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**A HIGHER POWER PRODUCES  
GREATER PROBLEMS: HOW  
RELIGIOUS HONOR CODES AND  
RELIGIOUS SCHOOLS EXACERBATE  
CAMPUS SEXUAL ASSAULT**

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### I. INTRODUCTION

During Thanksgiving break of her freshman year at Patrick Henry College (PHC), Sarah woke up to find one of her classmates attempting to rape her.<sup>1</sup> Shortly thereafter, Sarah reported her assault to the PHC Dean of Women, Sandra Corbitt, who replied that if Sarah was telling the truth, then God would have kept her conscious to bear witness to the sexual assault.<sup>2</sup> Sarah and her roommate, Rachel, attempted to report the perpetrator’s continued harassment to Dean Corbitt; they were instructed to delete all the emails and text messages from the perpetrator, in which he apologized for assaulting Sarah.<sup>3</sup> Dean Corbitt then threatened to expel Sarah and Rachel if they continued to speak about the incidents any further.<sup>4</sup>

Without support from her school, Sarah was subjected to a judiciary hearing, in which her perpetrator admitted to assaulting her but maintained it was consensual.<sup>5</sup> After deliberating, PHC found Sarah blameworthy for some of the assault because she put herself in a compromising situation by

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1. See Kiera Feldman, *Sexual Assault at God’s Harvard*, NEW REPUBLIC (Feb. 17, 2014), <https://newrepublic.com/article/116623/sexual-assault-patrick-henry-college-gods-harvard> (noting that the students were staying with PHC host parents for the break).

2. See *id.* (detailing that Corbitt described Sarah’s perpetrator as “a nice boy” and did not believe Sarah or her roommate).

3. See *id.* (demonstrating how Dean Corbitt confiscated and erased all evidence of the crime).

4. See *id.* (detailing Dean Corbitt’s efforts to prevent Sarah and Rachel from accessing the police, a legal remedy, or support).

5. See *id.* (describing her perpetrator’s assertion that he thought the sexual acts were consensual even though Sarah was asleep).

studying alone with the male student.<sup>6</sup> Despite her withdrawal from PHC at the end of the year, the administration continued to maintain that no sexual assault had occurred.<sup>7</sup>

A college campus is a place where sexualized violence not only occurs, but flourishes.<sup>8</sup> Twenty to twenty-five percent of female undergraduate students experience an attempted or completed sexual assault during their time in college.<sup>9</sup> Student survivors face serious obstacles when reporting a sexual assault.<sup>10</sup> Campus administrations are incentivized to maintain obstacles to reporting because they fear the stigmatization associated with sexual assaults will lead to decreased enrollment rates, donations, and revenue.<sup>11</sup> In addition to fear, university policymakers and judiciary committees often rely upon sexist and ill-informed beliefs that sexual assault is perpetrated primarily by pathological strangers or intruders.<sup>12</sup> The incentives to ignore, and the misperceptions of college campuses, create an atmosphere that promotes sexual assault and often fosters repeat offenders.<sup>13</sup>

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6. See *id.* (finding Sarah to blame for her sexual assault while absolving her perpetrator of virtually all culpability).

7. See *id.* (noting that when Sarah confronted the PHC Provost about the mishandling of her sexual assault case, he was dismissive and “unaware” of any sexual assault).

8. See Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 221 (2014) (highlighting how sexual violence occurs so frequently on college campuses due to the abundance of motivated offenders, suitable targets, and an absence of capable guardians in a highly structured space).

9. See Lauren P. Schroeder, *Cracks in the Ivory Tower: How the Campus Sexual Violence Elimination Act Can Protect Students from Sexual Assault*, 45 LOY. U. CHI. L.J. 1195, 1196-97 (2014) (reporting 95% of completed rape and nearly 96% of attempted rape survivors do not report their assault).

10. See BONNIE S. FISHER ET AL., U.S. DEP’T OF JUSTICE, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 23 (2000), <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf> [hereinafter DOJ REPORT] (identifying two reasons for not reporting sexual assault to law enforcement: (1) concern about the seriousness of the incident deemed worthy of law enforcement intervention, and (2) fear of stigmatization).

11. See Ashley Hartmann, *Reworking Sexual Assault Response on University Campuses: Creating A Rights-Based Empowerment Model to Minimize Institutional Liability*, 48 WASH. U. J.L. & POL’Y 287, 299-300 (2015) (exposing the monetary incentives that prejudice universities to deny survivors justice).

12. Compare *id.* at 294 (defining “rape myth” as the belief that sexual assaults are committed by pathological strangers at night), with Cantalupo, *supra* note 8, at 211 (noting that of the completed rapes, 35.5% of offenders were classmates, 34.2% were friends, 23.7% were boyfriends or ex-boyfriends, and 2.6% were acquaintances).

13. See FISHER ET AL., *supra* note 10, at 35 (noting rapists on college campuses are

Despite the significant issues survivors face, students in secular institutions benefit from access to Title IX and other sexual assault legislation; however, these laws do not protect students at religious institutions.<sup>14</sup> Religious schools are also founded on paternalistic principles that create additional layers of impediments to reporting sexual assault and leave survivors particularly vulnerable.<sup>15</sup> Religious beliefs about gender roles, modesty, and purity bias the religious academic administration's reception of a survivor's report.<sup>16</sup>

This Comment argues that the honor codes and approaches to campus sexual assault in religious colleges and universities are unconstitutional and should be regulated under Title IX, the Clery Act, and the Campus SaVE Act.<sup>17</sup> Part II of this Comment outlines the various legal remedies available to survivors of campus sexual assault and describes the particularly vulnerable state of survivors on religious campuses.<sup>18</sup> Part III argues that religious colleges and universities should be regulated under the Commerce Clause and subjected to the same legal standards as secular schools as it relates to campus sexual assault.<sup>19</sup> Part III additionally asserts that religious colleges and universities violate the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment.<sup>20</sup> Part IV

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often found to have raped six to eight other women).

14. See Feldman, *supra* note 1 (noting the uniquely vulnerable state of students at private religious schools because the Clery Act, Title IX, and the Campus Sexual Violence Elimination Act (SaVE) only apply to academic institutions that accept federal financial assistance).

15. See Zoe Mintz, *How Conservative Christian Colleges Treat Sexual Assault On Campus*, INT'L BUS. TIMES (Dec. 15, 2014, 1:13 PM), <http://www.ibtimes.com/how-conservative-christian-colleges-treat-sexual-assault-campus-1749980> (exposing how religious schools focus investigations on what the victim has to repent for, rather than what the perpetrator is guilty of).

16. See CHURCH EDUCATIONAL SYSTEM HONOR CODE, BRIGHAM YOUNG UNIVERSITY 1-2 (Nov. 9, 2015), <https://policy.byu.edu/view/index.php?p=26> [hereinafter BRIGHAM YOUNG]; PATRICK HENRY COLLEGE, STUDENT HANDBOOK 18-19 (2015), [http://cdn2.hubspot.net/hubfs/1718959/Documents/2015-2016\\_-\\_Student\\_Handbook\\_-UPDATED.pdf?t=1467393079717](http://cdn2.hubspot.net/hubfs/1718959/Documents/2015-2016_-_Student_Handbook_-UPDATED.pdf?t=1467393079717) [hereinafter PATRICK HENRY].

17. See *infra* Part III (outlining the various ways that Congress and the courts can and should control religious colleges and universities).

18. See *infra* Part II (outlining current sexual assault legislation, the Equal Protection Clause, and the Commerce Clause).

19. See *infra* Part III (arguing that under the Commerce Clause, Congress has the power to regulate religious colleges).

20. See *infra* Part III (arguing that religious colleges' honor codes unconstitutionally discriminate against female students and violate their right to access the criminal justice system).

recommends that Congress broaden the scope of Title IX to apply to religious institutions.<sup>21</sup> Lastly, Part V concludes that religious schools' approach to campus sexual assault is unconstitutional.<sup>22</sup>

## II. BACKGROUND

### A. Title IX and Its Accompanying Legislation

Survivors of sexual assault in secular schools have access to Title IX and other Congressional mandates to assist them in different procedural steps to report their sexual assault to their institution.<sup>23</sup> Title IX provides in pertinent part that “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.”<sup>24</sup> Title IX holds colleges and universities accountable for properly responding to reports of sexual assault.<sup>25</sup> Under Title IX, sexual assault is considered a subset of sexual harassment, which creates a hostile environment that deprives survivors of access to educational opportunities.<sup>26</sup>

Under Title IX, a school faces potential liability if they fail to adhere to the congressionally mandated rules for responding to sexual assault.<sup>27</sup> Specifically, liability occurs when a student alleges that a university intentionally failed to appropriately respond to known sexual harassment or assault.<sup>28</sup> Although Title IX is meant to encourage reports of sexual

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21. See *infra* Part IV (recommending that the language of Title IX should be broadened to include all schools, not just those that receive federal financial assistance).

22. See *infra* Part V (concluding that religious schools violate the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment and should be regulated under the Commerce Clause).

23. 20 U.S.C. § 1681 (1972) (providing recourse for sexual assault survivors who experience assault on their college campus if their college receives federal financial assistance).

24. See *id.*

25. See *id.* (explaining actionable sexual harassment has occurred when the constellation of surrounding circumstances and the relationship between a harasser and a victim breaches Title IX's guarantee of equal access to educational benefits).

26. See 20 U.S.C. § 1681 (2016); see also *Williams v. Bd. of Regents*, 477 F.3d 1282 (11th Cir. 2007) (explaining that a student may bring a Title IX complaint against a school for deliberate indifference to a rape, sexual assault, or further harassment).

27. See § 1681.

28. See *id.*; see also *Doe v. Blackburn Coll.*, 2012 WL 640046, at \*7 (C.D. Ill. Feb. 24, 2012) (demonstrating a school is liable under Title IX for deliberate indifference before or after a harassing attack that is so severe, pervasive, and objectively affirmed, that it deprives the victim of access to educational benefits).

assault, the standard of proof under Title IX is exceptionally high.<sup>29</sup> Recently, however, there has been an increase in Title IX complaints, leading to the investigation of over a hundred college campuses for mishandling reports of sexual assault.<sup>30</sup>

Although the number of Title IX complaints has increased, underreporting of sexual assaults continues to be an issue.<sup>31</sup> Congress responded to the underreporting rate of campus sexual assaults by enacting the Jeanne Clery Act (“Clery Act”).<sup>32</sup> The Clery Act informs prospective students and their parents on reporting statistics and the administrative procedures for each college and university.<sup>33</sup> The Act further provides survivors with information regarding their rights under the Campus Sexual Assault Victim’s Bill of Rights (“Campus SaVE Act”).<sup>34</sup>

The Campus SaVE Act was signed into law as an additional provision of the Violence Against Women Act (“VAWA”) reauthorization and was designed specifically to address the shortcomings of both Title IX and the Clery Act.<sup>35</sup> The Campus SaVE Act requires colleges and universities to clearly explain their policies on sexual assault, to revise reporting requirements, and to clarify the minimum standards for institutional

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29. See *Davis v. Monroe City Bd. of Educ.*, 526 U.S. 629, 644-45 (1999) (setting forth a six-factor standard for survivors seeking action against their academic institution); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 304 (1998) (Stevens, J., dissenting) (decrying the decision as encouraging schools to avoid actual knowledge of a sexual assault, rather than set up procedures by which survivors could easily report the assaults).

30. See Tyler Kingkade, *124 Colleges, 40 School Districts Under Investigation for Handling of Sexual Assault*, HUFFINGTON POST (July 24, 2015, 2:06 PM), [http://www.huffingtonpost.com/entry/schools-investigation-sexual-assault\\_us\\_55b19b43e4b0074ba5a40b77](http://www.huffingtonpost.com/entry/schools-investigation-sexual-assault_us_55b19b43e4b0074ba5a40b77) (reporting that as of July 22, 2015, the U.S. Department of Education, Office for Civil Rights, was conducting 140 investigations of 124 higher-education institutions).

31. See Schroeder, *supra* note 9 (reporting 95% of survivors of completed rape and nearly 96% of attempted rape do not report their assaults).

32. 20 U.S.C. § 1092(f) (2012).

33. See Cantalupo, *supra* note 8, at 244 (noting the Clery Act requires academic institutions to inform incoming students and their parents about their procedures for campus sexual assaults, a survivor’s rights, and reporting rates).

34. See 20 U.S.C. § 1092(f)(8)(B)(iv)-(vi) (describing the procedures for institutional disciplinary action in cases of alleged domestic violence, sexual assault, or stalking, including prompt and impartial investigation and resolution).

35. See Rachel Marshall, *Will it Really SaVE you? Analyzing the Campus Sexual Violence Elimination Act*, 6 LEGIS. & POL’Y BRIEF 271, 272, 278, 280 (2014); *The Campus Sexual Violence Elimination Act*, JEANNE CLERY ACT INFO. <http://www.cleryact.info/campus-save-act.html>; see also Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304, 127 Stat. 54, 89-92 (2013).

discipline proceedings.<sup>36</sup> Under the Campus SaVE Act, a survivor is provided with assurances that their school will inform them of their options regarding reporting to law enforcement and campus authorities.<sup>37</sup>

*B. Religious Institutions and Their Honor Codes*

Survivors of sexual assault who attend privately funded religious colleges and universities do not have access to Title IX, the Clery Act, or the Campus SaVE Act.<sup>38</sup> Religious schools, such as Patrick Henry College (“PHC”), often have honor codes, student handbooks, and founding principles that codify inherently discriminatory beliefs that further perpetuate campus sexual assault.<sup>39</sup> An independent study found that Bob Jones University (“BJU”) blamed, disparaged, and punished survivors of campus sexual assault.<sup>40</sup> Similarly, Brigham Young University’s (“BYU”) honor code is enforced so strictly that it punishes survivors for reporting sexual assault.<sup>41</sup> BYU uses its honor code to find fault in a survivor’s

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36. See Violence Against Woman Reauthorization Act of 2013 § 304; see also Schroeder, *supra* note 9, at 1224-25.

37. See Schroeder, *supra* note 9, at 1227 (explaining that under the Campus SaVE Act, a school is required to inform survivors of their right to be assisted by campus authorities in notifying law enforcement, their option to not notify the authorities, and the campus’s responsibility regarding protection orders, no-contact orders, and other court-issued orders).

38. See Feldman, *supra* note 1 (paraphrasing the president of the National Center for Higher Education Risk Management in explaining that religious colleges, such as PHC, are private campuses that are outside of federal influence and, thus, are granted a potentially dangerous amount of discretion).

39. See PATRICK HENRY, *supra* note 16, at 24-25 (codifying the Christian Patriarchy Movement into the PHC Student Handbook); BRIGHAM YOUNG, *supra* note 16 (establishing different codes of conduct for male and female students and finding survivors reporting sexual assault in violation of the honor code); see also BOB JONES UNIVERSITY, STUDENT HANDBOOK 1, 7 (Nov. 9, 2015), <http://www.bju.edu/life-faith/student-handbook.pdf?16> [hereinafter BOB JONES UNIVERSITY].

40. See GODLY RESPONSE TO ABUSE IN THE CHRISTIAN ENVIRONMENT (GRACE), FINAL REPORT: FOR THE INVESTIGATORY REVIEW OF SEXUAL ABUSE DISCLOSURES AND INSTITUTIONAL RESPONSES AT BOB JONES UNIVERSITY 50 n.46 (Dec. 11, 2014), <http://www.sccadvasa.org/wp-content/uploads/2014/12/Final-Report.pdf> [hereinafter GRACE] (reporting that 47% of the investigative sample answered that BJU made efforts to discourage survivors from making police reports).

41. See BRIGHAM YOUNG, *supra* note 16 (establishing different codes of conduct for male and female students on chastity, modesty, purity, and abstinence); see also Ana Cabrera & Sara Weisfeldt, *Punished after reporting rape at Brigham Young University*, CNN (Apr. 16, 2016, 4:09 PM), <http://www.cnn.com/2016/04/29/health/brigham-young-university-rape> (reporting that after Brooke reported she had been raped by a male BYU student, she was expelled for violating the BYU honor code that prohibited having premarital sex).

report to either expel her or coerce her into silence.<sup>42</sup> Sexual assault on religious campuses is uniquely exacerbated by the explicit codification of the administration's disbelief of survivors, intent to blame survivors, and willingness to punish survivors.<sup>43</sup>

### C. *The Commerce Clause*

The Commerce Clause provides in pertinent part “[t]he Congress shall have power . . . [t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”<sup>44</sup> Thus, under the Commerce Clause, Congress has the power to enforce federal legislation to regulate private actors.<sup>45</sup> In one of the most prominent Commerce Clause cases, *Heart of Atlanta Motel, Inc. v. United States*, the Court established that Congress could regulate private businesses under the Commerce Clause if the private business advertised in other states, solicited a diverse demographic of patrons, or was readily accessible to interstate highways.<sup>46</sup> Similarly, in *Katzenbach v. McClung*, the Supreme Court also used the Commerce Clause to regulate a private restaurant because discrimination was found to have a direct and limiting effect on interstate commerce.<sup>47</sup>

The Commerce Clause can be used to regulate even singular private

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42. See Yanan Want, *Brigham Young University Under Fire for Disciplining Sexual Assault Victim for Honor Code Breach*, WASH. POST (Apr. 20, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/04/20/brigham-young-university-under-fire-for-disciplining-a-sexual-assault-victim-for-honor-code-breach/> (explaining that after a victim reported a rape to the police, BYU launched an Honor Code investigation against her and put her on academic probation).

43. See Dahlia Lithwick, *Repeated Violations*, SLATE (Apr. 27, 2016, 5:15 AM), [www.slate.com/articles/news\\_and\\_politics/jurisprudence/2016/04/byu\\_s\\_honor\\_code\\_violates\\_survivors\\_and\\_makes\\_rape\\_likelier.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2016/04/byu_s_honor_code_violates_survivors_and_makes_rape_likelier.html) (finding the BYU policy antithetical to Title IX). See generally Claire Gordon, *How the ‘Fortress of Fundamentalism’ Handles Sexual Assault*, AL JAZEERA AM. (Nov. 14, 2013, 9:00 PM), <http://america.aljazeera.com/watch/shows/america-tonight/america-tonight-blog/2013/11/5/addressing-sexualassaultonafundamentalistchristiancampus.html> (noting that BJU’s response to sexual assault is to manipulate and coerce survivors into silence).

44. See U.S. CONST. art. I, § 8, cl. 3.

45. See *id.*; see also *United States v. Darby*, 312 U.S. 100, 111-12 (1941) (noting that the Commerce Clause includes any intrastate activity that is plausibly connected to the legislation).

46. See 379 U.S. 241, 261 (1964) (holding that the hotels around the country could be regulated under the Commerce Clause because they had an impact on interstate commerce and the transportation of passengers between the states).

47. See 379 U.S. 294, 304 (1964) (applying the Civil Rights Act through the Commerce Clause to a private restaurant by finding a rational impact on interstate commerce).



actors if their actions have a substantial effect on interstate commerce.<sup>48</sup> In *Wickard v. Filburn*, the Supreme Court looked to the Commerce Clause to regulate a farmer's surplus stock of grain because the aggregate effect of the farmer's private economic actions could rationally be believed to have an effect on interstate commerce, now or in the future.<sup>49</sup>

Accordingly, the Supreme Court grants broad discretion to Congress' use of the Commerce Clause as a tool for regulatory legislation.<sup>50</sup> Cases that have aimed to curtail the scope of the Commerce Clauses have, nevertheless, maintained that the Commerce Clause may be used to regulate activities that have a substantial effect on interstate commerce or if doing otherwise would undercut a broader federal regulation.<sup>51</sup> The Supreme Court's jurisprudence on the Commerce Clause encourages Congress to use its commerce power as a vehicle for legislation that regulates private actors to prevent public harms.<sup>52</sup>

#### *D. The Fourteenth Amendment of the United States Constitution*

The Due Process Clause of the Fourteenth Amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law."<sup>53</sup> A violation of a fundamental right occurs when an individual in

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48. See generally *Wickard v. Filburn*, 317 U.S. 111, 132-33 (1942) (penalizing a farmer for growing excess wheat for his own consumption because, although the activity may have been local and not regarded as commerce despite its nature, it could still exert a substantial effect on interstate commerce).

49. See *id.* at 130 (aggregating the intrastate activities of private businesses within a state to find an impact on interstate commerce).

50. See generally *Gonzales v. Raich*, 545 U.S. 1, 26-27 (2005) (using the Commerce Clause to enforce the Controlled Substances Act against Raich's marijuana cultivation, which was solely used for individual medical treatment).

51. But see *United States v. Morrison*, 529 U.S. 598, 613-14 (2000) (finding that although Congress stated that gender-motivated violence had an *aggregate effect* on commerce, Congress could not regulate it through creating a private cause of action because it was not economic in nature) (emphasis added); *United States v. Lopez*, 514 U.S. 549, 559-69 (1995) (finding that Congress' intent to protect students from firearms was not sufficient to find that the activity was substantially related to interstate commerce because it was not economic in nature and would not undercut a larger economic regulatory scheme).

52. See, e.g., *Champion v. Ames*, 188 U.S. 321, 354 (1903) (applying the Commerce Clause to enforce the Federal Anti-Lottery Act against two appellants who sent lottery tickets in the mail); *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938) (enforcing the Filled Milk Act, which prohibited adulterated foods that were injurious to public health, against the actions of a private company); *United States v. Darby*, 312 U.S. 100, 111-12 (1941) (regulating a lumber manufacturer under the Fair Labor Standards Act and noting that the Commerce Clause includes any intrastate activity that is plausibly connected to the legislation).

53. See U.S. CONST. amend. XIV.

the United States is denied a right that is deeply rooted in the nation's history and tradition.<sup>54</sup> In his dissent in *Poe v. Ullman*, Justice Harlan viewed liberty as a rational continuum of freedoms.<sup>55</sup> In *Abigail Alliance v. Von Eschenbach*, the Supreme Court recognized a fundamental right to refuse lifesaving medical treatment, but the Alliance failed to show there is a tradition of access to drugs that have not yet been proven effective and have not yet been proven safe.<sup>56</sup> A fundamental right must be carefully defined, or else it will fail to be found consistent with America's history and tradition.<sup>57</sup>

Alternatively, the Equal Protection Clause of the Fourteenth Amendment states, "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."<sup>58</sup> Under the Fourteenth Amendment, an Equal Protection violation occurs when a law or policy is used to classify and treat people differently based on an immutable characteristic.<sup>59</sup> For some time, the Court struggled with what level of scrutiny to apply for gender-based classifications.<sup>60</sup> However, in 1976, the Supreme Court

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54. See *Washington v. Glucksberg*, 521 U.S. 702, 725 (1997) (finding personal autonomy and self-sovereignty is objectively deeply rooted in our legal tradition and history); see also *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524–25 (2002) (quoting *United States v. Cruikshank*, 92 U.S. 542, 552 (1876)) (finding the right to petition the Government for a redress of grievances as one of the liberties safeguarded by the Bill of Rights and as essential to the very idea of a republican government).

55. See *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (impugning the court to consider that the liberty interests protected by the Due Process Clause are not fixed solely to the enumerated rights, but are a rational continuum).

56. See *Abigail All. for Better Access to Developmental Drugs v. Von Eschenbach*, 495 F.3d 695, 701-02 (D.C. Cir. 2006) (demonstrating that the Due Process Clause protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty); see also *Meyer v. Bd. of Cty. Comm'rs*, 482 F.3d 1232, 1243 (10th Cir. 2007) (recognizing a fundamental right under the First Amendment to file a complaint for physical assault); *United States v. Hylton*, 558 F. Supp. 872, 874 (S.D. Tex. 1982) (finding filing of a legitimate criminal complaint with local law enforcement officials constitutes an exercise of a First Amendment protected speech).

57. See *Glucksberg*, 521 U.S. at 720-21 (observing that the Court has required a careful description of the asserted fundamental liberty interest).

58. See U.S. CONST. amend. XIV, § 1.

59. See *id.*; see also *Reed v. Reed*, 404 U.S. 71, 76 (1971) (using a heightened level of rational basis review to strike down an Idaho law that gave immediate administrator rights to the male parent, over an equally qualified female parent of a deceased child's estate).

60. See *Frontiero v. Richardson*, 411 U.S. 677, 688-89 (1973) (setting the foundation for intermediate scrutiny by holding that classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and subject to heightened scrutiny).

adopted intermediate scrutiny for sexed-based classifications, finding that the use of sex-based criteria must be substantially related to the achievement of an important governmental objective.<sup>61</sup>

A two-pronged test for applying intermediate scrutiny was later established.<sup>62</sup> In applying the test, the Court in *Feeney* held that a Massachusetts law giving preference to hiring servicemen was a facially neutral law and its disproportionate adverse effect upon women was not unconstitutional, as the law could not be traced to a discriminatory purpose.<sup>63</sup> Accordingly, a plaintiff must demonstrate that the policy was undertaken, at least in part, because of its adverse effects upon an identifiable group, not merely in spite of it.<sup>64</sup>

Intermediate scrutiny has also been used to strike down sex-based policies that perpetuate intentional discrimination in the educational system.<sup>65</sup> In *United States v. Virginia*, a woman, who otherwise met the Virginia Military Institute's ("VMI") rigorous qualifications, was denied admission based solely on her sex.<sup>66</sup> The Supreme Court found the male-only admission policy did not substantially relate to an important governmental objective.<sup>67</sup> The policy was created to perpetuate the legal, social, and economic inferiority of women, which is unacceptable under the Equal Protection Clause.<sup>68</sup>

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61. See *Craig v. Boren*, 429 U.S. 190, 197-98 (1976) (determining statutory classifications that distinguish between males and females must be substantially related to an important governmental interest).

62. See *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 274 (1979) (holding intermediate scrutiny is applied to laws that overtly classify on the basis of sex and purposefully discriminate on the basis of sex).

63. See *id.* at 272 (noting that even if a neutral law foreseeably and disproportionately effects a specific group, it is only unconstitutional if it is the result of a discriminatory purpose).

64. See *id.* at 279 (clarifying that nothing in the record demonstrated that the statute was intentionally adopted for the collateral goal of keeping women in a stereotypical role).

65. See generally *United States v. Virginia*, 518 U.S. 515, 555 (1996) (establishing that all gender-based classifications today warrant intermediate scrutiny).

66. See *id.* at 523 (noting that from 1988 to 1990, VMI received and denied 347 women's applications because they were not from male applicants).

67. See *id.* at 534, 545-46 (finding VMI had fallen short in establishing the persuasive justifications for their male-only admission policy).

68. See *id.* (refusing to accept Virginia's rationale for having a male-only educational experience at VMI).

## III. ANALYSIS

A. *Religious Colleges and Universities Should Be Subjected to Congressional Regulation Under the Commerce Clause Because They Have an Aggregated Effect on Interstate Commerce*

Religious schools should be subject to Congressional regulation, such as Title IX, the Clery Act, and the Campus SaVE Act, under the Commerce Clause because of the schools' effect on interstate commerce.<sup>69</sup> In *Heart of Atlanta Motel, Inc. v. United States*, the Court found that Congress could regulate a private business under the Commerce Clause because seventy-five percent of the hotel's guests were from out-of-state.<sup>70</sup> Religious colleges and university have comparable rates of out-of-state students.<sup>71</sup> Schools such as PHC and BJU expect to have an out-of-state student population, which is evidenced by the five residence halls at PHC and the eight at BJU.<sup>72</sup> Residency halls on religious college and university campuses have an analogous effect on interstate commerce as the public accommodations of Heart of Atlanta Hotels.<sup>73</sup> Religious colleges and universities provide lodging and accommodations to out-of-state students who qualify as transient guests because most will relocate after college to seek job opportunities or return home.<sup>74</sup>

Additionally, PHC and other similar religious schools should be regulated under the Commerce Clause because they are readily accessible to interstate highways.<sup>75</sup> In *Heart of Atlanta Motel*, the Supreme Court

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69. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 274 (1964) (using the Commerce Clause to enforce the Civil Rights Act against private businesses).

70. See *id.* (finding that Congress could regulate the business under the Commerce Clause because the appellant had solicited patronage from outside of Georgia).

71. Compare *Patrick Henry College*, COLLEGE BOARD, <https://bigfuture.collegeboard.org/college-university-search/patrick-henry-college> (reporting 83% of PHC's students are from out of state), and *Bob Jones University*, COLLEGE BOARD, <https://bigfuture.collegeboard.org/college-university-search/bob-jones-university> (explaining that 67% of BJU's students are from out-of-state), with *Heart of Atlanta Motel*, 379 U.S. at 274 (noting that 75% of customers were from out-of-state).

72. See *Dorm Life*, PATRICK HENRY COLLEGE (Aug. 9, 2013), <http://www.phc.edu/dorm-life> (detailing the five dormitories and describing PHC as a primarily residential college).

73. See *Heart of Atlanta Motel*, 379 U.S. at 284 (stating the Commerce Clause regulates any place which provides lodging to transient guests or any place of public accommodation).

74. See *id.* (defining the Commerce Clause's scope as any place of public accommodation or any place that provides lodging for transient guests).

75. See *Patrick Henry College*, 10 Patrick Henry Circle, Purcellville, VA, GOOGLE

used the Commerce Clause to enforce Title II of the Civil Rights Act against the motel because it was readily accessible to Interstates 75 and 85 and State Highways 23 and 41.<sup>76</sup> Similarly, in *Katzenbach v. McClung*, the Court found an impact on interstate commerce where a restaurant was located near an interstate highway.<sup>77</sup> Comparatively, PHC is located just half a mile from the Harry Byrd Highway, Exit VA-287.<sup>78</sup> In just ten minutes, Harry Byrd Highway connects to U.S. Interstate 15, which runs across Virginia, North Carolina, and Pennsylvania.<sup>79</sup> Like PHC, many other religious colleges and universities are also readily accessible to interstate highways. For example, BJU is six minutes away from Interstates 385 and 85, which lead out of the state in less than one hour.<sup>80</sup>

A school's proximity to major urban areas also makes it subject to the Commerce Clause.<sup>81</sup> PHC advertises and solicits students from out-of-state by emphasizing its own proximity to Washington, D.C.<sup>82</sup> Comparatively, BYU is eight blocks away from downtown Provo, Utah, ten blocks from the Marriott Hotel Conference Center, twelve blocks from Seven Peaks

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MAPS, <http://maps.google.com> [hereinafter PHC GOOGLE MAPS] (follow "directions" hyperlink; then search Patrick Henry College).

76. See *Heart of Atlanta Motel*, 379 U.S. at 243, 274 (taking into account the motel's proximity to out-of-state highways in determining whether the hotel affected interstate commerce).

77. See *Katzenbach v. McClung*, 379 U.S. 294, 296 (1964) (applying the Commerce Clause to a restaurant eleven blocks from an interstate highway and close to interstate public transportation, such as bus and train stations).

78. Compare PHC GOOGLE MAPS, *supra* note 75 (follow "directions" hyperlink; then search Patrick Henry College and zoom in to view adjacent highways and interstates), with *Heart of Atlanta Motel*, 379 U.S. at 274 (finding the Motel's ready accessibility to interstate highways as a contributing cause for its impact on interstate commerce).

79. See PHC GOOGLE MAPS, *supra* note 75 (follow "directions" hyperlink, search Patrick Henry College, and then zoom in to view adjacent highways and interstates).

80. Compare Bob Jones University, 1700 Wade Hampton Boulevard, Greenville, SC, GOOGLE MAPS, <http://maps.google.com> [hereinafter BJU GOOGLE MAPS] (follow "directions" hyperlink, search Bob Jones University, and then zoom in to see that Interstates 385 and 85 are six minutes from the University), with *Heart of Atlanta Motel*, 379 U.S. at 274 (finding an impact on interstate commerce because the motel was readily accessible to several interstate and state highways).

81. See *Heart of Atlanta Motel*, 379 U.S. at 243 (considering the motel's proximity to an urban commercial area because the motel consisted of rooms on a street just two blocks from downtown).

82. Compare Patrick Henry College, INSTAGRAM, <https://www.instagram.com/patrickhenrycollege> [hereinafter PHC INSTAGRAM] (boasting on its home page that PHC is only located one hour away from Washington, D.C.), with *Heart of Atlanta Motel*, 379 U.S. at 243 (highlighting its proximity to the downtown area).

Water Park, and fourteen blocks from Peaks Olympic Hockey Ice Arena, all of which have a rational relationship to interstate commerce.<sup>83</sup>

Religious schools like PHC should also be subjected to federal regulation under the Commerce Clause because of their national advertisement campaigns and solicitation of out-of-state students.<sup>84</sup> The Court has found that the use of magazine advertisements, billboards, and highway signs soliciting out-of-state patronage creates a rational impact on interstate commerce.<sup>85</sup> PHC's use of Facebook, Instagram, Twitter, and YouTube are analogous contemporary uses of advertisements of national circulation.<sup>86</sup> These online advertisements solicit nationwide and international patronage.<sup>87</sup> PHC's use of social media and online presence satisfy the out-of-state advertisement element used in determining whether Congress can exercise its authority under the Commerce Clause.<sup>88</sup>

Moreover, religious colleges and universities should be regulated under the Commerce Clause because the Court has found that discriminatory practices have a direct and highly restrictive effect upon interstate commerce.<sup>89</sup> In *Katzenbach v. McClung*, the Court determined that by

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83. Compare Brigham Young University, Provo, UT, GOOGLE MAPS, <http://maps.google.com> [hereinafter BYU GOOGLE MAPS] (follow "directions" hyperlink, search Brigham Young University, and then zoom in to see BYU is less than ten minutes away from the Marriott Hotel Conference Center, Peaks Ice Arena, and Seven Peaks Waterpark), with *Heart of Atlanta Motel*, 379 U.S. at 243, 283-84 (applying the Commerce Clause to a motel that was two blocks away from a downtown area and regulating any place of public accommodation).

84. See Patrick Henry College, FACEBOOK, <https://www.facebook.com/patrick.henry.college> (advertising PHC's student body, academics, and campus life); see also *What It Means to Be Human-Patrick Henry College*, YOUTUBE (Jun. 19, 2013), <https://www.youtube.com/user/PHCvids> (hosting Patrick Henry College's YouTube Channel with advertisements, promotional videos, and interviews appealing to prospective students).

85. See *Heart of Atlanta Motel*, 379 U.S. at 243 (finding that the motels are subject to regulation because the motel solicited patronage from outside the state through national magazine advertisements and over 50 billboards and highway signs).

86. See Patrick Henry College, TWITTER, [https://twitter.com/patrickhenrycol?ref\\_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor](https://twitter.com/patrickhenrycol?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor) (soliciting high school students from around the country to apply to PHC); see also PHC INSTAGRAM, *supra* note 82 (advertising and publicizing Patrick Henry College).

87. See, e.g., *Heart of Atlanta Motel*, 379 U.S. at 274 (noting Congress was within its discretion under the Commerce Clause to regulate the private business, in part, because its extensive advertisements in various media outlets of national circulation that contributed to its large out-of-state patronage).

88. See *id.* at 261 (finding that the power to interpret and apply the Commerce Clause is within the exclusive discretion of Congress).

89. See *Katzenbach v. McClung*, 379 U.S. 294, 300-01 (1964) (determining that discrimination in restaurants had a direct and highly restrictive effect upon interstate

excluding African-American patrons, the restaurant was directly limiting interstate commerce by restricting how African Americans traveled across the nation.<sup>90</sup> The Court found there is a substantial impact on interstate commerce anytime there is an artificial market limitation imposed on an identifiable class of people.<sup>91</sup>

Unlike the public high school student in *United States v. Lopez*, religious colleges and universities have a substantial effect on interstate commerce because these college students have recently moved in interstate commerce, highlighting a concrete connection to their continued tuition payments or withdrawal from school to interstate commerce.<sup>92</sup> Both PHC and BJU host predominantly out-of-state students who pay out-of-state tuition.<sup>93</sup> The Supreme Court in *Lopez* did not allow Congress to ban guns in school zones under the Commerce Clause because the policy in question was not part of a larger regulation of economic activity in which the regulatory scheme would be undercut unless the intrastate activity was regulated.<sup>94</sup>

Title IX applies to all schools in the United States that accept financial federal assistance; however, its regulatory scheme is undercut by the intrastate activities of religious colleges and universities.<sup>95</sup> Religious

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travel by African Americans because the practices discouraged travel of African Americans and obstructed interstate commerce).

90. *See id.* at 300 (finding that by refusing to serve African Americans, the restaurant directly obstructed interstate commerce because “one can hardly travel without eating” and travelers would have to seek out other accommodations that would impact interstate commerce).

91. *See id.* at 299-300 (determining the discriminatory practice of the restaurant was an artificial market limitation which would disrupt the flow of interstate travelers and have a substantial impact on interstate commerce).

92. *Compare* *United States v. Lopez*, 514 U.S. 549, 642-43 (1995) (finding no substantial effect on interstate commerce because the respondent was a local student at a local school, there was no indication he had recently moved in interstate commerce, and there was no requirement that his possession of a firearm have any concrete ties to interstate commerce), *with* *Feldman*, *supra* note 1 (showing multiple reports of female sexual assault survivors withdrawing from PHC because of how they were treated by the Dean of Female Students, Sandra Corbitt), *and* *Cabrera & Weisfeldt*, *supra* note 41 (explaining how BYU’s punishment of survivors reporting their sexual assault led to students’ ultimate withdrawals).

93. *See* *Patrick Henry College*, *supra* note 71 (reporting 83% of PHC’s students are from out-of-state); *Bob Jones University*, *supra* note 71 (showing 67% of BJU’s students are from out-of-state).

94. *See Lopez*, 514 U.S. at 638-39 (refusing to apply the Commerce Clause because the Court could not draw any connection between the gun control and violence and interstate commerce).

95. *See* 20 U.S.C. § 1681 (1972) (applying Title IX liability to all schools in the United States that receive federal financial assistance and demonstrate deliberate indifference before or after a harassing attack); *see also* *Lithwick*, *supra* note 43

academic institutions substantially affect interstate commerce by coercing survivors into silence, thus retaining those students' enrollment and tuition payments, or by expelling survivors of sexual assault, thus sending those students to either enter the job market or seek admission to other schools.<sup>96</sup> The discriminatory practices of religious schools impose a substantial effect on interstate commerce, as the schools impose an artificial limitation on women's rights and resources under Title IX, which ultimately deprives them of academic opportunities.<sup>97</sup>

Additionally, religious schools' discriminatory actions have a direct effect on interstate commerce because they deter professional and skilled people from moving into areas where discriminatory practices occur.<sup>98</sup> Intrastate activity can be regulated under the Commerce Clause when the activity contributes to a nationwide harm.<sup>99</sup> The Court affirmed this position in *Polish Alliance v. Labor Board*, finding that Congress could consider the significance of local, intrastate discrimination because it is representative of many other forms of discrimination throughout the country.<sup>100</sup> This holding is distinguishable from *United States v. Morrison*, as the petitioner in *Morrison* sought to create a new cause of action against individual respondents, whereas Title IX already provides a cause of action that applies to all colleges and universities that accept federal financial assistance and is a national regulation with an already present applicable

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(finding the BYU policy antithetical to Title IX, which combats campus sexual assault by stopping predators and encouraging survivors to come forward).

96. See Feldman, *supra* note 1 (reporting that a student survivor had to start her college education over again with no credits, while another moved back to Florida and began working for Worldwide Opportunities on Organic Farms).

97. Compare *Katzenbach v. McClung*, 379 U.S. 294, 301 (1964) (finding racial discrimination affects interstate commerce), and *Lopez*, 514 U.S. at 638-39 (refusing to apply the Commerce Clause because the statute at issue was not part of a larger regulation of economic activity that would be undercut if intrastate activity was not regulated), with *Mintz*, *supra* note 15 (explaining how religious institutions violate Title IX, depriving women of their right to equal opportunity of education, by focusing investigations of sexual assault on blaming, disparaging, and silencing the survivor).

98. See *Katzenbach*, 379 U.S. at 300 (stating that the persistent discrimination in an area would have an effect on interstate commerce by deterring professional, out-of-state industry from relocating to that area).

99. See *id.* at 300-01 (finding the connection between discrimination and interstate commerce); see also *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 253 (1964) (articulating the connection between discrimination and interstate commerce).

100. See *Polish All. v. Labor Bd.*, 322 U.S. 643, 648 (1944) (concluding that Congress appropriately considered the discrimination as representative of harm because, if left unchecked, the consequences may well become far-reaching in their negative effect on commerce).



economic regulatory scheme.<sup>101</sup> Further, *Morrison* concerned all gender-based crimes generally, whereas student survivors who attend religious colleges or universities and make tuition payments, are often out-of-state students, have recently relocated, have plans to leave after graduation, contribute to the school's financial success or failure, and have, in large part, an economic relationship with the school.<sup>102</sup> The discrimination religious colleges and universities commit against students that are survivors of campus sexual assault contributes to nationwide harm, furthering the current sexual assault epidemic already present in society.<sup>103</sup>

Lastly, Congress should regulate religious colleges and universities under the Commerce Clause because it is used to enforce preventative and remedial federal legislation against the actions of private businesses.<sup>104</sup> Religious campuses act in direct opposition to federal legislative attempts to prevent and ameliorate campus sexual assault.<sup>105</sup> Similar to actions Congress has taken in the past, it can and should regulate the actions of private actors, like religious colleges and universities, to prevent the social

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101. Compare *United States v. Morrison*, 529 U.S. 598, 611 (2000) (noting that the gender-motivated crimes-of-violence statute in question was adopted by Congress to apply to intrastate activities), and *Lopez*, 514 U.S. at 550 (holding that the statute in question, Section 922(g), was not part of a larger regulation of economic activity, in which the regulatory scheme could be undercut, unless the intrastate activity was regulated), with 20 U.S.C. § 1681 (1972) (applying Title IX liability to all schools in the United States that receive federal financial assistance and prohibiting those institutions from mishandling reports of sexual assault and harassment that deprive individuals of educational opportunities).

102. See *Morrison*, 529 U.S. at 605-06 (declaring that a person who commits a general crime of violence that is motivated by gender is liable to the injured party for the recovery of compensatory and punitive damages, injunctive relief, and declaratory relief).

103. Compare *Polish All.*, 322 U.S. at 648 (applying the Commerce Clause to prevent national harm), with *Cantalupo*, *supra* note 8, at 210 (reporting that women, ages sixteen to twenty-four, are four times more likely to experience rape than women outside that age range).

104. See *United States v. Darby*, 312 U.S. 100, 121 (1941) (regulating the lumber manufacturer under the Fair Labor Standards Act and noting that the Commerce Clause includes any intrastate activity that is plausibly connected to the legislation); see also *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938) (enforcing the Filled Milk Act against the actions of a private company through the Commerce Clause successfully because filled milk was injurious to public health).

105. See *Lithwick*, *supra* note 43 (finding BYU's punishment and investigation of survivors who reported sexual assault to be discriminatory and contradictory to the purpose of Title IX); see also *Feldman*, *supra* note 1 (describing multiple instances PHC would have been found in violation of Title IX for deliberate indifference to known sexual assault).

harms associated with discrimination and sexual assault.<sup>106</sup> In *Gonzales v. Raich*, the Supreme Court found it was a valid use of the Commerce Clause to prevent two older women from growing marijuana as their sole form of effective medical treatment.<sup>107</sup> Similarly, the Supreme Court reasoned that even if the activity was local and not commercial, it may still be regulated by Congress under the Commerce Clause if it *could* affect interstate commerce.<sup>108</sup> Unlike the cultivation of marijuana, discrimination has a substantial effect on interstate commerce.<sup>109</sup> Religious colleges and universities can be regulated by Title IX, the Clery Act, and the Campus SaVE Act because these acts are aimed at preventing the nationwide epidemic of campus sexual assault, which allows for regulation under the Commerce Clause.<sup>110</sup> Although federal funding is an essential role in effecting change, the Commerce Clause is a strong outlet to enforce preventative federal legislation against the discriminatory actions of these private actors.

*B. Religious Universities' Honor Codes and Their Approach to Reports of Sexual Assault Are Unconstitutional Because They Violate the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.*

*1. Religious Academic Institutions' Approach to Sexual Assault Violates the Due Process Clause Because Religious Schools Deny a Survivor Access to the Police.*

Prohibiting an individual from filing a police report and seeking a lawful remedy is a violation of the implied fundamental right of access to the

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106. See *Carolene Products Co.*, 304 U.S. at 152 (banning filled milk because it is injurious to public health); see also *Katzenbach v. McClung*, 379 U.S. 294, 301 (1964) (preventing racial discrimination); *Champion v. Ames*, 188 U.S. 321, 322 (1903) (prohibiting gambling).

107. See *Gonzales v. Raich*, 545 U.S. 1, 2 (2005) (using the Commerce Clause to enforce the Controlled Substances Act against Raich's marijuana cultivation, which was solely used for individual medical treatment); see also *Champion*, 188 U.S. at 327 (applying the Commerce Clause to enforce the Federal Anti-Lottery Act against individuals who sent lottery tickets in the mail because Congress found gambling morally reprehensible).

108. See *Gonzales*, 545 U.S. at 18-19 (determining that leaving home-consumed marijuana outside federal control would defeat the purpose of the Controlled Substance Act and affect interstate prices and market conditions).

109. See *Katzenbach*, 379 U.S. at 301 (recognizing that racial discrimination in private businesses had a direct and highly restrictive effect upon interstate commerce).

110. See U.S. CONST. art. I, § 8, cl. 3.

police and criminal justice system.<sup>111</sup> In *Washington v. Glucksberg*, the Court established the test for determining whether there is a fundamental right.<sup>112</sup> To succeed on a substantive due process claim, a plaintiff must show the following: (1) the right is deeply rooted in our nation's history and tradition; and (2) the right is being denied in this particular case.<sup>113</sup> The degree of specificity to which a party defines the fundamental right at issue determines if the right will pass the *Glucksberg* test.<sup>114</sup>

Unlike the alleged violated right in *Abigail Alliance v. Von Eschenbach*, the Campus Sexual Assault Victim's Bill of Rights, Title IX, the Clery Act, the Campus SaVE Act, and VAWA have established a historic American tradition of combating sexual assault on college campuses through access to reporting.<sup>115</sup> The Supreme Court has also further looked to *United States v. Cruikshank* in locating an enumerated right to access the legal system for a redress of grievances.<sup>116</sup>

The Campus Sexual Assault Victim's Bill of Rights ("VBOR") is a part of the Clery Act and recognizes a survivor's fundamental right to report his or her case to the police.<sup>117</sup> The VBOR requires that schools grant certain

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111. See *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524–25 (2002) (citing *United States v. Cruikshank*, 92 U.S. 542, 552 (1876)) (locating the right to petition the Government for a redress of grievances as one of the liberties safeguarded by the Bill of Rights and as essential to the very idea of a republican government).

112. See *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (finding that a plaintiff may establish a fundamental right by showing that the right, which is deeply rooted in this nation's history and tradition, has been violated in a specific situation).

113. See *id.* at 723 (presenting the question of whether liberty, which is specially protected by the Due Process Clause, includes a right to commit suicide, and if so, whether a right to assisted suicide also exists).

114. See generally *Abigail All. for Better Access to Developmental Drugs v. Von Eschenbach*, 495 F.3d 129, 136 (D.C. Cir. 2006) (narrowing the fundamental right at issue to whether there was a history and tradition of giving terminally ill patients access to potentially life-saving phase I drugs, but questionably to phase II and III drugs).

115. Compare *id.* at 138 (finding that neither the Constitution nor any Congressional act provide a fundamental right to access experimental assisted-suicide drugs that have passed limited safety trials but have not yet been proven safe and effective), with 20 U.S.C. § 1681 (1972) (providing students on federally-funded college campuses access to a legal remedy if their school handles their sexual assault report improperly). But see 20 U.S.C. § 1681(a)(3) (2016) ("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.").

116. See *Cruikshank*, 92 U.S. 542, 552 (1876) (determining the right to petition the government for a redress of grievances is a right under the First Amendment).

117. See 20 U.S.C. § 1092(f) (1992) (detailing the rights a survivor has under the Jeanne Clery Act's Campus Assault Victim Bill of Rights); see also Schroeder, *supra* note 9, at 1212 (explaining that the Clery Act followed the rape and murder of a

rights to sexual assault survivors, including the option of reporting their case to law enforcement.<sup>118</sup> Moreover, a survivor's right to report sexual assault to the police can also be found in VAWA and the Campus SaVE Act.<sup>119</sup> Based on these Congressional mandates, survivors of sexual assault have the right to report the crimes perpetrated against them and to access the full protections of the law.<sup>120</sup>

Students attending religious colleges and universities satisfy the second prong of the *Glucksberg* test because these colleges deny survivors access to the police.<sup>121</sup> By denying survivors access to the police to file a complaint, religious schools are inconsistent with the American legal traditions that have long provided victims of a crime access to the law.<sup>122</sup> For example, at PHC, several survivors reported that the PHC Dean of Women was directly responsible for coercing survivors into silence and, at times, prevented them from seeking help from the police.<sup>123</sup>

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nineteen-year-old Lehigh University student, Jeanne Clery, and that Congress passed the legislation requiring colleges and universities to disclose information about crime on and around their campuses).

118. See Karen Oehme, Nat Stern & Annelise Mennicke, *A Deficiency in Addressing Campus Sexual Assault: The Lack of Women Law Enforcement Officers*, 38 HARV. J.L. & GENDER 337, 342 n.30 (2015) (explaining that under the VBOR, a school must inform individuals who report a sexual assault of their options to notify law enforcement, ability to take advantage of available counseling services, and choices regarding a change of academic and living situations).

119. See Schroeder, *supra* note 9, at 1226-27 (setting the following minimum standards under the Campus SaVE Act: (1) informing students of the procedures they should follow; (2) giving survivors information regarding the importance of evidence that may be necessary to prove the assault or obtain a protective order; (3) alerting students to whom the offense should be reported; and (4) disclosing the procedures for institutional disciplinary action).

120. See Oehme et al., *supra* note 118, at 342 (explaining that the Obama Administration in 2014 mandated that campus law enforcement must play a central role in responding to sexual assault).

121. See GRACE, *supra* note 40, at 28-29 (noting that 47.9% of the GRACE report interviewees explained that BJU personnel discouraged making a police report or explicitly directed them not to make a police report).

122. See Abigail All. for Better Access to Developmental Drugs v. Von Eschenbach, 495 F.3d 129 (D.C. Cir. 2006) (finding the second prong of the *Glucksberg* test is satisfied when the specific policy used by the defendant is inconsistent with the way that our legal tradition treats similarly situated persons); see also Meyer v. Bd. of Cty. Comm'rs, 482 F.3d 1232, 1243 (10th Cir. 2007) (determining that preventing someone from filing a report of physical assault and a complaint with law enforcement officials is an infringement of protected speech under the First Amendment).

123. Compare Feldman, *supra* note 1 (reporting that Sarah Patten in 2006, Jane Doe in 2007, Jane Doe in 2008, and Claire Spear in 2010, all explained that the Dean

PHC is inconsistent with the legal tradition of ameliorating campus sexual assault by the way it has actively worked to deny survivors their rights.<sup>124</sup> In ignoring legal tradition, PHC, and other schools like it, are denying survivors access to the court system and the police. For example, after Sarah, a PHC student, made a report to the Dean of Women, she was instructed to delete all electronic evidence of the assault and to not speak about the matter outside of the Dean's office.<sup>125</sup> The school also prevented the student from accessing counseling, discouraged her from speaking to the police, and threatened to expel her if she did not take their "advice."<sup>126</sup> This approach to sexual assault is unconstitutional and inconsistent with the legal tradition of the United States.<sup>127</sup>

Similarly, Bob Jones University explicitly denies survivors access to the police or to off-campus resources, including counseling.<sup>128</sup> The GRACE

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betrayed their trust, refused to punish their perpetrators, told them they would be expelled if they contacted the police, and blamed them for their own sexual assault), with *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524–25 (2002) (finding the right to petition the Government for a redress of grievances is a right guaranteed by the First Amendment).

124. Compare *Meyer*, 482 F.3d at 1243 (recognizing the right to petition the government for redress of grievances), and *United States v. Hylton*, 558 F. Supp. 872, 874 (S.D. Tex. 1982) (holding the filing of a legitimate criminal complaint with local law enforcement officials constitutes an exercise of a First Amendment right), with *Feldman*, *supra* note 1 (demonstrating that PHC threatened to expel the female student for an honor code violation if she pursued further action, such as bringing the assault to light or talking to the police).

125. Compare *Feldman*, *supra* note 1 (demonstrating how Dean Corbitt confiscated and erased all evidence of the crime in an effort to prevent the victim from contacting the police), with *BE & K Constr. Co.*, 536 U.S. at 524–25 (finding the right to petition the Government for a redress of grievances is essential to the very idea of a republican government).

126. See *Feldman*, *supra* note 1 (detailing how Dean Corbitt prevented the student from any means of access to the police, a legal remedy, or help for the trauma she was experiencing).

127. See *BE & K Constr. Co.*, 536 U.S. at 524–25 (determining the right to petition the Government for a redress of grievances is a right guaranteed by the First Amendment and long recognized in the American legal tradition); see also *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (observing that the Due Process Clause specifically protects fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition).

128. Compare Richard Perez-Pena, *Bob Jones University Blamed Victims of Sexual Assault, Not Abusers, Report Says*, N.Y. TIMES (Dec. 11, 2014), <http://www.nytimes.com/2014/12/12/us/bob-jones-university-sex-assault-victim-study.html> (exposing how BJU blamed and prevented survivors from reporting their sexual assault to the police), with *Meyer v. Bd. of Cty. Comm'rs*, 482 F.3d 1232, 1243 (10th Cir. 2007) (concluding that filing a criminal complaint is an exercise of the First Amendment right to petition).

report found that fifty-one percent of respondents described BJU personnel as discouraging them from making a police report or explicitly directing them to not make a police report.<sup>129</sup> Additionally, reports noted that the BJU counselor had further explicitly discouraged survivors from accessing the police during counseling sessions.<sup>130</sup> Like PHC, BJU's biblical mandate of separation is inconsistent with the legal tradition of the United States and is in direct violation of the Due Process Clause of the Fourteenth Amendment.<sup>131</sup>

2. *Honor Codes and Procedures Dealing with Sexual Assault Violate the Equal Protection Clause Because They Blame Female Survivors and Refuse to Punish Male Student Perpetrators*

The sex-based policies of religious colleges and universities violate the Equal Protection Clause of the Fourteenth Amendment because they intentionally perpetuate the social and legal inferiority of female students. The Court has adopted intermediate scrutiny for evaluating the legitimacy of classifications that are based upon sex, demonstrating that this heightened level of scrutiny will strike down sex-based policies that perpetuate discrimination within the educational system.<sup>132</sup> Under the two-part test articulated in *Feeney*, honor codes, student handbooks, and dress codes of religious colleges and universities fail the first prong of the test based on explicit classification of students on the basis of sex.<sup>133</sup> Religious colleges and universities further fail the second part of the *Feeney* test

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129. See GRACE, *supra* note 40, at 28-29 (finding 20.9% of the Investigative Sample reported BJU personnel discouraged a police report and 27% stated BJU staff directed them not to make a police report).

130. See *id.* at 181 (finding that during counseling sessions with survivors, Dr. Berg implied that the offense was an internal matter that should be handled by the school, and that he explicitly told survivors that they should not contact the police because it would upset internal family dynamics).

131. See *BE & K Constr. Co.*, 536 U.S. at 524-25 (describing the right to petition the Government for a redress of grievances as one that is essential to the very idea of a republican government); see also *United States v. Cruikshank*, 92 U.S. 542, 552 (1876) (declaring the right to petition the government for a redress of grievances as a protected liberty of the Bill of Rights and fundamental to the United States Government); *Meyer*, 482 F.3d at 1243 (recognizing the right to petition the government for the redress of grievances under the First Amendment).

132. See *United States v. Virginia*, 518 U.S. 515, 534 (1995) (prohibiting classifications in colleges and universities that are used to create or perpetuate the legal, social, or economic inferiority of women). See generally *Craig v. Boren*, 429 U.S. 190, 197 (1976) (adopting intermediate scrutiny for sex-based classifications).

133. See *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 274 (1979) (holding intermediate scrutiny is applied to laws that overtly classify and purposefully discriminate on the basis of sex).

because the classifications were adopted for discriminatory purposes.<sup>134</sup>

Religious college and university rules regarding dress and wardrobe of female students violate the Equal Protection Clause under intermediate scrutiny. BJU's student handbook includes a female student dress code, which intentionally subjugates women and is not substantially related to the achievement of an important governmental objective.<sup>135</sup> Evaluated under the *Feeney* test, BJU's dress code is clearly not a neutral policy, but rather explicitly classifies students and their permitted behaviors on the basis of sex.<sup>136</sup> Bob Jones University's honor code includes several pages on what female students should wear to class, in casual environments, in church, for recreational activities, what jewelry and make up is appropriate, and how female students should wear their hair.<sup>137</sup>

The dress code in the BJU student handbook further violates the Equal Protection clause because it was adopted, at least in part, for its intentional discrimination of female students.<sup>138</sup> In *Feeney*, the Court found nothing in the record to demonstrate the hiring policy was adopted for the collateral goal of keeping women in a stereotypical and a predefined position in society.<sup>139</sup> The discriminatory intent of the student handbook's dress code can be observed in its adoption and application to female BJU students.<sup>140</sup>

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134. *See id.* at 272 (finding a neutral law is only unconstitutional if it was adopted, at least in part, for its discriminatory purpose).

135. *See, e.g., Craig*, 429 U.S. at 197 (emphasizing that classifications that unfairly situate one gender over the other are subject to intermediate scrutiny).

136. *Compare Feeney*, 442 U.S. at 272 (finding a neutral law is only unconstitutional if it was adopted at least in part for its discriminatory purpose), *with* BOB JONES UNIVERSITY, *supra* note 39 (outlining specific dress requirements for female students but not for male students).

137. *See* BOB JONES UNIVERSITY, *supra* note 39, at 28-30 (mandating, in great detail, what female students are permitted to wear at school, in dormitories, on the weekends, and during campus sports, while also forbidding certain brands due to their antagonism to biblical morality).

138. *See Feeney*, 442 U.S. at 274 (delineating a legal test, where the second step is to establish that a policy was adopted purposefully to discriminate against individuals on the basis of sex).

139. *See id.* at 278 (considering state legislative history in determining whether the policy was adopted at least in part for a discriminatory purpose).

140. *Compare* United States v. Virginia, 518 U.S. 523, 534 (1996) (finding VMI's male-only policy unconstitutional because from 1988 to 1990, VMI received and denied 347 women applicants regardless of their individual merits), *and Feeney*, 442 U.S. at 284 (Marshall J., dissenting) (explaining that discriminatory intent should be established from its effect and that, where the impact is so disproportionate, the burden to prove the law's intent is not discriminatory should shift to government), *with* GRACE, *supra* note 40, at 50 (describing the school's intent in creating a dress code that only applies to women).

In the early 1900's, Bob Jones Sr. preached a sermon to women called "The Modern Women," in which he pointed to women's immodesty as the single greatest challenge that confronts American manhood.<sup>141</sup> In 2014, the Godly Response to Abuse in the Christian Environment ("GRACE Report") reported that the dress code, daily sermons, orientations, school trips, dormitory meetings, counseling sessions, and on-campus rhetoric at BJU functioned to blame female survivors of sexual assault for tempting their perpetrators with immodest dress.<sup>142</sup> The GRACE Report found that the dress code was used to directly blame female student survivors of sexual assault for causing their perpetrators to sexually assault them, further affirming the school's discriminatory purpose in crafting the policies.<sup>143</sup>

Conforming a student's conduct to Christ's example (i.e. female students dressing modestly) is also used to manipulate female survivors of sexual assault, placing blame upon themselves for their assault and guiltning survivors into forgiving their perpetrators.<sup>144</sup> The GRACE Report gives multiple accounts of BJU faculty holding women responsible for causing their brothers in Christ to sexually assault them due to their "immodest dress."<sup>145</sup> Unlike in *Feeney*, the history of BJU demonstrates that the dress code policy was adopted for the collateral goal of silencing and blaming female survivors of sexual assault.<sup>146</sup> Because BJU's honor code and dress

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141. See GRACE, *supra* note 40, at 50 (providing the origins of the dress code's adoption and its intent to apply solely to women).

142. See *id.* at 32 (submitting multiple reports of BJU graduates and current students on BJU's approach to sexual assault: a woman who is raped or abused brought it upon herself; women and girls are taught to confess the part of sexual abuse they enjoyed and that they probably enticed the abuser; reporting abuse is selfish because of its consequences on the perpetrator; and survivor reports are immediately disbelieved at BJU).

143. See *id.* at 49-51 (reporting multiple instances of BJU faculty finding women's dress responsible for men's actions and finding that the BJU dress code communicated the message of women's responsibility for men's lust, and women's blame for sexual abuse); see also *Craig v. Boren*, 429 U.S. 190, 197 (1976) (finding that maleness was an arbitrary distinction in allowing women to drink 3.2% alcohol concentrated beer, but not men).

144. See BOB JONES UNIVERSITY, *supra* note 39, at 28-30 (including three pages explicitly detailing what female students should wear in and out of class to conform with the articulated ideas of the church).

145. See GRACE, *supra* note 40, at 49 n.28 (demonstrating different scenarios where female students were taught their immodest dress was directly responsible for men's sexual misconduct and violence).

146. Compare *id.* at 55 (explaining that the dress code policy puts the onus of unwanted sexual attention on female students and, thus, was used to blame women for any sexual assault they may endure), with *Pers. Adm'r of Massachusetts v. Feeney*, 442



code policies were created with a discriminatory purpose of intentionally perpetuating women's social, legal, academic, and economic inferiority, the policies ultimately fail under the Equal Protection Clause.<sup>147</sup>

Moreover, the BJU dress code is unrelated to an important governmental objective.<sup>148</sup> The BJU dress code explicitly states its aim is to model biblical modesty in ways that reflect the Christian, God-ordained differences between men and women.<sup>149</sup> BJU was built upon a foundation of Christian fundamentalism.<sup>150</sup> BJU's mission statement, "for each student to grow more Christ-like" (i.e. for women to dress modestly and forgive perpetrators) works disproportionately to blame women who are sexually assaulted and refuses to hold men responsible for their actions.<sup>151</sup> BJU's enforcement of the message for female students, to consider the impact of their actions on others, is to hold women culpable for men's sexuality and actions.<sup>152</sup> Sex-based classifications that perpetuate the inferiority of women are unconstitutional and cannot be considered substantially related to an important governmental objective.<sup>153</sup>

Under *United States v. Virginia*, such sex-based classifications also cannot be used to denigrate members of either sex in an educational setting,

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U.S. 256, 279 (1979) (failing to find anything in the record that demonstrated that the policy was adopted at least in part for a discriminatory purpose).

147. See *United States v. Virginia*, 518 U.S. 515, 534 (1996) (determining that sex-based classifications within educational institutions are unconstitutional if they perpetuate the inferiority of women).

148. See *id.* at 516-17 (finding Virginia fell short of establishing the persuasive justifications for the categorical exclusion of female students as an important governmental objective).

149. See *BOB JONES UNIVERSITY*, *supra* note 39, at 28 (elaborating how modesty in dress is Christ-like because it would be living out Jesus' instructions of considering one's impact on others).

150. See *id.* at 28-30 (mandating in great detail what female students will wear at school and forbidding certain brands for their antagonism to biblical morality); see also *GRACE*, *supra* note 40, at 50 n.46 (finding Bob Jones University used its conservative religious policies to blame and disparage student sexual assault survivors on campus).

151. See *Feldman*, *supra* note 1, at 18 (reporting a former student's account of BJU's response to sexual assault: "women always did something to make it their fault if they were raped or assaulted – it was how they dressed, that they were flirting – it was never the man's fault"); see also *Gordon*, *supra* note 43 (giving a former student's account of BJU's response to sexual assault: "first they need to forgive their abuser, and second is that they shouldn't talk about it or it will hurt the cause of Christ").

152. See *GRACE*, *supra* note 40, at 51 (finding BJU's focus on blaming a woman's attire for men's lustful thoughts demonstrates the underlying sexism of viewing women's bodies as solely for men's pleasure).

153. See *Virginia*, 518 U.S. at 534 (prohibiting classifications that are used to create or perpetuate the legal, social, or economic inferiority of women).

but can be used to compensate for disadvantages they have historically suffered.<sup>154</sup> BJU's dress code policy denigrates female students by coercing them into wearing modest clothing so as not to cause men to "stumble" or "struggle and feel responsible for their own assaults."<sup>155</sup> BJU's interest in controlling female students' modesty and protecting men's sexuality from temptation does not outweigh the rights of female students denied and violated by both the honor and dress codes.<sup>156</sup> BJU's honor code and dress code do not serve an important governmental objective by purposefully discriminating against female students, and thus they violate the Equal Protection Clause.<sup>157</sup>

Similarly, PHC uses courtship culture to hold women responsible for men's actions, analogous to how BJU uses the dress code to blame women for campus sexual assault.<sup>158</sup> PHC is one of the most prestigious Evangelical Christian colleges and prides itself for its founding principle of courtship culture.<sup>159</sup> PHC's use of courtship culture when responding to reports of sexual assault does not satisfy the requirements of intermediate scrutiny because it purposefully discriminates against female students and is not substantially related to an important government objective.<sup>160</sup>

PHC's courtship culture and responses to sexual assaults fails to satisfy the first prong of the *Feeney* test because it classifies on the basis of sex and intentionally discriminates against female students.<sup>161</sup> Within this

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154. *See id.* at 533 (expressing the fact that inherent differences between the sexes may not be used for the denigration of the members of either sex or for artificial constraints on an individual's opportunity).

155. *See GRACE, supra* note 40, at 49 n.28 (finding female students were made to feel the responsibility for men's lust and that, if women did not do their part by dressing appropriately, it would cause a man to struggle).

156. *See Virginia, 518 U.S.* at 555 (weighing the state's interest in providing an all-male school and determining its interest is not greater than all the advantages withheld from women who wanted and were qualified for a specific education).

157. *See Craig v. Boren, 429 U.S.* 190, 197 (1976) (requiring the government to demonstrate that its use of sex-based criteria is substantially related to the attainment of an important governmental objective).

158. *See Feldman, supra* note 1 (recounting a church lecture where sexually active women were compared to used cars and survivors where shamed).

159. *See id.* (explaining courtship culture hinges around the disempowerment of women over their own sexuality while simultaneously holding women responsible for the sexual misconduct of men).

160. *See generally Craig, 429 U.S.* at 197 (explaining that intermediate scrutiny will strike down sex-based classifications that are not substantially related to the achievement of a governmental objective).

161. *Compare Virginia, 518 U.S.* at 534 (determining a sex-based classification in the educational system was unconstitutional because it perpetuated the inferiority of female students), *with Feldman, supra* note 1 (explaining that female students'

system of essentialist gender norms and paternalistic rules, women disproportionately bear the brunt of responsibility for policing men's sexual conduct.<sup>162</sup> PHC's policy of courtship culture fails intermediate scrutiny as evidenced by its founding purposes, which intentionally perpetuates the subjugation of women.<sup>163</sup>

Brigham Young University's honor code, and other similar codes that punish survivors, also fail intermediate scrutiny because they intentionally disincentivize student survivors from making a formal report.<sup>164</sup> Under the first prong of the *Feeney* test, the BYU honor code is a facially neutral blanket code of chastity, abstinence from substances, and obedience.<sup>165</sup> The honor code further espouses that students must live a chaste and virtuous life, which prohibits all sexual contact before marriage.<sup>166</sup> The honor code intentionally discriminates against female BYU students through its efforts to punish women for reporting sexual assault in violation of the "chastity" policy.<sup>167</sup> This is further evidenced by the fact that BYU begins Honor Code investigations into the female student survivor after they report a sexual assault.<sup>168</sup> This policy can be directly traced back to a

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immodesty and purity are responsible for "tempting" their brothers in Christ to "stumble" because of the belief that male 'urges' are irresistible and women are inherently corrupting).

162. See Feldman, *supra* note 1 (explaining that female students are taught to protect their "purity" and never "tempt" their brothers in Christ to "stumble" with immodest behavior).

163. See *generally Virginia*, 518 U.S. at 534 (determining a sexed-based classification in the educational system was unconstitutional because it perpetuated the inferiority of female students); *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (holding that classifications based upon sex, like those based upon race, alienage, or national origin, are inherently suspect because of women's historical oppression, and must, therefore, be subjected to heightened scrutiny).

164. See Want, *supra* note 42 (explaining that after a victim reported an off-campus rape to the Utah County Deputy Sheriff's department, BYU obtained the police report, launched an Honor Code investigation against the survivor, and subsequently put her on academic probation).

165. Compare *BRIGHAM YOUNG*, *supra* note 16, with *Frontiero*, 411 U.S. at 688 (finding the facially neutral hiring policy was only unconstitutional if it intentionally discriminated on the basis of sex).

166. Compare *BRIGHAM YOUNG*, *supra* note 16 (codifying chastity in the honor code statement), with *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 274 (1979) (establishing the second prong of the test as determining whether the policy purposefully discriminates on the basis of sex).

167. See Want, *supra* note 42 (reporting that after female students filed police reports for sexual assault, BYU began Honor Code investigations to determine whether to suspend or expel the female student survivors).

168. See Kristine Haglund, *At BYU, A New Confrontation in the Campus Sexual Assault Debates*, RELIGION & POL. (May 24, 2016),

discriminatory purpose grounded in the concepts of Mormonism, which equates virtue to a woman's virginity and an assault as a loss of virtue in violation to the honor code.<sup>169</sup>

Similar to the evangelical Christianity demonstrated at PHC and BJU, BYU's Mormonism views men as so naturally lustful and desirous that they cannot be held responsible for their actions.<sup>170</sup> In 2014, BYU opened Honor Code investigations after two female students reported their sexual assaults to University officials, suspending one for what the administration characterized as consensual sex.<sup>171</sup> In 2015, BYU obtained the police report of Madi Barney, who was raped off-campus, and thereafter opened an Honor Code investigation that prevented her from registering for any further classes and resulted in her eventual withdrawal.<sup>172</sup> Both the honor code and the policy to open up honor code investigations into female survivors was adopted because BYU officials view sexual assault as premarital sexual contact in violation of the honor code.<sup>173</sup> BYU's policies and procedures around reports of sexual assault are discriminatory as they perpetuate women's inferiority and dis-incentivize women from reporting sexual assaults in the future.<sup>174</sup>

BYU's honor code and procedure to begin Honor Code investigations of female survivors are moreover not substantially related to an important

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<http://religionandpolitics.org/2016/05/24/byu-brigham-young-campus-sexual-assault-debates/> (explaining that sometimes a reported rape will trigger an Honor Code investigation of a BYU student survivor).

169. See BRIGHAM YOUNG, *supra* note 16 (mandating BYU students live a chaste and virtuous life).

170. See Haglund, *supra* note 168 (explaining that from a young age, women are taught modesty and virginity are morals, while men are taught they cannot control their own sexuality).

171. See Cabrera & Weisfeldt, *supra* note 41 (explaining that a female BYU student who reported her rape by a fellow BYU student was later expelled as the result of an Honor Code investigation of the assault).

172. See *id.* (detailing that BYU wrote that Ms. Barney could finish the semester but would be unable to enroll in any more classes).

173. See Haglund, *supra* note 168 (describing a police sergeant's report that BYU's policy of disciplining students after reporting sexual assaults "creates a safe heaven" for sexual predators).

174. Compare Cabrera & Weisfeldt, *supra* note 41 (reporting that Madeline Macdonald, a BYU student who was sexually assaulted in December 2014, was told that they believed almost all of the reported rapes and assaults at BYU were false reports made by women that feel bad about their consensual activities), with *Craig v. Boren*, 429 U.S. 190, 191 (1976) (concluding that the state statute included language that prohibited only men from purchasing certain beers, without providing similar restraints on women).

governmental objective.<sup>175</sup> The goal of the BYU Honor Code is to demonstrate a personal commitment in daily living on and off campus of those moral virtues encompassed in religion.<sup>176</sup> BYU's honor code and investigations fail intermediate scrutiny because they are discriminatory and are not substantially related to an important governmental objective.<sup>177</sup>

#### IV. POLICY RECOMMENDATION

The scope of Title IX, and by extension the Clery Act and Campus SaVE Act, needs to be expanded to include students at both public and religious schools. Title IX is one of the most prominent and readily accessible remedies for a survivor and helps ensure that the institution properly handles the survivor's case.<sup>178</sup> Amending Title IX would allow students who attend religious schools and other privately funded educational institutions to access resources that are already accessible to students at secular colleges.<sup>179</sup> Currently, student survivors of sexual assault in privately owned religious schools are without any legal remedy to protect them from further harassment, which leaves them with no recourse for holding campus authorities accountable for the improper handling of their case.<sup>180</sup>

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175. *Compare* *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 274-75 (1979) (affirming the proposed governmental objective as the state's interest in hiring veterans), *with* *Lithwick*, *supra* note 43 (finding the BYU policy antithetical to the purpose of Title IX, which is to combat campus sexual assault and stop predators, not to prompt Honor Code investigations that expel student survivors).

176. *See* BRIGHAM YOUNG, *supra* note 16 (mandating BYU students are to maintain the highest standards of honor, integrity, morality, and consideration of others at all times).

177. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 541-42 (1995) (prohibiting sex-based classifications, such as VMI's male-only admission policy, because state actors may not distinguish qualified individuals based on fixed notions of males and females that perpetuate historical patterns of discrimination).

178. *See* *Kingkade*, *supra* note 30 (noting there has been an increase in the number of Title IX complaints in recent years that has resulted in the investigation of over one hundred secular schools).

179. *See* 20 U.S.C. § 1681 (1972) (providing a legal recourse for sexual assault survivors on campuses that accept federal financial assistance); *see also* 20 U.S.C. § 1092(f) (2012) (applying the Clery Act to only schools that receive federal financial assistance); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304, 127 Stat. 54, 89-92 (2013) (detailing the fact that the Campus SaVE Act only applies to those schools that receive federal funding).

180. *See* *Feldman*, *supra* note 1 (according to a report by Brett Sokolow, President of the National Center for Higher Education Risk Management, female students enrolled in private religious campuses lack all of the federal protections that attach to other colleges and universities).

Specifically, the language in the last clause of Title IX, “any education program or activity receiving federal financial assistance,” should be expanded.<sup>181</sup> It should be amended to provide a remedy to all persons in the United States who are subjected to discrimination under “any education program or activity.” Broadening Title IX’s scope would lift the same limitations in the Campus SaVE Act and the Clery Act and apply campus sexual assault legislation to religious colleges and universities.<sup>182</sup> Revising the language of Title IX would provide legal remedies to a vulnerable population of students attending religious educational institutions.

Limits on the scope of Title IX liability are inherently antithetical to its purpose. In *Gebser v. Lago Independent School District*, Justice Stevens decried in his dissent any limit on providing remedies to private citizens who endure discrimination based on sex.<sup>183</sup> Amending Title IX to broaden its scope is consistent with its legislative history and purpose.<sup>184</sup> Title IX was enacted to provide legal remedies to private citizens irrespective of whether their alleged perpetrator received federal funding.<sup>185</sup> Title IX, and similar anti-campus sexual assault legislation should be amended to broaden its scope to apply to all schools in the United States, refocusing the statute back to its original intent to provide private citizens with a legal cause of action against discrimination.

## V. CONCLUSION

The honor codes and religious colleges and universities responses to sexual assault violate the Fourteenth Amendment, and should be subject to federal regulation under the Commerce Clause.<sup>186</sup> Because religious academic institutions deny survivors their right to a lawful remedy, refuse

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181. See 20 U.S.C. § 1681 (1972).

182. See 20 U.S.C. § 1092(f) (2012) (noting that the Clery Act only applies to schools that receive federal financial assistance and, thus, does not currently reach privately funded religious institutions); see also Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304, 127 Stat. 54, 89-92 (2013) (explaining that the Campus SaVE Act only applies to schools that receive federal funding).

183. See 524 U.S. 274, 304 (1998) (Stevens, J., dissenting) (finding the purpose of Title IX provides private citizens with a private legal action against discrimination, regardless of federal funding).

184. See *id.* at 295 (Stevens, J., dissenting) (finding any limit on the remedies available under Title IX is inconsistent with Congress’ intent in enacting the statute).

185. See *id.* at 293-94 (Stevens, J., dissenting) (noting that Title IX was patterned after Title VI of the Civil Rights Act of 1964, which focused on private citizens and providing private action to any person in an effort to protect them against discrimination).

186. See U.S. CONST. amend. XIV, § 1.

to acknowledge perpetrators' actions, and punish survivors who are brave enough to report their assault, they violate students' equal protection rights.<sup>187</sup> Religious schools' honor codes not only use sexist gender norms that hold women to impossible expectations to disincentivize reporting, but also cultivate a climate of separation from the rest of the world that denies survivors any access to the police, criminal justice system, or trauma counseling.<sup>188</sup> Through the use of the Commerce Clause and Fourteenth Amendment, survivors of sexual assault in both public and private universities will be protected.<sup>189</sup>

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187. See Feldman, *supra* note 1 (finding that PHC administrators told survivors they would be expelled if they contacted the police); GRACE, *supra* note 40, at 181 (reporting that Dr. Greg told survivors not to contact the police because the campus viewed reporting as an affront to the church and God).

188. See GRACE, *supra* note 40, at 50 (stating that BJU's dress code communicates the message of women's responsibility for men's lust and women's blame for their own sexual assault); Feldman, *supra* note 12 (explaining that the Dean of Women at PHU forbade a survivor from seeking outside counseling).

189. See 20 U.S.C. § 1681 (1972); 20 U.S.C. § 1092(f) (2012); 20 U.S.C. § 1092(f)(8)(B)(iv)-(vi); see also Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304, 127 Stat. 54, 89-92 (2013).