . . . Playing for a program and on a campus that denies a large part of my identity was a tough situation to navigate.[364]

Brittney Griner Book].

358. Scott Gleeson, *Draft Day: WNBA's Griner Ready to Evoke Change, Test NBA Waters*, USA TODAY (Apr. 18, 2013, 8:35 PM), http://www.usatoday.com/story/sports/wnba/mercury/2013/04/16/draft-day-wnbas-brittney-griner-ready-to-evoke-change-take-on-nba/2087021/ [hereinafter Gleeson, *Draft Day*]; *accord* Sam Borden, *A Female Star Comes Out as Gay, and the Sports World Shrugs*, N.Y. TIMES (Apr. 19, 2013), http://www.nytimes.com/2013/04/19/sports/ncaabasketball/brittney-griner-comes-out-and-sports-world-shrugs.html?_r=0.

359. Borden, *supra* note 358.

360. Gleeson, *Brittney Griner Book*, *supra* note 357357; Abby Ohlheiser, *Why Baylor University's Sexual Conduct Policy No Longer Calls Out 'Homosexual Acts,'* WASH. POST (July 8, 2015), https://www.washingtonpost.com/news/acts-of-faith/wp/2015/07/08/why-baylor-universitys-sexual-conduct-policy-no-longer-calls-out-homosexual-acts/.

361. *See, e.g.*, Andy Birkey, *Eight Minnesota Colleges Discriminate Against LGBT Students, Staff, and Faculty*, COLUMN (July 15, 2015), http://thecolu.mn/16845/eight-minnesota-colleges-discriminate-against-lgbt-students-staff-and-faculty.

362. *Griner: No Talking Sexuality at Baylor*, ESPN (May 27, 2013), http://espn.go.com/wnba/story/_/id/9289080/brittney-griner-says-baylor-coach-kim-mulkey-told-players-keep-quiet-sexuality.

363. Anna Aagenes, *Come Out Like A Girl: Why Athletes Like Brittney Griner Deserve Our Applause and Our Attention*, HUFFINGTON POST (Feb. 2, 2016), http://www.huffingtonpost.com/anna-aagenes/brittney-griner-coming-out_b_3130781.html (citing BRITTNEY GRINER, IN MY SKIN: MY LIFE ON AND OFF THE BASKETBALL COURT (2015)). *See* BRITTNEY GRINER, IN MY SKIN: MY LIFE ON AND OFF THE BASKETBALL COURT (2015).

364. Antonya English et. al, *Openly Gay Athletes Challenge NCAA's Culture of Silence*, TAMPA BAY TIMES (Mar. 27, 2015), http://www.tampabay.com/sports/basketball/college/openly-gay-athletes-challenge-culture-of-silence-in-ncaa-womens-basketball/2223168 (citing BRITTNEY GRINER, IN MY SKIN: MY LIFE ON AND OFF THE BASKETBALL COURT (2015)).

As this Part explains, when student-athletes follow a vision of the good life that conflicts with the university's public witness to its faith, two distinct quandaries arise for institutions of higher learning: Has the institution facilitated or endorsed a student-athlete's conduct, and what countervailing interests do other students have? The last question arises most clearly with transgender athletes, where reasonable access to locker rooms and other facilities is essential if students are to have a meaningful opportunity to play.

A. Avoiding Endorsement of a Student Athlete's Conduct

By their nature, athletics involve universities deep in the lives of student athletes: Universities house athletes, provide facilities for changing, and provide accommodations while travelling away. When the relationship between the coach and athlete is a positive one, coaches sometimes act as confidants and mentors, giving the coach more knowledge of a player's private affairs than other university employees would have with ordinary students. Even when the relationship is not positive, coaches have a greater lens into the athlete's life by virtue of the sheer number of hours spent together.[365]

Given the slim hope of real privacy, it is not surprising that universities often learn intimate details of student-athletes' lives. To the extent that those details remain private, student-athletes' conduct raise the same questions as that of other, non-athlete students discussed in Part II.E(5) above. It is only when the student-athlete's conduct becomes public that the separate question arises about whether the university endorses the athlete's conduct.

Student-athletes undoubtedly are part and parcel of the university's public face. Indeed, a student-athlete *at any university* can engage in public behavior inconsistent with the university's "brand." Consider conduct wholly apart from a person's sexuality, like alcohol consumption,[366] illicit drug use,[367]

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365. Ben Strauss & Steve Eder, *College Players Granted Right to Form Union*, N.Y. TIMES (Mar. 26, 2014), http://www.nytimes.com/2014/03/27/sports/ncaafootball/national-labor-relations-board-rules-northwestern-players-are-employees-and-can-unionize.html?_r=0 (observing that some players spend fifty hours a week in practice or competition, lending support to an NLRB ruling allowing college football players to unionize based in part on that fact).

366. Gregory Smith, *Student Partying Prompts Rhode Island College to Put Sports Programs on Hold for 3 1/2 Days*, PROVIDENCE J. (Sept. 26, 2014), http://www.providencejournal.com/article/20140926/NEWS/309269992; *20*

or even sexual assault.[368] In each of these instances, few would question whether a university can be tarnished by association with behavior it does not condone. In fact, universities routinely suspend or expel athletes for such behavior.[369] Of course, being LGBT should not be equated with these acts.

For a set of religious universities, when a student engages in any sex before marriage, whether gay or straight, it implicates the university's witness to its own fundamental religious tenets. Some universities express this sentiment in their student-athlete handbook: "Because student-athletes are representatives of [the University] , both on and off campus, expectations and standards in some areas are placed at a higher level than the general student body. Accepting and being accountable to these standards is part of the responsibility of being a student-athlete."[370]

The amount of control that universities exercise over their student-athletes raises a separate consideration: facilitation. Religious universities have a specific interest in not facilitating sexual relationships that violate their religious tenets. Consider again facts far removed from issues surrounding LGBT status: a religious university can insist that students playing mixed doubles tennis not slip into each other's rooms while travelling for away games—and it can take steps to police this behavior.

Of course, an athlete's special relationship to the university places immense pressure on students like Griner. As Baylor's

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Centralia College Athletes Suspended for Drinking Party, KSL (Feb. 4, 2015), www.KSL.com/?nid=157&sid=33350356.

367. *Alcohol, Drug and Other Prohibited Substances Policy*, BATES COLL., http://athletics.bates.edu/alcohol-drug-and-other-prohibited-substances-policy (last visited Apr. 10, 2016).

368. Stanford University continues to defend how seriously it takes rape at the university after Brock Turner's sexual assault conviction resulted in a mere six months in jail, sparking a national furor. *See* Tyler Kingkade, *Students Want Stanford to Apologize for Brock Turner's Sexual Assault*, HUFFINGTON POST (June 8, 2016), http://www.huffingtonpost.com/entry/stanford-brock-turner-apology_us_57589064e4b0ced23ca6f901. Student conduct that reflects poorly on an institution is not limited to student athletes. For example, applications to the University of Virginia dropped after the later-discredited Rolling Stone story about a gang rape at a fraternity on University grounds. *See* Chris Staiti, *UVA Applications Drop in Wake of Discredited Gang Rape Story*, BLOOMBERG (Jan. 15, 2015), http://www.bloomberg.com/news/articles/2015-01-15/uva-applications-drop-in-wake-of-nowdiscredited-gangrape-story.

369. *E.g.*, *20 Centralia College Athletes Suspended for Drinking Party*, *supra* note 366; *March 28, 2006: Duke Lacrosse Team Suspended Following Sexual Assault Allegations*, HISTORY, http://www.history.com/this-day-in-history/duke-lacrosse-team-suspended-following-sexual-assault-allegations/print. (last accessed Apr. 13, 2016); Smith, *supra* note 366366.

370. LETOURNEAU UNIV., STUDENT-ATHLETE HANDBOOK 2015–2016, at 19 (2015).

later policy revision illustrates, universities can avow a commitment to chastity with equal-opportunity rules that all students, gay and straight, must abide (and may struggle to conform to). Notwithstanding the overarching intuition that a person's sexuality is private and irrelevant, if a student-athlete's conduct violates an equal-opportunity prohibition and it comes to light, the university may feel little choice but to sanction the player—which will strike some as unfair since student-athletes are under a public microscope.[371]

So what would happen if Griner played for Baylor today, with its equal-opportunity prohibition on sex outside marriage? Griner could be expelled if she admits to having sex outside of marriage, just as a straight athlete would be.[372] The difficulty arises if Griner legally married her partner and that marriage came to light. As noted above, if Baylor does not recognize her legal marriage, Griner can never comply with Baylor's ban after marrying. If Griner is treated as an employee, expelling Griner for violating the conduct code may well violate the law, as explained above, although it would be allowed under Title IX if the University secured a waiver.[373] But as with an endorsement of an employee's relationship, an equal-opportunity conduct rule would not strip a university of its ability to distance itself from Griner's choice, while witnessing to its own views in a mutually respectful way.[374]

In the end, it remains possible for universities to distance themselves from endorsing the conduct of their student-athletes without banning gay or transgender athletes. As the next Section explains, a university need not deny gay or transgender athletes access to locker rooms and other facilities in order to infuse its tenets throughout the community.

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371. *E.g.*, GRINER, supra note 363 363; *see, e.g.*, Noah Garcia, *Speaking Out: Student-Athletes Weigh in on LGBT Acceptance in Athletics*,STANFORD DAILY (May 27, 2015), http://www.stanforddaily.com/2015/05/27/speaking-out-student-athletes-weigh-in-on-lgbt-acceptance-in-athletics/ (discussing the discrepancy between LGBT acceptance on campus and LGBT acceptance within athletics).

372. *See* BAYLOR UNIV., BAYLOR UNIVERSITY STUDENT-ATHLETE HANDBOOK 2009–2010, at 8, http://grfx.cstv.com/photos/schools/bay/genrel/auto_pdf/0910-compl-studenthandbook.pdf ("A student that engages in misconduct is subject to disciplinary action ranging from a warning to expulsion."). *See supra* note 211 and accompanying text.

373. *See supra* Part II.D.

374. *See supra* note 331 and accompanying text.

B. Providing a Meaningful Opportunity to Play Means Providing Reasonable Accommodations

Plainly, the discussion of openly gay and transgender athletes invariably turns to "[t]he gay-shower scenario," whether the athlete plays professionally or in college.[375] When Jason Collins, a former NBA player, came out as gay, Bryan Fischer, a political talk show host, stated:

> I will guarantee you . . . if the ownership of whatever team is thinking about bringing him back, or thinking about trading for him, and they go to the players on that team and they say "How do you feel about an out active homosexual being in the same locker room, sharing the same shower facilities with you?" they'll say "no way. I don't want that. I do not want some guy, a teammate, eyeballing me in the shower."[376]

To be sure, many, if not most, players seem to have no anti-gay animus—contending that gay and straight players alike should be "look[ed] at like a brother," and not be "treat[ed] . . . any different[ly]" and that "things are changing" and "change is inevitable."[377] Still, even gay allies acknowledge that "the locker room [is] different."[378] "The locker room may not be ready for that . . . . [S]ome guys walk around completely naked all the time, and they might not want to do that anymore."[379] As players come out with greater frequency, how to fully include LGBT players will only take on greater significance.[380] But fears focused on competing claims in the locker room are overblown.

Consider first the bathroom issue, now the fodder of commentators and talk show hosts after North Carolina's law (H.B. 2) wiping aside a Charlotte ordinance that provided access

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375. *Fischer on Jason Collins: NBA Teammates Won't Want "Active Homosexual" To Be "Eyeballing" Them in the Locker Room*, HUFFINGTON POST (Feb. 2, 2016), http://www.huffingtonpost.com/2013/04/30/jason-collins-bryan-fischer_n_3185766.html.

376. *Id.*

377. Will Brinson, *Terrell Thomas Not Sure NFL Locker Room Ready for Gay Player*, CBS SPORTS (Jan. 12, 2014, 9:33 AM), http://www.cbssports.com/nfl/eye-on-football/24439998/terrell-thomas-not-sure-nfl-locker-room-ready-for-gay-player.

378. *Id.*

379. *Id.*

380. As more gay athletes chose to openly honor their relationships, one would expect signs of affection not to garner the kinds of headlines that followed Abby Wambach sharing a kiss with her wife Sarah Huffman after the United States beat Japan 5-2 and won the FIFA Women's World Cup in Vancouver, Canada. The moment graced front pages across the world. Cavan Sieczkowski, *This Photo of Abby Wambach Kissing Her Wife Sarah Huffman After World Cup Win Is What Loves Looks Like*, HUFFINGTON POST (July. 6, 2015), http://www.huffingtonpost.com/entry/abby-wambach-kisses-wife-world-cup_559a90d6e4b0c706985a4039.

to restroom facilities for gay and transgender individuals.[381] Passed in a one-day special session, H.B. 2 requires that transgender people use the bathroom facility matching their gender at birth,; it sparked a political maelstrom. North Carolina now faces the loss of about "$4.7 billion in federal education funding under Title IX alone," if a federal lawsuit challenging the law succeeds,[382] on top of lost jobs, conference venues, travel bans, and widespread boycott.[383]

Contrast that controversy with the duty Utah created in state law to accommodate transgender employees. In March 2015, Utah, the single most conservative state in the last presidential election, enacted its landmark Utah Compromise, extending protections against discrimination to the LGBT community in housing and hiring.[384] Recognizing that transgender employees

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381. Public Facilities Privacy & Security Act, H.B. 2, Gen. Assemb., 2d Extra Sess. (N.C. 2016). Months before H.B. 2's enactment, voters repealed Houston's non-discrimination ordinance, which was depicted as allowing "men . . . [to] use women's bathrooms." Justin Wm. Moyer, *Why Houston's Gay Rights Ordinance Failed: Fear of Men in Women's Bathrooms*, WASH. POST (Nov. 4, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/11/03/why-houstons-gay-rights-ordinance-failed-bathrooms/; City Council, Houston, Tex., Houston Equal Rights Ordinance, Ordinance No. 2014- (May 14, 2014), https://archive.org/stream/equal_rights_ordinance/equal_rights_ordinance_djvu.txt ("It is the policy of the city that the city will not discriminate on the basis of any protected characteristic in authorizing or making available the use of city facilities or in the delivery of city programs, services or activities.").

382. *Editorial: Federal Government Should Block Funds to States That Pass Discriminatory Laws*, CONN. L. TRIB. (June 8, 2016), m.ctlawtribune.com/#/article/1202759609976/8/Editorial; Complaint, United States v. North Carolina, No. 1:16-cv-00425 (M.D. N.C. May 9, 2016) [hereinafter DOJ Complaint], https://assets.documentcloud.org/documents/2827915/NC-DOJComplaint.pdf. The United States Department of Justice (DOJ) contends in a series of letters to North Carolina that the law violates Title IX, which prohibits sex discrimination and therefore sex stereotyping discrimination. *See Editorial: Federal Government Should Block Funds to States That Pass Discriminatory Laws*, *supra*. DOJ also alleges violations of Title VII, relying on *Price Waterhouse*'s theory of sex-stereotyping. Letter from Vanita Gupta, Deputy Assistant Attorney Gen., to Margaret Spellings, President Univ. N.C. (May 4, 2016), https://assets.documentcloud.org/documents/2823820/Dept-of-Justice-to-UNC-Illegal-to-discriminate.txt ("Federal courts and administrative agencies have applied Title VII to discrimination against transgender individuals based on sex, including gender identity."). DOJ further contends that "[d]enying transgender individuals access to a restroom consistent with gender identity discriminates on the basis of sex." *Id.*

383. South Dakota's Governor vetoed a similar measure aimed at students. Laura Wagner & Bill Chappell, *South Dakota Governor Vetoes Bill Stipulating Transgender Students' Bathroom Use*, NPR (March 1, 2016, 2:08 PM), http://www.npr.org/sections/thetwo-way/2016/03/01/468732723/south-dakota-s-transgender-bathroom-bill-hits-deadline-for-governor.

384. *See* Antidiscrimination and Religious Freedom Amendments, ch. 13, 2015 Utah Laws 68; ch. 46, 2015 Utah Laws 214; S.B. 296, Reg. Sess. (Utah 2015) ;

must have access to bathroom facilities during the day and that all employees deserve respect and dignity, Utah enacted a common-sense measure: Employers must "afford reasonable accommodations based on gender identity to all employees" if they "designate sex-specific facilities, including restrooms, shower facilities, and dressing facilities."[385] Realizing that other employees have interests, too, as the employer itself does, Utah provided assurances that employers could institute reasonable dress and grooming standards.[386] The Utah Senate and House of Representatives recognized the public's unease with transgender individuals, people with whom many Americans and Utahns have never interacted—and concluded that concerns about privacy could be solved with nothing more than a $50 lock on a bathroom door.[387] How would that work?

Imagine first a situation where Sam is in the process of transitioning from Sally.[388] Transitioning to another gender is time limited—Sam's outward appearance morphs until his

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Robin Fretwell Wilson, *After Indiana: Harmonizing Gay Rights and Religious Freedom*, LIBR. LAW & LIBERTY (Apr. 21, 2015), http://www.libertylawsite.org/2015/04/21/after-indiana-harmonizing-gay-rights-and-religious-freedom/.

385. UTAH CODE ANN. 1953 § 34A-5-109 (West 2015); Antidiscrimination and Religious Freedom Amendments, ch. 13, 2015 Utah Laws 68; S.B. 296, Reg. Sess., at lines 676–79 (Utah 2015) .

386. UTAH CODE ANN. 1953 § 34A-5-109 (West 2015); Antidiscrimination and Religious Freedom Amendments, ch. 13, 2015 Utah Laws 68; ch. 46, 2015 Utah Laws 214; S.B. 296, Reg. Sess., at lines 676–79 (Utah 2015) ("This chapter may not be interpreted to prohibit an employer from adopting reasonable dress and grooming standards not prohibited by other provisions of federal or state law, provided that the employer's dress and grooming standards afford reasonable accommodations based on gender identity to all employees . . . ."); S.B. 296, Reg. Sess., at lines 676–79 (Utah 2015) ("This chapter may not be interpreted to prohibit an employer from adopting reasonable rules and policies that designate sex-specific facilities, including restrooms, shower facilities, and dressing facilities, provided that the employer's rules and policies adopted under this section afford reasonable accommodations based on gender identity to all employees.").

387. *See* Utah Senate Floor Debate, S.B. 296, Reg. Sess. (Utah 2015), http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=18760&meta_id=548216.

388. The NCAA defines a "transgender" person as "an individual whose gender identity does not match their assigned birth gender. Being transgender does not imply any specific sexual orientation (attraction to people of a specific gender.) Therefore, transgender people may additionally identify as straight, gay, lesbian, or bisexual." PAT GRIFFIN & HELEN CARROLL, NCAA OFFICE OF INCLUSION, NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES 22 (2011), https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf. A transgender man or a FTM (Female-to-Male) person is someone who was assigned to the female gender at birth but has a male gender identity. *Id.* at 23. A transgender woman or a MTF (Male-to-Female) person is someone who was assigned to the male gender at birth but has a female gender identity. *Id.*

physical manifestation looks like any other man's.[389] Before Sam's outward characteristics change, imagine he begins using the men's restroom in the office. If Sam uses a stall with a lock on the door in the men's facilities, his privacy interests are adequately protected. The privacy of other men using the restroom, however, may be encroached upon if they use a urinal, rather than a stall. Here, the solution is easy—male employees can simply use stalls. Alternatively, employers have the discretion to give Sam and Sam's male coworkers additional privacy through another reasonable accommodation. For instance, employers could institute a process where employees hang a "do not disturb" sign on the multi-stall restroom while using it—effectively converting it into a single use facility while in use. This approach avoids the cost of renovating or constructing whole new facilities. Should this scheme create a backlog or lengthy waits, employers are free to institute other reasonable accommodations. Of course, once Sam's change in outward appearance is complete, he will present like any other man using the restroom and the need for accommodations will subside.

Now imagine instead that Sally is in the process of transitioning from Sam and wishes to use the restroom that reflects her desired gender. This was the issue that motivated North Carolina's ill-conceived law.[390] Sally's outward appearance may not match her desired gender for a year or more.[391] Female co-workers may worry about their own privacy. Ironically, multi-use women's restrooms have stalls with locks, giving more privacy than most men's rooms do. If Sally's female coworkers are concerned that Sally is in the restroom at the same time, an employer can accommodate these privacy and dignity concerns by allowing all employees to hang a "do not disturb" sign while using the facilities, ensuring maximum privacy.[392]

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389. *See* Joint Statement, *supra* note 97, at 2 (defining "transition").

390. Moyer, *supra* note 381.

391. *See Transgendercare Medical Feminizing Program*, TRANSGENDER CARE, http://www.transgendercare.com/medical/resources/tmf_program/tmf_program_6.asp (last accessed July 16, 2016).

392. Some may see allowing employees to hang a "Do Not Disturb" sign on an employer's multi-person restroom as stigmatizing for a transgender worker. The employer's duty to reasonably accommodate the transgender person comes with the discretion to adopt reasonable facility rules, which could, but need not consider the privacy concerns of others. Ideally, the employer would take steps to sensitize it employees to be welcoming of others. For workers slow to embrace that vision, a "do not disturb" sign may give some peace of mind until the newness of having a transgender coworker wears off. Further, with rising levels of acceptance of transpeople, cresting 70% among millennials, any stigma is likely to attach to the

There may be those, however, who do not accept Sally's transition and who are uncomfortable sharing facilities with her well after her transition is complete. Employers can use "do not disturb" signs, locks on the main bathroom door, or any other reasonable accommodation to manage interactions between coworkers that may be fraught with emotion because one co-worker will simply not accept the other's true identity.[393]

Contrast this dignified approach with "birth certificate" policies adopted in North Carolina and considered elsewhere.[394] These policies require that persons to use facilities consistent with their "anatomy as identified at birth."[395] Transgender individuals are forced to use facilities that they themselves feel uncomfortable and misplaced in.[396] Under these measures, a transgender person's self-identity is suffocated.

No point is served in barring a person from living out something so significant to their true gender when "reasonable accommodations" can preserve the dignity and privacy of all. Operationalized, these policies are self-defeating—forcing transgender women, who physically present as men, to use the women's bathrooms, with far more chances for friction and disease.[397]

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coworker who is concerned for her privacy, not to the transgender employee. ROBERT JONES & DANIEL COX, PUB. RELIGION RESEARCH INST., HOW RACE AND RELIGION SHAPE MILLENNIAL ATTITUDES ON SEXUALITY AND REPRODUCTIVE HEALTH 42 (2015), http://publicreligion.org/site/wp-content/uploads/2015/03/PRRI-Millennials-Web-FINAL.pdf (reporting that over 70% of millennials "support legal protections against discrimination in jobs, public accommodations, and housing for gay and lesbian people . . . and for transgender people"); HUMAN RIGHTS CAMPAIGN, EQUALITY RISING: 2015 GLOBAL EQUALITY REPORT 7 (2015), http://www.hrc.org/resources/equality-rising ("Between 2011 and 2015, the number of Americans who viewed transgender people favorably rose steeply from 26 percent to 44 percent.").

393. *See* Joanne Greenfield, *Coming Out: The Process of Forming a Positive Identity*, *in* THE FENWAY GUIDE TO LESBIAN, GAY, BISEXUAL AND TRANSGENDER HEALTH 45 (Harvey J. Makadon et al. eds., 2008).

394. *See* Dominic Holden, *South Dakota Becomes First State to Pass Anti-Transgender Student Restroom Bill*, BUZZFEED (Feb. 16, 2016, 3:22 PM), http://www.buzzfeed.com/dominicholden/south-dakota-becomes-first-state-to-pass-anti-transgender-st#.fcvlMNA2N.

395. Holden, *supra* note 394.

396. Zack Ford, *Opponents of LGBT Protections are Clueless about Transgender Men*, THINKPROGRESS (Oct. 23, 2015), http://thinkprogress.org/lgbt/2015/10/23/3715054/houston-hero-transgender-men/ ("Most importantly, transgender women are not predators; they are individuals who, like everybody else, simply want to pee in peace.").

397. *See* Phil Ciciora, *Why Laws Restricting Bathroom Access to Transgender Peope Wont Work*, UNIV. ILL. (May 26, 2016, 11:30 AM), https://news.illinois.edu/blog/view/6367/366409.

Like the bathroom issue, access to locker rooms poses similar challenges in college athletics. Athletic facilities are generally the most active area for Title IX waiver requests—evidencing that they are the situs of competing privacy interests.[398] ED's recent settlement with a Chicago school district over a transgender student's access to the locker room shows that it is possible to facilitate access to the locker room and changing facilities without ostracizing transgender students or sacrificing the privacy of others.[399]

District 211, Illinois's largest high school district, initially barred a transgender girl from the girls' locker room facilities at the high school,[400] violating the "student's rights under Title IX."[401] Administrators had offered the transgender student a changing area adjacent to the girl's locker room, but the student thought that it would "draw[] more attention," single her out, and be a hassle because a "staff member [would have] to unlock it for her."[402] By changing elsewhere, the student also missed out on the "informal camaraderie with her teammates that sometimes occurs in the girls' athletics locker room . . . prior to practice," much as it does in the locker room before physical education class.[403]

Federal officials gave District 211 "30 days to reach an agreement or risk having its federal education funding suspended or terminated" and face litigation.[404] District 211's school board

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398. WARBELOW & GREGG, *supra* note 25, at 11; *see* GRIFFIN & CARROLL, *supra* note 388.

399. GRIFFIN & CARROLL, *supra* note 388 398, at 10; *see* Duaa Eldeib, *District 211 Keeps Deal on Transgender Student After Heated Debate*, CHI. TRIB. (Dec. 8, 2015, 9:58 AM), http://www.chicagotribune.com/news/local/breaking/ct-transgender-student-district-211-settlement-update-met-20151207-story.html.

400. Erin Buzuvis, *Banning Transgender Girl from Girls' Locker Room Violates Title IX, OCR Says*, TITLE IX BLOG (Nov. 3, 2015), http://title-ix.blogspot.com/2015/11/banning-transgender-girl-from-girls.html?m=1 [hereinafter *Banning Transgender Girl*].

401. Duaa Eldeib, *Mother of Transgender Student at Center of National Debate Speaks Out*, CHI. TRIB. (Nov. 13, 2015), http://www.chicagotribune.com/suburbs/schaumburg-hoffman-estates/news/ct-transgender-student-mom-district-211-met-20151112-story.html.

402. *Banning Transgender Girl*, *supra* note 400.

403. *Id.*

404. Duaa Eldeib, *District 211 Keeps Deal on Transgender Student After Heated Debate*, CHI. TRIB. (Dec. 8, 2015), http://www.chicagotribune.com/news/local/breaking/ct-transgender-student-district-211-settlement-update-met-20151207-story.html. Officials acknowledged that if the District did not reach an agreement, it "risk[ed] lawsuits and the loss of millions of dollars in federal funding." Michael E. Miller, *Feds Say Illinois School District Broke Law by Banning Transgender Students from Girls' Locker Room*, WASH. POST (Nov. 3, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/11/03/feds-say-illinois-school-district-broke-law-by-banning-trans-student-from-girls-locker-room/.

subsequently voted 5-2 to give the student access to the girls' locker room,[405] which took the form of "a curtained-off area in which to change and shower."[406] This accommodation "stopped short of complying with the federal directive to offer full access to the girls' locker room."[407] Nonetheless, District 211 officials felt "they must weigh the rights of their transgender students with the privacy rights of the remaining 12,000-plus students," resulting in the decision to offer a curtained-off area.[408] The student not only "agreed to use the private areas of the locker room to change and shower,"[409] but preferred the arrangement.[410] Coming to an arrangement that suited the transgender student and her teammates is a happy ending—although the resolution of conflicting interests may not always be so easily solved.[411] Several parents of other children who attend District 211's schools have since countersued, claiming that the other students "experience humiliation, anxiety, intimidation, fear, apprehension, stress, degradation, and loss of dignity" because the transgender student uses the same facility.[412]

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405. Eldeib, *supra* note 404.

406. *Id.*

407. *Id.*

408. *Id.*

409. *Id.*

410. TITLE IX BLOG, *supra* note 400.

411. Individuals have been vocal on both sides of the issue of transgender students using locker room facilities. "[A] large majority of speakers . . . said they were against a settlement that would allow the student, who was born a male but identifies as female, to use the girls' locker room." Eldeib, *supra* note 404. Parents are uncomfortable, likely in part because they just do not know a lot about transgender students. Jeff Miller, for example, argued that his daughter was "scared and uncomfortable when she learned a transgender student could gain access to the girls' locker room." *Id.* Miller stated that "[p]eople have the right in this country to live their lives the way they see fit . . . [but w]hen it starts infringing on other people's rights, that's when it becomes a problem." *Id.* Another "high school senior cited her personal modesty and religious beliefs in not wanting the transgender student to be allowed in the locker room[,]" and refused to speak publicly because she was "'absolutely terrified of what other people would think of [her], [and] if they would call [her] intolerant.'" *Id.*

By contrast, John Knight of the American Civil Liberties Union of Illinois stated that while "he was pleased to see the board approve the settlement for [the student]," it is a "'terrible mistake' not to extend locker room access to other students." *Id.* ED's Assistant Secretary for Civil Rights, Catherine Lhamon, believes that "'[t]he agreement strikes a balance between respecting individual privacy while ensuring that all students receive the opportunity to participate equally in school programs and activities.'" *Id.*

412. Eric Peterson, *District 211 Sued Over Tansgender Student's Locker Room Access*, DAILY HERALD (May 4, 2016, 6:01 PM), http://www.dailyherald.com/article/20160504/news/160509515/.

To be sure, accommodations respectful of all raise challenging questions. For example, what happens if the student no longer finds the accommodation acceptable? Though the key for scholastic institutions is to attempt to provide "reasonable accommodations," in the locker room this goal can prove to be difficult in practice. The curtain arrangement used by District 211 ensures the privacy of the young woman behind the curtain, but not that of the young women dressing and undressing in front of open lockers. One possibility to ensure the privacy and modesty of others is to add curtained areas for all students, which would involve some cost. Another is to have the transgender student change first and then allow the rest of team or class to change after, to the extent that privacy matters to them. Many students likely will not care; the transgender student sacrifices no camaraderie with those who do not mind changing at the same time. For those who do care, privacy will be preserved, even if they are seen as intolerant for making that choice. Because the physical transition to another gender is often time limited, over time the need for a curtain or other accommodations falls away.[413]

In crafting reasonable measures surrounding transgender students and student-athletes, the importance of definitions—especially of gender identity—cannot be overstated. A definition that limits one's gender identity to the gender listed on one's birth certificate, like that enacted recently in North Carolina,[414] limits a student's access only to facilities matching his or her gender at birth and never accommodates the gender-reassigned individual, whether during the transition process or after. Such "birth certificate" policies effectively dodge the hard, but soluble, question of how to give transgender students access on the same basis as other students, while being respectful of the privacy interests of all.[415] By contrast, Utah recognized the need for employer certainty when accommodating employees, and defaulted to a medical definition drawn from the American Psychiatric Association's Diagnostic and Statistical Manual—which can be shown by medical history, treatment, or "other evidence that the gender identity is sincerely held, part of a

413. Even after Sam transitions completely to Sally, one can imagine some students, knowing that Sally transitioned, will never accept Sally as a woman and will assert a countervailing privacy interest. In this instance, the school must be trusted to continue to provide a reasonable accommodation.

414. Holden, *supra* note 394.

415. *See supra* Part II.E(6).

person's core identity, and not being asserted for an improper purpose."[416]

Other definitions place a premium on certain milestones, such as beginning hormone therapy.[417] For example, the NCAA defines "transgender" as "[a]n individual whose gender identity does not match the sex assigned at birth."[418] In discussing how "this physical transition is a complicated, multistep process that may take years," the NCAA specifically references "cross-gender hormone therapy and a variety of surgical procedures."[419] If the NCAA's definition *requires* completed hormonal therapy or surgery to trigger a duty that the member-university provide "access to various sport facilities, including locker rooms as well as restroom facilities [that are gender appropriate],"[420] then it operates to delay the student's social transition to the new gender, overlooking the transgender student's interest in living out their true identity during the transition process itself.[421] For a transgender woman, the transition from male to female culminates after one to two years, during which that athlete would have no access to the woman's locker room.[422]

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416. Antidiscrimination and Religious Freedom Amendments, ch. 13, 2015 Utah Laws 68 ("'Gender identity' has the meaning provided in the Diagnostic and Statistical Manual (DSM-5). A person's gender identity can be shown by providing evidence, including, but not limited to, medical history, care or treatment of the gender identity, consistent and uniform assertion of the gender identity, or other evidence that the gender identity is sincerely held, part of a person's core identity, and not being asserted for an improper purpose."). The DSM-5 replaced the older term "Gender Identity Disorders" with the new term, gender dysphoria, which lists multiple criteria determining when someone has a "strong and persistent cross-gender identification." See Camille Beredjick, *DSM-V to Rename Gender Identity Disorder "Gender Dysphoria"*, ADVOCATE (July 23, 2012), http://www.advocate.com/politics/transgender/2012/07/23/dsm-replaces-gender-identity-disorder-gender-dysphoria.

417. NAT'L COLLEGIATE ATHLETIC ASS'N, CHAMPIONS OF RESPECT: INCLUSION OF LGTBQ STUDENT-ATHLETES AND STAFF IN NCAA PROGRAMS 72 (2012), https://www.ncaa.org/sites/default/files/Pages%2Bfrom%2BChampions%2Bof%2BRespect%2B-%2BLGBTQ%2BTerminology.pdf.

418. *Id.* The definition also explains: "This individual usually desires to physically alter his or her body surgically and/or hormonally." *Id.*

419. GRIFFIN & CARROLL, *supra* note 388, at 23.

420. Andro Barnett, *NCAA Faces Challenges in Accommodating LGBT Athletes*, COLL. SPORTS J., http://www.college-sports-journal.com/index.php/ncaa-division-i-sports/707-ncaa-faces-challenges-in-accomodating-lgbt-athletes (last visited Dec. 23, 2015).

421. See Buzuvius, supra note 43, at __. ("[P]articipation policies based on hormone usage unnecessarily complicate what is already a complex and challenging decision about whether and when undergo hormone treatment.").

422. OLIVIA ASHBEE & JOSHUA MIRA GOLDBERG, TRANS CARE PROJECT, HORMONES: A GUIDE FOR MTFS 8 (2006), https://apps.carleton.edu/campus/gsc/assets/hormones_MTF.pdf.

The pressure for a definite standard, whether based on hormonal therapy or other evidence, is at its peak with younger students and high school adolescents, where some worry that a student will express a fleeting desire for another gender, ultimately changing their mind.[423] In that instance, policymakers could utilize the DSM-5's criteria, which require that symptoms of a "marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics" last at least six months and be manifested by at least six specified criteria.[424]

It may be that there is no definition without problems. Whatever definition legislatures and accrediting bodies like the NCAA choose, they should charge institutions with making reasonable accommodations that give transgender athletes access to needed facilities while protecting everyone's privacy and dignity.[425] As the locker room cases make clear, however, through

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423. GENDER DYSPHORIA, AM. PSYCHIATRIC PUB. (2013), http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf. In the primary and secondary school context, legislators may worry that students will express an interest in transitioning gender, only to abandon it later. Here, the criteria in American Psychiatric Associations Diagnostic and Statistical Manual provides clarity. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL (5th ed. 2013).

> In Adolescents and Adults Gender Dysphoria must last at least six months and be manifested by at least two of the following specified criteria: (1) "A marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics (or in young adolescents, the anticipated secondary sex characteristics)[;] (2) A strong desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experienced/expressed gender (or in young adolescents, a desire to prevent the development of the anticipated secondary sex characteristics)[;] (3) A strong desire for the primary and/or secondary sex characteristics of the other gender[;] (4) A strong desire to be of the other gender (or some alternative gender different from one's assigned gender)[;] (5) A strong desire to be treated as the other gender (or some alternative gender different from one's assigned gender)[;] (6) A strong conviction that one has the typical feelings and reactions of the other gender (or some alternative gender different from one's assigned gender)."

Id. In children, at least six of the specified criteria must be manifested; tying the gender identity to a marked difference between the individual's expressed/experienced gender and the gender others would assign him or her known as gender dysphoria. *Id.* Under DSM-5, that marked difference has to continue for at least six months. *Id.*

424. *Id.*

425. The NCAA has also attempted to include transgender student-athletes in a recent update which "ensures that transgendered student-athletes have respectful, legal and fair access to various college sport teams in accordance to current legal as well as medical knowledge." Barnett, *supra* note 420. The policy attempts to provide a suitable space for transgender student-athletes by facilitating "access to various sport facilities, including locker rooms as well as restroom facilities [that

thoughtful, reasonable accommodations, protecting the interests and privacy rights of all parties is possible.[426]

Conclusion

After *Obergefell*, hundreds of religious colleges and universities face a new challenge: how to square faith teachings and roles as educators with respect for LGBT students at a time when an increasing portion of the public sees application of religious tenets about marriage or sexuality as mere discrimination against LGBT students. Before *Obergefell* opened access to marriage for lesbian and gay couples, conduct codes that required all sexuality to be confined to marriage facially applied the same norm to all students—straight or gay.[427] Before *Obergefell*, civil law understandings of marriage aligned with the faith traditions of religious universities, avoiding questions about who should live in married student housing or whether everyone should abstain from sex outside marriage. Once those understandings diverged after *Obergefell*, thorny questions arise about how religious educational institutions can maintain their integrity and continue to witness to their faith traditions.

The natural impulse for many institutions will be to cordon off all homosexuality or to exclude LGBT students and employees entirely—something religious institutions can do while receiving Title IX money, but increasingly may not be able to do under state law or do as to employees under federal law.

Religious institutions of higher education should not want to discriminate against individuals *because of who they are*—even if the law presently permits them to do so. Religious universities can and do adhere to faith beliefs on quintessentially religious questions, like what counts as a marriage, and may fashion university policies around married student housing and other matters to mirror those beliefs.

But when the right to work or study at the university is tied to conduct codes that LGBT individuals can never conform to, religious universities tread on shaky ground legally. Conduct codes should operate as a backdoor device for emptying religious campuses of diversity. By taking steps inimical to the institutions' established educational missions, religious universities will

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are gender appropriate]" *Id.*

426. Eldeib, *supra* note 404.

427. *Sexual Conduct*, BAYLOR UNIV. (May 15, 2015), http://www.baylor.edu/content/services/document.php?id=39247 (noting that no distinction is made between hetero- and homosexual marriage).

become more insular and see their influence—and perhaps their ability to draw on public resources—wane.

Appendix A: The Limits of Title VII's Protections for Religious Organizations

Selected Religious Discrimination Cases				
Case	**Policy**	**Discrimnation Alleged**	**Defenses**	**Outcome**
Killiner v. Samford Univ., 113 F.3d 196(11th Cir. 1997)	Religious beliefs of the dean	Religious	702(a) & 703(e)(2)	Employer wins
Little v. Wuerl, 929 F.2d 945 (3rd Cir. 1991)	Catholic canonical marriage	Religious	703(e)(2)	Employer wins
Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618 (6th Cir. 2000)	No promotion of Homosexual ity	Religious	702(a) & 703(e)(2)	Employer wins
Kennedy v. St. Joseph's Ministries, Inc., 657 F.3d 189 (4th Cir. 2011)	Religious clothing	Religious—retaliation	702(a)	Employer wins

Selected Cases Involving Protected Ground and Religious Defense				
Case	**Policy**	**Dis-crimination Alleged**	**Defenses**	**Outcome**
Cline v. Catholic Diocese of Toledo, 206 F.3d 651 (6th Cir. 2000)	No pre-marital sex	Pregnancy; gender	None listed	Goes to trial to determine basis of discriminati on ("pretext" or not) & if rule applied equally. If unequally applied, plaintiff may recover, even if valid religious reason. The case eventually settled

Boyd v. Harding Acad. of Memphis, Inc., 88 F.3d 410 (6th Cir. 1996)	No pre-marital sex	Pregnancy; gender	702(a); Plaintiff failed to produce evidence	Goes to trial to determine basis of discrimination ("pretext" or not) & if rule applied equally. If unequally applied, plaintiff may recover, even if valid religious reason

Herx v. Diocese of Ft. Wayne-S. Bend Inc., 48 F. Supp. 3d 1168 (N.D. Ind. 2014)	No in-vitro fertilization	Pregnancy; gender	702(a) & 703(e)(2)	Goes to trial to determine basis of discrimination ("pretext" or not) & if rule applied equally. If unequally applied, plaintiff may recover, even if valid religious reason. Plaintiff was awarded damages
EEOC v. Miss. Coll., 626 F.2d 477(5th Cir. 1980)	Preference for Baptists	Gender	702(a)	Summary judgment for employer, unless plaintiff can show policy preferring baptists was not used, which then permits her to show employer acted on an impermissible basis

Selected Cases Involving Protected Ground and Religious Defense				
Case	**Policy**	**Dis-crimination Alleged**	**Defenses**	**Outcome**
Vigars v. Valley Christian Ctr. of Dublin, 805 F. Supp. 802 (N.D. Cal. 1992)	No adultery	Pregnancy; gender	702(a) & 703(e)(2)	Goes to trial to determine basis of discriminati on ("pretext" or not) & if rule applied equally. If unequally applied, plaintiff may recover, even if valid religious reason
Curray-Cramer v. Ursuline Acad. of Wilmington, Delaware, Inc., 450 F.3d 130 (3d Cir. 2006)	No pro-abortion speech; no anti-war speech	Gender	Entangleme nt	Employer wins; to decide questions of catholic doctrine violates establishme nt clause

Selected Cases Involving Protected Ground, But No Religious Defense Offered				
Case	**Policy**	**Discrimination Alleged**	**Defenses**	**Outcome**
EEOC v. Pac. Press Pub. Ass'n, 676 F.2d 1272(9th Cir. 1982)	Women paid less than similarly-situated men	Gender	No religious defense offered	Employee wins, cannot have a policy which treats men and women unequally
EEOC v. Fremont Christian Sch., 781 F.2d 1362 (9th Cir. 1986)	Married women do not receive health insurance that married men do	Gender	No religious defense offered	Employee wins, cannot have a policy which treats men and women unequally
Hypothetical	Cannot be pregnant	Pregnancy	702(a) & 703(e)(2)	Employee likely wins
Hypothetical	No same-sex marriage	Gender; sexual orientation (if accepted by courts or enacted into law)	702(a) & 703(e)(2)	Employee likely wins

Additional Church Autonomy Cases				
Case	**Policy**	**Discrimination Alleged**	**Defenses**	**Outcome**
Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360 (8th Cir. 1991)	N/a	Age & gender	Entanglement; plaintiff was an ordained chaplain	Suit dismissed on summary judgment for employer
Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985)	N/a	Sex & gender	Entanglement; plaintiff was an associate in pastoral care	Suit dismissed on summary judgment for employer
DeMarco v. Holy Cross High Sch., 4 F.3d 166 (2d Cir. 1993)	N/a	Age	Entanglement; plaintiff was a lay teacher with religious duties	Suit goes forward—no risk of entanglement
Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012)	N/a	Disability (ADA)	Entanglement; plaintiff was a "called" teacher with religious duties	Suit dismissed on summary judgment for employer

Appendix B

Four Competing Tests for Whether an Organization is Sufficiently Religious to Qualify Under Section 702(a)

Federal courts of appeal have developed four different tests to determine whether an organization qualifies as a religious organization under Section 702(a) : (1) the secularization test, (2) the sufficiently religious test, (3) the primarily religious test, and (4) the *LeBoon* test.[428] These tests yield different outcomes because they are responsive to different factors.

The secularization test focuses on whether an organization is "is, quite literally, [religious] only in name[,]" making it secular and therefore prohibited from religious discrimination.[429] In *Fike*, the court considered whether the defendant, United Methodist Children's Home, constistuted a religious organization under Title VII. The court observed that "[w]hile the original mission of the United Methodist Children's Home may have been to provide a Christian home for orphans and other children," the facts now "show that as far as the direction given the day-to-day life for the children at the Home is concerned, it is practically devoid of religious content or training, as such."[430]

The sufficiently religious test is illustrated by *Killinger v. Samford University*, where the Eleventh Circuit focused exclusively on the organization's observable religious characteristics.[431] The court found the university to be a religious educational institution because

> (1) it was founded as a theological institution by the Baptist Convention and is a member of the Association of Baptist Colleges and Schools, (2) its trustees were required to be Baptists, (3) the university received approximately seven percent of its funding from the Baptist Convention, (4) its faculty who taught religion courses were required to subscribe to the Baptist Statement of Faith and Message, and (5) the school's charter declared a religious purpose.[432]

In contrast to *Fike*, the U.S. Court of Appeals for Eleventh Circuit in *Killinger* held that "[e]ven if Samford has recently

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428. *See* Dyer, *supra* note 249, at 554–60.

429. Fike v. United Methodist Children's Home of Va., Inc., 547 F.2d 286, 290 (E.D. Va. 1982), aff'd, 709 F.2d 284 (4th Cir. 1983).

430. *Id.* at 290.

431. Killinger v. Samford Univ., 113 F.3d 196 (11th Cir. 1967).

432. Dyer, *supra* note 249, at 556 (citing *Killinger*, 113 F.3d at 199).

distanced itself somewhat from the Alabama Baptist Convention, it certainly has not given up its affiliation with Christianity and with a predominant point of view within the Christian perspective."[433] Both the U.S. Court of Appeals for Eighth Circuit and the U.S. Court of Appeals for Fifth Circuit used a similar "sufficiently religious" analysis to uphold the ability of religious universities legally to employ individuals on the basis of religion.[434]

The primarily religious test arguably represents the narrowest interpretation of religious institution under Title VII. Under this test, the court inquires "whether the 'general picture' of the institution is primarily religious or secular."[435] In adopting this test, the Ninth Circuit, the only appeals court to adopt this test, reasoned that "Congress's conception of the scope of section 702 was not a broad one" and that all "assumed that only those institutions with extremely close ties to organized religions would be covered. Churches, and entities similar to churches, were the paradigm."[436] Although each case must turn on its own facts, in *Townley* the defendant "was primarily secular because (1) it was for-profit, (2) produced a secular product, (3) had no ties to organized religion, and (4) did not state a religious mission in its articles of incorporation."[437]

Finally, the Third Circuit adopted its own test in *LeBoon v. Lancaster Jewish Community Cen. Ass'n*, which combines factors other circuits use to determine whether an organization qualifies for the religious employer exemption under Section 702(a).[438] The *LeBoon* test considers nine factors, including:

> (1) whether the entity operates for a profit, (2) whether it produces a secular product, (3) whether the entity's articles of incorporation or other pertinent documents state a religious purpose, (4) whether it is owned, affiliated with[,] or financially supported by a formally religious entity such as a church or synagogue, (5) whether a formally religious entity participates in the management, for instance by having

433. Killinger v. Samford Univ., 917 F. Supp. at 773, 777 (N.D. Ala. 1996), *aff'd*, 113 F.3d 196 (11th Cir. 1997).

434. *See* EEOC v. Miss. Coll., 626 F.2d 477, 478–79 (5th Cir. 1980); Wirth v. Coll. of the Ozarks, 26 F. Supp. 2d 1185, 1187 (W.D. Mo. 1998), aff'd, 208 F.3d 219 (8th Cir. 2000) (per curiam); see also Dyer, *supra* note *249*, at 556.

435. EEOC v. Townley Eng'g & Mfg., Co., 859 F.2d 610, 618 n.14 (9th Cir. 1988) (citation omitted).

436. *Id.* at 618.

437. *Id.* at 619.

438. Leboon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217, 226–27 (3rd Cir. 2007).

> representatives on the board of trustees, (6) whether the entity holds itself out to the public as secular or sectarian, (7) whether the entity regularly includes prayer or other forms of worship in its activities, (8) whether it includes religious instruction in its curriculum, to the extent it is an educational institution, and (9) whether its membership is made up by coreligionists.[439]

The court noted that whether an organization is religious "cannot be based on its conformity to some preconceived notion of what a religious organization should do," but instead "must be measured with reference to the particular religion identified by the organization. Thus not all factors will be relevant in all cases, and the weight given each factor may vary from case to case."[440] The Sixth Circuit uses a similar standard that considers slightly different factors.[441]

439. *Id.* at 226 (citations omitted).

440. *Id.* at 226–27.

441. *See supra* Part II.E.1 (discussing Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 625–25 (6th Cir. 2000)).