

THE RIGHT TO DISCRIMINATE: WHY RELIGIOUS UNIVERSITIES NEED GREATER PROTECTION FOR THEIR RIGHT TO MAKE EMPLOYMENT DECISIONS

Jennifer Gray[†]

I. INTRODUCTION

Religious universities today are experiencing a threat to their very identity and purpose because of recent changes in discrimination law.¹ These institutions are increasingly targeted in civil rights claims for their discernment in selecting employees who will be committed to the school's mission.² This Note addresses the question, What protections do religious colleges and universities have in their employment decisions regarding professors of non-religious subjects?

A sectarian university's³ identity in its mission of faith necessitates the ability to discriminate in the selection of educators based on a shared belief. Discrimination often is only considered in its unjust form, but by definition, it means "[t]o make a difference in treatment or favor (of one as compared

[†] Jennifer Gray will receive her Juris Doctor in May 2024 from Ave Maria School of Law. She would like to thank her mentor and faculty advisor, D. Brian Scarnecchia, for his constant support and guidance throughout the entire Note writing process. She also wants to thank Claudia Bihar, Morgan Burton, and Natalie Brazzale for their encouragement while she was writing her Note, as well as Jessica Berryman for her dedication and tireless efforts in the editing process.

1. See Elizabeth Redden, *LGBTQ Rights v. Religious Liberties*, INSIDE HIGHER ED (June 16, 2020), <https://www.insidehighered.com/news/2020/06/17/religious-colleges-see-conflict-between-supreme-court-ruling-lgbtq-rights-and-their>.

2. See, e.g., *Gordon College v. DeWeese-Boyd*, AMERICANS UNITED AGAINST SEPARATION OF CHURCH AND STATE, <https://www.au.org/how-we-protect-religious-freedom/legal-cases/cases/gordon-college-v-deweese-boyd/>; Fox 13 News Staff, *Attorney General Opens Civil Rights Investigation into Seattle Pacific University, SPU Sues in Return*, FOX13 SEATTLE (July 29, 2022), <https://www.fox13seattle.com/news/attorney-general-opens-civil-rights-investigation-into-seattle-pacific-university>.

3. This Note will refer to religious colleges, religious universities, and sectarian universities synonymously. A sectarian university is one that is affiliated with a specific religion or sect, where religious doctrine permeates the instruction, contrasted with a secular university model in which religious subjects are viewed as separate. See Steven H. Aden, *The Employment Non-Discrimination Act*, FEDERALIST SOC'Y (Mar. 23, 2010), <https://fedsoc.org/commentary/publications/the-employment-non-discrimination-act>; Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 *FORDHAM L. REV.* 493 (2003).

with others).⁴ Not all discrimination is unjust.⁵ In certain contexts, discrimination is appropriate, such as in the case of religious institutions, which is why they are granted exemptions.⁶ Arguably, it follows that religious organizations are not granted the license to act unjustly, but rather, in light of these exemptions, discrimination on the basis of religion is reasonable. Given their religious nature, these schools need to make employment decisions based on more than just merit. Religious employers discriminate in hiring based on an employee's commitment to abide by the university's mission and ability to authentically instruct students from a worldview rooted in shared religious belief.⁷ To maintain the integrity of these institutions, it is imperative that sectarian universities have the freedom to hire faculty and staff in adherence to their purpose and mission.

As a result of decisions like *Obergefell*⁸ and *Bostock*,⁹ interest in issues related to sexual orientation and gender identity have gained traction in the courts, which has directly affected individuals' and organizations' religious liberty rights.¹⁰ The federal legislature, too, has demonstrated a continued effort to offer further protection of those interests as seen in recently proposed bills and enacted legislation.¹¹ The more weight these interests are

4. *Bostock v. Clayton Cnty.*, 590 U.S. 644, 657 (2020) (quoting the 1954 Edition of Webster's Dictionary defining "discrimination" following Justice Gorsuch's question: "What did 'discriminate' mean in 1964?").

5. See *Discriminating Among Meanings of Discrimination*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/discrimination> (last visited Sept. 24, 2023) ("Discrimination has senses with neutral, positive, and negative connotations.").

6. See *infra* Section III.C.

7. See Brief for Benedictine College and Franciscan University of Steubenville as Amici Curiae Supporting Petitioner at 13-14, *Gordon Coll. v. DeWeese-Boyd*, 142 S. Ct. 952 (2022) (No. 21-145) [hereinafter Brief for Benedictine College and Franciscan University of Steubenville]; see *infra* Section IV.A.

8. *Obergefell v. Hodges*, 576 U.S. 644, 644, 675 (2015) (holding, under the Due Process clause and the Equal Protection clause of the Fourteenth Amendment, same-sex couples have a fundamental right to marry).

9. *Bostock*, 590 U.S. at 683 (holding it a violation of Title VII of the Civil Rights Act of 1964 if an employer discriminates against a person for being homosexual or transgender). See *infra* Part III.

10. See generally *YU Pride Alliance v. Yeshiva Univ.*, 2022 NYLJ LEXIS 1161 (holding that a Jewish university is required to formally recognize an LGBTQ student organization). See also *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731-32 (2018) (holding for Christian baker, Jack Phillips, who was sued after he declined to bake a wedding cake for a same-sex marriage because he was protected under the Free Exercise Clause).

11. See Respect for Marriage Act, Pub. L. No. 117-228, 136 Stat. 2305 (2022) (repealed the Defense of Marriage Act and ensured respect for marriage in all states as defined in *Obergefell*, 576 U.S. 644); Equality Act, H.R. 5, 117th Cong. (2021) (passed by the House on February 25, 2021; after two hearings, the Senate did not further consider it) (proposed legislation that would include sexual orientation and gender identity among prohibited categories of discrimination).

given, the more pressure there is on religious schools to conform.¹² As a result, sectarian universities that fail to comply with these shifting standards are being directly targeted. Those opposed to these universities have brought suits alleging various legal theories including employment discrimination, Title IX violations,¹³ as well as filed claims against members of a school's board of directors,¹⁴ and launched state and federal investigations.¹⁵

Religious schools have some protections in place against these claims of sex discrimination, but it is not always clear when and how they can be applied.¹⁶ The most reliable, but often disputed, protection is the ministerial exception¹⁷—a doctrine under both the Free Exercise and Establishment clauses¹⁸—that protects a religious organization's ability to make employment decisions free from government interference. It can be raised as a defense against both federal and state claims alleging discrimination.¹⁹ However, the applicability of this exception in the context of higher education and modern discrimination law remains uncertain, made more complicated by lower courts differing on narrow and broad interpretations.²⁰

12. See, e.g., Associated Press, *LGBTQ Students Wrestle with Tensions at Christian Colleges*, NBC NEWS (Dec. 5, 2022, 10:04 AM), <https://www.nbcnews.com/nbc-out/out-news/lgbtq-students-wrestle-tensions-christian-colleges-rcna60102>.

13. 20 U.S.C. § 1681 (previously “Title IX of the Education Amendments of 1972” before codified as 20 U.S.C. § 1681); see *Hunter v. U.S. Dep’t of Educ.*, 650 F.Supp. 3d 1104, 1114 (D. Or. Jan. 12, 2023) (class action suit filed by forty LGBTQ-identifying plaintiffs from religious colleges and universities against the department of education *challenging* the schools' religious exemptions in Title IX cases); Kate Brennan, *Lawsuit Challenges Religious Colleges' Exemption from Gender Equality Laws*, SYRACUSE.COM, <https://www.syracuse.com/syracuse-university/2022/06/lawsuit-challenges-religious-colleges-exemption-from-gender-equity-laws.html> (Mar. 6, 2023, 4:18 PM).

14. See Complaint & Demand for Jury Trial, *Guillot v. Whitehead* No. 22-2-14642-7 (King Cnty. Super. Ct. Sep. 12, 2022).

15. See John Riley, *Biden Administration Investigating 6 Religious Colleges for LGBTQ Rights Violations*, METRO WEEKLY (May 9, 2022), <https://www.metroweekly.com/2022/05/biden-administration-investigating-6-religious-colleges-for-lgbtq-rights-violations/>; *Attorney General Opens Civil Rights Investigation into Seattle Pacific University, SPU Sues in Return*, FOX13 SEATTLE (July 29, 2022), <https://www.q13fox.com/news/attorney-general-opens-civil-rights-investigation-into-seattle-pacific-university>.

16. See *Bostock v. Clayton Cnty.*, 590 U.S. 644, 730 (2020) (Alito, J., dissenting) (“The scope of these provisions is disputed, and as interpreted by some lower courts, they provide only narrow protection.”).

17. The Ministerial Exception is a First Amendment doctrine, “which protects a religious group’s right to shape its own faith and mission through its appointments [of its ministers].” *Hosanna-Tabor v. EEOC*, 565 U.S. 171, 188 (2012).

18. See *id.*; U.S. CONST. amend. I; *infra* Section III.C.2.

19. See *infra* Section III.C.2.

20. See *Adams v. Indiana Wesleyan Univ.*, No. 3:09-CV-468, 2010 WL 2803077, at *8 (N.D. Ind. Jul. 15, 2010) (professor of social work qualified as a minister); *Richardson v. Nw. Christian Univ.*, 242

Sectarian universities that abide by an integrated knowledge²¹ model need the protections afforded by the First Amendment to select and dismiss employees according to their adherence to the mission of the school. As Cardinal John Henry Newman explained in his treatise, *The Idea of a University*,²² and Pope John Paul II echoed in his encyclical, *Ex Corde Ecclesiae*,²³ the university has a central role in the mission of the Church, a mission which is only properly administered by faithful teachers. This insight is also modeled by universities of other faith traditions.²⁴ To continue to minister to students, these institutions require the freedom to hire employees—not just those with explicit religious functions—committed to the school’s beliefs, without government interference.

In Part II, this Note will distinguish an integrated faith university from the modern secular model of a university. Part III will explore the competing interests between discrimination law and religious freedom protections. Part IV will look at the ministerial exception in the context of higher education and review criticisms and suggested compromises. After reviewing this analysis, this Note will propose a solution to address the specific issue regarding employees of non-religious subjects, gleaned insight from John Henry Newman to discern the meaning of religious function by providing context and understanding of an integrated faith education.

F. Supp. 3d 1132, 1145 (D. Or. 2017) (professor of exercise was not a minister because religious function was “secondary to her secular role.”).

21. Also referred to as *integrated faith* or *integrative scholarship*, “[i]ntegration of knowledge is a process, one which will always remain incomplete; . . . But a University, and especially a Catholic University, has to be a living union of individual organisms dedicated to the search for truth . . . Aided by the specific contributions of philosophy and theology, university scholars will be engaged in a constant effort to determine the relative place and meaning of each of the various disciplines within the context of a vision of the human person and the world that is enlightened by the Gospel, and therefore by a faith in Christ, the Logos, as the centre of creation and of human history.” (internal quotations omitted). Pope John Paul II, *Ex Corde Ecclesiae* [*Apostolic Constitution on Catholic Universities*] ¶ 16 (1990) [hereinafter *Ex Corde Ecclesiae*].

22. JOHN HENRY NEWMAN, *THE IDEA OF A UNIVERSITY* (Martin J. Svaglic ed., 3d prtg. 1962).

23. *Ex Corde Ecclesiae*, *supra* note 21.

24. See Dr. Nathan Schlueter, *Philosophy, The University, and Hillsdale College*, <https://www.hillsdale.edu/hillsdale-blog/academics/classical-liberal-arts/philosophy-university-hillsdale-college/> (last visited Oct. 3, 2023); *The CCU Difference*, COLO. CHRISTIAN UNIV., <https://www.ccu.edu/about/difference/> (last visited Oct. 3, 2023); *About*, YESHIVA UNIV., <https://www.yu.edu/about/> (last visited Apr. 1, 2024).

II. TWO IDEAS OF A UNIVERSITY

A. John Henry Newman's "The Idea of a University"²⁵

In 1852, John Henry Newman, a Catholic cardinal and scholar, lectured on the nature and purpose of a university, which later resulted in his book, *The Idea of a University*. At that time, the idea of "mixed education" was gaining popularity, which contrasted with the model outlined by Newman in his lectures for an education that equally integrated faith and the so-called secular subjects.²⁶

He begins by defining "The University" as "a place of *teaching* universal knowledge."²⁷ Expanding upon this concept of universal knowledge, he explains, "all knowledge forms one whole, because its subject-matter is one."²⁸ And while he acknowledges the separation of this one body of knowledge into "partial views," he clarifies this "division is an abstraction"²⁹ because "there are no natural or real limits between part and part; one is ever running into another."³⁰ In other words, this pursuit of universal knowledge encompasses the entirety of a student's education, and these partial views could be likened to the various academic disciplines. By Newman's standard, while these disciplines appear to be separated, they are in fact all connected and serve the purpose of understanding knowledge as a whole. He continues, "all [parts], as viewed by the mind, are combined together, and possess a correlative character one with another, from the internal mysteries of the Divine Essence."³¹

Faced with a similar question as to the relevance of religion in collegiate education, he countered the false notion that religion is but a "sentiment."³² He explains that it is not mere sentiment but "an act of the intellect."³³ He

25. NEWMAN, *supra* note 22.

26. *Id.* at 26 (referring to a model of education that disregarded the significance and influence of theology for the purposes of combining people of different faith beliefs).

27. *Id.* at xxxvii (explaining that universal knowledge to Newman is knowledge that is discoverable and applicable to all men everywhere and at all times); Robert Kirkendall, *Introduction to The Idea of a Univ. Part 1: The Essence of a Univ.*, SAINT JOHN HENRY NEWMAN (Sep. 28, 2018), <https://www.cardinaljohnhenrynewman.com/introduction-to-the-idea-of-a-university-part-1-the-essence-of-a-university/>.

28. NEWMAN, *supra* note 22, at 38.

29. *Id.* at 34-35.

30. *Id.* at 34.

31. *Id.*

32. *Id.* at 21.

33. *Id.*

further posits, “all branches of knowledge are connected together, because the subject-matter of knowledge is intimately united in itself, as being the acts and work of the Creator.”³⁴ The oneness of this universal knowledge stems from its divine origin and source. From his detailed discourses, one can glean from this idea of a university that (1) it is universal, and every subject matter is a part of a whole; and (2) theology is a subject of equal importance with any other.³⁵ By this understanding of a university, there is no separation of secular teaching and religious teaching. “In word indeed, and in idea, it is easy enough to divide Knowledge into human and divine, secular and religious, and to lay down that we will address ourselves to the one without interfering with the other; but it is impossible in fact.”³⁶ This sets the foundation of the integrated faith (or integrated knowledge) model. Every branch of knowledge, limited by its boundary, interacts and informs the other. Therefore, theology, as an essential subject, interacts with mathematics and vice versa. Through this integrated education, one has the ability to pursue all of knowledge to its end.

Newman, in response to those who wrongly insisted that an institution dedicated to universal knowledge could exist without giving equal weight to the study of God, discusses the principle of combination and the limitations of compromise.³⁷ He begins, “when men combine together for any common object, they are obliged . . . in order to secure the advantages accruing from united action, to sacrifice many of their private opinions and wishes.”³⁸ He continues to explain how compromises are always made when two people come together.³⁹ This is because no two people think exactly alike, and each holds different views on various subjects. However, he clarifies that “the differences surrendered should be but ‘minor,’” and it is also understood that “there should be no sacrifice of the main object of the combination.”⁴⁰ “Any sacrifice which compromises that object is destructive of the principle of the combination, and no one who would be consistent can be a party to it.”⁴¹

Applying Newman’s principle, many faith-based institutions hold the biblical view on human sexuality as centrally important, which one could

34. *Id.* at 75.

35. *See id.* at 32-34.

36. *Id.* at 19.

37. *Id.* at 17.

38. *Id.* at 16.

39. *Id.*

40. *Id.*

41. *Id.*

conclude is a main object of “the combination.”⁴² This viewpoint shapes the entire understanding of the human person, which is underscored in every academic discipline as a whole;⁴³ therefore, this view is not one that can be compromised. Because authentic instruction from a Christian worldview is a main object of this combination, a different view on this fundamental belief would be destructive. This is not to say that all faithful faculty think alike; there are often many different views represented in a university. But in something so fundamental, this main object of Christian teaching cannot be sacrificed. For those universities that abide by Newman’s model, there is no question of the significance in shared belief. Some modern religious universities, however, including some Catholic universities, have separated secular and religious subjects, despite this division being a mere abstraction.

B. *An Idea of a Secular University*

Since Newman presented his model for a university, the university system increasingly became more secularized, and the concept of truly integrated knowledge has been lost on much of society.⁴⁴ As society valued secularization and modernism over tradition, a new model of a university emerged. In 1967, a group of Catholic universities decided to move beyond the integrated model of Newman in favor of the institution existing as a “Catholic-sponsored pluralistic society.”⁴⁵ In a statement drafted as a part of a conference with the International Federation of Catholic Universities, a model to move the university into the modern age was proposed.⁴⁶ Contrary to Newman’s focus on a unified commitment to the pursuit of universal knowledge, the conference members invented a new educational philosophy: “In a Catholic university all recognized university areas of study are frankly

42. *Id.*

43. See, e.g., Brief for Benedictine College and Franciscan University of Steubenville, *supra* note 7, at 11-12; *The Mission, Vision, and Charisms of Franciscan University of Steubenville*, FRANCISCAN, <https://franciscan.edu/mission-charisms/>.

44. See Steven Mintz, *Religion in the Secular University*, INSIDE HIGHER ED (June 7, 2023), <https://www.insidehighered.com/opinion/blogs/higher-ed-gamma/2023/06/07/religion-secular-university>; Adam Wilson, *Will Catholic Colleges Learn from Marian Court’s Closing?*, NAT’L CATH. REG. (June 25, 2015).

45. *Statement on the Nature of the Contemporary Catholic University*, UNIV. OF NOTRE DAME ARCHIVES, <http://archives.nd.edu/episodes/visitors/101/idea.htm> (last visited Mar. 18, 2023); see also Patrick Reilly, *The Land O’ Lakes Statement Has Caused Devastation for 50 Years*, THE CARDINAL NEWMAN SOC’Y: BLOG (July 20, 2017), <https://cardinalnewmansociety.org/land-o-lakes-statement-caused-devastation-50-years/>.

46. Later known as the “Land O’ Lakes Statement”—in reference to retreat center where all the university leaders met. Reilly, *supra* note 45.

and fully accepted and their internal autonomy affirmed and guaranteed. There must be no theological or philosophical imperialism; all scientific and disciplinary methods, and methodologies, must be given due honor and respect.”⁴⁷ They continued, “the university should endeavor to present a collegiate education that is truly geared to modern society. The student must come to a basic understanding of the actual world in which he lives today. This means that the intellectual campus of a Catholic university has no boundaries and no barriers.”⁴⁸

As schools implemented this conference’s proposed “reorganizations of structure,”⁴⁹ the authentic purpose and understanding of a university has been forgotten by many.⁵⁰ Despite what some may believe, however, Newman’s model still exists among many sectarian universities, as evidenced in Church documents and various schools’ mission statements.⁵¹ Pope John Paul II responded to this increasing secularization of universities in his encyclical, *Ex Corde Ecclesiae*,⁵² in which he emphasized the significant role that universities play in the Church and in the world: “The mission that the Church, with great hope, entrusts to Catholic Universities holds a cultural and religious meaning of vital importance because it concerns the very future of humanity.”⁵³ Furthermore, he explained that the identity of a university is “linked to the quality of its teachers and to respect for Catholic doctrine.”⁵⁴

Taking heed of the great pope’s words, a number of Catholic schools, some that specifically cite *Ex Corde Ecclesiae*, state a clear commitment to Catholic doctrine and to fostering an environment in which “faith informs the life of the community and takes expression in all its programs.”⁵⁵ Beyond the

47. *Statement on the Nature of the Contemporary Catholic University*, *supra* note 45.

48. *Id.*

49. *Id.*

50. See Kelly Bowring Cumming, *Secular Universities that Are Catholic*, CHRON. OF HIGHER EDUC. (June 17, 2005), https://www.chronicle.com/article/secular-universities-that-are-catholic/?emailConfirmed=true&supportSignUp=true&supportForgotPassword=true&email=jennygray%40icloud.com&success=true&code=success&bc_nonce=mxxgwb4om9f9izyn4q&cid=.

51. See, e.g., *Ex Corde Ecclesiae*, *supra* note 21; *The Mission of Franciscan University of Steubenville*, FRANCISCAN, <https://franciscan.edu/mission-charisms/>; *Founding & Governing Document*, THOMAS AQUINAS COLL., <https://www.thomasquinas.edu/about/bluebook>; Schlueter, *supra* note 24.

52. *Ex Corde Ecclesiae*, *supra* note 21.

53. *Id.* at 17.

54. *Id.* at 15.

55. *Our Mission*, AVE MARIA UNIV., <https://www.avemaria.edu/about/mission/#readmission> (last visited Mar. 18, 2023). See also *The Mission of Franciscan University of Steubenville*, FRANCISCAN, <https://franciscan.edu/mission-charisms/>; *Benedictine College’s Vision*, BENEDICTINE COLL., <https://www.benedictine.edu/about/vision/index>; *Catholicity*, WYOMING CATH. COLL., <https://wyomingcatholic.edu/about/catholicity/> (last visited Oct. 10, 2023); *Belmont Abbey College’s*

Catholic church, the Council for Christian Colleges and Universities advocates for the protection of higher education rooted in a biblical worldview.⁵⁶ These religious organizations hold higher education to be of central importance in furthering the Christian mission.⁵⁷ Sectarian universities that represent a Newman-like approach to universal knowledge expressly include the integration of “faith and scholarship” in their mission statements.⁵⁸ Faith is not simply compartmentalized in religious worship and theology instruction; it is the very foundation on which these universities stand.⁵⁹ The security of these universities to teach the faith and provide quality instruction from a Christian view is being threatened in the form of modern civil rights law. For example, Seattle Pacific University (SPU), a small Christian school in Seattle, Washington, has found itself in the middle of these two ideas of a university and at the center of the controversy between discrimination and religious freedom.

C. *Seattle Pacific University, A Case Study*

In the last few years alone, SPU has been involved in at least three different lawsuits, all regarding the issue of discrimination.⁶⁰ SPU was

Mission, BELMONT ABBEY COLL., <https://belmontabbeycollege.edu/about-us/mission-vision/>; *Founding & Governing Document*, THOMAS AQUINAS COLL., <https://www.thomasaquinas.edu/about/bluebook>.

56. The Council for Christian Colleges and Universities is an advocacy group that represents 150 “accredited, comprehensive colleges and universities whose missions are Christ-centered and rooted in the historic Christian faith.” *Our Work and Mission*, CCCU, <https://www.cccu.org/about/> (last visited Sept. 24, 2023).

57. *What is Christian Higher Education?*, CCCU, <https://www.cccu.org/about/#heading-what-is-christian-higher-3> (last visited Sept. 24, 2023).

58. *The Benedictine College Mission*, BENEDICTINE COLL., <https://www.benedictine.edu/about/mission/index> (last visited Mar. 18, 2023).

59. See Newman, *supra* note 22, at 75.

60. Complaint for Damages and Other Relief, *Rinedahl v. Seattle Pac. Univ.*, No. 21-2-00450-1 SEA (King Cnty. Super. Ct. Jan. 11, 2021) (settled May 6, 2022) (alleging discrimination based on professor’s sexual orientation); First Amended Complaint, *Seattle Pac. Univ. v. Ferguson*, No. 3:22-cv-05540-RJB (W.D. Wa. Sept. 2, 2022) (SPU filed suit against Washington Attorney General in response to a civil rights investigation into SPU’s employment practices following complaints of SPU’s discrimination); Complaint & Demand for Jury Trial, *Guillot v. Whitehead* No. 22-2-14642-7 (King Cnty. Super. Ct. Sept. 12, 2022) (students, faculty, and alumni filed a suit against the Board of Trustees alleging breach of fiduciary duty regarding the school’s hiring policy and statement on sexuality). See also Amended Complaint and Demand for Jury Trial at 54, *Hunter v. U.S. Dep’t of Education.*, No. 6:21-cv-00474-AA (D. Or. June 7, 2021) (SPU was implicated in class action suit that challenged religious schools’ Title IX exemptions. The complaint listed among its forty plaintiffs SPU student, Spencer Vigil, who claimed the university discriminated against him based on his transgender identity); *Lawsuits*, AFFIRM, <https://weaffirm.org/lawsuits/> (last visited Apr. 14, 2024) (website “[a]dvocating for LGBTQ+ inclusion at Seattle Pacific University” provides many legal documents for cases involving SPU).

originally founded as Seattle Seminary in 1891 and is affiliated with the Free Methodist Church.⁶¹ In its mission statement, SPU communicates its “[c]ommitment to Christian [f]aith,” which it clarifies is “not just its historical foundation” but rather a central part of its “current work and future planning.”⁶² While many of their university members have adopted the worldview of modern culture, the university administration has tried to uphold the institution’s Christian identity in the face of hostile adversity.⁶³

As part of its religious commitment, SPU has recognized the moral conclusions of Christian belief in its statement on sexuality.⁶⁴ The statement begins, “[a]s a community of men and women committed to following Christ, Seattle Pacific University recognizes the centrality of biblical teaching in all matters of life including human sexuality.”⁶⁵ This Christian teaching includes that “[h]uman beings are created in the image of God, male and female. The explicit relational dimension of human beings and the inherent differentiation of gender are foundational to our understanding of creation itself.”⁶⁶ Regarding marriage specifically, the statement continues, “[w]e believe it is in the context of the covenant of marriage between a man and a woman that the full expression of sexuality is to be experienced and celebrated and that such a commitment is part of God’s plan for human flourishing.”⁶⁷ This belief is rooted in the Bible itself and central to Christian teaching.⁶⁸ The school’s statement and its coinciding hiring policy sparked the ongoing controversy on this Seattle campus, which ignited with an employment discrimination suit.⁶⁹

61. See *Standing on Their Shoulders: History Matters*, SEATTLE PAC. UNIV.: OUR HISTORY, <https://spu.edu/about-spu/our-history> (last visited Mar. 18, 2023).

62. *Our Enduring Commitments*, SEATTLE PAC. UNIV.: MISSION, CORE THEMES, AND VISION, <https://spu.edu/about-spu/mission/enduring-commitments> (last visited Mar. 18, 2023).

63. See *Seattle Pacific Files Lawsuit in Support of Religious Freedom*, SEATTLE PAC. UNIV.: PRESS ROOM (July 28, 2022), <https://spu.edu/about-spu/press-room/Press/ag-lawsuit>.

64. *Statement on Human Sexuality*, SEATTLE PAC. UNIV.: SPU FACTS (Nov. 14, 2005), <https://spu.edu/about-spu/spu-facts/statement-on-human-sexuality>.

65. *Id.*

66. *Id.*

67. *Id.*

68. See *Genesis* 1:27, 2:18-24; *Matthew* 19:4-7; CATECHISM OF THE CATHOLIC CHURCH ¶¶ 1644-47 (2d ed. 1997).

69. Elise Takahama, *Nursing Professor Sues Seattle Pacific University, Says He Was Denied Full-Time Job ‘Because He’s Not Heterosexual’*, SEATTLE TIMES (Jan. 15, 2021, 6:00 AM), <https://www.seattletimes.com/seattle-news/nursing-professor-sues-seattle-pacific-university-says-he-was-denied-full-time-job-because-hes-not-heterosexual/>; Complaint for Damages and Other Relief, *Rinedahl v. Seattle Pac. Univ.*, No. 21-2-00450-1 SEA (King Cnty. Super. Ct. filed Jan. 11, 2021) (settled May 6, 2022).

In 2020, an adjunct instructor of a nursing clinic applied for a professor position but was not selected.⁷⁰ The former clinic instructor then sued the university, claiming that the school refused to hire him because he identifies as a gay man.⁷¹ Since this came to light, members of the student body and faculty petitioned for a change of hiring policy and for a removal or change of SPU's statement on sexuality.⁷² Despite this active resistance, the university's board has consistently stood by its statement, hiring policy, and code of conduct.⁷³

In the spring of 2022, students, faculty, and alumni opposed to the policy took their activism a step further and petitioned the Washington Attorney General to investigate the school.⁷⁴ A couple months later, the Washington State Attorney General's Civil Rights Division opened an investigation into the university and asked anyone who has allegedly been discriminated against to come forward and contact his office.⁷⁵ SPU attempted to block the Attorney General's probe by filing a First Amendment claim in federal court but ultimately had its case dismissed.⁷⁶ In November of 2022, SPU filed an appeal.⁷⁷

70. Takahama, *supra* note 69; Kyle Morrison, *Nursing Professor Sues SPU for Discrimination*, THE FALCON (Jan. 12, 2021), <https://thefalcon.seapacmedia.com/9260/news/nursing-professor-sues-spu-for-discrimination/>.

71. The lawsuit was settled out of court in May of 2022. Santi Quiroga Medina, *Settled: University Settles Sexual Orientation Discrimination Lawsuit*, THE FALCON (May 5, 2022), <https://thefalcon.seapacmedia.com/12957/featured-stories/settled/>.

72. See Kyle Morrison, *SPU Comes Out: Student Body Demonstrates for LGBTQIA+ Rights Outside President's House*, THE FALCON (Jan. 16, 2021), <https://thefalcon.seapacmedia.com/9370/news/spu-comes-out/>; Elise Takahama, *Seattle Pacific University Faculty Votes 'No Confidence' in Leadership after Board Upholds Discriminatory Hiring Policy*, SEATTLE TIMES (Apr. 26, 2021, 4:26 PM), <https://www.seattletimes.com/education-lab/seattle-pacific-university-faculty-votes-no-confidence-in-school-leadership-after-board-upholds-discriminatory-hiring-policy/>; *Seattle Pacific University Students and Faculty Protest Anti-LGBTQ Hiring Policy*, KING 5 (Apr. 16, 2021, 11:17 PM), <https://www.king5.com/video/news/local/seattle-pacific-university-lgbtq-hiring-policy/281-bae742cd-1c7f-41e5-ac90-2d8a3bf94470>.

73. Audrey Oscarson & Caleb Cissna, *Decided: Students Grapple with Announcement Regarding Sexual Conduct Expectations*, THE FALCON (May 23, 2022), <https://thefalcon.seapacmedia.com/13120/featured-stories/decided/>.

74. Erica Zucco, *Seattle Pacific University Files Lawsuit as AG Investigates Policy Prohibiting Staff from Same-Sex Activity*, KING 5 (July 29, 2022, 2:59 PM), <https://www.king5.com/article/news/local/seattle-pacific-university-lawsuit-ag-same-sex-activity/281-39ecbf04-1f67-4bab-81f4-36e6facc3635>.

75. *Attorney General Opens Civil Rights Investigation into Seattle Pacific University, SPU Sues in Return*, FOX13 SEATTLE (July 29, 2022), <https://www.q13fox.com/news/attorney-general-opens-civil-rights-investigation-into-seattle-pacific-university>.

76. *AG Ferguson: Judge Dismisses Seattle Pacific University's Lawsuit to Stop Attorney General Inquiry into Discrimination Complaints*, WASH. ST. OFF. OF THE ATT'Y GEN. (Oct. 26, 2022),

Shortly after the state began investigating the university in the summer of 2022, students, faculty, and alumni filed a claim against the board directly for a breach of fiduciary duty.⁷⁸ They claimed the board was no longer acting in the interest of the school and criticized its commitment to the controversial statement.⁷⁹ They further claimed the board members “abandoned their duties of care and loyalty to SPU and its people” for maintaining a “damaging employment policy” that “prohibits the employment of otherwise qualified LGBTQ+ people at SPU if an LGBTQ+ applicant or employee is married to, or in relationship with, someone of the same sex.”⁸⁰

While this suit was filed exclusively by SPU affiliates, it was also supported by a national legal activist group, the Religious Exemption Accountability Project (REAP).⁸¹ REAP actively targets religious schools for their views on sexual orientation and gender identity and advocates for the elimination or limitation of the exemptions afforded religious colleges and universities.⁸² Their most notable legal action is the *Hunter v. Board of Education* suit, which challenged the religious exemptions of several colleges in Title IX claims.⁸³

The legal battles at SPU and the activism of groups like REAP represent a pressing issue facing religious institutions in academia. The changes in discrimination law at both the federal and state levels present grave practical implications and directly impact religious institutions that uphold a fundamental biblical teaching of human sexuality. Increasingly, through recent legislation and court decisions, the government has conveyed an

<https://www.atg.wa.gov/news/news-releases/ag-ferguson-judge-dismisses-seattle-pacific-university-s-lawsuit-stop-attorney>.

77. Audrey Oscarson, *SPU Files Appeal: Lawsuit Against Washington Attorney General Not Over Yet*, THE FALCON (Jan. 6, 2023), <https://thefalcon.seapacmedia.com/14304/uncategorized/spu-files-appeal/>.

78. Libby Denkmann & Sarah Leibovitz, *Seattle Pacific University Trustees Sued by Students and Faculty*, KUOW (Sep. 13, 2022, 4:01 PM), <https://kuow.org/stories/seattle-pacific-university-trustees-sued-by-students-and-faculty>.

79. Amended Complaint & Demand for Jury Trial at 13, 18, 44, *Guillot v. Whitehead*, No. 22-2-14642-7, (King Cnty. Super. Ct. Oct. 25, 2022).

80. *Id.* at 2.

81. See *SPU Students File Lawsuit Against Board of Trustees Over Anti-LGBTQ Hiring Policy*, FOX 13 (Sep. 12, 2022), <https://www.q13fox.com/news/spu-students-files-lawsuit-against-board-of-trustees-over-anti-lgbtq-hiring-policy>; RELIGIOUS EXEMPTION ACCOUNTABILITY PROJECT, <https://www.thereap.org/about-reap>.

82. RELIGIOUS EXEMPTION ACCOUNTABILITY PROJECT, *supra* note 81.

83. See *Hunter v. U.S. Dep’t of Educ.*, 650 F. Supp. 3d 1104, 1125 (D. Or. 2023) (dismissing plaintiffs’ claim that religious exemptions violate their right to equal protection); *Court Victory: Religious Colleges Can Operate According to Beliefs, Receive Federal Financial Aid*, ADF MEDIA (Jan. 13, 2023), <https://adfmedia.org/case/hunter-v-us-department-education>.

interest in discrimination specifically implicating sexual orientation and gender identity.⁸⁴ This can be seen in the passage of the Respect for Marriage Act, which codified same-sex marriage.⁸⁵ While the Act does not expressly change any religious exemptions in place, the legislation suggests a strengthened government interest in same-sex marriage.⁸⁶

Considering the integrative nature of sectarian universities, it is important for them to be able to abide by their principles in their administrative decisions. As the culture continues to shift the standard on how to view human sexuality and gender,⁸⁷ the freedom of these universities to provide authentic and consistent teaching of their fundamental values must be protected. In response to the changing tide in culture and politics, many private religious universities have made a point to clarify the worldview they hold regarding sexual orientation and gender identity.⁸⁸ Seeking for these universities to conform to this new standard, their adversaries have turned to civil rights laws to enforce the public consensus upon these schools that abide by a traditional view.

III. DISCRIMINATION LAW AND RELIGIOUS FREEDOM PROTECTIONS

A. *Title VII and State Civil Rights Laws*

Title VII of the Civil Rights Act of 1964, enacted to ensure all employees have an equal opportunity in the workforce, sets the bar for

84. See *infra* Sections III.A-B.

85. Respect for Marriage Act, Pub. L. No. 117-228 (2022) (codified as amended 1 U.S.C. § 7).

86. See Kristen Waggoner, *A Friend's Response to David French on the Respect for Marriage Act*, WORLD (Dec. 1, 2022), <https://wng.org/opinions/a-friends-response-to-david-french-on-the-respect-for-marriage-act-1669898899>.

87. See, e.g., *WHO Updates Its Widely-Used Gender Mainstreaming Manual*, WORLD HEALTH ORG. (July 6, 2022), <https://www.who.int/news/item/06-07-2022-who-updates-widely-used-gender-mainstreaming-manual>; Ria Tabacco Mar, *Trans Rights Are Women's Rights*, ACLU (March 17, 2023), <https://www.aclu.org/news/lgbtq-rights/trans-rights-are-womens-rights>; Marina Pitofsky, *America is Changing How It Views Accepting Gay and Lesbian People, New Poll Reveals*, USA TODAY (Feb. 2, 2022, 4:30 AM), <https://www.usatoday.com/story/news/nation/2022/02/02/acceptance-gay-lesbian-gallup-poll/9292788002/>.

88. See, e.g., *The Mission, Visions, and Core Values of Franciscan University of Steubenville*, FRANCISCAN UNIV., <https://franciscan.edu/mission-charisms/> (last visited Apr. 1, 2024); Associated Press, *Using 'he/him' and 'she/her' in Emails Got 2 People Fired at Small Christian College*, NBC NEWS (May 22, 2023, 9:30 AM), <https://www.nbcnews.com/nbc-out/out-news/using-emails-got-2-people-fired-small-christian-college-rcna85542>; Martha Harris, *Honor Code Update Picks at Wounded Feelings of Belonging*, KUER 90.1 (Aug. 30, 2023), <https://www.kuer.org/education/2023-08-30/for-queer-byu-students-the-honor-code-update-picks-at-wounded-feelings-of-belonging>.

employment discrimination law.⁸⁹ The Act makes it unlawful for an employer to “fail or refuse to hire or to discharge any individual . . . because of such individual’s race, color, religion, sex, or national origin.”⁹⁰ This statute enabled a federal agency, the Equal Employment Opportunity Commission (EEOC), to sue private employers who discriminated in employment based on certain protected classes.⁹¹ The statute defines “religion” as “all aspects of religious observance and practice, as well as belief.”⁹² Until 2020, “sex” was simply understood to mean male or female.⁹³ Protecting the classes of sex and religion did not often create conflict—that is, until the Court expanded the scope of discrimination based on “sex.”⁹⁴

Title VII, as a federal statute, simply provides the minimum standard for how states may handle discrimination.⁹⁵ Thus, states, in their own civil rights acts, are not limited to the protected classes laid out by Congress in 1964 but may expand upon them.⁹⁶ This has resulted in more than half the states expressly listing protections related to sexual orientation and gender identity.⁹⁷ Some states like Washington explicitly include “sexual orientation” and “marital status” among the protected classes.⁹⁸ Washington’s civil rights code further states that the “right to be free from discrimination,”⁹⁹ based on these protected classes, “is recognized as and declared to be a civil right.”¹⁰⁰

89. Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-2000e17.

90. *See id.* § 2000e-2(a)(1).

91. *See id.* § 2000e-4.

92. *See id.* § 2000e(j).

93. *See Bostock v. Clayton Cnty.*, 590 U.S. 644, 683 app. A (Alito, J., dissenting) (collecting definitions) Discrimination “because of sex” also included sex-specific characteristics (of females) such as “on the basis of pregnancy, childbirth, or related medical conditions.” 42 U.S.C.A. § 2000e(k).

94. *Bostock* amended Title VII to “cover[] discrimination on the basis of gender identity and sexual orientation.” 42 U.S.C.S. § 2000e (LEXIS through Pub. L. No. 117-327 (excluding Pub. L. 117-263)).

95. State statutes are modeled after federal statutes in employment discrimination law. *See* 45A AM. JUR. 2D *Job Discrimination* § 39, Westlaw (database updated May 2023).

96. *Estenos v. PAHO/WHO Fed. Credit Union*, 952 A.2d 878, 887 (D.C. Cir. 2008) (“[T]he Council of the District of Columbia intended to go above and beyond the protections afforded to employees by Title VII . . . ‘the intent . . . in enacting this chapter, [is] to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit, including, but not limited to, the enumerated classes.’”).

97. *See* HRC Foundation, *2023 State Equality Index: National Stats*, 2023 Hum. Rts. Campaign Found., https://reports.hrc.org/2023-state-equality-index?_ga=2.98458011.505845068.1712543396-43882595.1712543396#national-stats (last visited Apr. 7, 2024).

98. Wash. Rev. Code Ann. § 49.60.180 (West, Westlaw Precision Through 2023 Sess.).

99. *Id.* § 49.60.030 (West, Westlaw Precision Through 2023 Sess.).

100. *Id.*

Additionally, changes in federal law impact various state laws and their interpretation. In 2022, Michigan reinterpreted “sex” in its Elliott-Larsen Civil Rights Act to include protection for sexual orientation and gender identity.¹⁰¹ Relying on the U.S. Supreme Court’s reasoning in *Bostock v. Clayton County*,¹⁰² the Michigan Supreme Court explained that these concepts—sex, sexual orientation, and gender identity—are “inextricably linked,”¹⁰³ which led it to conclude that “[d]iscrimination on the basis of sexual orientation necessarily constitutes discrimination because of sex.”¹⁰⁴ As at least one religious employer pointed out, this holding significantly burdens religious employees in Michigan because it did not even allow for a religious exemption.¹⁰⁵ While various states specifically prohibit discrimination based on sexual orientation and gender identity, this was not recognized nationally until 2020 in *Bostock*.¹⁰⁶

B. *Bostock*

Following *Obergefell*,¹⁰⁷ the case that legalized same-sex marriage nationwide, the Court in *Bostock* considered the issue of sexual orientation and gender identity in the context of Title VII.¹⁰⁸ Posed with the issue of whether a person can be fired “simply for being homosexual or transgender,”¹⁰⁹ in a 6-3 decision, the Majority held this action to be unlawful under a broad interpretation of sex discrimination in Title VII.¹¹⁰ Justice Gorsuch, writing the opinion of the Court, concluded that “it is impossible to discriminate against a person for being homosexual or

101. Brooke Migdon, *In Landmark Ruling, Michigan Supreme Court Says Definition of ‘Sex’ in Discrimination Law Includes Sexual Orientation*, THE HILL (July 29, 2022), <https://thehill.com/changing-america/respect/equality/3580184-in-landmark-ruling-michigan-supreme-court-says-definition-of-sex-in-discrimination-law-includes-sexual-orientation/>; see Alliance Defending Freedom, *Michigan Threatens Catholic School Over Gender Ideology*, ADF (Jan. 27, 2023), <https://adflegal.org/article/michigan-threatens-catholic-school-over-gender-ideology>; Mich. Comp. Laws Serv. § 37.2102 (LEXIS through 2023 Sess.).

102. *Bostock v. Clayton Cnty.*, 590 U.S. 644, 660-62 (2020).

103. *Rouch World, LLC v. Dep’t of Civ. Rights*, 987 N.W.2d 501, 511 (Mich. 2022).

104. *Id.* at 519.

105. Complaint ¶¶ 239-46, *Sacred Heart v. Nessel*, No. 1:22-cv-01214 (W. D. Mich., filed Dec. 12, 2022) (filing a lawsuit for violation of First Amendment rights by state civil rights law).

106. *Bostock*, 590 U.S. at 683.

107. *Obergefell v. Hodges*, 576 U.S. 644, 644, 675 (2015).

108. *Bostock*, 590 U.S. at 651.

109. *Id.*

110. *Id.* at 683.

transgender without discriminating against that individual based on sex.”¹¹¹ He reasoned that to discriminate based on a person’s sexual orientation or gender identity, an employer has to first consider the sex of the individual; therefore, the action is based “in part on sex.”¹¹² Referring to the ordinary public meaning of the statute at the time of its writing, he further explains that because the discrimination only needs to be based “in part” that “it doesn’t matter if other factors besides the plaintiff’s sex contributed to the decision.”¹¹³ This last factor creates the greatest concern for religious employers.¹¹⁴

Gorsuch later acknowledged these employers’ fears of the potential conflict between this new interpretation and their sincerely held religious beliefs.¹¹⁵ Although other factors in the employer’s decision are considered irrelevant, so long as it is based “in part on sex,” religious exemptions could apply.¹¹⁶ Because of the apparent conflict of his reinterpretation of sex discrimination and religious teaching, he attempted to placate concerns by briefly mentioning existing religious protections.¹¹⁷ The two protections he mentions are the ministerial exception under the First Amendment as well as the Religious Freedom Restoration Act (RFRA).¹¹⁸ While Gorsuch raises these options for religious employers, he acknowledged these protections are not a guarantee and simply concluded, “how these doctrines protecting religious liberty interact with Title VII are questions for future cases”¹¹⁹

Justice Alito, in his dissent, raised this concern and warned of the majority opinion’s effect on religious employers, especially educators.¹²⁰ He illustrates the hypocrisy in a school having to employ a teacher who violates its core beliefs.¹²¹ He states, “if a religious school teaches that sex outside marriage and sex reassignment procedures are immoral, the message may be lost if the school employs a teacher who is in a same-sex relationship or has undergone or is undergoing sex reassignment.”¹²² Acknowledging the

111. *Id.* at 660.

112. *Id.* at 659.

113. *Id.*

114. *Id.* at 660.

115. *Id.* at 681.

116. *Id.* at 659, 683; 42 U.S.C.S. § 2000e-2(e).

117. *Bostock*, 590 U.S. at 682.

118. *Id.* at 682; 42 U.S.C.A. § 2000bb (West).

119. *Bostock*, 140 S. Ct. at 682.

120. *Id.* at 729-30 (Alito, J., dissenting).

121. *Id.* at 731.

122. *Id.* at 729.

protection of religious institutions regarding those who can be deemed “ministers,” Alito questions, “what about other very visible school employees who may not qualify for the ministerial exception?”¹²³

Several religious organizations wrote amici briefs that called attention to the dangerous precedent that may result from this reinterpretation of sex discrimination.¹²⁴ One brief states that “286 religious universities, enrolling nearly 800,000 students, adhere to standards that prohibit sexual activity outside marriage between a woman and a man.”¹²⁵ This brief, written by several organizations of religious higher education, including the Counsel for Christian Colleges and Universities,¹²⁶ warns how this “proposed interpretation of Title VII would create additional obstacles for universities that seek to select faculty, leadership, and staff whose lives align with the institution’s religious mission.”¹²⁷ This reinterpretation of sex is a religious freedom issue because “[a] religious university expresses its religious character, in part, through its employment and student conduct standards.”¹²⁸ The authors of the amici brief furthermore emphasize the unreliability of existing religious exemptions and posit that the concern becomes greater “against a claim of LGBTQ discrimination.”¹²⁹

123. *Id.* (referring to the designation of a minister for purposes of applying the ministerial exception as decided in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012)).

124. Brief for Council for Christian Colleges and Universities et al. as Amici Curiae Supporting Employers, *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107) [hereinafter Brief for Council for Christian Colls. and Univs.]; Brief for Religious Freedom Institute’s Islam & Religious Freedom Action Team and Islamic Scholars as Amici Curiae Supporting Employers, *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107) [hereinafter Brief for Religious Freedom Institute’s Islam]; Brief for United States Conference of Catholic Bishops, et al. as Amici Curiae Supporting Employers, *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107) [hereinafter Brief for U.S. Conference of Catholic Bishops]; Brief for Billy Graham Evangelistic Association, et al. as Amici Curiae Supporting Employers, *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107) [hereinafter Brief for Billy Graham Evangelistic Association]; Brief for Institute for Faith and Family and Christian Family Coalition as Amici Curiae Supporting Employers, *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107) [hereinafter Brief for Institute for Faith and Family]; Brief for National Association of Evangelicals, et al. as Amici Curiae Supporting Employers, *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107) [hereinafter Brief for National Association of Evangelicals].

125. Brief for Council for Christian Colls. and Univs., *supra* note 124, at 4 (referencing Daniel Frost *Sexually Conservative Religious Universities and Tax Exemption*, 59 J. CHURCH & STATE 566, 567 (2017)).

126. *Id.* at 4a.

127. *Id.* at 4-5.

128. *Id.* at 23.

129. *Id.* at 6.

C. Religious Freedom Protections

1. Religious Freedom Restoration Act

One religious exemption that Justice Gorsuch mentioned in *Bostock* that could serve as protection against government interference is the Religious Freedom Restoration Act (RFRA).¹³⁰ Congress passed this legislation in 1993 in an attempt to balance the interests of government and the constitutional right to free exercise of religion.¹³¹ The purpose of this legislation was to create a “heightened standard of review for government actions that substantially burden a person’s exercise of religion” even in cases when laws are, on their face, “neutral” toward religion.¹³²

While RFRA initially applied to state as well as federal law under the Fourteenth Amendment, *City of Boerne v. Flores* overruled it as a defense in state claims and restricted the statute’s purview to only federal government action.¹³³ Since its enactment, the statute has been a subject of much controversy with opponents often seeking to repeal parts or all of it.¹³⁴ Most recently, the proposed Equality Act sought to limit the protection RFRA offered against discrimination claims.¹³⁵ RFRA may offer some protection in employment discrimination, but as its reach is only limited to cases involving the federal government, religious universities would be better suited to consider the ministerial exception—a religious exemption that can be invoked against state claims.

130. 42 U.S.C.A. § 2000bb (West).

131. *Id.*

132. WHITNEY K. NOVAK, CONG. RSCH. SERV., IF11490, THE RELIGIOUS FREEDOM RESTORATION ACT: A PRIMER, (2020).

133. *City of Boerne v. Flores*, 521 U.S. 507, 534-36 (1997) (reasoning of Justice Kennedy) (“RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion.”).

134. See Do No Harm Act, S. 2752, 118th Cong. (2021) (a bill to amend the Religious Freedom Restoration Act of 1993); see also Thomas Jipping & Sarah Perry, *The Religious Freedom Restoration Act: History, Status, and Threats*, HERITAGE FOUNDATION (May 4, 2021), <https://www.heritage.org/civil-rights/report/the-religious-freedom-restoration-act-history-status-and-threats>.

135. Equality Act, H.R. 5, 117th Cong. § 1107 (2021); see also Danielle Kurtzleben, *House Passes the Equality Act: Here’s What It Would Do*, NPR (Feb. 24, 2021, 5:00 AM), <https://www.npr.org/2021/02/24/969591569/house-to-vote-on-equality-act-heres-what-the-law-would-do> (explaining subject matter and consequences of Equality Act).

2. *The Ministerial Exception*

In *Bostock*, Gorsuch raised the ministerial exception doctrine as another option available to religious employers.¹³⁶ This country's founding document included as first among its guaranteed rights, the freedom of religion, which ensures the free exercise of religion and the freedom from a government-established state religion.¹³⁷ Inherent in this protection of free exercise was the right for churches to select who would minister to the faithful.¹³⁸ While a foundational religious freedom principle, this right was nonetheless challenged by the implementation and development of employment discrimination law—especially as the government became more involved in regulating private organizations.¹³⁹ Because this balance of interests needed to be clarified in the legal doctrine, the ministerial exception was established.

With the development of the ministerial exception, the right of a church to select its ministers was protected.¹⁴⁰ But the concept of religious institutions and ministers is not as clear when the institution is not an actual church but rather a religiously affiliated organization or school. The courts, first with the enactment of Title VII and then subsequent state discrimination laws, began to see cases between employees and their religious employers.¹⁴¹ Judges were faced with decisions in which they had to weigh the interest of

136. *Bostock v. Clayton Cnty.*, 644, 683-84. (2020).

137. U.S. CONST. amend. I.

138. In 1952, the Court in *Kedroff* recognized “[f]reedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference.” *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 116 (1952).

139. JOHN MARTINEZ, LOCAL GOVERNMENT LAW, *Employment Discrimination—Title VII of the Civil Rights Act of 1964* § 28:8, Westlaw (database updated October 2023) (“Since the basis of congressional power to enact Title VII was the Commerce Clause, both private and public employers who engage in interstate commerce are covered.”); *Timeline of Important EEOC Events*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/youth/timeline-important-eeoc-events#:~:text=President%20Lyndon%20B.,labor%20unions%20and%20employment%20agencies> (last visited Sept. 24, 2023) (In 1972, “Congress gives EEOC the authority to file lawsuits against private companies. It also applies Title VII to the entire federal government, and to all state and local government agencies with at least 15 employees.”).

140. *Hosanna-Tabor v. EEOC*, 565 U.S. 171, 194-95 (2012).

141. See *supra* Section III.A.; see also W. COLE DURHAM & ROBERT SMITH, RELIGIOUS ORGANIZATIONS AND THE LAW, *History of the Ministerial Exception* § 15:7, Westlaw (database updated Dec. 2022) (“The term ‘ministerial exception’ was coined by the Fifth Circuit in *McClure v. Salvation Army* in 1972, following the passage of the 1964 Civil Rights Act.”); see, e.g., *McClure v. Salvation Army*, 460 F.2d 553 (1972); *Equal Emp. Opportunity Comm’n v. Mississippi Coll.*, 626 F.2d 477 (5th Cir. 1980); *Equal Emp. Opportunity Comm’n v. Sw. Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981); *Van Osdol v. Vogt*, 908 P.2d 1122 (Colo. 1996); *Williams v. Episcopal Diocese of Massachusetts*, 766 N.E.2d 820 (Mass. 2002).

the state against the right of a religious organization to control its employment decisions.¹⁴²

The ministerial exception—a religious exemption derived from the Free Exercise Clause in the First Amendment—protects church autonomy in the context of employment discrimination claims.¹⁴³ The exception allows religious organizations the authority to choose their leaders—“a matter strictly ecclesiastical”—free from any state interference, even for claims entirely neutral to religion.¹⁴⁴ The issue as it is understood today was first considered in an appellate decision, *McClure v. Salvation Army*, in which the court stated, “[t]he relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose.”¹⁴⁵ The ministerial exception is accepted law, but courts disagree as to its scope and how involved the court should be in defining who qualifies as a minister.¹⁴⁶ The touchstone cases for the ministerial exception—*Hosanna-Tabor* and *Our Lady of Guadalupe*—delved deeper into the question regarding this religious protection in an educational context.¹⁴⁷

142. See cases *supra* note 141.

143. See generally Note, *The Ministerial Exception to Title VII: The Case for a Deferential Primary Duties Test*, 121 HARV. L. REV. 1776 (2008) (explaining that the history and constitutional bases of the ministerial exception encourage adoption of a deferential test).

144. “The purpose of the exception is not to safeguard a church’s decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter ‘strictly ecclesiastical[.]’” *Hosanna-Tabor*, 565 U.S. at 194-95 (quoting *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 119 (1952)).

145. *McClure*, 460 F.2d at 558-59.

146. Compare *Intervarsity Christian Fellowship/USA v. Bd. of Governors of Wayne State Univ.*, 534 F. Supp. 3d 785, 797, 808-09 (E.D. Mich. 2021) (holding student leader in campus organization was a minister because role entailed “a significant spiritual commitment”), and *Simon v. Saint Dominic Acad.*, Civil Action No. 19-cv-21271, 2021 U.S. Dist. LEXIS 81171, at *6 (D.N.J. Apr. 28, 2021) (holding Chairperson of Religion Department who performed mere office duties was a minister), with *DeWeese-Boyd v. Gordon Coll.*, 163 N.E.3d 1000, 1002 (Mass. 2021) (holding professor of social work at Christian college was not a minister), and *Trotter v. United Lutheran Seminary*, Civil Action No. 20-570, 2021 U.S. Dist. LEXIS 142222, at *12-13 (E.D. Pa. July 29, 2021) (holding employee was not a minister, despite being ordained and employer being a seminary, because she did not perform ministerial duties).

147. *Hosanna-Tabor*, 565 U.S. 171 (holding the ministerial exception applies as defense in employment discrimination suits); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2066 (2020) (holding that elementary school teachers at private religious school qualified as ministers).

2.i. Hosanna-Tabor

Hosanna-Tabor upheld the constitutionality of the ministerial exception in an employment discrimination suit.¹⁴⁸ Faced with the collision of Title VII employment discrimination and a religious institution's First Amendment right to appoint its ministers, the Court held that the relationship between a minister and her employer barred a schoolteacher from the ability to file a claim with the EEOC based on disability discrimination.¹⁴⁹ Contrary to other religious exemptions, the ministerial exception applies on a neutral basis.¹⁵⁰ If an employee qualifies as a minister, he or she can be fired regardless of whether the decision was made for any "religious reason."¹⁵¹ This protection is limited in its application in that it can only be implemented as an affirmative defense to a claim by an employee against a religious employer and not as a jurisdictional bar.¹⁵²

In support of its conclusion that a schoolteacher can qualify as a "minister," the Court considered factors such as her job title, distinctive role in the instruction of faith, religious training, and religious functions in her job.¹⁵³ The exception's primary purpose is to "ensure[] that the authority to select and control who will minister to the faithful . . . is the church's alone"¹⁵⁴ because the appointment of ministers is central to an organization's "right to shape its own faith and mission."¹⁵⁵

2.ii. Our Lady of Guadalupe

Eight years following *Hosanna-Tabor*, the Court further expanded upon this idea of the ministerial exception in *Our Lady of Guadalupe* to include those who were not specifically hired to be ministers. Moving beyond the four-part test employed in *Hosanna-Tabor*, the Court concluded that the factors it used as support for its decision are not dispositive for every case.¹⁵⁶ *Our Lady of Guadalupe* considered two different cases in which the

148. *Hosanna-Tabor*, 565 U.S. at 196.

149. *Id.* at 194.

150. *Id.* at 194-95.

151. *Id.*

152. *Id.* at 195 n.4.

153. Damonta D. Morgan & Austin Piatt, *Making Sense of the Ministerial Exception in the Era of Bostock*, 2021 U. ILL. L. REV. ONLINE 26, 33 (2021).

154. *Hosanna-Tabor*, 565 U.S. at 194-95.

155. *Id.* at 188.

156. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2063 (2020).

employees, both Catholic schoolteachers, filed claims alleging age discrimination and disability discrimination.¹⁵⁷ Although neither teacher held the title of minister, each employee led students in prayer and religious activities.¹⁵⁸ Justice Alito, recalling his concurrence in *Hosanna-Tabor*, emphasized that more significant than an employee holding the title of minister are the employee's "religious functions."¹⁵⁹ As support for his conclusion, he further explained the key role that religious education plays for all different religions in various faith traditions.¹⁶⁰ The educators in the two cases were Catholic elementary school teachers, and therefore had a more apparent ministerial function because "they were their students' primary teachers of religion," a role which holds great "religious significance."¹⁶¹ Abiding by the principle of the ministerial exception, the Court's decision secured the protection of a church's "autonomy with respect to internal management decisions that are essential to the institution's central mission."¹⁶²

In both cases, Justice Thomas, in his concurrences, echoed the importance of a church's autonomy from state interference as he encouraged the Court to "defer to a religious organization's good-faith understanding of who qualifies as a minister."¹⁶³ Calling attention to how many faith organizations would vary in determining their ministers due to "different leadership structures and doctrines," Thomas concluded that the designation of a minister is a theological question; therefore, the courts should not be the authority to answer that question.¹⁶⁴ The courts, however, do seem to be involved in deciding this theological question because the religious function of an employee is scrutinized and narrowly construed, which is especially apparent in the case of non-theological teachers.

157. *Id.* at 2058-59.

158. *Id.* at 2059.

159. *Id.* at 2063.

160. *Id.* at 2064-65.

161. *Id.* at 2067.

162. *Id.* at 2060.

163. *Hosanna-Tabor v. EEOC*, 565 U.S. 171, 196-97 (2012) (Thomas, J., concurring); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2069-70 (2020) (Thomas, J., concurring).

164. *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring).

IV. MINISTERIAL EXCEPTION IN HIGHER EDUCATION

Sectarian universities are being targeted today for abiding by their sincerely held beliefs and for committing to religious principles.¹⁶⁵ Rather than support the role of a religious institution as a respected part of a pluralistic society, those who disagree with their mission and purpose desire for them to conform to the new standards put in place in the political and cultural sphere.¹⁶⁶ An employee with a worldview that contradicts the worldview of their employer may not appear on the surface as a matter of great importance. But for a university that exists to form the student in light of God's revelation and pursues as its end, "the total integration of knowledge into the heart, mind, and soul of a well-cultivated person,"¹⁶⁷ this difference of worldview is not a compromise that can be made. Liberal arts schools in the tradition of John Henry Newman's idea of a university seek to provide students more than a training of skills and knowledge in one particular field; they offer an integrated and deep understanding of the human person and the world.

The modern view on sexual orientation and gender identity directly contradicts this teaching.¹⁶⁸ To effectively guide students in the manner these schools require, they cannot be forced to employ those whose values do not align and whose viewpoints and lifestyles contradict their fundamental identity. As adversaries of religious schools seek to enforce this contrary viewpoint of human sexuality through discrimination law, sectarian universities need specific protection for their missions and authentic religious

165. See, e.g., *California Christian Universities Under Attack*, CAL. CHRISTIAN FAM. COUNS. (May 16, 2022), <https://www.californiafamily.org/2022/05/christian-universities-under-attack/>; Michael Brown, *Activists Target Yeshiva University for Adhering to Torah*, DAILYWIRE, <https://www.dailywire.com/news/activists-target-yeshiva-university-for-adhering-to-torah> (last visited Sept. 24, 2023).

166. Paul Southwick, Religious Exemption Accountability's director, explained part of REAP's purpose: "Part of the change involves forcing these institutions to choose between accepting federal funding or continuing their discriminatory practices." Later he emphasizes his point of REAP: "bringing the fight to Christian Right institutions. . . ." Chrissy Stroop, *The Most Forgotten Queer Folks in the US Are Fighting Back Against a Powerful—and Publicly Funded—Group That Discriminates with Impunity*, RELIGION DISPATCHES (Apr. 8, 2022), <https://religiondispatches.org/the-most-forgotten-queer-folks-in-the-us-are-fighting-back-against-a-powerful-and-publicly-funded-group-that-discriminates-with-impunity/>.

167. Robert Kirkendall, *Introduction to The Idea of a University Part 3: The Fruit of a University*, SAINT JOHN HENRY NEWMAN (Nov. 9, 2018), <https://www.cardinaljohnhenrynewman.com/introduction-to-the-idea-of-a-university-part-3-the-fruit-of-a-university/> (providing summary and analysis of John Henry Newman's work).

168. See Congregation for Catholic Education, *Letter on "Male and Female He Created Them: Towards a Path of Dialogue on the Question of Gender Theory in Education"* (2019).

character. After the ministerial exception was accepted in employment discrimination suits and the doctrine was permitted to be invoked regarding a religious schoolteacher, a question was still left unanswered. How can this exception apply in the context of higher education, especially in situations regarding non-religious professors? This issue was raised in *DeWeese-Boyd v. Gordon College*,¹⁶⁹ in which the court held against the private college and denied its right to control employment free from government interference.

A. *Gordon College*

In *DeWeese-Boyd v. Gordon College*, Massachusetts addressed the applicability of the ministerial exception in the situation of a college professor.¹⁷⁰ DeWeese-Boyd was an associate professor in the Department of Sociology and Social Work.¹⁷¹ After the college denied her application for promotion to full professor, DeWeese-Boyd sued Gordon College alleging discrimination to which the college raised the affirmative defense of the ministerial exception.¹⁷² Deciding against the college, the Massachusetts Supreme Court held that DeWeese-Boyd was not a minister per the religious function test in *Our Lady of Guadalupe*.¹⁷³ Her responsibilities differed from that of an elementary school teacher because she did not “pray with her students, participate in or lead religious services, take her students to chapel services, or teach a religious curriculum.”¹⁷⁴ The court reasoned that while she was “expected and required to be a Christian teacher and scholar,” this religious aspect of her position was “different in kind,” and thus, she was not a minister.¹⁷⁵

Gordon College is committed to an “integrative scholarship that develops Christian perspectives.”¹⁷⁶ By integrative, the college explained that, “[n]ot only should faculty be able to explain current methodologies and theories of their disciplines to their students and colleagues, but they should continually explore how a Christian worldview enhances, redefines, or confronts their discipline’s preeminent practices and philosophical

169. *DeWeese-Boyd v. Gordon Coll.*, 163 N.E.3d 1000, 1002 (Mass. 2021).

170. *Id.*

171. *Id.*

172. *Id.* at 1003.

173. *Id.* at 1002. See discussion *supra* Section III.C.2.ii.

174. *DeWeese-Boyd v. Gordon Coll.*, 163 N.E.3d at 1017.

175. *Id.* at 1017-18.

176. *Id.* at 1005.

assumptions.”¹⁷⁷ This college follows the Newman model discussed in part II of this Note because it believes that principles of theology should interact with and inform other disciplines, contrasted with the second model that seeks to avoid “theological and philosophical imperialism.”¹⁷⁸ Furthermore, it expects its employees to embody this commitment to the Christian faith and its core tenets. As an evangelical Christian school, Gordon College holds a traditional and biblical view on marriage and homosexuality.¹⁷⁹ After committing to the school’s Christian mission, however, DeWeese-Boyd actively—vocally and publicly—opposed its policies regarding “LGBTQ+ individuals.”¹⁸⁰ She cited this vocal opposition as one of her reasons for discrimination.¹⁸¹

The court’s reasoning raises a serious issue for universities because most faculty at a university do not serve an immediately apparent religious function. The court’s statement that DeWeese-Boyd’s integration of religion was “different in kind, and not degree” simply represents the distinction of a college professor contrasted with a grade-school teacher.¹⁸² By the nature of the profession and the maturity level of the students, how a professor integrates faith in his or her teaching will look very different from that of an elementary school teacher. It was unreasonable to use this distinction in making this conclusion about her ministerial status.

In an amici brief in support of the college, several universities and collegiate counsels expressed the negative implication of a narrow interpretation of “minister” as seen in Massachusetts’ decision.¹⁸³ In their brief, they urged the court to review the ministerial exception for “religious higher education”¹⁸⁴ in the same broad manner as “applied to elementary and

177. *Id.*

178. *Statement on the Nature of the Contemporary Catholic University*, *supra* note 45.

179. Gordon College’s student handbook states: “The following behavioral expectations are binding on all members of the Gordon community. Those words and actions which are expressly forbidden in Scripture, including but not limited to blasphemy, profanity, dishonesty, theft, drunkenness, sexual relations outside marriage, and homosexual practice, will not be tolerated in the lives of Gordon community members, either on or off campus.” *Practices Governed by Scripture*, GORDON COLLEGE: LIFE AND CONDUCT STATEMENT, <https://www.gordon.edu/lifeandconduct> (last visited on Mar. 19, 2023).

180. *DeWeese-Boyd v. Gordon Coll.*, No. 144590, 2020 Mass. Super. LEXIS 73, at *1 (Mass. Super. Ct. Apr. 2, 2020).

181. *DeWeese-Boyd v. Gordon Coll.*, 163 N.E.3d 1000, 1003 (Mass. 2021).

182. *Id.* at 1017.

183. Brief for Cardinal Newman Society, et al. as Amici Curiae Supporting Petitioner, *DeWeese-Boyd v. Gordon Coll.*, 142 S. Ct. 952 (2022) (No. 21-145) [hereinafter Brief for Cardinal Newman Society].

184. *Id.* at 2.

secondary schools.”¹⁸⁵ They reasoned that the same purpose and mission of a grade school applies in the case of higher education.¹⁸⁶ Addressing the significance of a school’s right to integrate faith and establish a faculty, staff, and administration that uphold its mission, they wrote:

Religious institutions like Gordon—not state statutes or the courts—are entitled to determine the scope and application of their religious beliefs to those who teach their faith and carry out their religious mission. Gordon’s educational ministry—like that of all religious colleges and universities—depends on faculty who are willing and able to integrate the institution’s faith in their teaching and scholarship.¹⁸⁷

In addition to supporting the deference that should be afforded religious universities in their selection of faculty, the brief addressed the pressing issue regarding matters related to human sexuality.¹⁸⁸ It emphasized the urgent need to protect these institutions’ ability to remain “faithful[] to their religious tenets despite cultural shifts,” especially those “concerning sexual orientation and gender identity.”¹⁸⁹

Benedictine College and Franciscan University also wrote a brief in support of petitioners that focused on the totality of a religious college’s mission.¹⁹⁰ Critical of the court’s narrow interpretation of religious function, they explained that an understanding of a minister’s role cannot be “limited

185. *Id.*

186. *Id.*

187. *Id.* at 3.

188. *Id.* at 23.

189. *Id.* at 22.

190. “Benedictine College is a Catholic, liberal arts college in Atchison, Kansas, sponsored by the monks of St. Benedict’s Abbey and sisters of Mount St. Scholastica Monastery. . . . Benedictine puts Jesus Christ at the center of everything it does and encourages students, faculty, and staff to do the same. Benedictine educates the whole person, not just the intellect, so that students may come to wholeheartedly love and follow God through Jesus Christ. *Benedictine’s faculty play an integral and indispensable role* in the Christ-centered mission of the college and all *faculty must integrate the Catholic faith into their work.*” “Franciscan University of Steubenville is a Catholic university founded in Ohio in 1946 by the Franciscan Friars of the Third Order Regular at the request of Bishop John King Mussio. . . . With a robust and passionate integration of its Catholic faith throughout its academic programs, Franciscan has built an environment in which students, faculty, and staff seek ongoing personal conversion in the power of the Holy Spirit. . . . *All faculty at Franciscan must integrate the Catholic faith into their teaching, participate in the life of the Church on campus, and model the Catholic faith, as their vocations at Franciscan are central to the reform and the renewal of the Catholic Church.*” Brief for Benedictine College and Franciscan University of Steubenville, *supra* note 7, at 1-4 (emphasis added) (internal quotations omitted).

to a discrete set of functions,¹⁹¹ because at schools like theirs, faith is integrated in every subject and activity. Reminiscent of Newman's educational philosophy,¹⁹² they dismiss the notion that a professor can teach a purely secular subject—a concept they deem an “artificial separation of the intellectual and the faith life.”¹⁹³

In response to Gordon College's petition for a writ of certiorari, the Supreme Court denied certiorari, citing a complication of the “preliminary posture of the litigation.”¹⁹⁴ Four Justices, joining a concurrence written by Justice Alito, nevertheless admitted the importance of this religious liberty issue raised by Gordon College.¹⁹⁵ Alito noted that Massachusetts' definition of minister “reflects a troubling and narrow view of religious education.”¹⁹⁶ Echoing the view of the petitioner and the amici briefs in support, he agreed that “religious education at Gordon College does not end as soon as a student passes those required courses and leaves the chapel.”¹⁹⁷ Representing a deeper understanding of integrated faith compared with the Massachusetts court, he stated:

What many faiths conceive of as “religious education” includes much more than instruction in explicitly religious doctrine or theology. As one amicus supporting the college explains, many religious schools ask their teachers to “show students how to view the world through a faith-based lens,” even when teaching nominally secular subjects.¹⁹⁸

While not specifically stated, Alito's words reflect the view that a sectarian university does not have religious subjects and secular subjects that are completely autonomous.¹⁹⁹ Teaching from a faith-based lens is at the core of these schools and is integrated in every subject-matter. The religious function of a professor in higher education looks different than the religious function of an elementary school teacher. Due to this contrast, the Court needs to review the ministerial exception in this specific context. If other

191. *Id.* at 12.

192. *See supra* Part II.A.

193. Brief for Benedictine College and Franciscan University of Steubenville, *supra* note 7, at 12.

194. *Gordon Coll. v. DeWeese-Boyd*, 142 S. Ct. 952, 952 (2022) (Alito, J., concurring with denial of cert.).

195. *Id.*

196. *Id.* at 954.

197. *Id.* at 955.

198. *Id.* at 954 (quoting an amicus brief by the Jewish Coalition for Religious Liberty).

199. *Id.*

states or the Supreme Court applied the reasoning in *Gordon College* to other sectarian universities, this could, as Franciscan University and Benedictine College stated, “threaten their very existence.”²⁰⁰

B. *Employment Discrimination in Higher Education after Bostock*

Gordon College showcases the conflict that has arisen in collegiate education at the intersection of religious freedom and civil rights laws after *Bostock*.²⁰¹ Universities and other educational institutions expressed the issue that stems from a shift in cultural norms regarding human sexuality in the amici briefs they filed on behalf of *Gordon College*.²⁰² They need a guaranteed protection against an ideological movement opposed to the values they espouse in their missions and campus life. Without a secure protection of the employment decisions regarding all faculty and staff—not only those employees with explicit religious functions—universities will lose control over the direction of their mission. Following *Bostock*’s reasoning, which is in direct contradiction to the human anthropological views held by these sectarian universities, in matters of federal law, a case can be made to show how this law burdens religious organizations. In any matter of state law, however, new clarity must be found for the application of the ministerial exception for universities that takes into account the integration of faith.

1. *Bostock Upset the Balance*

Considering the implications of employment discrimination as interpreted under *Bostock*, the enforcement of such claims sets a dangerous precedent for religious universities. Regarding the balance of interests between religious liberty and discrimination law, Constitutional scholar, Timothy Tracey, explains, “a clear pattern developed among the states.”²⁰³ He continues, “when prohibitions on discrimination were expanded, protections for religious liberty were equally expanded. *Bostock* upset this balance.”²⁰⁴ Recall Alito’s argument in his dissent regarding the hypocrisy in

200. Brief for Benedictine College and Franciscan University of Steubenville, *supra* note 7, at 16.

201. *DeWeese-Boyd v. Gordon Coll.*, 163 N.E.3d 1000, 1002-03 (Mass. 2021).

202. Brief for Cardinal Newman Society, *supra* note 183; Brief for Benedictine College and Franciscan University of Steubenville, *supra* note 7, at 11-12.

203. Timothy Tracey, *Deal, No Deal: Bostock, Our Lady of Guadalupe, and the Fate of Religious Hiring Rights at the U.S. Supreme Court*, 19 AVE MARIA L. REV. 105, 115 (2021).

204. *Id.*

the precedent set by *Bostock*.²⁰⁵ Should an employee or prospective employee file a claim alleging discrimination based “in part on sex,”²⁰⁶ per the Court’s recent interpretation, the school would not be able to defend itself even if the decision was made for reasons related to religious belief. And this issue of a school having concerns over hiring someone who fundamentally disagrees with its view on human sexuality is a matter of belief.

Beliefs manifest as a way of life, and the converse is true: a way of life exemplifies a person’s belief system. A university that integrates faith desires consistency in commitment to fundamental beliefs. Consider, for example, a school that professes a statement that recognizes sexual difference and the complementarity of the sexes as central to God’s plan for humanity and marriage.²⁰⁷ At this same school, juxtaposed to its commitment to Christian teaching, a psychology class is taught by a professor in a legally recognized same-sex marriage. The public recognition of the professor’s relationship directly opposes a view of human anthropology held by the institution. Students, rather than being formed in accordance with the school’s Christian mission, are led to confusion resulting from the representation of two irreconcilable beliefs.

Furthermore, if a philosophy teacher instructs students about the unchanging nature of a thing but then a student’s biology professor claims a gender identity incongruent with his sex, there is a direct contradiction to the moral conclusion communicated in the school’s policy. At an institution like a religious college, each member is a part of a whole. Each individual teacher is integral in carrying out the school’s mission just as each subject is integral for the same purpose. But if a teacher’s professed worldview directly opposes the university’s main objective, one of the parts of the whole is skewed. A difference of philosophy or theology is being represented and the universal model of education is fractured.²⁰⁸

205. *Bostock v. Clayton Cnty.*, 644, 729-30 (2020) (Alito, J., dissenting).

206. *Id.* at 659 (majority opinion).

207. A statement similar to one in Ave Maria University’s Code of Conduct, that reads: “sexual difference is willed by God as part of the divine plan,” and “[t]he complementarity that results from this differentiation is ordered to the human good, particularly to marriage and family life.” *Code of Conduct on Transgenderism*, AVE MARIA UNIVERSITY STUDENT HANDBOOK (2023-24) 83, https://assets-global.website-files.com/6375326e346f27444ae6d852/65a0156fb31308500e060251_AMU-student-handbook-2023-24.pdf.

208. Recall John Henry Newman’s purpose of the university being “the teaching of universal knowledge.” NEWMAN, *supra* note 22, at xxxvii.

2. *Effectiveness of Federal Protections: Title VII Religious Belief Exemption and RFRA*

As mentioned in part III of this Note, a few religious exemptions could offer protection for these religious schools. If an employee files a federal claim against a university, the school could first raise the religious exemption in Title VII as a defense as well as RFRA.²⁰⁹ Title VII includes an exemption in specific cases for religious entities when discrimination concerns “the employment of individuals of a particular religion” whose work is connected with the organization's activities.²¹⁰ Given that the statutory definition of religion includes “all aspects of religious observance and practice, as well as belief,”²¹¹ an employee holding a belief incongruent with the institution’s statement of faith should justify application of the exemption. This argument has not had much promise, however, in cases alleging sex discrimination. For example, a district court in Indiana strictly held that the religious exemption in Title VII does not allow employers to discriminate “in a way that also discriminates against another protected class.”²¹² While lower courts have held against the legitimacy of a religion defense against a sex discrimination claim, this question is still in debate and should be revisited following the *Bostock* opinion.

The second defense available against federal claims is RFRA, which heightens scrutiny for the government when a neutral federal action unduly burdens the free exercise of religion.²¹³ The applicability of the statute in this context between a private religious institution and its employee is uncertain. The lower courts are divided with some courts granting religious protection “whenever federal law burdens religious exercise” and other courts allowing it only in claims “against the federal government.”²¹⁴ In the context of a university, RFRA was implicated in a Title VII case when a female associate professor was barred from filing a discrimination suit against the Catholic University of America for denying her a tenure position in the Department of

209. 42 U.S.C.A. § 2000e(j); 42 U.S.C.A. § 2000bb (West).

210. 42 U.S.C.A. § 2000e-1.

211. 42 U.S.C.A. § 2000e(j).

212. *Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc.*, 496 F. Supp. 3d 1195, 1205 (S.D. Ind. 2020).

213. *EEOC v. Cath. Univ. of Am.*, 83 F.3d 455, 470 (D.C. Cir. 1996) (“[W]e conclude that Congress had the authority, under the Constitution, to create a compelling interest defense for the benefit of those whose free exercise rights would be burdened by a neutral federal law of general application.”).

214. Tracey, *supra* note 203, at 127-28.

Canon Law because the job was one to be held only by a priest.²¹⁵ As the department was under the control of the Holy See, the District of Columbia Court of Appeals held that the suit violated the Free Exercise and Establishment clauses of the First Amendment as well as RFRA.²¹⁶ While RFRA may offer some protection, it is far from guaranteed given the lack of certainty in its application in any private suit, especially with the increased government interest in prohibition of sex discrimination.

The conflict of discrimination law and religious liberty becomes even more complicated when state law is involved. Because Title VII exemptions and RFRA cannot apply to state claims, this leaves the ministerial exception as the predominant defense against both federal and state claims.²¹⁷ Both SPU and Gordon College were party to claims alleging violations of state civil rights acts.²¹⁸ And due to the heightened nondiscrimination laws in thirty-three states,²¹⁹ the need to provide a broad and certain protection for sectarian universities is essential. Given the significant change in discrimination law resulting from the *Bostock* decision, the ministerial exception must be reviewed in the specific context of the university.

C. *Applying the Ministerial Exception in the Context of Higher Education*

While the Court further developed the doctrine of the ministerial exception in *Our Lady of Guadalupe*, it did not give a clear rule—leading to confusion and inconsistency in lower courts’ interpretations.²²⁰ Critics of this doctrine argue the Court’s application is either too broad²²¹ or too narrow;²²²

215. EEOC v. Cath. Univ. of Am., 83 F.3d at 457-59.

216. *Id.* at 470.

217. See *supra* Section III.C.

218. See Amended Complaint & Demand for Jury Trial at 11, *Guillot v. Whitehead*, No. 22-2-14642-7 (King Cnty. Super. Ct. Oct. 25, 2022) (alleging SPU’s violation of Washington’s civil rights law); see also Wash. Rev. Code Ann. § 49.60.030. (West, Westlaw through 2023 Sess.); *DeWeese-Boyd v. Gordon Coll.*, 163 N.E.3d 1000, 1003 (Mass. 2021) (DeWeese-Boyd alleged violation of Massachusetts’ civil rights law).

219. HRC Foundation, *supra* note 97.

220. See *Intervarsity Christian Fellowship/USA v. Bd. of Governors of Wayne State Univ.*, 534 F. Supp. 3d 785, 797, 808-09 (E.D. Mich. 2021); *Simon v. Saint Dominic Acad.*, Civil Action No. 19-cv-21271, 2021 U.S. Dist. LEXIS 81171, at *6 (D.N.J. Apr. 28, 2021); *DeWeese-Boyd*, 163 N.E.3d 1000 at 1002; *Trotter v. United Lutheran Seminary*, Civil Action No. 20-570, 2021 U.S. Dist. LEXIS 142222, at *12-13 (E.D. Pa. July 29, 2021).

221. See Matthew Junker, Note, *Ending LGBTQ Employment Discrimination by Catholic Institutions*, 40 BERKELEY J. EMP. & LAB. L. 403, 422 (2019) (arguing for a narrow interpretation of exception).

some want to abolish the doctrine altogether.²²³ Other disagreements center on the definitions of “religious institution,” “minister,” and “religious function.”²²⁴

1. Review of the Ministerial Exception as an Absolute Exemption

Those who argue for a narrow interpretation often raise concerns regarding the “absolute First Amendment protection” of the ministerial exception, which safeguards an employer’s decision about an employee regardless of the reason for the discrimination.²²⁵ In her *Our Lady of Guadalupe* dissenting opinion, Justice Sotomayor expressed discontent that “[the exception] gives an employer free rein to discriminate because of race, sex, pregnancy, age, disability, or other traits protected by law when selecting or firing their ‘ministers,’ even when the discrimination is wholly unrelated to the employer’s religious beliefs or practices.”²²⁶ In reference to the ministerial exception barring the disability claim in *Hosanna-Tabor*, Sabine Tsuruda noted a hypocrisy in a religious organization being granted an exemption for discrimination that it institutionally opposes.²²⁷ The exception, she said, “permitted Perich’s religious employer to fire her for non-religious discriminatory reasons, including reasons that were contrary to its own express values.”²²⁸

Responding to the *Hosanna-Tabor* decision and its critics, Douglas Laycock explained “the fundamental point of the ministerial exception [is]

222. See *Hosanna-Tabor v. EEOC*, 565 U.S. 171, 196-97 (2012) (Thomas, J., concurring) (arguing for good-faith approach).

223. See Leslie C. Griffin, *The Sins of Hosanna-Tabor*, 88 IND. L.J. 981, 1016-19 (2013) (arguing the exception was not necessary at all); *Are You a Minister? Supreme Court Denies Employment Protection to More Religious School Teachers*, AMS. UNITED (July 2020), <https://www.au.org/wp-content/uploads/migration/2020-07/Supreme%20Court%20&%20Ministerial%20Exception%20Report%207.10.20.pdf> (“In 2012, the Supreme Court held that the exemption isn’t limited to protecting the ability to hire people of the same faith into leadership positions. It instead applies to, and overrides, all antidiscrimination protections, even if the reason that an employer fires (or doesn’t hire) someone has nothing at all to do with religion and is invidious.”).

224. Richard C. Osborne III, Note, *A Country Divided: Refining the Ministerial Exception to Balance America’s Diversity*, REGENT U. L. REV. 607, 624-26 (2021-2022).

225. See Griffin, *supra* note 223, at 994.

226. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2072 (2020) (Sotomayor, J., dissenting).

227. Sabine Tsuruda, *Disentangling Religion and Public Reason: An Alternative to the Ministerial Exception*, 106 CORNELL L. REV. 1255, 1267 (2021) (referencing the disability discrimination claim in *Hosanna-Tabor*).

228. *Id.* at 1268.

that evaluation of a minister is inherently a religious decision.”²²⁹ For an employment discrimination case, an employer must show it acted for a legitimate work-related reason.²³⁰ The “work-related reason,” for a religious employer, “is about performance in the ministry,” which “[i]nvariably” includes “religious considerations”—something not within the purview of the courts.²³¹ Similarly, Justice Thomas wrote in his *Our Lady of Guadalupe* concurrence that “[j]udges lack the requisite ‘understanding and appreciation of the role played by every person who performs a particular role in every religious tradition.’”²³²

With the ministerial exception as only an absolute bar, with no regard to the reason for discrimination, a narrow application could be understood. This exemption without question—eliminating liability of religious employers—hinders the possibility of courts deciding to broaden the scope of the exception to encompass all faculty and staff. This raises the question of whether, under the ministerial exception doctrine, matters of belief could be considered in discernment of an employee’s ministerial status without getting the courts too involved in ecclesiastical matters. The courts have some discretion in the analysis of whether an employee can qualify as a minister, which is determined by considering the “religious function” of the employee in relation to his or her employer.²³³ This religious function is the most analyzed and contested aspect of the ministerial exception.²³⁴

2. *Limitations of Religious Function Interpretation*

The analysis in higher education centers on the interpretation of “religious function,” which became the focal point to determine whether an employee is a minister.²³⁵ As it relates to the expression of faith, the “religious function” of an employee may be understood differently by the courts than by a university. The religious function of a campus chaplain may

229. Douglas Laycock, *The Federalist Society National Lawyers Convention—2011: Hosanna-Tabor and the Ministerial Exception*, 35 HARV. J. L. & PUB. POL’Y 839, 850-51 (2012).

230. *Id.* at 850.

231. *Id.*

232. *Our Lady of Guadalupe*, 140 S. Ct. at 2070 (Thomas, J., concurring) (quoting concurrence in *Hosanna-Tabor v. EEOC*, 565 U.S. 171 (2012)).

233. Damonta D. Morgan & Austin Piatt, *Making Sense of the Ministerial Exception in the Era of Bostock*, 2021 U. ILL. L. REV. ONLINE 26, 39 (2021).

234. *See infra* Section IV.C.2.

235. *See* Damonta D. Morgan & Austin Piatt, *supra* note 153 at 26, 28; Osborne III, *supra* note 224; *DeWeese-Boyd v. Gordon Coll.*, 163 N.E.3d 1000, 1014 (Mass. 2021); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. at 2063.

look different than that of an English professor, but in an integrated faith university, both faculty members serve integral roles in the faith life of the university. Despite the theological nature of this question, it appears that some judges' opinions give little weight to how a school defines its religious mission in their reasoning.²³⁶

In an effort to balance the interests of employer and employee in a university, some courts have defined minister very narrowly as represented in the reasoning in *Winberry v. La. College*.²³⁷ Relying on a case from 1980, which only understood universities in the secular sense, the court held a professor was not a minister.²³⁸ While this case was before *Our Lady of Guadalupe*, the same reasoning is echoed in *Gordon College*.²³⁹ The case cited by Mississippi stated that “[the expectation for faculty members] to serve as exemplars of practicing Christians does not serve to make the terms and conditions of their employment matters of church administration and thus purely of ecclesiastical concern.”²⁴⁰ This is such a narrow construing of a religious professor's mission and purpose in a college setting.

This standard by which most judges determine the religious function of a university employee tends to entirely miss the point of the Christian way of life. The courts' analyses of religious function often conflate freedom of religion with freedom of worship,²⁴¹ however, living one's faith is more than mere worship. This standard narrowly construes the meaning of free exercise

236. See *Winberry v. La. Coll.*, 124 So. 3d 1212, 1216-17 (La. Ct. App. 2013); *Bohnert v. Roman Cath. Archbishop*, 136 F. Supp. 3d 1094, 1114-15 (N.D. Cal. 2015); *EEOC v. Miss. Coll.*, 626 F.2d 477, 485 (5th Cir. 1980).

237. *Winberry*, 124 So. 3d at 1217.

238. “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.” *Id.* (quoting *Miss. Coll.*, 626 F.2d at 485).

239. “Here, the integrative function is not tied to a sectarian curriculum: it does not involve teaching any prescribed religious doctrine, or leading students in prayer or religious ritual. Yet it does involve integrating the Christian faith generally into teaching and writing about social work. Whether this more general religious reflection was meant to be included in the Supreme Court's statement about ‘educating young people in their faith,’ and is enough to render her a minister, is not directly answered by precedent.” *DeWeese-Boyd*, 163 N.E.3d at 1014.

240. *EEOC*, 626 F.2d at 485.

241. See generally *Bohnert*, 136 F. Supp. 3d at 1114-15 (holding teacher was not minister, supported by reasoning: “Bohnert is not an ordained minister, and there is no evidence that the church held her out as one. She is not ‘called,’ and has no specific educational degree other than a Bachelor of Science in biology, a doctor of pharmacy, and a credential to teach biology.”); *Herx v. Diocese of Fort Wayne-South Bend Inc.*, 48 F. Supp. 3d 1168, 1176-77 (N.D. Ind. 2014) (holding “Title VII's statutory exemptions would apply in this case only if Mrs. Herx's claims were based on religious discrimination. But her Title VII claim alleges sex discrimination, not religious discrimination.”).

and entirely misunderstands the purpose of “integrative scholarship.”²⁴² If the court is focused on “what an employee does,”²⁴³ then what an employee does in line with religion is of equal weight to what an employee does *out of line with religion*. Religion is more than just explicit religious instruction or public prayer.

Damonta D. Morgan and Austin Piatt sought to rectify the unbalanced interests following the *Bostock* decision by proposing a “subjective-objective standard.”²⁴⁴ Pulling from the historic principles of the ministerial exception doctrine, this new standard would “requir[e] courts to consider (1) whether, in the view of the organization, a specific employee shares in the organization’s religious mission; and, (2) whether that employee’s everyday functions actually contribute to that mission.”²⁴⁵ Far from the original purpose of the doctrine to free religious organizations from state interference, this proposal would involve the courts in a nuanced interpretation of whether an employee’s functions qualify as ministerial. While initially it “credits a religious organization’s good-faith classification,”²⁴⁶ this proposal then enables the courts to look at “whether [an employee] plays an important role in fostering the faith of and spiritually developing his students.”²⁴⁷ Especially considering recent courts’ leaning on the issue of sex discrimination, granting the government more discretion to decide what constitutes a proper fostering of faith seems far from an effective answer to the problem at hand.

Richard C. Osborne III proposed a different solution to the religious function problem by first reconsidering the definition of what constitutes a “religious institution.”²⁴⁸ A religious institution, he suggests, is one “whose inability to choose its ‘ministers’ freely would threaten to undermine the religion clauses’ purpose.”²⁴⁹ Once satisfying this narrow definition, he then posits that these institutions be granted “broader discretion to determine who a minister is.”²⁵⁰ The second part of his solution proposes a “rebuttable presumption approach to define ‘ministers.’”²⁵¹ He explains, “courts should give religious institutions more deference to make ministerial determinations

242. *DeWeese-Boyd*, 163 N.E.3d at 1005.

243. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2064 (2020).

244. Morgan & Piatt, *supra* note 153, at 40.

245. *Id.*

246. *Id.* at 41.

247. *Id.*

248. Osborne III, *supra* note 224, at 611.

249. *Id.* at 633.

250. *Id.* at 611.

251. *Id.*

because they are generally in a better position to assess an employee's religious function."²⁵² Lastly, he suggests the courts should have discretion in a "procedural review" to "ensure that religious institutions utilize fair procedures to terminate their employees, even when the ministerial exception applies."²⁵³

After putting forth his solution, he demonstrates the application of the rule in a hypothetical, beginning with the definition of a religious institution and then looking at the relationship of the employee and employer, he contrasts a theology professor with a psychology professor.²⁵⁴ Despite the two professors having the same employer, he claims that for the theology professor, the university would qualify as a religious institution but not for the psychology professor.²⁵⁵ In this distinction, he entirely misunderstands the concept of integrated faith education.

Initially, Osborne's proposal provides a reasonable solution as it grants a broader discretion to religious organizations by offering them a rebuttable presumption to decide their ministers.²⁵⁶ His suggestion of a procedural review also has merit because any employee should be dismissed in a fair manner. In disregarding any principle of integrated faith in a religious university's curriculum, however, he offers the universities little support. His reasoning encompasses the same narrowly construed definition of religious function, which would leave any decisions regarding non-theology professors outside of the scope of First Amendment protection. As previously stated, a psychology professor's role is of equal weight and importance to the religious mission of a school as its theology professor. The relationship of the employee and employer in each situation remains the same and thus, should be analyzed the same.

3. *Proposed Solution for Integrated Faith Institutions*

Recognizing the importance for churches to have the ultimate discretion to decide their ministers free from any government interference, the absolute exemption must be preserved for leaders of worship. The circumstances resulting from the *Bostock* decision and the changing cultural tide on issues of human sexuality, however, necessitate a new standard regarding those

252. *Id.*

253. *Id.*

254. *Id.* at 633.

255. *Id.*

256. *Id.* at 611.

employees in a less traditional ministerial role.²⁵⁷ The recent court decisions and suggested proposals do not much dispute those in a traditional ministerial role.²⁵⁸ Thus, the central concern of this Note has been regarding those employees who, by secular understanding, do not appear to exercise a religious function. From a thorough understanding of integrative scholarship, however, these employees clearly serve an essential role in the overall mission of a university. Therefore, to maintain the doctrine's original integrity while accommodating sectarian universities in response to the changing circumstances, this Note proposes two standards for the ministerial exception in the context of higher education.

The two standards are determined by two classes of employees in religious universities. The first class of employees are those who are ministers of worship or teachers of theology as defined in *Hosanna-Tabor* and *Our Lady of Guadalupe*.²⁵⁹ The second class encompasses those responsible for integrating faith and reason into their curriculum as well as faculty and staff who serve as examples of lived faith. For the first class, the exemption applies absolutely—regardless of the reason for discrimination—and is based on the employee's express religious function. For the second class, the religious function is based on the institution's integration of faith, as defined by the school's mission, and the absolute exemption is reduced to a rebuttable presumption.²⁶⁰

Because the standard for the first class of employees remains the same, not much more needs to be explained beyond the reasoning of *Hosanna-Tabor* and *Our Lady of Guadalupe*.²⁶¹ The proposal of the second standard seeks to quell the fear of those concerned about a broad scope for an absolute exemption while also assuring that universities have the freedom to instruct students in universal knowledge rooted in faith and reason. The university will be presumed to have reasonably discriminated for the purposes of its mission. And by the nature of the claim, any suit alleging discrimination based on sexual orientation or gender identity fundamentally opposes the school's mission statement and profession of faith. Should a university abide by an integrated faith model, like that presented by John Henry Newman and followed by any of the universities mentioned throughout this Note, it is

257. See *Bostock v. Clayton Cnty.*, 590 U.S. 644, 682-83; *id.* at 729-30 (Alito, J., dissenting).

258. See *supra* Section IV.C.2.

259. See *supra* Section III.C.2.

260. This rebuttable presumption would be similar to that proposed by Richard C. Osborne III. Osborne III, *supra* note 224, at 611.

261. See *supra* Part III.C.2.

understood that any faculty or staff member serves an essential religious function.

As the Catholic Church founded the university,²⁶² a treatise by one of its revered leaders in educational philosophy on the nature and structure of this institution provides a firm basis from which to discern this issue. While John Henry Newman wrote specifically about a Catholic university, his model serves as a foundation for all sectarian universities. Because determining religious function at its essence remains a question of faith, it only follows that the law should consult the discipline of religion to understand its meaning.

V. CONCLUSION

At the heart of John Henry Newman's *The Idea of a University* is the integration of knowledge, rooted in a pursuit of truth, and guided by the Church.²⁶³ Justice Thomas wisely stated in his *Hosanna-Tabor* and *Our Lady of Guadalupe* concurrences that designation of a minister is a theological question and therefore, not one for the courts to decide.²⁶⁴ However, the progressive movement of civil rights laws has increasingly encroached upon this freedom of private religious institutions to secure a committed faculty who will instruct students in the truth, guided by the precepts of religion.²⁶⁵

In *Ex Corde Ecclesiae*, John Paul II echoed Newman's principle about theology's integral role in the university in its guidance of faith and reason and its meaningful interaction with all other disciplines.²⁶⁶ He explains that in fulfillment of the university's purpose to lead students in understanding universal knowledge, "the moral implications that are present in each discipline are examined as an integral part of the teaching of that discipline so that the entire educative process be directed towards the whole development of the person."²⁶⁷ There are no secular subjects or religious subjects; faith is integrated throughout every subject. Therefore, those who administer the instruction of these subjects serve an essential religious function by nature of their position.

262. *Universities*, NEW ADVENT, <https://www.newadvent.org/cathen/15188a.htm> (last visited Mar. 26, 2023).

263. NEWMAN, *supra* note 22.

264. *Hosanna-Tabor v. EEOC*, 565 U.S. 171, 196-97 (2012) (Thomas, J., concurring); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2069-70 (2020) (Thomas, J., concurring).

265. *See supra* Section II.C and Part IV.

266. *Ex Corde Ecclesiae*, *supra* note 21.

267. *Id.* ¶ 20.

Universities that model John Henry Newman's *The Idea of a University* still exist today.²⁶⁸ Notwithstanding that many schools have gone the way of the secular society and its fractured model of education, there are still many universities committed to the integration of knowledge.²⁶⁹ These universities are threatened by a culture that pressures them to conform to shifting standards and legal development that hinders their freedom of religion. Those who target these institutions through the enforcement of modern discrimination law do not simply want to win a case for a single wronged employee; they are seeking to corrupt the very integrity of these traditional institutions.²⁷⁰

Forcing these schools to abide by shifting modern standards on fundamental moral truths would directly affect their religious character and threaten their existence. Whether the opposition is from without or within, university administrations reserve the right to curate a faculty and staff who abide by the university's mission. The ministerial exception must be interpreted with this knowledge of integrating faith as the basis to understand religious function. When every subject informs the other and religious leaders have established the university's central role in the life of the church, every employee at a sectarian university serves an essential purpose in fulfilling its mission. Therefore, the freedom to discriminate, to make an employment decision based on more than merit, must be protected to preserve the very idea of a university.

268. See Brief for Council for Christian Coll. and Univ., *supra* note 124; Brief for Religious Freedom Institute's Islam, *supra* note 124; Brief for U.S. Conference of Catholic Bishops, *supra* note 124; Brief for Billy Graham Evangelistic Association, *supra* note 124; Brief for Institute for Faith and Family, *supra* note 124; Brief for National Association of Evangelicals, *supra* note 124.

269. See *supra* Part II and Section IV.A.

270. See RELIGIOUS EXEMPTION ACCOUNTABILITY PROJECT, <https://www.thereap.org/about-reap>; AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, <https://www.au.org>.