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Who Decides? The Title IX Religious Exemption and Administrative Authority

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Who Decides? The Title IX Religious Exemption and Administrative Authority

The Title IX religious exemption demonstrates how statutory religious exemptions can help further social change by neutralizing potential conflict with religious dissenters. Part of the reason for its success is that it is narrowly constructed and automatically applies to qualifying institutions. However, the regulations contradict the statutory text by potentially giving the Department of Education discretion to grant or deny exemptions. Were the Department to fully exercise this power, its actions would conflict with both the language of the statute and the Constitution. The Department of Education’s recent scrutiny of the “controlled by” language of the exemption provides an example of the hazards of allowing the Department to grant or deny exemptions.

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I. INTRODUCTION

In the past several years, statutory religious exemptions have come under fire as attempts to hinder social progress.¹ However, rather than an attempt to “allow . . . discrimination,”² Professor Carl Esbeck has noted that “a statutory religious exemption is understood by the Supreme Court as a case of Congress choosing to ‘leave religion alone.’”³ Thus, the aim of religious exemptions is to neutralize potential conflicts between government actions and the requirements of a religious conscience. In addition, statutory exemptions “are much more majoritarian” because they provide protections not only for religious majorities but also for religious minorities whose objections may not have been contemplated by lawmakers.⁴ So, religious exemptions have two great benefits: they protect religious exercise, including for religious minorities, while still facilitating social change.

Indeed, one of the reasons why a religious exemption is effective is “because it gives institutions deeply opposed to [change] a less draconian option than shutting down entirely.”⁵ Professor Robin Fretwell Wilson argues that specific statutory exemptions “can smooth the way for the realization of new civil rights.”⁶ As an example of the effectiveness of statutory religious exemptions, Professor Wilson cites the Church Amendment, which “advanced

1. See Ed O’Keefe, *Gay Rights Groups Withdraw Support of ENDA After Hobby Lobby Decision*, WASH. POST (July 8, 2014), <https://www.washingtonpost.com/news/post-politics/wp/2014/07/08/gay-rights-group-withdrawing-support-of-enda-after-hobby-lobby-decision/>; John M. Donnelly, *Exclusive: Obama Would Veto Defense Bill Over Discrimination Issue*, ROLL CALL (Oct. 26, 2016, 1:46 PM), <http://www.rollcall.com/news/policy/exclusive-obama-veto-defense-bill-discrimination-issue>.

2. Donnelly, *supra* note 1.

3. Carl H. Esbeck, *Federal Contractors, Title VII, and LGBT Employment Discrimination: Can Religious Organizations Continue to Staff on a Religious Basis?*, 4 OXFORD J.L. & RELIGION 368, 378 (2015).

4. Robin Fretwell Wilson, *When Governments Insulate Dissenters from Social Change: What Hobby Lobby and Abortion Conscience Clauses Teach About Specific Exemptions*, 48 U.C. DAVIS L. REV. 703, 720 (2014).

5. *Id.* at 714.

6. *Id.* at 715.

abortion rights in a concrete, material way.”⁷ Under this amendment, those who objected to abortions for reasons of conscience—including the hundreds of religious hospitals throughout the country that were faced with the possibility of shutting down after *Roe v. Wade*—were not required to perform them.⁸ After the Church Amendment was passed and signed into law in 1973, there was an immediate increase in access to abortion providers, including a fifty percent increase in the number of doctors performing abortions in their offices.⁹ Thus, Congress’s compromise allowed for both increased access to abortion providers and accommodations for religious dissenters.

Just as modern religious exemptions provide accommodations for religious dissenters, the earliest American religious exemptions provided protection against discrimination of religious dissenters. As early as 1669, the charter of the Carolina colony allowed for an exemption from oath taking.¹⁰ In 1673, Rhode Island allowed for exemptions from military service for conscientious objectors.¹¹ This was a remarkably liberal step in a time when Europe was roiled with religious warfare to stamp out dissenters rather than accommodate them.¹² The Constitution also allows exemptions from oath taking in four separate places, “matter-of-factly and without controversy.”¹³ First Amendment scholar Professor Doug Laycock notes that these exemptions were enacted based on the belief that “religious dissenters should be free to live in a jurisdiction and that their lives should not be made miserable because of their faith.”¹⁴ Professor Laycock further notes that “[o]nce a jurisdiction came around to this view, it quickly became apparent that toleration must apply not just to belief, but also to religious speech and worship, and to important

7. *Id.* at 778.

8. *Id.*

9. *Id.* at 779–80; *see also id.* at 715 (“[T]he Church Amendment prompted a 50% increase in the number of physicians performing abortions in their offices within months of its enactment.”).

10. Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1804 (2006).

11. *Id.* at 1806–08.

12. *See id.* at 1798–1803.

13. *Id.* at 1805.

14. *Id.* at 1804.

religious conduct.”¹⁵ Thus, the earliest religious exemptions protected both the beliefs and practices of religious individuals, even for controversial issues such as military service.

Since the Founding, there have been at least two schools of thought regarding the appropriate scope of religious liberty, including religious exemptions. The Jeffersonian view, popularized by his famous letter to the Danbury Baptists calling for a “wall of separation” between church and state, advocates for broad protections of religious beliefs but limited protections for religious conduct.¹⁶ Protecting beliefs but not conduct has limited efficacy because it means that if a government policy and religious practice conflict, the religious practice loses. This has particularly negative consequences for religious minorities, whose practices might not always be considered by those in power. Indeed, Professor Michael McConnell noted that Jefferson’s idea of a distinction between government protection for beliefs and government protection for conduct was outdated and “placed him at least a century behind the argument for full freedom of religious exercise in America.”¹⁷ Religious exercise, as opposed to just religious belief, was a primary concern for Madison, who advocated a more liberal view of religious exercise. After witnessing “5 or 6 well meaning [sic] men” imprisoned “for publishing their religious Sentiments which in the main are very orthodox,” he became a passionate defender of religious liberty, particularly for religious dissenters.¹⁸ Although Madison “advocated a jurisdictional division between religion and government,” he believed those boundaries should be defined “based on the demands of religion rather than solely on the interests of society.”¹⁹ As Madison famously wrote in his *Memorial and Remonstrance Against Religious Assessment*, duty to religion is “precedent both in order of time and degree of obligation, to the

15. *Id.*

16. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1451 (1990) (quoting Letter from Thomas Jefferson to a Committee of the Danbury Baptist Association (Jan. 1, 1820), in 16 THE WRITINGS OF THOMAS JEFFERSON 281–82 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1904)).

17. *Id.*

18. *Id.* (quoting Letter from James Madison to William Bradford (Jan. 24, 1774), in 1 THE PAPERS OF JAMES MADISON 104 (Robert C. Rutland & Charles F. Hobson eds., 1977)).

19. *Id.* at 1453.

claims of Civil Society.”²⁰ Thus, in Madison’s view, protecting religious liberty meant ensuring, as often as possible, that religious individuals were not forced to choose between two sovereigns—civil government or religious obligation.

An example of a liberal, Madisonian religious exemption in our time is the Title IX religious exemption, which has both accommodated religious exercise and promoted social change. For example, within twenty years of the enactment of Title IX in 1972, the percentage of females ages twenty to twenty-four enrolled in school almost doubled, from about fifteen percent to about twenty-nine percent.²¹ Currently, more than half of students enrolled in undergraduate institutions of higher education are female.²² Although other social, economic, and political factors have influenced this increase, scholars acknowledge the foundational role Title IX played in increasing women’s access to higher education.²³ The inclusion of a religious exemption in Title IX has allowed religious institutions of higher education, which have a long and valuable history in the United States,²⁴ to continue to adhere to their religious beliefs and practices while still promoting gender equality.

One of the reasons why the Title IX religious exemption has successfully protected both gender equality in education and

20. Letter from James Madison to The General Assembly of the Commonwealth of Virginia (June 20, 1785), in 8 THE PAPERS OF JAMES MADISON 295, 299 (Robert A. Rutland et al. eds., 1973) (an anonymous petition sent by James Madison to the legislature entitled “A Memorial and Remonstrance”).

21. NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., 120 YEARS OF AMERICAN EDUCATION: A STATISTICAL PORTRAIT 16–17 (Thomas D. Snyder ed., 1993).

22. Kurt Bauman & Camille Ryan, *Women Now at the Head of the Class, Lead Men in College Attainment*, U.S. CENSUS BUREAU: RANDOM SAMPLINGS (Oct. 7, 2015), <https://www.census.gov/newsroom/blogs/random-samplings/2015/10/women-now-at-the-head-of-the-class-lead-men-in-college-attainment.html>.

23. See, e.g., Katherine Hanson, Susan J. Smith & Ambika Kapur, *Does “All” Mean “All?”: Education for Girls and Women*, WOMEN’S STUD. Q., Fall-Winter 2000, at 249, 250 (“Since the fight for passage of Title IX . . . girls and women in general have had more opportunities than all previous generations.”).

24. It is worth noting that religious institutions of higher education have played a vital role in American higher education. In addition to historical examples such as Harvard College, which was established as a school to train clergy, there are at least 7000 religiously affiliated colleges and universities in the United States. *The History Behind Harvard University*, BEST C. REVIEWS, <http://www.bestcollegereviews.org/history-behind-harvard-university/> (last visited Jan. 4, 2018); see also *Religious Schools in the US*, INTERNATIONALSTUDENT.COM, https://www.internationalstudent.com/study_usa/religious-schools/ (last visited Jan. 9, 2018).

religious educational institutions is that the exemption, as written, is narrowly constructed and automatically applies to qualifying institutions.²⁵ The Department of Education has historically enforced the exemption in this manner, which has contributed to Title IX's success.²⁶ However, the regulations contradict the statutory text by creating a regulatory procedure that gives the Department discretion to grant or deny exemptions.²⁷ Were the Department to fully exercise this power, its actions would conflict with both the language of the statute and the Constitution.²⁸ The Department of Education's recent scrutiny of the "controlled by" language of the exemption provides an example of the hazards of allowing the Department to grant or deny exemptions.²⁹

This Comment argues that the Title IX religious exemption should be applied automatically, as written, instead of allowing the Department of Education to grant exemptions. Part II discusses the text and history of Title IX, focusing on the language enacted by Congress. Part III explores the conflict created by the regulations and argues that the religious exemption should be automatic for qualifying institutions. Part IV provides a recent example of the troublesome inconsistency that can result from allowing the Department of Education to grant exemptions. Part V concludes.

II. HISTORY AND TEXT OF TITLE IX

A. Passing Title IX: The Education Amendments of 1971 and 1972

Although little legislative history on the Title IX religious exemption is available, the legislative history on Title IX's nondiscrimination provision indicates that the bill had widespread support.³⁰ However, when what is now known as Title IX was first introduced in 1971, it was unsuccessful. Senator Birch Evans Bayh (D-IN), Title IX's primary sponsor in the Senate, advocated to expand the Education Amendments to include equal access to

25. *See infra* Part II.

26. *See infra* Part III.

27. *See infra* Part III.

28. *See infra* Part III.

29. *See infra* Part IV.

30. *See* 117 CONG. REC. 29339 (1971).

education for women as well as the impoverished, their original objective.³¹ After little debate, the amendment was rejected as not germane.³²

The next year, Senator Bayh successfully included sex as part of the Education Amendments of 1972.³³ Reading from an independent report on discrimination in higher education during a floor debate, Senator Bayh noted that “[d]iscrimination against women, in contrast to that against minorities, is still overt and socially acceptable within the academic community. The only antidote is a comprehensive amendment such as the one now before the Senate.”³⁴ The amendment easily passed the Senate on March 1, 1972, with an eighty-eight to six vote.³⁵

As Senator Bayh had done in the Senate, Congresswoman Green (D-OR), in the House, “made sure that her colleagues knew that the only thing which Title IX does is add the word ‘sex’ to existing law,”³⁶ thereby extending nondiscrimination protections to women in education. In the end, Title IX also passed with widespread support in the House, 332 to thirty-eight.³⁷

The exemptions to Title IX, including the religious exemption, were added as a compromise in the conference committee between the House and the Senate.³⁸ The House version of Title IX included the Erlenborn Amendment, which exempted all undergraduate institutions from Title IX.³⁹ In conference, the House was willing to let go of the Erlenborn Amendment, and in exchange, the Senate

31. Paul C. Sweeney, *Abuse Misuse & Abrogation of the Use of Legislative History: Title IX & Peer Sexual Harassment*, 66 UMKC L. REV. 41, 60 (1997).

32. *Id.* at 61.

33. *See id.* at 61–63.

34. *Id.*

35. Voting Record of Proposed Omnibus Education Amendments of 1972, GOVTRACK, <https://www.govtrack.us/congress/votes/92-1972/s496> (last visited Jan. 4, 2018).

36. Sweeney, *supra* note 31, at 66.

37. *Id.* at 67.

38. *Id.*

39. *Id.*

agreed to a series of exemptions to military institutions, traditionally single-sex institutions, and religious institutions.⁴⁰

President Nixon signed Title IX into law on June 23, 1972.⁴¹

B. Statutory Language

Especially given the sparse legislative history, the best indication of Congress's intent in passing the Title IX religious exemption is the statutory language. In comparison with other religious exemptions to federal civil rights laws, the Title IX religious exemption is narrowly constructed. The exemption reads that the nondiscrimination provisions of Title IX "shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization."⁴² This language is narrower than the religious exemption to Title VII, for example, which applies to any "educational institution . . . with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such . . . educational institution[s]."⁴³ Where the Title VII exemption applies to a wide range of religious organizations, the Title IX religious exemption applies only to "educational institution[s] *controlled by* a religious organization."⁴⁴

Also unlike Title VII, which has institution-wide application for employment,⁴⁵ the Title IX religious exemption narrowly applies only to the extent that Title IX is not "consistent with the religious

40. *Id.* By statute, Title IX includes nine categories for exemptions: (1) institutions that are not "institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education"; (2) institutions that were transitioning from being single sex to coeducational institutions within six years of the law's enactment; (3) educational institutions of religious organizations with contrary religious tenets; (4) educational institutions training for the military or merchant marine; (5) traditionally single sex undergraduate institutions; (6) social fraternities or sororities and voluntary youth service organizations, like Girl Scouts; (7) boy or girl conferences, such as the Boys State Conference; (8) father-son or mother-daughter activities; and (9) scholarship awards in beauty pageants. 20 U.S.C. § 1681(a)(1)–(9) (2012).

41. *See* 20 U.S.C. § 1681.

42. 20 U.S.C. § 1681(a)(3).

43. 42 U.S.C. § 2000e-1(a) (2012).

44. 20 U.S.C. § 1681(a)(3) (emphasis added); *see also infra* Section II.C.

45. *See Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).

tenets” of the organization. Thus, exemptions from Title IX are program-specific; no institution receiving federal assistance can receive a blanket exemption from Title IX. For example, a women’s college is exempt from Title IX in its admissions, but it cannot be exempt from Title IX’s requirement to address sexual violence.⁴⁶ Similarly, an institution may receive a religious exemption to require its students to abstain from extramarital sex, but that institution would still be required to follow Title IX in admissions.⁴⁷

Far from being a get-out-of-gender-equality-free card, the Title IX religious exemption is narrowly drafted to protect the religious beliefs and practices of educational institutions while still requiring religious institutions to promote gender equality.

C. “Controlled By”

Unlike other religious exemptions, the Title IX religious exemption applies to educational institutions that are “controlled by a religious organization.”⁴⁸ Although not a major consideration for much of the history of Title IX, this language recently received scrutiny from the Department of Education.⁴⁹ Although not an indication of Congress’s intent when it passed the Title IX religious exemption in 1972, a failed amendment to the Senate version⁵⁰ of the contemplated Civil Rights Restoration Act of 1987⁵¹ illustrates the scope of the “controlled by” language of Title IX’s religious exemption.

In a debate on the bill, which sought to “restore the broad scope of coverage and to clarify the application of Title IX of the Education Amendments of 1972,”⁵² Senator Orrin Hatch (R-UT) proposed an amendment to modify the religious exemption. His amendment sought to change the language of the Title IX religious exemption to include schools that are “closely identified with the tenets of” a

46. *Know Your Rights: Title IX Requires Your School to Address Sexual Violence*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/docs/know-rights-201404-title-ix.pdf> (last visited Jan. 4, 2017).

47. See 20 U.S.C. § 1681(a)(3).

48. 20 U.S.C. § 1681(a)(3).

49. See *infra* Part III.

50. S. 557, 100th Cong. (1988).

51. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988).

52. 134 CONG. REC. 330 (1988) (statement of assistant legislative clerk).

religious organization.⁵³ Senator Hatch argued that the amendment was important because he believed very few universities would fit within a strict construction of the “controlled by” language.⁵⁴ By his estimation, the only two universities that would be exempt from Title IX under the “controlled by” language were Brigham Young University and Catholic University.⁵⁵

The senators who opposed the amendment did so because they believed the existing exemption language was sufficient. Several senators expressed concern that changing the language would extend the exemption too far and could potentially derail the success of the bill.⁵⁶ Senator Edward Kennedy (D-MA) argued that the exemption’s “controlled by” language “basically addresses the central concerns” raised by the amendment.⁵⁷ He also argued that the proposed language would be over-inclusive, as it could apply to as many as one-quarter of all American institutions of higher education.⁵⁸ Senator Lowell Weicker (R-CT) warned that, “all sorts of untold mischief would occur as to title [sic] IX were the amendment to be adopted,” including that “anybody that is in contradiction to the civil rights laws of this Nation is all of a sudden going to find themselves closely identified with one faith or another.”⁵⁹ Similarly, Senator Carl Levin (D-MI) commented that the proposed language was “too vague.”⁶⁰ The amendment failed in a thirty-nine to fifty-six vote.⁶¹

53. *Id.* (statement of Sen. Hatch).

54. *Id.*

55. *Id.*

56. *Id.* In *Grove City College v. Bell*, the Supreme Court held that (1) if students received federal financial assistance, the school was deemed as receiving federal financial assistance for the purposes of Title IX, even though the assistance was indirect; and (2) that Title IX coverage was program-specific rather than institution-wide. *Grove City Coll. v. Bell*, 465 U.S. 555, 564–74 (1984), *superseded by statute*, Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988), *as recognized in Nat’l Collegiate Athletic Ass’n v. Smith*, 525 U.S. 459 (1999). Congress interpreted this case as limiting Title IX and enacted the Civil Rights Restoration Act to clarify that Title IX was to be applied on an institution-wide rather than program-specific basis. *See* Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988).

57. 134 CONG. REC. 334 (1988).

58. *Id.*

59. *Id.* at 335.

60. *Id.*

61. *Id.* at 336.

The debate on the Hatch Amendment suggests the idea that the language of Title IX religious exemption is neither too narrow (covering only two universities) nor too broad (covering one-quarter of all American colleges and universities). At the time of the debate, the Department of Education had recognized 150 religious exemptions to Title IX and had closed seventy-nine files

for a variety of reasons, including, but not limited to: the institution withdrew the request; the institution did not need a religious exemption since its admission practices were already exempt; the institution had ceased operations; or the institution failed to respond to repeated requests . . . for additional information.⁶²

Senator Kennedy also noted that, as of the debate, the Department of Education had “never denied a request for religious exemption.”⁶³ This trend would continue for almost three decades—a review of exemption requests indicates that as of December 31, 2016, the Department of Education had yet to deny such a request.⁶⁴

III. CLAIMING THE RELIGIOUS EXEMPTION

According to the language of the statute, qualifying institutions are automatically exempt from the requirements of Title IX to the extent that they conflict with the institutions’ religious tenets.⁶⁵ However, the regulations enacting the religious exemption conflict with the statutory text, creating ambiguity.⁶⁶ Although the Department of Education’s internal guidelines acknowledge the limitations on its authority in administering the religious exemption,

62. *Id.* at 334. After this debate, the Department of Education began processing and responding to exemption letters to clear the backlog. *See* Kif Augustine-Adams, *Religious Exemptions to Title IX*, 65 U. KAN. L. REV. 327, 362–78 (2016).

63. 134 CONG. REC. 334 (1988).

64. *See Religious Exemptions Index Prior to 2009*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/z-index-links-list-pre-2009.html> (last updated May 3, 2016) [hereinafter *Religious Exemptions Index Prior to 2009*]; *see also Religious Exemptions Index 2009–2016*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/z-index-links-list-2009-2016.html> (last updated Dec. 2017) [hereinafter *Religious Exemptions Index 2009–2016*].

65. 20 U.S.C. § 1681(a)(3) (2012).

66. 34 C.F.R. § 106.12(a) (2017).

the Department of Education (originally part of the Department of Health, Education, and Welfare) has used the regulations to expand its authority by creating procedures that conflict with the statutory text.⁶⁷ In addition, the Department has used language in its correspondence with schools that asserts its authority.⁶⁸ Not only do these procedures violate the automatic nature of the text as agreed upon by congressional compromise, they also present First Amendment concerns. Because the statutory language unambiguously grants exemption for qualifying educational institutions, and to avoid constitutional concerns,⁶⁹ the regulations should be read as a courtesy rather than a mandate.

A. Conflict Between the Statutory and Regulatory Language

Title IX's implementing regulations conflict with its statutory text by requiring a procedure for exemption. According to the language of the statute, "this section *shall not apply* to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization."⁷⁰ The "shall not apply" language indicates that qualifying organizations are automatically exempt and that no procedure is necessary for the institution to claim exemption. Additionally, the direct "shall not apply" language precludes the idea that the exemption is granted by any authority other than the statute. Subsection (a) of the regulation is in accordance with this principle, although it slightly modifies the statute's "*shall not apply*" language to say that "[t]his part *does not apply*" to qualifying institutions.⁷¹ As it does in the statute, this regulatory language indicates that the exemption is automatic.

Despite these initial similarities, the regulation conflicts with the

67. See *infra* Section III.C.

68. See *infra* Section III.A.

69. See *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 507 (1979) ("Accordingly, in the absence of a clear expression of Congress' intent to bring [activities of] church-operated schools within the jurisdiction of the Board, we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses.").

70. 20 U.S.C. § 1681(a)(3) (emphasis added).

71. 34 C.F.R. § 106.12(a) (emphasis added).

language of the statute by instituting procedures not required by Congress. In subsection (b), it sets forth a procedure for “[a]n educational institution which wishes to claim the exemption.”⁷² This contradicts the automatic nature of both the statutory exemption and subsection (a) of the regulation by asserting that an institution is not automatically exempt, but must “claim” the exemption. The procedure of subsection (b) requires that institutions “shall [claim the exemption] by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions . . . which conflict with a specific tenet of the religious organization.”⁷³ The regulation does not give any indication as to how, if at all, the Department is required to respond to these letters, nor does it say that the Department is responsible for “granting” exemptions.

A federal district court in Tennessee acknowledged the conflict between the statute and its enacting regulations in *Hall v. Lee College*, though it did not resolve the issue.⁷⁴ In one of the few cases to address the Title IX religious exemption directly,⁷⁵ a student at Lee College, “a small private college located in Cleveland, Tennessee . . . affiliated with the Church of God,” brought a Title IX claim after she was suspended because she was “pregnant and . . . unmarried.”⁷⁶ The court held that there was insufficient evidence to sustain the plaintiff’s claim and dismissed the case with prejudice.⁷⁷ Acknowledging that it did not need to resolve the question of whether the religious college was exempt, the court, nonetheless, noted that

it is not clear that the procedure for claiming the exemption contained in the regulation applies to the exemption contained in the statute. Section 106.12(b) [of the regulation] clearly refers to

72. *Id.* § 106.12(b).

73. *Id.* While the initial draft of the regulation allowed the Department of Education to determine whether the institution qualifies from exemption, that language was omitted from the final draft. See Augustine-Adams, *supra* note 62, at 333.

74. See generally *Hall v. Lee Coll., Inc.* 932 F. Supp. 1027 (E.D. Tenn. 1996).

75. See generally Amanda Bryk, *Title IX Giveth and the Religious Exemption Taketh Away: How the Religious Exemption Eviscerates the Protection Afforded Transgender Students Under Title IX*, 37 CARDOZO L. REV. 751, 778–79 (2015).

76. *Hall*, 932 F. Supp. at 1029–30.

77. *Id.* at 1033.

the exemption from the regulations set forth in section 106.12(a). It may very well be that to claim the exemption found in the statute, an educational institution need do nothing more than just raise the exemption.⁷⁸

Because the regulations conflict with the language of the statute, there was significant pushback from the United States Catholic Conference and the American Association of Presidents of Independent Colleges and Universities when the implementing regulations for Title IX were being reviewed.⁷⁹ The director and secretary of the American Association of Presidents of Independent Colleges and Universities, Dallin Oaks, testified at congressional hearings opposing the procedure of claiming an exemption by letter as “demeaning and inconsistent with the Federal Constitution.”⁸⁰ Oaks’s concern was that government administrators would become arbiters of whether the regulation was in violation of a religious tenet,⁸¹ thus anticipating that the Department of Education would see itself as the authority in granting exemptions rather than acknowledging an automatic exemption under the statute or, as Oaks argued, the Constitution.

B. History of Ambiguity in Interpretation

At the time the regulations were under review, Oaks was also President of Brigham Young University (BYU), a private university owned and operated by The Church of Jesus Christ of Latter-Day Saints. Once the regulations were finalized, President Oaks wrote a letter in compliance with subsection (b), despite his opposition to the procedure.⁸² In the letter, he said BYU did “not concede that the Department of Health, Education and Welfare has the power to review our claim of exemption on the ground of religion,” and that he was notifying the Department of BYU’s exemption rather than requesting exemption.⁸³ In addition to writing the letter, BYU took out advertisements in its campus newspaper and other local

78. *Id.*

79. Augustine-Adams, *supra* note 62, at 334.

80. *Id.*

81. *Id.*

82. *Id.* at 338.

83. *Id.*

newspapers, of its own policy of nondiscrimination on the basis of sex.⁸⁴ Although President Oaks complied with the requirements of the regulation, he did not cede authority to the Department.

After considerable negotiations between President Oaks and the Department of Health, Education, and Welfare, including a campus visit by department officials, the Office for Civil Rights issued a letter to Brigham Young University acknowledging its exemption.⁸⁵ In the letter, Martin H. Gerry, the director for the Office for Civil Rights, wrote that the Department “ha[d] determined . . . that BYU is . . . eligible for an exemption” and that BYU “is granted an exemption from those requirements” that would conflict with its religious tenets.⁸⁶ This language directly conflicted with President Oaks’s view of the department’s authority, which Director Gerry acknowledged.⁸⁷ However, he wrote that “because of the exemption granted herein and your agreement to comply with the regulations in all non-exempt areas, I do not believe any purpose would be served by further pursuing our discussion of this matter at this time.”⁸⁸ In other words, when faced squarely with the question of whether the Department grants exemptions or whether qualifying institutions are automatically exempt, the Department asserted its authority to grant exemptions in the language it used, but did not press the issue; BYU met the qualifications and was therefore exempt.

C. Administrative Interpretations of the Exemption

Despite the Department’s assertions to the contrary in its letter to President Oaks, some Department of Education documents admit that exemptions are automatic, not granted. The Smith memo—an internal memorandum for the Department of Education, written by William L. Smith, acting assistant secretary of the Office for Civil Rights, on October 11, 1989, which currently published on the

84. *Id.* at 343.

85. Letter from Martin H. Gerry, Dir., Office for Civil Rights, U.S. Dep’t of Educ., to Dallin Oaks, President, Brigham Young Univ. (Aug. 12, 1976) (on file with Harold B. Lee Library Special Collections at Brigham Young University).

86. *Id.*

87. *Id.* (“As discussed during the meeting, we disagree as to the scope of authority provided by Title IX. In your view, the regulation exceeds the authority provided in the statute.”).

88. *Id.*

Department of Education's website—states that “[t]he regulation does not require that a religious institution submit a written claim of exemption, nor is an institution's exempt status dependent upon its submission of a written statement.”⁸⁹ Instead, the Smith memo rightly interprets the letters as “request[s] for assurance” of exemptions.⁹⁰

*1. The letter-writing procedure of subsection (b)*⁹¹

The Department of Education has generally implemented subsection (b) of the regulation, requiring the highest official of an institution to send a letter to the Department if it “wishes to claim” an exemption, in a purely supervisory rather than substantive

89. Memorandum from William L. Smith, Acting Assistant Sec'y for Civil Rights, to Office for Civil Rights Senior Staff, U.S. DEP'T OF EDUC. 1 (Oct. 11, 1989), <https://www2.ed.gov/about/offices/list/ocr/docs/smith-memo-19891011.pdf>. The Smith Memo is the most recent of three memoranda published on the Department of Education's website about exemptions to Title IX. See *Exemptions from Title IX*, U.S. DEP'T OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/index.html> (last modified Oct. 23, 2017) [hereinafter *Exemptions from Title IX*].

90. Memorandum from William L. Smith, *supra* note 89.

91. In May 2016, the Department of Education began publishing the letters mentioned in subsection (b), as well as its responses. See *Religious Exemptions Index 2009–2016*, *supra* note 64. This list of letters has been referred to by some in the media as a “shame list.” Carly Hoilman, *Department of Education Publishes ‘Shame List’ of Faith-Based Colleges Seeking Title IX Exemption from Transgender Anti-Discrimination Rules*, BLAZE (May 1, 2016, 7:42 AM), <http://www.theblaze.com/stories/2016/05/01/u-s-department-of-education-publishes-shame-list-of-faith-based-colleges-seeking-title-ix-exemption-from-transgender-anti-discrimination-rules/>. As the Department has issued new regulations and guidelines over the years, several institutions have submitted multiple letters. See *Religious Exemptions Index 2009–2016*, *supra* note 64. Only three schools, Pepperdine University, Loyola New Orleans, and Kettering College requested to lose their exempt status and be taken off the “shame list,” with Pepperdine asserting that it had never activated its exemption from 1976 and had always complied with Title IX. See Letter from Andrew K. Benton, President & CEO, Pepperdine Univ., to Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., U.S. DEP'T OF EDUC. (Jan. 27, 2016), <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/pepperdine-university-request-01272016.pdf>; Letter from Nate Brandstater, President, Kettering Coll. of Med. Arts, to Caroline Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., U.S. DEP'T OF EDUC. (July 10, 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/kettering-college-of-medical-arts-request-08182016.pdf>; Letter from Kevin William Wildes, President, Loyola Univ. New Orleans, to Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., U.S. DEP'T OF EDUC. (May 19, 2016), <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/loyola-university-request-05192016.pdf>. These published letters were invaluable in my research regarding the application of the religious exemption; however, it appears that no letters have been published since December 31, 2016. See *Religious Exemption Index 2009–2016*, *supra* note 64.

manner.⁹² For this reason, although the regulatory procedure of writing a letter technically adds to the statutory language of the Title IX religious exemption, the procedure has not interfered with the effective implementation of the statutory language of the religious exemption.

When the Department of Education receives a letter from an educational institution in accordance with subsection (b), the Department either responds by acknowledging (or “granting”) the exemption or by requesting additional information. For example, Baptist Bible College and Seminary in Pennsylvania wrote a letter to claim its exemption after the Supreme Court’s decision in *Grove City v. Bell*.⁹³ Baptist Bible College had previously submitted an exemption letter in 1976 that was “granted” by the Department in 1985.⁹⁴ The Department responded to Baptist Bible College’s renewed letter in November 1988 by requesting additional information regarding how the religious tenets of the controlling organization conflicted with Title IX:

Although your request letter included general statements of religious tenets, and information regarding the Title IX regulation . . . regarding marital and parental status, it did not state the specific tenets or how they conflict with these sections of the regulation. If you wish the office to make a determination

92. 34 C.F.R. § 106.12(b) (2017).

93. Letter from Milo E. Thompson, Jr., President, Baptist Bible Coll. & Seminary, to Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., U.S. DEP’T OF EDUC. (Oct. 17, 1988), <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/baptist-bible-college-and-seminary-request-10171988.pdf>.

94. Letter from Ernest Pickering, President, Baptist Bible Coll. & Sch. of Theology of Pa., to the Dir., Office for Civil Rights, U.S. Dep’t of Educ., U.S. DEP’T OF EDUC. (Dec. 9, 1976), <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/baptist-bible-college-and-seminary-request-12091976.pdf>; Letter from Harry M. Singleton, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., to Mark Jackson, President, Baptist Bible Coll. & Sch. of Theology, U.S. DEP’T OF EDUC. (June 18, 1985), <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/baptist-bible-college-and-seminary-response-06181985.pdf>. Between 1976 and 1985, The Department of Education responded to very few of the exemption letters it received, perhaps out of the uncertainty regarding whether response was required. See Augustine-Adams, *supra* note 62, at 351–53. In 1985, the Secretary directed regional offices to clear the backlog of responses, resulting in many response letters being issued in that period. *Id.* at 361–66.

regarding a religious exemption in these areas, please provide the information requested and return it to this office.⁹⁵

Baptist Bible College responded in January of 1989 with extensive citations to the Bible.⁹⁶ In November 1992, more than three years after the initial letter, the assistant secretary for the Office for Civil Rights responded, “granting” the exemption.⁹⁷

If the institution does not respond to a request for additional information within a few months, the Department of Education sends a second letter indicating that if the Department does not receive a response with additional information within thirty days, it will assume that the organization no longer seeks the exemption. For example, the University of Dallas sent an exemption letter in October 1976.⁹⁸ On May 31, 1985, the Department requested additional information regarding religious tenets that conflict with the application of Title IX.⁹⁹ The Department sent a second request for additional information on July 18, 1985, informing the University that if it did not respond within thirty days, the Department would assume that the University no longer required a religious exemption.¹⁰⁰ On September 20, 1985, the Office for Civil Rights again wrote the University of Dallas informing them that the

95. Letter from Robert A. Smallwood, Reg'l Civil Rights Dir., U.S. Dep't of Educ., to Milo E. Thompson, Jr., President, Baptist Bible Coll. & Seminary, U.S. DEP'T OF EDUC. (Nov. 10, 1988), <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/baptist-bible-college-and-seminary-response-11101988.pdf>.

96. Letter from Milo Thompson, Jr., President, Baptist Bible Coll. & Seminary, to Robert A. Smallwood, Reg'l Civil Rights Dir., U.S. Dep't of Educ., U.S. DEP'T OF EDUC. (Jan. 26, 1989), <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/baptist-bible-college-and-seminary-request-01261989.pdf>.

97. Letter from Michael L. Williams, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to Milo E. Thompson, President, Baptist Bible Coll. & Seminary, U.S. DEP'T OF EDUC. (Nov. 2, 1992), <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/baptist-bible-college-and-seminary-response-11021992.pdf>.

98. Letter from Sybil Novinski, Assoc. Acad. Dean & Registrar, Univ. of Dall., to Albert P. Hamlin, Chairperson, Title IX Test Grp., Office for Civil Rights, U.S. Dep't of Health, Educ. & Welfare, U.S. DEP'T OF EDUC. (Oct. 6, 1976), <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/university-of-dallas-request-10061976.pdf>.

99. Letter from James M. Littlejohn to Frederick T. Cioffi, Acting Dir., Policy & Enf't Serv., Office for Civil Rights, U.S. Dep't of Educ., to Robert F. Sassen, President, Univ. of Dall., U.S. DEP'T OF EDUC. (Sept. 20, 1985), <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/university-of-dallas-response-09201985.pdf>.

100. *Id.*

Department had closed the University's file, assuming that it no longer required an exemption.¹⁰¹

2. Requests for additional information

When requesting additional information regarding whether an institution's religious tenets conflict with Title IX (as the Department did with the University of Dallas), the Singleton Memo, another internal memorandum within the Department of Education's Office for Civil Rights (OCR), asserts that OCR "cannot question what institution representatives claim as their beliefs" and can question only policies based on those beliefs "where one tenet clearly contradicts another."¹⁰² Although the guidelines permit staff to check citations to scripture, the guidelines clarify that "[u]nder no circumstances should OCR appear to be interpreting the Bible."¹⁰³ Similarly, staff should accept general explanations of tenets regarding marital and parental status.¹⁰⁴ In the course of its investigation into a Title IX complaint against such an institution, OCR may request an explanation of how religious tenets conflict with the requirements of Title IX from a religious leader.¹⁰⁵

When requesting additional information regarding whether an institution is controlled by a religious organization, the Department of Education's guidelines also require that the Department not conduct an independent investigation into whether an institution is "controlled by" a religious organization. On the contrary, the Department of Education "accept[s] as fact that an institution is controlled by a religious organization where the specific organization is named even when no information is provided on how that organization controls the institution."¹⁰⁶ The Department of Education grants an exemption if an institution submits a request with "a statement by the highest ranking official of the institution,

101. *Id.*

102. Memorandum from Harry M. Singleton, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to Reg'l Civil Rights Directors, U.S. DEP'T OF EDUC. 3 (Feb. 19, 1985), <https://www2.ed.gov/about/offices/list/ocr/docs/singleton-memo-19850219.pdf>.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

identifying the religious organization that controls the educational institution and specifying the provisions of Title IX or its regulations that conflict with the tenets of the religious organization.”¹⁰⁷ Control can be proven in a variety of ways, including “[a] doctrinal statement with the notation that specific members of the institution community must espouse a personal belief in the religion or doctrinal statement.”¹⁰⁸

Although no institution has ever been denied federal funds under Title IX, implicit in the Department’s letter-writing process is the threat that if a school does not adequately demonstrate its exemption, federal funding will be revoked. Instead, challenges to whether an institution qualifies for the religious exemption should come through the courts, the branch of government tasked with interpreting the language of statutes in cases and controversies.

D. Constitutional Concerns

In addition to violating the text of Title IX, conducting an inquiry into the beliefs or governance of a religious institution presents a variety of constitutional concerns, as alluded to by President Oaks in 1975. The automatic statutory language of the Title IX religious exemption reflected a compromise made in Congress to push forward desirable civil rights legislation while still “leav[ing] religion alone,” in the words of Professor Esbeck.¹⁰⁹ Creating a regulatory procedure by which an institution must prove its eligibility to claim the exemption restricts free exercise and impermissibly entangles church and state.

First, the regulations likely violate the church autonomy doctrine. The church autonomy doctrine is rooted in both the Free Exercise Clause and the Establishment Clause¹¹⁰ and “provides that religious communities should have autonomy, or independence, from the government in the formulation of their beliefs and faith, their organizational structure, and the whole range of policies and

107. *Exemptions from Title IX*, *supra* note 89.

108. Memorandum from William L. Smith, *supra* note 89, at 2 (internal quotation marks omitted).

109. Esbeck, *supra* note 3, at 378.

110. Douglas Laycock, *Church Autonomy Revisited*, 7 *GEO. J.L. & PUB. POL’Y* 253, 253 (2009).

practices that the organization adopts to conduct, or structure its operations.”¹¹¹ Thus, the essence of church autonomy is that a religious organization should be independent in how it manages its affairs. Professor Laycock has noted that a religious institution “can make out a good church autonomy claim simply by saying that this is internal to the church. This is our business; it is none of your business.”¹¹²

The Title IX regulations infringe on church autonomy because they require the Department of Education to be involved in the business of a church, assessing both its hierarchical structure and its beliefs. The “controlled by” provision requires the Department of Education to evaluate matters of church governance, including how centralized a religious organization is. The religious tenets provision requires the Department of Education to, at the very least, document the beliefs of a religious organization and evaluate whether those religious tenets justify exemption from certain provisions of Title IX. This procedure inserts the government into how a religious organization handles internal affairs, such as how to manage religious educational institutions, and thus violates the church autonomy doctrine.

In addition to infringing on church autonomy, the regulatory letter-writing procedure also restricts Free Exercise. As the Supreme Court has noted on several occasions, “[t]he Free Exercise Clause ‘protect[s] religious observers against unequal treatment.’”¹¹³ Although there are several other exemptions to Title IX, the Department of Education acknowledges that “[n]o similar process exists in the regulations for any other exemption.”¹¹⁴ A “policy [that] expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character . . . triggers the most exacting scrutiny.”¹¹⁵ Further, “when the State conditions a benefit in this way . . . the

111. W. COLE DURHAM & ROBERT SMITH, 1 RELIGIOUS ORGANIZATIONS AND THE LAW § 5:1, (2017).

112. Laycock, *supra* note 110, at 254.

113. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993)).

114. *See Exemptions from Title IX*, *supra* note 89.

115. *Trinity Lutheran*, 137 S. Ct. at 2021.

State has punished the free exercise of religion.”¹¹⁶ Thus, requiring religious organizations to go through an administrative procedure to be exempt when nonreligious groups are automatically exempt threatens Free Exercise.

In addition, if exemption letters were ever denied by the Department, this could further restrict Free Exercise. The automatic language of the exemption guarantees that an institution will not be required to comply with elements of Title IX that conflict with its religious tenets. If the exemption is not automatic, but conditional, the Department may deny an exemption if it decides that a religious tenet does not conflict with Title IX, *even if the religion says that it does*. This situation would force an institution to choose between exercising its religion and complying with federal requirements. Although some may see this process as a way to weed out insincere claims of religious affiliation by those who seek to avoid Title IX compliance, that is not what the requirements of the religious exemption do. The requirements of the Title IX religious exemption are not designed to measure sincerity—they assess organizational control and the application of religious tenets. Thus, if the Department decided to exercise its discretion to deny religious exemptions, it could further restrict Free Exercise.

The procedures created by subsection (b) also present Establishment Clause concerns by preferring certain kinds of religious organizations over others. The Supreme Court has often noted that “[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another,”¹¹⁷ that “[t]he government must be neutral when it comes to competition between sects,”¹¹⁸ and “that no State ‘can pass laws which aid one religion’ or that ‘prefer one religion over another.’”¹¹⁹ Subsection (b) crosses this line by giving the Department of Education discretion to inquire into the level of institutional control a religious group has over an educational institution. This is similar to the statute the Supreme Court struck down in *Larson v. Valente*.¹²⁰

116. *Id.* at 2022.

117. *Larson v. Valente*, 456 U.S. 228, 244 (1982).

118. *Id.* at 246 (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)).

119. *Id.* (quoting *Everson v. Board of Education*, 330 U.S. 1, 15 (1947)).

120. *See id.* at 255.

There, the Court held that a statute imposing institutional requirements to qualify for a religious exemption that had the effect of disfavoring certain religions was in violation of the Establishment Clause.¹²¹ Here, the Department could also unintentionally favor more centralized religions over less centralized religions in compliance with the “controlled by” provision, thus violating the Establishment Clause by preferring some kinds of religious organizations over others.

In sum, subsection (b) of the regulations violate both the text of Title IX and potentially the religion clauses of the First Amendment by creating a regulatory procedure that gives the Department of Education discretion to grant or deny religious exemptions. To avoid constitutional conflicts, the regulations should be read as a courtesy rather than a requirement.

IV. CHANGES IN ADMINISTRATION OF THE RELIGIOUS EXEMPTION, 2014–2016

Changes in the administration of the Title IX religious exemption from 2014–2016 illustrate the drawbacks of reading subsection (b) of the regulations as a requirement rather than a courtesy. From 2014 to 2016, the Department engaged in a procedural change in how it assessed exemption letters that coincided with a policy change. The policy change expanded Title IX to include nondiscrimination on the basis of sexual orientation and gender identity,¹²² resulting in many more religious exemption requests than any time since the earliest history of the exemption.¹²³ On February 22, 2017, the Department reversed this policy, removing previous guidance to the contrary from the Department of

121. *Id.*

122. *See, e.g.*, OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

123. According to publicly available information, ninety-nine schools requested exemptions from the Department of Education’s changed definition of sex from 2014 to 2016. By counting letters on the Department of Education’s website, I found ninety-nine requests for exemption from nondiscrimination provisions regarding sexual orientation and gender identity. *See Religious Exemptions Index 2009–2016, supra* note 64.

Education's website.¹²⁴ Although this change in policy has, in effect, made these requests moot, the manner in which the Department handled these requests is what is of concern here, not the substance of the policy. In processing the onslaught of exemption letters from 2014–2016, the Department overstepped its authority in violation of the text of Title IX.

A. “Controlled by” Language from 2014–2016¹²⁵

From 2014 to 2016, the Department asserted its authority under subsection (b) by examining control, a previously unquestioned element of the Title IX religious exemption. Prior to 2014, most requests for additional information pertained to whether the “application of [Title IX]” was “consistent with the religious tenets” of the organization.¹²⁶ The Department only requested additional information on whether an institution was “controlled by a religious organization” if the institution had not provided information regarding the “controlled by” language.¹²⁷ Since December 2014, all of the published requests for additional information were regarding the “controlled by” provision.¹²⁸

In its requests for additional information, the Department sought additional information on control even where it had previously determined that a school was exempt. As of December 31,

124. Letter from Sandra Battle, Acting Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., & T.E. Wheeler, II, Acting Assistant Attorney Gen. for Civil Rights, U.S. Dep’t of Justice, to Colleagues, U.S. DEP’T OF EDUC. (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>; see also Press Release, U.S. Secretary of Education Betsy DeVos Issues Statement on New Title IX Guidance, U.S. DEP’T OF EDUC. (Feb. 22, 2017), <https://www.ed.gov/news/press-releases/us-secretary-education-betsy-devos-issues-statement-new-title-ix-guidance>.

125. Seyfarth Shaw LLP, *Title IX Enforcement and Interpretation: The Winds of Change are Blowing*, JDSUPRA (Dec. 29, 2016), <http://www.jdsupra.com/legalnews/title-ix-enforcement-and-interpretation-43698/>.

126. See *supra* Section III.B.

127. See *generally Religious Exemptions Index Prior to 2009*, *supra* note 64; *Religious Exemptions Index 2009–2016*, *supra* note 64; Assurance of Compliance with Title IX of Education Amendments of 1972, 42 Fed. Reg. 15141, 15142–43 (Mar. 18, 1977); Memorandum from William L. Smith, *supra* note 89.

128. See *Religious Exemptions Index 2009–2016*, *supra* note 64. I read the requests for additional information in the letters pre-dating 2014, and they did not include requests for additional information about control unless no information was provided in the initial letter.

2016, when the publication of religious exemption letters seems to have ended,¹²⁹ 248 religious schools have been granted religious exemptions from Title IX by the Department of Education.¹³⁰ Ninety-nine schools have sent exemption letters regarding sexual orientation and gender identity since 2013.¹³¹ Twenty-three schools have not received a final response.¹³² The Department of Education requested additional information from nine schools regarding control.¹³³ Four of those nine schools had been previously deemed as exempt by the Department of Education.¹³⁴ Five of the nine schools received letters acknowledging their exemption after they sent additional information.¹³⁵ All nine schools provided information in their initial letters that was sufficient to meet the control test as published in the Federal Register.¹³⁶

129. When I first began researching this topic in the summer of 2016, the link indicated that it included exemption letters from 2009–present. Now, the same link includes letters from 2009–2016, and there is no link for letters after December 2016. Therefore, I assume that the Department has, at least temporarily, decided to stop publishing exemption letters. *See generally Religious Exemptions Index 2009–2016, supra* note 64.

130. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., INSTITUTIONS CURRENTLY HOLDING RELIGIOUS EXEMPTION, <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/rel-exempt-approved-and-pending.xlsx> (last updated Dec. 31, 2016) [hereinafter INSTITUTIONS CURRENTLY HOLDING RELIGIOUS EXEMPTION].

131. *See Religious Exemptions Index 2009–2016, supra* note 64.

132. *See generally* INSTITUTIONS CURRENTLY HOLDING RELIGIOUS EXEMPTION, *supra* note 130. I read through the exemption letters and responses to determine which schools had not received a response.

133. *See Religious Exemptions Index 2009–2016, supra* note 64. These nine schools are: (1) Biola University, (2) Colorado Christian University, (3) Criswell College, (4) Indiana Wesleyan University, (5) Missouri Baptist University, (6) Southeastern University, (7) The Masters College for Christ and Scripture, (8) Trinity Baptist College, and (9) the University of Dallas. *See id.* I read through the exemption letters and responses to determine which schools had not received a response.

134. *Id.* These four schools are: (1) Biola University, (2) Colorado Christian University, (3) Indiana Wesleyan University, and (4) Missouri Baptist University. *See id.* I read through the exemption letters before 2009 to determine which schools had already been considered exempt, and thus, by implication, had satisfied the control test in the past.

135. *Id.* The four schools that are still awaiting a final response from the Department of Education are: (1) Arlington Baptist College, (2) The Masters College for Christ and Scripture, (3) Trinity Baptist College, and (4) the University of Dallas. *See id.* I read through the exemption letters and responses to determine which schools had received both a request for additional information and a response acknowledging the exemption.

136. Each of the schools indicated in their request letters that they either required faculty to adhere to a statement of faith or that their official documents (bylaws, mission statements, etc.) espouse a particular faith, in accordance with part three of the published control test. *See id.*

These requests for additional information demonstrate the dangers of subsection (b) of the regulation. First, instead of being automatic as written in the statute, these schools' exemptions were contingent upon the Department's discretion. Second, the standards the Department used in assessing were unclear. Several schools received requests for additional information even where the provided information would previously have been deemed sufficient under the Department's published memoranda. Third, when the Department did not respond, especially after a school provided the requested additional information, schools were faced with uncertainty regarding their exempt status and whether they would continue to be eligible for federal funding.

B. Case Study: Indiana Wesleyan

The experience of Indiana Wesleyan University provides an example of the problems presented by the Department's administrative changes from 2014 to 2016. Indiana Wesleyan University sent an exemption letter on March 18, 2016, regarding the new guidelines pertaining to sexual orientation and gender identity.¹³⁷ In its letter, Indiana Wesleyan stated that it was "founded by the Wesleyan Church . . . and remains an institution of The Wesleyan Church to this day."¹³⁸ It articulated a list of seven religious tenets that conflict with the guidelines regarding sexual orientation and gender identity.¹³⁹ These disclosures comply with the requirements of the regulation because they identify the religious organization that controls the educational institution and specify the provisions of Title IX or its regulations that conflict with the tenets of the religious organization.¹⁴⁰ This information also satisfies the guidelines in the Singleton Memo because "the specific organization is named" and would have been sufficient "even [if] no

137. Letter from David Wright, President, Ind. Wesleyan Univ., to Catherine Lhamon, Assistant Sec'y, Office for Civil Rights, U.S. Dep't of Educ., U.S. DEP'T OF EDUC. (Mar. 18, 2016), <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/indiana-wesleyan-university-request-03182016.pdf>.

138. *Id.*

139. *Id.*

140. 34 C.F.R. § 106.12 (2017); Assurance of Compliance with Title IX of Education Amendments of 1972, 42 Fed. Reg. 15141, 15142-43 (Mar. 18, 1977).

information [were] provided on how that organization controls the institution.”¹⁴¹

In addition, the Department already acknowledged Indiana Wesleyan’s exemption to Title IX’s provision regarding pregnancy outside of marriage, and thus the University had been deemed to be controlled by a religious organization in the past.¹⁴² When Indiana Wesleyan, known at the time as Marion College,¹⁴³ previously wrote an exemption letter on June 28, 1976, it stated that it could not comply with sections of Title IX that conflicted with “the general rules of The Wesleyan Church by which Marion College is controlled.”¹⁴⁴ It provided no additional information regarding control.¹⁴⁵ In response, the Department of Education wrote that the president of the college had “supplied information in his request letter that establishes that the institution is controlled by a religious organization.”¹⁴⁶ Although the organizational structures of many religious colleges and universities have changed in the past forty years, in its most recent letter Indiana Wesleyan provided information that reflected its organizational structure had not changed, and it remains part of the Wesleyan Church.¹⁴⁷

Indeed, Indiana Wesleyan arguably provided more information regarding control in its 2016 request¹⁴⁸ than in its 1976 request,¹⁴⁹

141. Memorandum from Harry M. Singleton, *supra* note 102.

142. Letter from Woodrow Goodman, President, Marion Coll., to Peter E. Homes, Dir., Office for Civil Rights, U.S. Dep’t of Educ., U.S. DEP’T OF EDUC. (June 28, 1976), <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/indiana-wesleyan-university-request-06281976.pdf>.

143. *Id.*

144. *Id.*

145. *Id.*

146. Letter from Harry M. Singleton, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., to James P. Hill, Jr., President, Marion Coll., U.S. DEP’T OF EDUC. (Sept. 13, 1985), <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/indiana-wesleyan-university-response-09131985.pdf>.

147. *See* Letter from David Wright, *supra* note 137.

148. In its original letter, Wesleyan University wrote: “IWU was founded by The Wesleyan Church to provide higher education within a Christian environment for Wesleyan youth, and remains an institution of the Wesleyan Church to this day.” *Id.* That sentence concluded with footnote citations to pages on Indiana Wesleyan’s website and The Wesleyan Church website that support those assertions. *Id.*

149. Wesleyan University’s (Marion College) 1976 request included only the phrase “the Wesleyan Church by which Marion College is controlled.” Letter from Woodrow Goodman, *supra* note 142.

but the Department of Education requested additional information regarding control from Indiana Wesleyan on May 13, 2016.¹⁵⁰ On June 2, 2016, Indiana Wesleyan sent another letter to the Department with the requested additional information.¹⁵¹ As of December 31, 2016, the Department of Education had not responded to Indiana Wesleyan's additional information.

As the example of Indiana Wesleyan demonstrates, these requests for additional information exceeded the Department's authority by subjecting the Title IX religious exemption to arbitrary administrative discretion. The Department's enigmatic and delayed responses seemed to be a delaying tactic in an attempt to assert authority and restrict the religious exemption. Many universities were in a state of limbo, uncertain whether they would be deprived of substantial funding. If the Department continues to exercise authority to grant or deny religious exemptions under subsection (b), it may continue to act in an arbitrary manner, granting exemptions to some and ignoring or requesting additional information from others with little apparent justification. This violates the statutory language and subsection (a) of the regulation, and creates conflict with the First Amendment. Although a change in substantive policy from one presidential administration to another resolved the underlying substantive question, the problematic procedural precedents established by the Department's actions remain.

V. CONCLUSION

The language of the Title IX religious exemption reflects a congressional compromise that calls for automatic exemption of qualifying educational institutions. One of the reasons why Title IX has been effective in promoting gender equality in education is

150. Letter from Seth M. Galanter, Principal Deputy Assistant Sec'y, Office for Civil Rights, U.S. Dep't of Educ., to David Wright, President, Ind. Wesleyan Univ., U.S. DEP'T OF EDUC. (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/indiana-wesleyan-university-response-05132016.pdf>.

151. Letter from David Wright, President, Ind. Wesleyan Univ., to Seth M. Galanter, Principal Deputy Assistant Sec'y, Office for Civil Rights, U.S. Dep't of Educ., U.S. DEP'T OF EDUC. (June 2, 2016), <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/indiana-wesleyan-university-request-06022016.pdf?src=preview>.

because of its religious exemption, which allows the country's long-standing tradition of religious education to continue while still advancing gender equality.

Going forward, the Department of Education should apply the Title IX religious exemption as written. Recognizing that exemptions are automatically granted to qualifying institutions by statute and that it has no authority to grant or deny exemptions, the Department of Education should view the letter writing process as a courtesy, not a requirement. This is in harmony with the statutory text and avoids potential First Amendment conflicts.

Statutory religious exemptions have played a valuable role in American history, promoting desirable social change while providing accommodations for religious dissenters. Restricting statutory religious exemptions will not further civil rights but will instead create a new class of people who feel they are oppressed by the government because of their beliefs. Instead, government should continue to enact and implement automatic religious exemptions as they strive to create liberty and justice for all.

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