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ACCOMMODATING RESPECTFUL RELIGIOUS EXPRESSION IN THE WORKPLACE

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I. INTRODUCTION

“[M]orality [i]s essential to the well-being of society and . . . encouragement of religion [i]s the best way to foster morality.”

Justice Antonin Scalia¹

Religious accommodation doctrine is ripe for another round at the Supreme Court. Not since several landmark rulings in the 1970s and 1980s has the Court reviewed the Title VII statutory mandate that employers must accommodate religion *in the workplace*.² Meanwhile, with the Court’s personnel changes since then, the Court’s Establishment Clause jurisprudence has shifted significantly toward accommodating more religion *in the public sphere* (e.g., religious displays on government property and public funding of religious activities). Thus, when the religious accommodation law is reviewed by the Court again, in order for the Court’s Title VII workplace jurisprudence to be consistent with its shift toward supporting religious expression, the Court is likely to support more protection for religious workers.

Analogizing workers’ statutory religious rights to fundamental constitutional rights makes sense for two reasons. First, religion is given special protection under a variety of constitutional and statutory doctrines and is especially important to the current majority of Justices. Second, a person’s religious identity, although mutable, is a fundamental personal decision on par with recognized fundamental rights such as marriage and procreation.

1. *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 887 (2005) (Scalia, J., dissenting) (citing the Framers of the United States Constitution).

2. See Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2000); *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68–69 (1986).

Religion matters to people. It matters a great deal to religious observers who wish to be free from discrimination and who believe the law should protect them from harassment and discrimination when they express themselves. This is especially and most frequently true for observers of minority religions.³ It matters to those who do not ascribe to any religion because they want to be assured that religion is not encroaching on their right to a religious-neutral government and to live a life free from unwanted harassment or bias. This tension plays out most forcefully in two places in American society: the public sphere and the workplace. The public sphere is the forum where communities gather and express certain (often majority but also sometimes controversial) viewpoints. Yet the workplace is where most people spend most of their waking time and therefore bump up against others of different views most frequently.

Read at face value, the Free Exercise Clause protects religious expression against governmental power, while the Establishment Clause bars government from adopting a religion itself. In fact, the Supreme Court has recognized in First Amendment case law that the Constitution does not work to “constrain a worker to abandon his religious convictions” in the workplace.⁴ In the private sector, Title VII has been explicitly amended to broaden protections for religious expression.⁵ In stark contrast to its First Amendment jurisprudence, the Supreme Court has given Title VII’s protection the most narrow of interpretations, requiring employers to show only a *de minimis* burden⁶ to successfully avoid being required to accommodate religious workers. In response, members of Congress have repeatedly tried to strengthen those protections through various iterations of the Workplace Religious Freedom Act.⁷

3. In evaluating the rights of religious observers, it is important to note that discrimination and harassment of observers of minority religions most forcefully underscores the importance of legal protection. See, e.g., Bilal Zaheer, *Accommodating Minority Religions Under Title VII: How Muslims Make the Case for a New Interpretation of Section 701(J)*, 2007 U. ILL. L. REV. 497, 500 (emphasizing the unique problems that Islam, with its practice-intensive nature, presents for both employers and employees in trying to provide equitable accommodations to religious minorities in the workplace).

4. *Sherbert v. Verner*, 374 U.S. 398, 410 (1963).

5. Civil Rights Act of 1964, Pub. L. No. 92-261, § 2(7), 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e(j) (2000)).

6. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977).

7. The Workplace Religious Freedom Act of 2005, H.R. 1445, 109th Cong. (2005), S. 677, 109th Cong. (2005), aims “to amend title VII of the Civil Rights Act of 1964 to establish provisions with respect to religious accommodation in employment, and for other purposes.” See generally James A. Sonne, *The Perils of Universal Accommodation: The Workplace*

In the public sphere, courts allow many flowers to bloom. Nativity scenes next to menorahs,⁸ as well as Ten Commandments displays with historical (rather than exclusively religious) significance are allowed to flourish in the public domain.⁹ However, in the workplace, the Supreme Court has allowed employers to restrict religious expression.¹⁰ Legislative efforts to protect religious expression have been stymied by judicial refusal to protect such expression meaningfully.¹¹ This stems from courts' predisposition toward viewing "accommodation" as an entirely different concept than "nondiscrimination," viewing the former far more skeptically than the latter.

When faced with challenges by both religious observers and secularists, the Supreme Court treats the public sphere and the workplace very differently. What is striking is that the newly powerful conservative bloc of Justices (namely Scalia, Thomas, Roberts, and Alito) likely will be quick to support religious expression in the public

Religious Freedom Act of 2003 and the Affirmative Action of 147,096,000 Souls, 79 NOTRE DAME L. REV. 1023, 1026 (2004) (discussing widespread support for previous efforts to pass prior proposal for WRFA).

8. *E.g.*, Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 770 (1995) (ruling that the state did not violate the Establishment Clause by permitting a private party to display an unattended cross on the grounds of the state capitol); County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 621 (1989) (holding that a Chanukah menorah display next to a Christmas tree outside a city-county governmental building did not violate the Establishment Clause); Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (holding a city's inclusion of a nativity scene in its Christmas display did not violate the Establishment Clause).

9. *E.g.*, Van Orden v. Perry, 545 U.S. 677, 690–92 (2005) (ruling a Ten Commandments display on the grounds of the state capitol was constitutional when the display had an undeniable historical meaning). *But see* McCreary County v. ACLU of Ky., 545 U.S. 844, 871–72 (2005) (holding displays of the Ten Commandments at courthouses violated the Establishment Clause when the counties' purpose was to emphasize a religious message).

10. *See, e.g.*, Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 67 (1986) (noting that an employer is not required to bear more than a *de minimis* cost in accommodating an employee's religious beliefs); Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 710–11 (1985) (ruling a state statute that provides Sabbath observers with an absolute and unqualified right not to work on their Sabbath violates the Establishment Clause); *Trans World Airlines*, 432 U.S. at 84 (holding an employer is not required to bear more than a *de minimis* cost in accommodating an employee's religious beliefs); *see also* Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317, 321 (1997) ("[In] claims that employers have failed to reasonably accommodate the plaintiffs' religion by refusing to permit them to observe religious holy days or to dress or groom in a particular way . . . plaintiffs lose most of the time. Indeed, the law seems so settled . . . that the claims are rarely, if ever, brought any more.").

11. *See generally* Jamie Darin Prekert & Julie Manning Magid, *A Hobson's Choice Model For Religious Accommodation*, 43 AM. BUS. L.J. 467 (2006) (discussing how Title VII's religious accommodation mandate is often ineffective).

sphere cases, such as *McCreary County v. ACLU of Kentucky*,¹² yet they have joined a Court with a tradition of refusing to grant the same rights to observant workers.¹³ This Article explores whether the new Court will overturn its Title VII precedents to grant the same expansive religious rights in the workplace that it increasingly has granted in the public sphere.

This Article makes the case for judicial recognition of respectful religious expression in the workplace as more consistent with the Court's Establishment Clause jurisprudence and also more true to the legislative intent of the religious accommodation provisions of Title VII. Respectful religious pluralism in the workplace should become the norm through judicial requirements of best practices in the workplace. Such a view should be wholly supported by the majority of the Justices because it is consistent with their expressed views, in the Establishment Clause case law, that religion fosters moral good and that in a pluralistic society religious expression cannot automatically be deemed threatening to those with different views.

This Article examines in Part II how religious observance is an intrinsic and undeniable part of many people's identities, and it argues that refusing to acknowledge observers as religious people and refusing to allow them to express themselves as such is similar to keeping gays and lesbians in the closet. From that viewpoint, allowing religious expression is not an adventurous "accommodation" asking for different or "special" rights.

Next, in Part III, an examination of the Supreme Court's jurisprudence on the public sphere and religion cases showcases the judicial trend of not only allowing, but also promoting certain religious expression in our society.

Part IV details the refusal of courts to protect workers who express themselves religiously in the workplace, even though such protection is

12. 545 U.S. at 885–912 (Scalia, J., dissenting); *see also Van Orden*, 545 U.S. at 692 (Scalia, J., concurring); *id.* at 692–98 (Thomas, J., concurring); *Cutter v. Wilkinson*, 544 U.S. 709, 726–33 (2005) (Thomas, J., concurring); *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 732–52 (1994) (Scalia, J., dissenting); *Lee v. Weisman*, 505 U.S. 577, 631–46 (1992) (Scalia, J., dissenting); *ACLU of N.J. v. Black Horse Reg'l Bd. of Educ.*, 84 F.3d 1471, 1489–97 (3d. Cir. 1996) (Mansmann, J., dissenting, joined by Alito, J.); Brief for the United States, *Bd. of Educ. of the Westside Cmty. Sch. (Dist. 66) v. Mergens*, 496 U.S. 226 (1990) (No. 88-1597), 1989 WL 1127408 (co-authored by Roberts) (arguing to the Court that religious groups should not be banned from meeting on school grounds).

13. *See, e.g., Ansonia Bd. of Educ.*, 479 U.S. at 69.

mandated by Title VII and consistent with the Court's public sphere Establishment Clause doctrine.

Lastly, Part V attempts to solve this inconsistency by creating a path for the Supreme Court to follow: interpret Title VII's religious accommodation mandates in alignment with its Establishment Clause jurisprudence and with express congressional intent, an intent that is echoed in pending legislation that would expand protections for workers who express themselves in religious ways.¹⁴ Specifically, I propose three paths of judicial enforcement of respectful pluralism, which protect both religious expression and secularist workers from disrespectful expression.

II. THE IMPORTANCE OF PROTECTING RELIGIOUS EXPRESSION

People express themselves in a multitude of ways: by dress,¹⁵ with adornments, by surrounding themselves with objects, and through discussion with others. In this way, expression is not just verbal but occurs in myriad nonverbal associations, as the Court has noted in protecting "symbolic speech" and "expressive conduct" that is nonverbal and nonwritten.¹⁶ What we choose to wear, what we do to our skin and hair, what adornments we decide to put on—these are all expressions that reflect particular intrinsic characteristics of core parts of ourselves that are normally not meaningfully filtered. Instead, these expressions reflect who people are, what they believe, and in what category they hold their beliefs.

Religious expressions in particular can communicate many deeply held views. What people wear (such as a head scarf or prayer beads), what and whether they choose to eat (including strict dietary guidelines such as no pork or no meat on certain days or abstaining from all meals for certain periods),¹⁷ and what holidays they find important (such as Rosh Hashanah, Eid al-Adha, or Good Friday) are expressions

14. The Workplace Religious Freedom Act of 2007, H.R. 1431, 110th Cong. (2007).

15. See generally Gowri Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 MD. L. REV. 11, 13 (2006) (proposing a legal right to free dress); Dean B. Ziegel, Note, *The Prohibition of Religious Observances in the Workplace*, 5 HOFSTRA LAB. L.J. 197, 197-98 (1988) (discussing religious dress in the armed forces).

16. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565 (1991) (regarding dancing); *Texas v. Johnson*, 491 U.S. 397, 402 (1989) (regarding flag burning); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505-07 (1969) (regarding wearing black armbands).

17. In Islam, observant Muslims are required to fast for one month out of the year during Ramadan (known as *Sawm*).

communicating both religious identity and the level of commitment that person holds. In many instances, these expressions cannot be changed, at least not without altering the core of one's identity.

As members of particular societies, in order to assimilate, we learn to filter some individual expression to various degrees. This is especially true in the workplace, in keeping with particular norms of business or professions, as well as the public forum, where we want to "fit in" with our community members. However, certain intrinsic characteristics express themselves without much alteration, either because they are unalterable to the person or because they are too important to try to hide or change. Said another way, people feel they should not have to alter who they are by pretending to be something they are not—i.e., "passing," "covering," or "closeting" their true identities.¹⁸ This is because religious identity (and consequently its expression) is an integrated part of one's self. Although conversion happens and new faith beliefs evolve, many people's religion is set at a very early age and is an authentic expression of their world view.¹⁹ Much like it is difficult for the majority racial group to understand the primary importance of racial identity to a person in a minority race group, secularists often do not understand the commitment a religious observer has to her own religious identity.

Asking religious observers to suppress or deny their religious identity can be likened to the closeting of certain sexual orientations. Beyond the "nature or nurture" debate, it has been well established that being gay or straight is part of one's intrinsic being.²⁰ In situations of extreme societal pressures and intolerance, some GLBT members of society "closet" themselves by refusing to communicate their sexual orientation to others. Similarly, in many professional and educational sectors and culturally elite settings, expressing one's religious identity is

18. See Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 811–45 (2002) (discussing harm experienced by members of the gay and lesbian community as a result of having to mask their sexual orientation).

19. See Ross M. Stolzenberg et al., *Religious Participation in Early Adulthood: Age and Family Life Cycle Effects on Church Membership*, 60 AM. SOC. REV. 84, 98 (1995); Neela Banerjee, *A Fluid Religious Life is Seen Among Americans*, N.Y. TIMES, Feb. 26, 2008, at A12 (reporting that while religion is fluid and highly diverse in America, it remains "the single most important factor that drives American belief attitudes and behaviors" (quoting Michael Lindsay, Assistant Director of the Center on Race, Religion and Urban Life at Rice University)).

20. See, e.g., JANIS S. BOHAN, *PSYCHOLOGY AND SEXUAL ORIENTATION: COMING TO TERMS* 88 (1996); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 506 (1994).

likewise disfavored. Both should be antithetical to a tolerant society. Yet, we should be just as uncomfortable requiring religious observers to hide their expression²¹ because while a person's sexual orientation rarely *requires* particular dress, eating, or other observances, religious observers' expressions of those things are mandatory to orthodox or fundamentalist followers. While closets should be unnecessary in either case, tolerant society members should be compelled to protect those who are put to an untenable choice between following their faith and avoiding backlash from secularists.²²

Europe has seen significant recent examples of crackdowns on religious expression fundamental to people's identities. Recently, the French Parliament adopted a law that forbids teachers and students at public schools to wear ostentatious religious signs and apparel.²³ In Germany, the German Federal Constitutional Court made a controversial decision in its "head scarf decision" of 2003, when a teacher intending to wear a Muslim head scarf during school was rejected by the government of the State Baden-Württemberg.²⁴ Public outcry sparked global discussions about religious pluralism and the relationship between state and religion.

As the world's population becomes more transient and integrated, and diverse cultural identities collide, respect for religious pluralism takes on greater importance. In the early United States, religious diversity was minimal compared to today, given the country's Christian roots. But during the last century or so, the influx of immigrants bringing many different religions has made this topic more critical. Today, it should come as no surprise that many of the world's religions are being practiced in America.²⁵ But where are they being practiced? Privately, but also in the public sphere and in workplaces—and, as Parts

21. As one commentator eloquently asked, "Why should an employee be forced to surrender his or her right to communicate with coworkers who share a similar cultural world view in the language of that culture, at least where no immediate danger to person or property is at stake?" BILL PIATT, LANGUAGE ON THE JOB: BALANCING BUSINESS NEEDS AND EMPLOYEE RIGHTS 125 (1993).

22. Prenkert & Magid, *supra* note 11, at 468.

23. Law No. 2004-228, Article L. 141-5-1, of Mar. 15, 2004, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 17, 2004, p. 5190.

24. Bundesverfassungsgericht [BVerfG] [federal constitutional court] Sept. 24, 2003, 2 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1436 (F.R.G.).

25. BARRY A. KOSMIN ET AL., THE GRADUATE CENTER OF THE CITY UNIVERSITY OF NEW YORK, AMERICAN RELIGIOUS IDENTIFICATION SURVEY 2001, available at <http://www.trincoll.edu/NR/rdonlyres/AFCEF53A-8DAB-4CD9-A892-5453E336D35D/0/NEWARISrevised121901b.pdf>.

III and IV document, the courts treat the public sphere and the workplace strikingly differently when it comes to religious expression.

III. THE SUPREME COURT'S SHIFT TO STRONG SUPPORT FOR RELIGIOUS EXPRESSION IN THE PUBLIC SPHERE

Protecting religious expression and prohibiting the state from mandating any one particular religion to the exclusion of others are fundamental foundations of the Constitution's Bill of Rights. The Free Exercise Clause promotes religious expression by prohibiting any intentional burden on its practice.²⁶ Conversely, the Establishment Clause "protects religious liberty and autonomy, including the protection of taxpayers from being forced to support religious ideologies to which they are opposed."²⁷

Conservative jurists point out that the Framers intentionally carved out protections for religion because of the important place religion holds in American life.²⁸ As George Washington noted in his Farewell Address, "[o]f all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports."²⁹ This sentiment remains alive today in the hearts of many jurists and increasingly so in the Court's religion jurisprudence.

A. *The Supreme Court's Longstanding Acknowledgment of the Important Role Religion Plays in Society*

In religious display cases, the Supreme Court has often pledged its support for the role religion plays in American society. In 1952, Justice Douglas wrote that "[w]e are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary."³⁰

26. U.S. CONST. amend. I.

27. Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9, 37 (2004).

28. See, e.g., *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 887 (2005) (Scalia, J., dissenting) ("Those who wrote the Constitution believed that morality was essential to the well-being of society and that encouragement of religion was the best way to foster morality.").

29. George Washington, Farewell Address (Sept. 17, 1796), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS: 1789-1897, at 213, 220 (James D. Richardson ed., 1896).

30. *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

Ten years later, the Court declared (in grandiose fashion) that “[t]he history of man is inseparable from the history of religion.”³¹ And in 1984, Chief Justice Burger wrote that “[t]here is an unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789.”³²

In other religious expression contexts, the Court has also shown its willingness to support a broad role for religion in society. In 1983, the Court addressed prayer in government proceedings by first acknowledging:

In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an “establishment” of religion or a step toward establishment; it is simply a tolerable acknowledgement of beliefs widely held among the people of this country.³³

In First Amendment jurisprudence, religious holiday observers have fared well in the Supreme Court, as witnessed in the seminal case of *Sherbert v. Verner*, in which the Court recognized that an employer cannot deny employment benefits to an applicant who refused to accept work on her Sabbath because such denial violated the Free Exercise Clause.³⁴ Instead, the Court requires that laws do not “constrain a worker to abandon his religious convictions” in the workplace.³⁵

B. The Supreme Court Has Strengthened Protection of Religious Expression in the Public Sphere

In Establishment Clause jurisprudence, the Court grapples with how much religion government can support or participate in. During most of the mid-twentieth century, the prevailing view was to bar most government religious expression, such as voluntary school prayer³⁶ and financial support for activities that in any way related to religion, such as

31. *Engel v. Vitale*, 370 U.S. 421, 434 (1962).

32. *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984).

33. *Marsh v. Chambers*, 463 U.S. 783, 792 (1983).

34. 374 U.S. 398 (1963).

35. *Id.* at 410.

36. *Engel*, 370 U.S. at 424.

state aid to religious schools for secular subjects.³⁷ As was made clear in the seminal case of *Lemon v. Kurtzman*,³⁸ the Court placed a high burden on this uneasy relationship, requiring that in order for a government activity to pass constitutional muster, the government must prove the following: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’”³⁹

The tide in this area began to turn in the late 1980s, when the Court began to permit more religion in the public sphere.⁴⁰ The Court allowed some religious holiday displays on public property,⁴¹ more public funds for religious student organizations⁴² and parochial schools,⁴³ and more access to religious groups in public facilities,⁴⁴ including public universities.⁴⁵

This increasing permission granted by the Court between government and religion has recently become more pronounced by returning to the religious clauses’ historical roots and encouraging religion for the betterment of society. At the tail end of a flurry of cases involving religious artifact displays in the circuit courts,⁴⁶ in 2005, the Supreme Court issued two surprising decisions on the posting of the Ten

37. *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971).

38. *Id.* at 612.

39. *Id.* at 612–13 (internal citations omitted).

40. For a comprehensive address on this subject, see Scott A. Moss, *Where There’s At-Will, There Are Many Ways: Redressing the Increasing Incoherence of Employment At Will*, 67 U. PITT. L. REV. 295, 336–41 (2005).

41. *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 616 (1989).

42. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995) (holding that a public university violated the Free Speech Clause by denying university funding to a student religious publication).

43. *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (allowing public school teachers to be sent to parochial schools to provide remedial education and expressly overruling the contrary holding of *Aguilar v. Felton*, 473 U.S. 402 (1985)).

44. *Widmar v. Vincent*, 454 U.S. 263, 273 (1981).

45. *Rosenberger*, 515 U.S. at 837 (holding that the state violated the First Amendment by refusing to provide funds to a Christian student group that published a religious magazine).

46. See, e.g., *Books v. Elkhart County*, 401 F.3d 857, 858–59 (7th Cir. 2005); *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 695–96 (7th Cir. 2005); *Modrovich v. Allegheny County*, 385 F.3d 397, 399 (3d Cir. 2004); *Freethought Soc. of Greater Philadelphia v. Chester County*, 334 F.3d 247, 249 (3d Cir. 2003); *King v. Richmond County*, 331 F.3d 1271, 1273–74 (11th Cir. 2003).

Commandments on public property.⁴⁷ Ten separate opinions were issued in the two cases, reflecting the Court's splintered views on the subject. Given the recent personnel changes on the Court, taking a close look at the Justices' messages on religion is instructive as to the role they believe religion plays in private and public life.

In *Van Orden v. Perry*, a Court majority allowed a Ten Commandments monument to remain on state capitol grounds.⁴⁸ In doing so, the plurality opinion (written by Chief Justice Rehnquist) was explicit in wanting to allow the state to "encourage[]" religion and "widen the effective scope of religious influence":

When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. . . . [W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.⁴⁹

Here, the Court analyzes the constitutionality of a religious monument by evaluating the religious traditions of American history, signifying the importance they hold. It does so, however, while still acknowledging that religious freedom itself is endangered when government intervention in religious matters crosses a certain line.

In the companion case, *McCreary County v. ACLU of Kentucky*, the Court came to the opposite conclusion.⁵⁰ In a 5-4 decision, the Court held that displaying framed copies of the Ten Commandments in a county courthouse was improper because the hanging of the religious

47. See *Van Orden v. Perry*, 545 U.S. 677, 690-91 (2005) (ruling a Ten Commandments display on the grounds of the state capitol was constitutional when the display had an undeniable historical meaning); *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 871-72 (2005) (holding displays of the Ten Commandments at courthouses violated the Establishment Clause when the counties' purpose was to emphasize a religious message).

48. 545 U.S. at 692.

49. *Id.* at 684 (quoting *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952)).

50. 545 U.S. at 850-51.

display was a government action with a religious purpose, in violation of the Establishment Clause.⁵¹

Justice Breyer, the swing vote in both cases, wrote separately in *Van Orden*. In doing so, he took pains to reach out to religious observers, stating that “to reach a contrary conclusion here . . . would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions.”⁵² As the swing vote, Justice Breyer’s views and his reconciliation of religion in the hearts of many Americans with our nation’s tradition is important. Justice Breyer framed the issue precisely: how to balance the competing interests without creating hostility toward religion. It is exactly this elimination of hostility toward religious expression that must be examined by our courts and by our employers.

With the Court appearing to shift further in the direction of allowing public religious expression since these two cases (with Justice O’Connor, who voted to disallow both Ten Commandments displays, being replaced by Justice Alito), it is instructional to look at the writings of the Court’s most longstanding advocate of more religion in public life, Justice Scalia.

In *McCreary*, Justice Scalia wrote, in his trademark style, a pointed dissent for four Justices (Justices Rehnquist, Thomas, and in part Kennedy)—and, with Justice Alito having since joined the Court, Justice Scalia’s views may well now command a majority. In his *McCreary* dissent, Justice Scalia argued that the majority’s assertion that the Establishment Clause mandates neutrality toward religion is not supported by the Constitution, nor is it consistent with our nation’s history and tradition.⁵³ It is disappointing to note that Justice Scalia’s dissent in *McCreary* only goes so far as protecting the majority religion’s role in American society (Judeo-Christianity). He fails to acknowledge the role of minority religions, which as discussed above, play a crucial role in many Americans’ lives.⁵⁴

Justice Scalia made clear the Framers’ view that “morality was essential to the well-being of society and that encouragement of religion

51. *Id.* at 870–74.

52. *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring).

53. 545 U.S. at 885–912 (Scalia, J., dissenting).

54. The failure by Justice Scalia to include minority religions has been noted by other scholars. See, e.g., Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 NW. U. L. REV. 1097, 1098 (2006) (“In other words, in Justice Scalia’s opinion, biblical monotheism is now, has always been, and will always be, the favored religion of the United States Constitution.”).

was the best way to foster morality.”⁵⁵ This quote, more than any other, signals the Court’s likely journey forward: encourage religion in order to foster morality in our world.

Ironically, another theme of Justice Scalia’s dissent is the requirement that legal principles be applied consistently.⁵⁶ Yet as discussed below, it is with great inconsistency that the Court approaches religion in the workplace, never expressing the same respect for religion in employment cases that it has in its public sphere cases. The Ten Commandments cases showcase the Justices’ struggle to agree on exactly where to draw the line between the need to accommodate religious expression and accommodation that goes too far in the public sphere. What is striking is that in its employment law cases, the Court largely fails to protect religion in the workplace to any appreciable degree.

IV. HOW THE COURTS DENY RELIGIOUS EXPRESSION IN THE WORKPLACE

A. Congress’s Call: Protect Religious Expression of Employees

Beginning in the Civil Rights era, the United States has endeavored to eliminate workplace discrimination for workers who might suffer because of certain characteristics. In 1964, Title VII of the Civil Rights Act made it unlawful for an employer to “discriminate against any individual” with respect to employment “because of such individual’s race, color, religion, sex, or national origin.”⁵⁷ In amending the Act in 1972, Congress went further by requiring employers to provide “reasonable accommodat[ion]” of an employee’s religious beliefs unless such accommodation would impose an “undue hardship” on the employer’s business.⁵⁸ Congress took an unusual step in defining “religion” for purposes of the accommodation mandate (as “includ[ing] all aspects of religious observance and practice, as well as belief”)⁵⁹ but

55. *McCreary*, 545 U.S. at 887 (Scalia, J., dissenting).

56. *Id.* at 890–91.

57. 42 U.S.C. § 2000e-2(a)(1) (2000).

58. Pub. L. No. 92-261, § 2(7), 86 Stat. 103 (codified as amended 42 U.S.C. § 2000e(j) (2000)) (“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.”).

59. *Id.*

leaving the terms “reasonable accommodation” and “undue hardship” undefined.

A look into the legislative history suggests that the lawmakers’ intent was to protect employees from losing their jobs solely because their religious beliefs required them to do certain things, such as observe particular holidays, that the rules of their workplace otherwise might not allow.⁶⁰ This understanding comes from the two cases that Congress included in the legislative record, *Dewey v. Reynolds Metals Co.*⁶¹ and *Riley v. Bendix Corp.*⁶² Both cases stand for the proposition that there is no actionable religious discrimination so long as employers’ actions are based on uniformly applied, religion-neutral rules or working conditions. In *Dewey*, the plaintiff was discharged for refusing to work Sundays, and the court’s holding (which was affirmed by the Supreme Court)⁶³ was that the duty to accommodate based just on Equal Employment Opportunity Commission (EEOC) guidelines was without statutory basis.⁶⁴ In *Riley*, the court expressed doubt that employers should be forced to accommodate all religious beliefs: “[S]urely the great and diversified types of American business cannot be expected to accede to the wishes of every doctrine or religious belief.”⁶⁵

The outcomes of both cases were enough of a concern that Congress included them in the legislative record as specific examples of judicial reasoning that the accommodation mandate was intended to overturn.⁶⁶ The sponsor of the bill, Senator Jennings Randolph, urged Congress to “assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law.”⁶⁷ The lawmakers hoped that the accommodation mandate would then save employees from having to choose between their religious beliefs and their jobs.⁶⁸ The measure passed overwhelmingly in both houses.⁶⁹

60. 118 CONG. REC. 705–06 (1972) (statement of Sen. Jennings Randolph, sponsor and chief proponent of the 1972 amendments).

61. 429 F.2d 324 (6th Cir. 1970).

62. 330 F. Supp. 583 (M.D. Fla. 1971).

63. *Dewey v. Reynolds Metals Co.*, 402 U.S. 689 (1971) (per curiam).

64. *Dewey*, 429 F.2d at 334.

65. 330 F. Supp. at 590.

66. 118 CONG. REC. 705–13 (1972).

67. 118 CONG. REC. 705 (statement of Sen. Randolph).

68. *Id.*

69. See 118 CONG. REC. 731, 7170, 7572–73.

The scope and magnitude of this congressional grant of “positive rights”⁷⁰ for religious observers is profound, especially when contrasted to the lack of such protection for other categories, such as race and sex.⁷¹ Arguably there now exist statutory “accommodation” requirements for sex (such as 1993’s Family and Medical Leave Act,⁷² which was conceived largely as an accommodation for women with family responsibilities),⁷³ race (under the “disparate impact” doctrine requiring elimination of even neutrally intended practices that negatively affect racial minorities, a doctrine the Court established in 1971⁷⁴ and Congress strengthened in 1991),⁷⁵ and disability—but none of these “accommodation mandates”⁷⁶ existed at the time Congress legislated the requirement that employers accommodate their employees’ religions.

The language of the 1972 amendments sought to protect religious expression and eliminate the prior case law’s bright-line difference between religious status (protected) and religious conduct (unprotected). Instead of just protecting a worker’s status as a religious observer (as Congress did for racial minorities and for women), this law goes further to also protect the conduct associated with such status, such as religious expression and observance.⁷⁷ While the law requires that courts balance the interests of employers and employees, the statutory language indicates that the balance should be weighted in favor of employees, given the textual requirement that accommodation be provided unless it would unduly burden the employer.⁷⁸

B. The Courts’ Answer: Protect Employer Interests

The Supreme Court was unwilling to consider the expansive nature of the legislative history in interpreting the reasonable accommodation

70. Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 686 (1992).

71. For an analysis of the different treatment courts give religion versus sex and race under Title VII, see generally Engle, *supra* note 10.

72. 29 U.S.C. §§ 2601–2654 (2000).

73. See *Nev. Dept. of Human Res. v. Hibbs*, 538 U.S. 721, 728–31 (2003).

74. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971).

75. The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1080 (codified as amended at 42 U.S.C. § 2000e (2000)).

76. Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 231–32, 277–78 (2000) (noting how medical leave requirements and disparate impact similarly are “accommodation mandates”).

77. Equal Opportunities Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e (2000)).

78. See 42 U.S.C. § 2000e(j) (2000).

provision. Instead, the Court severely limited employers' obligations to accommodate religious employees. In 1977's *Trans World Airlines, Inc. v. Hardison*, the employee had a religious objection to working on his Sabbath day.⁷⁹ The Court held that an accommodation causes "undue hardship" whenever that accommodation results in "more than a *de minimis* cost" to the employer.⁸⁰ The only other Supreme Court decision addressing religious accommodation under Title VII was in 1986: *Ansonia Board of Education v. Philbrook*.⁸¹ In *Ansonia*, the Court rejected an employee's claim for religious accommodation and, in doing so, repudiated the requirement of employers having to reach a reasonable accommodation.⁸²

Outside these two opinions, the Court has never addressed religious accommodation under Title VII, and those two decisions merely address a facet of religious expression: employee requests for accommodation in work schedule conflicts. As the EEOC guidelines suggest, other important conflicts between workplace rules and religious observances exist, such as dress and grooming requirements, the need for prayer breaks, dietary requirements, and prohibitions on certain medical procedures.⁸³

Most courts post-*Hardison* and *Ansonia* have uncritically embraced the Court's stringent standard of requiring only *de minimis* accommodations, effectively stripping the accommodation down to a "dead letter."⁸⁴ Indeed, courts routinely take a "per se" approach: "virtually all cost alternatives have been declared unduly harsh simply because a loss is involved."⁸⁵ Additionally, judges are sympathetic to employers' arguments that co-employees would be negatively affected by a proposed accommodation for a religious employee, finding such arguments a basis for deeming a requested accommodation to cause the employer undue hardship.⁸⁶ In such holdings, as one commentator

79. 432 U.S. 63, 67 (1977).

80. *Id.* at 84. This definition was later reaffirmed by the Court in *Ansonia Board of Education v. Philbrook*, 479 U.S. 60, 67 (1986).

81. 479 U.S. at 63.

82. *Id.* at 74-75 (Marshall, J., concurring in part and dissenting in part).

83. 29 C.F.R. app. § 1605.2(d)(1) (2004).

84. Prekert & Magid, *supra* note 11, at 468.

85. Peter Zablotsky, *After the Fall: The Employer's Duty to Accommodate Employee Religious Practices Under Title VII after Ansonia Board of Education v. Philbrook*, 50 U. PITT. L. REV. 513, 547 (1989).

86. See, e.g., *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 607 (9th Cir. 2004); *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1021 (4th Cir. 1996); *Wilson v. U.S. West Commc'ns*, 58 F.3d 1337, 1341 (8th Cir. 1995).

notes, “Although the Supreme Court set a reasonable ceiling, the ceiling appears to have fallen to the floor.”⁸⁷

The well-known case of *Wilson v. U.S. West Communications* highlights this judicial philosophy when courts attempt to balance the needs of religious employees and employers’ business.⁸⁸ The employee made a religious vow to express her opposition to abortion and, in keeping with her religious views, wore a button depicting a photograph of a second-trimester fetus (one that does not appear to be particularly graphic),⁸⁹ with the slogans “Stop Abortion” and “They’re Forgetting Someone.”⁹⁰ Wilson’s coworkers opposed her wearing of the button at work and called it “disturbing,” claiming that the button amounted to harassment and charging the supervisor with harassment for failing to stop her from wearing it.⁹¹ The employer offered three accommodations: (1) Wilson could wear the button in her cubicle; (2) she could wear the button but cover it while she worked in the office; or (3) she could wear a different button that did not have a photograph of a fetus on it.⁹² When Wilson brought suit, claiming the employer failed to reasonably accommodate her, the trial court held that Wilson’s religious beliefs (although sincerely held) did not require her to engage in this expression and that requiring Wilson to cover the button while at work was a reasonable accommodation.⁹³

The Eighth Circuit upheld the trial court’s ruling. In an opinion reflecting the court’s clear indifference toward Wilson’s religious beliefs,⁹⁴ the court held that it would be unduly burdensome to allow her to wear her button because of the impact her chosen expression had on her coworkers.⁹⁵ The court characterized her requested accommodation as requiring her employer to “allow Wilson to impose her beliefs as she chooses.”⁹⁶ This “heckler’s veto”⁹⁷ trumped Wilson’s position that she was expressing her religious beliefs and stymied any discussion on what

87. Sonny Franklin Miller, *Religious Accommodation Under Title VII: The Burdenless Burden*, 22 J. CORP. L. 789, 795 (1997).

88. 58 F.3d at 1338–40.

89. Picture on file with author.

90. *Wilson*, 58 F.3d at 1339.

91. *Id.*

92. *Id.*

93. *Id.* at 1340.

94. See Theresa M. Beiner & John M. A. DiPippa, *Hostile Environments and the Religious Employee*, 19 U. ARK. LITTLE ROCK L.J. 577, 602–03 (1997).

95. *Wilson*, 58 F.3d at 1341–42.

96. *Id.* at 1341.

97. Prekert & Magid, *supra* note 11, at 497–98.

reasonable accommodations did exist to minimize the impact of her expression.

Trial courts are likewise unsympathetic to religious observers in the workplace because of the high *Hardison* undue burden threshold. Federal district courts routinely reject claims of workers to observe their religion through their grooming and other observant habits.⁹⁸ In one typical case, *Hussein v. Pierre Hotel*, the district court rejected the claims of a Muslim employee to have a beard in accordance with his religious observance by ruling that it was an undue hardship on the employer because it “jeopardiz[ed] [the hotel employer’s] reputation for elegance and cleanliness.”⁹⁹ These cases exemplify the approach taken by courts in reviewing religious accommodation suits: the balance swings in favor of the employer under the *de minimis* standard, and deference is given to any employer’s concern for possible offense over religious expression.

But isn’t Title VII’s religious accommodation mandate, and even the Free Exercise Clause, intended to protect these types of religious expressions, even if unconventional and outside the mainstream? And doesn’t protection of religious expression, whether by the Constitution or by Title VII, necessarily create a religiously pluralistic society in which each person’s openly religious identity could generate disagreement or upset in others? Anti-discrimination laws are not designed to protect majority views; they are written for protection of the minority, even if generally unpopular.

Of course, there is a line at which an employee’s religious expression crosses over into harassment. In *Peterson v. Hewlett-Packard Co.*, the employee, in response to diversity posters, posted Biblical scriptures in his work space, including one that condemned homosexuality.¹⁰⁰ His supervisors determined that the scripture postings were offensive and violated the company’s policy prohibiting workplace harassment.¹⁰¹

98. See, e.g., *EEOC v. Sambo’s of Ga., Inc.*, 530 F. Supp. 86, 90–91 (N.D. Ga. 1981) (rejecting the claim of a Sikh worker that a uniform grooming policy proscribing facial hair constituted unlawful discrimination); see also *Khan v. Fed. Reserve Bank of N.Y.*, No. 02 Civ.8893(JCF), 2005 WL 273027, at *7 (S.D.N.Y. Feb. 2, 2005); *Sheikh v. Indep. Sch. Dist. 535*, No. Civ. 00-1896DWFSRN, 2001 WL 1636504, at *7 (D. Minn. Oct. 18, 2001); *Hussein v. Waldorf-Astoria*, 134 F. Supp. 2d 591, 598 (S.D.N.Y. 2001); *Hussein v. Hotel Employees & Rest. Union, Local 6*, 108 F. Supp. 2d 360, 372 (S.D.N.Y. 2000); *Gay v. S.U.N.Y Health Sci. Ctr. of Brooklyn*, No. 96-CV-5065 (JG), 1998 WL 765190, at *7 (E.D.N.Y. July 22, 1998); *EEOC v. Presbyterian Ministries, Inc.*, 788 F. Supp. 1154, 1157–58 (W.D. Wash. 1992); *Ali v. S.E. Neighborhood House*, 519 F. Supp. 489, 497 (D.D.C. 1981).

99. 99 Civ. 2715, 2001 U.S. Dist. LEXIS 4859, at *13 (S.D.N.Y. Apr. 20, 2001).

100. 358 F.3d 599, 601 (9th Cir. 2004).

101. *Id.* at 602.

Subsequently, the employee was fired for insubordination when he refused to remove the scripture postings.¹⁰² In response to the employee's claims that his employer failed to accommodate his religious beliefs, the Ninth Circuit held that it would create an undue hardship for the employer to accommodate him by allowing him to post messages intended to demean and harass his coworkers.¹⁰³

Both the *Wilson* and *Peterson* cases involve balancing the religious observer's right to express his or her religious self and the right of others not to be demeaned and degraded. In essence, the content of the message matters. It is an interesting hypothetical to consider what type of anti-abortion button would cross the line into harassment such that Wilson's right to accommodation would be trumped by the degradation felt by the audience. What is required is a true balancing test that recognizes the accommodation requirement but only so far as would not devalue another. In this way, the doctrine can take its cues from anti-harassment laws in sex discrimination, as described below in Part V. Such a balancing test is a far cry from the current doctrine, in which there essentially is no right to religious expression or practice whenever others object.

Admittedly, it is unlikely that the Court will overtly overturn the *Hardison* decision on its own because it was a statutory interpretation by the Court, and "considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation."¹⁰⁴ The Court, however, can broaden the protections afforded employees without admitting a wholesale abandonment¹⁰⁵ of the *de minimis* standard because that standard is, in essence, a balancing test—just one that, to date, has been weighted too heavily against employees' rights.¹⁰⁶

102. *Id.*

103. *Id.* at 607–08.

104. *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977).

105. *See, e.g., St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981).

106. This broadening of employee protections might also come about through legislative reform, but such a turn of events still would require courts to struggle with the appropriate standard for balancing employee religious rights against employer prerogatives. If new laws are passed to strengthen current accommodation laws, such as the WRFA efforts, *see supra* note 7, the new laws would require courts to weigh the competing interests with a stronger emphasis on accommodating religious expression. These new laws would surely be quickly tested in litigation, given the balancing of interests such laws require. Thus, legislative reform would not obviate the need for courts to revisit the question of workplace religious accommodations.

Because the law protects religious expression and accommodates religious observers, the presumption should favor the worker, or at least the test should be one of fair balancing, not a strong presumption that employers and coworkers need not bear *any* inconvenience at all. As stated above, the courts have not followed this mandate. The issue is: How do we draw the line?

V. SOLVING THE INCONSISTENCY: THREE APPROACHES TO PROTECTING RESPECTFUL RELIGIOUS EXPRESSION IN THE WORKPLACE

How should the Court view the newly emerging religious accommodation right in order to be in line with the principles of tolerance and inclusion outlined above? Put another way, with religious expression in the public sphere enjoying significant support from the Court, how should it balance employee religious rights, coworker rights to be free from harassment, and employer business interests?

In accommodating religion in the workplace, courts necessarily face a balancing act. Courts must balance the right of employees to be free to express their religious identities with other employees' right not to work in a hostile environment and employers' interest in maintaining a respectful atmosphere conducive to productivity. When faced with having to balance competing rights and interests, judges are in the inevitable position of line drawing. So how can courts draw lines that foster workplace norms that include tolerating differing forms of religious expression?

By borrowing from already well-established legal doctrines, the Court can balance these rights in a way that meaningfully accommodates respectful religious expression while still protecting the rights of others to be free from harassment and discrimination if that expression is not respectful of others' rights and identities.

This part offers three suggestions of legal tests, none of them mutually exclusive or complete answers, to replace the current *de minimis* standard.¹⁰⁷ First, as subpart A discusses, courts could borrow from workplace harassment law to define the point at which one

107. See, e.g., *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67 (1986) (noting that an employer is not required to bear more than a *de minimis* cost in accommodating an employee's religious beliefs); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710–11 (1985) (ruling a state statute that provides Sabbath observers with an absolute and unqualified right not to work on their Sabbath violates the Establishment Clause); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) (holding an employer is not required to bear more than a *de minimis* cost in accommodating an employee's religious beliefs).

employee's religious expression begins to infringe upon another's right to a nonhostile workplace; harassment law also helpfully distinguishes between harassing conduct by supervisors and coworkers, deeming the former to be more troubling. Second, as subpart B discusses, courts could follow the mandate of the constitutional Establishment Clause concepts of noncoercion and nonendorsement to define the point at which employer accommodation of workplace religious expression begins to infringe on the rights of workers holding different religious beliefs. Third, as subpart C discusses, courts could look to various constitutional rights doctrines and the Americans with Disabilities Act, which do a more balanced job of weighing rights and costs, as a way to analyze similar issues regarding accommodating employee religious needs.

A. Nondegradation and Anti-Harassment Models

First and foremost, employees should be afforded more freedom to express their religious beliefs than what is reflected in the current standard in today's workplace. This requires more tolerance for pluralistic religious views by coworkers and supervisors. As American workplaces become more diverse, it is inevitable that a growing number of workers will desire to express themselves in religious ways in the workplace—and that workplaces will feature others with divergent religious views. Employees may have to work around the prayer schedules of other employees whose religious views offend them, and the calendars employees post in their cubicles may feature different religious quotations.¹⁰⁸ We could try to avoid these types of conflicts by banning such religious content (as current law and workplace norms largely do), but in American workplaces that regularly feature quirky and varied self-expression, it would be sheer discrimination to ban only *religious* calendars; in workplaces allowing breaks for coffee, cigarettes, etc., it would be discrimination to disallow only *prayer* breaks.

In this light, much "accommodation" is simply a rule of nondiscrimination.¹⁰⁹ To be sure, coworker disturbances can result from allowing such pluralism, but that was the case with the original

108. See, e.g., Religious Calendars, http://www.calendars.com/xq/asp/PID.1/MGID.26/gAffInfo._Phrase/qx/category.htm (last visited Nov. 10, 2008) (offering various Christian, Jewish, Buddhist, and other religious or spiritual calendars).

109. See Jolls, *supra* note 76, at 231.

discrimination laws' mandates that men must interact with women and that whites must interact with blacks.

Religious diversity, like other forms of diversity, can be embraced by employers who foster a workplace that allows employees to express their religious beliefs fully. As Douglas A. Hicks writes, in "constructing respectful pluralism," employers should presume inclusion.¹¹⁰ Employers can promote inclusion by encouraging a level of understanding and flexibility amongst coworkers about diverse religious backgrounds and the accompanying expression that stems from such identity.¹¹¹

Hicks extols "limiting norms" to address the potential pitfalls that can emerge in the workplace.¹¹² The first is a nondegradation policy prohibiting disrespect of coworkers.¹¹³ If an expression is aimed at degrading another (such as the anti-gay message of the employee in the *Peterson* case), then such expression is not protected and should be prohibited.

Courts can evaluate coworker complaints regarding unwelcome religious expression by borrowing from another established legal doctrine: the anti-harassment framework under Title VII. In sexual harassment law, there are two types of claims: "quid pro quo" and "hostile work environment."¹¹⁴ Quid pro quo harassment is when a supervisor's sexually discriminatory behavior "compels an employee to elect between acceding to sexual demands and forfeiting job benefits, continued employment or promotion, or otherwise suffering tangible job detriments."¹¹⁵ Under the EEOC guidelines, quid pro quo sexual harassment occurs when "submission to or rejection of (unwelcome sexual) conduct by an individual is used as the basis for employment

110. DOUGLAS A. HICKS, *RELIGION AND THE WORKPLACE: PLURALISM, SPIRITUALITY, LEADERSHIP* 173–75 (2003); see also Debbie N. Kaminer, *When Religious Expression Creates a Hostile Work Environment: The Challenge of Balancing Competing Fundamental Rights*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 81, 139–42 (2000) (encouraging an anti-harassment model in the workplace for religious expression).

111. For a critique on the limits of Hicks's religious pluralism, see Achim Seifert, *Respectful Religious Pluralism in the Workplace*, 25 COMP. LAB. L. & POL'Y J. 463 (2004) (book review).

112. HICKS, *supra* note 110, at 173–75.

113. *Id.* at 174.

114. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–23 (1993); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 63–69 (1986).

115. Christopher W. Deering, Comment, *Same-Gender Sexual Harassment: A Need to Re-examine the Legal Underpinnings of Title VII's Ban on Discrimination "Because of" Sex*, 27 CUMB. L. REV. 231, 239 (1996) (quoting *Highlander v. KFC Nat'l Mgmt. Co.*, 805 F.2d 644, 648 (6th Cir. 1986)).

decisions affecting such individual.”¹¹⁶ A quid pro quo religious harassment suit would likewise analyze whether a supervisor or manager is compelling an employee to elect between participating or attending religious proselytizing or practices in order to continue employment or suffer negative employment consequences.

The second harassment model that could be utilized in the religious expression context regards hostile work environments. Hostile work environment sexual harassment is defined by the EEOC guidelines as “conduct [that] has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”¹¹⁷ In the well-known *Meritor Savings Bank, FSB v. Vinson* case, the Supreme Court recognized the hostile work environment as sex discrimination in violation of Title VII.¹¹⁸ The Court adopted the language of the EEOC guidelines and found that a plaintiff could establish a prima facie case of sexual harassment even when no tangible or economic benefits are forfeited.¹¹⁹ Specifically, the Court articulated the rule that hostile environment claims constitute unlawful sexual harassment when the allegedly hostile acts are “sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’”¹²⁰

Currently, courts will recognize religious hostile work environment claims when confronted with overtly egregious harassment. For example, in *Weiss v. United States*, the employee was subjected to continuous religious slurs from both his coworkers and supervisor.¹²¹ The religious slurs included “such taunts as ‘resident Jew,’ ‘Jew faggot,’ ‘rich Jew,’ ‘Christ killer,’ ‘nail him to the cross,’ and ‘you killed Christ, Wally, so you’ll have to hang from the cross.’”¹²² The court recognized the hostile work environment claim, as the obviously demeaning and patently offensive comments constituted “[c]ontinuous abusive language, [which] whether racist, sexist, or religious in form, can often pollute a healthy working environment.”¹²³ Most commentators would

116. 29 C.F.R. § 1604.11(a)(2) (2007).

117. 29 C.F.R. § 1604.11(a)(3).

118. 477 U.S. 57 (1986).

119. *Id.* at 65.

120. *Id.* at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (1982)).

121. 595 F. Supp. 1050, 1053 (E.D. Va. 1984).

122. *Id.*

123. *Id.* at 1056.

agree that this was not a close call given the overtly hostile and demeaning nature of the slurs.

The true test will be the extent to which courts will recognize religious harassment claims in cases with behavior that is less outrageous, but still goes beyond the workplace norms of inclusiveness and respect for religious pluralism in the workplace. For example, in a workplace that allows all forms of idle conversation, an employee discussing her religious beliefs during breaks ordinarily would not be considered harassing. But if other employees perceive, with reasonable basis, that the religious employee is degrading or insulting them, or is pushing too hard for others to adopt her beliefs (such as a fervent proselytizer who does not take “no” for an answer), then the religious speech could approach the level of actionable harassment, and an employer would be entitled to put a halt to it before it became “pervasive” enough to amount to a violation of the harassment prohibition.

In such situations, the courts could do more to protect the expression of religious employees than is currently allowed, while remaining mindful of the limiting principles described here.

B. Noncoercion and Nonendorsement Models

Another limiting principle to the general acceptability of religious expression is one of noncoercion. Workplace policies can require employers not to use their authority (both formal and informal) over subordinates to influence them with regard to their religious beliefs.¹²⁴ Likewise, employees can be discouraged from imposing dogmatic views onto their coworkers. This includes “proselytizing” and other forms of coercive efforts by workers with the aim of changing another’s beliefs about religion. A religious supervisor could not require an atheist or any other employee to attend prayer meetings or be fired, although the supervisor has a religious expression right.¹²⁵

This would also include prohibiting employers from endorsing one particular religion over others in the workplace. Much like applying the Establishment Clause model to private employers, this limiting principle would combat the coercive effects of an “institutional preference for a

124. *See id.* at 1057.

125. These facts are similar to the case of *EEOC v. Townley Engineering & Manufacturing Co.*, 859 F.2d 610 (9th Cir. 1988), which instead relied upon anti-discrimination standards that “seem to conclude that religion has no place in the workplace.” Beiner & DiPippa, *supra* note 94, at 618–19.

specific religious worldview.”¹²⁶ Courts can borrow from the Establishment Clause model for evaluating the effects of employers’ religious expression by using the “endorsement” test.

After the *Lemon* test fell out of favor, the Court began assessing entanglement of government with religion by asking whether government action “constitutes an endorsement or disapproval of religion.”¹²⁷ Under this test, courts can examine employers’ religious expression by asking if the expression endorses or disapproves of one particular religion over others. For example, if an employer allowed employees to use a break room for all kinds of personal purposes, from baby showers to prayer meetings, then those prayer meetings would be a reasonable accommodation, not an impermissible “endorsement” of religion; as discussed above, courts have ruled exactly to the contrary under the *de minimis* standard of workplace religious accommodation,¹²⁸ but courts have allowed the same sort of neutral “open room” policies in Establishment Clause cases about the use of public property.¹²⁹ However, if an employer had a special room for Christian prayer groups exclusively, this would violate the endorsement test because it constitutes an endorsement of one particular religion over another. However, if the prayer room was open for all religious denominations, including meditation for Buddhists, prayer for Muslims, or chanting for Hindus, then the expression would not be endorsing one religion over another and would be acceptable religious expression.

The reason that employers’ religious expression would be curtailed more than employee religious expression under this test is because of the inherent power dynamic at play in the employment relationship that so heavily favors employers.¹³⁰ Because employees are in a subservient role vis-à-vis their employer, the employer cannot go too far in expressing one particular religion because of the chilling effect it has on employee religious expression. If an employer promoted its own religious views, the coercive effect of that seeming “endorsement” would prevent employees from expressing their own religious beliefs if they diverged from their employer’s religion. Accordingly, courts can

126. HICKS, *supra* note 110, at 179.

127. Lynch v. Donnelly, 465 U.S. 668, 694 (1984).

128. See Berry v. Dep’t of Soc. Servs., 447 F.3d 642, 655 (9th Cir. 2006).

129. See, e.g., Good News Club v. Milford Cent. Sch., 533 U.S. 98, 110 (2001) (holding unconstitutional a public school’s exclusion of a Christian children’s club from after-hours use of school facilities that ordinarily were open to groups of all kinds).

130. See, e.g., Lawrence E. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1406 (1967).

borrow the Establishment Clause test of “coercion” for these situations, which allows government religious expression as long as it does not “coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which ‘establishes a [state] religion or religious faith, or tends to do so.’”¹³¹ This test would be triggered to stop the coercive effects associated with the power imbalance imbued in employment relationships. However, while this test solves the power imbalance of employer religious expression, it does not reach the problem of employee religious expression, which would be chilled by such a restrictive test if applied to it.

With the aforementioned principles of religious pluralism in mind, courts can encourage employers to institutionalize policies that accommodate respectful religious expression in the workplace. Grievances (both internally and in the courts) can be evaluated based on principles that balance workplace ideals, such as accommodation, equality, neutrality, tolerance, and inclusion. These five ideals, as outlined by Steven D. Jamar,¹³² would foster a workplace that allows for religious expression without fear of coercion and intimidation.

For example, if coworkers were tolerant of the religious expressions of their fellow employees, there could be less of the sort of conflict created in the *Wilson* case.¹³³ Whether the fetus button she wore was degrading or should be tolerated is a content-based determination, but one which must be analyzed, first by the employer and, if necessary, by the courts. If the workplace norms had advanced such that workers were more regularly exposed to, and therefore were acculturated to be more tolerant of, opposing viewpoints, the conflict might never have inflamed to the point at which litigation became necessary.

C. Undue Burden Test

The balancing of religious expression in the workplace requires the courts to assess what is truly “unduly burdensome” for employers to undertake to accommodate their employees. In reevaluating what “unduly burdensome” means in a pluralistic society, the Court need look only to its “undue burden” jurisprudence in various fundamental constitutional rights. Analogizing workers’ statutory religious rights to fundamental constitutional rights makes sense for two reasons. First,

131. *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (quoting *Lynch*, 465 U.S. at 678).

132. Steven D. Jamar, *Accommodating Religion at Work: A Principled Approach to Title VII and Religious Freedom*, 40 N.Y.L. SCH. L. REV. 719, 780–89 (1996).

133. *See Wilson v. U.S. West Commc’ns*, 58 F.3d 1337, 1339 (8th Cir. 1995).

religion is given special protection under a variety of constitutional and statutory doctrines and is especially important to the current conservative bloc of Justices, as outlined above. Second, a person's religious identity, although mutable, is a fundamental personal decision on par with recognized fundamental rights such as marriage and procreation and arguably more important to many people than association and political speech.

Fundamental rights under the Constitution traditionally merit strict scrutiny, but given that Title VII religious rights extend further than constitutional religious rights (both by reaching into private workplaces and by requiring accommodations against neutral workplace rules),¹³⁴ it is appropriate to use the more lenient "undue burden" test applicable to constitutional rights such as abortion that do not require restrictions to be justified with strict scrutiny.¹³⁵ Similar language—"undue hardship"—is used in Title VII,¹³⁶ and the lawmakers arguably used that language for a reason: to provide substantial protection to religious workers' rights.¹³⁷

Under an "undue burden" standard, limits on religious expression would be lawful only if such limitations were not a "direct legal obstacle"¹³⁸ to expressing one's religion, or put another way, if the limitations on religious expression had a purpose or "effect of placing a substantial obstacle in the path."¹³⁹ Accordingly, laws or employer policies and practices that were a substantial obstacle to religious expression in the workplace would be struck down.

134. *Compare, e.g.,* Washington v. Davis, 426 U.S. 229 (1976) (holding that a "disparate impact" based on race, without discriminatory intent, is insufficient to establish a violation of the Equal Protection Clause of the Fourteenth Amendment), with Griggs v. Duke Power Co., 401 U.S. 424 (1971) (holding opposite under the Title VII statutory, rather than constitutional, ban on racial discrimination by employers).

135. Kathryn Kolbert & David H. Gans, *Responding to Planned Parenthood v. Casey: Establishing Neutrality Principles in State Constitutional Law*, 66 TEMP. L. REV. 1151, 1154 (1993) ("Casey rejected the strict scrutiny standard of review mandated by *Roe*, adopting instead the more permissive 'undue burden' standard.") (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973)).

136. 42 U.S.C. § 2000e(j) (2000) ("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.").

137. See Engle, *supra* note 10, at 387–89.

138. Zablocki v. Redhail, 434 U.S. 374, 387 n.12 (1978) (regarding the fundamental right to marriage).

139. *Casey*, 505 U.S. at 877 (regarding women's fundamental right to choose whether to have an abortion).

Employers may argue that accommodating religious workers simply costs too much. As commentator Achim Seifert has acknowledged, religious pluralism principles are effective in the private work sphere only so long as they are compatible with the ultimate goal of business: profit making.¹⁴⁰ While these principles are seemingly not inconsistent with profit seeking, the courts are likewise sympathetic to the employer's interest in the productivity lost as these interests are sorted out.¹⁴¹ There are three responses to courts' concern about putting employers' profits at risk.

First, eradicating discrimination in the workplace often comes with a price tag, but courts still mandate compliance in the interest of furthering a just society (or at least in the interest of effectuating a clear congressional intent to further a just society by imposing a rights mandate on businesses). For example, in the disability context, the Americans with Disabilities Act requires that employers comply with its provisions for equal accessibility for disabled employees.¹⁴² Although these provisions can cost employers thousands, or tens of thousands, of dollars per accommodated employee,¹⁴³ the courts have upheld this costly burden because of the justice it serves in assuring equal access for all.

Indeed, the disabled worker is unable to work in a particular workplace if accommodations are not made. In workplaces that fail to accommodate religious workers, these workers are faced with a similar dilemma of lost job opportunities because they are unwilling to abandon their religious identity and the requirements of that identity. Even though one might point out that disabled workers do not choose their disability, as stated above, religious workers do not view an abandonment of their religion as a "choice" able to be made at will.

Additionally, where a requested religious accommodation is relatively modest, courts should not hesitate to require it when the only objection is that it would make other employees unhappy. After all, courts have never recognized an "upset coworker" exception to anti-

140. Seifert, *supra* note 111, at 467.

141. See, e.g., *Wilson v. U.S. West Commc'ns*, 58 F.3d 1337, 1341 (8th Cir. 1995).

142. 42 U.S.C. §§ 12111–12114 (2000).

143. Peter David Blanck, *Transcending Title I of the Americans with Disabilities Act: A Case Report on Sears, Roebuck and Co.*, 20 MENTAL & PHYSICAL DISABILITY L. REP. 278, 279–80 (1996) (noting that while many disability accommodations are low-cost, accommodations such as automatic door openers (a common accommodation for wheelchair-using employees) cost over \$1000, and the cost of visual impairment accommodations (such as Braille displays and related technologies) can exceed \$20,000).

discrimination laws, even to accommodation mandates. Rejecting religious accommodation because coworkers are upset is no more justified than letting coworker preferences trump requirements of disability accommodations, medical leave, anti-harassment policies, etc.

This argument against a “coworker veto” does not diminish the point made above that religious expression that is aimed at demeaning secularist workers should not be protected or accommodated. Like prohibited hate speech (in the constitutional context) or sexual harassment (in the statutory context), speech and conduct that courts find violate these principles should not be deemed acceptable (and protectable) religious expression. In this way, content matters and, as in other content-based inquiries, courts will have to balance the rights of religious expression with the rights of other workers to be free from harassment.

Lastly, a proactive approach for employers to create a respectful workplace for religious diversity is arguably good for business, as well as good for employees. As any good motivational speaker will tell you: Happy employees are productive employees.¹⁴⁴ In order to keep both the religious observer and the secularist happy, employers can promote a set of “best practices” guidelines¹⁴⁵ for managers and supervisors that incorporate the values of inclusion and nondiscrimination outlined here.

However, this approach does require an expansion of what is currently considered acceptable workplace behavior and discussion. In an expansive and healthy workplace, workers are free to express religious views, as they do views on traditional American topics of conversation: politics, sports, and family, to name a few. Religious garb or prayer breaks can be met, not with suspicion of coercion, but with the openness that accompanies culturally acceptable identities, such as being married with children, or an animal lover, or a rabid fan for a particular baseball team. Although a single worker might feel devalued with prominent photographic displays of spouses and children, a mother of six children might feel slighted by a population-control advocate, an animal lover might be horrified by a hunting aficionado, and a Mets fan might dislike the overbearing Yankees fan with excessive team paraphernalia, one set of these workers does not get to control the workplace to prohibit the other’s expression. Likewise, secularist

144. See, e.g., PETER R. GARBER, 99 WAYS TO KEEP EMPLOYEES HAPPY, SATISFIED, MOTIVATED, AND PRODUCTIVE (2001).

145. See N.Y. Civil Liberties Union, Free Speech in the Workplace: Policy #193 (on file with author).

workers should not have the ability to silence religiously observant workers.

Courts have the tools to balance the competing interests of employees' right to express their religion with employers' interest in productivity. By using a true "undue burden" test, instead of a *de minimis* standard, courts could enforce the true legislative intent of the accommodation laws. Further, anti-discrimination and anti-harassment laws already in place can be used to curb the threat of coercive expression. These already familiar approaches support the implementation of workplace norms that include respectful religious pluralism.

Through this self-correction, the courts will be addressing three important, converging issues identified in this Article: (1) workplaces are increasingly sites of important expression; (2) workplaces are increasingly sites of broad religious diversity; and (3) employers cannot expect workers to cover or sever their religious identities at their door.

VI. CONCLUSION

With growing religious diversity in the workplace, the clear congressional intent to support religious accommodation, and the Supreme Court's increasing recognition of religion's role in society, it is time for courts to refine their balancing act. It is time to move away from the *Hardison* position of allowing employers to stamp out employee religious expression with only a *de minimis* burden showing. Instead, courts must adhere to a new balancing act, one which encourages employers to make a strong showing of an actual burden if denying religious accommodation to their employees. But with this rise of recognizing that religious observers have expressive rights, even in private workplaces, comes with it the inevitable task of line drawing. What should the outcome be when religious observers express themselves religiously but disrespectfully in workplaces, and when do the rights of secularists become trumped or devalued?

Courts have the tools by which to balance these interests already. First, workplace harassment law provides the framework to define the point at which one employee's religious expression begins to infringe upon another's right to a nonhostile workplace and distinguishes between harassing conduct by supervisors and coworkers. Second, the constitutional Establishment Clause concepts of noncoercion and nonendorsement help to define the point at which employer accommodation of workplace religious expression begins to infringe on

the rights of workers holding different religious beliefs. Third, courts should look to various constitutional rights doctrines and the Americans with Disabilities Act to analyze the careful balancing of the costs and rights associated with accommodating employee religious needs.

This new perspective results in a commingling of two important concepts: first, fostering respectful religious pluralism and freedom of religious expression; second, strengthening accommodation rights to allow anti-discrimination laws to be fully realized. Because the law protects religious expression and accommodates religious observers, the presumption should favor the worker's religious expression *unless* it demeans or devalues another worker's beliefs. Balancing of interests is nothing new; giving true accommodation to religious workers is. The test should be one of fair balancing, not a strong presumption that employers and coworkers need not bear any inconvenience at all. This self-correction harkens back to the original intent of the First Amendment, as well as the congressional intent of Title VII.