

COMMENTS

RELIGION AND SEX IN THE YALE DORMS: A LEGISLATIVE PROPOSAL REQUIRING PRIVATE UNIVERSITIES TO PROVIDE RELIGIOUS ACCOMMODATIONS

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INTRODUCTION

On October 15, 1997, four students filed suit against Yale University, claiming that their constitutionally protected right to free exercise of religion had been violated.¹ Yale has a policy requiring first- and second-year students to live in university housing.² These four students, all Orthodox

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¹ See Plaintiffs' Complaint ¶¶ 60-67, *Hack v. President of Yale College*, 16 F. Supp. 2d 183 (D. Conn. 1998) [hereinafter *Complaint*]. Although the media has referred to these students as the "Yale Five," see *infra* note 4, only four students were plaintiffs in the lawsuit. Initially, there was a fifth student who intended to join the others in filing. At the time, she was engaged to be married a few months later. As discussed below, Yale allows an exemption to the residency requirement at issue in the lawsuit for married students. Thus, to exempt herself, and avoid the necessity of joining the suit, she and her fiancé had a civil marriage ceremony performed. See *Complaint, supra*, at ¶ 57 (detailing the exit of the fifth student from the suit). As a result, Yale recognized her marriage and exempted her from the dorm requirement. After the civil ceremony, however, she had no intention to—and did not—live in a "true marriage relationship" with her fiancé until after their religious marriage ceremony months later. *Id.* Thus, when the story was first reported by the media, there were five potential plaintiffs. Even after the fifth litigant left the case, the name "the Yale Five" survived.

² See *Hack v. President of Yale College*, 16 F. Supp. 2d 183, 186 (D. Conn. 1998) ("Yale's 'Dormitory Regulations' provide that '[a]ll freshmen and sophomores are required to live on-campus, except freshmen who are married or who are over twenty-one years of age.'"). Before the 1995-96 academic year, this regulation did not apply to first- or second-

Jews, claimed that dormitory life was incompatible with their strict religious standards of modesty.³ Yale argued that living in the dormitories is “an integral component of a Yale education.”⁴ These students, however, did not want to choose between the best education available to them and adherence to their religious tenets. The two sides failed to reach a settlement, despite extensive negotiations, and the students filed suit in the United States District Court for the District of Connecticut.⁵

In July, 1998, the court granted Yale’s motion to dismiss on all counts.⁶ The students’ primary legal theory was that Yale was a state actor, and, by failing to accommodate their religious needs, Yale violated the Free Exercise Clause of the First Amendment.⁷ Although such a claim would have

year students whose families lived in New Haven; nor did the policy apply to married students or students over 21. See Complaint, *supra* note 1, ¶ 47. For the reasons that Yale changed its residency policy, see *infra* note 58.

³ Orthodox Judaism thoroughly prescribes the details of daily life. Among the various restrictions placed on its adherents, Orthodox Jews are forbidden from touching or being alone with members of the opposite sex who are not spouses or close family members. Furthermore, and most relevant to the *Hack* lawsuit, it prohibits exposure to undressed or immodestly dressed members of the opposite sex. See Complaint, *supra* note 1, ¶ 48 (outlining some aspects of the Orthodox code of sexual modesty); see also *Hack*, 16 F. Supp. 2d at 186-87 (“The plaintiffs are Orthodox Jews ‘whose religious beliefs and obligations regarding sexual modesty forbid them to reside in the coeducational housing provided and mandated by Yale.’” (quoting Complaint, *supra* note 1, ¶ 1)). See generally Samuel G. Freedman, *Yeshivish at Yale*, N.Y. TIMES, May 24, 1998, § 6 (Magazine), at 32 (providing background on the facts surrounding the *Hack* case).

⁴ Defendants’ Memorandum in Support of Motion to Dismiss at 2, *Hack*, 16 F. Supp. 2d 183 (D. Conn. 1998) [hereinafter “Motion to Dismiss”]; see also Complaint, *supra* note 1, ¶ 58 (alleging that Yale has insisted “that living in a Residential College [on-campus] is ‘integral’ to a Yale education”); William Glaberson, *Five Orthodox Jews Spur Moral Debate Over Housing Rules at Yale*, N.Y. TIMES, Sept. 7, 1997 (Metro Report), at 45 (quoting Yale officials as saying that residing on-campus is a “‘defining requirement’ of a Yale education”).

⁵ See Susanne Sachsman, *Orthodox Students File Lawsuit*, YALE DAILY NEWS, Oct. 16, 1997, at 1 (reporting that prior to the filing of the lawsuit, Yale negotiated extensively and made numerous offers of accommodations); see also *infra* note 62 and accompanying text (describing the negotiations between Yale and the students).

⁶ See *Hack*, 16 F. Supp. 2d at 197 (dismissing the plaintiffs’ multiple claims).

⁷ The First Amendment bars Congress from making any law “respecting an establishment of religion, or prohibiting the free exercise thereof . . .” U.S. CONST. amend. I; see also *infra* note 16 (explaining the application of the First Amendment to state actors by the incorporation doctrine).

In addition to the Free Exercise Clause violations, the plaintiffs in this case alleged infringements of their constitutionally protected rights to privacy and equal protection. See Complaint, *supra* note 1, ¶ 4 (claiming that Yale has a legal obligation to “avoid arbitrary unequal treatment . . . and invasions of constitutionally protected privacy rights”). The students also pursued a number of statutory and common law claims. See *id.* Because this Comment’s legislative proposal addresses the need to regulate religious accommodations, the constitutional analysis will be primarily limited to the Free Exercise Clause. See *infra* Part I (discussing the constitutional right to religious accommodations under the First Amendment);

merit if Yale were a state university, the court, confirming the predictions of legal commentators, rejected the argument that Yale is a state actor.⁸

It was necessary for the students to rely on such a far-fetched legal theory because few of the federal anti-discrimination statutes provide a remedy for their claim.⁹ Indeed, the only civil rights statute under which the students advanced a claim was the Fair Housing Act, a claim which also was dismissed by the court.¹⁰

This Comment argues for federal legislation requiring reasonable religious accommodations by private universities. This argument presupposes two major premises. First, modern society places an ever-increasing value on higher education. Today, a degree from an institution of higher learning is a prerequisite for almost any individual with professional aspirations.¹¹ Second, America has seen a religious awakening of sorts over the past few years.¹² The role of faith in our lives has been cast into the limelight. This trend can be seen both on Capitol Hill, where Congress has reaffirmed its commitment to religious freedom, and in the fact that many individuals, especially professionals and students, are rediscovering religion in their daily routines.¹³

Our legal system already recognizes that religious beliefs should not serve as an impediment to the realization of professional goals. To that end,

see also infra notes 78, 96 (discussing the scope of the analysis with regard to the statutory claims advanced). In discussing the scope of its legislative proposal, this Comment also will address certain Establishment Clause issues. *See infra* Part III (examining Establishment Clause case law to determine the permissible scope of legislation requiring religious accommodations).

⁸ *See Hack*, 16 F. Supp. 2d at 189 (holding that Yale is not a state actor). This result confirms the thoughts of several commentators who previously had ventured guesses as to what the court would hold. *See, e.g.,* Sachsman, *supra* note 5 (quoting Columbia law professor Michael Dorf as saying that the assertion that Yale is a state actor is "absurd" and "ridiculous" and noting that Harvard law professor Kent Greenwalt echoed that opinion). *But cf.* John Cloud, *Ivy League Gomorrah?*, TIME, Sept. 22, 1997, at 70; Stuart Vincent, *Down on the Dorm*, N.Y. NEWSDAY, Sept. 24, 1997, at A6 (reporting that prominent attorney and Harvard law professor Alan Dershowitz has "taken up [the students'] cause"). Nonetheless, the students' attorneys recently reported that they would appeal the decision. *See Housing Suit Sent Packing*, YALE ALUMNI MAG., Oct. 1998, at 17.

⁹ *See infra* Part II.A (detailing how various civil rights statutes do not provide legal recourse for these students).

¹⁰ *See Hack*, 16 F. Supp. 2d at 193; *see also infra* Part II.A (discussing the court's treatment of the Yale Five's Fair Housing Act claim).

¹¹ *See infra* Part II.B.1 (discussing the similarities between religious discrimination in higher education and religious discrimination in employment).

¹² *See infra* notes 107-11 and accompanying text (citing various indications of a religious revival in America).

¹³ *See generally infra* Part II.B.3 (discussing the growing public commitment to religion and congressional interest in ensuring religious freedom).

Congress enacted Title VII, an anti-discrimination law prohibiting employers from punishing employees because of their religious observances.¹⁴ The current civil rights statutes, however, have not kept pace with either society's relatively newfound emphasis on higher education or its religious revitalization. As citizens rekindle their interest in religion, the existing laws protecting the employee remain weak and ineffective, and there is no protection for the religious student enrolled in a private university. Individuals in college and graduate school, in pursuit of professional success, should be afforded at least the same protection from religious discrimination as job applicants and employees. Thus, in response to these societal trends, Congress should mandate that private universities make reasonable religious accommodations for their students.

In Part I, this Comment analyzes the obligation of a state-actor university to accommodate religious requests made by its students. This is an appropriate starting point, given the recent decision in a similar case involving religious accommodations and residency requirements at the University of Nebraska, a state actor. Furthermore, the plaintiffs in the *Hack* case advanced the legal theory that Yale is a state actor. Part I concludes that had the court deemed Yale a state actor, the school would have a duty to make reasonable religious accommodations. Part II considers the current federal anti-discrimination and civil rights statutes and concludes that there is presently no statutory remedy available to private university students whose religious observances fall beyond the guarantees of constitutional protection. Part II then presents the normative and policy arguments that support the proposition that Congress should create a cause of action to give redress to students who require reasonable religious accommodations. Part III will address ways in which the proposed legislation could violate the Establishment Clause, thereby limiting the scope of the proposal. Finally, in Part IV, this Comment suggests the affirmative constitutional basis for, and drafts the language of, the proposed legislation which imposes a duty to accommodate on private universities.

¹⁴ 42 U.S.C. §§ 2000e(j), 2000e-2 (1994).

I. CONSTITUTIONAL REQUIREMENTS TO PROVIDE RELIGIOUS ACCOMMODATIONS

A. *The Precedents: Rader v. Johnston and Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*

A fundamental principle regarding the Bill of Rights is that it only regulates governmental actors.¹⁵ Thus, because Yale is a privately-operated, not a state-controlled, university, one would expect that it should not be bound by the restrictions of the Bill of Rights and the Fourteenth Amendment.¹⁶ The heart of the Yale Five's case against the school, however, was found in a series of constitutional claims that assumed that Yale is a state actor.¹⁷ Although contrary to the district court's conclusion, if we do assume that Yale is a state actor,¹⁸ the most appropriate starting point for any analysis would be the constitutional requirements under the First Amendment to provide religious accommodations.¹⁹ The case that most recently applied First Amendment law to the question of universities' obligation to provide religious accommodations is *Rader v. Johnston*.²⁰ *Rader* is not only

¹⁵ Chief Justice Marshall observed long ago that the Bill of Rights speaks to Congress and not the state governments. See *Barron v. Mayor of Baltimore*, 32 U.S. 153, 159, 7 Pet. 242, 250 (1833) (noting that the Bill of Rights "contain[s] no expression indicating an intention to apply them to state governments"). In fact, the language of the First Amendment supports this: "*Congress shall pass . . .*" U.S. CONST. amend. I (emphasis added). Even after the Court held that many of the Bill of Rights prohibitions are imposed on the states, see *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940), it is clear that these prohibitions place no restrictions on the activity of private citizens.

¹⁶ The First Amendment and certain other provisions of the Bill of Rights are applicable to the states by incorporation into the Fourteenth Amendment. See, e.g., *Cantwell*, 310 U.S. at 303-04 (applying the First Amendment to the states by the incorporation doctrine). The Fourteenth Amendment is explicitly applicable to the States. See U.S. CONST. amend. XIV ("No State shall . . .") (emphasis added).

¹⁷ See *supra* note 7 (discussing the additional claims that the Yale Five made against the university).

¹⁸ This Comment later discusses the court's rejection of this premise. See *infra* Part I.C (analyzing the application of the factors used in *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374 (1995), to the Yale Five case).

¹⁹ This analysis is also relevant in supporting the normative arguments underlying this Comment's legislative proposal. If the Constitution imposes on state actors a duty to accommodate, then Congress should mandate a parallel, statutory duty of private individuals. See *infra* notes 79, 97 and accompanying text (explaining the relationship between the Constitution's protections against discrimination and the federal civil rights statutes). Thus, despite the *Hack* court's decision that Yale is not a state actor, the constitutional analysis still remains important from a policy perspective. Cf. Michael C. Dorf, *God and Man in the Yale Dormitories*, 84 VA. L. REV. 843, 845 & n.12 (1998) (presenting the argument that "private universities ought to adopt First Amendment principles" in accommodating students' religious requests).

²⁰ 924 F. Supp. 1540 (D. Neb. 1996).

the most recent case, but also the most directly on point to the case of the Yale Five, as it, too, discusses university residency requirements.

Douglas Rader, a devout Christian and incoming first-year student to the University of Nebraska at Kearney ("UNK"), requested permission to live off-campus.²¹ He asserted that the offensive and wild behavior that is typical of dormitories would drastically interfere with his religious lifestyle.²² Rader needed UNK's permission to move off-campus because UNK, like Yale, has a parietal rule requiring first- and second-year students to live on-campus. UNK provided a number of reasons for this rule, including the positive effects of promoting diversity and tolerance among the student body, as well as enhancing student academic performance.²³ Despite these rationales, however, UNK had been less than rigorous in enforcing this policy: it waived the residency requirement in response to numerous claims of "exceptional circumstances," in addition to a number of standard exemptions.²⁴

Rader argued that the state university violated his rights under the Free Exercise Clause of the First Amendment by applying the parietal rule to him in a discriminatory fashion.²⁵ In assessing Rader's claim, the court applied the test outlined in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*,²⁶ which addresses state action that curtails religious freedom.²⁷ In *Church of Lukumi*, the defendant city passed several ordinances designed to prevent the members of the Church of the Lukumi Babalu Aye from performing ritual animal sacrifices.²⁸ These ordinances were riddled with exceptions, allowing the slaughter of animals for almost any purpose other than ritual sacrifice.²⁹ In determining the constitutionality of this law, the Court's analysis initially turned on whether the state law was (1) neutral and (2) of general applicability.³⁰ If the statute or rule did not conform to either one of these requirements, the Court required, in order for the statute to pass Constitu-

²¹ The facts here are based on the district court's account. See *Rader*, 924 F. Supp. at 1543-49 (detailing Rader's request and UNK's policy on first-year housing).

²² See *id.* at 1544-45.

²³ See *id.* at 1548, 1558 n. 16; cf. *infra* notes 156-58 (discussing UNK's and Yale's reluctance to admit to financial motivations underlying their respective parietal rules).

²⁴ *Rader*, 924 F. Supp. at 1546-47. These standard exceptions included exemptions for married students and students over the age of 21. See *id.*

²⁵ See *id.* at 1543; see also U.S. CONST. amend. I.

²⁶ 508 U.S. 520, 545 (1993) (holding that a city ordinance clearly designed to prohibit a certain religious group from performing ritual animal sacrifices was unconstitutional).

²⁷ See *Rader*, 924 F. Supp. at 1551 (requiring that restrictions on religion be both neutral and generally applicable).

²⁸ See *Church of Lukumi*, 508 U.S. at 527-28.

²⁹ See *id.* at 535-38.

³⁰ See *id.* at 531-32.

tional muster, that the statute (1) fulfill a compelling state interest and (2) be narrowly tailored to that objective.³¹ Applying that test to Rader's situation, the district court concluded that UNK violated the First Amendment by forcing Rader to live in the dormitories.³²

B. *Applying the Rader and Church of Lukumi Analyses to the Yale Case*

The First Amendment claim that Rader advanced was particularly strong because of several factors specific to his case.³³ This is reflected in the relative ease with which the court in *Rader* concluded that the UNK rule was unconstitutional.³⁴ In the Yale case, however, and a hypothetical case which this Comment will develop for purposes of discussion, a First Amendment claim would not be as strong.³⁵ Even under the facts of the

³¹ See *id.* at 532, 544-46 (finding that the city ordinances were underinclusive, since they applied only to religious animal sacrifices, and that they were not narrowly tailored to the compelling governmental interest of preventing cruelty to animals and preserving the public health).

³² Specifically, the district court found that the great number of exceptions allowed by UNK rendered the rule neither neutral nor generally applicable. See *Rader*, 924 F. Supp. at 1553-56 (noting that UNK allowed medical, age, and marital status exceptions, but did not allow religious exceptions). The *Rader* court further concluded that the granting of these exceptions undercut UNK's argument that the parietal rule served a compelling state interest. If the interest was legitimately compelling, UNK would not have allowed such a great number of exemptions. Finally, the court provided many examples that showed how the implementation of the rule by UNK was both under- and over-inclusive in relation to its stated objectives. For example, the court did not understand how exempting students whose parents lived in the vicinity of UNK furthered the objectives of the parietal rule. If the purpose of the rule was to increase diversity, then those students who resided nearby also should have been forced to live in university housing. As a result, the court easily concluded that the rule was not narrowly tailored. See *id.* at 1556-58; see also *infra* Part I.B (applying the *Church of Lukumi* compelling-state-interest requirement to the Yale Five case).

³³ See *Rader*, 924 F. Supp. at 1555; see also *supra* note 32.

³⁴ See *Rader*, 924 F. Supp. at 1553-56; see also *supra* note 32 (discussing how the unusual amount of exceptions to UNK's housing rule allowed the court to conclude that the rule neither served a compelling state interest nor was narrowly tailored).

³⁵ This Comment assumes the facts of the Yale situation to be roughly the same as that of a hypothetical case. It is true that all universities have different policies and respond differently to students' requests. Yale's policy, however, as well as its response to the requests, have been fairly reasonable and administered with relative uniformity (as opposed to that of UNK). See *infra* note 42 and accompanying text (noting that Yale has strictly enforced the dorm requirement); *infra* note 62 (stating that Yale negotiated with the students before reaching an impasse). Because Yale has been consistent and reasonable, it serves as a good "hypothetical" model.

This Comment also generally limits its analysis to the parietal rule question. It recognizes that requests for religious accommodations can potentially come in all different forms. Of the many ways that university policies could interfere with a student's religious life, however, forcing a student to reside in an objectionable living situation is at the more extreme end of the spectrum. The anti-discrimination laws should at least support a student's request to live

Yale case, however, it still appears that a state-actor university would have a duty to make religious accommodations.

1. Neutrality and General Applicability

In *Rader*, UNK gave exemptions to over one-third of the incoming first-year students for a variety of social and economic reasons.³⁶ Since the University accommodated the needs of a large portion of its student population, but not *Rader*'s religious request, the court easily concluded that the University was not administering its rule neutrally.³⁷ Moreover, the existence of "standard" exemptions³⁸ showed that the rule was not generally applicable.³⁹ Thus, in order for UNK's parietal rule to pass constitutional muster, UNK would have had to show a compelling state interest to deny *Rader*'s request.⁴⁰

Unlike *Rader*, Yale's rule was not only facially neutral, but also was implemented in a non-discriminatory manner.⁴¹ The dorm requirement at Yale was faithfully enforced, with only the rarest of exceptions granted.⁴² Yale's rule, however, still arguably could be considered not neutral or not

in a nonoffensive setting. Thus, it is appropriate to generally base the discussion of the necessity to mandate religious accommodations on the specific facts of the Yale case. *See also infra* note 111 (citing reports that requests similar to those put forth by *Rader* and the Yale Five are becoming more commonplace on college campuses).

³⁶ *See Rader*, 924 F. Supp. at 1547 n.14 (noting that only 1600 of the 2500 first-year students lived on-campus).

³⁷ *See id.* at 1554-55 (arguing that while the residency policy "as written is certainly neutral on its face and in its purpose," the court could not "conclude that the rule is being enforced in a neutral manner" when "administrators refuse to consider an entire class of individuals . . . who desire to live [off-campus] based upon their faith, for exceptions to a policy that some thirty-six percent of freshmen students routinely receive"). *See generally* *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that a facially neutral statute can violate the Equal Protection Clause if it is administered in a discriminatory fashion).

³⁸ *See Rader*, 924 F. Supp. at 1546-47 (describing UNK's residency rule exceptions).

³⁹ *See id.* (finding that the policy is not generally applicable where there are many exceptions allowed, but not one for religious beliefs).

⁴⁰ *See id.* at 1556-58 (conducting an analysis of the compelling interests that UNK's policy was designed to foster); *see also supra* note 32 (discussing the *Rader* court's opinion that the large number of exceptions undercut the University's compelling-state-interest argument).

⁴¹ For purposes of discussion, the same applies to my hypothetical case. *See supra* note 35 (explaining why the Yale fact scenario is appropriate for use as a hypothetical case).

⁴² As opposed to *Rader*, where the plaintiff was easily able to point to numerous exceptions to UNK's parietal rule, the Yale Five could not. *See* Complaint, *supra* note 1, ¶¶ 64, 71 (alleging only that Yale granted the standard exemptions to students who were married or over 21 years of age); *see also* *Sachsman*, *supra* note 5 (quoting Yale officials as saying that accommodating students' requests does not mean "waiving the housing policy"); Vincent, *supra* note 8 (reporting that the students were aware that "Yale required all freshmen and sophomores to live on campus").

generally applicable. Although Yale enforced the rule for the overwhelming majority of students, there were still a number of exceptions granted to married students and students over the age of twenty-one.⁴³ The *Church of Lukumi* Court stated that where “individualized exemptions from a general requirement are available, the government ‘may not refuse to extend that system to cases of “religious hardship” without compelling reason.’”⁴⁴

Even if a valid argument could have been advanced that Yale’s parietal rule was neutral,⁴⁵ there are other considerations that would have circumvented the need for the neutrality and general applicability analysis. The *Rader* court, for example, identified one scenario in which even a neutral law must meet the compelling interest test.⁴⁶ That scenario was based on an observation of the Supreme Court in *Employment Division v. Smith*.⁴⁷ The Court noted that if state action infringes upon more than one constitutional right, the law must be narrowly tailored to a compelling state interest, regardless of its neutrality or general applicability.⁴⁸ In the Yale case, the right to free exercise of religion was not the only potential constitutional violation. The students also alleged that their rights to equal protection and privacy had been violated.⁴⁹ Thus, these other constitutional claims may have triggered the compelling interest standard, even if the residency rule was applied neutrally.⁵⁰

⁴³ See Complaint, *supra* note 1 ¶¶ 64, 71 (arguing that the exemptions granted by Yale to married students, students over age 21, and all juniors and seniors render the rule neither neutral nor generally applicable). The plaintiffs also argued that there was no rational basis to impose the dorm requirement on first- and second-year students, while exempting juniors and seniors. Therefore, they asserted, the rule also violates the Equal Protection Clause. See *id.* ¶¶ 73-74.

⁴⁴ *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537 (1993) (quoting *Employment Div. v. Smith*, 494 U.S. 872, 884 (1990)); see also *Rader*, 924 F. Supp. at 1552 n.23 (listing several instances where the Supreme Court has held that specific exceptions to a general rule can trigger strict scrutiny, if exemptions are not also granted for religious reasons).

⁴⁵ See Motion to Dismiss, *supra* note 4, at 12-14 (making the same argument that Yale’s parietal rule was neutral).

⁴⁶ See *Rader*, 924 F. Supp. at 1550-51 n.21 (discussing a scenario in which some courts have applied strict scrutiny despite a law’s neutrality and general applicability).

⁴⁷ 494 U.S. at 872.

⁴⁸ See *id.* at 881-82 (asserting that “the First Amendment bars application of a neutral, generally applicable law to religiously motivated action” not only when the Free Exercise Clause is implicated, but when other constitutional protections are implicated as well, and providing examples of such cases).

⁴⁹ See *supra* note 7.

⁵⁰ See *Rader*, 924 F. Supp. at 1550-51 n.21. The *Rader* court explained that it did not address any alternative constitutional claims, though viable, because they were not presented by the plaintiff. See *id.* at 1543 n.2. In the Yale case, however, the plaintiffs alleged a number of constitutional violations other than the free exercise claim. See *supra* note 7 (listing the students’ allegations of breaches of their rights to privacy and equal protection).

2. Narrowly Tailored to a Compelling Interest

The Yale rule would fail the first prong of the Supreme Court's test either because the rule is not neutral, or because other constitutional rights are violated.⁵¹ Therefore, the parietal rule at issue must comply with the second prong: it must be narrowly tailored to serve a compelling state interest in order to survive a constitutional attack.⁵² In *Rader*, the court cited *Church of Lukumi* for the proposition that a "law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited."⁵³ Thus, the sheer number of exceptions to the residency requirement granted by the UNK administration led the court to decide that living on-campus could not be a compelling interest.⁵⁴ In the Yale case, however, there were far fewer exemptions.⁵⁵ This difference may be enough to convince a court that Yale's parietal rule furthered the compelling state interest of promoting diversity among the stu-

The discussion of multiple constitutional claims is relevant here despite this Comment's limited focus on the Free Exercise Clause. In situations where university students request religious accommodations, especially when asking for special living arrangements, these other constitutional rights (most often, the right to privacy) are frequently implicated. Thus, plaintiffs in such cases will often be able to rely on other constitutional claims to bolster their free exercise claims.

It should be noted that some lower courts have been hesitant to require state action to meet the compelling interest test simply because of a "hybrid," multiple-constitutional claim. In *Kissinger v. Board of Trustees of Ohio State University*, 5 F.3d 177 (6th Cir. 1993), the court rejected the proposition that "a state regulation would violate the Free Exercise Clause if it implicates other constitutional rights but would not violate the [F]ree Exercise Clause if it did not implicate other constitutional rights." *Id.* at 180. The Sixth Circuit thus declined to accept the hybrid claim theory until the Supreme Court expressly adopts the theory in a holding. (The *Kissinger* court maintained that the passage in *Smith* on which the hybrid theory is based is merely dicta.) See *id.* Other courts, however, such as the district court in *Rader*, have embraced the hybrid claim. See *First Covenant Church v. City of Seattle*, 840 P.2d 174 (Wash. 1992) (accepting the hybrid claim theory to require a showing of a compelling state interest). Thus, one could safely assume that the students would prevail either with the strong argument that the parietal rule at issue is not neutral or generally applicable, or they could convince the court to accept the hybrid claim theory.

⁵¹ See *supra* Part I.B.1 (discussing the constitutional analysis under the first prong of the Court's test).

⁵² See *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-33 (1993) (stating that a law failing to satisfy the neutrality and general applicability requirements must be narrowly tailored to serve a compelling state interest); see also *Smith*, 494 U.S. at 881-82 (noting that when more than one constitutional right is implicated, even a neutral and generally applicable law may have to undergo this more stringent analysis).

⁵³ *Rader*, 924 F. Supp. at 1557 (quoting *Church of Lukumi*, 508 U.S. at 547).

⁵⁴ See *supra* notes 32-34 and accompanying text (discussing the court's opinion that the large number of exceptions undercut the University's argument that there was a compelling interest in living on-campus).

⁵⁵ See Motion to Dismiss, *supra* note 4, at 14 n.16 (distinguishing the Yale case from *Rader* on the reasoning that UNK "granted many exceptions to the [residency requirement]").

dent body. Indeed, Yale asserted the centrality of dorm life to the "Yale experience" and subsequently implemented policies furthering these objectives.⁵⁶

Nevertheless, assuming Yale is a state actor, there was another reason to believe that Yale's rule may not have been serving a compelling interest: the Yale administration had readily admitted that it would not enforce its own parietal rule. As long as the students paid the required fee for room and board, the University would not check if the students were actually living in the dorm and benefiting from the "Yale experience."⁵⁷ Just as the multiple exemptions weakened UNK's assertion of the parietal rule's importance, this professed lack of enforcement on Yale's part undercut its position that dorm life is central to the Yale education.⁵⁸

Moreover, even if Yale could have proven that its rule is motivated by a compelling interest, the rule must also have been narrowly tailored to further that objective.⁵⁹ Yale's stated reason for its residency requirement was to encourage diversity on its campus.⁶⁰ The plaintiffs did not argue with this objective; rather, it was the exposure to the sexual promiscuity of dormitory life that they found offensive.⁶¹ In the course of negotiations be-

⁵⁶ See *supra* note 4 (noting that University officials stressed that living on-campus is integral to the Yale experience).

⁵⁷ See Cloud, *supra* note 8 (noting that Yale has allowed Orthodox students in the past to live off-campus, provided that they pay the fee and that recounting Yale also offered this option to the students in the current case).

⁵⁸ Yet another factor could undermine the credibility of Yale's claim that the dorm requirement serves a compelling interest. The parietal rule made an exception up until two years ago for those students whose families resided in New Haven. See *supra* note 2. Some have cynically suggested that Yale's change in policy was not the result of a rethinking of fundamental educational values. Rather, Yale implemented the new rule for financial reasons because a great number of upperclassmen were moving off-campus. See Jonathan Rabinovitz, *Yale Degree, Minus the Fabled Dorms*, N.Y. TIMES, Oct. 18, 1995, at B1 (reporting that hundreds of students are fleeing the dorms and instead choosing to live on their own in New Haven).

Ultimately, however, it may not matter whether or not Yale had this less-than-noble motive for changing its policy. In *Rader*, the court reserved judgment regarding whether the parietal rule could further a compelling interest even if its basis was financial. See *Rader*, 924 F. Supp. at 1557 (stating that UNK's many interests, including an "interest in ensuring the financial stability of its residence hall programs," are "legitimate and possibly even important state interests"). Thus, even if the court had found that the change in Yale's residency requirements was motivated by financial considerations, this would not have been necessarily fatal to Yale's contention that the rule serves a compelling interest.

⁵⁹ See *Rader*, 924 F. Supp. at 1557 ("[A] law cannot be regarded as protecting an interest of the highest order . . . [sic] when it leaves appreciable damage to that supposedly vital interest unprohibited." (quoting *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (alteration in original) (internal quotations omitted)).

⁶⁰ See *supra* note 4 (noting the importance of the "Yale experience" in the dormitories).

⁶¹ See *Hack v. President of Yale College*, 16 F. Supp. 2d 183, 186-87 (D. Conn. 1998)

tween the students and Yale, the University offered single-sex rooms on single-sex floors. The students ultimately rejected this offer because Yale refused to enforce a policy prohibiting visitors of the opposite sex.⁶² Yale did not claim that allowing students to bring overnight visitors of the opposite sex is a compelling state interest. The University's only concern was exposing its students to the diversity of its community.⁶³ Thus, the parietal rule is unconstitutional because of Yale's failure to implement the dorm requirement in a manner which minimized unnecessary infringement on these students' First Amendment rights.

C. *Private Universities Are Not State Actors*

In light of the analysis above, an aggrieved student could successfully litigate a complaint that charged a lack of religious accommodations by a university if the constitutional standards apply to the university. The Court's extensive test in *Church of Lukumi* is well-designed to prevent curtailments of religious freedom in violation of the First Amendment. Thus, a university that can be classified as a state actor could be held accountable for the form of religious intolerance alleged in the Yale case.

Even before the district court ruled that Yale was not a state actor, Yale's status as a state actor was questionable at best. Since the Fourteenth Amendment—and thus, the Bill of Rights—binds only state actors, privately owned institutions are not generally within its reach.⁶⁴ The Court has recognized some limited exceptions to this rule, such as when the private action can be attributed to the State.⁶⁵ The plaintiffs in the Yale case, however, did not suggest that Yale serves a public function, as it is a privately

(noting that the plaintiffs' religious beliefs prohibited them from living in the coeducational housing); see also *supra* note 3 (discussing the restrictions imposed by Orthodox Judaism regarding contact between members of the opposite sex).

⁶² See *Morning Edition: Yale Religious Controversy* (NPR radio broadcast, Sept. 24, 1997) [hereinafter *Morning Edition*] (reporting that Yale offered the students single-sex floors and bathrooms, but that Yale claimed it "cannot get into the business of policing dormitories to make sure that no men ever show up to visit a female area or vice versa"); see also Jonathan Rosenblum, *Free the Yale Five*, JERUSALEM POST, Nov. 21, 1997, at 9 (noting that Yale "flatly rejected the [students'] suggestion that they be placed with other students who have voluntarily committed to refraining from sex in the dorms").

⁶³ See Motion to Dismiss, *supra* note 4, at 2 (asserting that "living on campus is an integral component of a Yale education").

⁶⁴ See *supra* notes 15-16 (noting that the Fourteenth Amendment and, therefore, the Bill of Rights, apply only to state actors).

⁶⁵ See, e.g., *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (noting that if the State "exercised coercive power" or provided "significant encouragement," the State would be deemed responsible for the actions of a "private decision"); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974) (adopting a "sufficiently close nexus" test to determine whether private business action should be considered state action).

owned and operated university.⁶⁶ Nor did they propose that “a sufficiently close nexus between the State”⁶⁷ and Yale’s action existed, a nexus that might cause the State to be responsible for⁶⁸ Yale’s policies discriminating against religion.

Instead, the students in the Yale case relied exclusively on the Court’s recent decision in *Lebron v. National Railroad Passenger Corp.*,⁶⁹ and argued that Yale was a direct agent of the State of Connecticut. In *Lebron*, the Court held that the National Railroad Passenger Corporation (“Amtrak”) is a state actor with regard to rights protected by the Constitution, despite being a privately owned, for-profit organization.⁷⁰ The Court developed a three-pronged test to identify a state actor: the corporation must be created by a special act of Congress; the corporation must be designed to carry out government objectives; and the government must retain the right to choose the majority of the board of the corporation.⁷¹ Thus, although Amtrak is privately owned in name, it is effectively an “agency or instrumentality” of the government. In *Hack*, the plaintiffs argued that Yale’s close ties with the State of Connecticut rendered Yale an instrumentality of the State.⁷² They cited the state constitution which charters the University and mandates

⁶⁶ See Motion to Dismiss, *supra* note 4, at 10 (noting that the “plaintiffs . . . refrain from making an alternative [traditional] claim for state action under the pre-*Lebron* analysis” (citing *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374 (1995))); *infra* notes 69-74 and accompanying text (discussing the *Lebron* doctrine). To be cautious, however, Yale cited numerous cases in its motion supporting the proposition that private universities are not state actors, under the traditional tests of state action. See Motion to Dismiss, *supra* note 4, at 10-11. The court, following Yale’s lead, engaged in an analysis of the issue as well, even though the students did not argue on that ground. See *Hack*, 16 F. Supp. 2d at 187-92 (analyzing whether Yale’s conduct qualifies as state action).

The primary case cited by Yale and discussed by the court supporting this position is *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982). See *Hack*, 16 F. Supp. 2d at 187, 190-92. In *Kohn*, the Supreme Court held that a private school that received 90 to 99% of its budget from public funding was still not a state actor. See 457 U.S. at 840-41. Because the government regulators took little interest in and prompted little activity concerning the school’s policies, its decisions could not be attributed to the state. See *id.* at 841. Similarly, Yale argued and the *Hack* court concluded that Yale is not a state actor, as there was no allegation that “the State of Connecticut, either through a regulation or policy, exercised coercive power or significantly encouraged Yale to adopt its housing policy.” *Hack*, 16 F. Supp. 2d at 191.

⁶⁷ *Jackson*, 419 U.S. at 351.

⁶⁸ See *Blum*, 457 U.S. at 1005.

⁶⁹ 513 U.S. 374 (1995).

⁷⁰ See *id.* at 400 (holding that the close connection between Amtrak and the government makes Amtrak “part of the Government for purposes of the First Amendment”).

⁷¹ See *id.* (outlining the three-part test that the Court applied to determine whether a private corporation is a state actor for First Amendment purposes).

⁷² See Complaint, *supra* note 1, ¶¶ 66-67 (alleging that the historically close relationship between Yale and the State of Connecticut renders Yale’s refusal to provide religious exemptions state action).

that the Governor and Lieutenant Governor sit on the governing body of Yale.⁷³

Nevertheless, the district court followed the lead of several lower courts, which have read the *Lebron* decision extremely narrowly. Specifically, those courts declared that even if the State wields a good deal of influence in an organization, *Lebron* does not control unless a majority of the board is appointed by the State.⁷⁴ In response to this contention, the plaintiffs argued that Connecticut's influence on Yale is far greater than simply assigning two members to the University's governing body.⁷⁵ The court, however, was not persuaded and preferred a more technical application of *Lebron*, holding that because the State of Connecticut does not select a majority of the Yale board, the third prong of the *Lebron* test was not met. As a result, the Supreme Court's decision did not control in this case.⁷⁶

This analysis yields an even more important result in a hypothetical case. If Yale, whose relationship with the State of Connecticut predates the American Revolution by three-quarters of a century, is not a state actor under a technical application of *Lebron*, then neither is any other private university.⁷⁷ The religious student, searching for recourse after requests for

⁷³ See *id.* The students also detailed at length many other facets of a three-hundred-year history tying together the State of Connecticut and Yale. See *id.* ¶¶ 18-45.

⁷⁴ See, e.g., *Hall v. American Nat'l Red Cross*, 86 F.3d 919, 921-22 (9th Cir.) (holding that the Red Cross is not a state actor because the government can choose only 8 of its 50 board members), *cert. denied*, 117 S. Ct. 516 (1996); *American Bankers Mortgage Corp. v. Federal Home Loan Mortgage Corp.*, 75 F.3d 1401, 1407-08 (9th Cir.) (noting that even when an institution is chartered by Congress, it is not a state actor when the President appoints only 5 of 18 board members) *cert. denied*, 117 S. Ct. 58 (1996); *Glendora v. Cablevision Sys. Corp.*, 893 F. Supp. 264, 270 n.6 (S.D.N.Y. 1995) (distinguishing its case from *Lebron* because, in its case, the government had no authority to appoint board members).

⁷⁵ The plaintiffs pointed to the significance of the two board members that the State appoints—the Governor and Lieutenant Governor. See Complaint, *supra* note 1, ¶ 66. This argument was questioned on the grounds that the board membership of these state officers was a mere formality. See Sachsman, *supra* note 5 (reporting that Yale's legal counsel contended that the Governor's position was merely honorary).

⁷⁶ *Hack v. President of Yale College*, 16 F. Supp. 2d 183, 189 (D. Conn. 1998) (noting that because the Yale board has 19 members, the 2 members chosen by the State—the Governor and Lieutenant Governor—are not a majority; therefore, *Lebron* does not apply).

⁷⁷ For this reason, the specific result in the Yale case is not of absolute importance. Even if the plaintiffs on an appeal could convince a court that factors such as Yale's 300-year history with the State of Connecticut make the University a state actor, almost no other private universities are chartered by their state constitutions. It is, thus, very unlikely that students from other private universities could win on constitutional claims. Although its analysis was pre-*Lebron* (and thus not entirely compelling), one court has already rejected such an argument in connection with Yale's fiercest competitor. See *Rice v. President of Harvard College*, 663 F.2d 336, 337-38 (1st Cir. 1981) (holding that the historical connection between Harvard and the State of Massachusetts is not sufficient to give the University status as a state actor).

reasonable accommodations have been refused, would have to look beyond the protections afforded directly by the Constitution.

II. THE FEDERAL ANTI-DISCRIMINATION STATUTES AND RELIGIOUS ACCOMMODATIONS

With no basis for constitutional claims, religious students must turn to the federal civil rights statutes for relief.⁷⁸ Following the Constitution's model outlawing state discrimination, the civil rights statutes were designed to protect the general population from private acts of discrimination.⁷⁹ Although existing civil rights statutes govern discrimination in the context of education, these laws deal only with issues of race and gender.⁸⁰ As a re-

⁷⁸ As noted above, the *Hack* plaintiffs advanced claims on a number of statutory grounds. See Complaint, *supra* note 1, ¶¶ 5, 7; *supra* note 7 (noting that the Yale Five advanced a number of statutory claims); see also *infra* note 96 (noting that the students advanced claims under the Fair Housing and Sherman Antitrust Acts). For the reasons noted below, this Comment will not address the Sherman Antitrust claims.

Interestingly, none of these alternative legal theories are based on the civil rights statutes except the dismissed fair housing claim. Furthermore, in *Rader v. Johnston*, there were no civil rights claims presented other than a dismissed claim under the now unconstitutional Religious Freedom Restoration Act (the "RFRA"). See 924 F. Supp. 1540, 1543 n.2 (D. Neb. 1996) (noting a previous grant of summary judgment against the plaintiff under RFRA, 42 U.S.C. § 2000bb (1994), declared unconstitutional in *City of Boerne v. Flores*, 117 S. Ct. 2157, 2172 (1997)). The fact that the plaintiffs in the two most prominent cases on point failed to even make out a colorable claim based on the civil rights laws further supports the proposition that there is, indeed, no statutory remedy under current federal anti-discrimination laws. See *infra* Part II.A (arguing that the current civil rights laws do not provide sufficient protection); see also Glaberson, *supra* note 4, at 49 (reporting that federal civil rights laws do not address the religious discrimination faced by the *Hack* plaintiffs).

⁷⁹ See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 284 (1978) (stating that the purpose of Title VI of the Civil Rights Act of 1964 is to "halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution"); *United States v. Medical Soc'y*, 298 F. Supp. 145, 151 (D.S.C. 1969) (noting that the purpose of Titles II and VII of the Civil Rights Act is to "eliminate the inconvenience, unfairness, and humiliation of racial discrimination"); see also *infra* notes 101, 136 (explaining the purposes of Title VII). Thus, if the only weak link in the students' constitutional claims was that Yale was not a state actor, there is good reason to create protection under a new civil rights statute. See *supra* note 19 (noting the bases of policy arguments for the creation of a new statute mandating reasonable religious accommodations).

⁸⁰ See, e.g., 42 U.S.C. § 2000d (1994) ("No person . . . shall, on the ground of race, color, or national origin, be excluded from participation in . . . or be subjected to discrimination under any program . . . receiving Federal financial assistance."); *id.* § 2000d-4a (defining the term "program" under § 2000d to include colleges, universities, and other educational institutions); *Harper v. Edgewood Bd. of Educ.*, 655 F. Supp. 1353, 1355 (S.D. Ohio 1987) (noting that 42 U.S.C. § 1981, part of the civil rights statutes, applies only to racial discrimination); see also *infra* notes 89-90 and accompanying text (noting that the Supreme Court has stated that both 42 U.S.C. § 1981 and Title II of the Civil Rights Act ban racial discrimination in private, nonsectarian schools that would otherwise accept any qualified applicant). Although it is not regulated in the group of statutes that are formally known as "civil rights statutes,"

sult, the students alleged a violation of the Fair Housing Act, which prohibits discrimination in the sale or rental of housing, including discrimination on the basis of religion.⁸¹ This claim, however, was also dismissed by the court.⁸² Of the remaining civil rights laws, only two expressly deal with religious discrimination—the statutes commonly known as Title II⁸³ and Title VII.⁸⁴ Of these two, Title VII does not provide relief for the students, as it regulates exclusively in the area of employment discrimination.⁸⁵ Title II is thus the only potentially applicable religious discrimination statute. It, however, will not assist private-college students.

A. *Title II: The Public Accommodations Statute*

The federal public accommodations statute entitles “[a]ll persons . . . to the full and equal enjoyment of the . . . privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin.”⁸⁶ On its face, this statute may appear to be the answer to the religious students’ problem. If a private school could be classified as a public accommodation, one could argue that a private university that fails to accommodate the students’ religious needs would violate this law.⁸⁷

The Supreme Court has yet to apply the statute to a scenario of religious discrimination in an educational context. The Court, however, has ad-

gender discrimination is accounted for in Title IX, 20 U.S.C. § 1681 (1994). See *infra* note 105.

⁸¹ See 42 U.S.C. § 3604(b) (1994) (providing, in part, that “it shall be unlawful . . . [t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling . . . because of race, color, religion, sex, familial status, or national origin”).

⁸² See *infra* note 91 and accompanying text (providing an analysis of the court’s reasoning); see also *infra* note 96 (arguing for the necessity of this Comment’s proposal even if the fair housing claim would win on appeal).

⁸³ 42 U.S.C. § 2000a.

⁸⁴ See *id.* § 2000e.

⁸⁵ See, e.g., *UWM Post, Inc. v. Board of Regents of the Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1177 (E.D. Wis. 1991) (stating that Title VII only applies in “employment, not educational, settings”).

⁸⁶ 42 U.S.C. § 2000a (1994).

⁸⁷ The students’ position can be formulated in a number of ways. Section 2000a-2 protects all individuals from intimidation and punishment as a result of exercising their rights under § 2000a. See *id.* § 2000a-2 (“No person shall (a) withhold, deny, . . . (b) intimidate, threaten, or coerce, . . . (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 2000a . . . of this title.”). Accordingly, the plaintiffs could argue that Yale withheld or denied their rights to “full enjoyment” of their college education, contingent on discriminatory demands. Alternatively, they could argue that being forced to pay for dorm rooms that they could not use “punishes” them for exercising their protected rights.

dressed some issues relevant to this question. In *Runyon v. McCrary*,⁸⁸ for example, the Court held that 42 U.S.C. § 1981, a provision of the civil rights statutes, barred a private, nonsectarian school from racially discriminating in its admissions policy.⁸⁹ In dicta, the Court implied that Title II also would apply to discriminatory action by a private nonsectarian school that would otherwise accept any qualified applicant.⁹⁰ Accordingly, the plaintiffs could argue that Yale's religious discrimination is regulated by this statute.

This argument, however, will fail for the same reason that the district court rejected the students' fair housing claim. Like the Fair Housing statute, Title II does not contain any provision imposing an affirmative duty to accommodate religious requests.⁹¹ There is sound public policy underlying this omission. It would be impractical, under Title II, to impose on every inn, restaurant, hotel, and public place a duty to accommodate the various religious needs of the general population. Only in Title VII, which regulates the employment context, did Congress extend this degree of protection, to

⁸⁸ 427 U.S. 160 (1976).

⁸⁹ See *id.* at 173 (holding that discrimination in the admissions decisions of private schools violates 42 U.S.C. § 1981). The plaintiffs also filed a Title II claim, but later abandoned it. See *id.* at 164 n.2.

⁹⁰ See *id.* at 173 n.10 (recognizing explicitly that "Title II . . . does not by its terms reach private schools," but suggesting that so-called "private" universities would still be subject to Title II because a school which accepts any qualified applicant is not "private" for purposes of Title II, and would have to conform to the limitations of Title II as a "public accommodation").

⁹¹ See 42 U.S.C. § 2000e-2(a) (making it "an unlawful employment practice . . . to discriminate against any individual . . . because of such individual's . . . religion"); *id.* § 2000e(j) (defining the term "religion" to include "all aspects of religious observance . . . unless an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . religious observance"). No court has ever held that Title II imposes an affirmative duty to accommodate.

In truth, there is a reasonable accommodations provision in the Fair Housing Act. See *id.* § 3604(f)(3) (defining "discrimination" to include the refusal to permit "reasonable modification" of premises at the expense of the handicapped person). It is limited, however, to mandating accommodations for physically handicapped individuals. See *id.* The *Hack* court stated that because the statute specifically provides accommodations for physical handicaps, "[t]he statute cannot be construed to mean that refusal to make reasonable accommodations constitutes discrimination in any other context." *Hack v. President of Yale College*, 16 F. Supp. 2d 183, 193 (D. Conn. 1998).

The court's reasoning leaves room for the students to argue that where a statute is silent on the issue of reasonable accommodations, such as in Title II, it may be interpreted to require a university to accommodate the plaintiffs in order to avoid discrimination under that statute. Ultimately, however, this argument would not be persuasive, as no court has ever read Title II to require an affirmative duty to accommodate. The *Hack* court simply put forth its strongest argument against requiring religious accommodations under the Fair Housing Act. The opinion does not, however, intend to intimate that other statutes without an express provision mandating accommodations should be construed to require them.

ensure "employment opportunity to all groups in our pluralistic society" without regard to race, religion or gender.⁹²

Even if, hypothetically, the current Title VII standard of accommodation applied to Title II and Fair Housing cases, religious students may still find themselves without recourse. In *Ansonia Board of Education v. Philbrook*,⁹³ the Court held that if the employer offers to make any reasonable accommodation, even if it is not to the employee's liking, then the employer has discharged its obligation to accommodate. Here, Yale engaged in extensive negotiations in which several proposals were suggested before reaching an impasse with the Yale Five.⁹⁴ None of these suggestions satisfied the students, although courts may have deemed them to be reasonable. Thus, even if a court were to read an accommodation duty into Title II and the Fair Housing Act, it would not require more than the existing duties created by Title VII, still leaving the students without a remedy.⁹⁵

B. *Normative and Policy Arguments Supporting a Legislative Proposal to Impose a Duty to Accommodate on Private Universities*

Since a private school is not a state actor, there is virtually no legal recourse for religious students in private schools who demand reasonable religious accommodations.⁹⁶ The federal anti-discrimination statutes do not

⁹² *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 712 (1985) (O'Connor, J., concurring).

⁹³ 479 U.S. 60 (1986). In *Ansonia*, the Court maintained that there was "no basis in either the statute [Title VII] or its legislative history for requiring an employer to choose any particular reasonable accommodation." *Id.* at 68.

⁹⁴ See *supra* note 62 and accompanying text (detailing the negotiations between Yale and the students).

⁹⁵ See *infra* note 154 (suggesting that the standard of accommodation of Title VII cases would not offer effective relief to the Yale Five); *infra* Part IV.B.3 (discussing how the *Ansonia* ruling effects this Comment's legislative proposal). There is another limitation to the accommodation provision of Title VII. In *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84-85 (1977), the Court held that, under Title VII, an employer has to bear no more than a de minimis cost in accommodating the religious request of an employee. This Comment will discuss later how much that standard would affect the students' requests to live off-campus. See *infra* Part III.C (addressing the potential reach of reasonable accommodations); see also *infra* Part IV.B.2 (discussing how the proposed statute should define reasonable accommodation).

⁹⁶ As noted earlier, the students advanced a number of creative statutory and common law theories, including claims under the Fair Housing and Sherman Antitrust Acts. See *Hack*, 16 F. Supp. 2d at 192-97; see also *supra* notes 7, 78 (noting that the Yale Five advanced numerous statutory claims). Even if these nonconstitutional claims would succeed on an appeal, federal legislative remedies still would be necessary to ensure that students' religious freedoms are protected. As a matter of public policy, parties should not be forced to assert their religious discrimination claims in a backhanded manner, for example, via the Sherman Antitrust Act.

sufficiently fill the gap between the obligations that the Constitution imposes on the State and the less inclusive statutory imperatives for private citizens.⁹⁷ This result does not fit well with the government's general policy against other forms of discrimination in public and private education. Moreover, given the close connection between higher education and employment opportunities, it is inconsistent that an employee is not forced to choose between professional advancement and religion, while a college student must do so. Finally, there are several indicators that congressional and public opinions support more, not less, accommodation for religious practitioners.

1. The Importance of Higher Education and Title VII

In today's society, education is closely linked with success in the job market.⁹⁸ A growing number of professions require college and graduate degrees as prerequisites. In today's job market, even these degrees do not always suffice.⁹⁹ Furthermore, the quality of the education has an enormous impact on the student's potential for professional advancement.¹⁰⁰ Failure

Moreover, the Fair Housing Act is insufficient statutory protection for religious students. Only the specific request at issue in the Yale case, relating to a dorm requirement, allowed the students to allege a violation of the Fair Housing Act (which, as mentioned earlier, was dismissed). All other requests for religious accommodations, however, would not benefit from any of the civil rights laws and would remain unprotected. Therefore, from a normative perspective, there should be a civil rights statute more directly addressing this problem.

⁹⁷ See *supra* Part I (detailing the constitutional requirements to provide religious accommodations); Part II.A (analyzing Title II in light of this problem).

⁹⁸ See President William J. Clinton, Remarks to Students and Teachers of Houston High Schools (Jan. 9, 1998), available in 1998 WL 5403 (emphasizing that education is "not just an advantage," but rather a "necessity"). Among other things, the President noted that while 20 years ago, college graduates earned 40% more than high school graduates, "[t]oday . . . the gap has gone to 75 percent." *Id.*; see also Chairman Alan Greenspan, Remarks at Syracuse University (visited Sept. 23, 1998) <<http://www.federalreserve.gov:80/BOARDDOCS/SPEECHES/19971203.htm>> (noting that "education, especially to enhance advanced skills, is so vital to the future growth of our economy" and that "broader human capital skills have been associated with higher education"). Chairman Greenspan also concluded that "the demand for college-trained workers has been increasing rapidly." *Id.*

⁹⁹ See, e.g., Lisa Benavides, *Plain MBAs May No Longer Be Enough*, GANNETT NEWS SERVICE, Dec. 17, 1997, available in 1997 WL 8843298 (reporting that "[t]here are many jobs where an employer specifies you need an MBA" and that there "may be the need for ever-advanced degrees . . . [with the] MBA . . . becom[ing] more of a front-end preparation for a career" (internal quotation marks omitted)).

¹⁰⁰ See, e.g., *Workplace in the 21st Century: Testimony Before the Subcomm. On Oversight and Investigations of the House Comm. on Educ. and the Workforce* (statement of Ed Montgomery, Chief Economist, Dep't of Labor), Oct. 29, 1997, available in 1997 WL 679258 (testifying that the "evidence is clear that people with more education and skills do substantially better in today's economy"). In the *Hack* case, the plaintiffs, in support of their antitrust argument, put forth the argument that a Yale education is unique. See Complaint, *supra* note

to make religious accommodations in a university setting, then, is comparable to a similar refusal to accommodate in the workplace. Thus, it would be manifestly unfair to prevent a qualified student from attending the college of her choice because of an inflexible housing policy.

The case law of Title VII explains that the purpose of the statute is to guarantee full access to employment for all members of our pluralistic society—without having to choose between profession and religion.¹⁰¹ Because higher education is directly correlated with future professional achievement, it would be inconsistent with the public policy underlying Title VII to allow religious discrimination in education.¹⁰²

2. The Federal Government's Policy Against Discrimination in Education

The federal government has a long history of combating discrimination in all forms of education. Perhaps the most well known are the Supreme Court decisions, such as *Brown v. Board of Education*,¹⁰³ which used the Equal Protection Clause to end the era of segregated public schools.¹⁰⁴

1, ¶ 95 (“[A] Yale degree has unique attributes that make it without substitute or equal.”). Although the court rejected this argument in that context, see *Hack*, 16 F. Supp. 2d at 195-97, it fits quite well into an analogy to Title VII. The future earning potential of a student could be seriously affected by not attending Yale.

¹⁰¹ See *infra* note 136 and accompanying text (stating that Title VII's constitutionality rests on its valid secular purpose and protections of employment opportunity); see also *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 90-91 n.4 (1977) (Marshall, J., dissenting) (explaining that the secular purpose of Title VII is to protect the employment opportunities of members of minority religions); *Brown v. Polk County*, 832 F. Supp. 1305, 1312-13 (S.D. Iowa 1993) (noting that the purpose of outlawing religious discrimination in employment is to ensure that workers are hired and retained on the basis of skill, not religious practices and beliefs), *aff'd in part and rev'd in part*, 61 F.3d 650 (8th Cir. 1995), *cert. denied*, 516 U.S. 1158 (1996).

¹⁰² The argument that we must protect individuals from employment discrimination prior to their becoming employees is not unprecedented. Title VII itself protects not only actual employees but also applicants and, under certain circumstances, individuals who have not even applied for a job. See 42 U.S.C. § 2000e-2(a) (1994) (prohibiting discrimination in the hiring of employees); see also *Robinson v. Montgomery Ward & Co.*, 823 F.2d 793, 796 (4th Cir. 1987) (stating that Title VII protection can extend even to individuals who did not apply for a job when it is clear that they would be subject to discrimination in the hiring process). Thus, Congress has extended protection to potential employees. Nevertheless, the case law clearly establishes that Title VII is not applicable in the *Hack* case. See, e.g., *UWM Post, Inc. v. Board of Regents of the Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1177 (E.D. Wis. 1991) (stating that Title VII only applies in employment, and not educational, settings). The *Hack* case does, however, show the inconsistency between the policy behind Title VII and the result of its application. This anomalous result lends support to the argument that there should be some other statutory remedy for religious university students who are denied reasonable religious accommodations.

¹⁰³ 347 U.S. 483 (1954).

¹⁰⁴ See U.S. CONST. amend. XIV, § 1 (forbidding the states to “deny to any per-

Congress expanded on the protections offered directly by the Constitution by passing legislation outlawing racial and gender discrimination in both public and private education.¹⁰⁵ The courts, too, attacked discrimination in areas other than constitutional law, and construed various congressional acts as prohibiting educational discrimination on the basis of race.¹⁰⁶ Nevertheless, despite judicial and legislative activism aimed at preventing both racial and gender discrimination, there has been relatively little governmental effort to curb religious intolerance in the education context.

3. Congressional and Public Opinion Support More Religious Accommodation

The issues raised by students such as Michael Rader and the Yale Five did not appear in a vacuum. Over the last several years, public opinion has shifted towards greater religious practice and, consequently, more tolerance and accommodation.¹⁰⁷ Professionals are taking time out of their workdays

son . . . equal protection of the laws").

¹⁰⁵ See, e.g., 20 U.S.C. § 1681 (1994) (Title IX) (regulating gender discrimination in education); 42 U.S.C. § 2000c (1994) (protecting against racial discrimination in public education); see also *id.* § 2000d-4a (including private colleges and universities within the reach of Title VI, which outlaws racial discrimination in those activities that receive federal funding); *Radcliff v. Landau*, 883 F.2d 1481, 1483 (9th Cir. 1989) (applying Title VI to a private law school accepting federal financial assistance).

¹⁰⁶ See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 579 (1983) (holding that a private university which enforces discriminatory practices does not qualify for tax exempt status, as it violates the "national policy to discourage . . . discrimination in education" (citing Rev. Rul. 71-447, 1971-2 C.B. 230, at 231)); *Runyon v. McCrary*, 427 U.S. 160, 170-75 (1976) (stating in dicta that the federal public accommodation statute applies to a private, non-sectarian school that accepts any qualified applicant); see also *Radcliff*, 883 F.2d at 1482-83 (applying Title VI to a private law school accepting federal financial assistance).

¹⁰⁷ See, e.g., Andrea Heiman, *Back to Basics: Orthodox Movements Like Aish HaTorah Are Galvanizing Jews to Return to Their Roots*, L.A. TIMES, Feb. 2, 1997 (Magazine), at 10, 10-14, 28, 30 (reporting on an Orthodox Jewish movement aimed at bringing secularized Jews back to the Orthodox faith); Ron Stodghill II et al., *God of Our Fathers: The Promise Keepers Are Bringing Their Manly Crusade to Washington*, TIME, Oct. 6, 1997, at 34 (reporting on the religious revival among Christian American men through the Promise Keepers); Elwood Watson, *America's Experiencing a Spiritual Revival*, HEADWAY, Feb. 28, 1997, at 14, 14 ("Some people believe [that America is] on the verge of another great [religious] awakening."). This trend of religious revitalization can be seen worldwide as well. See, e.g., Abu Ibrahim et al., *Religious Revival Becomes a Trend Among Local Moslems*, JAKARTA POST, Aug. 12, 1997, at 9 (noting the return of many Moslems to their faith); Jack Kelley, *Cuba: After Four Decades of Communism, Faith Has Hold on Masses*, USA TODAY, Jan. 16, 1998, at 1A (reporting on Pope John Paul II's momentous visit to Cuba in the context of "a major religious revival"); Stuart Vincent, *The Newsday Interview with Eric Yoffie: Jewish Education Is My Primary Concern*, N.Y. NEWSDAY, Sept. 9, 1996, at A33 (noting a "religious revival" among Reform Jews).

to study and contemplate the teachings of their faiths.¹⁰⁸ Others have taken on religious obligations and practices which “interfere” with employers’ expectations of appropriate dress and attendance at work.¹⁰⁹ Employers have been less than amicable in response to this trend. Employees, in turn, have looked to Title VII for assistance. The number of complaints of religious intolerance filed with the Equal Employment Opportunity Commission (the “EEOC”) has risen dramatically since the beginning of this decade.¹¹⁰

This newfound interest in religion has not been limited to the workplace. Although only *Rader* and the Yale Five have received national attention, an increasing number of students have requested various religious accommodations from their school administrations.¹¹¹ Furthermore, a number of congressional actions reflect this recent sensitivity to religion, deriving from a policy of greater religious tolerance. Most notable was the passage of the Religious Freedom Restoration Act (the “RFRA”)¹¹² (subsequently held to be unconstitutional) in response to the Court’s decision in *Employment Division v. Smith*.¹¹³ In a very unpopular decision,¹¹⁴

¹⁰⁸ See David W. Chen, *Fitting the Lord into Work’s Tight Schedules*, N.Y. TIMES, Nov. 29, 1997, at A1 (reporting how a great number of professionals of various religions meet during the workday for prayer meetings, study sessions, and other religiously oriented activities).

¹⁰⁹ See Stephanie Armour, *Religion, Workplace Collide: Conflict Grows Between Bosses, Devout Workers*, USA TODAY, Nov. 21, 1997, at 1B (recounting numerous incidents where individuals faced discrimination at work because of religious garb or the observance of religious holidays); Jane Easter Bahls, *Make Room for Diverse Beliefs*, HR MAG., Aug. 1, 1997, at 89, 89-90, 92, 95 (reporting an increasing number of nontraditional or informal religious practices in the workplace and the need for their accommodation).

¹¹⁰ See Armour, *supra* note 109, at 1B (noting that, by the end of the federal government’s fiscal year, the number of religious discrimination complaints filed with the EEOC had “soared 43%, from 1,192 cases in 1991 to 1,709 in . . . 1997”); Bahls, *supra* note 109, at 90 (reporting that the EEOC “received more than 1,560 allegations of religious discrimination [in 1996], up almost 31 percent from 1991”).

¹¹¹ See Glaberson, *supra* note 4, at 45 (quoting an expert on higher education as saying that “Yale’s dilemma [with requests for religious accommodations] is a common one on campuses in the 1990’s”); *Morning Edition*, *supra* note 62 (“Higher education experts say disputes like the one going on at Yale are becoming common.”).

¹¹² 42 U.S.C. § 2000bb (1994) (declared unconstitutional in *City of Boerne v. Flores*, 117 S. Ct. 2157, 2172 (1997)).

¹¹³ 494 U.S. 872, 890 (1990) (holding that the Free Exercise Clause permits a state to prohibit the use of peyote for sacramental purposes and therefore permits the state to deny unemployment benefits for persons discharged for such use of peyote).

¹¹⁴ See, e.g., *City of Boerne v. Flores*, 117 S. Ct. 2157, 2176-85 (1997) (O’Connor, J., dissenting) (arguing that *Smith* “adopted an improper standard for deciding free exercise claims”); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 559-77 (1993) (Souter, J., concurring in part, dissenting in part) (arguing that the *Smith* rule is inconsistent with the “original understanding and purpose” of the Free Exercise Clause); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1114-53 (1990) (objecting to the *Smith* opinion’s use of legal sources and to its theoretical argument).

the Supreme Court held in *Smith* that a neutral and generally applicable law was constitutional, even though the law infringed upon some constituencies' free exercise of religion.¹¹⁵ Not only was this decision criticized in Congress (to the extent that Congress subsequently overruled *Smith* by enacting the RFRA), but the holding was also questioned by prominent legal scholars and several members of the Court itself.¹¹⁶

Congress's fight to guarantee religious freedom has not ended on the First Amendment front. Rather, Congress is now considering further legislation to curtail religious discrimination by private actors. Currently, there is a legislative proposal in both houses of Congress that would overrule two key Supreme Court decisions which severely hinder the effectiveness of Title VII's religious accommodation requirements.¹¹⁷ This debate demonstrates the level of importance that the American public and legislature attach to the need for religious accommodation by private actors.

4. Summary of Policy Arguments

Congress used the civil rights statutes to extend the government's anti-discrimination policy beyond state actors bound by the Fourteenth Amendment. Yet the facts of the *Hack* case yield a result where a state university must accommodate its students, while a private school has no such requirement. Given the importance of higher education and the government's role in promoting equality in education, as well as current public approval of religion and religious expression, Congress should pass legislation extending the duty to accommodate religious practices to private universities.¹¹⁸

¹¹⁵ See *Smith*, 494 U.S. at 882, 890. In *Smith*, the Court ruled on the denial of unemployment benefits to workers who had been discharged due to their illegal drug use. The Court held that, although the employees took the drugs as part of a religious ritual, they were not protected by the First Amendment. The Free Exercise Clause, the Court maintained, does not allow the violation of neutral, generally applicable laws. See *id.* at 879-82; see also *supra* notes 47-50 and accompanying text (discussing the application of the *Smith* holding to the Yale case).

¹¹⁶ See *supra* note 114 (listing cases in which members of the Court disagree with the *Smith* decision).

¹¹⁷ See Workplace Religious Freedom Act, 105th Cong., 143 CONG. REC. S8590 (daily ed. July 31, 1997) (statement of Sen. Kerry); see also H.R. 2948, 144 CONG. REC. E4 (daily ed. Jan. 27, 1998) (statement of Rep. Goodling) (introducing H.R. 2948, a companion bill to Senator Kerry's proposed amendments to Title VII). The two cases that the proposed legislation intends to overrule are *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986), and *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

¹¹⁸ Professor Michael Dorf, in a recently published essay, presents and ultimately rejects the proposition that Yale should be statutorily mandated to accommodate students such as the Yale Five. Dorf, *supra* note 19, at 862. Dorf agrees that a state university in a similar situation should (and probably would) have a duty to accommodate under the First Amendment. See *id.* at 861. Moreover, he urges Yale "to grant exemptions as a matter of its own compre-

III. THE CONSTITUTIONALLY PERMISSIBLE SCOPE OF RELIGIOUS ACCOMMODATION IMPOSED BY STATE OR FEDERAL GOVERNMENT

Whenever Congress or any governmental actor accommodates a religious practice, constitutional problems are bound to arise. Although Congress is obligated to allow the free exercise of religion, it is (at the very least) prohibited from establishing laws mandating religious beliefs or practices.¹¹⁹ Particularly with respect to private actors, Congress has to be especially careful not to mandate religion, lest it violate the Establishment Clause. Thus, in order to determine the constitutionally permissible scope of proposed legislation that requires religious accommodations from private

hensively liberal principles." *Id.* at 862. Nonetheless, Dorf maintains that requiring Yale, as a matter of law, to accommodate the students "would be to deny the institution's nomic character," and doing so would be an inappropriate response by the state. *Id.*

This Comment, however, concludes that the interests at issue are sufficiently important to warrant legislation, even if that requires denying Yale its nomic character. After drawing his distinction between Yale and similarly situated state universities, Dorf pauses to recognize the limits to which Yale (or any other institution) should enjoy nomic sovereignty. *See id.* at 865-68. He notes that a military academy would not be insulated from "criminal or civil liability for brutal batteries on the ground that this is understood as permissible hazing within the college's distinct nomos." *Id.* at 867. Once Dorf concedes that the issue is one of degree, the line allowing a nomic institution autonomy from state interference can be drawn elsewhere. While Dorf attaches great significance to Yale's retention of its nomic character, this Comment argues that, for the policy reasons outlined above, the importance of providing religious accommodations for university students overrides these other considerations. Therefore, legislation is appropriate.

¹¹⁹ *See supra* note 7 (citing the prohibitions of the First Amendment religion clauses). The precise limitations that the Establishment Clause imposes remain unclear after the Supreme Court's last decision on the matter. In *Lee v. Weisman*, 505 U.S. 577, 598-99 (1992), the Court held that a public school could not provide for a prayer to be recited at graduation—even if the prayer was "nonsectarian." There, Justice Kennedy, writing for the majority, framed the issue as one of state coercion of religion. *See id.* at 599 (holding that the government may not "compel a student to participate in a religious exercise"). Several Justices in concurrence, however, maintained that "it is not enough that the government restrain from compelling religious practices: It must not engage in them either." *Id.* at 604 (Blackmun, J., concurring) (noting further that the "Court repeatedly has recognized that a violation of the Establishment Clause is not predicated on coercion"); *see also id.* at 619 (Souter, J., concurring) (stating that the Supreme Court precedent "cannot . . . support the position that a showing of coercion is necessary to a successful Establishment Clause claim"). Given this ambivalence within the majority, the development of the actual standard remains to be seen. Thus, the language in the text asserts only that the government, at the very least, cannot mandate religion. Resolution of this dispute is not necessary to the argument of this Comment. In *Lee*, the Court itself limited its analysis from the outset to "the controlling precedents as they relate to prayer and religious exercise in . . . public schools . . ." *Id.* at 586. Thus, the Court declined the invitation of the parties to reconsider "questions of the definition and full scope of the principles governing the extent of permitted accommodation by the State for the religious beliefs and practices of many of its citizens." *Id.* Consequently, *Lee* did not upset the state of the law as explained elsewhere in this Comment.

universities, it is necessary to examine Establishment Clause case law. Cases discussing Title VII and its accommodation provision are especially relevant, because this Comment's proposal, like Title VII, is to require "reasonable accommodations."

A. *The Constitutionality of Title VII*

The extent to which Congress can require private citizens to provide religious accommodations without violating the Establishment Clause is a question of degree. *Estate of Thornton v. Caldor, Inc.*¹²⁰ is a seminal case in determining the precise limit of this congressional power. In *Estate of Thornton*, the Court held that a Connecticut law allowing every employee to choose any day of the week as her Sabbath violated the Establishment Clause.¹²¹ The Court stressed that "[t]he First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities."¹²² This Connecticut statute left the absolute power in the hands of the employee, with the right to demand leave for any one day of the week. Furthermore, the employee's choice of day was not limited by any potentially adverse consequences to her employer or fellow employees. The Court maintained that this extreme and absolute privilege, granted to Sabbath observers above all others, was unconstitutional.¹²³

Interestingly enough, the majority opinion did not explain why other statutes making religious accommodations were constitutional. Justice O'Connor, in her concurrence, addressed this implicit question left unan-

¹²⁰ 472 U.S. 703 (1985).

¹²¹ See *id.* at 710-11.

¹²² *Id.* at 710 (Hand, J.) (alteration in original) (quoting *Otten v. Baltimore & Ohio Ry.*, 205 F.2d 58, 61 (2d Cir. 1953)).

¹²³ See *id.* at 710-11. In reaching its decision, the Court paid lip-service to the well-known, three-part *Lemon* test as the basis for its holding. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (requiring a statute to (1) have a secular purpose; (2) not foster excessive entanglement of the government with religion; and (3) not have the primary effect of advancing or inhibiting religion in order to pass muster under the First Amendment). After briefly stating the standard set forth in *Lemon*, however, the Court in *Estate of Thornton* pursued its own line of analysis, turning on and closing with the remarks quoted above from Judge Learned Hand. See *Estate of Thornton*, 472 U.S. at 410. Members of the Court have noted the Court's inconsistent application of the *Lemon* test. See, e.g., *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 750-51 (1994) (Scalia, J., dissenting) (describing the Court's erratic relationship with the *Lemon* test). Therefore, although some of the decisions (including *Estate of Thornton*) periodically "rely" on the *Lemon* test, my discussion will view *Estate of Thornton* as formulating its own standard for testing the constitutionality of government imposed religious accommodations.

swered by the majority.¹²⁴ She distinguished the Court's holding in *Estate of Thornton* from Title VII and the strong assumption of constitutionality that it enjoys.¹²⁵ Justice O'Connor emphasized three points in drawing her distinction. First, Title VII, as opposed to the Connecticut statute, has a manifest secular purpose of allowing all members of "our pluralistic society"¹²⁶ equal opportunity to work. In a second related point, Justice O'Connor noted that Title VII protects "all religious beliefs and practices rather than protecting only the Sabbath observance."¹²⁷ Finally, the reasonable nature of Title VII's accommodation, versus the absolutist approach of the Connecticut statute, keeps the former from running afoul of the Establishment Clause.¹²⁸

B. *The Application of Estate of Thornton*

The *Estate of Thornton* decision has been discussed by the Court in several other cases where there was arguably preferential treatment given to a religious constituency. By looking to these other cases for guidance in reading *Estate of Thornton*, the Court's holding becomes clearer and the

¹²⁴ See *Estate of Thornton*, 472 U.S. at 711 (O'Connor, J., concurring) (explaining why "the Court's opinion [does not] suggest[] that the religious accommodation provisions of Title VII" are unconstitutional).

¹²⁵ In addition to Justice Marshall's statement in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 90 & n.4 (1977) (Marshall, J., dissenting) (arguing that a statute outlawing employment discrimination has a valid secular purpose of assuring opportunities to all groups in our pluralistic society), upon which Justice O'Connor based her conclusions, a number of lower courts also declared that Title VII was free of Establishment Clause concerns. See, e.g., *McDaniel v. Essex Int'l, Inc.*, 696 F.2d 34, 36-37 (6th Cir. 1982) (holding that the accommodations provision of Title VII does not violate the Establishment Clause); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1244-46 (9th Cir. 1981) (maintaining that accommodations under Title VII are constitutional); *Hardison v. Trans World Airlines, Inc.*, 527 F.2d 33, 43-44 (8th Cir. 1975) (same), *rev'd on other grounds*, 432 U.S. 63 (1977). Likewise, since *Estate of Thornton*, lower courts have repeatedly upheld Title VII as constitutional. See, e.g., *EEOC v. Ithaca Indus., Inc.*, 849 F.2d 116, 119 (4th Cir. 1988) (holding that the accommodation provision has a secular purpose and therefore is consistent with the First Amendment); *Vigars v. Valley Christian Ctr.*, 805 F. Supp. 802, 809-10 (N.D. Cal. 1992) (same); see also *Workplace Religious Freedom Act*, 143 CONG. REC. S8590 (daily ed. July 31, 1997) (statement of Sen. Kerry) (assuming that there is a strong presumption in favor of the constitutionality of Title VII and its religious accommodation provision).

¹²⁶ *Estate of Thornton*, 472 U.S. at 712 (O'Connor, J., concurring).

¹²⁷ *Id.* But see Christopher L. Eisgruber, *Political Unity and the Powers of Government*, 41 UCLA L. REV. 1297, 1307 n.31 (1994) (arguing that O'Connor's reasoning in *Estate of Thornton* is not compelling because of the possibility that Connecticut intended its statute to alleviate a burden, rather than to endorse a particular religion).

¹²⁸ See *Estate of Thornton*, 472 U.S. at 712 (O'Connor, J., concurring) (arguing that statutes that make constitutional religious accommodations have a manifest secular purpose; protect all religious beliefs and practices; and demonstrate a reasonable, rather than an absolutist, approach).

permissible parameters of this Comment's proposed legislation become more defined.

1. Breadth of the Accommodations

Shortly after *Estate of Thornton* was decided, the Court again faced the issue of conflict between Sabbath observance and the workplace. In *Hobbie v. Unemployment Appeals Commission*,¹²⁹ the state commission denied unemployment benefits to an employee after her employer discharged her for refusing to work on her Sabbath.¹³⁰ The Court held that granting her governmental unemployment benefits did not violate the Establishment Clause, even though this gave special status to a religious practitioner.¹³¹ Although *Hobbie*, like *Estate of Thornton*, deals with state-granted benefits to Sabbath observers, *Hobbie* is still easily distinguished from *Estate of Thornton*. In *Estate of Thornton*, only Sabbath observers benefited from the accommodation provided; in *Hobbie*, in contrast, all religious groups received accommodation from the state. There is nothing per se offensive, however, in allowing accommodations to Sabbath observers.

Although the Court does not say so explicitly, its opinion in *Hobbie* clearly endorses Justice O'Connor's concurrence in *Estate of Thornton*. Ultimately, the Court's reasoning rests on the breadth of the accommodation, a focus upon which O'Connor relied in distinguishing *Estate of Thornton* from Title VII.¹³² This distinction is especially relevant to the discussion of state-mandated religious accommodation by private universities. This Comment's proposed legislation would avoid a conflict with the Establishment Clause by requiring private universities to accommodate all religious practices equally. Since there is no rationale for limiting the proposal to any one religious practice, there is little reason to fear that the Court would find the proposal unconstitutional on these grounds.

¹²⁹ 480 U.S. 136 (1987).

¹³⁰ See *id.* at 137.

¹³¹ See *id.* at 144-45. The thrust of the Court's decision deals with the Free Exercise, not the Establishment, Clause. The employee contended, and the Court agreed, that the state unemployment commission could not deny the benefits in this case without violating the Free Exercise Clause. The commission, however, raised the Establishment Clause as a defense for its actions. Relying on *Estate of Thornton*, the commission argued that since it was a state actor, giving the Sabbath observer special status should be prohibited by the Establishment Clause. There, the Court disagreed.

¹³² See *Estate of Thornton*, 472 U.S. at 711-12 (O'Connor, J., concurring) (emphasizing that "[t]he statute singles out Sabbath observers for special . . . protection without according similar accommodation to ethical and religious beliefs"); *cf. Hobbie*, 480 U.S. at 145 n.11 (stating that Florida's granting "of unemployment benefits to religious observers does not single out a particular class of such persons . . . and thereby have the effect of implicitly endorsing a particular religious belief").

In *Texas Monthly, Inc. v. Bullock*, the Court reiterated Justice O'Connor's assertion that religious accommodation must be sufficiently broad.¹³³ In that case, the Court struck down a state tax exemption available only to religious publications. Based on Justice O'Connor's concurrence in *Estate of Thornton*, the Court argued that since the Texas sales tax exemption did not extend to other publications of nonreligious moral and ethical material, it was unconstitutional.¹³⁴

Texas Monthly's holding touches upon a related, but different, criterion from the one relied upon in *Hobbie*. In *Texas Monthly*, the Court stresses the requirement that a statute have a secular purpose. This requirement extends beyond the prohibition of singling out a certain religious group or practice. Even if legislation grants equal protection to all religions, the law will be unconstitutional if it does not serve some secular purpose.¹³⁵ Title VII has a secular purpose, and is therefore constitutional, because the religious employee is only one of many who are protected.¹³⁶

Although this Comment's proposal would be limited to prohibiting religious discrimination on-campus as opposed to in the workplace, there should still be no Establishment Clause concerns. Currently, existing protection from racial and gender discrimination in education would place regulation of religious discrimination in a secular context.¹³⁷ Thus, no new legislation regarding other forms of discrimination would need to be passed, as the stage is already set for Congress to simply create another protected class.

¹³³ 489 U.S. 1 (1989).

¹³⁴ See *id.* at 16 ("[T]he exemption could not be reserved for publications dealing solely with religious issues . . ."); cf. *Welsh v. United States*, 398 U.S. 333, 361-67 (1970) (Harlan, J., concurring in result) (maintaining that conscientious objector to war status cannot be limited to those with religious objections, but must be extended to protesters with moral, ethical, or philosophical complaints).

¹³⁵ See *Texas Monthly*, 489 U.S. at 16 n.6 (pointing out that Texas's exemption is even more offensive given other state tax exemptions that do serve a secular purpose by including charitable and educational organizations together with religious ones); see also *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring) (implying that the government generally cannot direct a subsidy exclusively to religious groups without endorsing religion).

¹³⁶ See *Estate of Thornton*, 472 U.S. at 712 (O'Connor, J., concurring) (stating that "a statute outlawing employment discrimination based on race, color, religion, sex, or national origin has the valid secular purpose of assuring employment opportunities to all groups in our pluralistic society").

¹³⁷ See *supra* notes 104-05 and accompanying text (detailing laws preventing racial and gender discrimination in education).

2. Burdens and Effects on Other Constituencies

There is yet another point in *Estate of Thornton* that is relevant in predicting potential Establishment Clause problems with proposed religious accommodation legislation. This factor does not come from Justice O'Connor's concurrence, but rather from the opinion of the Court. Writing for the majority, Chief Justice Burger argued that one crucial factor in rendering the Connecticut Sabbath-observance accommodation statute unconstitutional was that it had a deleterious impact on employers and fellow employees.¹³⁸ The fact that the statute took "no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath" was one of the law's fatal flaws.¹³⁹

In later cases, the Court recognized the importance of taking into account the effect that religious accommodation has on others.¹⁴⁰ It is clear, however, that a statute is not per se burdensome simply because religious parties receive a benefit and nonreligious parties do not. For example, in *Board of Education of Kiryas Joel Village School District v. Grumet*,¹⁴¹ the Court addressed whether a school district comprised exclusively of Satmar Hasidim (an ultra-Orthodox Jewish sect)¹⁴² could receive state funding, while remaining true to the Establishment Clause.¹⁴³ Ultimately, the Court concluded that the school district's funding was unconstitutional.¹⁴⁴ In his concurrence, Justice Kennedy noted that in *Estate of Thornton*, the Sabbath-observance accommodation was invalid due to the burden it placed on non-Sabbath observers.¹⁴⁵ Justice Kennedy concluded in *Kiryas Joel*, however, that the creation of a Satmar-only school district would not significantly burden non-Satmars.¹⁴⁶ Even though Justice Kennedy readily admitted that

¹³⁸ See *Estate of Thornton*, 472 U.S. at 709.

¹³⁹ *Id.*

¹⁴⁰ See, e.g., *Texas Monthly*, 489 U.S. at 15 (stating that a statute violates the First Amendment "when government directs a subsidy exclusively to religious organizations . . . and . . . burdens nonbeneficiaries markedly").

¹⁴¹ 512 U.S. 687 (1994).

¹⁴² The Court provided the following brief description of Satmar Hasidim:

The [Hasidim] are vigorously religious people who make few concessions to the modern world and go to great lengths to avoid assimilation into it. They interpret the Torah strictly; segregate the sexes outside the home; speak Yiddish as their primary language; eschew television, radio, and English-language publications; and dress in distinctive ways that include headcoverings and special garments for boys and modest dresses for girls.

Id. at 691.

¹⁴³ See *id.* at 696.

¹⁴⁴ See *id.* at 702-10.

¹⁴⁵ See *id.* at 725 (Kennedy, J., concurring).

¹⁴⁶ See *id.* at 724-25.

“[t]here is a point . . . at which an accommodation may impose a burden on nonadherents so great that it becomes an establishment,”¹⁴⁷ the mere existence of an accommodation which exclusively benefits a religious group is by no means per se prohibited by the Establishment Clause.

This analysis is very important with respect to this Comment’s legislative proposal. In the employment context, in order to allow religious employees their necessary accommodations, employers would necessarily lose revenues and employees would have to shift their work schedules. The private university setting, however, does not present the same imposition on the relevant nonreligious parties. There is no reason to believe that accommodating religious students would burden nonreligious students in any meaningful manner.¹⁴⁸ Thus, while *Estate of Thornton* and its progeny control this issue in an employment context, a statute regulating religious accommodations by private universities would be constitutionally sound.

C. *The Extent of Reasonable Accommodations*

The Court’s interpretation of *Estate of Thornton* leads to the conclusion that a statute which reasonably accommodates a broad range of religious practices, placed in a greater secular context, and which would not significantly burden nonreligious constituencies, would be within the confines of the First Amendment. The line of cases citing *Estate of Thornton* discusses and defines these factors: the necessary breadth of the accommodation, the definition of a “secular” context, as well as what is considered to be “burdensome” on others.¹⁴⁹ The definition of “reasonable accommodations,” however, is not directly put forth in those cases.

The Court, however, has interpreted reasonableness in the statutory setting of Title VII. This interpretation yielded a reading of the statute that imposes nothing more than a de minimis obligation on the employer.¹⁵⁰

¹⁴⁷ *Id.* at 725. Justice Kennedy agreed with the Court that the creation of such a school district was unconstitutional for other reasons. *See id.* at 722, 728 (“[I]n my view one such fundamental limitation [imposed by the Establishment Clause] is that government may not use religion as a criterion to draw political or electoral lines.”).

¹⁴⁸ Indeed, Justice Kennedy maintained that the creation of an entire school district, designed exclusively to accommodate a religious group, could be consistent with the Establishment Clause insofar as it did not burden others. *See id.* at 725. The argument, thus, is that nonreligious students do experience significant sacrifices or losses when religious students receive accommodations. At Yale, non-Orthodox students would bear no greater burden if the Orthodox students were allowed to live off-campus. *See infra* Part III.C (discussing the scope of the reasonable accommodations requirement).

¹⁴⁹ *See supra* Part III.B (discussing what is required of a statute in order not to violate the Establishment Clause).

¹⁵⁰ *See supra* note 95 and accompanying text (discussing the de minimis obligation imposed by Title VII’s reasonable accommodations standard).

Moreover, the employer does not even have to accept the specific reasonable accommodation of the employee's choice.¹⁵¹ This limitation on Title VII, however, was fueled by statutory interpretation, not by constitutional imperative. In fact, in *Trans World Airlines, Inc. v. Hardison*,¹⁵² both the Court and Justice Marshall in dissent left open the question of how much more than a de minimis obligation Congress could require without violating the Establishment Clause. Thus, the extent of the obligation that could be imposed on private universities is left unresolved by the courts.¹⁵³ Nevertheless, there is no reason to doubt that a statute in the education context could be written at least as strongly as Title VII (requiring a de minimis effort) without any constitutional trouble.

This entire discussion may be moot, however. It may still be possible to make effective reasonable accommodations in the private university setting, even with a simple de minimis obligation.¹⁵⁴ Employers create rules in

¹⁵¹ See *supra* notes 93-95 and accompanying text (discussing *Ansonia's* limitation on the Title VII reasonable accommodation standard).

¹⁵² 432 U.S. 63, 70 (1977) (noting that, since the Court found that TWA was not required to bear more than a de minimis cost to avoid Title VII liability, it was unnecessary to address Establishment Clause concerns); *id.* at 90 n.3 (Marshall, J., dissenting) (leaving "for another day the merits of any constitutional objections that could be raised if the law were construed to require employers (or employees) to assume significant costs in accommodating").

¹⁵³ The proposal for the Workplace Religious Freedom Act insists that placing more than a de minimis obligation on an employer for the purposes of Title VII *would* be constitutional. See Workplace Religious Freedom Act, 105th Cong., 143 CONG. REC. S8590, S8590 (daily ed. July 31, 1997) (statement of Sen. Kerry) (arguing that his proposal is "constitutional because it simply clarifies existing law . . . strengthening the required standard [of religious accommodation]"). Even trusting Senator Kerry's constitutional expertise, this statement is not dispositive on the issue. Senator Kerry only compares the proposed legislation to the RFRA and assures the President that the new and improved Title VII would not exceed Congress's power under the Fourteenth Amendment as the RFRA did. See *id.* He did not, however, discuss potential First Amendment challenges.

¹⁵⁴ This does not imply, however, that the same standard that currently applies to Title VII would be effective in the Yale case. Indeed, if that standard were applied to this Comment's proposal, then the plight of religious students would not be alleviated. As mentioned above, under Title VII the employer does not have to accept the employee's suggested accommodation to fulfill its obligation to accommodate. The Court in *Ansonia Board of Education v. Philbrook* held that as long as there is a showing that the employer was willing to provide some reasonable accommodation, there is no liability under federal law. See 479 U.S. 60, 68 (1986); see also *supra* note 93 and accompanying text. The question of whether a university's response is "reasonable" will then be left in the hands of judges and juries.

Nevertheless, the *Ansonia* analysis is ultimately irrelevant. The only reason to limit this proposal would be due to any constitutional constraints. As mentioned earlier, the Court's discussion and decision in *Ansonia* revolves entirely around statutory interpretation. See 479 U.S. at 68; see also *supra* notes 93-95 and accompanying text; *infra* Part IV.B.3 (discussing how this Comment's proposal, by explicitly defining the term "reasonable accommodations," will prevent the Court from reducing the requirements of the proposed accommodations provision).

the workplace to enhance efficiency and ultimately increase the bottom line. Thus, allowing a Sabbath-observing employee to choose his or her vacation time, without regard for company rules, can lead to inefficiency and lost revenues.¹⁵⁵ In contrast to the workplace, most university rules regulating student life (other than requiring the payment of tuition) are generally not designed to generate income. A student requesting to live off-campus does not create the efficiency problems that an employee who chooses her own vacation time does. An accommodation that would require a substantial cost to an employer may only impose a de minimis cost on a university. Therefore, a de minimis obligation helps students significantly more than it helps employees.

The de minimis obligation, however, leaves room for the university to assert a strong reply to a student requesting an exemption to a residency requirement. Under such a standard, the university, in theory, may argue that losing the cost of the dormitory fee is more than a de minimis cost.¹⁵⁶ It is doubtful, however, that universities would utilize this defense. Universities would be unlikely to readily admit and publicly proclaim that they make a profit from the dormitories. In response to Michael Rader's suit, UNK admitted only reluctantly (and during cross-examination) that one of the functions of its parietal rule was to "ensure[] full occupancy of UNK's residence halls."¹⁵⁷ Yale, too, has publicly disavowed that any financial considerations underlie its position regarding the Yale Five.¹⁵⁸ Thus, although a mere de minimis obligation creates a legal loophole for the universities, it is unlikely that the universities would invoke this technicality on their behalf.

Furthermore, notwithstanding the possibility that a statute imposing a mere de minimis obligation would be limited in its effectiveness, such a statute will provide at least some assistance to the religious student who currently has nowhere to turn.

¹⁵⁵ See *Trans World Airlines*, 432 U.S. at 84-85 & n.15 (explaining how rearranging work shifts to accommodate a Sabbath-observer will result in inefficiency and higher costs to the company); *Wilson v. U.S. W. Comm.*, 58 F.3d 1337, 1342 (8th Cir. 1995) (maintaining that Title VII does not require an employer to allow an employee to impose her religious views on the employer and others); *Vetter v. Farmland Indus.*, 884 F. Supp. 1287, 1309 (N.D. Iowa 1995) (stating that any cost in efficiency or wage expenditures to the employer that is more than de minimis is not required by Title VII).

¹⁵⁶ Indeed, the mandatory dormitory fee for one year at Yale was close to \$7,000. See Complaint, *supra* note 1, ¶ 23 (reporting that "Yale charged \$6,850 for room and board for the academic year 1997-1998").

¹⁵⁷ *Rader v. Johnston*, 924 F. Supp. 1540, 1556 (D. Neb. 1996).

¹⁵⁸ See *Sachsman*, *supra* note 5 (reporting that Yale's attorney claims that Yale has no interest in "making money off of the students"); see also *infra* Part IV.B.2 (proposing the implementation of a de minimis obligation).

IV. THE LEGISLATIVE PROPOSAL: MANDATING RELIGIOUS ACCOMMODATIONS BY PRIVATE UNIVERSITIES

A. *Affirmative Constitutional Grant of Congressional Authority To Regulate Discrimination in Private Education*

Although Congress can draft legislation requiring religious accommodations without offending the Establishment Clause, it still must find a basis in the Constitution upon which to affirmatively justify passing that legislation. Title VII and its case law, while providing many of the normative arguments and legal analogies discussed by this Comment,¹⁵⁹ may be neither the best, nor a constitutional, approach.

When the Civil Rights Act of 1964 (which included Title VII) was proposed, there was great debate in Congress and among legal scholars as to which clause in the Constitution should provide the basis for the new anti-discrimination laws.¹⁶⁰ Ultimately, Congress relied on the Commerce Clause to support the constitutionality of the new Civil Rights Act.¹⁶¹

Although the Civil Rights Act of 1964 has survived the test of time with the Commerce Clause as its constitutional foundation,¹⁶² it is questionable

¹⁵⁹ See *supra* Part II.B.1 (drawing support for the proposal by analogy to Title VII); Part III (using the Title VII case law on the Establishment Clause to properly limit the scope of the proposal).

¹⁶⁰ There was strong support for the position that Section 5 of the Fourteenth Amendment should serve as the constitutional basis for the statute. This school of thought argued that Section 5, by granting Congress the "power to enforce, by appropriate legislation, the provisions" of the Equal Protection Clause, provided sufficient justification to pass anti-discrimination statutes. U.S. CONST. amend. XIV, § 5. See Additional Views on H.R. 7152 (Hon. William M. McCulloch et al.), 1964 U.S.C.C.A.N. 2487 (noting the possibility of using the Fourteenth Amendment as the basis for the Civil Rights Act); see generally GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 201-03 (13th ed. 1997) (arguing that the "most obviously relevant source of national [constitutional] power" to enact a "federal ban on discrimination" is the "Fourteenth Amendment, rather than the tenuously related commerce clause" (citation and internal quotations omitted)). This argument, however, not only failed to convince members of Congress then, but was also recently rejected by the Supreme Court in its decision declaring the RFRA unconstitutional. See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2167 (1997) (noting that Congress cannot draw any "substantive . . . power" from the Enforcement Clause). Thus, in this Comment's proposal, the Fourteenth Amendment cannot be used as the constitutional grant of power.

¹⁶¹ See U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power to "regulate Commerce . . . among the several States"). Although the Commerce Clause was clearly not directly related to an anti-discrimination statute, the prevailing view in Congress was to make use of the plenary power granted by that Clause. See, e.g., S. REP. NO. 88-872, at 12 (1964), reprinted in 1964 U.S.C.C.A.N. 2355, 2366-68 (supporting the position that the Commerce Clause can and should be used as the constitutional foundation for the Civil Rights Act of 1964).

¹⁶² See, e.g., *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (holding that the Civil Rights Act of 1964 is constitutional because it is supported by Congress's authority

whether this Comment's proposal would fare as well. The Civil Rights Act relates to various commercial activities, albeit in the context of discrimination, thereby finding a clear nexus with Congress's power to regulate interstate commerce.¹⁶³ Title VII itself provides a good illustration of this point. Regulation in the area of employment is easily tied to the Commerce Clause, as most forms of employment can be tied to interstate commerce. Title II also lends support to this position, as it regulates the activities of restaurants, hotels, and other businesses that clearly affect interstate commerce.

This Comment's proposal, however, is not so clearly related to the Commerce Clause and interstate commerce. Despite the normative arguments presented above outlining the connection between education and employment, the Court has shown its reluctance to recognize that relationship in Commerce Clause jurisprudence. Indeed, the Court recently struck down a law prohibiting guns in school zones, holding that the Commerce Clause does not give Congress the power to legislate in all areas of education.¹⁶⁴

The better choice for the constitutional foundation of this proposal is the Spending Power.¹⁶⁵ Since this proposed legislation would be visibly tied to the private universities receiving federal funding, it would presumably be constitutional. Congress would simply attach a condition to the receipt of federal financial assistance: the provision reasonable religious accommodation for the students. This approach closely follows the model of

under the Commerce Clause); *Katzenbach v. McClung* 379 U.S. 294 (1964) (same).

¹⁶³ See generally *Heart of Atlanta Motel*, 379 U.S. at 249-62 (upholding Title II as a valid exercise of the Commerce Power).

¹⁶⁴ See *United States v. Lopez*, 514 U.S. 549, 566 (1995) (noting that Congress's authority under the Commerce Clause "does not include the authority to regulate each and every aspect of local schools"). There is, however, a distinction that can be drawn between the Gun-Free School Zones Act (discussed in *Lopez*) and this proposal. The Court in *Lopez* would not accept the argument that there was a sufficient relationship between local elementary and secondary schools, and interstate commerce, to justify Congress's authority in that case. Without such a nexus, Congress had no jurisdictional hook on which to base its authority under the Commerce Clause. See *id.* This Comment's proposal would regulate private colleges—arguably institutions with a greater effect on interstate commerce. Given the Court's move toward less congressional power under the Commerce Clause, however, it is safer not to rely on it here. Moreover, the existence of a viable alternative to the Commerce Clause makes reliance on it unnecessary. See *infra* notes 165-67 and accompanying text (describing possible reliance upon Congress's Spending Power to provide a constitutional basis for this proposal); cf. Dorf, *supra* note 19, at 865 (suggesting that Congress could pass such legislation either as an amendment to Title VI or by creating a new statute under the authority of the Commerce Clause).

¹⁶⁵ See U.S. CONST. art. I, § 8, cl. 1 (granting Congress the power to "pay the debts and provide for the common Defence and general Welfare of the United States"). See generally GUNTHER & SULLIVAN, *supra* note 160, at 235-48 (outlining the scope of the Spending Power).

Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race in any program receiving federal funding.¹⁶⁶ Based on the case law of Title VI, there is good reason to be confident that the courts would construe this statute broadly, and universities receiving even a small amount of federal funding would be subject to the restrictions of this Comment's proposal.¹⁶⁷

B. *Language of the Proposed Legislation*

1. The Substantive Provision

As this proposal is founded on the Spending Power, like Title VI, it would be appropriate to use that statute as the model for the proposal's drafting. Thus, the statute would read as follows:

No person in the United States shall, on the ground of religion, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any college, school, or university receiving Federal financial assistance.

Like Title VI, the constitutional basis of this proposal (the Spending Power) is clear from a plain reading of its language. Moreover, and perhaps more importantly, it would, in broad terms, prevent any university from punishing those who wish to adhere to their religious faiths and practices while attending college. The plight of students like Michael Rader and the Yale Five would be remedied. These students would not have to choose

¹⁶⁶ Title VI, 42 U.S.C. § 2000d (1994), provides, in pertinent part, that "[n]o person . . . shall, on the ground of race . . . be subjected to discrimination under any program or activity receiving Federal financial assistance." Title VI includes colleges and universities within its scope. *See id.* § 2000d-4a(2)(A).

¹⁶⁷ *See, e.g.,* Association of Mexican-Am. Educators v. California, 836 F. Supp. 1534, 1543-44 (N.D. Cal. 1993) (holding that as long as any part of a college receives federal funding, all of that college's operations are subject to Title VI); United States v. El Camino Community College Dist., 454 F. Supp. 825, 829 (C.D. Cal. 1978) (holding that Title VI should be construed liberally to effect its remedial purpose). Although some colleges might not be subject to this proposal, this is a relatively minor risk when compared to the possibility that the proposal may be unconstitutional if based on the Commerce Clause. *See supra* note 164 (discussing the failure of the Gun-Free School Zones Act to establish congressional power to regulate based on the Commerce Clause). Given that so many colleges and universities receive federal funding, the reach of this proposal seems sufficiently broad. Moreover, if the proposal were founded on the Commerce Clause, it would perhaps be necessary to require a showing that a university was substantially related to interstate commerce in order to provide a jurisdictional hook. *See Lopez*, 514 U.S. at 567 (noting that the Gun-Free School Zones Act had "no requirement that [the] possession of [a] firearm have any concrete tie to interstate commerce" and, therefore, congressional authority under the Commerce Clause was not a proper basis for the Act).

between their religion and the best education for which they are qualified and entitled to receive.

2. A Definition: "On the Ground of Religion"

Defining the phrase "on the ground of religion" presents a difficult dilemma. A quick review of the definitional provisions of Title VII is illustrative. Title VII, in its substantive section, simply prohibits discrimination in the workplace "because of such individual's . . . religion."¹⁶⁸ There is no mention of the "reasonable accommodations" obligation in Title VII's main provision. Only in its definitional section does the statute define religion to include the reasonable accommodations standard.¹⁶⁹ Moreover, the Workplace Religious Freedom Act proposes to broaden the scope of Title VII protection by amending one definitional section and by adding another.¹⁷⁰ It accomplishes this task by specifically redefining the term "undue hardship" to require accommodations unless they compel an employer to incur "significant difficulty or expense."¹⁷¹ Most significantly, the Court's construction of the definitional section of Title VII has severely limited the scope of that statute's substantive protection.¹⁷² Thus, despite general, broad language in the substantive section of this Comment's proposal, the phrase "on the ground of religion" must be defined to ensure that courts properly interpret the statute.

In connection with Establishment Clause concerns, there are two basic options for defining "religion" and "reasonable accommodation."¹⁷³ The proposal can follow the existing model of Title VII, leaving "reasonable ac-

¹⁶⁸ 42 U.S.C. § 2000e-2(a)(1)-(2) (1994).

¹⁶⁹ Title VII provides: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." *Id.* § 2000e(j).

¹⁷⁰ See Workplace Religious Freedom Act § 2(a), 143 CONG. REC. S8590 (daily ed. July 31, 1997) (proposing amendments to Title VII's existing definitional section, 42 U.S.C. § 2000e(j)); *id.* § 2(b) (proposing an amendment to Title VII's substantive provision, 42 U.S.C. § 2000e-2, with respect to the reasonableness of accommodations).

¹⁷¹ *Id.* § 2(a)(4).

¹⁷² See *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68-69 (1986) (holding that an employer may make any reasonable accommodation to satisfy its obligation and is not required to accept an accommodation proposed by the employee); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) (holding that Title VII's term "reasonably accommodate" imposes no more than a de minimis obligation on employers).

¹⁷³ See *supra* Part III.C (discussing the Court's interpretation of the phrase "reasonable accommodation," its applicability to the religious context, and Title VII's requirement of no more than a de minimis obligation on the employer).

commodation" or "undue hardship" defined without any specificity.¹⁷⁴ This approach has the advantage of being the safest route for avoiding conflict with the Establishment Clause. As mentioned earlier, however, the Court has read this vague language to impose nothing more than a de minimis obligation on the employer.¹⁷⁵

Alternatively, the proposal can adopt the language of the Workplace Religious Freedom Act, which strongly and clearly requires reasonable accommodations that do not impose on the employer "significant" costs in accommodating its employees.¹⁷⁶ The Court, however, has yet to decide whether a statute imposing significant financial burdens on an employer for religious accommodations can be squared with the Establishment Clause.¹⁷⁷

Thus, this Comment's proposal is forced to choose the lesser of two evils: assuming the risk that the Court will interpret the statute in a manner that will not fully serve its intended purpose, or assuming the risk that the Court will declare the law unconstitutional. In weighing these alternatives, the possibility that the Court will strike down the proposal as unconstitutional warrants adopting the "weaker" language for the proposal by following the current, constitutional lead of Title VII. As discussed above, even a statute mandating a simple de minimis obligation on a university could provide the legal recourse needed by an aggrieved student.¹⁷⁸ A statute that is unconstitutional, on the other hand, provides no recourse at all. Furthermore, if Congress passes the Workplace Religious Freedom Act, with its broader definition of reasonable accommodations, and the law survives constitutional challenges, Congress could then amend this Comment's proposal to guarantee its effectiveness. As the law stands now, however, the constitutional support for the stronger language is unclear. Furthermore, if the statute is found to violate the Establishment Clause, other possible statutory remedies for the religious student are limited, if they even exist. Thus, it is prudent to adopt a conservative draft of the proposal to provide an aggrieved student some recourse rather than none at all.

¹⁷⁴ See 42 U.S.C. § 2000e(j) (1994) (failing to define "reasonably accommodate" or "undue hardship" with any specificity).

¹⁷⁵ See *supra* note 172 (citing *Ansonia* and *Trans World Airlines* as cases that have limited the scope of Title VII).

¹⁷⁶ See Workplace Religious Freedom Act § 2(a)(4)(3), 143 CONG. REC. S8590, S8590 (daily ed. July 31, 1997) (defining "undue hardship" to "mean[] an accommodation requiring significant difficulty or expense").

¹⁷⁷ See *supra* note 152 and accompanying text (discussing how both the Court's decision and Marshall's dissent in *Trans World Airlines* failed to address the Establishment Clause concerns, reaching a decision on other grounds).

¹⁷⁸ See *supra* notes 152-58 and accompanying text (discussing the viability of the de minimis obligation and its ability to require schools to accommodate students' requests).

Given these considerations, and drawing heavily from Title VII, this Comment's proposal would define "religion" as follows:

The term "religion" includes all aspects of religious observance, practice, and belief, unless a university demonstrates that it is unable to reasonably accommodate a student's or prospective student's religious observance, practice, or belief without undue hardship on the administration's conduct of the university.

3. Definition of Accommodation

The final issue to address is the definition of "accommodation" under this proposal. As discussed above, in addition to the de minimis spending limit, the Supreme Court in *Ansonia* handicapped Title VII's religious accommodation provision in another way. The Court held that an employer has no duty to "choose any particular reasonable accommodation."¹⁷⁹ Thus, an employee may remain unaccommodated even after the employer has discharged its obligation to provide reasonable accommodations.¹⁸⁰ Even if the employee can demonstrate that her suggestion would not create undue hardship for the employer, while providing her more religious accommodation, the Court has ruled that the employer has no legal requirement to heed the employee's request.¹⁸¹

This Comment's proposal would circumvent this potential problem by explicitly defining "reasonable accommodation" to preclude any such reading by the Court. A similar approach has been suggested by the Workplace Religious Freedom Act, in its proposed amendments of Title VII, by defining accommodation very precisely to overrule the Court's holding in *Ansonia*.¹⁸²

Unlike the de minimis question discussed above, there is no constitutional question raised by this Comment's proposed amendment to Title VII.¹⁸³ The Court was free initially to interpret the accommodation re-

¹⁷⁹ *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68 (1986).

¹⁸⁰ See Workplace Religious Freedom Act, para. 3, 143 CONG. REC. S8590 (daily ed. July 31, 1997) (explaining that court decisions have severely hindered the effectiveness of the required reasonable accommodations).

¹⁸¹ See *Ansonia*, 479 U.S. at 68 ("[There is] no basis in either the statute or its legislative history for requiring an employer to choose any particular reasonable accommodation. . . . [A]ny reasonable accommodation by the employer is sufficient to meet its accommodation obligation.").

¹⁸² See Workplace Religious Freedom Act § 2(b)(o)(2) (proposing that an employer's accommodation "remove the conflict between employment requirements and the religious observance or practice of the employee").

¹⁸³ Although the Establishment Clause question was touched upon briefly by the Court in discussing the de minimis spending limit in *Trans World Airlines*, see *supra* note 152 and ac-

quirement to provide the most helpful accommodation that did not present the employer with "undue hardship." So long as the accommodation did not burden other constituencies, the mandatory offer of an accommodation would not even raise Establishment Clause concerns.¹⁸⁴ The Court declined, however, to impose this duty on employers. Now, the Workplace Religious Freedom Act seeks to impose that duty. This Comment's proposal would adopt similar language to ensure that accommodations actually accommodate the students.¹⁸⁵ Thus, taken primarily from the Workplace Religious Freedom Act, this Comment's proposal would include the following provision:

For purposes of determining whether a college, school, or university has violated section ___ [the substantive section] of this Act by failing to provide a reasonable accommodation to the religious observance, practice, or belief of a student, an accommodation by the college, school, or university shall not be deemed to be reasonable if such accommodation does not remove the conflict between the college's, school's, or university's requirements and the religious observance, practice, or belief of the student.

CONCLUSION

Because most private colleges and universities are not state actors, their students do not receive the same protection of the First Amendment that state university students do—the accommodation of religious requests. Unprotected by the Constitution and largely unaided by the civil rights statutes, religious students are left without legal recourse in the face of an intolerant private school administration. This need not be so. This Comment has shown that a statute may be drafted that provides students with protection, while not violating the Establishment Clause. The requirement of religious accommodation for students is appropriate, given the government's active role in preventing discrimination in education, as well as Congress's recent and continuing attempts to provide more, not less, religious accommodation. Thus, this Comment proposes that Congress pass legislation, drawing from

companying text, there was no mention at all of any potential conflict with the First Amendment in *Ansonia*.

¹⁸⁴ See *supra* Part III.B.2 (discussing the issue of burdening nonreligious constituencies).

¹⁸⁵ It is worthy to reiterate that the effectiveness of this proposed statute, however, will remain somewhat subject to the possibility that a court would impose a de minimis expense limit in order to avoid conflict with the First Amendment, as discussed *supra* Part IV.B.2. What the definition of "reasonable accommodation" does accomplish, however, is that if a university can provide an accommodation consistent with the Establishment Clause, then it may not turn to statutory interpretation to free itself of its obligation, as the employer did in *Ansonia*.

the models of Titles VI and VII of the Civil Rights Act of 1964, guaranteeing private university students reasonable religious accommodations.