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Threats to Religious Higher Ed and the Implications of Title IX Regulation

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Introduction

According to the most recent data from the National Center for Education Statistics of Fall, 2019, there are 866 universities with religious affiliations with a total enrollment of over 1.8 million students.¹ A faith tradition characterizes these institutions, most significantly represented by Catholic, Methodist, Baptist, and Presbyterian denominations.² Religious postsecondary education is a cornerstone of the Christian faith and religious pluralism. While not all religiously affiliated colleges and universities prescribe to the traditional Christian beliefs on marriage, gender, and sexual orientation, a large majority continue this tradition. Yet, maintaining the long-held Christian traditional view of marriage, gender, and sexuality is currently under threat. Reinterpretations of gender and sexuality on a legal and regulatory level pose serious threats to religious universities that hold to traditional values. One of these Regulations is Title IX which is a 1972 federal regulation that was passed as part of the Education Amendments to the Civil Rights Act of 1964.³

The policy issue discussed at length in this paper is the current threat to religious higher education from reinterpretations of sex in Title IX regulation. These threats are examined, and a legislative and alternative solution to protect religious universities is proposed. The Title IX regulation states, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any educational programs or activity receiving federal financial assistance.”⁴ More specifically, the law prohibits discrimination on the basis of sex in educational institutions receiving federal financial assistance. Any university that receives federal funding is obligated by law to abide by Title IX regulations.⁵

Title IX is typically thought of as a tool for increasing females’ sports and athletic opportunities and for addressing sexual harassment.⁶ Yet, Title IX encompasses so much more than issues around sports and sexual harassment. It places conditions on the federal funds that schools, both public and private, receive. The condition for receiving funding is that institutions cannot discriminate based on sex. This regulation affects all aspects of an educational institution, including

¹NCES. “Digest of Education Statistics.” 2020.

² Ibid.

³ Valentin, Iram. “Title IX: Brief History.” Holy Cross Journal of Law and Public Policy, 123. 1997. 123.

⁴ Ibid.

⁵ “Title IX and Sex Discrimination.” US Department of Education (ED), August 20, 2021.

⁶ Augustine-Adams, Kif. “Religious Exemptions to the Title IX”. *Kansas Law Review*. 65, no. 2. 2016: 327-414, 331.

recruitment and admissions, counseling, athletics, financial aid, employment, and student life.⁷

Title IX regulations threaten religious schools to remove sex-specific facilities, allow transgender athletes to compete in sports of the opposite biological sex, prohibit policies that consider sexual orientation and gender identity (SOGI) in employment and admissions decisions, affect faith-based counseling programs, and change conduct codes around LGBTQ behavior. Ultimately, the threat of reinterpretation of Title IX may lead to anti-discrimination lawsuits against these universities.

In 2020, the legal protections from discrimination based on SOGI changed in the landmark Supreme Court decision *Bostock v. Clayton County*. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex, and national origin.⁸ In *Bostock v. Clayton County*, the Supreme Court held that Title VII covers discrimination which includes sexual orientation and gender identity encompassed under the term “sex.”⁹ In the majority opinion, Justice Gorsuch, stated, “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”¹⁰ *Bostock v. Clayton County* is significant to Title IX because it expanded SOGI protections to include protections for SOGI in hiring practices by extending the judicial interpretation of “sex” in Title VII of the Civil Rights Act. While Title VII is limited to issues of discrimination in hiring practices, Title IX is much broader in extent and implications if reinterpreted under SOGI requirements. If jurisprudence built off the reasoning of *Bostock v. Clayton County* is applied to Title IX, then all aspects of Title IX, including recruitment and admissions, counseling, athletics, financial aid, employment, and student life, will be affected.

Lawsuits using the legal jurisprudence of *Bostock v. Clayton* could then be targeted against religious universities intending to force religious universities to violate their religious beliefs by implementing SOGI protections. If these schools refuse to do so, they would be forced to give up federal funding. Losing federal funding is a substantial threat for religious universities because such funding covers a significant portion of their budgets.¹¹ According to Representative Chris Stewart (R-UT2) and Gene Schaerr, in the *Why Conservative Religious Organizations and Believers Should Support the Fairness for All Act*, “Religious schools and colleges that accept federal funds-meaning nearly all of them-would likely have to abandon

⁷ “Title IX and Sex Discrimination.” US Department of Education (ED), August 20, 2021.

⁸ EEOC. “Title VII of the Civil Rights Act of 1964.” US Equal Employment Opportunity Commission. 1964.

⁹ Valenti, Alix. “LGBT Employment Rights in an Evolving Legal Landscape: The Impact of the Supreme Court’s Decision in *Bostock v. Clayton County*, Georgia.” *Employee Responsibilities and Rights Journal* 33, no. 1 (2020): 3–23.

¹⁰ *Ibid.*

¹¹ “The Freedom Fund.” Christendom College. 2020.

religious standards governing student admission, conduct, and housing to the extent they embody traditional beliefs about gender and sexuality.”¹² Consequently, under an expanded definition of SOGI, the entire might of the federal and civil rights enforcement apparatus would be turned against religious institutions.¹³

Regulatory Environment

On the regulatory front, religious universities have been able to operate under a traditional view of marriage and sexuality due to religious exemptions under Title IX regulation. According to the Department of Education (Ed), some organizations can receive exemptions from Title IX regulation allowing religious organizations to discriminate on the basis of sex.

The organization must meet two criteria. Firstly, it is “controlled by a religious organization,” and secondly that the application of Title IX “would not be consistent with the religious tenets” of that organization.¹⁴ The Department of Education states, “Title IX does not apply to an educational institution that a religious organization controls to the extent that application of Title IX would be inconsistent with the religious tenets of the organization.”¹⁵

Title IX regulations offer a process for an educational institution to send a written statement to the Office for Civil Rights (OCR) claiming a religious exemption, which is reviewed by the Assistant Secretary of the OCR to acknowledge the institution’s exemption.¹⁶ The process requires the highest-ranking official of the religious institution to submit a written statement to the Assistant Secretary of Civil Rights identifying the provisions of Title IX that conflict with a specific tenet of the religious organization.¹⁷ According to author Augustine-Adams in *Religious Exemptions to the Title IX of the Kansas Law Review*, since the passage of Title IX regulation, no religious exemption has ever been denied. As of the publication date of 2016, 285 religious exemptions had been granted. However, as Augustine-Adams points out, while 285 exemptions have been granted, educational institutions have increasingly acquiesced to the administrative state, eroding religious freedom.¹⁸ Not only is there a lack of

¹² Stewart, Chris, and Gene Schaerr. “Why Conservative Religious Organizations and Believers Should Support the Fairness for All Act” *Notre Dame Journal of Legislation*. 2019. 140.

¹³ *Ibid.*

¹⁴ Augustine-Adams, Kif. “Religious Exemptions to the Title IX”. *Kansas Law Review*. 65, no. 2. 2016: 332.

¹⁵ Office for Civil Rights. “Exemptions from Title IX.” US Department of Education (ED). March 8, 2021.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ Augustine-Adams, Kif. “Religious Exemptions to the Title IX”. *Kansas Law Review*. 65, no. 2. 2016: 327-414, 331.

transparency in the religious exemption process, but by requesting exemptions under regulatory procedures, universities have deferred power to the bureaucratic administrative state, which has manifested stricter requirements for religious schools by the OCR.¹⁹ Rather than religious universities claiming their inherent exemption under the Title IX statute itself and the Constitution, they allowed the OCR to arrogate the power and authority to regulate religious exemptions.²⁰

Since 1998, the OCR has moved away from concise exemption recognition language as outlined in the February 1985 Policy Memorandum on religious exemptions, which set the standard for exemptions under the “adequately establishes” language for control.²¹ The irony of the OCR’s creation of new regulatory power for itself through claims of permissance and eligibility is that not a single exemption recognition letter from the OCR from 2013 to 2016 concluded that the religious university had “established the control required to be eligible for a religious exemption.”²² Yet, the OCR still granted the religious exemption claims. The OCR used this artificially constructed regulatory power to request more information regarding universities’ religious exemption requests.²³ While they have appropriated far more regulatory power than explicitly granted in the 1972 Title IX regulation, the OCR has yet to use the power in significant ways to oppose religious exemptions likely to avoid litigation by religious universities. As Augustine-Adams points out, nearly all religious universities relinquished claims to their strongest “inherent exemption” by deferring to the OCR to grant their requests.

The Title IX Final Rule released in May of 2020 amended some aspects of Title IX regulation. It provided regulatory clarification with the force and effect of law, bringing new clarification to religious exemptions under Title IX. Under the new Final Rule, it is expressly stated that those educational institutions, which are controlled by a religious organization, are not required to request an assurance from the Assistant Secretary of the OCR.²⁴ This update brings the regulatory power of the OCR back to the original wording as written in the Title IX regulation, which allows for educational institutions to simply assert an exemption, including for the first time during an investigation or compliance review by OCR. Furthermore, Title IX Final Rule explains that the revision to the existing regulation is consistent with

¹⁹ Augustine-Adams, Kif. “Religious Exemptions to the Title IX”. *Kansas Law Review*. 65, no. 2. 2016: 327-414, 331.

²⁰ *Ibid.*

²¹ *Ibid.* 396.

²² *Ibid.*

²³ *Ibid.* 400.

²⁴ “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,” *Federal Register* / Vol. 85, No. 97 § 30475. 2020.

Title IX as well as the First Amendment to the US Constitution and the Religious Freedom Restoration Act.”²⁵

Prior to the Final Rule, Title IX regulations implied that to assert a religious exemption under Title IX, an educational institution must request an assurance from the Assistant Secretary. Educational institutions may now assert such an exemption, including during an investigation or compliance review by OCR for the first time. In Section 106.12 of the Code of Federal Regulations Educational Institutions Controlled by a Religious Organization, commentators note that the Federal Government should be making it easier for religious institutions to operate and thrive, not harder.²⁶ It would be a waste of resources for a school to apply for a religious exemption assurance letter when in fact, no such letter is needed for the exemption, according to the commentators. Further, they state that under the Final Rule, entanglement with religious universities by the Department of Education might be limited to only cases where “a complaint is filed, or where the school affirmatively requests an exemption assurance letter.”²⁷

The recent return to the inherent exemption standard signals a possible reinvigoration of universities’ abilities to use religious exemptions to avoid regulatory control by the Office for Civil Rights and politically motivated administrations which seek to impose SOGI standards on religious organizations. In the long term, it remains to be seen what effect the Final Rule will have on religious freedoms. The OCR could continue to tighten its factual review under the control test and impose a more rigorous, less deferential standard, especially as executive power grows and faces little opposition from the legislature. Possible changes by the OCR in conjunction with explicit threats to religious universities from President Biden’s executive orders leave the door open to increased restriction on religious exemption claims.

Judicial Threat

Hunter v. US Department of Education (2021) is a recent potential landmark lawsuit which says that the Department of Education bears “complicity in the abuses and unsafe conditions thousands of LGBTQ students endure at hundreds of taxpayer-funded, religious colleges and universities.”²⁸ The suit also cites the religious exemptions given under Title IX as cause for the Department of Education contributing to the discrimination of “more than 100,000 sexual and gender minority students attending religious colleges and universities where discrimination

²⁵ “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,” Federal Register / Vol. 85, No. 97 § 30475. 2020.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

on the basis of sexual orientation and gender identity is codified in campus policies and openly practiced.” The suit seeks to remove the religious exemptions from Title IX regulations. In March of 2021, students from 25 religiously affiliated universities filed the class-action lawsuit against the Department of Education.²⁹ The suit claims that these religious universities discriminate against members of the LGBTQ community.³⁰ Of the 25 universities named in the lawsuit, 18 universities are members of the Council of Christian Colleges and Universities (CCCU).³¹ The CCCU is one of the leading associations of Christian higher education around the world, with over 150 Christian institutions in the US. Since a significant number of the 25 named religious institutions operate as CCCU members, the CCCU filed a motion to intervene as defendants in the case to be permitted to “assert and defend its members’ interests in preserving the important provision of Title IX that Plaintiffs challenge here.”³²

Along with two member universities, William Jessup University and Corban University, and one non-member university, Phoenix Seminary, the CCCU filed Motions to Intervene.³³ They asserted that they were entitled to intervene under Federal Rule of Civil Procedure 24(a)(2), or alternatively under Rule 24(b)(1)(B), because they had a powerful interest in preserving the Title IX exemption in all its applications. Only through intervention can the CCCU ensure that this Court fully understands the vital importance of the religious exemption to religious colleges in an ever-changing world.”³⁴ The Motion to Intervene was granted by the judge of the United States District Court of Oregon.³⁵ At the time of publication, a judgment has yet to be made. If the plaintiffs in *Hunter v US Department of Education* succeed, the ramifications to religious universities would be significant. The immediate lack of religious exemptions to Title IX would leave schools open to further lawsuits and punitive damages for perceived discrimination based on SOGI. Confronted with further litigation without the religious exemptions, schools would face the choice to either relinquish federal funding or acquiesce to federal demands under SOGI. Unlike *Hunter v US Department of Education*, further litigation would directly target religious organizations like the CCCU rather than the Department of Education, directly challenging their federal funding.

²⁹ *Elizabeth Hunter, et al., Plaintiffs, v. U.S. Department of Education* (Case 6:21-cv-00474-AA) March 29, 2021.

³⁰ *Ibid.*

³¹ *Elizabeth Hunter, et al., Plaintiffs, v. U.S. Department of Education, et al., Defendants* (In the United States District Court For The District of Oregon Eugene Division) May 12, 2021.

³² *Elizabeth Hunter, et al., Plaintiffs, v. U.S. Department of Education* (Case 6:21-cv-00474-AA) May 12, 2021. 2.

³³ *Ibid.*

³⁴ *Ibid.* 8.

³⁵ *Ibid.*

Funding

Federal funding makes up a significant portion of private religious universities budgets which is why the risk is so significant to the existence of religious universities. According to Dale Kemp, the former Vice President for Finance and Operations at Wheaton College, “The fear is so large in so many institutions because 40 or 50 or maybe even 60 percent of their budgets are really coming from the federal government.”³⁶ This funding comes in the form of student loans, scholarships, grants, work-study programs, higher education tax credits, aid for military members and families, and aid for international study.

Already Religious universities are forced to compete with state-funded colleges, which receive billions of dollars in funding. According to the US Department of Education, federal financial assistance is given to over 5,000 postsecondary educational institutions.³⁷ In the fiscal years of 2016 and 2017, Forbes analyzed the 933 private non-profit colleges with enrollment greater than 500 students using data from the National Center for Education Statistics Integrated Postsecondary Education Data System.³⁸ Forbes used grading standards that evaluated schools on the financial criteria such as endowment assets, core operating margin, tuition as a percentage of core revenue, and other criteria, totaling nine grading standards. The analysis found that a total of 675 or just over 72 percent of private colleges analyzed were “tuition-dependent schools,” which means that the schools “squeak by year-after-year” and often lose money or eat into their dwindling endowments.³⁹

Forbes’ analysis predates the COVID-19 pandemic, which has furthered the economic strain on universities.⁴⁰ 118 of 177 schools, or just over 66 percent of schools that received the lowest financial grade of D had religious affiliations.⁴¹ Shirley Hoogstra, the President of the CCCU, in *Evangelicals Magazine: A Pandemic Impact on the Church* wrote an article titled “On Christian College Survival,” where she discussed the impact of COVID-19 on Christian universities.⁴² According to Hoogstra, COVID-19 added significant financial

³⁶ Gjelten, Tom. *Christian Colleges that Oppose LGBT Rights Worried About Losing Funding*. NPR. March 27, 2018.

³⁷ “US Department of Education makes available \$36 billion in American rescue plan funds to support students and Institutions.” May 11, 2021.

³⁸ Schiffrin, Matt, and Carter Coudriet. “Dawn of the dead: For hundreds of the nation’s private colleges, it’s merge or perish.” Forbes. December 15, 2020.

³⁹ Ibid.

⁴⁰ Schiffrin, Matt, and Carter Coudriet. “Dawn of the dead: For hundreds of the nation’s private colleges, it’s merge or perish.” Forbes. December 15, 2020.

⁴¹ Ibid.

⁴² Hoogstra, Shirley. “On Christian College Survival.” National Association of

challenges to Christian colleges. These new challenges included “unanticipated expenses to both support students and pivot to online learning, financial losses from room and board, less income from donors who face their own economic challenges, and catastrophic losses to endowments.”⁴³ The financial impact of COVID-19 on top of the existing financial struggles of many religious postsecondary institutions means that a complete loss of federal funding would likely shutter a significant amount of religious universities – universities that exist to provide an alternative form of education that is oriented around faith.⁴⁴

Executive Threat

Since the inauguration of President Biden, the executive branch has begun to take actions that further the threats to religious universities. In January of 2021, during President Joe Biden’s first week as president, he signed Executive Order 13988 titled, “Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation.”⁴⁵ Executive Order 13988 directs all federal agencies, including the Department of Education, to review existing orders, regulations, guidance, documents, policies, or other agency actions, to ensure that all conform to the reinterpretation of “sex” discrimination under the *Bostock v. Clayton County* decision. In October of 2019, the Supreme Court’s ruling in *Bostock v. Clayton County* redefined Title VII of the Civil Rights Amendment, which prohibits employers from discriminating against any individual “because of such individual’s race, color, religion, sex, or national origin,” to also include discrimination based on an individual’s sexual and gender orientation.⁴⁶ EO 13988 directs federal agencies to begin enforcing anti-discrimination laws under Title IX of the Education Amendments, the Fair Housing Act, and Section 412 of the Immigration and Nationality Act using *Bostock*’s reinterpretation of “sex” to encompass discrimination based on gender identity or sexual orientation.⁴⁷

In March, the White House put forth Executive Order 14021 entitled “Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender

Evangelicals. September 30, 2021. Accessed January 10, 2022.

⁴³Ibid.

⁴⁴ Ibid.

⁴⁵ Federal Register, & Biden, J., (January 20, 2021) Executive Order 13988: Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation. Federal Register.

⁴⁶ *Bostock v. Clayton County, Georgia*. June 15, 2020.

⁴⁷ Federal Register, & Biden, J., (January 20, 2021) Executive Order 13988: Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation. Federal Register.

Identity.”⁴⁸ EO 14021 reaffirmed the sentiment of EO 13988.⁴⁹ Both executive orders direct the head of agencies to review all agency orders and actions to be in line with SOGI. Executive Order 14021 specifically directed the Secretary of Education to within 100 days consult with the attorney general to review all existing regulations, orders, guidance documents, policies, and any other similar agency actions that are or may be inconsistent with the administration’s reinterpretation of sex under Title IX from EO 13988. Findings of the review were to be reported to the Director of the Office of Management and Budget. The executive orders are anticipated to affect how colleges and universities handle campus sexual misconduct, and sex discrimination allegations as the Department of Education reviews its policies.⁵⁰

In June of 2021, the Department of Education issued a Notice of Interpretation to the Office of the Federal Registrar, stating that it will enforce the new interpretation of discrimination under Title IX.⁵¹ In the notice, the Department of Education stated, “Consistent with the Supreme Court’s ruling and analysis in *Bostock v. Clayton County*, the Department interprets Title IX’s prohibition on discrimination ‘on the basis of sex’ to encompass discrimination on the basis of sexual orientation and gender identity.”⁵² Furthermore, the notice stated that after reviewing the text of Title IX and Federal courts’ interpretation of Title IX, the Department of Education concluded that Title IX “prohibits recipients of Federal financial assistance from discriminating based on sexual orientation and gender identity in their education programs and activities.”⁵³ The affirmation of the Department of Education’s interpretation of Title IX regulation, now pursuant to President Biden’s executive order, opens religious universities to the investigation who are adequately in compliance with current regulation in the view of the Office for Civil Rights.

Some might contend that these directives are merely loosely enforced regulatory changes through executive orders, which can easily be reversed. After all, the replacement of the current administration with a different president could immediately lead to the reversal of the executive orders. The issue is that these executive orders are just the first step towards a complete legal reinterpretation of gender and sexuality that would comprehensively shift legal requirements for religious institutions across America. The administrative bureaucracy is insulated

⁴⁸ “Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity.” The White House. March 8, 2021.

⁴⁹ Ibid.

⁵⁰ Spagnuolo, Dee, Brian Pedrow, Nikki Hatza, Diana Joskowicz, and Lizzy Wingfield. “Biden Executive Order Expands Title IX Protections: Insights.” Ballard Spahr. March 9, 2021.

⁵¹ “US Department of Education Confirms Title IX protects students from discrimination based on sexual orientation and gender identity.” US Department of Education. June 16, 2021.

⁵² Ibid.

⁵³ Ibid.

from significant legislative oversight. Presidents face challenges in altering the bureaucracy as many positions are not political appointees and can resist political directives through inaction or delayed action. If given broad power to redefine sex under SOGI, politically motivated bureaucrats can use Title IX to have an immediate impact on schools around the country.

In June of 2021, the Department of Education held virtual public hearings to gather information “for the purpose of improving enforcement of Title IX of the Education Amendments of 1972.”⁵⁴ The hearings sought to gather comments from the public on ways to ensure that schools are providing students with environments free from discrimination in the form of sexual harassment and to address discrimination based on sexual orientation and gender identity.⁵⁵ In response to the OCR’s request for comment on the two executive orders, the Association of Christian Schools International (ACSI), the world’s largest protestant school association, sent a written comment.⁵⁶ In the statement, the ASCI responded to the question of addressing discrimination based on sexual orientation and gender identity. The ASCI stated that “Executive Order 13988 itself can reasonably be questioned” as 13988 attempts to apply the ruling in *Bostock v. Clayton County* to other laws when the decision itself is “clearly limited to employment issues specific to Title VII of the Civil Rights Act.”⁵⁷ The ASCI argued,

The department must acknowledge and provide for the reality that no family that participates in a religious school environment is compelled to be there. Anyone who disagrees with Christian standards – or who becomes alarmed that they are implemented in error – is free to find other options. But those who desire to participate in a Christian (or other faith-based) education environment must have the freedom to do so as well. The department should make clear in all of its regulations that it has no authority to violate the conscience of religious believers who have standards of sexual conduct and belief that promote the flourishing of individuals and the common good; and that the department may not compel or suppress any specific belief or religious practice.⁵⁸

Others have already begun to challenge President Biden’s executive orders expanding *Bostock v. Clayton’s* interpretation to other laws, including Title IX under the Department of Education and Office for Civil Rights. In August of 2021,

⁵⁴ Office of Civil Rights. “Announcement of Public Hearing; Title IX of the Education Amendments of 1972.” 2021. 1.

⁵⁵ Ibid.

⁵⁶ Association of Christian Schools International. “Re: Written Comment – Title IX Public Hearing. Written Comment.” June 7, 2021.

⁵⁷ Ibid. 2.

⁵⁸ Ibid. 3.

a coalition of 20 States led by Herbert H. Slatery, Attorney General of Tennessee, filed a “Complaint for Declaratory and Injunctive Relief” in the US District Court for the Eastern District of Tennessee. The complaint argues that the Department of Education and Equal Employment Opportunity Commission (EEOC) “issued ‘interpretations’ of federal anti-discrimination law far beyond what the statutory text, regulatory requirements, judicial precedent, and the Constitution permit.”⁵⁹ Among the reasons listed, the complaint cited the Department of Education’s interpretation of prohibition on discrimination “on the basis of sex” in Title IX of the Education Amendments Act of 1972, to encompass discrimination based on sexual orientation or gender identity. The complaint calls the Department of Education’s reinterpretation “erroneous interpretation” pointing out that the reinterpretation gives the department the power to launch an investigation if a school prevents a student from joining an athletic team or using the restroom that corresponds to the student’s gender identity, or if a student’s peers decline to use the student’s preferred pronouns.⁶⁰ The status of the lawsuit is currently pending.

Legislative Threat

Another major threat to religious universities exists in the legislation of the Equality Act, which has been a significant legislative agenda item for the Democratic party in Congress to pass since its introduction in March of 2019.⁶¹ Unlike a mere shift in regulatory action under Biden’s executive orders, the Equality Act codifies into law what Biden’s executive orders only do through regulation. The Act “prohibits discrimination based on sex, sexual orientation, and gender identity in areas including public accommodations and facilities, education, federal funding, employment, housing, credit, and the jury system. Specifically, the bill defines and includes sex, sexual orientation, and gender identity among the prohibited categories of discrimination or segregation.”⁶² If passed into law, the Act would change the wording of the Public Accommodations section of the Civil Rights Act of 1964 to include full protections against discrimination on the grounds of race, color, religion, or sex (including sexual orientation and gender identity) or national origin. Public accommodation would be expanded to include establishments that provide a good, service, or program. No area would be safe from the Equality Act, with affected areas including restrooms, adoption and foster care, women’s shelters and prisons, schools, and healthcare treatment. Regarding education, schools could

⁵⁹ *The State of Tennessee et al. v. United States Department of Education* (Case No. 3:21-cv-00308) August 30, 2021.

⁶⁰ *Ibid.*

⁶¹ Congress.gov. “H.R.5 – 116th Congress (2019-2020): Equality Act.” May 20, 2019.

⁶² *Ibid.*

be forced to institute mandated pro-LGBTQ curriculum.⁶³ Female sports would be forced to integrate students by gender identity regardless of biological sex, and restrooms based on biological gender could be eliminated, as well as dormitories and student apartments organized by gender. In basic terms, the Equality Act is comprehensive legislation that codifies discrimination based on sexual orientation or gender identity.

The Center for American Progress (CAP), a left-leaning public policy research and advocacy organization, posited that the Equality Act not only would protect religious liberty but advance it.⁶⁴ They argue that people of faith would receive new protections from discrimination and would retain all the same exemptions that already exist under civil rights laws, including Title VII and the Federal Housing Act (FHA). Yet, the CAP states that that organization would still be allowed to favor people of the same religion, “so long as they do not discriminate based on other protected characteristics.” Notably, the characteristics of SOGI that the CAP is referring to are the very characteristics that violate the religious convictions of faith-based education organizations and universities.⁶⁵

Not only does the Equality Act violate religious freedoms, but it also partially repeals the Religious Freedom Restoration Act (RFRA), one of the most robust legislative bills to pass, which increased protections for religious liberty.⁶⁶ The RFRA was sponsored by notable Democratic Senator then Representative, Chuck Schumer, adopted by overwhelming bipartisan majorities. It was signed by President Bill Clinton in 1993.⁶⁷

In a statement on the Equality Act, the CCCU said, “As currently drafted, the bill fails to provide essential religious liberty protections that would allow a diverse group of social service and civic institutions to continue to thrive.”⁶⁸ The Association of Christian Schools International (ASCI) and the American Association of Christian Schools (AACCS), two leading advocacy organizations for Christian education, released a joint statement that put the situation even more bluntly. “Even at first blush, the Equality Act is so extreme that, unlike almost all state and local sexual orientation and gender identity (SOGI) requirements, it

⁶³ Pribyl-Huguelet, Hunter. “Equality Act: The Equality Act Is a Poster Child for the Claim That Congressional Bills Have Titles That Are Completely Opposite of the Content. It Is Anti-Religion, Anti-Woman, and Anti-Child.” *New American* (08856540) 37 (8): 25–29. 2021.

⁶⁴ Medina, Caroline, Thee Santos, and Sharita Gruberg. “What You Need to Know about the Equality Act.” Center for American Progress. March 15, 2021.

⁶⁵ *Ibid.*

⁶⁶ “The Equality Act HR 5.” American Association of Christian Schools. August 20, 2019.

⁶⁷ *Ibid.*

⁶⁸ CCCU. “CCCU Statement on Fairness for All and the Equality Act.” Council for Christian Colleges & Universities. February 26, 2021.

allows no exemptions for religious non-profits.”⁶⁹ Further, “It does not stop there: it explicitly bans any appeal to the Religious Freedom Restoration Act (RFRA), which merely gives a religious entity its day in court when faith and government policy conflict. It is the very opposite of a good faith attempt to allow diversity of opinion and respect for those who disagree.”⁷⁰

Affecting so many areas outside of just education, the Equality Act is an extreme piece of legislation that, if passed, would codify the abridgment of religious liberties that is already being attempted by executive regulations and judicial litigation. The Act passed the House of Representatives in February of 2021 but has failed to garner enough support in the Senate for passage. However, the Equality Act has received significant support from Democratic legislators in both the House and the Senate as well as from President Joe Biden. While the current version of the Equality Act has yet to pass in the Senate, the significant support from Democrats signals that the battle to pass the Equality Act (or similar bills to come) is not yet over.

Policy Goal

The policy goal is to protect the freedom of universities to operate according to their religious beliefs. While the status quo has worked for religious universities for decades and for some even centuries, religious protections are under attack as many seek to remove all exemptions for religious freedom. The combined efforts on the executive and regulatory levels and from the legislative and judicial branches continue to move towards infringing upon religious freedom in postsecondary education. The policy goal then is not to just defend the current status quo, which is quickly moving toward restricting religious freedom, but to strengthen protections for religious institutions. The policy goals as established in this analysis focus on a two-front approach to religious freedom in postsecondary education. The first is to protect the status quo of religious freedom protections that exist in current law and regulation. The second front is to introduce politically feasible policies which will strengthen religious freedom.

The Fairness for All Act (FFA) is proposed legislation that would amend the Civil Rights Act of 1964 to codify gender identity and sexual orientation as a federally protected class under federal law in line with the judicial ruling of *Bostock v. Clayton County*.⁷¹ The Act would protect the status quo of religious exemptions

⁶⁹ “American Association of Christian Schools and Association of Christian Schools International Joint Statement.” American Association of Christian Schools and Association of Christian Schools International. February 24, 2021.

⁷⁰ Ibid.

⁷¹ Stewart, Chris, and Gene Schaerr. “Why Conservative Religious Organizations and Believers Should Support the Fairness for All Act” Notre Dame Journal of Legislation. 2019. 140.

while also introducing a politically feasible way to simultaneously strengthen religious freedom and protections for LGBTQ individuals. The difference between the previously discussed Equality Act and the Fairness for All Act is that the FFA adopts the “live-and-let-live” principle – emphasizing that it is wrong to initiate force, fraud or coercion – of Justice Kennedy of the Supreme Court, thereby expressly protecting important religious interests.⁷² The goal of the FFA is to reconcile the interests of LGBTQ individuals with religious liberties which have historically been in conflict.⁷³ In *Why Conservative Religious Organizations and Believers Should Support the Fairness for All Act*, Representative Chris Stewart, and Gene Schaerr argue that the FFA is a product of years of negotiation between conservative religious groups and LGBTQ rights groups and represents a good-faith compromise rather than a “winner-take-all” approach. The FFA was originally introduced by Representative Chris Stewart in December of 2019 with the aim to “protect everyone’s dignity in public spaces.” It harmonizes religious freedom and LGBTQ rights by amending the Civil Rights Act, protecting religious freedom in the workplace, protecting the rights of LGBTQ individuals, and preserving First Amendment rights.⁷⁴

The FFA claims to be the largest expansion of religious freedom and LGBTQ civil rights under federal law in a generation.⁷⁵ The Act failed to pass the House of Representatives, where it was first introduced in 2019 and died in committee.⁷⁶ The bill was then reintroduced in February of 2021 and was referred to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties, where the bill currently sits. The FFA recognizes three inescapable realities. First, religious organizations are inherently oriented toward faith and reconciliation, not participating in cultural or political conflict.⁷⁷ Second, the status quo cannot hold because “religious freedom-only” arguments that deny LGBTQ rights are losing.⁷⁸ Thirdly, the conflict over religious freedom and LGBTQ rights is damaging support for religious people.⁷⁹ Representative Stewart argues that legislative efforts to pass broad religious freedom-only bills are dead while, at the same time, indefinite efforts against LGBTQ rights bills will likely fail whether conservative and

⁷² Stewart, Chris, and Gene Schaerr. “Why Conservative Religious Organizations and Believers Should Support the Fairness for All Act” *Notre Dame Journal of Legislation*. 2019. 138.

⁷³ *Ibid.*

⁷⁴ Stewart, Chris. “Stewart Protects Religious Freedom and LGBT Individuals.” *US Congressman Chris Stewart*. December 6, 2019.

⁷⁵ *Ibid.*

⁷⁶ *Congress.gov*. “H.R.5331 - 116th congress (2019-2020): Fairness for All Act” December 6, 2019.

⁷⁷ Stewart, Chris, and Gene Schaerr. “Why Conservative Religious Organizations and Believers Should Support the Fairness for All Act” *Notre Dame Journal of Legislation*. 2019. 141.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.* 147.

religious groups accept it or not.⁸⁰ The willingness of the conservative religious community to embrace religious pluralism as a viable solution to disagreements over gender and sexuality is an existential issue. The “privileged and accommodated existence” of the conservative religious community is under serious threat.

The federal FFA bill is inspired by a Utah state law that was created through years of conversation between Utah’s conservative Latter-Day Saints community and local LGBTQ communities to form the “Fairness for All” law in the Utah state legislature.⁸¹ The result of the legislation was the addition of SOGI to the Utah Antidiscrimination Act and to Utah’s Fair Housing Act. The Act also increased religious protections for institutions in housing decisions as well as commercial decisions such as preventing lawsuits against a religious official or organization to force them to defy their religious beliefs in providing goods, services, accommodations, advantages, or facilities.⁸² Though some in the religious community feared that the new law would be used to infringe upon religious freedom, Stewart states that in the five years that the law had existed, no religious organization has been sued under its terms.⁸³ Stewart also notes that for a state as conservative as Utah, there have also been few SOGI lawsuits against commercial businesses, pointing to further success of the legislation.⁸⁴ The FFA takes the principles of the legislation passed in Utah and applies them on a federal level. By utilizing compromise between two diametrically opposed groups, the FFA creates new protections for both groups that strengthen the religious plurality of America while recognizing the inherent worth of everyone. The key features of the FFA reconcile the competing interests of both groups. The FFA preserves the Religious Freedom Restoration Act (RFRA) of 1993.⁸⁵

The RFRA Prohibits any agency, department, or official of the United States or any State (the government) from substantially burdening a person’s exercise of religion even if the burden results from a rule of general applicability, except that the government may burden a person’s exercise of religion only if it demonstrates that application of the burden to the person: (1) furthers a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.⁸⁶

⁸⁰ Stewart, Chris, and Gene Schaerr. “Why Conservative Religious Organizations and Believers Should Support the Fairness for All Act” Notre Dame Journal of Legislation. 2019. 143.

⁸¹ Ibid. 150.

⁸² Ibid. 155.

⁸³ Ibid. 156.

⁸⁴ Ibid. 156.

⁸⁵ Ibid. 157.

⁸⁶ Schumer, C. (1993). H.R.1308 - 103rd congress (1993-1994): Religious freedom ... Congress.gov.

As Stewart states, “Short of an express exemption, the RFRA contains the most powerful standard for protecting religious liberty in the US legal canon.”⁸⁷

The FFA protects the tax-exempt status of religious organizations. In addition to federal funding, religious universities are also at risk of losing tax-exempt status. The FFA removes the financial threat from being used as a weapon against religious dissenters for whatever political or social disagreement may exist over sexuality.⁸⁸ In granting more rights to LGBTQ members, the FFA defines “sex” under the standards of SOGI, adopting a straightforward definition of “sexual orientation” as “homosexuality, heterosexuality, or bisexuality” as well as a standard definition of gender identity.⁸⁹ Another protection the Act grants to the LGBTQ community is the addition of SOGI to the other classes already protected under Title VII of the Civil Rights Act. In addition to these increased protections for religious groups and LGBTQ individuals, the FFA introduces new protections and regulations around housing, public accommodations, and non-retaliation. Lastly and most importantly, the FFA provides religious exemptions from SOGI in areas of public accommodations, federal financial assistance, employment, housing, accreditation, and more.

Policy Alternatives

Religious universities must recognize the potential for pro-religious freedom policy to not only fail but for the current protections to be removed. Thus, religious postsecondary institutions must both be aware of this possibility and prepare some type of alternative if protections are removed. Some postsecondary religious universities have found a solution without Title IX religious exemptions. According to a Freedom of Information Request, schools that do not accept federal funding include Hillsdale College in Michigan, Grove City College in Pennsylvania; Christendom College in Virginia; Pensacola Christian College in Florida; Patrick Henry College in Virginia; Wyoming Catholic College, Gutenberg College in Oregon, and Yeshiva Toras Chaim Talmudic Seminary of Denver.⁹⁰ Universities like Hillsdale College, Grove City College, and Christendom College can serve as funding structure models for universities. The question is how universities operate independently of government funding.

A deeper look into these universities reveals the unique way in which they can operate free of federal funding. Hillsdale College decided back in 1985 to

⁸⁷Stewart, Chris, and Gene Schaerr. “Why Conservative Religious Organizations and Believers Should Support the Fairness for All Act” Notre Dame Journal of Legislation. 2019. 157.

⁸⁸ Ibid. 157.

⁸⁹ Ibid. 160.

⁹⁰ Caputo, Ibbey, and Jon Marcus “Some religious colleges forgo federal funding, staying free of Civil Rights Rules.” The Hechinger Report. April 8, 2021.

forego federal funding to avoid the regulatory strings that come with federal dollars. They believed that it was more important to follow their principles than to accept federal funding.⁹¹ According to Hillsdale, the financial packages the university is able to provide to students are made possible through the gifts of hundreds of thousands of generous donors nationwide.⁹² On the importance of independence from the federal government, Hillsdale College states, “By refusing even one penny of federal or state aid for grants, awards, loans, or scholarships, we free ourselves from educational regulation and programs imposed by the government.”⁹³ Therefore, “Hillsdale College must replace millions of dollars every year in student financial assistance and must raise monies for all college activities and programs from the private sector.”⁹⁴ This distinction allows Hillsdale to market to donors in a unique way, where support for the university is tied less into direct associations with the school, such as being an alumnus. Instead, many donors to the university see their support as furthering the mission of private independent education. The university’s independence from federal dollars is not just a policy stance but integral to the university’s mission. The policy of not accepting federal dollars to operate independently of government is a key component of these universities’ identity and a common theme in each.

Christendom College uses its stance against federal funding as a tool for support. On the university’s support page, they proudly acknowledge that they have rejected federal funding from their founding, noting that “Today, we remain among the fewer than 1% of Catholic universities in the United States that reject all federal government aid.”⁹⁵ Furthermore, Christendom’s rejection of aid is closely tied to its position as a Catholic institution. They state, “By rejecting federal funding, Christendom is free to have faculty take an oath of fidelity to the Magisterium, uphold moral student life policies, forgive loans for alumni-religious who take vows of poverty, and implement more policies ensuring dedication to our Catholic mission.”⁹⁶

Patrick Henry College also rejects funding as part of a Christian worldview. The College states, “In order to safeguard our distinctly Christian worldview, we do not accept or participate in government funding. We believe such financial independence is a critical component of a Patrick Henry College education.”⁹⁷

Transitioning to the funding models of these institutions is not an easy task. Christendom College, for example, is one of only two accredited Catholic higher

⁹¹ Perry, Mark J. “The Hillsdale Solution for Harvard: Give up federal money and run admissions the way you want.” American Enterprise Institute. October 17, 2018,

⁹² “Donors and Friends.” Hillsdale College. Accessed January 10, 2022.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ “The Freedom Fund.” Christendom College. 2020.

⁹⁶ Ibid.

⁹⁷ Patrick Henry College. “Financial Aid.” Patrick Henry College. Accessed January 10, 2022.

education institutions that are not dependent on federal student aid and are free to teach without government interference. Even depending on accreditation standards, there are no more than 20 institutions nationwide that refuse government funding. The mere existence of these institutions demonstrates viability in the funding model. The transition to private funding would be immensely difficult. On average, federal funding covers about 25 percent of the average college budget.⁹⁸ Little public data exists on the portion of religious universities' budgets made up by federal funding, though, as previously noted, the number may consistently be between 40 to 60 percent.⁹⁹ Suppose even half the budget of religious universities currently comes from the federal government. In that case, a complete shutoff to that funding could be a fatal blow forcing most religious universities to shut down.¹⁰⁰ However, the existence of institutions that do not take federal funding demonstrates viability in the model.

Raising the price of tuition is an unlikely solution. According to a 2017 Lumina Foundation report, low-income students cannot afford 95 percent of colleges. Worse still, "Private and non-profit institutions, which includes most Christian higher education institutions, miss the affordability threshold by an average of \$16,000 annually," according to the National Association of Student Financial Aid Administrators.¹⁰¹ This sentiment is further echoed by William L. Anderson, a professor of economics at Frostburg State University in Maryland, in *The Coming Crises for Christian Colleges*, stating, "Given that many Christian colleges almost are as costly as their secular counterparts (a year of undergraduate studies at Wheaton costs about \$50,000), removal of federal funding, tax-exempt status, and accreditation would effectively shutter them."¹⁰² With costs rising, it is getting more difficult for most students to afford private religious universities. The best option for religious universities is to recognize in advance the potential of an incoming decision between abiding by revised Title IX regulations that violate the institution's religious beliefs or rejecting federal funding and risking shutting down the institution.

While this decision may soon come for many schools, an alternative policy decision that should be made immediately is to begin exploring possible ways to implement a private funding model. The biggest step towards accomplishing this goal is to bolster a supporter-based model built around the identity of the university.

⁹⁸"The Freedom Fund." Christendom College. 2020.

⁹⁹ Schiffrin, Matt, and Carter Coudriet. "Dawn of the dead: For hundreds of the nation's private colleges, it's merge or perish." *Forbes*. December 15, 2020.

¹⁰⁰ Gjelten, Tom. *Christian Colleges that Oppose LGBT Rights Worried About Losing Funding*. NPR. March 27, 2018.

¹⁰¹ Bidwell, Allie. "Report: Low-Income Students Cannot Afford 95 Percent of Colleges." NASFAA. 2017.

¹⁰² Anderson, William L. "The Coming Crises for Christian Colleges." The James G. Martin Center for Academic Renewal. December 13, 2020,

As evidenced by the funding structures of Hillsdale and Christendom, the mission of private religious education draws supporters when they feel they are investing in the mission of the university. Thus, the funding sources for universities to transition to a fully private funding model exist, but because most private schools rely on limited donor bases, some support remains untapped. The financial feasibility for many is low due to the immense gap that exists between federal funding and university revenue in university budgets. For religious universities which rely heavily on federal funding to survive in the long run as crackdowns on religious liberty continue, they must be ahead of the curve on adopting new funding structures.

Recommendation

The recommendation proposed in this policy analysis is for organizations like CCCU (Council of Christian Colleges and Universities), ACSI (Association of Christian Schools International), AACCS (American Association of Christian Schools), the ACCU (Association of Catholic Colleges and Universities), and other higher education institutions to dedicate significant amounts of resources to legislative advocacy efforts. Through lobbying, policy advising, and grassroots initiatives, awareness can be increased to threats like the Equality Act and *Hunter v. Department of Education*. It will also require individuals and communities to be more engaged through social and civic action such as grassroots activism, voting, and contributing resources to preserving religious freedom in education at all levels. Individuals not involved in litigation and legislation should focus on advocacy, such as reaching out to congressmen and giving financial support to organizations dedicated to preserving religious freedom in education.

This policy analysis serves as a warning to the incoming threat to religious universities that maintain traditional views on issues of marriage and sexuality. The requirement for adopting this policy is for the Fairness For All Act to pass both the United States House of Representatives and the Senate and be signed into law by the president. Some recognized keys to passing effective legislation include focusing on common concerns, including the most significant aspects of the opposing party's position, and understanding the audience. The FFA is an effective piece of legislation because it recognizes the inherent opposition of two opposing groups and seeks to address the biggest concerns on each side. It acknowledges that the divide between the religious community and the LGBTQ community cannot be solved without compromise on either side of the political aisle.

This analysis recommends the FFA as the best solution for reconciling the threat to religious higher education and the interests of the LGBTQ community. The viability of a completely private funding model for religious schools in the current environment is very low. Yet, the option should be further explored. It is a

secondary policy alternative that must remain on the table as an option since the current long-term viability of religious universities is in question. While this analysis has largely highlighted the political threat to funding of private religious universities, another factor may contribute to religious higher education's decline. According to historian, Allen Carl Guelzo, the biggest threat to these schools comes not from rising tuition or political bias but demographics.¹⁰³ Plummeting birth rates have resulted in a plateau of college attendance, which Guelzo argues will disproportionately affect smaller private schools.¹⁰⁴ Guelzo states, "As the pool of college-bound students shrinks, elite schools will recruit more from populations once left to the smaller regional colleges. That will leave the small colleges with fewer candidates to recruit, and less in student-aid enticements to keep applicants from being sucked away by big-name schools."¹⁰⁵ The long-term viability of many private religious universities remains in a delicate position responding to market change, demographic changes, and the COVID-19 pandemic. A loss of federal funding on top of these factors would be devastating for religious universities. Thus, those interested in preserving private religious higher education must increase federal protections for religious liberty in education.

The FFA's implementation would occur most dramatically at a regulatory level where new protections implemented would bolster religious exemption claims to Title IX while codifying the language of sexual orientation and gender identity for LGBTQ individuals. Another area of implementation and adoption that would be significant would be in the judiciary. With *Bostock v. Clayton County* already establishing significant precedent around SOGI, the likelihood of FFA getting struck down by the judiciary is extremely low. Since the judiciary's role is not to create new laws but to interpret existing ones, the existence of the FFA would provide a whole new basis for decisions in federal courts around SOGI. Simultaneously, it would provide new avenues for the courts to side with religious groups against claims of discrimination.

¹⁰³ Guelzo, Allen C. "America's Disappearing Private Colleges." The Wall Street Journal. February 21, 2019.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

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