

Religious Values in Secular Institutions?

Yeshiva University and the Future of Religiously Affiliated (but Secularly Chartered) Higher Education in America

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Universities that are incorporated under a secular charter face a number of challenges in claiming religious exemptions or religious character. These secularly chartered but religiously motivated universities (SCbRMU) often are attempting to get the best of both worlds, by maintaining entitlement to government funding that is exclusive to secular entities while also claiming religious protections. In this paper, Yeshiva University (YU) is used as a case study of the difficulties faced by these institutions. YU has been sued by a group of students and alumni for refusing to authorize an official LGBT club, and YU has argued that it is entitled to a religious exemption from New York City anti-discrimination laws. This paper discusses the history of YU and its relationship with LGBT rights, as well as relevant case law concerning religious education, discrimination on the basis of sexual orientation, and religious exemptions. The paper concludes with a discussion of the legal options a SCbRMU has when faced with these issues, including shedding part of its identity (either the religious or the secular), maintaining the status quo, and defiance. Ultimately, none of the options are ideal for such an institution, and the nature of the conflict for YU, when discrimination against funding religious institutions leads to the financial need for a secular charter, and the school's secular status then leads to difficulty receiving a religious exemption from anti-discrimination laws, show that society is not tolerant of ambiguity in this scenario, and institutions are better served if they avoid these contradictions.

Keywords

religious educational institutions – anti-discrimination – sexual orientation – religious freedom – conflicts of rights

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1 Introduction

Yeshiva University (YU) has long served an almost unique function within both American Orthodox Judaism and the world of post-secondary education. Its slogan, *Torah u-madda* (“Torah and science”) reflects this uniqueness. Conceptually, YU seeks to educate its students in Jewish law and texts as well as in secular studies, and to serve as an example that it is possible to do both while detracting from neither. In this endeavor, the school has been served by many leaders and religious authorities, some of whom agreed with the mission of YU more so than others. Above them all still stands Rabbi Joseph B. Soloveitchik, the leading authority not only with respect to YU but to American Modern Orthodox Judaism as well. Although he passed away nearly 30 years ago, his influence on the institution remains decisive. His views and vision were integral to the religious imprimatur of YU, and he was “extremely loyal” to the school.¹ In the spring of 1970, therefore, it was no small matter that Rabbi Soloveitchik publicly criticized what he saw as a dangerous concession to modernity and financial realities: the decision to incorporate YU under a secular charter to accommodate the receipt of needed governmental funds.² Rabbi Soloveitchik—ever a visual speaker—claimed that he “saw ghosts.” Harvard, Yale, and Princeton “all began as divinity schools,” he warned, “and Yeshiva, Heaven forbid, could also go the way of all these great and early citadels of American higher education” and become a secular institution, having lost its moorings as a religious institution.³

So far, Rabbi Soloveitchik has not been correct in his prediction. For fifty years, YU has managed to function as a religious undergraduate college, with a dual curriculum of Jewish studies and secular studies, even with a secular charter. Officially, YU is a secular college affiliated with a religious seminary. A deep religious and ethical vision flows from the seminary to the university. Although only the seminary was formally exempt from the nondiscrimination

University, received my BA from the secularly chartered Yeshiva College, and was twice ordained by the Rabbi Isaac Elchanan Theological Seminary of Yeshiva University (its religiously affiliated seminary).

- 1 Norman Lamm, “A EULOGY FOR THE RAV: ‘A great prince in Israel has fallen today’—II Samuel 3:33,” 28 *Tradition: A Journal of Orthodox Jewish Thought* 1 (1993), 13.
- 2 The primary impetus was funding from the New York state government. Like many states, New York has a no-aid provision in its state constitution that prohibits government aid for religious education. The year YU reincorporated itself, the state government announced which schools were deemed eligible for funding. Initially, YU was an ambiguous case, even with a secular charter, although the state later determined that it was eligible. See William E. Farrell, “21 Colleges Ruled Ineligible for Aid,” *The New York Times*, 6 Jan. 1970.
- 3 For more on this, see Rabbi Zevulun Charlop, “The Rav and Dr. Belkin,” in Zev Eleff (ed.), *Mentor of Generations: Reflections on Rabbi Joseph B. Soloveitchik*, (2008), 85, and

rules, both the college and the seminary have functioned as if they were one; for example, almost all the students are traditional Orthodox Jews, an apparent violation of anti-discrimination statutes. While YU has several graduate schools affiliated with it that have generally catered to a diverse population of students, the undergraduate colleges have used tight admission standards that selected only students who were deeply interested in Orthodox Jewish life and lifestyle and wished to study at a gender-segregated institution. The robust dual curriculum includes morning Talmud study and required Bible, Hebrew, and Jewish history coursework. Few applied who did not fit in. The admissions process informally weeded out students who did not fit in well with the religious mission of the undergraduate colleges. In this way, YU managed to maintain a relatively homogenous undergraduate student population without engaging in overtly discriminatory practices. It was able to legally describe itself as nondenominational and at the same time market its undergraduate programs exclusively to Orthodox Jews.⁴

Now YU faces a challenge. Several students recently requested school recognition of a “gay-straight” alliance club at YU. The school administration rejected the club,⁵ stating that although “the Torah is accepting [of] each individual with love while affirming its timeless prescriptions,” the requested LGBTQ club “under the auspices of YU will cloud [the Torah’s] nuanced message.”⁶ The group, known as the YU Pride Alliance, has filed a civil rights complaint against YU with the City of New York Commission on Human Rights. The complaint cites a violation of the New York City Human Rights Law, which on its face applies to the secularly chartered YU.⁷

Andrew Geller, “Rav Responds to Secularization; Sympathizes with Student Rally”, 35 *The Commentator* 13 (April 15, 1970) [Retrieved on 5 July, 2022] <https://yucommentator.org/2019/09/from-the-commie-archives-rav-soloveitchik-decries-secularization-of-yeshiva-students-protest-at-chag-hasemicha/>. For a thoughtful discussion of this in the context of the times, see Jeffrey S. Gurock, *The Men and Women of Yeshiva* (1988), 236–245. Prior to writing this article, Yosef Lemel of the *Commentator* shared with me that *The [Stern College] Observer* published what seems to be close to a transcription of Rabbi Soloveitchik’s remarks on April 15, 1970 in an article entitled “Rav Soloveitchik Speak Out on YU Crisis”, 12 *Observer* 12 (1970).

4 Lee Mitgang, “Yeshiva University Students Wear Two Hats: Yarmulke and Mortarboard”, *Los Angeles Times*, 5 Oct. 1986.

5 Sruli Fruchter, “YU Announces New LGBTQ Inclusivity Policies, Denies LGBTQ Club Formation”, *The Commentator*, 3 Sept. 2020, [Retrieved on 5 July, 2022] <https://yucommentator.org/2020/09/yu-announces-new-lgbtq-inclusivity-policies-denies-lgbtq-club-formation/>.

6 *Ibid.*

7 See the Sexual Orientation Non-Discrimination Act (SONDA), the New York law that prohibits discrimination on the basis of actual or perceived sexual orientation in employment, housing, public accommodations, education, credit, and the exercise

The New York Jewish Week reported simply:

The move intensifies a long-simmering battle for gay recognition at Modern Orthodoxy's flagship institution... The complaint, filed last week, states that YU has "refused to allow an official LGBTQ student group" over the course of many years, and has "suppressed LGBTQ-themed events." The complaint also stated that a senior vice president at the university "tried to pressure student council leaders to reject" the club's second bid for approval in two consecutive years... **Though it is easy to "feel like the underdogs," [a representative of the club] said, he is confident that the grassroots student club has the upper hand. "YU is a non-sectarian institution, with no legal basis for discriminating against LGBTQ students"**⁸ (emphasis added).

As of this writing, the litigation has been conducted in front of Judge Lynn Kotler of the New York Supreme Court (the trial court of New York State).⁹ YU won an initial victory in fighting off a preliminary injunction sought by the plaintiffs, with Judge Kotler initially determining that YU likely fell within the definition of a religious institution under the New York City Human Rights Law, notwithstanding its representations to the contrary to federal and state bodies, and therefore the plaintiffs had not shown that they had a reasonable chance of success.¹⁰ She ruled, however, that there were matters of fact and law that required elucidation, and she converted the YU motion to dismiss to a motion for summary judgment, giving the plaintiffs an opportunity for limited discovery, including a deposition of a YU administrator, to attempt to gather evidence that YU was indeed a secular institution.¹¹

of civil rights. The focus on YU in the LGBTQ world are coordinated, as noted at "Yeshiva University Students Hold Pride Parade" at <https://gaycitynews.com/yeshiva-university-students-hold-pride-parade/>.

- 8 The Jewish Week, "LGBTQ Students File Complaint Against Yeshiva U: Battle for gay rights intensifies as students take discrimination grievance to NYC Human Rights Commission" (Feb 18, 2010). [Retrieved on 5 July, 2022] also at <https://jewishweek.timesofisrael.com/battle-for-gay-recognition-intensifying-at-yeshiva-u/>. See also [Retrieved on 5 July, 2022] <https://nypost.com/2020/03/07/lgbtq-students-file-discrimination-complaint-against-yeshiva-university/>.
- 9 See Index number 154010/2021 for the case entitled "YU PRIDE ALLIANCE vs. YESHIVA UNIVERSITY" at [Retrieved on 5 July, 2022] <https://iapps.courts.state.ny.us/nyscef/DocumentList?docketId=TpMNHEU1/861D4BDWhg95A==&display=all>.
- 10 Order of the Honorable Lynn R. Kotler, 2021 Aug. 8 at [Retrieved on 5 July, 2022] <https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=DQjqb6i1Q1xnw4pMXQFhw==>.
- 11 Order of the Honorable Lynn R. Kotler, 2021 Oct. 12, at [Retrieved on 5 July, 2022] <https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=IqoMfndSpK7ovp83HdPtWw==>.

In June of 2022, Judge Kotler released her decision and found in favor of the plaintiffs,¹² determining both that YU is a secular institution and that recognizing the YU Pride Alliance did not violate the First Amendment rights of YU as it did not restrict its exercise of religion. Her decision rested on several factors, including the YU charter and the representations YU has made for state and federal funding, as well as members of YU faculty acknowledging that they were subject to the New York City Human Rights Law as a non-sectarian institution.¹³ She also found that the primary purpose of YU was education, religion being secondary to it.¹⁴ With regard to the exercise of religion by YU, Judge Kotler ruled that the law is neutral and of general applicability, and that it already has a carve-out for religious corporations.¹⁵ Finally, simple recognition of a group does not mean endorsement of it or its message.¹⁶ YU has indicated that it intends to appeal the decision.¹⁷

Even if YU is successful in appealing the decision, it is likely that the institution, and others like it, will face similar challenges in the years ahead. Operating as a secularly chartered but religiously motivated university (hereinafter, SCbRMU) will become increasingly complex, as such institutions will contend both with state and federal anti-discrimination laws. Trying to get the benefits of both worlds, enjoying the financial benefits of a secular institution and at the same time claiming religious exemptions from anti-discrimination statutes, would become more and more difficult to justify legally. This may lead to increased public pressure to close these loopholes and prevent institutions

12 Order of the Honorable Lynn R. Kotler, 2022 June 14, at [Retrieved on 5 July, 2022] <https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=rwka4dewc1G0d7L4FzWaw==>.

13 *Ibid.*, at 7–10.

14 *Ibid.*, at 11–12.

15 *Ibid.*, at 14–15; Judge Kotler relied on the precedent of the Supreme Court decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), discussed in more detail in Section 2.3.

16 *Ibid.*, at 15.

17 A YU spokesperson issued the following statement:

“The court’s ruling violates the religious liberty upon which this country was founded. The decision permits courts to interfere in the internal affairs of religious schools, hospitals, and other charitable organizations. Any ruling that Yeshiva is not religious is obviously wrong. As our name indicates, Yeshiva University was founded to instill Torah values in its students while providing a stellar education, allowing them to live with religious conviction as noble citizens and committed Jews. While we love and care for our students, who are all—each and every one—created in G-d’s image, we firmly disagree with today’s ruling and will immediately appeal the decision.”

See Chaim Book, S. Jonas, N. Katz, & J. Levin, “YU Must Allow LGBTQ Club to Form on Campus, Court Rules”, *The Commentator*, 14 Jun 2022, [Retrieved on 5 July, 2022] at <https://yucommentator.org/2022/06/yu-must-allow-lgbtq-club-to-form-on-campus-court-rules/>.

from engaging in certain practices. The operative question here is when secularly chartered educational corporations should be eligible to receive religious exemptions, and whether they should be able to do so with regards to discrimination against statutorily protected characteristics like sexual orientation.

This article describes what I believe are the best legal options SCbRMUs have if they wish to avoid costly litigation. The remainder of the article is organized as follows. I first describe the legal background for anti-discrimination law in the US regarding sexual orientation and the relevant case law concerning religious universities. I also discuss some current cases that may affect existing religious exemptions and briefly touch on recent cases concerning freedom of expression and religious education. Next, using YU as an example of a SCbRMU, I discuss the current legal issues, that have led to this situation, and why these issues are arising only now. I proceed by listing several possible choices that YU has, and the advantages and disadvantages of each, then put forward what I believe to be its best and most justifiable position. I conclude by summarizing my arguments and discussing the inherent and irreconcilable problem at the heart of SCbRMUs.

2 Brief Overview of Legal Background

2.1 *Federal Law*

The primary federal statute relevant for SCbRMUs is Title IX of the Education Amendments of 1972 (“Title IX”), which states: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” In more recent years, both the Obama and Biden administrations determined that this prohibition should be understood to extend to discrimination on the basis of sexual orientation and gender identity.¹⁸

Courts have also determined that discrimination on the basis of sexual orientation or gender identity can also be considered discrimination on the basis of sex. The most significant recent case has to do with a related statute, Title VII of the Civil Rights Act of 1964 (“Title VII”). Title VII prohibits discrimination in employment on the basis of “race, color, religion, sex, or national

18 For the Obama Administration, see [Retrieved on 5 July, 2022] <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf> and [Retrieved on 5 July, 2022] <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>. For the Biden administration, see “U.S. Department of Education Confirms Title IX Protects Students from Discrimination Based on Sexual Orientation and Gender Identity” at

origin.” As the Department of Justice noted, “Though Title VII and Title IX are two distinct statutes, their statutory prohibitions against sex discrimination are similar, such that Title VII jurisprudence is frequently used as a guide to inform Title IX.”¹⁹ In *Bostock v. Clayton County*,²⁰ the plaintiffs had been terminated from their jobs due to their sexual orientation or gender identity and alleged that this was a violation of Title VII. The plaintiffs argued that they were included in a class already enumerated in the statute. The Court found in favor of the plaintiffs and determined that discrimination on the basis of sexual orientation or gender identity fell within the category of discrimination on the basis of sex. Justice Gorsuch wrote for the majority opinion:

An employer who fired an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.²¹

As noted, the language of Title VII is nearly identical to that of Title IX, as are its statutory protections, aside from dealing with employment rather than educational institutions, and therefore the findings of the Court likely extend to Title IX as well. Indeed, some federal courts have already taken that step.²² Thus it seems clear that in the United States secular educational institutions cannot discriminate based on LGBTQ status.

Note, however, that Title IX provides for exemptions to religious institutions. The statute does not provide for a blanket exemption, but rather exemptions are granted on a case-by-case basis and “only to the extent Title IX would be inconsistent with the religious tenets of the organization.” As a result, a federal class-action lawsuit has been brought against the Department of Education

[Retrieved on 5 July, 2022] <https://www.ed.gov/news/press-releases/us-department-education-confirms-title-ix-protects-students-discrimination-based-sexual-orientation-and-gender-identity>.

19 “Title IX Cover Addendum post-Bostock”, Title IX Legal Manual, Department of Justice, [Retrieved on 5 July, 2022] <https://www.justice.gov/crt/title-ix#Bostock>.

20 590 U.S. ___ (2020).

21 *Ibid.* at 2.

22 See, e.g., *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 616–17 (4th Cir. 2020) (“Although *Bostock* interprets [Title VII], it guides our evaluation of claims under Title IX.”), *as amended* (Aug. 28, 2020), *reh’g en banc denied*, 976 F. 3d 399 (4th Cir. 2020), *cert. denied*, No. 20–1163 (June 28, 2021); *B.P.J. v. W. Virginia State Bd. of Educ.*, No. 2:21-cv-00316, 2021 WL 3081883, at *7 (S.D.W. Va. July 21, 2021); *Koenke v. Saint Joseph’s Univ.*, No. CV 19–4731, 2021 WL 75778, at *2 (E.D. Pa. Jan. 8, 2021); *Doe v. Univ. of Scranton*, No. 3:19-cv-01486, 2020 WL 5993766, at *11 n.61 (M.D. Pa. Oct. 9, 2020).

seeking to strike down religious exemptions to Title IX discrimination with regard to sexual orientation and gender identity.²³ This lawsuit focuses on Christian colleges, particularly those that explicitly state that they do not subscribe to conceptions of sexual orientation or gender identity that go against their religious beliefs, and therefore are exempt from Title IX anti-discrimination laws on that basis. If religious exemptions are tightened as a result of this lawsuit, YU and other SCbRMUs will have considerably greater legal difficulties.

As noted, every educational institution that receives federal funding is subject to Title IX, and opting out of federal funding tends to be impractical. A small number of religious colleges do opt out of receiving federal funding, including entitlements to federal financial aid for their students or federal grants for professors, precisely to avoid even requiring a religious exemption to Title IX. But the vast majority of universities, like YU, do not have this option and would be unable to function without federal aid.²⁴

2.2 *State and Municipal Law*

Several states have also passed anti-discrimination legislation or instituted human rights codes that prohibit discrimination on the basis of sexual orientation. The New York Human Rights Law would be the governing statute in the case of YU. The statute states with regards to educational institutions that “[i]t shall be an unlawful discriminatory practice for an educational institution to deny the use of its facilities to any person otherwise qualified, or to permit the harassment of any student or applicant, by reason of his... sexual orientation...”. Denial of facilities extends to refusal to authorize groups to form under the auspices of the university and receive funding and official use of university facilities. The statute exempts religious institutions in two ways. First, it explicitly allows “any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization” to favor “persons of the same religion or denomination” and to “tak[e] such action as is calculated by such organization to promote the religious principles for which it is established or maintained.” The statute also

23 Kiara Alfonseca, “LGBTQ college students allege discriminatory treatment at Christian schools” ABC News, 2022 Apr. 10, [Retrieved on 5 July, 2022] at <https://abcnews.go.com/US/lgbtq-college-students-allege-discriminatory-treatment-christian-schools/story?id=83788043>.

24 See Ibby Caputo and Jon Marcus, “The Controversial Reason Some Religious Colleges Forgo Federal Funding”, The Atlantic, 7 July 2016, at [Retrieved on 5 July, 2022] <https://www.theatlantic.com/education/archive/2016/07/the-controversial-reason-some-religious-colleges-forgo-federal-funding/490253/>.

provides a more blanket exemption that “a religious corporation incorporated under the education law or the religious corporations law” shall always be considered private, and laws that apply to places of “public accommodation” will not apply to it. But a SCbRMU would likely be unable to take advantage of this second exemption, and other language in the statute may make it more difficult for it to claim any sort of exemption in the first place. The statute defines an educational institution as “any education corporation or association which holds itself out to the public to be non-sectarian and exempt from taxation pursuant to the provisions of article four of the real property tax law [which covers not-for-profit corporations].”

Many cities and counties have also passed anti-discrimination statutes. For SCbRMUs, this can be particularly relevant in states that have not passed anti-discrimination laws concerning sexual orientation or gender identity. Thus, being located in a particular urban area may entail being subject to a stricter legal regime than what applies to other areas of a given state. New York City, where YU is located, has its own human rights law. It is generally seen as broader than the state law, with lower thresholds of proof for plaintiffs, and it is under these provisions that the YU Pride Alliance has brought its lawsuit. But the relevant provisions are substantively similar to the state law quoted above, with the same exclusion of a “religious corporation incorporated under the education law” and allowance of religious organizations to take actions that promote religious principles.

When litigation has occurred based on state human rights statutes, the results have been mixed between jurisdictions. Georgetown University (GU) attempted to deny recognition to gay rights groups at its undergraduate college and its law school based on its adherence to Catholic doctrine. After nearly a decade of litigation, the D.C. Court of Appeals split the difference, stating that Georgetown was not required to recognize the group and thereby endorse it, but Georgetown also had to provide the group equal benefits to those of other student groups.²⁵ The Court determined this to be a correct balance between the freedom of religion and expression of GU on one hand, and the compelling interest of the government in preventing discrimination on the basis of sexual orientation on the other. Note that D.C. does not have the same blanket statutory exception for religious educational institutions in its human rights code that New York does. Rather, its code allows a religious organization to take into account religion in hiring or admissions policies, but the Court noted that this exemption did not allow GU to take into account

25 *Gay Rights Coalition of Georgetown University v. Georgetown University*, D.C. Court of Appeals, 496 A.2d 567 (1985).

any other protected characteristic, including sexual orientation, in allocating benefits to its students.²⁶

By contrast, in 2005, the New Jersey Court of Appeals found in favor of Seton Hall University, another Catholic institution, in a claim brought by a student who wished to start a Pride organization at the university.²⁷ The plaintiff argued that Seton Hall had waived any potential religious exemption by publishing anti-discrimination policies that included sexual orientation as a factor. In that case, the Court found that the religious exemption in New Jersey law was comprehensive, and could not be waived by a religious organization. It further ruled that the language of the anti-discrimination policy of the university, which specified that a person could not be denied “admission to the University or to any of its programs and activities” based on sexual orientation, did not imply a requirement to endorse an LGBTQ student organization.

At times litigation was not necessary to effect change at religiously affiliated schools. Pushback on LGBTQ student groups at Touro University California (a medical school affiliated with Touro University, which describes itself as “Rooted in Jewish tradition, built on Jewish values”)²⁸ and at New York Medical College (now also affiliated with Touro, but then under the auspices of the New York Roman Catholic Archdiocese) led to both medical schools backing down under serious public pressure, as well as pressure from licensing groups and local government.²⁹

2.3 *Recent Trends in Religious Freedom and Religious Education Adjudication*

2.3.1 Hobby Lobby

In recent years, the Supreme Court has been moving in a more expansive direction concerning freedom of religious expression. In some cases, this has been due to legislation. The Religious Freedom Restoration Act of 1993 (RFRA) and the Religious Land Use and Institutionalized Persons Act (42 U.S.C. § 2000cc et seq.) (RLUIPA) both explicitly require the government to use the least restrictive means in pursuing its interests if the action entails a burden on free expression. These statutes have made it easier for plaintiffs to prevail

²⁶ *Ibid.*, at note 13.

²⁷ *Romeo v. Seton Hall University*, Superior Court of New Jersey, Appellate Division, 378 N.J. Super. 384 (2005).

²⁸ See [Retrieved on 5 July, 2022] <https://www.touro.edu/about/jewish-heritage/>.

²⁹ See [Retrieved on 5 July, 2022] <https://www.sfgate.com/bayarea/article/VALLEJO-Gay-rights-group-not-banned-school-says-2488472.php> and [Retrieved on 5 July, 2022] <https://www.glma.org/index.cfm?fuseaction=Feature.showFeature&CategoryID=4&FeatureID=26#::~:~:text=GLMA%20Executive%20Director%2C%20Joel%20Ginsberg,unique%20needs%20of%20LGBT%20patients.%E2%80%9D> for details therein.

in federal religious discrimination cases than in previous legal regimes. The statutes were a legislative response to *Employment Division v. Smith*, where the Court determined that the state did not need to take into account religious accommodation for a neutral, generally applicable law.³⁰ RFRA and RLUIPA, as well as some state-level RFRA, were intended to require the government to accommodate religious practice under more circumstances.

RFRA was a significant factor in the determination of *Hobby Lobby*,³¹ where the Court found that a closely-held for-profit corporation was able to assert a religious claim allowing it an exemption from providing medical insurance to employees that covered certain forms of contraceptives that it considered abortifacients. The Court asserted that the company was able to do so because the government had already provided a program whereby religious employers could apply for exemptions concerning the same medication, and therefore the government had already indicated that it was able to accommodate these claims. As a result, it was self-evident that the initial legislation did not involve the least restrictive means to pursue the government's purpose.³² Allowing a relatively small religious exemption does not indicate that the Court would be open to allowing exemptions concerning discrimination law or the like to otherwise secular entities. The Court used the example of racial discrimination to note explicitly with regard to religiously-motivated discriminatory hiring practices that existing anti-discrimination laws are precisely tailored and serve a compelling purpose.³³ In *Bostock*, the Court described RFRA as "a kind of super statute, displacing the normal operation of other federal laws," and noted that "it might supersede Title VII's commands in appropriate cases."³⁴ But RFRA is not a defense in and of itself; the Seventh Circuit Court of Appeals, for example, has determined that Title VII protection of gender identity is indeed the least restrictive means to pursue the compelling government interests of preventing discrimination, and that the RFRA balancing test would not protect a religious claimant from having to follow Title VII (and by extension, Title IX).³⁵

It is possible to argue that *Hobby Lobby*, which concerned a for-profit corporation that cannot legally declare itself religious, cannot be extended to a case involving a SCbRMU, where the educational institution typically has the option to incorporate as a religious educational institution but has chosen not

30 *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

31 *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

32 *Ibid.* at 730–731.

33 *Ibid.* at 733.

34 *Bostock supra* note 20 at 32.

35 *EEOC v. R.G.*, 884 F.3d 560 (6th Cir. 2018) at 595; *aff'd on other grounds by Bostock supra* note 20.

to. In this case, it is more difficult to argue that a religious exemption should apply to a nominally secular institution that has explicitly chosen that designation. By contrast, a for-profit corporation cannot incorporate as a religious for-profit corporation, and therefore it is more justified to look beyond the corporate form. *Hobby Lobby* was also a closely-held corporation, so the Court saw no issue with attributing the owners' religious beliefs to the company; secular non-profits like universities presumably would not be able to meet similar criteria.

RFRA is highly significant in this case. First, it is a federal law that applies only to the federal government and federal laws. State-level RFRA's are required to challenge state-level actions, and in the absence of an RFRA law, the existing First Amendment test under *Smith* applies. In addition, there is currently a question whether RFRA applies in cases where the government is not a party, as the provision states that a person "can obtain appropriate relief against a government" and puts the onus on the government to show that legislation can satisfy the RFRA test. Some have argued that this could lead to seemingly absurd results, like an employer being able to use RFRA as a defense against a government organization alleging discrimination, but not against an employee.³⁶ But even presuming that RFRA can apply to cases between private parties, this would be of little help to SCbRMUs in states that do not have an RFRA when dealing with state-level legislation. This is particularly true when the state offers a category called "religious educational corporation."

2.3.2 Other Cases

*Masterpiece Cakeshop*³⁷ appears to be the Supreme Court case most similar to the YU Pride Alliance case, as it involved a small business refusing to provide a wedding cake for a same-sex wedding because of the owner's religious beliefs, for which he was sanctioned by the state commission for human rights. This case took place in Colorado, which does not have any form of state RFRA, so the plaintiff was not able to rely on RFRA and structured his arguments based on his freedom of religious expression and freedom of speech. The Court found in favor of the store owner, but did not determine whether his freedom of religious expression could outweigh the interest of the state in preventing discrimination. Rather, its ruling was carefully limited, focusing on alleged misconduct and bias by the Colorado Human Rights Commission, without engaging in the

36 For an overview of the arguments, see *Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006) and the dissent therein by Judge Sotomayor (as she was then).

37 *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 584 U.S. ___ (2018).

substance of the matter.³⁸ Denial of a neutral forum to the plaintiff allowed the Court to sidestep the numerous “difficult issues” of the case.

The Court has also expanded the ability or obligation for states to fund religious education. The Court has found that a church-run preschool must be eligible to apply for an aid program for infrastructure that was available to secular institutions.³⁹ The Court also determined that if a state provides funding or tax credits for private education, it cannot exclude religious institutions from the program.⁴⁰ In both cases, the Court reached these conclusions despite state constitutional provisions that prohibited funding for any religious institution, and it determined that these provisions, despite being rooted in Establishment concerns, went too far in restricting freedom of expression in such cases. These cases dealt with explicitly religious institutions, unlike SCbRMUs, and did not address the matter of religious exemptions from anti-discrimination law.

Finally, although the Supreme Court has never directly addressed the issue, state and federal courts have attempted to define or categorize what a religious institution is with respect to entitlement to religious exemptions. Typically, these attempts have arisen with regard to employment issues because religious institutions are entitled to unique protection, known as the “ministerial exception.” Any employee of a religious institution who meets the definition of a “minister” cannot challenge employment decisions or terminations in court, even under civil rights statutes, because courts have found that the First Amendment bars courts from interfering in what it views as inherently religious decisions.⁴¹

As noted, the Supreme Court case law in this area has focused only on defining what type of employees can be termed “ministers” when they work at a religious corporation. Other jurisdictions, however, have sought to define whether

38 The commissioner of the Colorado Civil Rights Commission stated: “Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to— to use their religion to hurt others” (*Ibid.* at 13). The Court found this language “cast doubt on the fairness and impartiality of the Commission’s adjudication of [the] case” (*Ibid.* at 14).

39 *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. ____ (2017).

40 *Espinoza v. Montana Department of Revenue*, 591 U.S. ____ (2020). The case of *Carson v. Makin* (20–1088, 596 U.S. ____ 2022), decided on June 21, 2022, makes it exceedingly unlikely that discrimination against religiously chartered schools is still constitutional. The court stated that “[i]n particular, we have repeatedly held that a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefit” (slip op, page 7). This does nothing to help SCbRMU institutions, however.

41 *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012), *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 US _ (2020).

disparate entities such as rest homes⁴² or hospitals⁴³ can qualify as religious institutions. Recently, a state court in Massachusetts set out a helpful review of the case law that is particularly relevant to educational institutions:⁴⁴

First, “in order to invoke the [ministerial] exception, an employer need not be a traditional religious organization such as a church, diocese, or synagogue, or an entity operated by a traditional religious organization.” Conlon, 777 F.3d 829 at 834 (quotations and citation omitted). Second... the exception applies to a “religiously affiliated entity,” whose “mission is marked by clear or obvious religious characteristics.” Shaliehsabou, 363 F.3d at 310; see also Kirby, 426 S.W.3d at 609 (“An entity, allegedly religiously affiliated, will be considered a ‘religious institution’ for purposes of the ministerial exception ‘whenever that entity’s mission is marked by clear or obvious religious characteristics.’”) Third, and of particular significance to this case, “[j]ust like churches, schools may pursue a religious mission. Indeed, education is at the core of religious activity for many Americans.” *Duquesne Univ. of the Holy Spirit v. NLRB*, 947 F.3d 824, 828 (D.C.Cir. 2020)

It may be questioned whether SCbRMUs can fall within this relatively expansive category, considering that their mission may still retain some religious characteristics. But both in the above-mentioned Massachusetts case and in the *Duquesne* case from the D.C. Circuit, the courts were dealing with schools that were explicit about their religious nature in their corporate documents and in their publicly stated missions and affiliations.⁴⁵ By contrast, SCbRMUs by definition lack official religious affiliations or religious references in corporate documents, and therefore it is much more questionable whether they fall within these categories.

3 The Discrimination Litigation History of Yeshiva University and What Has Changed

As noted, YU avoided the many complexities in its undergraduate institutions that largely serve a religious community by employing several strategies, such

42 *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299 (4th Cir. 2004).

43 *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223 (6th Cir. 2007), rev'd on other grounds by *Hosanna-Tabor supra* note 41.

44 *Deweese-Boyd v. Gordon College*, 2020 Mass. Super. LEXIS 73 (Sup. Ct. Mass.), aff'd by *DeWeese-Boyd v. Gordon Coll.*, 487 Mass. 31, 163 N.E.3d 1000 (2021) (Sup. Jud. Ct. Mass.).

45 *Ibid.* at 40–44; *Duquesne Univ. of the Holy Spirit v. NLRB*, 947 F.3d 824 (D.C.Cir. 2020) at 833.

as requiring obligatory religious study. This has not been the case with regard to the graduate schools of YU, which are—or were, in the case of the Albert Einstein College of Medicine, formerly the YU medical school—secular in their student body and academic orientation and never had either a critical mass of traditional Jewish students or a commitment to any significant study of Jewish law, texts, or values. Rather, the graduate schools have merely accommodated traditional Jewish practice by providing kosher food and scheduling classes around both the Jewish and the secular holidays.⁴⁶ Other than the Bernard Revel School of Jewish Studies and the Azrieli Graduate School of Jewish Education and Administration, the YU graduate schools are indisputably secular in their orientation. They allow social, religious, and student affinity clubs and organizations that no Orthodox Jewish organization would allow. They have students with no connection to Judaism, who attend merely because of the lofty academic quality of the institution, and there have been clashes between cultures as a result.

For example, controversy erupted in 1995, when a student speaker at the convocation for Cardozo Law School, the YU-affiliated law school, referenced his partner in his speech. At the time, YU hesitated to engage in a legal fight concerning LGBTQ student groups in the affiliated graduate schools, despite the furor this incited in certain circles. The school president was quoted as saying: “To deny gay clubs the right to function would be to deny Yeshiva University its right to exist. We have no intention of closing our doors over this... It is more important [to keep the clubs so] our school stays open.”⁴⁷ At the time, YU had a sufficiently significant concern about finances to avoid even confronting this issue. To address the backlash, memos were circulated to justify the decision not to pursue legal avenues to shut down the groups. These documents emphasized the small size of the groups and the need for governmental funding for YU to survive, as well as the fact that at the time these groups were limited to the graduate schools, which do not have rules concerning religious observance and study.⁴⁸ For example, unlike some Christian-affiliated law schools,⁴⁹

46 On this and Rabbi Soloveitchik’s observations about why this is proper, see the remarks of Rabbi Soloveitchik entitled “On the Creation of Yeshiva University’s Albert Einstein College of Medicine” in (Nathaniel Helfgot, ed.), *Community, Covenant and Commitment: Selected Letters and Communications* (2005), 85–92.

47 Binyamin Jolkovsky, “Yeshiva U. Facing Gay Backlash”, *Jewish Daily Forward*, 30 Sept. 1994.

48 This memo has been included as an exhibit in the YU Pride Alliance case and can be found at [Retrieved on 5 July, 2022] <https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=wmvzFClacaObC5h3prj/A==>.

49 See, for example, Regent University, which includes, as part of its Student Handbook, a sexual misconduct policy articulated as follows: “Regent University fully accepts the teachings of the traditional Biblical view with regard to the goodness of our sexuality,

YU never expected Cardozo Law students to sign any religiously motivated community compact or code of conduct, although the school library is closed on Shabbat and Jewish holidays.

In 2001, YU sought to restrict the right to married students' housing at Albert Einstein School of Medicine to married students (at the time, same-sex marriage had not yet been made legal anywhere in the United States), and not allow housing for students in a same-sex relationship and their partner. Two students sued, and the New York Courts ruled that the plaintiffs had articulated a valid claim that YU policy would violate New York City ordinances⁵⁰ legally mandating that housing be given to such students.⁵¹ YU settled the case and changed its policy, allowing housing in the Einstein dorms for same-sex couples who were not married.⁵²

By contrast, the undergraduate schools were perceived to be different and as having a strong religious core despite the secular charter. As a result, YU did not plan for the future in a universe in which it was becoming increasingly more difficult to be both secularly chartered and religiously affiliated. In 1995, Rabbi Chaim Dov Keller, a prominent rabbi, critic of YU, and alumnus, wrote in a public letter to Rabbi Dr. Norman Lamm, President of YU at that time: "Are your undergraduate colleges, Yeshiva College and Stern College for Women, not under the same nondenominational charter? Sooner or later you will have to face the problem of gay students in these schools. How will you avoid the

the importance of chastity, and the place of heterosexual marriage as God's intended context for complete sexual expression to occur (Gen. 2:21–24). Sexual misconduct that is prohibited includes disorderly conduct or lewd, indecent, or obscene conduct or expression, involvement with pornography, premarital sex, adultery, homosexual conduct or any other conduct that violates Biblical standards." (See <https://www.regent.edu/admin/stusrv/docs/StudentHandbook.pdf>, at 35, section 5.2.16). This policy extends to all students, including those in its law school and other graduate programs.

50 In 2000, secular institutions in New York City could not discriminate against same-sex unmarried couples based on the combination of three laws: (1) NY Roommate Law (Real Property Law, section 235(f)); (2) New York City Human Rights Law sections 296(2-a), 296(4), and 296(5); (3) New York City Administrative Code 8–197(5). The law has changed slightly since the legalization of same-sex marriages, but the differences are not important in this context.

51 *Levin v. Yeshiva University*, 96 N.Y.2d 484 (NY Ct of Appeals 2001). (In New York, the Court of Appeals is the highest court in the State.) For a popular recounting of the win by the students, see "Yeshiva Lesbians Win Ok To Sue Over Dorms" NY Post July 3, 2001 at [Retrieved on 5 July, 2022] <https://nypost.com/2001/07/03/yeshiva-lesbians-win-ok-to-sue-over-dorms/>.

52 See Adam Dickter "Yeshiva University Changes Housing Policy: Medical School To Allow Same-Sex Couples To Share Housing" (August 16, 2002) in *Voices of New York* [Retrieved on 5 July, 2022] at https://voicesofny.org/2002/08/nycma-voices-31-news-news_2/.

problem there? Whatever means you are presently using will soon become obsolete, if you are true to your duty as the head of a non-denominational institution to ‘conform to the secular law.’⁵³

In New York, the sole direct financial support by the state for independent colleges based on degree productivity is called “Bundy Aid,” and as the Commission on Independent Colleges and Universities in New York notes, “Bundy Aid has been a centerpiece of New York’s compact with Independent Sector colleges and universities for 50 years.”⁵⁴ But schools with religious charters are not allowed to receive this funding. The same is true for many other government programs.

In the face of governmental funding discrimination, YU changed its legal status to secular in 1970 and tried to satisfy its religious requirements *sub rosa*. It has been clear, however, that YU did not recharter as a result of a rethinking the core mission of the school or in a desire to distance itself from Orthodox Judaism. It was perceived as a matter of economic necessity. At the time, the state government had indicated an openness to amending the state constitution to allow funding for religious higher education,⁵⁵ although the change did not come to fruition. Thus, it is reasonable to believe that both YU and the state perceived the change as a “legal fiction” with little effect on YU and how it functions.⁵⁶ But the informal understandings of legislators and administrators have little bearing on the legal obligations of YU 50 years later. Beset by financial problems, particularly after the 2008 recession, YU continued to define itself as a secular institution as a matter of law, mostly to remain eligible for a variety of financial assistance provided by the state and national government. When tensions arose, as they occasionally did, they were addressed discreetly, without publicity or legal challenge. All knew that this situation was somewhat disingenuous and legally tenuous because YU was not secular like NYU or Columbia, or even Emory; in other words, its legal status did not reflect its seemingly discriminatory practices in admission or the conduct of its undergraduate colleges and students.

Matters in the undergraduate colleges, however, did not come to a head until recently, and YU was able to rely on the homogeneity of the religious outlook

53 See Rabbi Chaim Dov Keller, “A Letter That Should Never Have Been Published” *The Jewish Observer* pages 31–32 (Summer 1995) also found at [Retrieved on 5 July, 2022] <https://agudah.org/wp-content/uploads/2016/08/JO1995-V28-N05.pdf>. In 2002, the author wrote to Rabbi Lamm concerning the same point at some length, as did many others.

54 <https://cicu.org/legislation-policy/state-aid-programs/direct-institutional-bundy-aid>.

55 Grace Lichtenstein, “Blaine’ Provision Born 75 Years Ago”, *The New York Times*, 17 Feb. 1970.

56 Gurock *supra* note 3 at 239.

of its undergraduate student body to prevent controversy. But public perception of LGBTQ issues has shifted rapidly,⁵⁷ and that of the Modern Orthodox community is no exception. Many in the Modern Orthodox community are comfortable with the call to ban discrimination based on sexual orientation and the extension of Title VII and Title IX to prohibit such practices⁵⁸ (I am, as I note here),⁵⁹ while at the same time exempting religious institutions from anti-discrimination obligations. Furthermore, there is much greater tolerance of the LGBTQ movement and sympathy for it in the Orthodox community now compared to even a decade ago.

Yeshiva College has expanded its admission base and has admitted many more students who are less committed to a complete and full Orthodox life than in earlier times.⁶⁰ The number of students who are not Sabbath-observant has risen, and the number of male students who do not wear the customary head covering has increased as well. The number of hours of Jewish studies required per student has gone down, and there is a greater variety of programs for both

57 Support for same-sex marriage, for example, in the U.S. has risen from 27% in 1997 to 70% in 2021; see Justin McCarthy, “Record-High 70% in U.S. Support Same-Sex Marriage”, Gallup, 2021 June 8, at [Retrieved on 5 July, 2022] <https://news.gallup.com/poll/350486/record-high-support-same-sex-marriage.aspx>.

58 *Bostock supra* note 20; see also Michael J. Broyde, “The Equality Act Is Good For The Jews” *The Jewish Press*, 3 July 2019 at [Retrieved on 5 July, 2022] <https://www.jewishpress.com/indepth/opinions/point-counterpoint-2/2019/07/03/>.

59 When I published an article in the YU student newspaper (the Commentator), upon which this article elaborates, entitled “The Ghosts Have Become Alive: Yeshiva University and the Future of Religiously Affiliated Higher Education in America,” on May 10, 2020 [Retrieved on 5 July, 2022], critics commented that I take no stand on the moral correctness of the YU view. I repeat that “error” here. Over the years, the leadership of YU has made it clear that they viewed the formation of an LGBTQ student group or club of the type sought now as incompatible with the core religious mission of YU. My views can be found in an article from 1993, entitled [Retrieved on 5 July, 2022] “Bullets that Kill on the Rebound: Discrimination Against Homosexuals and Orthodox Public Policy,” as well as in this [Retrieved on 5 July, 2022] blog post from 2019. My more thorough analysis of the relevant Jewish Law issues can be found at [Retrieved on 5 July, 2022] <https://www.jewishpress.com/indepth/opinions/homosexuality-and-halacha-five-critical-points/2010/03/17/> [retrieved 6 July, 2022].

60 See, for example, “How Bare Heads Are More Than Just Bare Heads, and Why It Matters for YU,” which notes “Indeed, Yeshiva University accepts students spanning a wide range of religious commitment and does not enforce any religious observance on its students. It is an open institution that welcomes non-religious students who want to connect to and learn from Judaism in their own way, allowing everyone to feel comfortable in his own level of observance” at [Retrieved on 5 July, 2022] <https://yucommentator.org/2018/10/bare-heads-just-bare-heads-matters-yu/> and [Retrieved on 5 July, 2022] <https://yucommentator.org/2018/10/response-ask-bareheaded-students-wear-kippot/>). This is a far cry from the historical policies and social practices of many other eras of YU.

men and women that are not based on classical text study. Furthermore, there are many more programs that compete with YU for classically yeshiva-trained students, reducing the number of those who end up at YU. These trends have brought to YU a higher percentage of students who are not or who are less traditionally Orthodox.

These shifts in admission policy and attitudes even within the target population of YU have left the university in a quandary that is also faced by other SCbRMUs. Title VII and Title IX increasingly regulate the conduct of secular institutions, educational and otherwise. YU simply cannot endorse or condone same-sex relations in any manner consistent with Jewish law as it understands it,⁶¹ and yet federal law directly denies secular institutions the right to engage in religiously-based discrimination against LGBTQ populations. SCbRMUs find themselves in a tenuous position, needing to prove their religious credentials when making claims for exemptions and leaving said exemptions completely vulnerable to shifts in legislation, adjudication, and public opinion.

4 Possible Responses by Secularly Chartered but Religiously Motivated Universities

In response to this dilemma, SCbRMUs have four reasonable options and one unreasonable one, as described below.

First, SCbRMUs can allow such clubs to open and permit students to conduct themselves in a manner not consistent with their faith. This approach is not only consistent with their secular charter but also legally the easiest to implement; in the case of YU, it would require accepting the judgment of the New York Supreme Court. This was the outcome that Rabbi Soloveitchik feared most when he spoke fifty years ago about YU, which is that the educational agenda would be secularized.⁶² It would mean the abandonment of the historical mission of many such institutions. YU in particular was intended to meld the best of Western culture with traditional Jewish law and be an educational institution that was consistent with both the vision of elite North American education institutions, like Harvard, and elite Jewish education institutions,

⁶¹ This is not the place to address this issue in detail. See, for example, “Statement of Principles on the Place of Jews with a Homosexual Orientation in Our Community” at [Retrieved on 5 July, 2022] <https://statementofprinciplesny.blogspot.com/> or Michael J. Brojde and Shlomo Brody “Homosexuality and Halacha: Five Critical Points” at [Retrieved on 5 July, 2022] <https://www.jewishpress.com/indepth/opinions/homosexuality-and-halacha-five-critical-points/2010/03/17/> or many others.

⁶² *Supra* note 3.

like Volozhin, a legendary Eastern European yeshiva run by the ancestors of Rabbi Soloveitchik in the 19th century.⁶³

Second, SCbRMUs can seek to continue their current policy of being nominally secular while acting functionally like a religious institution. Like Yeshiva, SCbRMUs can double down on the practice of adopting *pro forma* secular policies that comply with the legal requirements for neutrality while functionally reinforcing their religious mission. For example, they could prohibit all student clubs that are not academic in nature and not under the aegis of an academic department to prevent the opening of a “gay-straight alliance” club. They could tighten enrollment policies to reduce the likelihood of students being interested in these clubs, and raise the threshold of student signatures needed to form a social club to a high number that would reduce the likelihood of such a club being able to be formed, consistent with the neutral secular rules that exist now. Religious student clubs could be rechartered under the affiliated religious seminary, given that almost all SCbRMUs have an associated religious seminary exempt from these laws.

The advantages of this approach are three-fold. It is a tried and true method that many have used before, and administrators are familiar with it. It continues to allow access to the pools of money provided to secularly chartered institutions. Finally, it seems at first glance to be ideologically more consistent with the basic message of all SCbRMUs: at their core, these institutions assert that one can be both a religious and a secular person without contradiction. The movement away from that ideal would be disconcerting.

As noted, this approach opens these institutions to potential litigation and leaves their status dependent on outside certifying agencies that will always be befuddled by the parochial nature of SCbRMUs, despite their incorporation as secular and nondenominational entities. It also leaves these institutions in an awkward political and religious position, where they will be pressured on both sides of the debate. They will be pushed both toward greater recognition of the LGBTQ community, as is already the case in fully secular colleges, and pressured by those who seek a more traditional observance of the norms of their faith. For example, a similar situation has arisen at the University of Notre Dame, a Catholic university that faced controversy in 2021 when a student wrote an editorial for an independent student newspaper demanding that the

63 The exact content of this mission is beyond the scope of this article. See Norman Lamm, *Torah Umadda: The Encounter of Religious Learning and Worldly Knowledge in the Jewish Tradition* (2010) for a longer discussion. My favorite short essays that encapsulate the YU experience can be found in essays by Rabbi Dr. Norman Lamm and Rabbi Dr. Aharon Lichtenstein. See Norman Lamm, “There is only One Yeshiva College” (pp. 219–225),

university engage in stricter observance of Catholic doctrine and in the condemnation of same-sex relationships.⁶⁴ The editorial prompted impassioned responses from LGBTQ advocates at Notre Dame, who also decried the current attitude of the university towards its LGBTQ community.⁶⁵

The third approach is to recharter the undergraduate colleges or even the entire university as a religious institution and seek shelter from Title VII, Title IX, and the many laws like the Human Rights Laws of New York City, which explicitly do not apply to religious institutions.⁶⁶ The advantages of this approach are clear: they allow direct and unmanipulated assertion of the values of SCbRMUs, untampered by the State or Federal law for secular institutions. The law school and other secular divisions could retain their secular charter, but divisions that are intended to serve parochial objectives will clearly be defined as religious. Indeed, at that point they would cease to be SCbRMUs. The disadvantages are also clear: as religious institutions, they will lose access to a few pools of money granted only to secular institutions—the exact reason they had sought a secular charter to begin with. Institutions could attempt to argue that state-level no-aid provisions are unconstitutional, in similar fashion to the successful litigants in *Espinoza v. Montana*,⁶⁷ but this would necessitate legal battles that many may hesitate to undertake.

As noted, no court has yet fully discussed access to funding for religious schools on one hand and exemptions from anti-discrimination statutes on the other. This seems to be a difficult ideological position to justify. YU, for example, can clearly argue that being forced to recharter to access state funding was discriminatory. Indeed, it is discrimination against religion as a whole that the government crafts programs that exclude religiously chartered institutions of

Menachem Butler and Zev Nagel (eds.) *My Yeshiva College: Seventy-Five Years of Memories* (2006) and Aharon Lichtenstein, “Looking Before and After” (pp. 231–239) (*Ibid.*)

64 Mary Frances Myler, “No Man Can Serve Two Masters”, *The Irish Rover*, 13 Oct. 2021.

65 For examples, see [Retrieved on 5 July, 2022] <https://ndsmcobserver.com/2021/10/observer-editorial-love-thee-love-all/> and [Retrieved on 5 July, 2022] <https://ndsmcobserver.com/2021/10/an-open-letter-to-the-editor-in-chief-of-the-irish-rover/>.

66 The New York State Attorney General noted: some exemptions that preexisted SONDA—and apply to discrimination on any of the grounds listed in the law, not only sexual orientation—affect SONDA’s application. A “religious or denominational institution,” or an “organization operated for charitable or educational purposes” that is “operated, supervised or controlled by or in connection with a religious organization,” may: 1. limit employment, sales or rental of housing accommodations, and admission to persons of the same religion. 2. give preferences to persons of the same religion or denomination; and 3. take “such action as is calculated by such organization to promote the religious principles for which it is established or maintained.” [Retrieved on 5 July, 2022] <https://ag.ny.gov/civil-rights/sonda-brochure>.

67 *Espinoza supra* note 34.

higher education. But even if this hurdle is cleared, there still remains the issue of whether the state must fund an institution that also seeks exemption from human rights laws.

Chartering as a religious institution need not be an all-or-nothing undertaking, however, but needs to be carried out with a great deal of care to accomplish two central goals. First, those parts of SCbRMUs that are already secular in outlook can remain so. Division by division, each school needs to examine itself to determine which portions have central religious values and which merely adhere to nominal religious accommodations but do not have a religious mission. Only the former should have a religious charter. Second, a sufficient part of the university needs to be left secular to allow for robust access to benefits provided uniquely to secular programs. Many “religious institutions” have learned to do this, as anyone can see from the diverse institutional bond-issuing practices⁶⁸ of the New York Dormitory Authority.

The fourth approach is to fight: SCbRMUs can argue for an extension of the basic ruling in *Hobby Lobby* and argue that religiously influenced secular institutions should be granted exceptions from secular laws that are contradictory to their religious traditions, just as individuals are granted such exemptions. In the weak form of the claim, one would argue that institutions like YU need not comply with those provisions of the New York City Human Rights Law that violate its religious beliefs. In its strong form, all SCbRMUs could argue that they should remain entitled to the allocations provided to secular institutions because they are secular institutions, albeit with religious values.⁶⁹ The problem with this approach is that the government has a compelling state interest that is likely to survive scrutiny (strict or otherwise) in the enforcement of the anti-discrimination provisions of Title VII and Title IX, particularly when the laws already exempt religious institutions.

Generally, the federal government allows limited discrimination by religious institutions based on their faith (although, as often as possible, this is limited to matters like the hiring of co-religionists; the sole explicit Title VII religious exemption, like the D.C. Human Rights Code, is to discriminate based on religion). But the government has a strong and compelling interest in enforcing anti-discrimination statutes, and secular institutions, unless they carry out a clear religious purpose (like a kosher or halal caterer) have rarely been successful in achieving anything more than limited religious exemptions, as in

68 [Retrieved on 5 July, 2022] <https://www.dasny.org/sites/default/files/inline-files/DASNY%20December%2031%2C%202019%20Alpha%20Sort%20Web%20Version.pdf>.

69 Related to this is seeking special legislative status or exemption from the State of New York. This approach is practically unlikely, so it is not addressed here.

Hobby Lobby.⁷⁰ An institution that represents itself as secular and has no clear religious organizational control, explicit bylaws, or governing philosophies will have difficulty justifying any form of discrimination, particularly in situations where an institution purports to be covered by all relevant anti-discrimination statutes, as is the case with YU. Thus, “[t]here is no less restrictive alternative to choose from if the decision is between permitting discrimination and forbidding it.”⁷¹ The hard argument that the courts would therefore have to accept is that secular corporations that could (but chose not to) charter as religious are entitled to all the benefits of both secular and religious corporations, as they choose. As noted above, the *Hobby Lobby* precedent gives little support to this contention, and can easily be distinguished in several significant ways.⁷²

Finally, SCbRMUs could litigate, and, upon losing, resist. Their boards can engage in acts of defiance and resistance, and force the secular society around it to take it apart piece by piece in a painful way. The most popular paradigm for this type of resistance was in the segregationist South in the 1950s and 1960s, but many other times and many other places have seen religious institutions engage in resistance to oppressive laws with a great deal of success. A similar issue, in Canada, shows that it is difficult to fight when one requires outside accreditation to function. A Christian university, Trinity Western University (TWU), wished to start a law school. The school has a community covenant that prohibits sexual relationships outside of heterosexual marriage, and, as a result, the Law Societies of Ontario and British Columbia refused to accredit the school. The Supreme Court of Canada found that this was a reasonable use of their discretion, and the religious freedom of TWU did not outweigh the public policy concerns of the Law Societies.⁷³ Even if TWU wishes to pursue the matter, it is precluded from doing so because students will not attend a law school that is not accredited in two of the most populous provinces in Canada.⁷⁴

Note, however, that it is difficult to compare religious liberty jurisprudence between jurisdictions. The United States in particular is unique in the Western world, having a more religious populace and yet stricter laws regarding religious

⁷⁰ *Hobby Lobby*, *supra* note 31.

⁷¹ Sara K. Finnigan, “Note: The Conflict between the Religious Freedom Restoration Act and Title VII of the Civil Rights Act of 1964”, 48 Fla. St. U.L. Rev. 257.

⁷² See Section 2.3.1 above and footnotes therein.

⁷³ *Law Society of British Columbia v. Trinity Western University*, 2018 S.C.C. 32; *Trinity Western University v. Law Society of Upper Canada*, 2018 S.C.C. 33.

⁷⁴ For an overview of the case from the perspective of an intervenor on the side of TWU, see [Retrieved on 5 July, 2022] <https://www.evangelicalfellowship.ca/Resources/Court-cases/2018/Trinity-Western-University-School-of-Law-2013-201>.

involvement with government than most European countries. Religious freedom jurisprudence from the US Supreme Court, as noted, has most recently been strongly in favor of religious freedom of expression, with several justices explicitly raising concerns in some cases and ensuring that religious exemptions continue to exist for anti-discrimination statutes. By contrast, a jurisdiction like Canada explicitly allows other concerns to outweigh certain freedoms, including religious freedom, and gives much greater discretion to judges to balance competing interests. Thus, the risks of such a strategy are difficult to calculate and anticipate.

Finally, related to this approach but quite different, is another option: a SCbRMU can move to a more sympathetic jurisdiction. In the case of YU, this approach would announce to the community that the ideas and ideals that YU was crafted around—that the best of secular culture and Orthodox Judaism can exist in a yeshiva that is a university—can still be achieved, but not in New York City. Like the legendary Volozhin Yeshiva of lore, which was putatively forced by the government in Czarist Russia to offer secular studies and chose to close rather than comply, YU can announce that in light of the oppressive attacks on its religious values, it will cease to function in New York City.⁷⁵

It has become clear what approach Yeshiva is taking based on its arguments in the case brought against it by the YU Pride Alliance and on the statements of its representatives following Judge Kotler's judgment against the school. YU is asserting that its current status is sufficient to claim a religious exemption and that because it incorporates Jewish values into its secular charter, it should be treated as a religious institution for many purposes. In its reply brief, YU claims:

Yeshiva's functions show it is religious. Applying New York's common law functional analysis to Yeshiva confirms that it is a religious corporation. A mountain of undisputed evidence proves Yeshiva's deeply religious character: over 80% of undergraduates begin their Yeshiva experience with a year of intensive religious studies in Israel for University credit; on campus, students are required to spend one to nearly six hours a day in Torah study; consistent with Torah law and tradition, all campuses,

75 For a historically accurate portrayal of why the Yeshiva in Volozhin closed, see Jacob J. Schacter "Haskalah, Secular Studies and the Close of the Yeshiva in Volozhin in 1892" in *The Torah Umaddah Journal* 2:76–133 (1990) at <https://www.yutorah.org/lectures/lecture.cfm/704403/rabbi-dr-jacob-j-schacter/haskalah-secular-studies-and-the-close-of-the-yeshiva-in-volozhin-in-1892/> [Retrieved 6 July, 2022] and Shaul Stampfer, *Lithuanian Yeshivas of the Nineteenth Century. Creating a Tradition of Learning*, in Lindsey Taylor-Guthartz (trans.), *Littman Library of Jewish Civilization* (2007).

dorms, and prayers are sex-segregated; Shabbat is strictly observed on campus; and all student activities are subject to University approval for religious compliance. And Yeshiva is closely intertwined with [the Rabbi Isaac Elchanan Theological Seminary, the rabbinical seminary associated with YU]. Given this evidence, labeling Yeshiva—a university for which Judaism is the very core of its existence—a secular organization presents an avoidable constitutional conflict.⁷⁶

The heart of the YU argument has been that its form as a religious institution should provide it with enough “religious character” not to be considered a secular institution. As YU claims, “Religious status is based on overall character, not corporate form.”⁷⁷ The YU legal team has criticized Judge Kotler’s decision, saying that YU’s “religious characteristics are plain and obvious,” and that “[c]ourts don’t get to quibble over whether you said enough in your article of incorporation about your religious character.”⁷⁸

5 Problems with the YU Approach and Contradictions within SCbRMUs in General

In its first memorandum of law, YU declared that “[t]his case is about whether Yeshiva or the secular courts get to shape Yeshiva’s religious environment.”⁷⁹ This assessment is absolutely true. But the secular world has embraced the equality project, and if YU tries to claim its status as both a religious and secular organization, it must answer to the secular world, including its secular courts.

With secular funding comes secular responsibilities, both legally and morally, following the *Bob Jones University* model.⁸⁰ In *Bob Jones*, the US Supreme Court allowed the removal of tax-exempt status from a religious university that prohibited interracial relationships, even though the prohibition was based on genuine religious belief. The state interest in preventing racial discrimination

76 Defendants’ Reply in Support of their Motion to Dismiss the Complaint, page 7, at [Retrieved on 5 July, 2022] <https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=OCEwoTeHb4es0HUMndUoKQ==>.

77 Defendants’ Memorandum of Law in Opposition to Plaintiff’s Motion for Preliminary Injunction, page 10, at [Retrieved on 5 July, 2022] <https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=48NBAS5e/4Bsxh7bg/LIYQ==>.

78 Liam Stack, “Yeshiva University Must Recognize L.G.B.T.Q. Club, Judge Says”, *The New York Times*, 16 Jun. 2022.

79 Def Memo in Opposition *supra* note 77 at 1.

80 *Bob Jones University v. United States*, 461 U.S. 574 (1983).

in education outweighed the religious expression of the university. Although this approach has not yet gained momentum in cases concerning sexual orientation or gender identity, some argue that it is only a matter of time, and that one day society will look at these policies in the same way as we look at religiously motivated racism.⁸¹ This leads to the conclusion that American jurisprudence is now misaligned with religious morality. For a SCbRM institution to access the civil courts and civil law as a secular institution, they must comport their corporate life with the values and priorities of the American legal system. There is a reason why religious corporations are exempt from many laws and secular corporations are not.

As of 2021, only three free exercise cases that have come before the Supreme Court have been won by non-Christian parties: *Murphy v. Collier* (2019), *Holt v. Hobbs* (2015), and *Church of the Lukumi Babalu Aye* (1993).⁸² Of these, only *Lukumi Babalu* was determined to be a violation without taking RFRA or RLUIPA into account, and it was a case in which the municipality was explicit in targeting practitioners of Santeria. The RFRA regime has therefore been responsible for the few victories of non-Christian parties in cases where the discrimination is less than explicit, and not a single successful claim of free exercise of religion exists for non-Christian faiths before the 1990s. Successful new free exercise litigants are almost all post-Reformation faiths, and those who try to claim First Amendment rights to religion find themselves inevitably shaped and defined by the adversarial legal structure in which they engage. Courts will not interpret religious doctrine robustly for fear of evoking the religious question doctrine, but if contracts and charters detail religious terms and ideas, the courts may have Establishment clause concerns and refuse to adjudicate altogether.⁸³ Merely transposing religious doctrine into the key of secular language, to play the translated material for secular judicial analysis, forces the

81 Dyllan Moreno Taxman, "What About Bob: The Continuing Problem of Federally-Subsidized LGB Discrimination in Higher Education", 34 *Wis. J.L. Gender & Soc'y* 39 (2019); Matthew J. Parlow, "Revisiting Gay Rights Coalition of Georgetown Law Center v. Georgetown University A Decade Later: Free Exercise Challenges and the Nondiscrimination Laws Protecting Homosexuals" 9 *Tex. J. Women & L* (2000), 219; William N. Eskridge Jr., "Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms", 45 *Ga. L.Rev.* (2011), 657.

82 *Murphy v. Collier*, 587 "U. S. ____ (2019)" (holding that an inmate had a right to his Buddhist spiritual advisor at his execution); *Holt v. Hobbs*, 574 U.S. 352 (2015) (holding that a prison's restrictions on beard length were unconstitutional when conflicting with Muslim beliefs); *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993) (holding that an ordinance passed against killing animals was not neutral or of general applicability when it was passed to target those practicing Santeria).

83 Michael J. Broyde, *Sharia Tribunals, Rabbinical Courts, and Christian Panels: Religious Arbitration in America and the West* (2017), 42-44; Michael A. Helfand and Barak

religious litigants to contort themselves to fit the U.S. legal system, and through such action, “subjects are made and unmade, maintained and destabilized.”⁸⁴ These Frankensteinian expressions of religion are rarely successful in court.

The LGBTQ community has faced similar difficulties in articulating their unique experiences before the bench. Queer communities have advocated for and won decriminalization and equal access to marriage; the new legal battle is to “challenge the pervasive and often invisible heteronormativity” of modern American society. Civil courts often find themselves preoccupied with the “rights” rather than the “interests” of the queer claimants seeking vindication, and with the “broad range of social, cultural, economic, and legal interests that may not be fully satisfied by the vindication of [only] rights claims.” Minority groups that have been denied access to the historical development of such rights claims are meant to benefit from them but “run the risk of performing, circulating, and thereby perpetuating [their] own feelings of subjugation in reality.”⁸⁵

Despite popular conceptions of Western law being based on Judeo-Christian norms and values, Jewish religious claims can face similar difficulties in court. At times, courts in other jurisdictions have tended to view Jewish religious norms through a lens of Protestant Christian religious understanding. For example, the Supreme Court of the United Kingdom has found that an Orthodox Jewish school’s admissions policy, where matrilineal Jewish descent or conversion was required for a student to be admitted, was discriminatory; troublingly, some justices directly compared the policy with Christian conceptions of religious belonging and determined that Jewish law was discriminatory compared to Christian law.⁸⁶ YU has recognized that this litigation is an attempt by some students to change school policy,⁸⁷ but YU and other SCbRMUs might fail to recognize the need to deform and reform their religious views and values to play in the secular sandbox, which is what Rabbi

D. Richman, “The Challenge of Co-Religionist Commerce”, 64 *Duke L.J.* 769 (see section on “The Translation problem” for more analysis on this point).

84 Teemu Ruksola, “Raping Like a State”, 57 *UCLA L. Rev.* 1477 (2010), 1480–1481.

85 Daniel Del Gobbo, *Queer Dispute Resolution*, 20 *Cardozo J. Conflict Resol.* (2019), 283, 296.

86 For more details, see J.H. Weiler, “Discrimination and Identity in London: The Jewish Free School Case, *Jewish Review of Books*”, [Retrieved on 5 July, 2022] https://cpb-us-e1.wpmucdn.com/sites.northwestern.edu/dist/c/1549/files/2019/01/weiler_discrimination-uggvqo.pdf.

87 Defendants’ Memorandum of Law in Support of their Motion to Dismiss the Complaint, p. 12 (“And it is why Plaintiffs ask this Court to force Yeshiva to approve the Pride Alliance: Doing so will force Yeshiva to ‘make a statement,’ which ‘could really change things’ at Yeshiva, including the minds of ‘people who are against the movement in the student body.’”) at [Retrieved on 5 July, 2022] <https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=BVQCABcwq7DGznt6ZTjx2g==>.

Soloveitchik was afraid of a half a century ago. As the government attempts to classify, contain, and convert its secular citizens through policy and legislation, it often works with a “limited definition of ‘religion,’” which “inevitably draw[s] attention away from other aspects of religion—aspects that another brand of theorist may regard as of key importance.”⁸⁸ Having a secular corporate charter makes this inevitable.

What is best for the nation state is not best for each and every one of the citizens, and when the state operates with a restricted vision of religion and religious practices, “such a strategy may well lead to more, rather than less, religious strife.”⁸⁹ For example, in its response to the YU Pride Alliance’s claim that YU vacillates between representing itself as religious and representing itself as non-denominational or nonsectarian, YU runs the risk of violating the prohibition of the Dormitory Authority of the State of New York of bond issuers using funds for religious purposes.

YU argues that despite its legally secular status, it can also be religious as it accepts students “from all Jewish denominations, and indeed, from all faiths.”⁹⁰ Here, the YU claim to the ambiguous status of religious but secularly chartered fails to engage directly and clearly with anti-discrimination issues.⁹¹ Such generalizing statements, always needed by SCbRMUs, force them to disavow their specific guiding religious mandate, for a veil of generic religious inclusivity when dealing with civil courts and secular legal systems. It is also unclear whether this weakening of the particularity of Jewish law in the eyes of the court will ultimately pay off or be successful. The only case that addressed a religious free exercise violation of a state anti-discrimination law is *Masterpiece Cakeshop*, and the majority skirted the direct conflict by ruling on the practices of a particular Civil Rights Commission rather than on religious priority over equality legislation.⁹²

Consider how difficult it has been to resolve a simple case involving a religious corporation. In *Little Sisters of the Poor*, a Catholic nonprofit organization objected to the contraceptive mandate under the Affordable Care Act, similarly to *Hobby Lobby*, but their free exercise of conscience claim extended

88 Victoria Harrison, *Religion and Modern Thought* (2007), 20.

89 Saba Mahmood, “Secularism, Hermeneutics, and Empire: The Politics of Islamic Reformation,” 18 *Public Culture* 2 (2006), 328 fn. 11.

90 Def Memo of Law ISO Dismissal, *supra* note 77, at 14–15.

91 As noted above, whereas *Trinity Lutheran*, *supra* note 39, and *Espinoza*, *supra* note 40, address equal access to public funds for religious institutions, neither of these cases addresses violations of anti-discrimination laws.

92 *Masterpiece Cakeshop*, *supra* note 37.

to even signing the forms required to request the exemption.⁹³ The Little Sisters argued that, by filling out a form to obtain a religious-based accommodation from ACA contraceptive requirements, they were “taking actions that directly cause others to provide contraception or appear to participate in the Departments’ delivery scheme.”⁹⁴ It seems that the nuns “wish to convince the country that their moral views describe the correct way to live, not only for Christians, but for everyone,”⁹⁵ by refusing to sign the exemption to contraception requirements paperwork signifies defiance of the law itself rather than its application to their employees. Justice Ginsburg, dissenting, argued that “the Court casts totally aside countervailing rights and interests in its zeal to secure religious rights to the nth degree.”⁹⁶ Both the Little Sisters and Justice Ginsburg find their arguments bound up with questions of power, validity, subjectivity, and normative linkages within the “alchemy of religion and morality.”⁹⁷ Similarly to *Hobby Lobby*, the Little Sisters offered “a blend of religious and moral rationales” as additions to their conscience claim.⁹⁸ But their complicity claim, despite some acceptance by the Court, seems dubious: “It is highly doubtful that the Little Sisters would have violated Catholic teaching on ‘cooperation with evil’ if they had signed a government form declaring their conscientious objection to providing contraception.”⁹⁹ In *Little Sisters*, “given the applicable legal framework’s emphasis on ‘sincerity,’ and the tendency of American culture to equate sincerity with honest and emotionally fueled reaction, it would have been counterproductive” for the nuns to analyze “Catholic moral theology” on complicity.¹⁰⁰ Instead, they relied on emotionally fueled, reactionary arguments to link the Catholic prohibition of abortion with signing a government form that declared their conscientious objection to an insurance mandate. Such conscience arguments embrace “a corrosive and morally solipsistic individualism,” and forego the duties to greater society contemplated by Catholic doctrine to serve others.¹⁰¹ Under *Little Sisters*, conscience

93 *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 591 U.S. ____ (2020).

94 *Ibid.*

95 Cathleen Kaveny, “The Ironies of the New Religious Liberty Litigation,” 3 *Dædalus* 149 (2020), 74.

96 *Little Sisters of the Poor*, *supra* note 93 (J., Ginsburg, dissenting).

97 Ronit Y. Stahl, “Chapter 2: Conscience”, in Joshua Dubler and Isaac Weiner (eds.), *Religion, Law, USA* (2019), 41.

98 *Ibid.*, 52.

99 Cathleen Kaveny, “The Ironies of the New Religious Liberty Litigation,” 3 *Dædalus* 149 (2020), 78.

100 *Ibid.*, 78–79.

101 *Ibid.*, 79 (“the Roman Catholic tradition has not understood rights in a way that is abstracted from a more holistic understanding of the good of the entire community.”).

claims “now provide a language for making rights claims that transform moral and religious objections to other people’s life choices into practices deserving personal legal protection.”¹⁰²

Similarly, YU seems to be making a Catholic-influenced conscience complicity claim on behalf of its secular institution with religious influences: by allowing the creation of an LGBTQ club, it is complicit in LGBTQ practices. This approach is not problematic for a religious corporation, but it is for a SCBrMUs. In an email entitled “Fostering an Inclusive Community,” YU presented its official stance on an LGBTQ club as follows: “The message of Torah on this issue is nuanced, both accepting each individual with love and affirming its timeless prescriptions. While students will of course socialize in gatherings they see fit, forming a new club as requested under the auspices of Yeshiva University will cloud this nuanced message.”¹⁰³

LGBTQ students, just like Jewish students, have the right to know upfront the rules at any institution they consider attending. Every minority student struggles to distinguish friendly from unfriendly institutions, and every person has a moral right to clarity in civil society regarding the values of institutions, even as religious institutions have the right to discriminate, consistent with their religious values. The YU black box of nuanced interpretation only compounds this difficulty and makes it difficult for students to understand the expectations.

In an article addressing the *Masterpiece Cakeshop* case and subsequent conflicts, John Corvino proposed redrafting anti-discrimination laws to avoid the conflict of LGBTQ individuals seeking publicly available services from businesses with religious owners.¹⁰⁴ His most applicable solutions to the situation of YU are the following:

- (2) Legally prohibit discrimination, grant religious (and perhaps other) exemptions, but require business owners who take advantage of such exemptions to post their position publicly, in order to give prior warning to same-sex couples; (3) Legally prohibit discrimination, do not grant religious (and other) exemptions, but permit business owners who object to same-sex marriage to post their position publicly.¹⁰⁵

102 Ronit Y. Stahl, “Chapter 2: Conscience”, in Joshua Dubler and Isaac Weiner (eds.), *Religion, Law, USA* (2019), 53.

103 [Retrieved on 5 July, 2022] at https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=_PLUS_zJcPKVqnuFtruzDh1PdDA==.

104 John Corvino, “Bake Me a Cake: Three Paths for Balancing Liberty and Equality,” *What’s Wrong* (blog), Oct. 15, 2015.

105 *Ibid.*

Without taking a public stance on what its legal status is, YU (and all SCBrMUs) wants to have its cake and eat it too: it wishes to discriminate in private while declaring inclusivity in public and through its internal documentation.¹⁰⁶ Furthermore, it does not draw clear boundaries for its discrimination or give students a sense of where and when it applies.¹⁰⁷ That approach seems unlikely to be acceptable to the American public, which has always upheld the right of religious institutions to be exempt from most anti-discrimination laws but would not have the same opinion toward secular institutions. Fairness almost directs disclosure.

6 Conclusion

An overview of the relevant issues could be categorized as follows:

- Religiously chartered institutions are generally permitted, both as a matter of American Constitutional law and through specific statutory exemptions, to engage in discrimination that is prohibited to secular institutions. That is part of the historical model of American religious freedom and it is unlikely to either change or be challenged in the foreseeable future. The French *laïcité* model of governmental regulation of religions is constitutionally difficult to imagine in America.¹⁰⁸
- Since *Employment Division v. Smith* (1990), it has become clear that people generally are not entitled to religious exemptions from largely neutral state laws. Furthermore, I suspect that religious minorities do not gain from allowing more religiously motivated commercial discrimination by people in commercial matters or in secular settings.¹⁰⁹

¹⁰⁶ For example, see the YU Official Non-Discrimination and Anti-Harassment Policy & Complaint Procedures at [Retrieved on 5 July, 2022] <https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=tOzzjY8MxB8dQVWjXwrbnQ==>.

¹⁰⁷ Consider as an example the question whether the description of what YU is as found in the text accompanying note 63 is intended to apply to Cardozo Law School. I suspect it is not.

¹⁰⁸ I discussed this at some length in Michael Broyde, *Sharia Tribunals, Rabbinical Courts, and Christian Panels: Religious Arbitration in America and the West* (2017), in the final two chapters.

¹⁰⁹ I discussed this in “Jewish Law and American Public Policy: A Principled Jewish View and Some Practical Jewish Observations”, in *Formulating Responses in an Egalitarian Age: Proceedings of the 13th Orthodox Forum of Yeshiva University 2001*, Marc D. Stern, ed., (2005), 109–129. This was one of my first public policy articles “Bullets that Kill on the Rebound: Discrimination against Homosexuals and Orthodox Public Policy”, 54 *Jewish Action* 1 (1993), 52, 74–78, where I argued that Orthodox Judaism ought to support

- It may be that with respect to the New York City Human Rights Law (a local law in New York City), YU will be able to persuade the courts that it is a religious institution. Indeed, to the extent one wants to read the YU argument extremely narrowly, this is exactly the point one would advance—that the term “religious corporation” in the NYC Human Rights Law need not have the exact same definition as in other statutory areas. But in the bigger picture, all SCbRMUs will have difficulty being both secular and religious institutions at the same time for purposes of United States law, particularly concerning Titles VII and IX.¹¹⁰

The future of secularly chartered but religiously motivated universities appears dim. The ultimate question is whether SCbRMUs can continue to exist in a self-contradictory manner, and whether such institutions should be able to do so, availing themselves of government funds but also avoiding government discrimination statutes. Even if one argues that this state of affairs should be maintained because these bridging institutions serve a valuable cultural and intellectual model for the coexistence of competing visions, the bridge is swaying and unstable. As a result, if they wish to preserve their religious identity, YU and similarly situated institutions would need to recharter portions of their institutions as religious corporations, rather than remain completely non-sectarian or secular. Otherwise, SCbRMUs must accept the risk that secular values will occasionally be forced on them because of their secular charter and access to funding.

If they are not careful, SCbRMUs leave themselves open to having their religious agenda determined by a secular court and legislature rather than by their religious sensibilities. This is the heart of the problem these institutions face.

A better approach for SCbRMUs is to recharter as religious educational institutions and challenge as discriminatory against religion those funding models that exclude them because of their religious charter. The state and federal government can and should fund educational outcomes that it favors. New York can provide incentives for students studying AI and not Canon Law, or finance rather than Talmud, but the Supreme Court’s most recent cases¹¹¹ seem to indicate that the government is not able to fund only the outcomes it wants in secular institutions and not fund religious ones. Religiously chartered

nondiscrimination—even when discrimination is religiously motivated—in the secular workplace. Such discriminatory acts, as the title suggests, are like bullets that kill on the rebound.

110 As noted above, now that it is clear that Title VII applies in the LGBTQ arena, this will not be a long-term solution. See, e.g., *Bostock*, *supra* note 20.

111 Particularly *Trinity Lutheran* *supra* note 39, *Espinoza* *supra* note 40 and *Carson v. Makin* *supra* note 40.

universities produce hundreds of graduates every year who join the general workforce in a variety of professions, from law to medicine, accounting, and computer science. Judaic studies is a rare major, and in recent years biology has been the largest major at YU.¹¹² Refusing to fund religiously chartered universities at the same level as secular ones seems to be no longer constitutional,¹¹³ but, regardless, it is simply unfair on a moral level. Religious and secular institutions should be entitled to equal access to government funding, assuming identical educational outcomes.

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¹¹² Avi Strauss, "An Analysis of Trends in Major Selection on the Wilf and Beren Campuses", *The Commentator*, 28 Jan. 2018 at [Retrieved on 5 July, 2022] <https://yucommentator.org/2018/01/analysis-trends-major-selection-wilf-beren-campuses/>.

¹¹³ See Section 2 above, as well as the Supreme Court decisions in *Trinity Lutheran*, *supra* note 39, and *Espinoza*, *supra* note 40. When the government can make funding contingent upon nondiscriminatory conduct, rather than upon mere charter identification, a question somewhat related to the issue the court managed to avoid in *Masterpiece Cakeshop*, *supra* note 37, warrants a more detailed discussion than the one appearing in Section 2.