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ACCOMMODATING RELIGION AT WORK: A PRINCIPLED APPROACH TO TITLE VII AND RELIGIOUS FREEDOM

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I. INTRODUCTION

This article examines the problem of balancing several core interests: society's interest in eliminating unfair employment discrimination including discrimination on the basis of religion; an employee's interest in seeking, obtaining, and holding employment free from unfair discrimination; and an employer's interest in the employer's free exercise of religion, including using religious criteria for employment decisions. Also implicated are issues concerning both public and private tolerance of religion, issues concerning the relationship of the state to the individual in religious freedom, and employee interests in associating with employees with similar religious mind-sets. I suggest that most issues of this sort be resolved through a practical approach not dissimilar to that advanced for disability-related employment disputes under the Americans with Disabilities Act.[1] For those issues which cannot be resolved through such pragmatic means, the law and courts must get involved. As I explain at some length below, I propose that even in formal legal fora such problems should not be decided by relatively rigid application of formulaic rules. Instead, they should be decided through carefully nuanced consideration of the seemingly imprecise principle of accommodation tempered by and informed by the principles and ideals of tolerance, equality, neutrality, and inclusion.

The role of religion in modern political and social development has taken many forms. Fundamentalist religious movements have gained prominence in many predominantly Islamic countries, and in the case of Iran, have led to a repressive theocracy. Religious strife has torn apart Lebanon, has repeatedly flared in India, has created destructive, sectarian strife in Sri Lanka, and has plagued Northern Ireland for centuries. Israel has significant regional problems largely, though not solely, because Israel is a Jewish state in an Islamic region.

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1. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. 12101-213 (1988 & Supp. II 1990); *see* 29 C.F.R. § 1630.2(o) (1995) (Reasonable Accommodation); 29 C.F.R. pt. 1630 App. § 1630.9; *infra* parts III.B.2., IV.

The United States is no stranger to religion as a social and political force.[2] Many of the early European colonizers crossed the Atlantic driven largely by religious motives.[3] Most of the colonies established state religions.[4] Others, such as Maryland, which still uses the motto "The Free State," supported religious freedom, although they too had many oppressive laws.[5]

After independence and during the process of ratification of the Constitution, the failure of the Constitution to address the role of the state in religion was one of the key concerns of the state ratifying conventions.[6] Ultimately, the Bill of Rights was adopted and the prohibition of governmental establishment of religion and the protection from infringement on the free exercise of religion were enshrined in the First Amendment.[7]

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2. *See* SYDNEY E. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE (1972); HENRY F. MAY, IDEAS, FAITHS AND FEELINGS: ESSAYS ON AMERICAN INTELLECTUAL AND RELIGIOUS HISTORY 1952-1982 (1983); CHRISTOPHER F. MOONEY, PUBLIC VIRTUE: LAW AND THE SOCIAL CHARACTER OF RELIGION (1986).

3. *See* WILLIAM L. MILLER, THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC (1986).

4. For example, Virginia was Anglican and, except for Rhode Island, the Congregational Church was the state church throughout Puritan New England. *See, e.g.*, Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837, 879-91 (1995). *See generally* FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 42-45 (1985); LEO PFEFFER, CHURCH, STATE, AND FREEDOM (1967).

5. *See, e.g.*, Underkuffler-Freund, *supra* note 4, at 885-86 (discussing one Maryland statute that imposed the death penalty on anyone who, *inter alia*, engaged in blasphemy or denied the existence of Jesus Christ); *see also* Kenneth Lasson, *Free Exercise in the Free State: Maryland's Role in the Development of First Amendment Jurisprudence*, 18 U. BALT. L. REV. 81, 82 (1988) (describing religious discrimination in Maryland, including penalties for blasphemy).

6. *See* Underkuffler-Freund, *supra* note 4, at 885-86, 891-93, 919-24 (esp. note 276, at 892) (describing the debates surrounding the adoption of the U.S. Constitution); *see also* Everson v. Board of Educ. of Ewing Township, 330 U.S. 1, 11-14 (1947) (discussing Virginia's enactment of the Virginia Bill for Religious Liberty in 1785-86, which embodied the same objectives as the First Amendment); Reynolds v. United States, 98 U.S. 145, 162-64 (1878) (discussing the religious debates surrounding the adoption of the Constitution and several state proposals for amendments). *See generally* MILLER, *supra* note 3.

7. U.S. CONST. amend I. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

In modern times religion continues to affect our political lives. As recently as 1960 many political pundits were concerned about whether the United States could or should have a Catholic as President.[8] Even in 1991 the issue of Clarence Thomas's ability to judge the abortion issue free from domination by the Pope was raised after his nomination to the United States Supreme Court.[9] Religious leaders have figured prominently in the civil rights movement. For example, Martin Luther King, Jr. was a Christian minister. The Black Muslim movement, with its conversion of many African-Americans to Islam and the creation of a new sect of Islam, The Nation of Islam, continues in both guises as a religious, social, psychological, and in many instances, a political force.[10] Some evangelical Christians have created right-wing organizations such as the Moral Majority and the Concerned Women of America with overtly political agendas.[11] Evangelical Christians have sponsored a candidate for the Republican Party nomination for President.[12]

Religious beliefs continue to inform our positions on many of the most difficult issues of the day. Although most of the social and political issues surrounding religion, as well as most of the reported religion cases, involve either the very public spheres of education[13] and governmental involvement in the promotion of religion,[14] or deep moral and ethical issues such as abortion[15] and the right to die,[16] a number of cases and

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8. Michael Barone & Katia Hetter, *The Lost World of John Kennedy*, U.S. NEWS & WORLD REP., Nov. 15, 1993, at 39.

9. Lucy Howard & Ned Zeman, *Wild at Heart*, NEWSWEEK, July 15, 1991, at 4.

10. *See* MALCOLM X & ALEX HALEY, THE AUTOBIOGRAPHY OF MALCOLM X (1965).

11. David Von Drehle, *Coalition Reaching to the Middle*, WASH. POST, Aug. 15, 1994, at A1.

12. Pat Robertson, a televangelist, ran unsuccessfully for the Republican nomination in 1988. T.R. Reid, *'Invisible Army' Won Few Battles; Robertson, Followers Had Little Clout at Polls*, WASH. POST, Dec. 17, 1988, at A3.

13. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (involving the right of members of the Old Order Amish religion to be exempt from compulsory school attendance laws because enforcement would pose a grave danger to their religous beliefs).

14. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573 (1989) (concerning the display of a Christian nativity scene and a Chanukah menorah on public property).

15. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973).

16. *In re* Storar & Eichner, 52 N.Y.2d 363 (1981) (discussing the view of the Catholic church that permits the termination of "extraordinary life support systems when there is no reasonable hope for the patient's recovery").

a variety of issues have surfaced in that most amoral (and all too frequently immoral) realm—the marketplace.

The importance and inseparability of religious and ethical values in the pursuit of a livelihood are not just positions of people on the fringe; not only the Amish and certain others of conscience believe in finding an ethical way to make a living.[17] Living well by doing good is the goal of many.[18] The scandals on Wall Street[19] and in the savings and loan institutions graphically display the results of separate weekday dog-eat-dog, marketplace amorality and Sunday morning charity-for-all.[20]

Significant problems with legal, political, and practical dimensions arise when employers self-consciously carry not only their mores and morality to their workplaces, but also bring their religious beliefs and practices. Frequently, the explicit goal of such employers is to create a business environment infused with the employers' own religious beliefs and practices. To an outsider the stamping of the corporate culture with the imprint of religious beliefs and practices appears unnecessary and irrelevant to the "business of business"—the pursuit of commercial gain.[21] To an employee the work environment can appear unnecessarily uncomfortable or even hostile.

The following questions help focus the problem: Is a belief in god or a particular set of religious beliefs a legitimate prerequisite for commercial employment? Or more broadly considered: Can or should society decree that secular, commercial job performance cannot be measured by spiritual criteria? Or add working society's interest into the mix: Does society have a legitimate interest in furthering non-discrimination on behalf of

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17. *See* Laura S. Underkuffler, *"Discrimination" on the Basis of Religion: An Examination of Attempted Value Neutrality in Employment*, 30 WM. & MARY L. REV. 581, 581 n.1 (1989) (quoting Matt Moffett, *Fundamentalist Christians Strive to Apply Beliefs to the Workplace*, WALL ST. J., Dec. 4, 1985, at 33).

18. Andrea L. Woolard, *Funds with Social Themes: Investing Principal in Your Principles*, CHRISTIAN SCI. MONITOR, Aug. 14, 1986, at 19.

19. *See, e.g.*, Steve Coll & David Vise, *Inside Milken's Empire: Transcripts Inside Green Tree Case Offer Rare Look at Drexel*, WASH. POST, Mar. 8, 1987, at H1 (discussing Michael Milken's involvement in the junk bond market and "questionable corporate takeover practices").

20. This statement does not imply that all of the people involved are hypocrites. Many are not religious and others may believe in separating parts of themselves from other parts for various settings. *See* Michael J. Sniffen, *High Conviction Rate in S&L Cases*, THE ASSOCIATED PRESS, Nov. 13, 1995, *available in* WESTLAW, Allnews Library, 1995 WL 4414159 (discussing the Justice Department's recent convictions of over 2000 people who were involved in major financial fraud schemes).

21. *E.g.*, Brown Transp. Corp. v. Commonwealth of Pa., 578 A.2d 555, 561 (Pa. 1990) (describing employee's complaint as based, in part, on the belief that "religion should not be part of business affairs").

employees to limit private citizens from organizing workplaces in accordance with religious norms?[22]

The problem arises most acutely when an employer makes employment decisions based upon the compatibility of the employee's religious beliefs with those of the employer.[23] Such actions may well run afoul of the Civil Rights Act of 1964[24] as well as many state and municipal human rights laws.[25] The problem arises in a more subtle form where there are no overt or well-defined acts of discrimination, but where the employee feels so uncomfortable in the religiously-infused work environment that he or she claims that the work environment itself is discriminatory.[26] (In this latter instance the claim may resemble co-employee sexual or racial hostile environment cases.)[27] The question is: Should the First Amendment's right to free exercise of religion shield employers from discrimination claims based on a difference of religious conviction between employer and employee?

The issue is complicated by the fact that both the employer and the employee have the right to exercise their religious beliefs and that one or the other must either give way completely or one or the other or both

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22. I owe a debt to Prof. McConnell for part of this formulation of the core issue.

23. *E.g.*, Minnesota v. Sports & Health Club, Inc., 370 N.W.2d 844, 846 (Minn. 1985), *dismissed for lack of jurisdiction*, 478 U.S. 1015 (1986).

24. 42 U.S.C. § 2000e-2 (1988).

25. *See, e.g.*, CAL. CIV. CODE § 51 (Deering 1995); GA. CODE ANN. § 89-1703 (Harrison 1980); MINN. STAT. ANN. § 363.03 (West 1995); N.Y. EXEC. LAW § 296 (McKinney 1993).

26. *See* Turner v. Barr, 806 F. Supp. 1025, 1027-28 (D.D.C. 1992); Meltebeke v. Bureau of Labor and Indus., 903 P.2d 351 (Or. 1995).

27. *See* Ball v. City of Cheyenne, 845 U.S. 803 (1993) (sexual harassment within police department); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 60 (1986) (bank employee claiming sexual harassment by supervisor); Meininger v. Swift-Eckrich, Inc., No. 93-4166-RDR, 1995 U.S. Dist. LEXIS 1434, at *4 (D. Kan. Jan. 6, 1995) (sexual harassment by co-employees); Crissman v. Healthco Int'l, No. 89-C8298, 1992 U.S. Dist. LEXIS 13167, at *4 (N.D. Ill. Sept. 1, 1992) (sexual harassment by male sales representatives toward female representatives); Sims v. Montgomery Cty. Comm'n, 766 F. Supp. 1052 (M.D. Al. 1990) (claims of racial and sexual harassment in sheriff's department); Barrett v. Omaha Nat'l Bank, 584 F. Supp. 22, 23-24 (D.N. 1983) (sexual harassment by co-employees); Colorado Div. of Empl. & Training v. Hewlett, 777 P.2d 704, 706 (Co. 1989) (harassment by co-workers concerning illicit relationships between employee's husband and other employees).

must give way partially through accommodation.[28] The variability of employees further complicates the analysis. For example, an employee who desires a religion-infused workplace would not be able to find one if there were no religiously-organized workplaces. Further complicating matters are the dual interests of the community and the state in things religious and things commercial. That is, there are other interests involved in addition to those of the employer and employee—the interests of the community as expressed through the acts of the state.

More abstractly, these interests can be grouped as those of the individual (employer or employee) and those of society (community and state). From this perspective, this article is in part an elaboration of the premise that the claim for social harmony and the claim for individual privacy and independence are in a necessary dialectical tension, with neither being primary nor superior to the other and with neither being sufficient alone to develop principled, consistent jurisprudence of First Amendment religious freedom.[29] The employer and employee are essentially making individual claims which are both at loggerheads with each other and are, taken together, potentially in conflict with the community's interest in social harmony. Taken to an extreme, where a single person can nullify the effect, as to that individual, of general society-building actions, the primacy of that individual's claim results in a unit veto. Taken to the other extreme, primacy of the community's or state's claim results in tyranny by the majority. Thus, the employer could effectively veto the effect of the state's antidiscrimination laws by simply asserting a right to be exempted from their reach. Or the employee could be a tool of the majority by enforcing a claim for special treatment under the antidiscrimination laws in a way that would not respect the legitimate interests of the employer. These assertions of individual rights could exacerbate declining social harmony. Hence we see the dialectical tension between the individual-rights-based approach and the social-harmony approach.

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28. Some courts have articulated the need for mutual accommodation for employees seeking accomodation of their religious needs. *E.g.*, Smith v. Pyro Mining Co., 827 F.2d 1081, 1084-85 (6th Cir. 1987); Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141, 145-46 (5th Cir. 1982).

29. *See* Ashby D. Boyle II, *Fear and Trembling at the Court: Dimensions of Understanding in the Supreme Court's Religion Jurisprudence*, 3 CONST. L.J. 55, 57-60 (1993) (analyzing the relationship of religious autonomy and social coherence in religious jurisprudence). A thorough exploration of the issues involving community in politics and the importance of community in preserving social harmony can be found in AMATAI ETZIONI, THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES AND THE COMMUNITARIAN AGENDA (1993).

This dialectical tension can be resolved by applying foundational principles of respect for equality and human dignity.[30] If we treat each other with equal respect and if we recognize each person's claim to human dignity, then we are bound to act in a way which legitimates both the individual interest as well the group interest in social harmony. Respecting equality and respecting the inherent human dignity of each person perforce leads to social harmony through tolerance rather than through hegemony. That is, one can have a shallow, enforced social harmony through hegemony (for example, Yugoslavia under Marshall Tito), but such harmony is frail because it is shallow. Harmony built on tolerance is stronger and more resilient. One cannot claim that the United States has always been—or even that it has ever been—a model of tolerance; certainly one cannot claim that it is a repository of social harmony, narrowly conceived. But through all of the struggles and missteps and disharmony, there is a general sense of social cohesion and a willingness to return to the principles of equality and tolerance of differences.

In this article the foundational principles of respect for the equality and dignity of each person are given practical voice by analyzing the tough problems of religious employment discrimination through discourse framed[31] or given shape by the principles of tolerance, inclusion, neutrality, equality, and, most importantly, accommodation. This article adopts neither the extreme approach of complete governmental detachment from regulating things religious nor the approach of active government advocacy of either religiousness or non-religiousness.[32] Instead, this

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30. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 182, 272-78 (1978). Dworkin ultimately finds equality to be the underpinning for the jurisprudential validity of fundamental rights. *Id.* My purpose here is not to engage in the debate among those on the Dworkin side and those on the side of positivists like H.L.A. Hart. My point is that using the foundational principle of respect for the equal claim to human dignity of each person one can craft a workable approach to the problem of employment discrimination on the basis of religion. In this article I am taking a largely functional approach to the problem and I use certain principles of jurisprudence in this instrumental fashion. *See* discussion *infra* part III.

31. *See* Steven D. Smith, *Free Exercise Doctrine and the Discourse of Disrespect*, 65 U. COLO. L. REV. 519, 526 (1994) [hereinafter Smith, *Free Exercise Doctrine*] (discussing the framing of analysis through the words and approaches chosen to discuss a problem).

32. For a brief summary of the contours of the various approaches see Rodney K. Smith, *Conscience, Coercion and the Establishment of Religion: The Beginning of an End to the Wanderings of a Wayward Judiciary?*, 43 CASE W. RES. L. REV. 917, 919-27 (1993) [hereinafter Smith, *Conscience, Coercion and the Establishment of Religion*]. *See generally* Symposium, *Religion and the Public Schools After* Lee v. Weisman, 43 CASE W. RES. L. REV 699, 700 (1993) (explaining that views expressed at that particular

article advocates an approach under which governmental action is characterized by tolerance, inclusion, and neutrality and under which governmental action in the form of law seeks to further tolerance, inclusion, and equality in society, primarily through laws based on and interpreted in accordance with the five principles enumerated above, with particular emphasis on accommodation.

Accommodation is particularly relevant to religious employment discrimination because such discrimination is fundamentally different from other types of employment discrimination, such as racial and sexual employment discrimination. One difference arises from the importance of the interests sought to be protected. The employer's desire to conduct its business as it sees fit is not of the same magnitude as either the employee's right to be free from race-based or sex-based discrimination or as society's interest in social justice. The balance in such cases is easy to strike in favor of the employee because there is no constitutional right or human right which extends to the extent of denying another's humanity on the basis of sex or race.[33] That is, there is no right which permits or even requires discrimination on those bases which would countervail the employee's non-discrimination right.[34] However, the balance is less easy to strike where the conflict is between the exercise of religious beliefs by the employer on the one hand and by an employee on the other. The religious freedom interests of the employer and the employee are both of the first magnitude. In such situations, either the employer or the employee or both will have their religious beliefs offended or religious practices restricted.

A second, deeper difference arises from the nature of religious discrimination as distinct from status-based discrimination. Religious discrimination is often based upon a difference of belief, unlike discrimination based on race, sex, color, national origin, age, and disability, which are based not on beliefs, but on attributes dependent upon one's birthright. Discrimination based on belief is different from that based upon birthright because beliefs and concepts are a matter of choice.

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symposium ranged from "strict separationist to staunch accommodationist").

33. In a subset of the gender and racial discrimination cases, the constitutional right of free speech may well be implicated. *See* Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1800-06 (1992) (discussing the problem of drawing the line between permissible, protected speech (including religious speech) and harassment). In such cases, there are concerns similar to those developed in this article regarding freedom of religion. In such cases, the interest in equality in employment based upon birthright characteristics would be sufficiently compelling to overcome the free speech claim.

34. The availability of the extremely rare sex change operation is not really germane.

A person cannot convert to being of Native American or African American or European American origin nor to the opposite sex. But a person can choose to convert to Christianity, Buddhism, or Islam merely by a genuine declaration of intent.

Our society places freedom of thought and expression as protected interests of the highest order. Society is to be ordered and truth is to be ascertained through the tugs and shoves of thoughts in the marketplace of ideas.[35] Rational and even irrational discourse is encouraged. People are taught to think for themselves, to accept little as true merely because someone says it is true. When a society encourages vigorous religious, philosophical, and political discourse, prohibiting people from making decisions based on belief, regardless of the source of that belief, unavoidably creates intellectual dissonance. Consequently, an employer who wants to act on his or her moral and religious convictions, but is prevented from doing so, has a complaint of some legitimacy. If we as a society encourage diversity, encourage inclusion, encourage independent thought and evaluation of ideas, and even reward experimentation in various approaches to commerce, then placing limits on those aspects of life in which ideas play a formative role creates a conflict of priorities.

Discrimination based on differences in ideas seems contrary to some fundamental aspect of our society. Indeed, notions of equality and of according every person equal dignity seem to be offended by such discrimination. But those same notions also seem offended by restrictions on a person's actions when those actions are driven by conscience. Consequently, employers who do not separate their religious beliefs and actions from their employment practices challenge the underlying policies of the Civil Rights Act. For them the Act's shield against religious-based discrimination becomes a sword of discrimination cutting down the employers' rights (and those of like-minded employees) to free exercise to make room for the employee's rights.[36]

The main purpose of this article is to develop an approach which treats seriously the religious claims of an employer who engages in what would normally be considered a secular commercial enterprise, but who claims that he or she is required by his or her religious beliefs to operate

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35. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

36. The problem primarily considered in this article is not that of religious employers such as churches and religion-affiliated schools. Special statutory provisions which have been interpreted by the courts mark the bounds of permissible discrimination by such institutions. *See* discussion *infra* part IV.C (highlighting some of the relevant matters concerning such employers).

the business in accordance with those religious convictions.[37] To explore this issue fully, this article has been structured as follows: First, a fairly complete background section covers the basics of Title VII law and summarizes the jurisprudence of the First Amendment's religion clauses. Then in the subsequent sections the proffered solution of accommodation is developed and explained, and finally tested. The article concludes with general observations about the topic and the broader issues of freedom of religion.

The core of the proposed approach is that cases should be decided less through application of rigid rules in a mechanistic, syllogistic fashion and more on the basis of discourse framed by direct consideration of the seemingly imprecise principle of accommodation tempered by and informed by the principles and ideals of tolerance, equality, neutrality, and inclusion.[38] This approach is a three-legged stool. One leg is the idea that the way we think about a subject, the way we corral its boundaries, the way we frame the discourse about it, affects the result. My extension of this idea is to adopt an approach which explicitly recognizes this theory and to use it in deciding what factors to use to frame the discourse.[39] The second leg is Dworkin's rule/principle dichotomy. I argue below that rules do not work in this area, or at least not for the particular problem I am examining, and that using principles will produce better results. The third supporting leg is provided by fundamental legal and extra-legal values of equality, tolerance, community, and respect for human dignity.

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37. A related issue concerns secular employers who accommodate religious expression by employees despite other employees being offended by it. This class of employers is considered *infra* part IV.A, but these employers are not the main focus of this article. The plight of the religious employee, which is the flip-side of the topic of this article, is considered in David L. Gregory, *Government Regulation of Religion Through Labor and Employment Discrimination Laws*, 22 STETSON L. REV. 27 (1992) (arguing that current law, especially the duty of religious accommodation under Title VII, does not adequately protect employees).

38. As further developed *infra* in part III, generally, there is a near identity of neutrality and equality in the religious freedom setting. The ideas of accommodation, tolerance and inclusion are close kin. At core, the approach turns on implementing the principle of accommodation. But accommodation, standing alone, is not sufficient. The other principles operate to keep the accommodation idea within bounds.

39. *See* discussion *infra* part III.A.

II. BACKGROUND

A. *Analytic Framework for Employment Discrimination Claims*

In response to the civil rights movement of the 1950s and 1960s, Congress enacted the Civil Rights Act of 1964.[40] In the course of passing the bill, Congress declared that the elimination of discrimination is a national goal of the highest priority.[41] This attitude has historically been shared by the Supreme Court.[42] Even as the Supreme Court retreated from its long-standing role as champion of civil rights,[43] it has continued to pay lip-service to "a firm national policy to prohibit racial segregation and discrimination."[44]

Although the primary target of the act was the elimination of racial discrimination against African-Americans,[45] it was more broadly drafted to prohibit discrimination not only on the basis of race and color, but also on the basis of religion, sex, and national origin.[46] The act contains several sections addressing discrimination in various aspects of public endeavor including education,[47] places of public accommodation[48] (e.g., restaurants and hotels), and employment.[49] Discrimination in

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40. 42 U.S.C. § 2000a (1988). Many states and municipalities enacted similar legislation thereafter. See Underkuffler, *supra* note 17, at 589-90 n.38, for a list of state employment discrimination statutes. Although this article considers only the federal act, the considerations are generally the same under state statutes and local ordinances.

41. *See* S. REP. NO. 872, 88th Cong., 2d Sess., pt. 1, at 11, 24 (1964).

42. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974) (discussing the availability of forums for employment discrimination claims as consistent with Congressional intent to place discrimination as the "highest priority"); *see also* EEOC v. Pacific Press Publishing Ass'n, 676 F.2d 1272, 1280 (9th Cir. 1982) (emphasizing Congressional intent in Title VII to eliminate discrimination as the "highest priority").

43. *See, e.g.*, Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989); City of Richmond v. J.A. Croson, 488 U.S. 469 (1989).

44. Bob Jones Univ. v. United States, 461 U.S. 574, 593 (1983).

45. The history of the statute is quite interesting. In one of the most curious developments in Congressional legislation ever, the amendment to add sex as a category on which discrimination would be prohibited was introduced for the purpose of defeating the bill. The senator who introduced the amendment incorrectly thought that no one would ever vote for such an "obviously absurd" provision. Elizabeth Roth, *Sex Discrimination: The Civil Rights History of Sex: A Sexist, Racist, Congressional Joke*, A.B.A. L. PRAC. MGMT., Sept. 1993, at 26, 28.

46. 42 U.S.C. §§ 2000a-2000h-2 (1988).

47. *Id.* § 2000d.

48. *Id.* § 2000a.

49. *Id.* § 2000e-2(a)(1) & (2).

employment is controlled by Title VII of the Act which expressly prohibits private employers from discriminating on the basis of a person's "race, color, religion, sex, or national origin."[50] Later statutes prohibit employment discrimination on the basis of age[51] and disability.[52]

1. Legal Theories to Prove Employment Discrimination

To accomplish the aim of eliminating unlawful discrimination "root and branch,"[53] the courts early on developed two primary theories for a Title VII claimant: (1) disparate treatment, and (2) disparate impact of otherwise neutral policies or practices.[54] A third significant theory stems from workplace harassment or the existence of a hostile work

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50. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), provides:

> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise, to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

In 1972 Title VII was amended to apply to federal, state, and local employers. Pub. L. No. 92-261, 86 Stat. 103, 111.

51. Age Discrimination in Employment Act, 29 U.S.C. § 621 (1994).

52. Americans with Disabilities Act, 42 U.S.C. § 12,101 (1994).

53. Green v. County Sch. Bd. of New Kent Cty., 391 U.S. 430, 438 (1968).

54. There are other means of proving an employment discrimination case. As stated by Justice Stevens in his dissent in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989):

> Although disparate impact and disparate treatment are the most prevalent modes of proving discrimination violative of Title VII, they are by no means exclusive. *See generally* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 13-289 (2d ed., 1983) (four chapters discussing "disparate treatment," "present effects of past discrimination," "adverse impact," and "reasonable accommodation" as "categories" of discrimination). *Cf.* [*Wards Cove*, *supra* at n.4 (referring to a sort of "separate but equal" type of discrimination)]. Moreover, either or both of the primary theories may be applied to a particular set of facts. *See* Teamsters v. United States, 431 U.S. 324, 336 n.15 (1977).

Wards Cove, 490 U.S. at 668 n.13 (Stevens, J., dissenting).

environment.[55] Although this theory is analytically a subset of the disparate treatment theory (forcing an employee to work in a hostile work environment treats one differently with respect to the "terms and conditions of work"), it has sufficiently special attributes to be legitimately treated as a separate theory. An additional theory is available to a person claiming religious discrimination—the claimant can assert that the employer failed to accommodate his or her religious beliefs or practices.[56]

a. Disparate Treatment

In a disparate treatment case the employee claims that he or she was treated less favorably than others because of his or her statutorily protected status, that is, his or her race, sex, color, religion, or national origin.[57] A disparate treatment case can be proven through direct, positive evidence of discriminatory intent, e.g.: "I would never hire her because she is a Buddhist," or indirectly through presumptions and shifts in the burden of proof. Cases involving direct evidence of discriminatory intent are both relatively rare and relatively easy, at least analytically. Cases in which clear, direct evidence of proscribed intent does not exist, and in which the indirect means of proving intent must be used, are more common and are analytically more complex.

In disparate treatment cases in which intentional discrimination is proven by indirect means, the Supreme Court has allocated the burdens of production and persuasion between the employer and employee as follows:[58] First, the employee must present evidence of her prima facie case of disparate treatment. This typically requires showing that the employee has not received employment for which she was qualified while the employer has elevated another, seemingly less qualified person of a different group within the subject category, e.g., race, to the position. Such proof raises the presumption that the employer's treatment of the claimant was different and was due to a prohibited motive. Once an employee meets this burden of production, the burden of production shifts

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55. *E.g.*, Harris v. Forklift System, 114 S. Ct. 367 (1993); Hall v. Gus Constr. Co., 842 F.2d 1010, 1014 (8th Cir. 1988) (harassment based on gender held to be unlawful discrimination); Weiss v. United States, 595 F. Supp. 1050, 1056 (E.D. Va. 1984) (ongoing pattern of religious slurs constitutes harassment and unlawful employment discrimination).

56. 42 U.S.C. § 2000e-2(j) (Supp. V 1993).

57. *E.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807 (1973) (refusal to rehire allegedly based on racial discrimination).

58. *See, e.g.*, Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981); *McDonnell Douglas*, 411 U.S. at 802-03.

to the employer to establish a legitimate, non-discriminatory reason for the action taken. If the employer meets its burden, then the burden of producing evidence shifts back to the employee who must then produce evidence that the employer's defense is either a pretext or is discriminatory in its application. The ultimate burden of persuading the trier of fact that unlawful discrimination occurred is on the employee throughout the case.[59]

One can also prove disparate treatment indirecty through statistics.[60] The rationale is that where there is a pattern and practice of exclusion of qualified candidates on the basis of a prohibited characteristic (e.g., race), the employer can legitimately be held to have an improper intent. That is, the inference that such an employer approved of or at least accepted the

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59. Patterson v. McLean Credit Union, 491 U.S. 164, 186-87 (1989); *Burdine*, 450 U.S. at 252-53; *McDonnell Douglas*, 411 U.S. at 802. In one aberrant case, St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2748 (1993), the Supreme Court held that a claimant could lose the case despite meeting his or her rebuttal burden of proving that the employer's proffered reason was a pretext. The Court held that although the reason given by the employer was not the real reason, the finder of fact could still find that the burden of persuasion with respect to the whole case had not been met. Thus an employee can lose a case where (1) the employee meets the burden of producing evidence that he or she has been treated differently; (2) the employer merely produces any evidence of a legitimate, non-discriminatory business reason; and (3) the employee proves that the employer lied to the court. Meeting the initial burden of production permits an inference of disparate treatment, but, in the face of the employer's production of any evidence of an excuse for the treatment, even a pretextual excuse, the trier of fact can still find a failure of proof of discrimination. *Id.*

Comparison to a situation in which the employer fails to produce any evidence of a legitimate, non-discriminatory reason helps illuminate the rather bizarre result in *St. Mary's Honor Center*. If the employer does not present any evidence, the finder of fact could still decide that despite the claimant having met his burden of *producing* evidence on each element of the prima facie case, the claimant did not *persuade* the finder of fact that the evidence shows that intentional discrimination was more likely than not the reason for the employer's action. But in cases where an employer presents a reason which the finder of facts disbelieves and finds pretextual, then there is logically only one remaining reason for the employment decision—the improper motive. This situation is also to be distinguished from those where the finder of fact cannot choose between the employer's explanation and the claim of pretext; such cases are run-of-the-mill instances of claimants failing to meet their burden of persuading by a preponderance of the evidence that the employer acted improperly. The *St. Mary's Honor Center* case is almost certainly an anomalous one.

60. International Bhd. of Teamsters v. United States, 431 U.S. 324, 340 n.20 (1977) ("Since passage of the Civil Rights Act of 1964, the courts have frequently relied upon statistical evidence to prove a violation. . . . In many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer."); *see also* Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307-08 (1977); EEOC v. O & G Wire Forms Specialty Co., 38 F.3d 872 (7th Cir. 1994).

discriminatory result is strong enough to impose liability for intentional discrimination.

b. Disparate Impact

The second main theory for proving employment discrimination, disparate impact, is more controversial than the disparate treatment theory because an employer can be found liable for seemingly neutral practices which have a discriminatory effect on grounds prohibited by the statute. Part of the fear is that this theory may induce employers to improperly use quotas, despite the explicit statutory prohibition of using quotas,[61] in order to avoid a claim that some unknown practice has a disparate impact. Targeting employment policies which have the *effect* of discriminating illegally, not just employment policies which are *intended* to discriminate on unlawful grounds, places an affirmative duty on employers to avoid discrimination. In contrast, under a disparate treatment theory, the employer is under a negative duty to not intentionally discriminate against an employee on improper grounds.

Like disparate treatment claims, disparate impact claims use a burden-shifting approach to proving the claims. However, both (i) that which must be proven and (ii) the burdens which are shifted (production and persuasion) differ. The specific means of proving the claim has varied in recent years as a result of court decisions and Congressional amendments to the statute. Until 1989 a claimant in a disparate impact case could establish a prima facie case by presenting evidence that facially neutral employment practices or policies had a significant adverse impact on a protected class.[62] The challenged employment practices did not need to be isolated, identified, and specifically tied to the discriminatory impact; proof of questionable employment practices and a general proof of the causal link was enough.[63] In practice the adverse impact was often proven by statistical evidence that a particular protected group was under-represented on the job in light of the relative availability of qualified people in the applicant pool in the relevant geographic area.[64]

Once the claimant set forth his or her prima facie case, the burden of production shifted to the employer. However, rather than proving a legitimate non-discriminatory reason for the employment decision (as in

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61. 42 U.S.C. § 2000e-2(g) (1988).

62. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (holding that facially-neutral ability test which operated to exclude minority employees from promotions, and which was unrelated to job performance, is prohibited by Title VII).

63. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 672 (1989) (Stevens, J., dissenting).

64. *See Griggs*, 401 U.S. at 430-32.

disparate treatment cases), the employer was required to justify the challenged employment practices by showing that the practice had a manifest relationship to the employment position in question and that the practice was justified by business necessity.[65]

Next, the employee, as in disparate treatment cases, was given the opportunity to refute the employer's defense. However, rather than showing that the defense was a pretext for discrimination, the claimant's burden was to show that other non-discriminatory practices would satisfy the employee's interests.[66] The law recognized that even modestly sophisticated businesses seeking to discriminate could easily develop some seemingly neutral screening test to function as basis for discrimination; the courts simply would not allow such a subterfuge to work. In fact, under the disparate impact theory, the motivation of the business is not relevant and even if the business was not seeking to use a test as a subterfuge, a test with a discriminatory impact is still subject to challenge.

Unlike the employer's burden in disparate treatment cases, which was merely a burden of production, the business necessity defense placed the risk of non-persuasion on employers so that employers had to prove that the qualification had a significant relationship to the particular employment position.[67] The employer's burden was more than trivial; mere assertion that a requirement applied to all employees for the position on an equal, non-discriminatory basis was not enough. Indeed, the core part of disparate impact cases typically surrounded the business necessity issue. As stated in *Griggs*, "[t]he touchstone is business necessity."[68] In one post-*Griggs* decision the Supreme Court held that the job requirement had to be "essential to job performance."[69] Several other cases noted that the otherwise neutral requirement had to have "a manifest relationship to the employment."[70] In short, the putative business requirement had to be truly necessary for the business to conduct its business, not merely convenient.[71]

In 1989 the Supreme Court dramatically narrowed the availability of the disparate impact theory by requiring not only that the claimant prove the imbalance between the workforce and the qualified applicant pool and

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65. Connecticut v. Teal, 457 U.S. 440, 446-47 (1982); *Griggs*, 401 U.S. at 432.

66. Albermarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

67. *Griggs*, 401 U.S. at 432.

68. *Id.* at 431.

69. Dothard v. Rawlinson, 433 U.S. 321, 331 (1977) (height and weight requirements for prison guards not essential for job performance).

70. *Teal*, 457 U.S. at 446; *Griggs*, 401 U.S. at 432; *see Moody*, 422 U.S. at 425 (employer's burden to prove its "tests are 'job related'").

71. *See Dothard*, 433 U.S. at 331-32.

prove in general the suspect employment practices, but also that the employee identify and prove a specific hiring practice which directly caused the imbalance.[72] The claimant was required to discover and prove precisely how the discrimination occurred by isolating the specific factor or factors which led to the discriminatory impact. That is, among the manifold factors which led to the employment decision, the employee had the burden of identifying which one caused the wrongful effect. Except in the clearest cases, such a burden would be almost insurmountable. A determined and modestly clever employer could all too easily avoid liability simply by adopting complex set of requirements and criteria for employment which included a large degree of subjective elements. As scofflaw employers became more sophisticated, the law became less favorable to the injured supplicant.

Wards Cove went even further to eviscerate the disparate impact theory in procedural and substantive ways. Procedurally, the employer's burden was reduced from needing to persuade the finder of fact that the requirement or practice was manifestly job-related, and was necessary to the operation of the business, to a burden of justifying its employment practices merely by producing evidence that "a challenged practice serves, in a significant way, the legitimate employment goals of the employer."[73] Substantively, the business necessity defense was reduced to one of mere business justification on any non-insubstantial grounds.[74] "Necessity" became a "legitimate goal[]" and "manifestly or significantly related to job performance" became "serves, in a significant way . . . ."[75] The requirement did not need to be necessary for the business; the requirement merely had to serve a legitimate goal, any legitimate goal. The change from a burden of persuasion to one of mere production had the effect of forcing the claimant to prove a negative, that is, to prove the *lack* of a business justification, as soon as the employer presented any evidence of its justifications.

The Supreme Court reduced the availability of the disparate impact claim even further by changing the requirements of the claimant's rebuttal case regarding proof that the putative justification was pretextual.[76] Under pre-*Wards Cove* disparate impact law, the key method of proving pretext was to show that other non-discriminatory practices which would meet the employers' goals existed, but had not been adopted. However, under *Wards Cove* the employee was required to show not only that the

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72. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 650 (1989).

73. *Id.* at 659.

74. *Id.* at 658.

75. *Id.* at 659-61.

76. *Id.* at 660-61.

non-discriminatory practices would be effective, but also that they would "be equally effective as [the employers'] chosen hiring procedures in achieving [the employers'] legitimate employment goals."[77] In evaluating the effectiveness of the alternative policies, "the cost or other burdens of proposed alternative selection devices are relevant."[78] The claimant was required not just to prove an effective, viable alternative, but that the alternative would be just as effective and just as inexpensive.

In 1989, Congress set to work to overturn *Wards Cove* and a number of other Supreme Court cases in the area of civil rights.[79] On November 21, 1991, after two years of rancorous wrangling between the Democratic Congress and Republican President, Congress passed and President Bush signed, the Civil Rights Act of 1991.[80] One of the specific purposes of the Act as stated in the Act itself was "to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in Griggs v. Duke Power Co., and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio."[81] Another express purpose was to recognize explicitly the validity of and to codify the process of proving disparate impact claims[82] which had been, until the 1991 Act, merely the result of shifting court interpretations of the Civil Rights Act of 1964.

The 1991 Act amends Title VII by adding a comprehensive new subsection regulating disparate impact claims.[83] Basically, the Act restored the law to the pre-*Wards Cove* standards and burden shifting process, though exactly how it did so is more than a little torturous. Furthermore, some of the differences from prior law may or may not be substantive, depending upon how the courts implement them.

Under new 42 U.S.C. § 2000e-2(k), an employee can prove a prima facie case by demonstrating[84] either that a particular employment practice has caused a disparate impact on employment of members of the protected group to which the claimant belongs, or that the employer's decision-making process cannot be separated for analysis with the consequence that the claimant can treat the decision-making process as a single employment

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77. *Id.* at 661.

78. *Id.* (quoting Watson v. Fort Worth Bank & Trust Co., 487 U.S. 977, 998 (1988)).

79. In 1990, Congress enacted legislation to modify several of the 1989 holdings of the Supreme Court, but President Bush vetoed it.

80. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

81. *Id.* § 3(2).

82. *Id.* § 3(3).

83. *Id.* § 105(2) (amending 42 U.S.C. § 2000e-2 by adding subsection (k)).

84. "Demonstrate" is a term of art under the act and is defined to mean "meet[] the burdens of production and persuasion." 42 U.S.C. § 2000e(m) (Supp. V 1993).

practice.[85] If the employee establishes his prima facie case, the burden shifts to the employer to demonstrate "that the challenged practice is job related for the position in question and consistent with business necessity."[86] Significantly, the statute does not define "job related" and "business necessity" other than to refer to the law prior to *Wards Cove*.[87] Whether the courts will latch onto the phrase "consistent with" as a means of reducing the seriousness of the business necessity term remains to be seen.

The Act also allows a disparate impact claim to be proven using the pre-*Wards Cove* "alternative employment practice" theory. In essence the employee can overcome an employer's proof of job-relatedness and business necessity by proving pretext, that is, by proving that an alternative policy or practice could be adopted which would accomplish the same goal and that the employer refuses to adopt it.[88] This provision also explicitly articulates the intent of Congress that the law be returned to its pre-*Wards Cove* state with the additional consequence that the employee need not prove that the alternative would be equally effective and economical; he or she just needs to prove that it would accomplish the employer's goal.

c. Hostile Work Environment

The third main theory for proving employment discrimination cases is based on employer or co-employee harassment which creates a hostile or abusive work environment. As noted above, analytically these cases are a subset of a disparate treatment claim because the employee is claiming that the employer has treated the employee differently than other employees with respect to the work conditions experienced by that employee. That is, by allowing co-employees to harass the claimant or by permitting the continuation of a work environment hostile to a person with the claimant's protected characteristics, i.e., gender, race, national origin, etc., the employer has treated the claimant differently in an unlawful manner. Nonetheless, the harassment claim is sufficiently distinct from the other disparate treatment cases to warrant its own category.

The harassment theory was fully recognized in 1986 when the Supreme Court held that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or

85. *Id.* § 2000e-2(k)(1)(A)(i), (k)(1)(B)(i) (Supp. V 1993).

86. *Id.* § 2000e-2(k)(1)(A)(i).

87. *Id.* § 2000e-2(k)(1)(A)(i), (k)(1)(c).

88. *Id.* § 2000e-2(k)(1)(A)(ii) & (k)(1)(c). The opacity and convoluted structure of the Act can only be understood as the result of necessity borne of grudging compromise between Congress and the President.

abusive work environment."[89] In so holding, the Court cited with approval older lower court cases imposing liability for hostile environments created by harassment on the basis of race,[90] national origin,[91] and religion.[92] Other federal courts had previously explicitly approved such claims.[93]

In general the harassment must be severe or pervasive.[94] A few discrete episodes of hurtful language or "practical jokes" are not sufficient. Harassment is to be determined from the totality of the circumstances.[95] To prove religious discrimination on the basis of a hostile environment, an employee must establish: (1) that the employee suffered intentional discrimination because of his religion; (2) that the discriminatory conduct was pervasive and regular; (3) that the discrimination detrimentally affected the plaintiff's terms and conditions of employment; and (4) that the discrimination would detrimentally affect a reasonable person of the same religion in that position.[96]

The Equal Employment Opportunity Commission (EEOC) has issued regulations governing harassment based on national origin[97] and gender.[98] The EEOC recently attempted to develop and issue guidelines for harassment on all of the statutorily prohibited grounds, including religion, but was forced to withdraw them in large part because of the

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89. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66 (1986).

90. Firefighters Inst. for Racial Equality v. City of St. Louis, 549 F.2d 506, 514-15 (8th Cir.), *cert. denied*, 434 U.S. 819 (1977).

91. Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87 (8th Cir. 1977).

92. Compston v. Borden, Inc., 424 F. Supp. 157 (S.D. Ohio 1976).

93. *E.g.*, Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971) (permitting claim based on discrimination due to national origin); Weiss v. United States, 595 F. Supp. 1050 (E.D. Va. 1984) (allowing a status-based claim arising from religious harassment).

94. *See* Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370 (1993); Dillon v. Frank, 1992 WL 5436 (6th Cir., Jan. 15, 1992); Carrero v. New York City Hous. Auth., 890 F.2d 569, 577 (2d Cir. 1989); Lipsett v. University of P.R., 864 F.2d 881, 897-98 (1st Cir. 1988); Hicks v. Gates Rubber Co., 833 F.2d 1406, 1413 (10th Cir. 1987); Scott v. Sears, Roebuck & Co., 798 F.2d 210, 212-13 (7th Cir. 1986).

95. *Harris*, 114 S. Ct. at 370.

96. *See id.*; *Meritor Sav. Bank*, 477 U.S. at 67; Goldberg v. City of Phila., No. CIV.A.91-7575, 1994 WL 313030 (E.D. Pa., June 29, 1994).

97. EEOC Guidelines on Discrimination Because of National Origin, 29 C.F.R. § 1606.8 (1992).

98. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (1992).

problem of treating religion the same as status-based discrimination in the harassment-claim setting.[99]

The harassment which causes the hostile environment must affect a "term, condition, or privilege"[100] of employment. As noted by the Court:

> the language of Title VII is not limited to "economic" or "tangible" discrimination. The phrase "terms, conditions, or privileges of employment" evinces a Congressional intent "'to strike at the entire spectrum of disparate treatment of men and women'" in employment.[101]

The Court emphasized that not all harassment is severe enough to support a Title VII claim; employers need not provide pristine work environments. Occasional offensive comments by coworkers are not enough; the harassment must be "sufficiently severe or pervasive 'to alter the condition of [the victim's] employment and create an abusive working environment.'"[102] The claims contemplated by the Court and the successful claims presented to various lower courts have tended to involve egregious, pointed comments and epithets and practical jokes which continued for a significant period of time. The incidents noted in those cases tended to constitute both the proof of and the content of the abusive environment. No showing of intent by the employer to create such an environment was needed. (Naturally if an employer intentionally created a racially charged environment or sexually offensive atmosphere, such actions would now be per se violations of the law.) Though the effect on the claimant is supposed to be significant before a claim succeeds, as a practical matter, a specific improper animus lowers the threshold and makes the claim easy to decide.

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99. EEOC Proposed Rules, Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability, 58 Fed. Reg. 51266 (1993) (intended to have been codified at 29 C.F.R. § 1609). *See* David E. Anderson, *A 2nd Look at Faith on the Job: Foes of EEOC Plan Hail Vote for Revision*, WASH. POST, July 7, 1994, at B7.

100. 42 U.S.C. § 2000e-2(a)(1) (1988).

101. *Meritor*, 477 U.S. at 64 (quoting Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971))).

102. *Meritor*, 477 U.S. at 67 (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

d. Accommodation of Religious Needs

The fourth theory relevant here—the duty of employers to accommodate their employees' religious needs—applies only with respect to religious-based discrimination. The original wording of the Civil Rights Act of 1964 prohibited employment discrimination on the basis of religion without defining religion and without further clarification of what religious discrimination entailed.[103] Although the legislative history is not helpful on this point, it is probable that religion was originally seen as a status, like race or sex, and the problem of discrimination based upon belief or religious needs was not well thought through.

In 1970 the Sixth Circuit interpreted religious discrimination in employment to require merely treating employees the same without regard to religion.[104] The Sixth Circuit noted that since the requirement that employees work on Sundays was generally applicable to all employees regardless of the employees' religious beliefs, it did not discriminate against any employee's religion.[105] Consequently, the court held that an employer had no duty under Title VII to accommodate an employee's religious prohibition against working on Sundays.[106] The United States Supreme Court affirmed the holding by an equally divided court.[107] This holding had the potential to limit a Title VII religious discrimination claim to situations of discrimination based only on religious affiliation or status (and possibly religious beliefs) to the exclusion of claims based on practice. Essentially, employers had a negative duty of not discriminating against employees based on religion, but no affirmative duty to accommodate the religious needs of employees. Indeed, the employer who accommodated an employee's particular religious needs would be discriminating in favor of that employee and this was deemed to be just as prohibited as discrimination against an employee.

In response to *Dewey v. Reynolds Metals Company*, Congress amended Title VII to reach not only religious affiliation or status, but also beliefs and practices by adding the following definition of religion to the Act:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer

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103. 42 U.S.C. § 2000e-2 (1966).

104. Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971).

105. *Id.* at 330.

106. *Id.*

107. Dewey v. Reynolds Metals Co., 402 U.S. 689, 689 (1971).

> 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.[108]

This amendment was the first legal recognition that religion-based cases needed to be treated differently from other cases. The normal duty under Title VII is not to treat employees differently in an adverse manner based on the listed characteristics. But, as a result of the amendment, an employer has an affirmative duty to treat certain employees differently, and some would argue favorably, by accommodating their religious needs. Thus an employer has a duty to discriminate in favor of certain employees by granting an employee special treatment because of the employee's religious practices, that is, to accommodate the employee's special religious needs.

The distinction between the normal requirements of Title VII and this new duty is not merely the difference between essentially negative duties (do not treat differently) and an essentially affirmative duty (take steps to avoid discriminatory effects); the distinction is that the employer must, in certain cases, actually discriminate on the basis of a protected characteristic. The duty to provide a work environment free of harassment effectively places on the employer a duty to take affirmative steps to prevent and if discovered, eradicate, such harassment.[109] Similarly, the disparate impact theory in effect imposes on employers an affirmative duty of vigilance not to have practices which have a discriminatory effect. However, neither of these duties require an employer to act in favor of any person or group. Instead, they merely require an employer to refrain from acting to the detriment of a protected group or require an employer to take steps to see that no protected group is illegally disadvantaged.

The difference drawn above is not one of divergence of the aims and purposes of Title VII, but of the means to accomplish those ends. The underlying principles are the same, but the rules are different. For example, accommodating a sabbatarian furthers the aims of equality and non-discrimination by permitting a sabbatarian access to jobs which would otherwise not be available to him or her, thereby placing him or her on an equal footing with other applicants. The religious accommodation

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108. 42 U.S.C. § 2000e(j) (Supp. V 1993).

109. *Id.* Treating the failure to accommodate as a type of disparate treatment does not change the essential fact that the statutory prohibition of discrimination based on race or sex does not contain such a requirement, though one could argue that failure to accommodate the special needs of a pregnant woman would constitute disparate treatment based on sex.

approach is fundamentally consistent in another respect as well: all employees are treated equally with respect to non-discrimination and the duty to accommodate. Thus on the level of abstraction of underlying principles, the legal rules are in accord with each other.

Cases based on the duty to accommodate religious belief and conduct, as distinguished from those based purely on religious status, have further refined the method of proving religious employment discrimination.[110] To establish a prima facie accommodation case the claimant must show (1) that an employment policy conflicts with an employee's religious practice; (2) that the religious practice is required by the employee's bona fide religious belief; (3) that the employer has been made aware of the conflict; and (4) that the employee has been refused employment or otherwise suffered adverse consequences because of his noncompliance with the employer's requirement.[111]

Once the employee establishes these elements, the burden shifts to the employer to show that it "made good faith efforts to accommodate [the employee's] religious beliefs and, if those efforts were unsuccessful, to demonstrate that [it was] unable reasonably to accommodate [the employee's] beliefs without undue hardship."[112] Under the express language of the statute, the hardship must be to the "conduct of the employer's business," not to the exercise of the employer's faith.[113] The extent of hardship to the business that must be shown is minimal. More than mere inconvenience or some modest hardship is required—the hardship must be "undue"—but the hardship to the employer need not be onerous.[114] The test is whether the employer would suffer "more than a *de minimis* cost" by accommodation.[115] Despite the minimal showing required by an employer to defeat an accommodation claim, the accommodation requirement does impose some burden on an employer and

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110. *E.g.*, EEOC v. Townley Eng'g and Mfg. Co., 859 F.2d 610, 614 n.5 (9th Cir. 1988). Although the courts refer to it as a three-part test, the first element is actually two: (1) there must be a conflict between the employment policy and the employee's religious practices, and (2) the employee must show that the religious practice is based upon a bona fide religious belief. *See* 29 C.F.R. § 1605.2 (1995).

111. *See Townley*, 859 F.2d at 614 n.5; Turpen v. Missouri-Kansas-Texas R.R., 736 F.2d 1022 (5th Cir. 1984); Brown v. General Motors Corp., 601 F.2d 956 (8th Cir. 1979); Anderson v. General Dynamics Convair Aerospace Div., 589 F.2d 397, 401 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979); *see also* EEOC Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.2 (1980).

112. *Anderson*, 589 F.2d at 401; *see also* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 74 (1977).

113. 42 U.S.C. § 2000e(j) (Supp. V 1993).

114. *Trans World Airlines*, 432 U.S. at 84.

115. *Id.*

does favor the employee's rights over the employer's rights, at least to the extent of prohibiting utterly arbitrary discrimination against any person based solely on the employee's religious beliefs and practices.[116]

e. Defenses

The primary defenses against discrimination claims are (1) that the employer denies wrong-doing;[117] (2) that the action taken was a business necessity (for disparate impact claims); (3) that the employer's attempted accommodation was reasonable (for religious accommodation claims); and (4) that the disputed employment requirement is a bona fide occupational qualification (BFOQ). The defense of denial is self-explanatory.[118] The current formulations of the defenses of business necessity[119] for disparate impact claims and of reasonable accommodation[120] for religious accommodation claims were outlined above. The defense of bona fide occupational requirement remains to be examined briefly.

The defense of a BFOQ originates in the statute itself.[121] Under the BFOQ defense an employer may consider religion, sex, or national origin (but not race or color) when one of those characteristics is necessary for proper performance of the job. This defense has been treated as "an extremely narrow exception to the general prohibition on discrimination."[122] Examples of the proper use of the BFOQ doctrine include a requirement that Catholic priests be Catholic men, and can

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116. EEOC Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.2(e) (1995).

117. Although this defense is simply a denial of the plaintiff's claims, the 1991 Civil Rights Act provides that "if the [employer] demonstrates that a specific employment practice does not cause the disparate impact, the [employer] shall not be required to demonstrate that such practice is required by business necessity." 42 U.S.C. § 2000e-2(k)(1)(B)(ii) (Supp. V 1993). This curious provision seems to imply that the employer could have the burden of proving that the challenged practice does not cause the discrimination, despite the clarity of placing the overall burden of proving discrimination on the claimant.

118. *See supra* note 59 (discussing an unusual twist of what ultimately was a denial type of defense turning on the burden of persuasion on the prima facie case not being met by the claimant, despite the claimant proving the employer's proffered reason was pretextual).

119. *See supra* text accompanying notes 61-66. The defense of business necessity does not exist for disparate treatment claims. 42 U.S.C. § 2000e-2(k)(2) (Supp. V. 1993).

120. *See supra* text accompanying notes 103-07.

121. 42 U.S.C. § 2000e-2(e)(1) (Supp. V. 1993).

122. Dothard v. Rawlinson, 433 U.S. 321, 334 (1977).

extend to such positions as teachers at religiously affiliated schools.[123] Requiring locker room attendants to be the same sex as the users of the locker is a BFOQ,[124] although requiring journalists who conduct post-game interviews in locker rooms to be male is not.[125] There are very few occupations where religion can be treated as a BFOQ under the current law.

2. Uniqueness of Employment Discrimination on the Basis of Religion

As noted above, discrimination based on religion has some important similarities to, but even more critical differences from, employment discrimination based on race, sex, color, national origin, age and disability. Some of the consequences of these distinctions have been specifically addressed by statute while others have not been fully dealt with either by statute or case law. Two such distinctions, the accommodation claim and religious qualifications as a BFOQ, were discussed above. The balance of this section will more closely consider the uniqueness of religious discrimination both in concept and in practice.

The central similarity between employment discrimination based on religion and other employment discrimination is that some religious discrimination can be based on the status of being identified with a particular religion or sect. Such religious discrimination often is very close kin to other status-based discrimination, i.e., discrimination based on sex, race or national origin. In most commercial settings the standard disparate treatment and harassment theories present no particularly troublesome problems when applied to discrimination based on an employee's religious affiliation or status.[126] However, for some

123. *See* Pime v. Loyola Univ. of Chicago, 803 F.2d 351 (7th Cir. 1986) (holding Jesuit university could limit hiring in certain positions to members of that order); *cf.* EEOC v. Kamehameha Schools/Bishop Estate, 990 F.2d 458 (9th Cir. 1993) (holding a school could not legally honor a conditional bequest which required hiring exclusively Protestant teachers).

124. *See* Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1087 (8th Cir. 1980), *cert. denied*, 466 U.S. 966 (1980).

125. *See* MARIAH BURTON NELSON, THE STRONGER WOMEN GET, THE MORE MEN LOVE FOOTBALL: SEXISM AND THE AMERICAN CULTURE OF SPORTS 228-58 (1994).

126. Accommodation theory does not really apply to status-based discrimination since, by definition, such discrimination is based solely on status, not on the need to accommodate any religious needs. Of course, in practice-based claims, the cases would not be so pure, and a Jew requiring a day off for Chanukah would arguably have both a status-based claim and a practice-based accommodation claim.

religious employers running commercial businesses even these status-based claims raise problems of conflicting religious rights.[127]

A potentially troublesome aspect of status-based discrimination claims relates to the applicability of a disparate impact theory when that theory depends upon statistics. A statistical approach does not work effectively where there are many protected groups. Where many discrete groups exist, how does one define the relevant group to assess whether there has been a statistically significant disparate impact on that group?[128] Does one look to broad religious categories or to denominational affiliation? Does one use a quota system, e.g., so many employees must be Catholic, Lutheran, Presbyterian, Baptist, Anglican, Eastern Orthodox, Orthodox Jew, Conservative Jew, Reform Jew, Sunni Muslim, Shia Muslim, Sikh, Evangelical Christian, Hindu, Buddhist, New Age, Wiccan, Secular Humanist, agnostic, and atheist?[129] The point is that this approach is less useful in religion claims than in some other types of claims.

Another important distinction between religious discrimination and other types is that religious discrimination may be based not on religious affiliation or status per se, but rather on the employee's religious practices. An employer who does not discriminate against present or prospective employees based upon their religious affiliation could still discriminate against them based upon inconvenient (to the employer) religious practices. Even a generally applicable, neutral job requirement such as working on Sunday could in effect prohibit sabbatarians from being employed.[130] Similarly, a restaurant which requires men to have short hair, which requires men to be clean-shaven, and which prohibits headgear would not hire Sikhs or Orthodox Jews.[131] In its pure form, this sort of discrimination is not based on any antipathy toward the beliefs or affiliation of the employee; rather it is simply the result of a failure to accommodate religious practices. This sort of discrimination is a clear target of the duty to accommodate.

Another and more profound distinction between status-based discrimination (race, color, sex, national origin, age, disability) and ability-based discrimination (age, disability) on the one hand and religious discrimination on the other hand is that religious discrimination can occur solely because of an incompatibility of constitutionally protected beliefs or ideas. For example, a Christian employer could refuse to promote a Christian employee based on theological disputes on the inerrancy of the

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127. *See infra* part IV.B.

128. The potential problem also exists with respect to national origin.

129. *See infra* part IV.A.

130. *See* Dewey v. Reynolds Metals Co., 402 U.S. 689 (1971).

131. *See* EEOC v. Sambo's of Ga., Inc., 530 F. Supp. 86, 88 (N.D. Ga. 1981).

Bible, on the propriety of divorce, on the authority of the Pope, etc. This sort of discrimination is based not upon an unavoidable status which is an accident of birth such as race, color, sex, or national origin, or the result of natural processes such as aging or the result of disability whether congenital or the result of some post-natal illness or trauma; it is based on choice. That is, people can choose what to believe and can change their beliefs.

Care must be taken to understand the distinction between status-based discrimination and belief-based discrimination rooted in the individual ability to choose and to avoid certain specious similarities. For example, a supervisor may exclude women as a group from being mechanics and may assert that the decision is based on his "belief" that women belong in the home, not doing a dirty, technical job. But such an action ultimately is not based on a belief per se nor based on a difference in belief between employer and employee, but rather, it is based on an unavoidable status: sex. One may believe that a particular attribute such as sex, race, or national origin may carry with it certain limitations, but the personal belief and the employment action are ultimately based on a birthright status, not on chosen ideas. In such cases the employer's personal beliefs are not being disciplined; rather, it is actions based on those beliefs that are being sanctioned. The supervisor can continue to believe what he likes, but cannot act on those beliefs. In contrast, discrimination based on religious beliefs is discrimination based on a difference of opinion between the employer and the employee, not on the difference in religious status. The fact that one's beliefs about another's status is the psychologically motivating force for the action does not transmute status-based discrimination into belief-based discrimination.

Conversely, since the nature of religious belief is such that it ultimately drives both practices and religious affiliation, any religious discrimination is, in the final analysis, based on belief. But focusing on this underlying unity distorts the very real distinctions among discrimination based on religious status, on religious practices, and on religious beliefs. Employment actions taken on the basis of differences in philosophy, differences in approach to life, and differences in religious belief are qualitatively different from those taken on mere status and may be easier to justify. Indeed, all employers have some value system, some guiding principles by which they run their businesses, and they have some right to pursue these ends as well.[132]

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132. *See* Underkuffler, *supra* note 17 (offering a sophisticated discussion of the futility of pursuing policy to create value-neutral work environment).

B. *Freedom of Religion*

The First Amendment declares that Congress[133] "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."[134] Freedom of religion has two parts: (1) the establishment side, the freedom from compulsion to affirm or practice or support any particular religion or religion at all,[135] and (2) the free exercise side, the freedom to believe, and within limits, to practice, one's own religion or nonreligion.[136]

This section describes the basic contours of the current law of freedom of religion and casts those contours onto a theoretical and historical landscape. This section begins with a nod to the intractable problem of defining what religion is. Then *Reynolds v. United States*[137] and some of the historical context surrounding the genesis of the religion clauses are outlined. This section concludes by extracting from some of the major religious freedom cases the relevant principles of accommodation and neutrality (or as I generally broaden it, equality) which underlie decisional rules such as the least restrictive alternative test. Other ideas used in religious freedom analysis such as separation, tolerance, and coercion are highlighted in the cases.

1. What Is Religion?

Just what is to be considered religious for first amendment purposes is one of the more vexatious religion-related problems which has plagued the Court.[138] In various contexts the Court has wrestled with this problem with only limited success. Many commentators have sought to develop intellectually honest, fair, consistent, and practical definitions capable of generally consistent and fair application.[139] In the main, they

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133. The restriction also applies to the states through the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

134. U.S. CONST. amend. I.

135. *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (describing the language of the Establishment Clause and its function).

136. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2222 (1993) (holding laws restricting practice of Santeria religion unconstitutional).

137. 98 U.S. 145 (1878).

138. For additional discussion of this problem see Underkuffler-Freund, *supra* note 4, at 846-73.

139. *See, e.g.*, Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579 (1982); Carl H. Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?*, 70 NOTRE DAME L. REV. 581, 610, 612-13 (1995); Donald A. Giannella, *Religious Liberty, Nonestablishment, and*

have failed.[140] Nonetheless, some working definition is required if for no other reason than cases presented to the Court need to be decided.[141]

In its earlier jurisprudence the Supreme Court viewed religion theistically. For example, in 1890 the court wrote that "[t]he term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."[142] Later, in 1931, the Court stated that

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Doctrinal Development: Part I. The Religious Liberty Guarantee, 80 HARV. L. REV. 1381 (1967); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753 (1984); Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233 (1989); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 172-75 (1992); Timothy L. Hall, Note, *The Sacred and the Profane: A First Amendment Definition of Religion*, 61 TEX. L. REV. 139, 143 (1982). *Cf.* Christopher L. Eisgruber, *Madison's Wager: Religious Liberty in the Constitutional Order*, 89 NW. U. L. REV. 347, 352 (1995) (taking self-described "definitional agnosticism" approach to problem). As noted by Professor Underkuffler-Freund, "[t]he fundamental problem in the Court's [separationist] approach has been recognized by the Court itself: that the religious and the secular, as a theoretical and practical matter, are hopelessly intertwined." Underkuffler-Freund, *supra* note 4, at 873 (citing Lynch v. Donnelly, 465 U.S. 668, 673-74 (1984)).

140. The efforts made to develop a definition of religion have been critiqued. *See, e.g.*, Anand Agneshwar, *Rediscovering God in the Constitution*, 67 N.Y.U. L. REV. 295 (1992); George C. Freeman, III, *The Misguided Search for the Constitutional Definition of "Religion,"* 71 GEO. L.J. 1519 (1983); Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*,73 TEX. L. REV. 209, 231 (1994) ("[p]robably no such definition [of religion] is possible").

141. Working definitions are rarely found in court decisions. More frequently courts use the term "religion" without further definition. This omission is caused in part because the religiousness of the questioned conduct is not often at issue. *See, e.g.*, Rosenberger v. Rector and Visitors of the Univ. of Va., 115 S. Ct. 2510 (1995). Frankfurter warned of the one problem with defining religion in his dissent in West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 658 (1943), in which he noted that when the Court decides what is and what is not religion, it treads into the minefield of establishing religion. Stephen Carter used a working definition of religion as "a tradition of group worship (as against individual metaphysic) that presupposes the existence of a sentence beyond the human and capable of acting outside the observed principles and limitations of natural science, and, further, a tradition that makes demands of some kind on its adherents." STEPHEN L. CARTER, CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 17 (1993). Another working definition is that which Professor Underkuffler-Freund derives from her examination of the intellectual history of the period around the formation of the Constitution. She defines religion for First Amendment purposes as "the search for transcendent, moral principles." Underkuffler-Freund, *supra* note 4, at 961.

142. Davis v. Beason, 133 U.S. 333, 342 (1890) (upholding laws restricting bigamy and polygamy).

"[t]he essence of religion is belief in a relation to God involving duties superior to those arising from any human relation."[143]

By 1961 the Court held that nonbelievers and believers in non-theistic religions are entitled to First Amendment free exercise protections to the same extent as followers of theistic religions.[144] The Court stated in a now famous footnote that "[a]mong religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others."[145] In effect, freedom of religion means freedom of conscience, not just freedom to choose among various Christian sects.

Four years later the Court struggled with the problem of what is a religion in a statutory context arising out of claims by conscientious objectors to the Vietnam War.[146] A person claiming to be exempt from military service because of his religious beliefs had to establish that his belief was sincere and meaningful and that it "occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God . . . ."[147] While the first part of what the objector needed to establish was simply genuiness, the second part ventured into the land of distinguishing religion from non-religion. The Court expanded on this functional test of religiosity as requiring that the belief be "based upon a power or a being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent."[148] Though at first blush this test seemed to be a throwback to theistic religions, the careful wording of "based upon a

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143. United States v. Macintosh, 283 U.S. 605, 633-34 (1931) (Hughes, C.J., dissenting) (challenging the Court's decision to deny naturalization to conscientious objector).

144. Torcaso v. Watkins, 367 U.S. 488 (1961) (denying the constitutionality of state oath of office requiring declaration of belief in God).

145. *Id.* at 495 n.11.

146. Since the Court was interpreting a statute, extension of the definition used by the Court in the conscientious objector cases to First Amendment interpretation is problematic. The Court could very well use one definition for constitutional purposes and another for statutory interpretation. Nonetheless, at some point, any definition would be constrained by establishment and free exercise concerns. Too restrictive a definition might be seen as establishment, favoring one religion or one type of religious experience over another and might exclude people claiming spiritual, religious motivations and thus impinge on free exercise. Too broad a definition may include conduct not protected by the First Amendment and may also run into establishment problems. Wisconsin v. Yoder, 406 U.S. 205 (1972). On balance, a broader approach seems more likely to pass muster than a narrower definition. This fascinating issue is not central to this article and need not detain us longer. *See infra* note 158 (regarding EEOC regulation defining religion).

147. United States v. Seeger, 380 U.S. 163, 165-66 (1965).

148. *Id.* at 176.

power . . . or upon a faith" permits inclusion of a broad range of beliefs, including Buddhism and Taoism in particular. The *Reynolds'* conception,[149] built on Jefferson's writings, that what was protected was conscience,[150] was becoming more prevalent, though the Court had still not abandoned the need for some separate conception of religion (as distinct from philosophy or ethical beliefs) however ill-defined.

The Court's tests, howsoever vague and imprecise, still seem to require some element of wonder and power beyond the senses. A purely rational, philosophical ethical system, regardless of how moral and central to a person's life would appear not to meet the definition. This limitation was explicitly articulated in 1972, in *Wisconsin v. Yoder*[151] where the Court considered whether the First Amendment permitted the Amish to not comply with Wisconsin's compulsory education requirements. Writing for the majority, Chief Justice Burger wrote:

> A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a "religious" belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.[152]

Chief Justice Burger went on to distinguish a claim of exemption made on the basis of a "subjective evaluation and rejection of the contemporary secular values accepted by the majority"[153] from those of the Amish who base their claim on religious tenets. The Court used Thoreau's choice to remove to the isolation of Walden Pond as an example of what would not be protectible under the First Amendment religion clauses because his "choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the religion clauses."[154]

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149. Dewey v. Reynolds Metals Co., 429 F.2d. 324 (6th Cir. 1970).

150. This is the exact point made by Professor Underkuffler-Freund. She proposes extending this focus from a definition of religion to being a central, if not the central, tenet of religion clause interpretation. Underkuffler-Freund, *supra* note 4, at 961-88.

151. 406 U.S. 205 (1972).

152. *Id.* at 215-16 (footnote omitted).

153. *Id.* at 216.

154. *Id.*

Because the nature and content of religious beliefs are not subject to external tests of logic or reasonableness, courts have in general limited their inquiry into the genuineness of the professed beliefs without inquiry into the validity of the source or religiosity of them.[155] The "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[156] Nonetheless, there are limits. If an assertion is "bizarre or incredible,"[157] then at some outer limit the assertion may not be protected.

Detecting religions created for pretextual reasons, such as avoiding taxes, is not really the problem; they are easily and regularly exposed.[158] The ability to expose fraud is different from the ability to say what a religion is or is not. One concerns genuineness of belief; the other concerns content.

At present, there is no simple test for determining what is and what is not religious for First Amendment purposes, unless one considers "under all the circumstances" a simple test. The requirements of otherworldliness and a belief in the existence of a god are nearly gone, but vestigial elements of wonder and a place of centrality in one's life like that of Christ to Christians remain.[159] Neither faith in reason nor subjective judgments about what constitutes a good, virtuous life are enough. When pressed, the Court has looked to the existence of an organized group, reliance on a religious text, and a belief that the actions being taken are

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155. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2225 (1993); Frazee v. Illinois Dept. of Employment Sec., 489 U.S. 829, 833 (1989); Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707, 714-15 (1981).

156. *Church of the Lukumi Babalu Aye*, 113 S. Ct. at 2225 (quoting with approval *Thomas*, 450 U.S. at 714).

157. *See Frazee*, 489 U.S. at 834 n.2.

158. *E.g.*, First Libertarian Church v. Commissioner, 74 T.C. 396 (1980).

159. Though not controlling for First Amendment analysis, the EEOC Guidelines contain the following definition of what is meant by a religious practice or belief: "[T]he Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." 29 C.F.R. § 1605.1 (1995). Whether this interpretation would be followed by a court construing a Title VII religious discrimination case, in light of the constitutional religious clause jurisprudence, is problematic. It is not at all clear that Congress intended religion, as used in Title VII, to be broader than the First Amendment. Indeed, the evidence is contrary to the special treatment afforded traditional religious institutions. It also seems unlikely that Congress intended to grant employees unlimited abilities to exempt themselves from business requirements they do not like by simply claiming an ethical or philosophical basis for disagreement. *See supra* note 145 (noting similar problems with respect to the conscientious objector statute).

compelled by external doctrine, not merely chosen for philosophical reasons.[160]

The issue of what is a religion is primarily one of theoretical interest in Title VII religious discrimination cases. In the cases decided to date the legitimacy of the beliefs, both as to genuineness and religiosity, have either been conceded by all sides, or have not been otherwise seriously in question. Although one can conceive of an employee claiming that a secular company's entire business philosophy creates an oppressive, discriminatory environment (for example, one can imagine a socialist employee in a cutthroat capitalist company being very uncomfortable), it is hard to imagine either that the Title VII prohibition of employment discrimination based on religion was intended to protect an employee's assertion of non-religious, value-based discrimination, or that the religion clauses would protect the employer who might wish to assert in its defense to such a claim that its success depends upon establishing one corporate culture or another.[161] Thus, for most employment settings, defining what is a religion is not yet a significant practical problem.

2. A Slice of History

In constitutional religious jurisprudence, after deciding whether the claim is religious rather than philosophical or secular,[162] the focus shifts to defining the scope of free exercise and the limits of the reach of the governmental action based on establishment concerns. Before reviewing the current confused state of affairs, some history is appropriate.

The seminal freedom of religion case is *Reynolds v. United States*.[163] In *Reynolds* a devotee of the Church of Jesus Christ of Latter-Day Saints, commonly known as the Mormon Church, was, as then required by church doctrine for those who could afford it, a polygamist.[164] In its capacity as the legislative body for the territory (Utah was not yet a state), Congress had enacted a law which prohibited polygamy. The issue was whether Congress could so restrict the exercise of religion, i.e., whether Congress could constitutionally restrict religious adherents from taking specific actions where those actions were driven by genuine religious beliefs. The Court concluded that Congress could

160. *E.g.*, Wisconsin v. Yoder, 406 U.S. 205, 216-17 (1972).

161. For a description of a particular corporate culture, see John Burges, *Life After Perot: For EDS the Times Are Great, Even in the Shadow of the Billionaire Founder*, WASH. POST., May 31, 1992, at H1.

162. The Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, does not attempt to define religion. Laycock & Thomas, *supra* note 140.

163. 98 U.S. 145 (1878).

164. *Id.* at 161.

constitutionally prohibit polygamy, regardless of the religious beliefs and practices of any particular sect to the contrary.[165]

In reaching its decision, the Court reviewed the history of the religion clauses, including, in particular, the antecedent legislative fight in Virginia and the positions of Thomas Jefferson and James Madison. The Court concluded that from its inception the free exercise right deprived Congress "of all legislative power over mere opinion, but . . . left [it] free to reach actions which were in violation of social duties or subversive of good order."[166] The Court noted that what the framers were most careful to preserve was freedom of conscience, the freedom to believe whatever one wished.[167] The Court quoted with approval language from the preamble of a Virginia bill establishing freedom of religion that "to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty," and "that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order."[168] The court added that "[i]n these two sentences is found the true distinction between what properly belongs to the church and what to the State."[169]

The Court also quoted at length a letter Jefferson wrote in reply to a letter to him by a committee of the Danbury Baptist Association:

> Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions—I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion or prohibiting the free exercise thereof," thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which

165. *Id.* at 166-67.

166. *Id.* at 164.

167. *Id.*

168. *Id.* at 163 (quoting 12 Hening's Stat. 84).

169. *Id.*

> tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties.[170]

The *Reynolds*' Court treated this statement as authoritative and held that "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."[171] And again: "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[172] The law barring polygamy was a proper, constitutional "law of the organization of society. . . ."[173] The Court refused to follow the path advocated by Reynolds because "[t]o permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."[174]

The *Reynolds* Court thus took a pragmatic approach to resolving the inherent problems of church and state and developed four core guidelines which govern the area even today: Congress cannot coerce or burden belief; it cannot establish religion; but it can regulate conduct and actions for the general good of society; and there is to be a "wall of separation" between the religion and government.[175]

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170. *Id.* at 164 (quoting 8 JEFFERSON'S WORKS 113). Jefferson's prediction of the natural evolution of religion as marching in phase with the development of concepts of social justice and duty has not proven to be the case—not everyone believes in the same natural rights or in the relationship of those rights to social duties. Jefferson's prescience assumed that religious development would proceed along certain rational lines in harmony with the rational precepts of democracy. Such has not been the case. Regular conflicts between religious belief and practice on the one hand and social duty on the other still exist.

171. *Id.*

172. *Id.* at 166.

173. *Id.*

174. *Id.* at 167.

175. The validity of this separationist approach as a matter of historical accuracy has been questioned by Prof. Underkuffler-Freund, who makes a strong case for the proposition that the aim of the religion clauses was to protect freedom of conscience by protecting individuals and groups from burdens and control by government. She argues that the original understanding was that religion should only be interfered with in cases presenting "particular extremity or danger." Underkuffler-Freund, *supra* note 4 at 891-956, 967. Professor Michael W. McConnell also challenges the current approach, though he reaches somewhat different conclusions. He finds that the law should grant exceptions for religious activity from otherwise neutral, generally applicable laws. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1453-55 (1990) [hereinafter McConnell, *Origins*].

The *Reynolds* opinion also speaks to the principles central to my approach. The principle of tolerance for differing opinions was both explicitly stated,[176] though not using the term "tolerance" and implicitly addressed in the Court's review of beliefs that may be held regarding actions which may be proscribed.[177] The Court noted that polygamy, sati (the universally banned practice of a Hindu widow burning herself on her husband's funeral pyre), and human sacrifice all fell within the category of ideas which cannot be proscribed, but the actions taken in furtherance of them can be.[178] These same examples illustrate that the idea of accommodation of practices was inherent in the case, but it was not fully developed using this term. The Court did establish that there was some outer limit to accommodation of practices, which in the *Reynolds* case was polygamy, beyond which free exercise would not shield actions from government regulation or proscription.

As time passed and additional cases came to the Court, the problems of separating conduct from belief and of government infringement on religious conduct became more subtle than the outright banning of polygamy. For example, by 1940, the Free Exercise Clause was explicitly held to limit Congress' ability to infringe or burden religious actions as well as beliefs and speech about those beliefs.[179] The state was not only to tolerate and accommodate religious beliefs, but also had to accommodate religious practices.

The pace of federal development of the jurisprudence of the religion clauses was dramatically spurred by a series of Supreme Court rulings in the 1940's which incorporated into the Fourteenth Amendment the First Amendment guarantees of free exercise[180] and non-establishment,[181] which moved toward the idea of the least restrictive alternative test,[182] and which moved toward the compelling state interest test.[183]

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176. In referring to the defendant's belief that the law ought not to have been enacted, the Court wrote: "[i]t matters not that his belief was a part of his professed religion: it was still belief, and belief only." *Reynolds*, 98 U.S. at 167.

177. *Id.*

178. *Id.* at 166.

179. Cantwell v. Connecticut, 310 U.S. 296, 303-4 (1940).

180. *See id.* at 296.

181. *See* Everson v. Board. of Educ. of the Township of Ewing, 330 U.S. 1 (1947).

182. *Cantwell*, 310 U.S. at 303-4 (holding that a state cannot "unduly infringe" exercise of religion).

183. *See, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943) (noting that religious practice rights are "susceptible [to] restriction only to prevent grave and immediate danger to interests which the State may lawfully protect").

In *Cantwell v. Connecticut*,[184] the Court ruled that the arrest and prosecution of Jehovah's Witnesses for soliciting donations without proper permits impermissibly limited their rights to free exercise of their religion. Because *Cantwell,* like *Reynolds,* articulates many of the tensions which still exist in the area today, I will quote liberally from the opinion. The Court acknowledged the double aspect of the religious freedom guarantee when it wrote:

> On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. No one would contest the proposition that a State may not, by statute, wholly deny the right to preach or to disseminate religious views. Plainly such a previous and absolute restraint would violate the terms of the guarantee. It is equally clear that a State may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment.[185]

Under the Connecticut statute only religious or charitable solicitors were required to obtain permits. The religious nature of the applicant was determined by a low-level administrator. The Court wrote that "[s]uch a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth."[186]

In considering the state's argument that it had an interest in protecting its citizens from fraudulent schemes, the court wrote:

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184. 310 U.S. 296 (1940).

185. *Id.* at 303-4 (footnotes omitted).

186. *Id.* at 305.

> Even the exercise of religion may be at some slight inconvenience in order that the State may protect its citizens from injury. . . .[187] The State is likewise free to regulate the time and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience. But to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.[188]

The Court held that the Jehovah's witness who was convicted of breach of the peace was doing what he was lawfully entitled to do since he "was upon a public street, where he had a right to be, and where he had a right peacefully to impart his views to others."[189]

> [W]e find only an effort to persuade a willing listener to buy a book or to contribute money in the interest of what Cantwell, however misguided others may think him, conceived to be true religion.
>
> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to villification of the men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.
>
> The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds. There are limits to the exercise of these liberties. The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and

187. *Id.* at 306.

188. *Id.* at 306-307.

189. *Id.* at 308.

> other transgressions of those limits the States appropriately may punish.[190]

In *Cantwell*, the principles of tolerance and accommodation, and in a more hidden way, equality, drove the law. The government may restrict exercise by reasonable regulation of time, place, and manner, but the "shield" of the Free Exercise clause is to protect the "unmolested" development of "many types of life, character, opinion, and belief."[191] The reference to events in fascist Germany ("those . . . in the delusion of racial or religious conceit")[192] to illustrate the need for the Court to support the "equal right to exercise" clearly signals both an appeal to equality of treatment and to the premise and promise of tolerance.

The second major case constituting the religion-clauses revolution of the 1940's is *West Virginia State Board of Education v. Barnette*.[193] In *Barnette*, another Jehovah's Witness sought to be exempted from pledging allegiance to the flag. In holding that the Free Exercise Clause required exempting them, the Court wrote: "[these rights] are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect."[194] This formula, obviously borrowed from the then-current "clear and present danger" test of free speech jurisprudence, ultimately became the compelling state interest test.[195]

The principles of tolerance and accommodation are evident in much of the opinion's reasoning. For example, the propriety of accommodation underlies the following analysis by the Court:

> The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior

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190. *Id.* at 310.

191. *Id.*

192. *Id.*

193. 319 U.S. 624 (1943).

194. *Id.* at 639.

195. *See* Wisconsin v. Yoder, 406 U.S. 205, 205 (1972) (holding that a state's interest in universal education is not free from a balancing process when it impinges on other fundamental rights); Sherbert v. Verner, 374 U.S. 398, 403 (1963) (holding South Carolina's Compensation Act, which made a claimant ineligible for benefits if she failed to accept available suitable work, abridged plaintiff's First Amendment freedom because her faith did not allow her to work Saturdays).

> is peaceable and orderly. The sole conflict is between authority and rights of the individual.[196]

Similarly, the principle of tolerance of diversity is expressed in the following passage:

> Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.
>
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[197]

In *United States v. Ballard,*[198] another case of the 1940's revolution, the Court explicitly recognized that freedom of religion really extends to freedom of thought and belief in many guises:

> Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. . . . Men may believe what they cannot prove. . . . Religious experiences which are as real as life to some may be incomprehensible to others.

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196. *Barnette*, 319 U.S. at 630. I would note in passing that the issue considered in this article does involve exactly the sort of intervention by the state to determine "where the rights of one [employer] end and those of another [employee] begin."

197. *Id.* at 641-42.

198. 322 U.S. 78 (1944).

> Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law.[199]

Here again, we see the Court being very careful to accommodate and even to protect beliefs. And once again, working just beneath the surface of the language are the principles of tolerance and of a sort of spiritual equality.

In 1947, in *Everson v. Board of Education of the Township of Ewing*,[200] the Court, as it had in *Reynolds* seventy years earlier, undertook a detailed evaluation of the historical context of the constitutional guarantees of religious freedom.[201] This time, the Court was faced with an establishment issue: Was the Establishment Clause violated by the state's reimbursement to parents of costs of transporting their children to religious schools on the same terms as it was provided to public schools? Ultimately, the Court held in a 5-4 decision that the State of New Jersey could reimburse parents for the cost of bussing students to parochial schools.[202]

In reaching its decision, the majority took pains to summarize the social conditions, starting with persecutions in Europe, which led to the development of religious freedom guarantees. The Court noted that colonial charters required the establishment of churches,[203] and that in keeping with the practice in Europe, including Great Britain, the colonies taxed citizens to pay minister's salaries and to build and maintain churches. The Court then summarized Madison's *Memorial and Remonstrance* in which Madison argued that no true religion needed the support of law, that no person should be taxed to support the church, that the best interest of society required that the minds of men be wholly free, and that established religions always led to cruel persecutions.[204]

After reviewing this history, the Court, in essence, concluded that the Establishment Clause was narrowly focused on keeping the government out of religious matters directly through targeted programs, but that indirect benefits of neutral, generally available benefits were not the target of the Establishment Clause. The Court held that the provision of a neutral government benefit, such as transportation to schools, to a religious organization was not an unconstitutional establishment of religion

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199. *Id.* at 86-7.

200. 330 U.S. 1 (1947).

201. *Id.* at 8-13.

202. *Id.* at 17.

203. *Id.* at 8-11.

204. *Id.* at 11-12. Madison's *Memorial and Remonstrance* is reproduced in its entirety as an appendix to the decision. *Id.* at 63-72.

even though the benefit helped the religious organization. The Court noted in particular that the benefit went to the parents, not directly to the schools. The Court wrote:

> [The First] Amendment requires the state to be a [sic] neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.
>
> . . . [The] legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.
>
> The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here.[205]

Two *Everson* dissenters took an absolutist position that taxation for the assistance of parochial schools was establishment and that no tax or public moneys could be used to support such institutions, even indirectly.[206] The dissenters noted that private, for profit, non-parochial schools were not provided with this benefit. Police and fire protection and the like would be available everywhere, but support otherwise is not allowed. All four dissenters, in the opinion written by Justice Rutledge, revisited the history of the Establishment Clause and found different rules.[207] For them, the key starting point was that the Establishment Clause does not merely prohibit establishing a state religion, but rather it prohibits "any law respecting an establishment of religion."[208] The dissent argued that the subsidy of a religious organization would help establish religion and that a law making such a subsidy, even an indirect one, would be a "law respecting" the religious organization and would therefore be a "law respecting an establishment of religion."[209] Since subsidizing transportation to religious schools was supporting religion, a point even the majority conceded, the law was an unconstitutional one because it "respected" or was concerned with helping a religious endeavor.

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205. *Id.* at 18.

206. *Id.* at 20-21 (Jackson, J., dissenting).

207. *Id.* at 29-33 (Rutleledge, J., dissenting).

208. *Id.* at 31 (Rutleledge, J., dissenting).

209. *See id.* at 45 (Rutleledge, J., dissenting).

The *Everson* Court also relied on principles of tolerance, accommodation, equality, and neutrality. It held that the attenuated subsidy preserved neutrality of the government with respect to religion. This, along with the fact that the subsidy was available on an equal basis to all such schools, not just those of one sect, was important in the Court's reasoning.[210] The need to tolerate and accommodate both religious belief and exercise supported the Court's decision to allow payment for transportation to parochial schools. Indeed, without these principles, the statement by the Court that it is not breaching the wall of separation between church and state seems disingenuous. There is certainly a tension between the tugs of tolerance and the impulse to accommodate on the one hand and the desire for clear separation on the other. In *Everson*, the Court decided in favor of the accommodation.

The establishment problem presented in *Everson* is still very much alive with the Court regularly struggling to distinguish between those benefits which can be granted[211] and those which cross the line.[212] These establishment cases are easy prey for those who wish to illustrate inconsistent, seemingly rudderless Court decisions.[213] Nonetheless, the Court has followed fundamental principles in its decisions in this field. Even in cases where the liberal concepts of tolerance and accommodation are unstated, they form part of the underpinning of the analysis. Unfortunately for the sake of simplicity, clarity, and predictability, these principles are broad and general, and cannot be applied in a mechanical, syllogistic manner.

3. Current Judicial Interpretation of the Religion Clauses

The principles of accommodation, tolerance, equality, and neutrality[214] are still used in free exercise and establishment analysis today. They are not the only principles used, but they are the ones most

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210. *Id.* at 20-21 (Jackson, J., dissenting).

211. *E.g.*, Zobrest v. Catalina Foothills, 113 S. Ct. 2462, 2469 (1993) (permitting state funding of an interpreter for a deaf student attending a parochial school, under The Individuals with Disabilities Education Act, 20 U.S.C. § 1400 (1994)).

212. *E.g.*, School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 373-74 (1985) (holding unconstitutional the provision of public employees to teach classes in private and parochial schools).

213. *E.g.*, Underkuffler-Freund, *supra* note 4, at 848-74 (highlighting many of the difficulties in the current approach to the various strains of religious freedom cases).

214. Neutrality has a number of potential meanings. Here, I am adopting the broad, simple meanings of neutrality as between religious and non-religious as well as neutrality among religions; or perhaps more clearly, evenhanded treatment of the religions. *See* discussion *infra* part III.C.1.

suitable for the problem addressed in this article. Other principles include burden (for free exercise analysis), coercion (for establishment analysis), and separation of church and state. Though not irrelevant for the problem of religious secular employers,[215] they are less central.

a. Free Exercise

A core concept in analyzing free exercise claims is the concept of burden. From at least 1972 until 1990, free exercise challenges to the application of laws, including generally applicable, religiously neutral laws (such as social security), were to be tested by determining whether there was a substantial burden on the exercise of religion, and if so, whether the state had a compelling state interest at stake and had adopted the least restrictive alternative to achieve that interest.[216] The effect of this test was to give great weight to tolerating religious differences and accommodating diverse beliefs and practices.

This test was modified in 1990 in *Employment Division v. Smith,*[217] a decision which has been roundly criticized by many scholars of the Free Exercise Clause.[218] *Smith* subjected neutral, generally applicable statutes to a reasonableness test, while retaining the compelling state interest test for laws which target religion.[219] The Court distinguished prior cases which had required a showing of a compelling state interest by finding other fundamental rights at stake such as First Amendment rights of speech and press,[220] or by restricting the compelling state interest test to the employment compensation cases in which it was most clearly articulated.[221]

The vitality of *Smith* is questionable. In 1993 Congress passed the Religious Freedom Restoration Act of 1993 (RFRA)[222] which in essence

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215. *See infra* part IV.B.

216. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

217. 494 U.S. 872 (1990).

218. *E.g.*, McConnell, *Origins, supra* note 175, at 1453-55 (1990) (stating that Madison believed freedom of religion to include exemption from generally applicable laws in some circumstances). Many of the pieces criticizing the *Smith* case are noted in James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1409 n. 15 (1992). For a contrary view, see Mark Tushnet, *The Rhetoric of Free Exercise Discourse*, 1993 B.Y.U. L. REV. 117 (1993).

219. *Smith*, 494 U.S. at 872-73.

220. *Id.* at 877.

221. *Id.* at 880.

222. Pub. L. No. 103-141, 107 Stat. 1488 (codified in scattered sections of 42 U.S.C.).

sought to restore free-exercise jurisprudence to the pre-*Smith* status by codifying a version of those rules. The RFRA requires that whenever a government action would "substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability," the government must demonstrate that the burden furthers a compelling state interest and that the requirement is the least restrictive means to accomplish that interest.[223] (The act specifically states that it does not affect Establishment Clause jurisprudence.)[224]

The burden on the claimant's religious practice must be substantial.[225] To be a substantial burden "[t]he burden must be more than an inconvenience; the burden must rise to the level of pressuring the adherent to commit an act the religion forbids, or preventing the adherent from engaging in conduct that the faith requires."[226]

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223. 42 U.S.C. § 2000bb (1996).

224. Some courts have interpreted the RFRA to restore the First Amendment free-exercise law to pre-*Smith* jurisprudence. *See, e.g.*, Droz v. Commissioner, 48 F.3d 1120, 1122 n.2 (9th Cir. 1995) (applying pre-*Smith* determinations to consider if Droz was exempt from Social Security tax because of religious beliefs). Others have used a two-part analysis under which the First Amendment guarantees and the RFRA claim are treated as independent bases of analysis. *See, e.g.*, American Life League, Inc. v. Reno, 47 F.3d 642 (4th Cir. 1995) (the Freedom of Access to Clinic Entrances Act does not violate the First Amendment right to free speech). One district court found the RFRA unconstitutional on the grounds of separation of powers. Flores v. City of Boerne, 877 F. Supp. 355 (W.D. Tex. 1995) (holding RFRA unconstitutinally changed the burden of proof established by *Smith*(, *rev'd*, 73 F.3d 1352 (5th Cir. 1996) (holding that Congress had acted within its enumerated powers in enacting the RFRA). Some commentators have also proposed that the Act is unconstitutional. *See, e.g.*, Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 MONT. L. REV. 39 (1995); Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437 (1994). The Montana Law Review published a symposium on the RFRA. The James R. Browning Symposium for 1994, *The Religious Freedom Restoration Act*, 56 MONT. L. REV. (1995). Since the focus of this article is on the proper balance of the employer's interest, the employee's interest, and the community's interest in the religious secular employer setting in light of Title VII and the religion clauses, and not on the constitutionality of RFRA, this issue will not be pursued further here. The approach I propose is different from *Smith*, RFRA, and pre-*Smith* law and constitutes a proposed method of accommodating the interests involved. Hence, I am effectively calling for a change in how the religion clauses are applied in the employment setting. To the extent the RFRA conflicts with my approach I think it should be modified, but that too is well beyond the scope of this article.

225. 42 U.S.C. § 2000bb-1(a); *see also* Hernandez v. Commissioner, 490 U.S. 680, 699 (1989); Murphy v. Arkansas, 852 F.2d 1039, 1041 (8th Cir. 1988) (challenged governmental action must interfere with sincerely held religious beliefs).

226. Brown v. Polk County, 37 F.3d 404, 410 (8th Cir. 1994).

Beyond this formulation there are many difficult problems with deciding what burdens are substantial and no clear test or process for deciding how to decide what substantial means or how it is to be measured. For example, does one examine the burden from an outsider's "reasonable" or "social" point of view or from an insider's subjective point of view? How does one decide substantiality? Must it be central to the religion? If so, how does one decide centrality?

b. The Establishment Clause

Establishment Clause jurisprudence is even more confused than that of Free Exercise. To the extent legal tests and principles have been enunciated, they are often pliable and molded to fit situations for which they were never designed. Despite these limitations, and despite recent decisions which muddy the waters even more, certain strands of ideas run through many of the cases and may eventually be woven into new threads and fabric. Until such time as the Supreme Court weaves the Establishment Clause cloth anew, we must finger only the threads and strands.

Two major concepts in establishment jurisprudence are (i) separation of church and state,[227] and (ii) governmental neutrality.[228] The state is to be neutral toward religion and things religious are to be separated from things political and secular. Even seemingly neutral laws may run afoul of the establishment clause. Since 1971 the primary test of government action under the Establishment Clause has been the three-prong *Lemon* test under which an otherwise neutral government regulation (1) must have a secular purpose, (2) must not have the principal effect of advancing or inhibiting religion, and (3) "must not foster 'an excessive government entanglement with religion.'"[229] Alternatives have been proposed ranging from encouragement of religion by the state, to neutrality in other forms such as accommodation, to adoption of a coercion standard (if there

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227. *See* Everson v. Board of Educ. of the Township of Ewing, 330 U.S. 1, 18 (1947) (holding reimbursment for parents to send kids to private parochial school not a violation of the separation between church and state); Underkuffler-Freund, *supra* note 4, at 840-44.

228. Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510 (1995) is the most current reaffirmation of the importance of neutrality. *See infra* text accompanying notes 249-50, 256 & 258 for a discussion of *Rosenberger.*

229. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)). As noted below, the *Lemon* test is not without critics and is not consistently applied in establishment cases.

is no coercion, then the state can constitutionally act),[230] and shifting the focus from neutrality and separation to preserving freedom of conscience.[231]

This debate was refueled by the Court in *Lee v. Weisman*[232] where the Court held, in a 5-4 decision, that state-arranged prayers at graduation ceremonies violated the Establishment Clause largely because of their coercive nature and because of the stamp of governmental approval such prayer signaled.[233] The argument was made that *Lee v. Weisman* signaled the end of the *Lemon* test and a movement toward a combined free-exercise/coercion test.[234] The argument was also made that *Lemon* in some form survived *Lee v. Weisman,* and that the pillars of separation and neutrality, though not capable of clear, simple application would still be the guiding concepts for courts and the public.[235]

The Supreme Court breathed new life into *Lemon* test in 1993 when it applied the test to rule in *Lamb's Chapel v. Center Moriches Union Free School District*[236] that schools which otherwise make their facilities available for use by the public could not constitutionally exclude religious groups from using the same facilities for educational uses or for meetings just because the group was religious.[237] The basis for the decision

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230. For a brief summary of the debate, see Smith, *Free Exercise Doctrine, supra* note 31.

231. Professor Underkuffler-Freund argues that underlying the current approach of the Court is the concept of separation of the secular from the sacred, but that this approach is not in accord with the original understanding of the First Amendment, and is not the best approach to take. She advocates a focus on protecting freedom of conscience as the central theme. Underkuffler-Freund, *supra* note 4, at 840-44, 961.

232. 505 U.S. 577 (1992).

233. Several symposium issues of law reviews have been published in recent years on religious freedom issues. Two of them are: Symposium, *Religion and the Public Schools After* Lee v. Weisman, 43 CASE W. RES. L. REV. 699 (1993) and Symposium, *New Directions in Religious Liberty*, 1993 B.Y.U. L. REV. 1 (1993).

234. T. Michael Stokes Paulson, *Lemon Is Dead*, 43 CASE W. RES. L. REV. 795 (1993). *See also* Smith, *Free Exercise Doctrine, supra* note 31 (arguing that the Court's use of the term "conscience" as opposed to "religion," in Establishment Clause analysis marks a larger agenda for the Court to expand protection for religious and related liberties).

235. Daniel O. Conkle, *Lemon Lives,* 43 CASE W. RES. L. REV. 865, 872-74 (1993).

236. 508 U.S. 384 (1993).

237. *Id.* at 391. In his dissent, Justice Scalia provided, according to Justice Stevens, a "divert[ing] . . . evening at the cinema" when he (Scalia) wrote of the majority opinion's "invocation of the *Lemon* test" as follows: "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being

appeared to be largely one of neutrality toward religion and treating religious organizations the same as non-religious organizations; a species of equality or equal protection, if you will.

However, even after *Lamb's Chapel*, *Lemon* is not all there is to Establishment Clause jurisprudence. For example, in *Zobrest v. Catalina Foothills School District*,[238] another 1993 case, the Court did not apply it, despite *Lemon* being the basis for the lower court decision.[239] In *Zobrest*, the Court upheld the constitutionality of a school district providing an interpreter for a deaf person attending a parochial school. The law requiring provision of an interpreter, the Individuals with Disabilities Education Act,[240] "neutrally provide[d] benefits to a broad class of citizens defined without reference to religion" and thus was "not readily susceptible to an Establishment Clause challenge just because [a] sectarian institution may also receive an attenuated financial benefit."[241] The *Zobrest* decision illustrates the application of principles of tolerance and neutrality like *Barnette* fifty years before it.

The neutrality principle is one of the rudders currently steering the Court through the religious freedom waters. In *Board of Education of Kiryas Joel Village School District v. Grumet*[242] the Court held that the Establishment Clause was offended when school district gerrymandering created a special, separate school for a homogenous religious enclave.[243] Such an action quite clearly promotes religion, and in *Kiryas Joel*, a particular religion; it is not merely neutral toward it or tolerant of it. The creation of the school district deviated from the Constitution's requirement of neutrality by "delegating the State's discretionary authority over public schools to a group defined by its character as a religious community, in a legal and historical context that gives no assurance that governmental power has been or will be exercised neutrally."[244]

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repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District." *Id.* at 392-94.

238. 113 S. Ct. 2462 (1993).

239. *Id.* at 2464-66.

240. Pub. L. No. 91-230, 84 Stat. 175 (1970) (codified as amended at 20 U.S.C. § 1400 (1994)).

241. *Zobrest*, 113 S. Ct. at 2466.

242. 114 S. Ct. 2481 (1994).

243. *Id.* at 2483-84.

244. *Id.* at 2487. *Kiryas Joel* must be viewed as a setback for those advocating a coercion test instead of a neutrality test. The principled approach proposed in this article of deciding cases directly on the basis of principles of tolerance and accommodation tempered by equality (neutrality) supports the result in *Kiryas Joel*.

In addition to relying on the principle of neutrality in deciding *Kiryas Joel*, the Supreme Court also explicitly called upon the principles of tolerance and accommodation. In *Kiryas Joel* the Court highlighted accommodation as a cardinal principle when it wrote as follows:

> In finding that Chapter 748 violates the requirement of governmental neutrality by extending the benefit of a special franchise, we do not deny that the Constitution allows the state to accommodate religious needs by alleviating special burdens. Our cases leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice. Rather, there is "ample room under the Establishment Clause for 'benevolent neutrality [tolerance?] which will permit religious exercise to exist without sponsorship and without interference;'" "government may (and sometimes must) accommodate religious practices and . . . may do so without violating the Establishment Clause." The fact that Chapter 748 facilitates the practice of religion is not what renders it an unconstitutional establishment.
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> But accommodation is not a principle without limits, and what petitioners seek is an adjustment to the Satmars' religiously grounded preferences that our cases do not countenance. Prior decisions have allowed religious communities and institutions to pursue their own interests free from governmental interference, but we have never hinted that an otherwise unconstitutional delegation of political power to a religious group could be saved as a religious accommodation. Petitioners' proposed accommodation singles out a particular religious sect for special treatment, and whatever the limits of permissible legislative accommodations may be, it is clear that neutrality as among religions must be honored.[245]

In *Kiryas Joel* the Court avoided the conceptual dissonance which has become the subject of much debate in the legal literature surrounding the religion clauses—whether to premise analysis on coercion,[246] on

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245. *Id.* at 2492-93 (citations and footnotes omitted).

246. *E.g.*, Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986) [hereinafter McConnell, *Coercion*]. *See generally* Smith, *Free Exercise Doctrine*, *supra* note 31.

neutrality,[247] or on accommodation[248]—by adopting a multi-factored approach in which guiding principles, not syllogistic rules, played the leading roles.

This same approach was reinforced in the 1995 case of *Rosenberger v. Rector & Visitors of the University of Virginia.*[249] *Rosenberger* presented the issue of whether a public university which funded various student activities, including many publications, out of a student activities fee could refuse to fund a religious publication on the grounds that the Establishment Clause required it not to do so. The majority opinion in the 5-4 decision based its conclusion largely on the neutrality principle (in the sense of evenhandedness.) After finding that the free speech clause was being violated by denying access to the funding, the Court found that the need to avoid an establishment clause violation was not a compelling interest because there was no establishment clause violation. The Court noted that "[a] central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion."[250]

4. The Principles

The Court has at times explicitly and other times implicitly used the principles of accommodation, tolerance, and equality (in both its neutrality

247. *E.g.*, Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U. L. REV. 146 (1986) [hereinafter McConnell, *Neutrality*]; Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311 (1986); Jay Alan Sekulow et al., *Religious Freedom and the First Self-Evident Truth: Equality as a Guiding Principle in Interpreting the Religion Clauses*, 4 WM. & MARY BILL RTS. J. 351 (1995).

248. *E.g.*, Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation*, 140 U. PA. L. REV. 555, 567, 580 (1991) [hereinafter Lupu, *Reconstructing*]; Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743 (1992) [hereinafter Lupu, *The Trouble with Accommodation*]; Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1 (1985) [hereinafter McConnell, *Accommodation*]; Michael W. McConnell, *Accommodation of Religion: An Update and a Response to Critics*, 60 GEO. WASH. L. REV. 685 (1992) [hereinafter McConnell, *Accommodation Update*]; *see also* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990); Alan Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L.J. 692, 727-37 (1968).

249. 115 S. Ct. 2510 (1995).

250. *Id.* at 2521.

and nondiscrimination guises) in deciding religion clause cases.[251] Laws which violate these principles by targeting beliefs or practices based on religion, or which treat various sects differently have been overturned.[252] As Justice Kennedy recently wrote: "The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions."[253] Under these principles the state is to allow freedom of belief, conscience, and action, at least insofar as the actions taken in exercise of the religion do not adversely affect the peace and the general welfare of society.[254] Different groups in American history bring new challenges whether it is Mormons asserting a right to polygamy, or Amish wanting to be exempt from compulsory education, or conscientious objectors seeking to avoid military duty, or religious objectors opposing taxation, or fundamentalist Christians creating religious-infused work environments.

The literature points out, quite properly, that taken to extremes, the approaches conflict with each other and can lead to untoward results.[255] Neutrality can become hostility if it reaches out to stop any government benefit for religion (tax exempt status or police and fire protection).[256] Coercion analysis can lead to all sorts of subtle and not-so-subtle problems. The pledge of allegiance is coercive. Must it therefore be banned? Or is accommodation enough to ameliorate the coercive effect? Coercion analysis also flies in the face of the separation between church and state. Accommodation can be a dragon with an endless appetite for

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251. *See, e.g.*, Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977) (holding airline made reasonable efforts to accomodate employee's request for days off for Sabbath); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (holding a state's law compelling flag salute and recitation of pledge of allegiance not within the government's power).

252. *E.g.*, McDaniel v. Paty, 435 U.S. 618, 629 (1978) (holding state law which prohibited clergy from holding certain public offices unconstitutional); Fowler v. Rhode Island, 345 U.S. 67, 69 (1953) (holding that a municipal ordinance, which, as applied, prohibited preaching in a public park by Jehovah's Witness,' but permitted preaching there by Catholics or Protestants, is unconstitutional).

253. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2222 (1993).

254. Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 879 (1990) (noting that free exercise claims that challenge legitimate laws must fail); Reynolds v. United States, 98 U.S. 145, 167 (1878) (holding that practice of polygamy is contrary to social order).

255. *E.g.*, Smith, *Free Exercise Doctrine*, *supra* note 31, at 919-26; Lupu, *The Trouble with Accommodation*, *supra* note 248.

256. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510, 2532 (1995) (holding that university's denial of resources to religious group violated policy of nuetrality).

permitting actions contrary to the common good, if taken to an extreme. As stated in *Reynolds,* if each person can choose to obey or not obey laws based on religious conviction, each person becomes a law unto himself, in effect, a unit veto, and the social good suffers.[257] But, as exemplified in 1995 in *Rosenberger,*[258] in 1994 in *Kiryas Joel,*[259] and two decades earlier in *Yoder,*[260] the principles of equality (and its close relative here—neutrality), tolerance, and accommodation can be used in a sensitive, non-extreme way to accomplish sound, relatively consistent, and principled interpretation of the freedom of religion clauses.[261] These four principles plus the idea of inclusion are shown below to provide a principled, sensible, and just approach to resolving the Title VII-Religious Freedom tension. If these principles are used to interpret the religion clauses, then the current tension and imbalance between Title VII and religious freedom can be resolved.

III. A PRINCIPLED APPROACH

Title VII seeks, in part, to protect employees from religious discrimination.[262] The religion clauses seek to insure religious freedom for citizens of the United States. Although both aim to further religious freedom, Title VII as interpreted and applied by the courts has reduced the religious freedom of the religious secular employer by effectively barring the employer from using religious precepts with respect to employment decisions.[263] The courts have extended the separationist approach beyond separating government from religion[264] to separating the sacred from the secular in the workplace. The previous sections outlined the

257. *Reynolds*, 98 U.S. at 167.

258. 115 S. Ct. 2510 (1995).

259. 114 S. Ct. 2481 (1994).

260. 406 U.S. 205 (1972).

261. This sort of fact-sensitive decision-making is explicitly called for by Justice O'Connor in her concurrence in *Rosenberger*, 115 S. Ct. at 2525-28.

262. *See generally* The Civil Rights Act of 1964 (codified at 42 U.S.C. § 2000e, *et seq.* (1988)).

263. See *infra* Part IV.B for a discussion of several of the main cases illustrating this point. One commentator argued that Title VII is also ineffective in protecting employees. Gregory, *supra* note 37, at 28 ("Recent decisions have left the individual religious employee, who is most often in need of effective protection against unlawful discrimination in secular employment on the basis of religion, largely bereft of constitutional and statutory safeguards."). Although the protection for the employee in the pure secular employment setting could be stronger than it is, the religious secular employer has no effective protection whatsoever.

264. *See* Underkuffler-Freund, *supra* note 4, at 848-74.

contours of Title VII actions[265] and show the use of principled analysis in cases involving the religion clauses.[266] This section develops an approach to the religious secular employer problem which, by relying on some of the fundamental principles used by the courts and commentators in the area instead of focusing on more technical, mechanistic tests, more fairly balances the competing interests of employer, employee, community, and state.

This section is organized as follows: First, two ideas of jurisprudence which form part of the underpinning of the approach are developed.[267] Then the several principles that I suggest should drive the analysis are examined and explained.[268] Alternative principles which could also form a discursive framework for resolving the religious employment discrimination cases are examined and the reasons for their rejection explained.[269] Then the proposed approach is restated in a somewhat more precise form.

A. *Jurisprudential Underpinnings*

There are two main ideas of jurisprudence I am employing in my approach to reconcile Title VII with the religion clauses. The first idea is Ronald Dworkin's distinction between rules and principles.[270] The second is the role of legal principles in framing discourse on social concerns and how that framing itself controls, or at least contributes, to the decision-making process.[271] As stated by Steven Smith: "Even when

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265. *See supra* part II.A.

266. *See supra* part II.B.

267. *See infra* part III.A.

268. *See infra* part III.B.

269. *See infra* part III.C.

270. DWORKIN, *supra* note 30, at 22-31. This distinction is not accepted by every legal philosopher and is a part of the larger debate involving Dworkin, Hart, and others. *E.g.*, Kent Greenawalt, *Policy, Rights and Judicial Decision*, 11 GA. L. REV. 991 (1977), countered by Dworkin in *Taking Rights Seriously*, *supra* note 30, at 294-330. Whatever may be the ultimate verdict on the philosophical validity of this distinction, it is a valuable description and is used here in a pragmatic, descriptive way. In any event, my argument does not rest on agreeing with Dworkin or even with the distinction that he makes and I adopt. The approach I am suggesting works the same whether one calls the principles "rules," "principles," or "ideas," or whether one thinks of these things as the same or as hierarchically different or, as Dworkin does, as logically different. The point is that approaching the Title VII-Religion Clauses problem at this level of abstraction is superior to the mechanistic, conclusory, rule-based level now used. Thus, I am using the distinction in a functional, not theoretical way.

271. Smith, *Free Exercise Doctrine*, *supra* note 31, at 526.

it does not dictate the results in particular cases, legal doctrine has the power to orient and direct the kind of discourse in which those cases are debated and decided."[272] I will argue that these two ideas are fully compatible with each other, at least in this setting, and that they provide a sound jurisprudential context to my proposal and that using the approach of principled analysis rather than lower-level rule-based analysis is not only effective, but reflects more accurately what is actually done and what should be done in deciding such fundamental issues.

Dworkin carefully distinguishes rules from principles. The core distinction he makes is as follows:

> The difference between legal principles and legal rules is a logical distinction. Both sets of standards point to particular decisions about legal obligation in particular circumstances, but they differ in the character of the direction they give. Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision.
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> . . . .
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> But this is not the way . . . principles . . . operate. . . . [Principles] do not set out legal consequences that follow automatically when the conditions provided are met.[273]

According to Dworkin rules are at least theoretically complete.[274] One could list all the possible rules and all the possible exceptions to them, and then apply them in a mechanistic fashion using basic syllogistic reasoning. However, principles are of a different nature. They provide guidance and are formulations of ideas which influence a decision, but cannot be applied in a mechanistic way, and can never be completed by listing exceptions. Dworkin used the following example to illustrate his central distinction:

> In 1889 a New York court, in the famous case of *Riggs v. Palmer* [115 N.Y. 506, 22 N.E. 188 (1889)], had to decide whether an heir named in the will of his grandfather could inherit under that will, even though he had murdered his grandfather to do so. The court began its reasoning with this admission: "It is quite true that statutes regulating the making, proof and effect of wills, and the devolution of property, if literally construed, and if their force and effect can in no way and under no circumstances be

272. *Id.*

273. DWORKIN, *supra* note 30, at 24-25.

274. *Id.* at 24.

> controlled or modified, give this property to the murderer." But the court continued to note that "all laws as well as all contracts may be controlled in their operation and effect by general, fundamental maxims [principles] of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime." The murderer did not receive his inheritance.[275]

Dworkin then proceeds to show how the principle of not profiting from one's own wrong is hardly a rule. For example, adverse possession violates this principle as does permitting an employee to keep his new salary when that employee breaks an employment contract and goes to work for another employer at higher pay.[276] These counter-examples do not negate the principle nor are they "exceptions" to the rule. Dworkin further stated:

> A principle like 'No man may profit from his own wrong' does not even purport to set out conditions that make its application necessary. Rather, it states a reason that argues in one direction, but does not necessitate a particular decision. . . . All that is meant, when we say that a particular principle is a principle of our law, is that the principle is one which officials must take into account, if it is relevant, as a consideration inclining in one direction or another.[277]

Considered in light of Dworkin's distinction, the concepts of tolerance, inclusion, accommodation, neutrality and equality are principles, not rules.[278] That is, one cannot say that there is a set of standards, facts, or legal elements for these ideas which, when found to exist, require one result or another. Tolerance is not self-defining and is susceptible to no final or complete enumeration of factors or elements that, when satisfied, means toleration exists. Accommodation, as a principle, has the same quality. While we should accommodate diversity and religious practice as much as possible, one cannot clearly state all of the

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275. *Id.* at 23 (footnotes omitted).

276. *Id.* at 25.

277. *Id.* at 26.

278. *See* discussion *infra* part III.B.

factors to be used in deciding when an appropriate level of accommodation has been accomplished.[279]

Of course neutrality and equality are quintessential principles.[280] True neutrality is an impossible goal; to do nothing is to do something, and doing something will invariably involve excluding or including one group or another.[281] Equality simply cannot be captured in any test capable of syllogistic application.[282]

Inclusion, the final principle I propose adding to the analysis is, like tolerance, perhaps less a legal principle than a societal aim or moral attribute. But in the Dworkian typology it functions in this setting like a principle, i.e., it points one in a direction but does not compel any particular result.[283]

Principles function both as the substantive law that justifies the decision and as discourse-framing concepts. The selection of principles determines what the focus of the debate will be. They may not determine the result in the same way that decisional rules do, but they are applied to the situation to assess the merits of it. While rules are more of a template, principles are more of a lens through which one views the problem. Principles by their very nature force consideration of interests and policies and typically involve weighing competing concerns more than

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279. *See* Lupu, *The Trouble with Accommodation*, *supra* note 248; McConnell, *Accommodation*, *supra* note 248; McConnell, *Accommodation Update*, *supra* note 248. One should be careful to note the distinction between accommodation as a principle and accommodation as a decisional rule with relatively discrete standards and tests, which is the way it is used in Title VII religious discrimination actions. "Accommodation" used as decisional rule states that an employer has a duty to accommodate the religious needs of employees. The standard is whether the accommodation would impose more than a de minimus cost on the employer. If so, then the accommodation need not be done. But note that one can (and I argue one should) still use the principle, the idea, to help decide whether the employer has done enough. *See, e.g.*, EEOC v. Townley Eng'g and Mfg. Co., 859 F.2d 610 (9th Cir. 1988). That is, the fuzzy standards and ideas surrounding a principle can be considered when determining whether the rule—the standard—has been met.

280. *See generally* McConnell, *Neutrality*, *supra* note 247; Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311 (1986); Jay Alan Sekulow, et al., *Religious Freedom and the First Self-Evident Truth: Equality as a Guiding Principle in Interpreting the Religion Clauses*, 4 WM. & MARY BILL RTS. J. 351 (1995).

281. *See* Edward B. Foley, *Political Liberalism and Establishment Clause Jurisprudence*, 43 CASE W. RES. L. REV. 963, 972 (1993).

282. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510 (1995) (explaining how equality is a guiding principle).

283. *See* Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of "Diversity,"* 1993 WIS. L. REV. 105 (1993).

deterministic rules which dictate results. Once one decides which principles are relevant, the bounds of the discourse are framed, howsoever unclear or elastic the edges of that frame may be.

A sporting analogy may help make the idea of the discourse-framing attribute more clear. If one decides to create a game with rules which state that a round ball is to be used, that players are prohibited from touching the ball with their hands or arms, and that the aim is to get the ball in the opponent's goal, the game will necessarily take on certain characteristics. That is, these rules will help define the game. If we treat the characteristics of the location of play as variable, the game will change even if all of the rules stay the same. For example, in soccer, the size of the field dramatically affects the game. Outdoor soccer on a wide, long field has a pace and openness different from the same game played indoors on a carpeted hockey rink. Throw-ins, long kicks, passing, bank-shots, and such are all changed by the nature of the field of play. In the rule-principle analysis the principle is the field of play. The principles help define the game and the nature of the game changes according to the set of principles in which we place the rules.[284]

If we were to decide that principles of coercion or of encouragement should guide interpretation of the religion clauses, we would find a very different field than if accommodation, tolerance, and neutrality were selected.[285] One could permit a non-coercive burden under one approach but find it lacking in tolerance and neutrality under the other. For example, requiring an employer to accommodate an employee's religious needs could coerce the employer to act contrary to the employer's religious beliefs. If coercion were the polestar of free exercise analysis, the employee's accommodation claim could fail against an employer's first amendment challenge based on the coercion principle. But a sense of evenhandedness or neutrality could lead to a different result under which both employer and employee interests must be accommodated. The current approach of separating secular and religious endeavors[286] and favoring employees over employers leads to a

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284. I am proposing to use principles both in this discourse-framing sense and as the actual, direct decisional bases of the decisions. That is, I urge direct application of the principles. Thus the entire analysis moves to the higher plane of discourse and analysis based on principles, interests, and policies rather than on lower level rules.

285. Professor Underkuffler-Freund outlines some of the possible differences in results that may arise if one were to move from the separation model to the freedom of conscience model she proposes. *See* Underkuffler-Freund, *supra* note 4, at 961-85. A similar result could be found here.

286. Underlying Title VII is the idea that religion does not belong in the workplace, i.e., that secular endeavors can and must be separated from sacred. This fallacy permeates the jurisprudence of the religion clauses. *See* Underkuffler-Freund, *supra* note

discounting of the employer's interest in favor of the employee's interest, even when that interest is merely a freedom from exposure to religion.

Thus we find a symmetry between Dworkin's rule-principle dichotomy and Smith's discourse-based analysis. As Smith notes, discursive analysis does not render doctrine irrelevant.[287] Doctrine, in the form of both rules and principles, has "the power to influence the direction and the terms of the discourse in which legal issues are framed and resolved."[288] That is, the words we choose to discuss the topic affects the way we discuss and think about the topic. Smith examines the Court's decisions and decision-making processes in religion cases and concludes:

> If one approaches these disparate approaches with formalistic expectations, then one is likely to read them as adopting a "compelling interest" balancing test, with two kinds of qualifications [i.e., carelessness in application and exceptions]. . . . Conversely, from a less formalistic perspective this codification will seem to be an imposition upon the cases. Balancing language will appear to be merely one feature in the Court's rhetorical repertoire . . . .
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> It need not follow from this less formalistic reading that the decisions, taken as a body, were incoherent. In fact, a consistent theme runs through the decisions: the state has a constitutional duty—albeit not an absolute duty—to accommodate the practice of religion.[289]

Smith's analysis then reaches a conclusion similar to mine developed in the previous section,[290] though his is cast in somewhat different language: Accommodation is a central principle of religion clause jurisprudence. And even further, and even closer to Dworkian terminology:

> [I]f one emphasizes the discursive quality of doctrine over its power to dictate results through sheer logic, this formalist objection to a doctrine framed in terms of accommodation loses much of its force. To be sure, doctrine imposing a non-absolute duty of accommodation cannot logically determine the results in particular cases. But then, realistically, a compelling interest test

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4, at 848-74.

287. Smith, *Free Exercise Doctrine*, *supra* note 31, at 527.

288. *Id.*

289. *Id.* at 533.

290. *See supra* part II.

> cannot do that either. What the accommodationist doctrine does is orient the debate about free exercise problems in terms of accommodation or, to use what I will argue is in this context a practically equivalent term, of tolerance.[291]

Rosenberger v. Rector & Visitors of the Univeristy of Virginia[292] illustrates both the use of a principled approach and the effect the selection of principles can have on the framing of the discourse and the effect that it, in turn, can have on the outcome. In *Rosenberger* the Court explicitly used a principled approach. As stated most clearly by Justice O'Connor in her concurring opinion, "the [*Everson*] decision reflected the need to rely on careful judgment—not simple categories—when two principles, of equal historical and jurisprudential pedigree, come into unavoidable conflict."[293] And again, "When two bedrock principles so conflict, understandably neither can provide the definitive answer. Reliance on categorical platitudes is unavailing. Resolution instead depends on the hard task of judging—sifting through the details and determining whether the challenged program offends the Establishment Clause."[294]

The majority opinion first framed the discourse around free speech, and then considered whether the Establishment Clause afforded a compelling state interest to not support the religious speech.[295] O'Connor's concurrence on the other hand framed the discourse around two conflicting "bedrock principles" and resolved the conflict by subtle, fact-specific judgment.[296] Souter's dissent[297] approached the problem by framing the discourse as a separationist problem where the state was clearly supporting religion by paying for the publication. Souter then looked to determine if there were other principles which would override the violation. He found neutrality to be lacking in force to overcome the clear violation.[298] *Rosenberger* thus provides not only another example of nuanced use of principles in the area of religious freedom, but also an example of just how affected the discourse is by the principles one chooses to emphasize, and ultimately an example of how the result is affected by the discourse-framing concepts.

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291. Smith, *Free Exercise Doctrine*, *supra* note 31, at 534.

292. 115 S. Ct. 2510 (1995).

293. *Id.* at 2526 (O'Connor, J. concurring).

294. *Id.* at 2525-26.

295. *Id.* at 2516-25.

296. *Id.* at 2525-28.

297. *Id.* at 2533.

298. *Id.* at 2535.

B. *The Principles*

The five principles that I suggest should drive judging Title VII cases involving religious secular employers, i.e., accommodation, equality, neutrality, tolerance, and inclusion, are interrelated and are not always distinguishable from one another in the course of a carefully nuanced analysis. These words stand for ideas which in turn are never full reflections of reality. Neither the words nor the ideas they represent should be treated as talismans whose invocation will lead to fully consistent, predictable, and just results. Instead, these principles should be used as Justice O'Connor used the neutrality principle in *Rosenberger*, i.e., as guides for analyzing the details of each case and doing the hard job of judging.[299] If these principles are accepted as the ones to be used to discuss the problems, then an acceptable level of predictability should follow. Given this understanding, the descriptions of the principles below ought not be taken as a full exploration of each of them applicable to all situations. This is not an attempt to make a *Grand Unified Theory* of the religion clauses; it is an attempt to develop from prior law a principled approach to resolving a major conflict in the current law in a way more respectful of those who do not separate their lives or themselves into the sacred and the profane.

Before corralling the meaning of the principles, an examination of why certain current rule-level doctrines are not adequate for evaluating the Title-VII/religious freedom problem is in order. The *Lemon*[300] approach is not fully satisfactory in evaluating Title VII situations. *Lemon* relies heavily on neutrality (neither advance nor inhibit) and separation (entanglement) and is designed for laws which are facially neutral with a secular purpose as in the case of mandatory schooling.[301] Title VII has a secular purpose (furthering inclusion and equality), but it is not religion-neutral. That is, in singling out religion for special treatment in employment settings and for special treatment within the law itself, it does not have a strictly secular focus.[302] For example, Title VII exempts religious organizations from the general non-discrimination requirement.[303] Even more telling for the topic of this article, by prohibiting discrimination on the basis of religion and by requiring

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299. *Id.* at 2525-28.

300. Lemon v. Kurtzman, 403 U.S. 602 (1971).

301. *E.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972).

302. This special treatment may be compelled by First Amendment considerations, but that is not the point. The point is that prohibiting discrimination on the basis of religion is not religiously neutral.

303. 42 U.S.C. § 2000e-2(e)(2) (1988).

employers to accommodate religious needs of employees, Title VII specifically addresses and limits actions of individuals based on religion.[304] Thus to an extent Title VII entangles the government (in administering the law and in judging cases) in religious issues including the nettlesome problem of what is and what is not religion.

Ideas of coercion and separation can be found in Title VII's treatment of religion.[305] It arguably "coerces" employers to accommodate employees with different religious beliefs. That is, it compels employers to consider religious factors in employment decisions (accommodation), or compels them not to consider religious factors in employment decisions (non-discrimination). Thus, it can, similar to requiring students to say the pledge of allegiance, compel conduct which a person (in this case an employer) might find contrary to his or her beliefs.

The idea of separation underlies the structure of Title VII's treatment of religion. Title VII extends the idea of separating government from religion into the private marketplace. In requiring nondiscrimination on the basis of religion, the law presumes the separability of the religious from the secular and presumes, at least as interpreted, the ability and propriety of separating religious beliefs and actions from secular ones. Requiring an employer to accommodate an employee's religious practices presumes that the employee and employer can or are willing to separate them from the workplace. Barring discrimination on the basis of religious beliefs assumes an ability to separate the religious beliefs from the marketplace beliefs. This sort of assumed separateness does not adequately respect the employer who does not separate religion from other parts of life.

On the free exercise side, the idea of substantial burden is very important in weighing governmental requirements. Title VII burdens all employers who bring religion to work. Indeed, it is because of this burden and the substantiality of it that the religious secular employer cases arise. But burden analysis with the categorical focus on substantiality, compelling state interest, and least restrictive alternative is not sufficiently subtle for resolving these disputes in a sound, just, and consistent way. The burden on the employer confers a benefit on the employee and yet they both have free exercise rights. The approach I suggest recognizes the balance and does not seek to decide cases in the all-or-nothing fashion that current separation-based and burden-based analysis does.

The ideas of coercion, separation, and burden have roles to play in the Title VII setting, but they are not sufficient and should not be central. The principles which work better and which, as shown above, have a long pedigree in religious clause jurisprudence (as do the concepts of coercion,

304. 42 U.S.C. § 2000a-2 (1988).

305. *See generally* 42 U.S.C. § 2000 (1988).

separation, and burden), are accommodation, neutrality, equality, tolerance and inclusion.

1. Neutrality and Equality

Neutrality is, of course, a central concept in establishment clause jurisprudence,[306] and closely related is the idea of equality.[307] Indeed, in some respects neutrality is merely an implementation of certain aspects of the notion of equality. In particular, the idea of evenhandedness underlies the constitutionality of the provision of certain governmental benefits to religious institutions in contravention of notions of strict separation.[308] Notions of equality in this evenhandedness sense underlie prohibiting government from favoring or establishing one religion or another and from unduly restricting the exercise of one religion or another.

The idea of neutrality ostensibly extends to being neutral as between religion and non-religion as well. However, this sort of neutrality is not possible to achieve. In prohibiting discrimination on the basis of religion and in requiring accommodation of religious needs of employees, Title VII itself is not "neutral" in this sense. Indeed, the Constitution is not neutral—religion has a favored place over non-religious ethical and philosophical beliefs.[309]

A major problem with an attempt to use a pure neutrality-based approach is that no government action is truly neutral.[310] For example, anytime the state chooses to limit government-sponsored prayer or curtail the teaching of creationism, some religion is being affected. Even the acts of choosing texts and teaching tolerance necessarily result in favoring one religious position or another.[311] Treating religion specially in Title VII or in the tax code is not treating it "neutrally," in the sense of special treatment. In a sense, the government promotes religious observance by

306. *E.g.*, *Rosenberger*, 115 S. Ct. 2510; McConnell, *Neutrality*, *supra* note 247.

307. *See* Paulsen, *supra* note 280, at 311; Sekulow, *supra* note 280, at 351.

308. *E.g.*, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993) (making school space available to Christian groups on an equal basis as it is available to secular groups).

309. *See generally* Wisconsin v. Yoder, 406 U.S. 205 (1972).

310. *See* Foley, *supra* note 281, at 972-78.

311. Certain religions, particularly the three Western ones, Judaism, Christianity, and Islam, teach that they have a lock on the truth and that other religions are therefore wrong. Some strains of Christianity go so far as to consider teaching any morality aside from Christian-based morality as wrong and thus see the teaching of tolerance as decidedly not neutral. The ongoing dispute over teaching creationism is another example of this sort of problem.

extending protections in employment to employees who seek to practice their religions. Thus, the mere inclusion of religion as a grounds upon which to base a Title VII claim shows a lack of neutrality as between the religious and the non-religious.

Neutrality beyond evenhandedness is chimerical for another reason as well: evenhanded allocation of benefits and burdens still results in governmental actions promoting certain behaviors and discouraging others. Exempting charitable, educational, and religious organizations from taxes appears to be evenhanded in its treatment of religion as being like educational and charitable institutions rather than commercial ones, but such a benefit clearly would tend to promote certain behaviors. Such "neutral" governmental actions will affect behavior, but will do so based primarily on civic, social, economic, and political ideas rather than explicitly religious ones.[312]

Neutrality is largely an Establishment Clause principle, but it lives in the Free Exercise side as well. Seemingly neutral governmental actions run afoul of the Free Exercise Clause when they substantially burden religious exercise without a compelling state interest and when the least restrictive means are not chosen to accomplish the end sought.[313] A law which is not neutral, i.e., one which targets the exercise of religion, has an even greater burden to overcome.[314]

Not only do the ideas of neutrality and equality have currency in cases involving the religion clauses, but they also undergird antidiscrimination laws like Title VII. The idea of non-discrimination is certainly a part of the idea of equality. And the core idea of according all persons equal respect despite differences is the basis of the prohibition of certain types of discrimination in the terms and conditions of employment.

Despite their limitations the principles of neutrality and equality are valuable, especially in exposing actions of the government which could otherwise evince hostility toward religion. Thus the idea of neutrality is a sound one at least as a corrective for such misguided (socially, politically, and constitutionally) actions as school boards prohibiting only religious organizations from using campus facilities for religious meetings while permitting the same access to a host of other organizations.[315]

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312. This is the secular purpose prong of Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

313. RFRA, *supra* note 222. To the extent that Employment Div., Or. Dep't of Human Resources v. Smith is still good law, the test for generally applicable neutral laws is one of reasonableness, not compelling state interest. 494 U.S. 872 (1989).

314. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2227 (1993).

315. *See generally* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993).

2. Accommodation

Like the principle of neutrality, the idea of accommodation has solid footing in both the religion clauses and Title VII, although they do not mean quite the same thing in the different settings. Accommodation under the religion clauses generally refers to the ability of the government to take steps which benefit religion by allowing it room to exist and extends to steps which differentially benefit religion.[316] For example, granting tax-exempt status to religious organizations benefits them by relieving them from a burden that commercial concerns experience heavily. Similarly the government accommodates religion through the various provisions of Title VII which exempt religious organizations from certain forms of employment discrimination claims and through requiring employers to take special steps with respect to meeting the religious needs of employees.[317] Accommodation under the religion clauses grants broader latitude than mere neutrality or evenhandedness would.[318]

While the principle of accommodation under the religion clauses relates to limits on what the government may permissibly do to benefit religion,[319] in Title VII the idea of accommodation relates to the relationship of the employer to the employee.[320] Because the settings are so different (government-governed; employer-employee) the same term has somewhat different meanings, though there remains an underlying similarity. In the employment setting, the term accommodate is explicitly used to create an affirmative duty on an employer to do something extra to meet the religious needs of the employee.[321] The government has no similar duty of doing something extra to meet the religious needs of the governed.[322] Under Title VII, the duty of accommodation (with the case-

316. I am using the term "accommodation" as a principle in much the way the Court has used it. *See, e.g.*, Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481 (1994); *see supra* text accompanying notes 245-50. I am not using it as an overarching organizing principle, or in precisely the way a number of commentators have used it. *See, e.g.*, Lupu, *The Trouble with Accommodation*, *supra* note 248; Lupu, *Reconstructing*, *supra* note 248; McConnell, *Accommodation*, *supra* note 248; McConnell, *Accommodation Update*, *supra* note 248.

317. *See* 42 U.S.C. § 2000e-2(e)(2) (1988).

318. *See Kiryas Joel*, 114 S. Ct. at 2481.

319. *See* Lee v. Weisman, 112 S. Ct. 2649, 2656 (1992).

320. 42 U.S.C. § 2000e-2 (1988).

321. 42 U.S.C. § 2000e(j) (1988).

322. Employment Div., Or. Dep't of Human Resources v. Smith, 494 U.S. 872 (1990), is a prime example of the government not accommodating the religious needs of Native Americans. The government could have accommodated the needs but chose not to do so. This choice was held constitutional. *Id.* at 890. That is, the right of free

law gloss) has become a rule with relatively discrete factors and standards to be applied more than a discourse-framing, direction-pointing principle.[323] The employer needs to meet the needs of the employee only if the burden placed on the employer is *de minimus*.[324] The employer has a duty to accommodate the employee, but an employee cannot unreasonably refuse a reasonable accommodation.[325]

I am using the principle of accommodation in a general sense. When I suggest that the courts use the idea of accommodation to help resolve the tension between the statutory obligations and the free exercise rights of religious secular employers and their obligations, I am not using the term in the narrow Title VII sense. Nor am I necessarily using it as it has come to be used in religious freedom cases. Instead, I am using it in the more ordinary sense of the word of simply making room for the needs (and in this setting, the rights) of another. The connotations of "reconciling," "harmonizing," and "making room for" are what is intended.

3. Tolerance and Inclusion

The fourth and fifth principles are closely related to each other. The principle of tolerance applies both in state action and in private conduct. There must be official tolerance of religion; this much at least is required by the Free Exercise Clause.[326] Official tolerance requires the state to permit a wide range of religious actions, even when those actions are antithetical, to some extent, to the general welfare. Though one would normally like to see tolerance exercised by the legislative and executive bodies, the principle of tolerance can guide courts as well. Although *Smith* may have been decided correctly as a matter of Constitutional law (though many of us think not), many would be more comfortable with a

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exercise did not overcome the generally applicable, religion-neutral law. *Id.* at 885.

323. *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 71-75 (1977) (tracing statutory and case law history surrounding employee's discrimination claim that airline should have accomodated his request for days off for Sabbath).

324. *Id.* at 84; *see* part II.A.1.d for further discussion of the law on this point.

325. Smith v. Pyro Mining Co., 827 F.2d 1081, 1085 (6th Cir. 1987) ("Although the burden is on the employer to accommodate the employee's religious needs, the employee must make some effort to cooperate with an employer's attempt at accommodation."); *see also* Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141, 145-46 (5th Cir. 1982) ("[B]ilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business.").

326. See Underkuffler-Freund, *supra* note 4, at 879-91, for a discussion of colonial religious intolerance.

legislative exception which is more sensitive to and tolerant of the religious needs of small, minority sects.[327] Tolerance would perhaps avoid the paranoid antipathy which leads school boards to so completely exclude religion from school so as to move from neutrality to hostility.

Official tolerance justifies the special treatment of religion and religious organizations in Title VII. The toleration shown by excluding religious organizations from the prohibition of discrimination on the basis of religion is quite obvious. Perhaps less obvious is the fact that tolerance provides a sound justification for including religion among the prohibited grounds for discrimination along with race, sex, national origin and color. By including religion in the list, the government has taken a non-neutral position with respect to religion—it has said religion cannot matter in employment decisions. This favors religion; it is not neutral toward it. Furthermore, at least with respect to religious secular employers of the type focused on in this article, the requirement not to discriminate on the basis of religion is coercive insofar as it coerces an employer to hire someone the employer would otherwise exclude on the basis of religion. Both neutrality and coercion fail to justify the Title VII ban on religious discrimination. In contrast, accommodation and the idea of official tolerance do justify the state's mandating nondiscrimination, on the basis of religion. By including religion as an illegal grounds of discrimination, the state has furthered the principle of tolerance enshrined in the First Amendment and has itself "tolerated" and accommodated religion.

In addition, the idea of encouraging private tolerance provides a justification for the inclusion in Title VII by encouraging tolerance in the workplace. That is, the state has declared an interest in extending the constitutionally mandated tolerance of religion to the market place in the private relationships between employer and employee. The employer is told to tolerate people with different religious views, or face Title VII sanctions. This sort of tolerance is appropriate in a diverse society such as the United States. Encouraging private tolerance is a good thing and a legitimate state interest. Preventing employment discrimination based on religion furthers this interest.

Because of the manifold conceptions about the meaning of the word "tolerance," a few notes about it are in order. Dictionary definitions of tolerance include "not narrow or conservative in thought, expression, or conduct" and "not strict or severe."[328] The connotations are of openness and almost welcoming. The connotations of the verb form (tolerate which denotes "to put up with," and "to neither forbid nor

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327. In Employment Div., Or. Dep't of Human Resources v. Smith, 494 U.S. 872 (1990), an exception could have been made for religious use of certain controlled substances, a common element in Native American religions.

328. AMERICAN HERITAGE DICTIONARY (3d ed. 1993) (CD-ROM).

prevent"[329]) are quite different. They are more condescending and reflect a dismissive attitude. Tolerance as a legal principle involves permitting others with different beliefs and practices to have and act upon those beliefs and practices. It does not mean acceptance of or encouragement of those beliefs or practices. But neither does it mean a condescending permission exemplified by an attitude found in "you are crazy, but, because I am so superior, I will allow you to be crazy." Tolerance, as a legal principle, and as noted by Smith, properly involves both charity toward the other and humility toward one's own correctness.[330]

A concept closely related to tolerance is the fifth principle of inclusion.[331] One of the central principles in our entire political system, at least since the Civil War Amendments, is inclusion. A fundamental underpinning of *Brown v. Board of Education*[332] was the idea that excluding African Americans from equal access to education was unconstitutional. The doctrine of separate but equal was rejected in recognition that separate meant unequal.[333] Exclusion and separation represent the flipside of inclusion and by banning exclusion and separation, the value of inclusion was advanced. The aim of including everyone, of granting access to the goods of our social, economic, and cultural system, is a legitimate factor to consider when interpreting and applying antidiscrimination laws. Indeed, inclusion is at core a necessary support for achieving actual equality. Thus the principles of inclusion and equality are intimately related to one another.

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329. *Id.*

330. Smith, *Free Exercise Doctrine*, *supra* note 31, at 526.

331. There is a large body of literature surrounding this idea, particularly in connection with ideas of enhancing diversity. *See, e.g.*, MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW (1990); Paul D. Carrington, *Diversity!*, 1992 UTAH L. REV. 1105 (1992); Ken Feagins, *Wanted-Diversity: White Heterosexual Males Need Not Apply*, 4 WIDENER J. PUB. L. 1 (1994); Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of "Diversity,"* 1993 WIS. L. REV. 105 (1993); Christian M. Keiner, *A Critical Analysis of Continuing Establishment Clause Flux as Illustrated by* Lee v. Weisman, 112 S. Ct. 2640 (1992) *and Graduation Prayer Case Law: Can Mutual Tolerance Reconcile Dynamic Principles of Religious Diversity and Human Commonality*, 24 PAC. L.J. 401 (1993); Douglas W. Kmiec, *The Original Understanding of the Free Exercise Clause and Religious Diversity*, 59 UMKC L. REV. 591 (1991).

332. 347 U.S. 483 (1954).

333. *Id.* at 495.

C. *The Proposal Restated*

I propose that in employment discrimination cases where the employer's religious beliefs or practices are a cause of the employee's complaint, the standard discrimination theories should be applied, but they should be interpreted and applied within the framework of the central principle of accommodation tempered by principles of tolerance, inclusion, equality, and neutrality. Building on these principles, as distinguished from attempting to apply relatively rigid rules in a syllogistic fashion, will help resolve religious discrimination employment disputes in a fair, principled manner for all three concerned groups, i.e., the employer, the employee, and society. Indeed, if these principles are followed, many disputes may be avoided or mediated before they reach the level of adversely affecting terms and conditions of an employee's employment.

The more traditional decisional rule-based approach has many problems. Attempts at developing legal rules to be applied in a syllogistic fashion to the broad range of settings which implicate religious freedom have not been very successful in general and are even less effective for religious employment discrimination. One reason for the ineffectiveness in general stems largely from the complexity and subtlety of the issues and interests involved.

The ineffectiveness of the hard-rule approach (versus the principle approach) in the employment setting has the same difficulty as in other settings plus the added complication of involving more than two parties' interests. In a typical religion case the primary interests are the state's interest and the adherent's interest. In a religious secular employment setting there are three groups—the state, the employer, and the employee. The problem becomes more difficult because the religious exercise by one, either the employer or the employee, will affect the room available for religious exercise by the other. The rules designed for the two-party model just do not handle this setting well.

For example, the free exercise rules assume a state action burdens just one individual's (or a like-minded group of which that person is a member) expression and are designed to minimize that burden. The pre-*Smith* free exercise decisional rules have been codified in The Religious Freedom Restoration Act of 1993[334] as follows: (1) Any burden on the exercise of must be substantial before the First Amendment free exercise guarantee applies; and (2) a state may substantially burden religious exercise (a) provided the state can show a compelling state interest being served by the action, and (b) provided that the state has chosen the least

334. Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb *et seq.*).

restrictive means of meeting its compelling interest.[335] In the employment setting a state may have a compelling interest in eliminating discrimination but, in doing so it is favoring one person's exercise, the employee's, over another's, the employer's. This result runs afoul of principles of equality or "neutrality" (as between the affected parties), of tolerance (for the employer's views), and of accommodating (as a society and as an employee) the employer's views.

The approach actually taken by the courts to solve the religious employment discrimination problem is to functionally dismiss or ignore any claim of religious rights by the employer in favor of such claims by the employee.[336] The courts have too easily found a compelling state interest in the statute sufficient to overcome the employer's claim founded on the First Amendment.[337] This sort of analysis misses the true nature of the problem.[338]

My proposal attempts to validate and give effect to both the employer's and employee's religious beliefs and needs to the fullest extent possible. This approach is premised primarily on the principles of tolerance and accommodation. Under my approach, not only is the employer to tolerate and accommodate the employee; but the employee is to tolerate and accommodate the employer as well.

IV. APPLYING THE PRINCIPLED APPROACH

This section tests the utility of analyzing religious employment discrimination problems using the principles of accommodation, inclusion, tolerance, neutrality, and equality. This section is organized on the basis of the nature of the employer's use of religion in business and in

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335. *Id.* Deciding what burden is substantial causes a great deal of difficulty when viewed from many angles, including the basic problems of: who is to judge substantiality—the burdened person or the state; what degree of state interest is compelling; and, if any less restrictive alternative is available, to what extent does the cost of that alternative affect the analysis?

336. *See generally* Blalock v. Metals Trades, Inc., 775 F.2d 703 (6th Cir. 1985).

337. *See infra* part IV.B.

338. Professor Underkuffler-Freund proposes an approach which removes the employer's motivation from the employee's prima facie case but which requires the employee to show with some particularity just which of the employee's religious status or beliefs (or lack thereof) are offended or not accommodated by the employer. She argues that for the employee's prima facie case the employer's religious beliefs are not relevant; the question is whether the particular practices, expressions, and conduct of the employer, regardless of the motivation or source of those actions, are causing adverse terms and conditions for the employee. The employer's motivation or the religious reasons for the employer's actions are relevant only with respect to defenses such as statutory exemptions or constitutional rights. Underkuffler, *supra* note 17, at 611-16.

employment decisions. Focusing on the attributes of the employer is consistent with the statutory scheme under which general employers are distinguished from certain religious employers. However, in another sense this approach turns Title VII on its head because in general Title VII is intended to protect the interests of the employee, not the employer.[339]

The statute clearly contemplated secular employers and it works fairly well for such employers. The statute also contemplated the special nature of some employers as being either religious organizations or organizations so closely tied to a religion as to require them to discriminate against non-like-minded people in order to maintain their identity. But the statute did not separately address a third type of employer—the employer who is engaged in secular business activity, but who nonetheless considers the business to be a religious enterprise. This sort of employer often does not distinguish between those activities that are secular and those that are sacred. My argument is that the characteristics of the employer are relevant for all Title VII cases, not just for those involving religious institutions.

The three employment settings are: (1) "Pure" secular employers; (2) religious secular employers; and (3) statutorily-recognized religious entities such as churches and parochial schools.[340] Naturally not all cases fit neatly within these categories, but the typology is useful nonetheless. The characteristics and problems associated with the first two categories will be explored in some depth. The most interesting and difficult category is the second one. The third category is considered only briefly in order to highlight contrasts among the categories.[341]

A. *"Pure" Secular Employers*

Pure secular employers occupy one end of a continuum from secular to religious employers. This category is composed of employers who do not consciously incorporate particular religious beliefs and values into the

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339. This is particularly true of accommodation claims where it is the employer, not the employee, who is required to be accommodating.

340. The explicit exclusion of religious institutions, without according special treatment by "religious secular employers" who want to act on their religious beliefs in their employment relationships, is one of the arguments against recognizing their special status. *See* EEOC v. Townley Eng'g and Mfg. Co., 859 F.2d 610, 617-19 (9th Cir. 1988). But the argument being advanced in this article is premised not on The Civil Rights Act as it has been interpreted, but rather on how it should be interpreted or modified in light of the First Amendment and competing interests.

341. For a thorough treatment of these employers see Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391 (1987) [hereinafter Lupu, *Free Exercise Exemption*].

workplace. Such an employer may well demand certain values and beliefs of employees, e.g., honesty and fidelity to the employer, but the employer does not base these values explicitly on religious precepts or does not use a religious basis to support using those values in employment decisions. These employers emphasize business, narrowly considered; i.e., money, deals, and the production and delivery of goods and services. These commercial, secular settings present no truly vexatious problems of conflicting religious claims between the employee and the employer since the employer is not claiming religious grounds for its actions. Instead, the Title VII issues arising under this category in general present a relatively straightforward problem of balancing an employee's religious interest against a typical employer's commercial efficiency claim.[342] Nonetheless, as will be seen, there are still interesting issues because the discrimination can be based on an employee's beliefs and exercises, not only on status.

The great majority of employers are pure secular employers. From large public corporations to small private shops, most employers do not attempt to impose their religion on the workplace or the workers. In most settings in American society the distinction between the secular and the religious, between the realm of the marketplace and the realm of the sacred, seems clear. Business is concerned with money, goods, and deals, with production and distribution. Religion is concerned with relationships between people and the divine, with non-economic values, with truth, with otherworldly concerns, and with souls. Consequently the religious interests are frequently easy to separate from the secular interests.

Although the distinction between the sacred and the profane is often valid and is generally easy to make, even in the most secular business environments arguably "non-economic" values are present. For example, many businesses value honesty, fair dealing, personal discipline, teamwork, and cheerfulness. Although these values could possibly be traced to religious doctrine, they cannot be said to be exclusively from or properly resident only in either the domain of religion or the marketplace. A sullen receptionist ought to be discharged or reassigned regardless of whether the employer requires a cheerful, prompt, polite greeting because of the employer's religion, or because the employer just wants it that way, or because it is just plain good for business.

For the typical secular business, the moral or ethical basis for an employer's employment decision is not relevant to the issue of

342. In an accommodation claim, an employer needs to do very little to accommodate before the business efficiency concerns outweigh the accommodation sought. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977). *See supra* part II.A.1.d.

discrimination.[343] A non-productive employee need not be retained regardless of race, color, sex, or religion. As long as the employer is using regular, traditional criteria of performance in the manner in which that performance is traditionally defined in business, including subjective criteria and values or attitudinal criteria, then most religious discrimination cases should be quite straightforward from a legal or theoretical standpoint. For example, a law firm which never hired Jews or one which only hired Jews would be guilty of status-based discrimination the same as though the terms "women" or "African Americans" were substituted for the word "Jews." Similarly, overt harassment based on religious status would generally be actionable under the same standards as harassment on the basis of sex.

But even secular employers are affected by the distinct nature of religious discrimination as potentially arising not from birthright but from belief. For example, a secular employer does have one extra duty in the area of religious discrimination: accommodate an employee's religious needs. Thus a failure to try to accommodate a sabbatarian would violate the law. No other grounds for discrimination presents this sort of belief-based duty.

The typical disparate treatment, disparate impact, and harassment theories apply with few quirks attributable to the fact that the basis for the discrimination is religious.[344] Though the claim may be difficult to prove, an intentional discrimination (disparate treatment) claim (excluding for now harassment claims) does not present any theoretical difficulties in the secular employer situation. For the secular employer there is no justification for treating an employee worse on the basis of the employee's religion. Claims of customer comfort levels should have no more credence here than in sex- or race-based claims. For example, a claim that all of the customers are Christians should not justify refusing to hire or promote a Muslim any more than a claim that all customers are white justifies hiring only whites.

One case which involves direct disparate treatment by a mostly secular employer is *Blalock v. Metals Trades, Inc.*[345] Although in *Blalock* the employee wanted to work in a "Christian company," and one of the owners of Metal Trades represented it to be one,[346] the company did not

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343. *See* Underkuffler, *supra* note 17, at 588-625 (discussing the value-free workplace). For these situations, i.e., secular employers and religious employees, Professor Underkuffler-Freund's proposal of not inquiring as to the source of the employer's values makes sense and could generally work well.

344. *See supra* part II.A (detailed description of these theories).

345. 775 F.2d 703 (6th Cir. 1985), *aff'd on appeal after remand,* 833 F.2d 1011 (6th Cir. 1987), *cert. denied,* 490 U.S. 1064 (1989).

346. *Id.* at 704.

have a policy of being a purely Christian environment and was generally a secular company. After a time Blalock and one of the two main owners of the company developed theological disagreements.[347] Ultimately Blalock was fired because of those disagreements.[348] The court held that such an action based on a difference of religious belief was actionable religious discrimination.[349]

The disparate impact theory is more problematic in religion cases. In some cases the disparate impact theory is viable where there is no need for statistical proof. In instances where a seemingly innocent policy itself excludes members of a religious group, the disparate impact theory works well. Nonetheless, there is at least one significant difference between a disparate impact case based on birthright and one based on religion. Normally an employment policy which excludes people by race or sex must be changed with respect to all employees. In contrast, an employment policy which adversely affects a particular religious group can be retained in general by the simple expedient of making exceptions as needed for various religious needs. The principle of accommodation works well in understanding and resolving these problems. In effect, a disparate impact case becomes an accommodation case with the religious employee receiving special treatment, i.e., treatment based on an exception to a general policy still kept in force. This use of accommodation furthers the interests of tolerance on the part of both the employee and the employer.

For example, a requirement that men not wear headgear and that they not have beards, a seemingly neutral policy not targeted at any particular religious group, would *ipso facto* exclude Sikhs. A fairly simple accommodation would eliminate the discriminatory effect of these otherwise neutral policies—the employer need not abandon the general policy in order to comply with the law; the employer need only accommodate the particular need of the Sikhs.[350] The employer in this

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347. *Id.* at 705.

348. *Id.* at 705-06.

349. Admittedly, this case is somewhat atypical of purely secular employers. Nonetheless, it fits within the first category, although it would be placed on the continuum toward the second category since one of the employers acted on the basis of religious values. *Id.* at 705, 708.

350. EEOC v. Sambo's of Ga., Inc., 530 F. Supp. 86 (N.D. Ga. 1981). *See also* United States v. Board of Educ. for Sch. Dist. of Phila., 911 F.2d 882 (3rd Cir. 1990); EEOC v. Reads, Inc., 759 F. Supp. 1150 (E.D. Pa. 1991) (holding that Muslim woman improperly denied position as third grade counselor because her religion required her to wear a scarf covering her head); *cf.* Cooper v. Eugene Sch. Dist. No. 4J, 723 P.2d 298 (Or. 1986) (upholding a state statute that prohibits the wearing of religious clothing while teaching in a public school in the face of a Sikh woman's free exercise challenge), *appeal*

example could require neatness of appearance and, in the case of a restaurant, the use of a hairnet to avoid potential health hazards from long hair or facial hair.

Another common example arises from sabbatarians who are required by their religion not to work on the sabbath.[351] In most employment situations an employer should be able to accommodate that employee despite general requirements that employees work on Saturday (or Sunday, depending on which day the sabbatarian observes). For example, requiring the worker to find another employee with whom to swap workdays has been held a reasonable accommodation.[352] If no accommodation were possible, then this otherwise neutral job requirement should withstand a discrimination challenge. Similarly, allowing members of a religious sect to take that particular sect's religious holidays off is a simple accommodation for the secular employer to do. Thus the disparate impact of seemingly neutral policies can be handled effectively as accommodation claims.

The legal rules for these sorts of disparate impact claims comport well with the principled approach advocated here and there is little impetus to revise them significantly. Requiring employers either to modify policies or to make exceptions to seemingly neutral employment policies which have the effect of excluding whole classes of employees on the basis of religion furthers the aims of inclusion and equality. Demanding inclusion is fully consonant with furthering tolerance.

However, disparate impact cases which would need to be proven by demonstrating a statistical imbalance in a workforce present significant conceptual and proof problems. In general, statistics can be used to establish that the overall employment policy has a discriminatory impact

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dismissed for lack of a substantial federal question, 480 U.S. 942 (1987).

351. In 1980, the EEOC issued regulations which create a presumption of religious discrimination if the employer inquires into the availability of a prospective employee for work. 29 C.F.R. § 1605.3(b)(2) (1995). The employer has the burden of production and of persuasion to demonstrate that such inquiry did not affect the employment decision. 29 C.F.R. § 1605.3(b)(3) (1995).

352. *See, e.g.*, Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141, 145 (5th Cir. 1982); United States v. Albuquerque, 545 F.2d 110, 114 (10th Cir. 1976). *But see* Smith v. Pyro Mining Co., 827 F.2d 1081 (6th Cir. 1987) (requiring employee to find another with whom to trade shifts was not adequate accommodation where employee's religious beliefs prevent him from aiding another to sin by working on Sunday). *See also* Brown v. General Motors Corp., 601 F.2d 956 (8th Cir. 1979) (stating that where employer would not have incurred any actual cost in accommodating employee's refusal to work on the Sabbath, refusal to so accomodate was unreasonable); Redmond v. GAF Corp., 574 F.2d 897 (7th Cir. 1978) (holding employer's actions were unreasonable where employer made no effort to accommodate employee's religious needs and failed to demonstrate that it would suffer undue hardship).

where the particular offending employment practice cannot be articulated.[353] One problem with a statistical case is choosing which group should be a legitimate group for purposes of comparison. Should the comparison be between all Jews, Christians, and Muslims as one group (all western religions based on shared stories—all "people of the book")? Or should Jews, Christians, and Muslims be treated as three groups? If so, then why not further splintering—Orthodox, Reform, and Conservative Jews; Catholics and Protestants; Shiite and Sunni Muslims. And even further—among the Christians for example: Catholics, Anglicans, Eastern Orthodox, Presbyterians, Methodists, Lutherans, Baptists, AME, Jehovah's Witnesses, Seventh Day Adventists, Mormons, and so on. Or why not group sects by certain like characteristics, e.g., Papists, Evangelicals, Ecstatics, Mainstream, or New Age.

For statistically small sects (in the United States) like B'Hai's, Unitarians, Quakers, and Muslims proof of discrimination by the statistical disparate impact theory would be nearly impossible. In a statistical disparate impact claim the comparison is to be between the number from the aggrieved group actually employed compared to the number from the group who are qualified for the position in the relevant market. Because there are not likely to be enough qualified members of the particular religious sect in the applicant pool to make a statistically meaningful case for comparison, such claims should not be allowed for small groups.[354]

But one ought not rule out the statistical-imbalance theory for all religious discrimination claims. If the particular, relevant market has sufficient numbers of the excluded group to make the statistical approach valid, it should be allowed. For example, the (hopefully) past practice of some law firms of excluding Jews, without explicitly having a policy to do so, could well be challenged using the statistical disparate impact theory in some markets where there are a sufficiently large number of Jewish lawyers and job applicants.

The aims of the statistical imbalance approach are to prevent employers from masking intentional discrimination behind seemingly neutral policies and to uncover hidden bias even in the absence of an

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353. 42 U.S.C. § 2000e-2(k)(1)(A)(i), (1)(B)(i) (1988 & Supp. III 1991).

354. This practical difficulty of proof exposes the fundamental flaw in alarmist responses to hypothetical affirmative action programs based on religion, such as that raised in John E. Sanchez, *Religious Affirmative Action in Employment: Fearful Symmetry*, 3 DET. C.L. REV. 1019 (1991). The same argument can be made for national origin discrimination. If Sanchez's point is that either voluntary or imposed affirmative action is not appropriate to redress religious discrimination, he proves too much. Just as racial diversity can be an aim, so religious diversity can be an aim. And one cannot justify exclusion on the basis of religion just because an affirmative action program runs into a problem with too many sects from which to choose.

improper overt motive. These aims are fully consonant with the principles of inclusion, equality, and tolerance. If the cases were decided directly on these principles (plus the accommodation principle) then the statistics would be used only to show exclusion and inequality. That is, an absence of members of a sect from employment may indicate a violation of the principles of inclusion, equality, and tolerance. For large enough groups the EEOC and the courts should attempt to decide cases to include qualified of members of the excluded group in the particular employment setting. Principles of tolerance and equality would also thereby be furthered. The accommodation *principle* would work as the accommodation *rule* now does—the employer need not throw out an otherwise viable employment policy. Instead, the employer can modify or make exceptions to the policy to accommodate the religious needs of the excluded group. Note that under any circumstances the statistical approach would still not work for small groups.

In most cases, the harassment theory of discrimination presents no particular difficulties in the secular employer environment. Harassment based on religion is often the same as harassment based on sex or race or national origin insofar as it targets one's status as a member of a different group.[355] But there is one significant distinction between a "typical" harassment claim and a religion-based one: One must be careful to draw the line between permissible religious discourse on the one hand and harassment on the other. This line is akin to the difference between a serious discussion of gender roles and insulting sexual comments and innuendo; it is not always easy to draw, but it does exist.[356] Naturally, to the extent the discrimination moves from status-based (i.e., religion or religious group affiliation) to belief-based, the line becomes much more fuzzy. But it is not too much for an employer to enforce civility, to referee conduct and to curb an abusive style of comments relating to religion in the same way employers are required to do for sex and race. Nonetheless, courts ought to tread quite cautiously in cases of employees claiming harassment based on words and even arguments. That is, civil liability ought not follow from mere incivility or even sharp exchanges of views or even passionate arguments. But at some point the line is crossed and the argument becomes abuse and the incivility becomes harassment. At that point the employer must act or else must be liable for the failure to act.

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355. *E.g.*, Goldberg v. City of Phila., No. CIV.A. 91-7575, 1994 WL 313030, (E.D. Pa. June 29, 1994).

356. *See* Volokh, *supra* note 33 (discussing the problem of drawing the line between permissible speech (including religious speech) and harassment).

Though drawing the line in such cases will never be an easy task, the general rules of law in this area are now fairly well developed.[357] The harassment complained of must be severe or pervasive.[358] A few discrete episodes of hurtful language or "practical jokes" are not sufficient. Harassment is to be determined from the totality of the circumstances. Numerous small slights generally ought not add up to a harassment claim, particularly in a religious-belief or conduct claim. If these slights are from an employer (as distinguished from co-employees) and if they affect the employee's terms and conditions of employment, then a disparate impact claim exists. But, if they are simple insensitivity by an employer or intolerance by co-employees, then the harassment ought not be too easily found. The desirability of vigorous discourse about deeply important things ought to give pause to one seeking to stifle expression of disagreement based on beliefs. As stated by the Supreme Court in *Cantwell*,

> To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.[359]

Courts should consider the extent to which their decisions will enhance societal goals of inclusion, tolerance, and respect for equal claims to human dignity in deciding when vehemently uncivil discourse becomes harassment.

Despite the well-developed statements of the legal rules, drawing the line between callousness and an actionable harassing environment is not easy. In one case an employee with certain religious sensibilities was

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357. *See supra* part II.A.

358. Dillon v. Frank, No. 90-2290, 1992 WL 5436 (6th Cir. Jan. 15, 1992); Carrero v. New York City Hous. Auth., 890 F.2d 569, 577 (2d Cir. 1989); Lipsett v. University of P.R., 864 F.2d 881, 897-98 (1st Cir. 1988); Hicks v. Gates Rubber Co., 833 F.2d 1406, 1413 (10th Cir. 1987); Scott v. Sears, Roebuck & Co., 798 F.2d 210, 213 (7th Cir. 1986); Lambert v. Condor Mfg., Inc., 768 F. Supp. 600 (E.D. Mich. 1991) (finding an employer in violation of an employee's right to be free of religious discrimination by refusing to accommodate the employee's religious beliefs by removing offending nude photos of women from the workplace).

359. Cantwell v. Conn., 310 U.S. 296, 310 (1940).

taunted by his more vulgar fellow employees.[360] The employer took little action until it ultimately agreed to transfer him to another department. But the transfer was delayed and because of the continued harassment, the employee quit before the transfer occurred. One issue was whether the use of vulgarities around an employee with known religiously-derived sensitivities to such language is religious harassment. The court stated the test for whether the harassment was religious to be "[w]hether a comment occurred because of an individual's religious beliefs or would not have occurred but for an individual's religion . . . ."[361] The court reversed the summary judgment for the employer and remanded the case.

In another case, *Turner v. Barr*, the court listed the following to support its finding of religious harassment:

> (1) The Plaintiff was required to suffer reference to the Holocaust by one of the supervisory Deputies. The Deputy related a joke about the Holocaust. The Deputy stated that the cost of Germany's reconstruction after World War II was high because of its high gas bill during the War.
>
> (2) When the Plaintiff was assigned to collect for a charity drive, he was subjected to comments about the appropriate nature of the assignment, because Jews were supposedly skilled in dealing with money.
>
> (3) On another occasion, when the Plaintiff was assisting in the execution of a writ at a jeweler's store, the Plaintiff was told that he should have been running the store. The clear and indisputable thrust of the comment was that being a jeweler was something for Jews.[362]

This group of three items taken together, though certainly morally improper and likely to be hurtful (as they were to the plaintiff), do not seem to be in themselves sufficient to support a finding of religious harassment under the "severe and pervasive standard." Probably because of this concern, the court did note that its opinion did not contain a complete list of all of the incidents and did not detail the full factual basis for the court's decision. Furthermore, this case included racial epithets and other evidence of disparate treatment on the basis of race and perhaps the decision should be understood in that light. This case also involved direct, targeted harassment based not on a difference of beliefs, but solely on the basis of an employee's status as a member of a particular sect. As

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360. Finnemore v. Bangor Hydro-Elec. Co., 645 A.2d 15, 16 (Me. 1994).

361. *Id.* at 17.

362. Turner v. Barr, 806 F. Supp. 1025, 1028 (D.D.C. 1992).

a general proposition, it is easier (and properly so) to convince a court to find liability for even a few outrageous, targeted items than for more vague, general actions.

As a remedy, the court ordered that "the Defendant, its agents, servants, and employees, shall be and hereby are directed to hereafter refrain from any racial, religious, ethnic, or other remarks or slurs contrary to their fellow employees' religious beliefs."[363] This sort of broad sweep would seem to prohibit even reasoned, measured discussion about religious beliefs whenever those "remarks" were religious in nature and "contrary to their fellow employee's religious beliefs." Someone who sought to explore theological issues such as why Jews consider themselves the chosen people and Christians do not so consider them, or why Christians believe in Christ as a Messiah, but Jews and Muslims do not, would be making remarks "contrary" to the other's beliefs. It would seem that such discussion would be protected from governmental interference on the grounds of both Free Exercise and Free Speech.

Even in a case with such an overly broad injunction, the principles of tolerance and according dignity to another person regardless of differences in belief underlie the court's decision insofar as it attempted to accommodate the employee and to encourage tolerance of the employee by other employees. But tolerance and accommodation ought not mean that employers and employees cannot talk about matters of central importance in their lives. Instead it should mean that they should discuss the matters with civility, respect, and reason.[364] Of course this "should" is not a legal must. The line between liability and nonliability would be drawn much further from the dispassionate, civil, reasoned discourse pole and much closer to the emotional, abusive, epithet-slinging discourse pole. But the idea of civil, reasoned discourse need not be abandoned merely because the line of liability moves to toward the nasty end of the spectrum.

The focus in this article is on what the state can or should mandate, not on what private employers can or should do in this area. A private employer could implement work rules which limit or even nearly eliminate religious discussion; such private action is not state action and so is not

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363. *Id.* at 1029.

364. According respect on the basis of tolerance of another's viewpoint does not mean acceptance of that viewpoint. One can and should still make judgments about what is right and true and better, but one ought not be dismissive of those with other ideas. Smith, *Free Exercise Doctrine*, *supra* note 31, at 526-27. Female circumcision is wrong regardless of cultural-religious norms and one need not change this view to respect, as fellow human beings, those who hold another view. Similarly, one can be tolerant of those on the other side of the abortion issue (whichever side one is on) without adopting that view.

reached by the Constitution. But the reason the employer could not completely ban religious discussion is that it would seem that at some point an employee's statutorily protected right would permit some discussion and expression under the accommodation theory. For example, an outright ban would not accommodate the interests of all employees, particularly those for whom witnessing is a religious requirement. Furthermore, the principles which underlie the area and which this article argues should be placed even more to the front would not support such a ban. Banning all religious expression may further equality in a weak sense (non-tested, non-diverse) and may further superficial tolerance, but it would not deepen respect and tolerance and encourage acceptance of diversity which can only come about through fuller exploration of the values and beliefs of another.

A business enterprise may have an interest in banning religious expression because doing so may (a) reduce exposure to suits for religious harassment, and (b) may increase workplace harmony. But the employer will then have the problem of deciding *what* is religious expression. Certain obvious actions like explicit discussion of religious beliefs and Biblical interpretation may present easier cases. But a discussion about Israel's legitimacy may well be more religious than political though expressed in political terms.

The particular extent to which one can comment and the extent to which the court can create a remedy in the nature of a gag order are in practice difficult. It is doubtful that either Congress or the courts can create pristine work environments by passing laws and issuing orders. Because excluding all religious speech and expression lacks viability, an opinion like *Turner v. Barr* puts employers on notice of the need to take specific actions to encourage tolerance of religious diversity and to encourage inclusion of those with different religious views. Thus, despite its weaknesses, *Turner v. Barr* furthers two of the core policies of this area of the law, tolerance and inclusion. Since the option of excluding all religious speech and expression appears unworkable, and possibly illegal under Title VII under certain circumstances, employers would be well advised to establish traditional liberal values of tolerance and reasoned discourse in employees in order to avoid liability.

The fourth theory, the duty to accommodate, was designed for the secular employer and presents no problems other than those identified above.[365] The duty to accommodate is obviously tightly tied to principles of tolerance, accommodation and inclusion. However, to be consistent with the aims of the law and the goals of inclusion and tolerance, the duty to accommodate should be raised above its current "more than a de minimus cost" standard. Perhaps the level articulated in

365. *See supra* notes 316-25 & 342-52 and accompanying text.

the Americans with Disabilities Act of 1990 (ADA)[366] which requires employers to do more than show that they would suffer "more than a de minimus cost" by accommodation would be adequate.[367] Though the ADA uses the same general test, i.e., the employer must make "reasonable accommodation" unless to do so would cause "undue hardship,"[368] the clear thrust of the language and the examples in the statute make the duty meaningful and raise the de minimus standard to one of reasonability under all of the circumstances.[369]

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366. Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101-213 (1988 & Supp. II 1990)).

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

368. *Compare* 42 U.S.C. § 2000e(j) (1988) (accommodation of religion) *and Hardison*, 432 U.S. at 84, *with* 42 U.S.C. § 12111(3), (9) (Supp. IV 1992) (examples of reasonable accommodation for disabilities) *and* 42 U.S.C. § 12111(10), 12112(b)(5)(A) (Supp. IV 1992) (undue hardship defined and factors identified for disability accommodation).

369. The overall approach advocated in this Article ultimately contemplates that employers and employees would typically work out practical solutions rather than taking a rights-based approach in court. This approach of seeking a negotiated accommodation is similar to the approach contemplated by the Americans With Disabilities Act under which a pragmatic approach to meeting the needs of the employer and employee is preferred to a more absolutist rights-based approach. 29 C.F.R. § 1630.2(o) (Reasonable Accommodation); 29 C.F.R. § 1630, App. § 1630.9 "The determination of which accommodation is appropriate in a particular situation involves a process in which the employer and employee identify the precise limitations imposed by the disability and explore potential accommodations that would overcome those limitations." *Id.*

> Process of Determining the Appropriate Reasonable Accommodation. Once a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability. Although this process is described below in terms of accommodations that enable the individual with a disability to perform the essential functions of the position held or desired, it is equally applicable to accommodations involving the job application process, and to accommodations that enable the individual with a disability to enjoy equal benefits and privileges of employment. See Senate Report at 34-35; House Labor Report at 65-67. When a qualified individual with a disability has requested a reasonable accommodation to assist in the performance of a job, the employer, using a problem solving approach, should: (1) Analyze the particular job involved and determine its purpose and essential functions; (2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitation could be overcome with a reasonable accommodation; (3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the

Instead of letting employers off with a showing of merely de minimus hardship, employers should be required to show that the hardship is real and "undue" and not a mere inconvenience. The guiding principles should be tolerance and inclusion, not maximum economic efficiency. The societal values here outweigh mere claims of economic hardship, unless that hardship is serious enough to be "undue." If analysis is premised on encouraging tolerance and promoting accommodation in general, then the secular employer ought to be required to shoulder some of this burden. As stated by the Sixth Circuit:

> [A]n employer does not sustain his burden of proof merely by showing that an accommodation would be bothersome to administer or disruptive of the operating routine. In addition, we are somewhat skeptical of hypothetical hardships that an employer thinks might be caused by an accommodation that never has been put into practice. The employer is on stronger ground when he has attempted various methods of accommodation and can point to hardships that actually resulted.[370]

Despite the general theoretical simplicity of the pure secular employer setting, not all cases involving secular employers would be so clear-cut. Many employers develop a corporate culture to which the employees must conform. The culture may be open and non-hierarchical like the early Apple Computer company or rigidly hierarchical and formalistic like IBM or Ross Perot's EDS. Whichever corporate culture exists, that culture will be based upon the extra-economic values of management as well as on the judgment of management as to what will generate profits. Painted most broadly, some employers want employees to have balanced lives and some want employees to have their lives revolve around work.[371] An ill fit between a particular employee and a particular corporate culture can often be traced to the difference between the values of the management and the employee.[372] Sometimes those conflicts in values will be based on life-style choices which may not be founded upon religious ideas, e.g., value of family and community over corporation and profit. But

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individual to perform the essential functions of the position; and (4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.

Id.

370. Draper v. U.S. Pipe & Foundry Co., 527 F.2d 515, 520 (6th Cir. 1975).

371. *See* Burges, *supra* note 161.

372. Some incompatibilities are based on disputes as to business goals and means of accomplishing those goals. *Id.*

sometimes the conflicting values are directly the result of the employee's religious beliefs.

Where the employer is making the same demand on all employees and so is not treating some employees differently from others, and where a neutral policy functionally excludes not only members of a religious group but also others who do not fit the corporate culture for what could be purely secular or philosophical or "life-style" choice reasons, the theory of failure to accommodate ought to be applied with great care. The statutory text of Title VII does not prohibit discrimination on the basis of differences in values, but on the basis of religion. However, Title VII interpretation has not followed the *Yoder* approach which would protect the Amish and their values because of the religious sources of them, but which would not so protect a follower of Thoreau. In fact the EEOC and the courts have broadened the term "religion" to include atheists and the rights of the non-religious such that the employee need not show a particular religious value which is being affected.[373]

The EEOC regulations do not distinguish between values-based decisions and religious-based decisions.[374] The regulations define as religious a broad range of secular values as long as those values are somehow central to the employee's core belief system. Though as a philosophical and even religious proposition this approach seems sound, as a legal one, particularly in the employment context, it seems too broad for at least two reasons. First, the inconsistency with the First Amendment can cause unnecessary problems and analytic complexities;[375] and second, as so well-exposed by Professor

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373. 29 C.F.R. § 1605 (1994); EEOC v. Townley Eng'g and Mfg. Co., 859 F.2d 610, 620-21 (9th Cir. 1988).

374. The EEOC Guidelines contain the following basic definition of what is meant by a religious practice or belief: "[I]n those cases in which the issue [of whether or not a practice or belief is religious] exist[s], the Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." 29 C.F.R. § 1605.1 (1994). The EEOC cites United States v. Seeger, 380 U.S. 163 (1965) and Welsh v. United States, 398 U.S. 333 (1970) in support of this expansive interpretation. It does not cite the decision in *Yoder* which distinguished religion from philosophy. The constitutional limitation is not coextensive with the statutory obligation as developed in the EEOC regulation.

375. For example, how does an evangelical religious employer who displays religious symbols accommodate an employee who believes as a matter of moral and ethical belief that religious, moral, and ethical beliefs are an intensely personal matter not to be discussed, as a matter of principle, in the workplace. Is this the sort of belief the act was intended to protect and shield? To the extent the employee is asserting an ethical basis and not a religious basis, it would seem that, under *Yoder*, the conflict is between a constitutional right on the one hand and a statutory or regulatory right on the

Underkuffler-Freund, the goal of achieving value-neutrality is illusory at best.[376]

The source of the employee's conflicting beliefs ought not to change commonplace incompatibility into a viable religious discrimination claim. If an employer requires 100% commitment from employees to the exclusion or diminution of employee involvement in family and community and the employee's religious beliefs put family first, this incompatibility of beliefs ought not be actionable under Title VII. In this sort of case the principle of equality or non-discrimination in treatment of the employees seems to override a claim for accommodation.

The belief component of religious discrimination which distinguishes it from the other types is visible even in the "pure" secular setting. Courts need to recognize this and carefully distinguish between status-based and belief-based discrimination, particularly in cases involving values and in cases involving a religious adherent seeking beneficial treatment, i.e., seeking accommodation. Firing an employee because of a difference in belief in the infallibility of the Pope would not seem to be justified. Firing an employee because of a difference in belief about the relative importance of work and family would seem to be legal under of Title VII.

B. *Religious Secular Employers*

This group of employers is very difficult to corral and is quite heterogeneous. The essential common feature is that the employer intentionally imports religious values into the secular business world. Some employers create religiously infused environments,[377] others require certain religious-type conduct such as attendance at Bible study meetings,[378] others make employment decisions on the basis of beliefs and values explicitly derived from religious sources, and still others make the decisions explicitly on the basis of religious status or on the nature of the compatibility or "rightness" of the employee's beliefs and practices.[379]

Religious secular employers create several issues touching central tenets of our conceptions of liberty. One cluster of issues surrounds the

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other. The balance in such a case may shift somewhat in favor of the religious claim since the claims of the two sides are no longer premised on the same fundamental law.

376. Underkuffler, *supra* note 17.

377. State v. Sports & Health Club, Inc., 370 N.W.2d 844, 846 (Minn. 1985), *dismissed for lack of jurisdiction,* 478 U.S. 1015 (1986).

378. EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 612 (9th Cir. 1988).

379. Dayton Christian Sch. v. Ohio Civil Rights Comm'n, 766 F.2d 932, 934 (6th Cir. 1985).

intractable problem of distinguishing religion and religious activity from secular activity. For example, when an employer uses the Bible as the company's business manual,[380] what distinguishes use of that book from *On a Clear Day You Can See General Motors,*[381] or *How to Win Friends and Influence People*[382] or any other business manual, published or private? The source of the information is, according to adherents, different: the Bible comes from the mind of God and the other books from the pens of people. The main purpose is different: one is concerned with eternal verities while the others are concerned with earthly wealth. But these distinctions are not based on the use to which the book is put, i.e., running the business. If one is to tell an employer that the use of the Bible as a guide to business is improper, then one is clearly sending the message that the Bible is only religious. To make that judgment requires one to determine what is and what is not religious. Furthermore, this distinction is based solely on the religious content and source of the Bible. Consequently, even secular use (running a business) of a religious item (the Bible) can be found, quite improperly, to offend Title VII.

A closely related problem arises from the necessity to decide which business purposes are proper and which are not. An employer who dedicates his business to the glory of God and runs it as a discipleship to be used to witness for God and Jesus ought not have the court rule that such a purpose is not a legitimate business purpose. An employer who intends to use the business both as a secular platform for making money and as a religious platform for spreading the word seems to have a legitimate claim to access to the marketplace under principles of equality and inclusion. The Free Exercise clause would seem to support such a claim and the courts have so recognized. But the courts have always ruled that Title VII restricts the religious aspects of the employer in favor of the employee whenever the employee complains.[383]

The effect of such rulings is to diminish the ability of certain types of Christians to be employers. That is, if a religious person seeks to be an employer and seeks to bring the religion into the workplace, the law will severely limit that person's ability to do so. Despite the Ninth Circuit's comments about mutual accommodation in *Townley,*[384] that court also wrote: "Where the practices of employer and employee conflict, as in this

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380. *Sports & Health Club, Inc.*, 370 N.W.2d at 847.

381. ROBERT A. WRIGHT, ON A CLEAR DAY YOU CAN SEE GENERAL MOTORS (1968).

382. DALE CARNEGIE, HOW TO WIN FRIENDS AND INFLUENCE PEOPLE (Pocket Books 1982) (1936).

383. *E.g., Townley*, 859 F.2d 610; Brown Transp. Corp. v. Pennsylvania, 578 A.2d 555 (Pa. 1990).

384. *Townley*, 859 F.2d at 621.

case, it is not inappropriate to require the employer, who structures the workplace to a substantial degree, to travel the extra mile in adjusting its free exercise rights, if any, to accommodate the employee's Title VII rights."[385] The *Townley* court acknowledges that "Title VII . . . could not, require individual employers to abandon their religion."[386] But it can and does favor the employee over the employer; it is the employer who must accommodate under the statute.

Most of the free exercise defenses to employment discrimination claims have been raised by employers who are evangelical, fundamentalist Christians who believe that everything they do is done as a "discipleship for the Lord."[387] In all of the reported cases the employer who brought religion into the business was found to have violated Title VII or similar state laws and to not be protected by the First Amendment.[388] In most of the cases there is little discussion of the employer's right of free exercise and the constitutionality of the statute as applied against such an employer.[389] As pointed out by Professor Underkuffler-Freund, the courts have assumed that religion in the marketplace is discriminatory.[390]

A common problem which complicates analysis is that cases can involve not just religious discrimination, but also discrimination on the

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385. *Id.*

386. *Id.*

387. *E.g.*, State v. Sports & Health Club, Inc., 370 N.W.2d 844, 859 (Minn. 1985), *dismissed for lack of jurisdiction* 478 U.S. 1015 (1986); *Townley*, 859 F.2d 610.

388. *E.g.*, Blalock v. Metals Trade Inc., 775 F.2d 703 (6th Cir. 1985) (holding that an employee discharged after theological dispute with his supervisor who wanted the employee to defer to him on religious matters was discrimination under Title VII); Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140 (5th Cir. 1975) (holding that employer's refusal to excuse an employee from the religious portion of the weekly business meetings was a failure to accomodate the employee's religious beliefs). *But see* Meltebeke v. Bureau of Labor and Indus., 903 P.2d 351 (Or. 1995) (employer not liable under state law because of lack of notice or knowledge of hostile or intimidating effect of employer's witnessing of employee and labelling him as a sinner). *See infra* notes 460-65 and accompanying text for a fuller discussion of the *Meltebeke* case; *see also Brown Transp. Corp.*, 578 A.2d at 555 (finding religious harassment where an employer published religious articles in its newsletter and printed Bible verses on paychecks).

The United States Supreme Court has avoided deciding this issue each time it has been presented the opportunity. *Dayton Christian Sch.*, 766 F.2d 932 , *rev'd on other grounds, sub nom.* Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619 (1986) (not ripe); *Sports & Health Club, Inc.*, 478 U.S. 1015 (1986) (lack of jurisdiction); *Townley*, 859 F.2d 610.

389. *E.g.*, *Townley*, 859 F.2d 610.

390. Underkuffler, *supra* note 17.

basis of sex or marital status.[391] Religious secular employers have sought to justify even their non-religious discrimination on free exercise grounds.[392] Further complicating the analysis is that freedom of speech and freedom of association interests and claims are also often present. The complex jumble of complementary and competing rights and the subtle, difficult nature of the problem are illustrated in the cases briefed below. First an accommodation case is presented because it is simpler than the others and because it is the one which most fully addresses the Title VII-Free Exercise tension. Next considered are disparate treatment cases including offensive environmental cases and harassment cases. Then the disparate impact theory is analyzed for these types of employers.

1. Accommodation Cases

In perhaps the most comprehensively written opinion to date, the Ninth Circuit decided a case in which a manufacturer required employees to attend mandatory devotional services as a condition of their employment.[393] The court held that the employer was not a religious institution for purposes of being exempt from Title VII, that the employer had not adequately accommodated the employee's religious needs, and that the constitutional right of free exercise of religion did not invalidate application of Title VII.

At the start of business in 1963, the owners of the Townley Manufacturing Co., Inc., had "made a covenant with God that their business 'would be a Christian, faith-operated business.'"[394] The owners are born again Christians who "'are unable to separate God from any portion of their daily lives, including their activities at . . . [their] company.'"[395]

In 1979 a machinist named Pelvas was hired at a Townley plant in Arizona where, at that time, there were no devotional services. In December 1982 the employees were issued an employee handbook which stated that they were required to attend the devotional services as a condition of continued employment. However, services were not begun at the plant where Pelvas worked until April 1984. In June 1984 Pelvas objected to the requirement and asked to be excused from attending. He

391. *E.g.*, State v. Sports & Health Club, Inc., 370 N.W.2d 844 (Minn. 1985), *dismissed for lack of jurisdiction,* 478 U.S. 1015 (1986); Dayton Christian Sch. Inc. v. Ohio Civil Rights Comm'n, 766 F.2d 932 (6th Cir. 1985), *rev'd on other grounds, sub nom.* Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619 (1986).

392. *Sports & Health Club, Inc.*, 370 N.W.2d 844; *Townley*, 859 F.2d 610.

393. *Townley*, 859 F.2d at 612.

394. *Id.*

395. *Id.* (quoting from Appellant's Brief p.6).

was not excused. In December 1984 Pelvas left the company. In July 1986 the EEOC brought an action against Townley claiming that Pelvas, an atheist employee, was discriminated against on the basis of religion, that Townley failed to properly accommodate Pelvas, and that Pelvas was constructively discharged. In May 1987 the district court granted partial summary judgment, ruling for the EEOC on the first two issues, and issued a permanent injunction prohibiting mandatory devotional services at the plant. The court denied summary judgment on the constructive discharge issue which was eventually tried with a result in favor of the employer. The employer appealed the summary judgments and the injunction.

The employer had also raised the hardship defense to the accommodation claim. On appeal the majority opinion of the Ninth Circuit expressly rejected the employer's assertion that spiritual hardship meets the standard of undue hardship on the conduct of the employer's business.[396] The court focused exclusively on whether excusing the employee from the meetings would have a significant adverse affect on the money-making aspect of the business and concluded it would not. The majority completely discounted, for purposes of Title VII analysis, the fact that the business was run as part of the owner's covenant with God. The court rightly held that the religious organization exemptions in the act did not apply because the manufacturing business did not qualify as a religious organization. It also held that whether the owners made the distinction or not, the law distinguishes between business and secular purposes on the one hand and religious purposes on the other. Hardship analysis ignores the latter.

In its split decision, the Ninth Circuit held that the compelling state interest in prohibiting discrimination overrides the employer's First Amendment rights of freedom of religion.[397] However, the court did conclude that the district court's injunction was too sweeping. Consequently, the court ordered the injunction to be modified to be as narrowly tailored as possible to meet the needs of employees. The court wrote:

> The district court simply enjoined *all* mandatory services at Townley's Eloy plant. We believe the district court's decree was too broad. The goal of Title VII is served by protecting only those who have religious objections to the services. To protect those who do not have such objections is not necessary. Nor do we think that to require that the service be voluntary as to all employees, whether that is their wish or not, is necessary to

396. *Id.* at 615.

397. This case was decided before *Smith*, and before the RFRA was enacted.

> further the purposes of Title VII. Following this decision, it is not likely that fear of intimidation will suppress requests to be excused on religious grounds. Obviously such requests must be honored by both Townley and the Townleys.[398]

Thus the injunction could be tailored to have attendance mandatory for everyone who does not object on religious grounds. This would more closely meet the religious needs of the employer. In explaining its decision the majority wrote:

> The transcendent principle in cases of this sort is accommodation. Where the religious practices of employers, such as the Townleys, and employees conflict, Title VII does not, and could not, require individual employers to abandon their religion. Rather, Title VII attempts to reach a mutual accommodation of the conflicting religious practices. This is consistent with the First Amendment's goal of ensuring religious freedom in a society with many different religions and religious groups.[399]

The dissenting judge disagreed factually with the majority and disagreed on the core principle to be followed. First, the dissent noted that accommodation had in fact been attempted in the form of requiring attendance, but allowing the employee to ignore the goings-on. The employer explicitly permitted the employee to wear ear plugs, read a book, or even sleep at the meetings, as long as he physically attended. According to the dissent, such accommodation was enough because it permitted the employee to shut out and disassociate himself from the worship service and religious indoctrination. To the dissent such an accommodation was sufficient under the law because the employee had no right to any particular form of accommodation.

The more significant disagreement was over the standard to be used in weighing the competing rights. The majority used an accommodation and tolerance standard while the dissent sought to premise the analysis on coercion. The dissent felt that there was no coercion to force the employee "to practice the company's religion or to give up his own."[400] The dissent conceded that if the circumstances were such that an employee were to be penalized or ostracized for conduct such as reading or wearing earplugs, then a claim would exist. But such was not the case in *Townley*.

The *Townley* case explicitly rejected any free exercise claim of the employer. Using traditional free exercise rules which permit the state to

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398. *Townley*, 859 F.2d at 621.

399. *Id.*

400. *Id.* at 622.

burden the employer provided there is a compelling state interest in doing so and, provided that the least intrusive means is chosen, the court held that Title VII was properly applied to limit the employer's exercise. Essentially the majority latched onto the idea of accommodation, both in the statutory sense and in the principle sense to justify burdening the employer. However, I think the case should have come out differently using the same basic principle. Essentially, the court placed the entire burden of accommodation on the employer and held that whenever there was a conflict, the employer's interest must give way. But the law need not be applied in such a draconian or one-sided manner, especially since it is not written as such. The employer has a statutory duty to accommodate. But the duty is to accommodate identifiable religious needs of an employee, not the desire not to be exposed to ideas. What if the employer were conducting civics classes on the duty to vote? How does one distinguish an employee request to be excluded from such classes from the employee in *Townley*. If an employee claims that to vote is either a meaningless act, or is antithetical to his principles because he believes the government to be so corrupt that any collaboration, such as voting, is immoral, then that claim seems to be of a similar nature to the religious one insofar as it is untestable, a matter of faith, a life-ordering concept, and such. Why should only required exposure to religious ideas be banned?

In *Townley* the employee was not seeking to have a religious need of his accommodated; he was merely seeking to fulfill his desire to avoid exposure to unpleasant religious indoctrination. The unpleasantness was not due to such exposure being against his religious beliefs; he merely disagreed with the views being presented. The employee was permitted to assert non-religion as a ground for accommodation under the statute. On the other hand, the employer believed that its actions were not only part of religious practice, but were part of his doing business, i.e., part of the business purpose was to witness for Jesus. This secular employee/religiously-motivated employer situation is not what the statute was originally aimed at. While I think it proper that the statute reach this far, I think the religious action by the employer ought not give a per se claim to the employee. To this extent I agree with Professor Underkuffler-Freund.

Though the *Townley* court used one of the major principles of the religious freedom cases, accommodation (which is also one of the major principles to be used under my proposal), it did not consider the other principles and did not adequately weigh the employer's interests. The court mentioned that both the employer and employee must accommodate each other. But this was said in the very limited context of negating the ability of an employee to force the employer to accept a particular type of accommodation. That is, the employee can suggest an accommodation, but an employer is free to try to meet the employee's needs another way.

Only in this limited sense must the employee "accommodate" the employer. The court justified placing the burden on the employer because the employer has greater control over structuring the workplace. Unstated but implied from that comment is concern over the relative power of the parties. An employer has significantly greater power in the relationship with an individual employee than does the worker. Antidiscrimination law is premised in part on this disparity in power and antidiscrimination laws help equalize the relationship in this critical area. In general disparity in bargaining power ought to be recognized and weighed in any decision, but it is not so heavy as the court seemed to indicate and the scope of protection granted seems much more than is necessary to counterbalance that weight.

Ultimately, the *Townley* court did not really grant the employer's right to religious freedom sufficient weight. The dissent noted that the fundamental flaw in the EEOC's argument and in the position of the majority was in treating the defendant in this sort of religious discrimination case "as though the defendant was simply one more racist bigot."[401] The court did not give equal dignity to the employer's claim. The court did not explain why the proposed accommodation (Pelvas attending, but not paying attention) was so burdensome on Pelvas' religion.

For the employer's rights to be treated with equal dignity, accommodation must become a two-way street. If we seek to encourage tolerance, requiring an employee to attend a Bible study meeting may help that employee understand that with which he disagrees and may help the employer be more tolerant of different views held by employees. Simply separating the two is a weak form of tolerance. Allowing employers like Townley greater latitude than was evident in this case furthers tolerance not only on the employee-employer level but also on the societal level. Court toleration of marginal religious groups even as employers may help affect society's willingness to tolerate and include sects in a positive way.

If the case had been decided by framing the relevant discourse around the principles of tolerance, equality, inclusion and accommodation, then a better result could well have been achieved. By taking a more limited rules-based approach and by focusing on only one limited aspect of only one principle, the court failed to treat the employer with sufficient regard.

The second case to be examined, *State of Minnesota v. Sports & Health Club, Inc.*,[402] is much more complex with many more suspect activities involved than in *Townley*. In *Sports & Health Club, Inc.*,

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401. *Id.* at 624. This is also the tone of the EEOC regulations concerning religious discrimination. *See* 29 C.F.R. § 1605 (1994).

402. 370 N.W.2d 844 (Minn. 1985), *dismissed for lack of jurisdiction,* 478 U.S. 1015 (1986).

fundamentalist Christians implemented their religious beliefs and practices in their business, a closely-held corporation, which owned and ran a group of exercise and recreation facilities. Several aspects of the employment relationship were challenged by the Minnesota Department of Human Rights under the state law prohibiting discrimination on the basis of employment.[403] The challenged policies and practices included the conduct and content of employment interviews, the holding of Bible study groups on the premises during business hours, the prohibition against promoting into management anyone who was not a "growing Christian," and certain disciplinary actions taken based on employees' private conduct away from the premises.

During employment interviews prospective employees were questioned about their marital status (particularly women applicants), were asked about their religious beliefs, and were advised about the religious nature of the business. Although Catholics, Jews, Muslims, mainstream Protestants, and atheists were hired at all levels except management, all employees regardless of faith had to demonstrate a "disciplined lifestyle" in accordance with the employer's interpretation of the Bible. For example, employees could not have pre- or extra-marital sex and could not cohabitate with a member of the opposite sex out of wedlock.[404]

The environment at the workplace was intended to be a disciplined, Christian one in which religion was discussed freely and frequently, in which cheerful, obedient attitudes were required, and in which a proper attitude was a constant requirement. Management employees were required to attend weekly Bible study meetings; the Bible was their management manual. Other employees were invited to attend Bible study meetings, but were not required to do so.

The State of Minnesota brought a class action against Sports and Health Club and its owners and principals claiming that they had violated the Minnesota Human Rights Act by unlawfully discriminating on the basis of religion, sex, and marital status. The defendants admitted many of the practices and defended primarily on the grounds that their religious beliefs required them to so act.

The Minnesota Supreme Court willingly conceded the genuineness of the employer's beliefs and the religious nature and source of them, and noted that despite all of the alleged actions of discrimination, the defendants had always employed, and through the various trials continued to employ married, divorced, and single men and women, as well as people of various faiths, "so long as such other persons [were] not offended by the owners' faith, [were] not antagonistic toward the Christian

403. MINN. STAT. ANN. § 363.04 (West 1991). For purposes of this article, the requirements of the state law are virtually the same as the federal law.

404. *Sports & Health Club, Inc.*, 370 N.W.2d at 847.

gospel, and [would] comply with the management's work rules in a cheerful and obedient spirit."[405] Nonetheless, in a split decision, the court affirmed the findings and conclusions of the administrative law judge, enforced the injunction, and remanded the case for the determination of damages to be awarded the various class members.[406]

The dissenters questioned the adequacy of the majority's analysis in several respects. For example, one dissenter, Justice Peterson, queried how one could distinguish between an impermissible inquiry during an employment interview about reading the Bible from a presumably proper inquiry about reading a modern anthology of literature.[407] Justice Peterson also noted that, "[t]o say as the [administrative law judge] said, that '[t]he essence of the employer's business is not a 'discipleship for Christ' . . . but rather the operation of an exercise emporium' is impermissibly to substitute the examiner's business judgment for [the defendants'] business judgment."[408] Justice Peterson rightly pointed out that the majority's decision mandates that religion does not belong in commerce.[409] Under the majority opinion religion is worse than irrelevant in the marketplace; it is banned.[410] There was to be no relationship between "praying on one's knees on Sunday [and] preying on other persons in the marketplace on Monday . . . ."[411]

The other dissenter, Justice Yetka, noted the irony that the law intended to protect minority religions discriminates against the majority

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405. *Id.* at 848.

406. In a later case, Cooper v. French, 460 N.W.2d 2 (Minn. 1990), decided after *Smith*, the Minnesota Supreme Court reached the opposite conclusion, but did so under the Minnesota Constitutional protection of free exercise rather than under the Federal Constitution, because *Smith* eliminated any federal free exercise challenge. (One of the dissenters in *Sports and Health Club* wrote the majority opinion in *Cooper*.) The court held that a person renting a house could discriminate on religious grounds against prospective renters on the basis of their marital status. This precise issue was decided the other way in *Sports and Health Club*. Furthermore, the court accepted the economic necessity argument of French while it rejected a similar claim by the Sports and Health Club, i.e., French was not told to get out of the business or comply with the law while the Sports and Health Club was. The court reached for any distinguishing characteristic and relied most heavily on the difference between employment relationships and renting places of accommodation. The court did not convincingly explain why they were different under free exercise analysis, it just stated that they were.

407. *Sports & Health Club, Inc.*, 370 N.W.2d at 870.

408. *Id.* at 859.

409. *Id.*

410. *Id.*

411. *Id.*

religion, Christianity, and that "[t]his decision would deny a Christian the right to practice his belief in the marketplace."[412]

The defendants appealed to the United State Supreme Court.[413] After sitting on the case for over nine months the court refused to hear the case on the unexplained grounds that the Court did not have jurisdiction.[414] By not dismissing for lack of a substantial federal question nor addressing the petition for certiorari, the Court dismissed the case in a manner which gave no guidance on the merits of the claim.[415]

Although many of the actions of Sports and Health Club would be illegal under the test proposed here, the overriding antagonism toward the owners as evinced in the decision of the administrative law judge,[416] in the language of the Minnesota supreme court's opinion,[417] and in the overly broad sweep of the rulings would be curtailed under my proposal. To the extent decisions were made on the basis of sex, and on the basis of beliefs about sex and sex roles, Sports and Health Club's owners'

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412. *Id.* at 876. This insight is incomplete, however, because it fails to distinguish between the status of the claimant as employee or employer. A Christian seeking employment from a Jewish employer is protected under the Civil Rights Act.

413. They also petitioned for certiorari in the event that the appeal was somehow considered to be improper. Under the law at the time, the appeal was proper and as of right since the Minnesota Supreme Court had upheld that state statute against a First Amendment challenge. State v. Sports and Health Club, Inc., 478 U.S. 1015 (1986). During that period the Court also refused to handle another case raising similar issues. *See* Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc., 477 U.S. 619 (1986).

414. *Id.* The *Dayton Christian Schools* case was appealed about the same time *Sports & Health Club*. *Sports & Health Club* was dismissed the week following the decision that *Dayton Christian Schools* would not be decided on the merits at that time.

415. However, lower courts on occasion have attempted to glean some meaning from dismissals such as this. One such attempt occurred in the Third Circuit's discussion of the Supreme Court's dismissal of Cooper v. Eugene Sch. Dist. No. 4J, 723 P.2d 298 (Or. 1986), *appeal dismissed*, 480 U.S. 942 (1987). The Third Circuit wrote:

> The Supreme Court dismissed Cooper's appeal for want of a substantial federal question. [compared to a lack of jurisdiction in the *Sports & Health Club* case] Summary dispositions by the Supreme Court of appeals by right have the controlling effect of Supreme Court precedent with regard to "the specific challenges presented in the statement of jurisdiction," assuming, of course, that there have been no subsequent doctrinal changes that cast doubt on the continued vitality of the holding. However, "[a] summary disposition affirms only the judgment of the court below, and no more may be read into [the Supreme Court's] action than was essential to sustain that judgment."

United States v. Board of Educ. for the Sch. Dist. of Phila., 911 F.2d 882, 888 (3d Cir. 1990) (citations and footnote omitted).

416. *Sports & Health Club*, 370 N.W.2d at 846.

417. *Id.*

interest in applying their interpretation of the Bible in the workplace must give way. Legal rules regulating treatment of women are the sort of limits on free exercise which must be permitted to stand, as was decided a century ago in the *Reynolds*[418] case in which a law banning polygamy, though then a religious requirement for the Mormons, was held constitutional.[419] And the distinction between status-based discrimination and belief-based discrimination would support a distinction under the Religious Freedom Restoration Act[420] between the two cases. That is, there is a compelling state interest in eradicating sex-based discrimination and there is no less restrictive alternative than imposing sanctions for violating women's rights. Even if the interest is deemed to be less compelling for belief-based discrimination than for sex or race discrimination, (an arguable point), many less restrictive alternatives to outright prohibition of employer speech, conduct, and decision-making on religious grounds are possible.

The use of a religious status test for promotion into management, at least management below the control group, seems problematic, though it is a closer call than the sex-based actions. Freedom of association, and freedom to create a Christian work environment, requires some control over who would be responsible for that environment. Thus at some level it would appear that limiting policy-level management to like-minded people would be proper, if we are to recognize the legitimacy of the employer's claim to free exercise at all. The employer should be open to external scrutiny to ferret out sham and subterfuge, but the employer should be able to control who controls the business. For relatively small operations like Sports and Health Club and Townley Engineering the social interest and the employee's interest do not seem so pressing. The employee who can rise no further can find another exercise club or machine shop in which to pursue a career.

A number of things done by the employer should have been permitted and should not have formed the basis of a finding of discrimination. The employer should be able to explain to a prospective employee what the environment is like. Not only was the topic forbidden in interviews, but even distributing a one-page form which disclosed the employer's Christian approach to business was banned. The employer should be able to distribute literature and discuss religion on the premises. And the

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418. Reynolds v. United States, 98 U.S. 145 (1879).

419. *Id.*

420. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb).

employer should be able to hold Bible-study meetings at which attendance is open to, but not required of, all employees.[421]

These activities undeniably create a "Christian environment" which some employees would find uncomfortable. But value-based discomfort is not illegal and ought not be made so just because the values are religiously based. A religion-infused environment may present genuine practical problems for the non-Christian employee who feels uncomfortable in the workplace because of it.[422] But discomfort is not or ought not be actionable until it rises to a significant level which is not merely discomforting to an employee, but which affects the conditions of employment in a significant way beyond that caused by a disagreement about ideas. Under current law, to prove religious discrimination on the basis of a hostile environment, an employee must establish: (1) that the employee suffered intentional discrimination because of his religion; (2) that the discriminatory conduct was pervasive and regular; (3) that the discrimination detrimentally affected the plaintiff's terms and conditions of employment; and (4) that the discrimination would detrimentally affect a reasonable person of the same religion in that position.[423] Where the employer and employee both assert Free Exercise rights, the current standard of detriment is too low. Unlike racial or sexual harassment cases, or cases where the work environment is racially or sexually oppressive, even if the environment does not directly attack or target any particular person, or race, or gender, a Christian work environment which some would find offensive or even oppressive, but which does not directly harass or attack any particular person or group, should not be illegal. Even though there is conduct and speech which would be out of bounds in the employment setting, but which would be entirely permissible in many other fora, there should be room for the employer's religion as well as the employee's.

An employee who is merely uncomfortable at the job because of the Christian work environment has no more claim for discrimination than an employee who does not want to work eighty hours per week in a white-collar sweatshop. An employee who finds certain religious doctrines and

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421. As noted in EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610 (9th Cir. 1988), an employer can even go further and require attendance of all those who do not object on religious grounds.

422. *E.g.*, Meltebeke v. Bureau of Labor and Indus., 903 P.2d 351 (Or. 1995). In *Meltebeke* the employer "witnessed" a non-Christian employee who was severely distressed by the employer's actions, but did not mention it because he thought it might affect his employment prospects with the company. *See id.*

423. Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370 (1993); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986); Goldberg v. City of Phila., No. CIV.A. 91-7575, 1994 U.S. Dist. WL 313030, at *10 (E.D. Pa., June 29, 1994).

practices distasteful and intrusive, e.g., Christian witnessing, should not have an unfettered veto of such conduct. The source of the corporate culture and the nature of it ought not be the test for legality. The employee should have no claim based merely on discomfort because of a difference in religious beliefs.

Looked at from the perspective proposed in this article, an employee must tolerate and accommodate the religious expression and beliefs of the employer. Granting equal dignity to the values of two religious parties would seem to require this. The justification for burdening the employer as opposed to the employee, i.e., the difference in the power relationship, takes too cramped a view. If such a rule were followed, then no employer could create a Christian work environment, and adherents to that brand of Christianity found in *Sports & Health Club*[424] would be excluded from being employers.[425]

A simpler case than *Sports & Health Club*[426] is *Brown Transport Corp. v. Pennsylvania*.[427] *Brown Transport*, though less than a full Christian environment case because of the relatively few things done by the employer, illustrates aspects of both religious exercise and free speech issues.[428] In *Brown Transport* the employer engaged in religious speech to its employees through publishing Bible verses on paychecks and through occasional religious articles in the company newsletter.[429] A Jewish employee was offended and communicated his displeasure to his supervisor.[430] The supervisor responded that he should take the paychecks and not complain.[431] The employee's "main contention with the sporadic religious connotations in 'Brownie Sez' and continual Bible verses being typed on his checks was that, in his opinion, religion should not be part of business affairs."[432] Soffer, the employee, said that he "also would have been offended if the same perceived religious matters he found objectionable had discussed or highlighted aspects of his own

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424. 370 N.W.2d 844 (Minn. 1985).

425. This same result could happen where the beliefs require subordinating women, but such status-based discrimination is different from discrimination based on belief, and such a consequence is more acceptable.

426. 370 N.W.2d 844 (Minn. 1985).

427. 578 A.2d 555 (Pa. 1990).

428. *Id.*

429. *Id.* at 557-58.

430. *Id.* at 557.

431. *Id.*

432. *Id.* at 561 (quoting Finding 20 of the Pennsylvania Human Rights Commission).

religion."[433] Despite excellent performance evaluations, Soffer eventually was fired.[434] The court accepted Soffer's claim that the employer's Christian speech made him reasonably believe that non-Christian employees would not be treated equally.[435]

In *Brown Transport* the employee suffered consequences not because of his status as a Jewish person in a "Christian" company, and not because of his particular religious beliefs.[436] That is, the employer took no actions against the employee based on the employee's beliefs. Instead, the employer made its beliefs known in ways that made the employee uncomfortable and in ways that the employee felt were inappropriate.[437] Ultimately it was not the difference in beliefs which precipitated the discharge, but the breakdown in the relationship between the employee and the supervisor.[438] Had the employee not made a point about the employer's religious speech, then the relationship between his employer and him would probably not have soured. Had the employee accepted the propriety of the employer expressing religious views on paychecks and in a company newsletter, i.e., had the employee shown tolerance and accommodation of the employer's beliefs and speech, then the problem would not have arisen.

But the record as reported by the Pennsylvania Commonwealth Court does show a likelihood of retaliation by the employer in response to the employee's complaints.[439] So the employer could and should have shown greater tolerance and been more accommodating. The employee ought not be put in the position of "put up or shut up" which seems to have been the supervisor's attitude.[440] But the employer ought not to be silenced because an employee believes such speech does not belong at work. The law of employment discrimination ought not extend so far into regulating speech and expressions of belief.

Brown Transport is perhaps a case where the law regarding work environments emboldened an employee to the ultimate detriment of both employer and employee. The court seems to have held that the employer's mere communication of religious beliefs violated the law against discrimination on the basis of religion.[441] This should not be the

433. *Id.* (quoting Finding 21 of the Pennsylvania Human Rights Commission).

434. *Id.* at 558.

435. *Id.* (quoting Finding 23 of the Pennsylvania Human Rights Commission).

436. *See generally* Brown Transp. Corp. v. Pennsylvania, 578 A.2d 555 (Pa. 1990).

437. *Id.* at 557-58.

438. *Id.* at 558.

439. *Id.* at 562.

440. *Id.* at 557.

441. *Id.*

law, but it appears to be, as was seen in *Sports & Health Club*,[442] and as will be seen in other religious environment cases.

In *Turic v. Holland Hospitality, Inc.*,[443] a woman employee considered having an abortion.[444] Her mere contemplation of this option and her mentioning it at work offended her co-workers.[445] Ultimately, Turic did not have an abortion.[446] However, she claimed that her employer fired her:

> to protect the religious sensibilities of the rest of the staff, and that their religion was impermissibly forced upon her. Plaintiff asserts that, in essence, a religious test was established as a condition of employment with defendant. She contends that because her views on the morality of abortion differed from those of the Christian staff, she was treated differently than they were on the basis of religion.[447]

Ms. Turic did not claim that her religious beliefs were being affected by what the employer did.[448] Instead, the discrimination happened because of a difference between her non-religious beliefs which allowed her to consider abortion, and the religious sensibilities of most co-workers which did not.[449] Ultimately the court found against the plaintiff on the religious environment theory because of a lack of sufficient proof, but found for the plaintiff on the theory of intentional sex discrimination arising out of the abortion issue.[450]

This is really a relatively straightforward harassment case. An employer's religion or a dominant religion among co-workers ought not excuse intolerance and abuse or shunning by employers or co-workers toward another of a different faith. But this case may not be a religious discrimination case at all because abortion, though certainly a religious issue to many, is also a political and moral and social issue. Title VII

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442. 370 N.W.2d 844 (Minn. 1985).

443. 849 F. Supp. 544 (W.D. Mich. 1994).

444. *Id.* at 546.

445. *Id.*

446. *Id.* at 557.

447. *Id.* at 551.

448. *Id.*

449. *Id.* at 556.

450. *Id.*

does not reach employment actions based solely on differing conceptions of morality.[451]

Another case, *Brown v. Polk County*,[452] presents additional issues because it involves the government as an employer, and because the conduct objected to by employees was done by an intermediate-level governmental employee who was their immediate supervisor.[453] The supervisor's religious-based statements and actions had created a divisive atmosphere in the county department offices which he oversaw, and the tensions rendered the office dysfunctional.[454] The county eventually required him to stop holding Bible study meetings, not to express his religious opinions in the workplace, and not to confront the employees he supervised about religious beliefs or practices.[455] The county also instructed the employee to remove all religious paraphernalia in his private office.[456] The court upheld the county's actions in all respects, including the removal of religious items from his office.[457]

The court was probably correct in finding the county's interest in providing effective service through its various departments to be strong enough to limit its supervisory employee's religious statements and conduct toward his employees.[458] But the prohibition against displaying religious icons and symbols in his office[459] must be a full step too far and does not comport with ideas of tolerance and accommodation. To put it perhaps too broadly, one employee's beliefs and practices are not being accommodated and tolerated largely because of his intolerance and failure to accommodate the beliefs and practices of the employees he superivsed.

Another case arose in Oregon.[460] John Meltebeke was a sole proprietor running a painting business. Meltebeke is an evangelical Christian whose beliefs compel him to "witness" for the lord by telling others about Jesus and by denouncing the sins of others. Meltebeke believes that he has these obligations at work as well as outside of work.

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451. *Id.*

452. 37 F.3d 404 (8th Cir. 1994).

453. *Id.* at 406.

454. *Id.*

455. *Id.* at 407.

456. *Id.*

457. *Id.*

458. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510, 2533 (1995) (Souter, J. dissenting) (Justice Souter disagreed with the majority's holding that the denial of university funds to a student organization which published a newspaper with a Christian viewpoint amounted to viewpoint discrimination).

459. Brown v. Polk County, 37 F.3d 404, 407 (8th Cir. 1994).

460. Meltebeke v. Bureau of Labor and Indus., 903 P.2d 351 (Or. 1995).

Meltebeke hired someone to help him in his painting business. Naturally Meltebeke witnessed to the new employee, called him a sinner, and repeatedly invited him to attend his church. The employee declined the invitations. After about six weeks Meltebeke fired the employee for poor job performance. The employee sued under Oregon employment discrimination regulations alleging that the employer's conduct constituted religious harassment, a form of religious discrimination in employment. As summarized by the Oregon Supreme Court (quoting as noted from the findings of the administrative agency and testimony of the principals involved):

> Complainant never informed Employer that he felt offended, harassed, or intimidated by anything that Employer said to him or to anyone else. He did not ask Employer to cease. Employer "did not know that his comments were unwelcome or offensive to Complainant," the agency found as fact. Employer did not "criticize[] any religion by name" to Complainant or apply any "religious slur" to Complainant or otherwise. . . .
>
> Complainant felt "embarrassed," "very uncomfortable," "humiliated," "bug[ged]," "reluctant to go to work each morning," and "out of place" because of his perception that Employer "was pushing God down his throat, and he did not want to have anything to do with it." Complainant "would come home from work angry. . . . [H]e was coming home after work and 'basically exploding.'" Employer's comments caused Complainant to hate churches. Now he 'can't stand looking at them' [and] 'can't stand' to talk about religion. He 'gets upset' whenever religion is mentioned.
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> Complainant did not complain or request that Employer cease inviting him or discussing religious topics, because "you don't say that to your boss. I mean, at least I don't. I told him I couldn't make it [to church] all the time. He should have got the hint, and I ain't a rude person that tells someone that's his religion, that's not mine." "Complainant thought his job might be affected by his unwillingness to go to church. . . . He did not know what to do because [Employer] was his boss. . . . After two weeks of employment with [Employer], Complainant began looking for other work because he was so uncomfortable about [Employer's] religious comments."[461]

461. *Id.* at 353-54 (footnotes omitted).

The Oregon Bureau of Labor and Industry (BOLI) found that the proselytizing by the employer was unwanted and offensive to the employee and that the conduct "was sufficiently pervasive so as to alter the conditions of employment, and had the effect of creating an intimidating and offensive working environment." BOLI found both that the employee subjectively felt harassed and that using an objective standard, a reasonable employee would find the work environment to be intimidating and hostile. Consequently the employer was found liable. BOLI rejected the religious freedom constitutional defenses raised by the employer.

The Oregon law applied by BOLI provides that:

> [I]t is an unlawful employment practice:
> . . . .
> (b) For an employer, because of an individual's . . . religion . . . to discriminate against such individual in compensation or in terms, conditions or privileges of employment.[462]

In a previous case under the statute BOLI developed and applied the following interpretation:

> Harassment on the basis of religion is a violation of ORS 659.030. Unwelcome religious advances and other verbal or physical conduct of a religious nature constitute religious harassment when:
>
> > (1) submission to such conduct is made, either explicitly or implicitly, a term or condition of the subject's employment;
> > (2) submission to or rejection of such conduct by the subject is used as the basis for the employment decisions affecting the subject; or
> > (3) such conduct has the purpose or effect of unreasonably interfering with the subject's work performance or creating an intimidating, hostile or offensive working environment.[463]

In *Sapp's Realty*, BOLI was careful to state that "general expressions of religious beliefs at the workplace, by themselves, [do not] constitute a violation of ORS 659.030."[464] As summarized by the Oregon Supreme Court, BOLI had further developed the rules to include the following:

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462. ORS § 659.030(1) (1993).

463. *Meltebeke*, 903 P.2d at 355 (quoting *In re* Sapp's Realty, No. 11-83 at 79 (BOLI 1985)).

464. *Id.* at 355-56 (quoting *In re* Sapp's Realty, No. 11-83 at 80 (BOLI 1985)).

> (1) The "religious advances" or "other verbal or physical conduct of a religious nature" must be "sufficiently pervasive as to alter the conditions of employment." The employer's conduct will be examined to determine whether, from the objective standard of a "reasonable person," that conduct would actually create an "intimidating, hostile, of offensive working environment."
> (2) The conduct must in fact be unwelcome to the employee. As to that factor, the test is subjective.
> (3) The unwelcome conduct must have been directed at an employee because of that employee's religion.
> (4) Within the meaning of the rule, "religion" for both employer and employee includes nonbelief, as well as belief.[465]

Ultimately, the Oregon Supreme Court sided with the employer and held that a subjective standard of the employer actually knowing that the environment was intimidating or hostile or harassing to an employee was required. The reasonable employer standard was not to be used in religious expression or practice cases. The court did not find a hard privilege or right for the employer which would trump the employee's right.

Although the *Meltebeke* court seems to be the one most favorable to the interests of employers, it falls far short of truly meaningful protections for the employer. Had the employee in *Meltebeke* simply told the employer that he was discomfited by the proselyzation, then the employer would have had actual, subjective knowledge of the problem and, under the Oregon rule, no protection. Merely allowing some religious speech does not seem sufficient. Employees ought not have a veto power over speech and work conditions to the extent BOLI and the Oregon Supreme Court seem to contemplate.

Particularly in cases where a small business is involved and a close working relationship is forced, as in *Meltebeke*, and where the actions taken by the religious employer are to a large degree compelled by that employer's faith, then the employer should be granted more latitude. Perhaps a different rule would fit for Microsoft, but it is less likely (though far from impossible) that such a large company would maintain an intolerant religious environment.

The religious secular employer cases present a special problem of scope. If the employer's requirements are treated as part of a corporate culture or as values-based requirements, and if the terminology is changed just slightly, from an employer creating a religiously informed work environment, to an employer requiring each employee (1) to have certain personal characteristics such as a teachable spirit and a disciplined

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465. *Id.* at 356 (construing BOLI rule interpreting ORS § 659.030).

approach to work and life, (2) to accept the hierarchical structure of the company, and (3) to meet weekly to discuss the business manual, then the matter becomes less easy.[466] That is, if one focuses not on any special religious status or source of the environment, but upon the functional requirements, then if one is to find discrimination it must be some kind other than religious. To find such things discriminatory one must look behind the functional requirements to the source of them, to the genesis of the values, to some external and internal criteria of what makes those requirements improper. Conduct that is otherwise legitimate should not be illegal because it is somehow tainted by being premised on the religious beliefs of the employer.

The sort of cases where the employer has both a work environment and employment policies ultimately based on religious notions implicates First Amendment Free Exercise and Establishment concerns. If the employer cannot operate the business as a "discipleship for the lord" we are ultimately telling that employer that his or her religion has no place in the marketplace. He or she may be an employee, but not an employer. Essentially, the statute not only cuts out impermissible conduct with respect to status-based discrimination, but also ideas about how best to run a business from a business and ethical perspective. It encourages businesses to become ever more amoral and focused on the bottom line, on economics alone, on the "almighty dollar." Is not this itself a sort of religion for some?

Employers in this category ought to be able to establish business criteria from whatever source they deem fit. Those religious criteria for promotion ought to have only some minimal relationship to the "business of business" to pass muster. That is, the employer ought to be able to set criteria for promotion and employment using whatever source or yardstick the employer considers appropriate, provided the yardstick is not based on status, on belief in a particular god or sect, or on religiosity in general. The employer must still approach the individual based on values and functional qualities. Thus, a requirement of employee acceptance of a hierarchical structure would be acceptable, but a requirement of an acceptance of Christ as savior would not.

In this arena justice seems hard to quantify universally. We have an interest in allowing people to make a living by doing what they know. This interest can cut in favor of employees in communities with few employment options, but it also cuts in favor of an employer being able to be religious and act on his or her religious beliefs.

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466. These were the salient factors in State v. Sports & Health Club, Inc., with the Bible being the business manual, 370 N.W.2d 844, 847-48 (Minn. 1985), *dismissed for lack of jurisdiction*, 478 U.S. 1015 (1986).

These work environment cases present several significant challenges to the principled analysis and application of the law to achieve just results. As shown above, one problem is that a religious work environment is, in some sense, just another corporate culture, and as such is not fundamentally different from any other corporate culture. To claim that it is different brings one squarely to the problem of defining what religion is, a definition which has never been satisfactorily made and which carries establishment clause implications. Even if one decides just what a religious environment is in the business setting, and if one can separate religious from secular environments, then by necessity one is making liability judgments based on the employer's beliefs. That is, judgments are made not on the secular nature of the environment, but ultimately on the source of those beliefs leading to the environment. Using the test of legitimate business purpose related to economic aims itself may distort what are proper aims of businesses and may chill altruistic behavior.

Ultimately, the decision to favor the employee must be founded upon a sense of a fair, but unfortunate need to adjust the power balance between the employer and employee. In general, employers have more power than employees—economically, politically, and culturally. Should we adjust the power balance to ensure that ideas of the less powered survive? What of the circumstance where the minority group, such as fundamentalist, evangelical Christians is the employer? The policy of attempting to protect that expression is harmed by stifling it in favor of majoritarian religions. The shield of the Civil Rights Act becomes a sword of discrimination.

C. *Religious Institutions*[467]

Title VII contains some special provisions relating to religion in partial recognition of the uniqueness of religious-based discrimination. As discussed above, religious discrimination claims are governed by general employment discrimination laws including the theories of disparate treatment and disparate impact and harassment.[468] In addition, a claimant in the right case can assert an accommodation claim as well. As in other types of cases, employers have the benefit of the burden shifting and the defenses of denial, business necessity, and bona fide occupational qualification.[469]

Among the other special provisions relating to religion in Title VII, Congress exempted religious institutions from certain requirements of the

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467. *See* Lupu, *Free Exercise Exemption, supra* note 341, for a more complete analysis of this part of Title VII.

468. *See supra* part II.A.

469. 42 U.S.C. § 2000e-2(e) (Supp. V 1993).

Act in an effort to balance the competing interests of protecting employees from religious discrimination, of protecting the free exercise rights of employers, and of avoiding establishment problems.[470] Under Title VII a religious institution is defined as a "religious corporation, association, educational institution, or society."[471] Such religious organizations may employ persons of a particular religion provided the job is "connected with the carrying on by such [religious entity] . . . of its activities."[472] Courts have limited this exemption to discrimination based on religion; discrimination on the basis of race, sex, color, or national origin is not exempt.[473] Thus for example, a church could not prohibit an African-American from becoming an employee provided the candidate met other job-related criteria. However, the church could prohibit that same person from employment if he or she did not subscribe to the tenets of the church.

Originally the 1964 Act exempted religious organizations only for "religious activities."[474] The word "religious" before "activities" was deleted in the 1972 amendments.[475] Consequently, any activities, regardless of their secular nature, are exempt under this religious-organization provision.[476] If the organization is a religious one, it is exempt from Title VII religious discrimination claims.[477] The constitutionality of this exemption has been upheld as applied to employees of secular nonprofit activities of religious organizations.[478] Whether it would pass constitutional muster if applied to protect a religious for-profit organization has not yet been decided.

Just what constitutes a religious organization for purposes of this exemption is not clear from the statute itself.[479] The statute contains no definition of religion or religious organization (aside from defining

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470. These special religious-employer exemptions normally do not apply to the types of cases with which this article is primarily concerned.

471. 42 U.S.C. § 2000e-1 (1982).

472. *Id.*

473. *Id.*

474. Title VII Equal Employment Opportunity Act of 1964, Pub. L. No. 88-352, Sec. 702, 78 Stat. 241 (1965) (codified as amended at 42 U.S.C. § 2000e *et seq.*).

475. This section has been upheld as constitutional as applied to nonprofit religious organizations. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).

476. 42 U.S.C. § 2000e-1 (1982).

477. *Id.*

478. *Id.*

479. *See* EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 617-19 (9th Cir. 1988).

religious discrimination to include the failure to accommodate an employee's religious practices and beliefs and even that "definition" assumes content for the word "religious"). On the one hand, traditional entities such as mainstream churches and even splinter churches or sects are quite clearly protected. On the other hand, organizations asserting no religious nature and claiming to be merely commercial would not be protected. In between these poles are myriad types of entities including church-related charitable organizations, non-denominational religiously based charities, non-profit charitable agencies not clearly religious in nature, various community centers tied to certain religious groups, essentially secular groups which are or were nominally or historically religiously tied such as the YMCA and the YWCA, and businesses run as "religions" or at least with overt religious foundations, e.g., Mary Kay Cosmetics,[480] and various televangelists.

The religious organization exemption has been treated as a narrow one, limited to exempting churches, synagogues, organized religions, and religiously-related enterprises closely tied to such entities.[481] Mere affiliation and funding by a church is not enough.[482] For example, the United Methodist Children's Home was held to have lost its possible protection as a religious organization because on balance, its charitable mission of providing a home for orphans and other children had become secularized.[483] The issue was whether the children's home was

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480. *See, e.g.*, Skip Hollandsworth, *Hostile Makeover*, TEX. MONTHLY, Nov. 1, 1995, (quoting Mary Kay Ash, founder and president of Mary Kay cosmetics: "I feel that God has led me to this position, as someone to help women know how great they really are.")

481. *See, e.g.*, Rayburn v. General Conference of Seventh Day Adventists, 772 F.2d 1164 (4th Cir.) *cert denied,* 478 U.S. 1020, (1985) (defendant was exempt as a church); EEOC v. Mississippi College, 626 F.2d 477 (5th Cir. 1980), *cert. denied,* 453 U.S. 912 (1981) (college exempt because it was owned and operated by Baptist churches). *But see* EEOC v. Fremont Christian Sch., 781 F.2d 1362 (9th Cir. 1986) (holding that a church-operated private school was not exempt from Title VII and the Equal Pay Act when it gave insurance benefits only to head of household employees, because this was interpreted by the school to mean that only single people and married men received insurance benefits); EEOC v. Pacific Press Publishing Ass'n, 676 F.2d 1272, 1276 (9th Cir. 1982) (holding that a publishing company was not exempt from Title VII when it discriminated against a single female employee with regard to annual monetary and automobile allowances. The court held that Title VII was intended by Congress to be applied in this circumstance, and that Pacific Press's claims of entitlement to express and implied exemptions were refuted by the legislative history of Title VII and its amendments.).

482. *See, e.g.*, Fike v. United States Methodist Children's Home, 547 F. Supp. 286 (E.D. Va. 1982), *aff'd*, 709 F.2d 284 (4th Cir. 1983).

483. *Id.* at 290.

primarily religious or secular.[484] After reviewing all of the circumstances, the court concluded that the primary mission of the home was secular.[485] The "day-to-day life [of] the children [was] practically devoid of religious content or training . . . ."[486]

The reach of the exemption has been extended to religion-based values and mores as a grounds for a religious institution to take action against an employee.[487] In *Little v. Wuerl*,[488] a non-Catholic employee of a Catholic school was discharged because she remarried.[489] (The Catholic church generally bars divorce and remarriage.) The employment action was taken not because of her status as a non-Catholic, but rather because of her belief, and her actions on that belief, that remarriage was proper.[490]

In contrast, the Christian Science Monitor, a newspaper published by the Church of Latter Day Saints, Christ Scientist, was held to be a part of the religious organization for purposes of the Title VII exemption.[491] Consequently the newspaper was permitted to use a religious test for employment at the paper.[492] But the court had the following to say about the crafting of the exemption:

> The exemption presently afforded by Title VII, 42 U.S.C. § 2000e-1, is a remarkably clumsy accommodation of religious freedom with the compelling interests of the state, providing on the one hand far too broad a shield for the secular activities of religiously affiliated entities with not the remotest claim to first amendment protection while on the other hand permitting intrusions into wholly religious functions.[493]

Many Christians, Jews, and Muslims, as well as others, believe that their religion requires them to live their religion at work as well as at home and in church. Indeed, a for-profit business engaged in commerce in the marketplace could very well be considered a religious organization

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484. *Id.* at 288.

485. *Id.* at 290.

486. *Id.*

487. *See* Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991).

488. *Id.*

489. *Id.* at 946.

490. *Id.*

491. Feldstein v. Christian Science Monitor, 555 F. Supp. 974 (D. Mass. 1983).

492. *Id.* at 975.

493. *Id.* at 979 (quoting EEOC v. Southwestern Baptist Theological Seminary, 495 F. Supp. 255, 260 (N.D. Tex. 1980)).

by the owners.[494] However, the religious institution exemption has not been extended to such typically secular businesses which have religion-infused work environments. For example, in *EEOC v. Townley Engineering & Manufacturing Co.*,[495] the court held that "the beliefs of the owners and operators of a corporation are simply not enough in themselves to make the corporation 'religious' within the meaning of section 702 [religious institutions exemption]."[496] The court so held despite conceding that the business was a "discipleship Jake and Helen Townley have for the Lord Jesus Christ," and noting the various religious activities including devotional services and financial support of Christian radio broadcasts, missionaries, and churches.[497] The court found more persuasive that the business was for profit, and that it manufactured "mining equipment, an admittedly secular product," and that it lacked support from or affiliation with a church.[498] The court did not formulate a test to distinguish the religious from the secular,[499] but merely listed those facts which it considered religious and those which it considered secular and made no allowance for the owners of the business to make that determination themselves.[500]

Another special exemption protects church-affiliated educational institutions and other educational institutions which have as their missions the advancement of a particular religion.[501] As in the case of religious institutions, all employees, even those employed in a secular capacity are exempted from the protections of Title VII.[502] This exemption, like that for the religious institutions, has not been broadly interpreted and would not apply to a commercial enterprise run by Christians as a discipleship for God, even though the commercial enterprise was deemed by them to

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494. *See, e.g.*, State v. Sports & Health Club, Inc., 370 N.W.2d 844 (Minn. 1985), *dismissed for lack of jurisdiction*, 478 U.S. 1015 (1986); EEOC v. Townley Eng'g and Mfg. Co., 859 F.2d 610, 617-19 (9th Cir. 1988).

495. 859 F.2d 610 (9th Cir. 1988).

496. *Id* at 619.

497. *Id.*

498. *Id.*

499. *Id.*

500. *Id.*

501. 42 U.S.C. § 2000e-2(e)(2) (Supp. V 1993); *see, e.g.*, Pime v. Loyola Univ., 803 F.2d 351 (7th Cir. 1986).

502. *See* EEOC. v. Kamehameha Sch./Bishop Estate, 990 F.2d 458 (9th Cir. 1993) (school founded on will-based endowment requirement of religious orientation held not to permit religious-based hiring of teachers in contravention of employment discrimination law).

be a form of witnessing for their Lord (and hence a form of worship and a method of educating others).

An interesting case involving a religious educational institution is *Ohio Civil Rights Commission v. Dayton Christian Schools.*[503] In *Dayton Christian Schools*, a pregnant teacher's contract was not renewed because of the school's religious doctrine that mothers of preschool-age children should stay home with their children.[504] As a result the teacher contacted an attorney who threatened the school with litigation under state and federal civil rights laws if the school did not change its decision.[505] The school officials then fired her for going outside of the "Biblical chain of command" to resolve the dispute, i.e., contacting an attorney.[506] The teacher contacted the Ohio Civil Rights Commission alleging sex discrimination and retaliatory termination.[507]

Dayton Christian Schools sought an injunction in federal district court against the Ohio Civil Rights Commission on the grounds that the pursuit of the action against it would violate its free exercise rights.[508] The district court held against the school, and the school appealed the decision.[509] The Sixth Circuit Court of Appeals reversed, holding that the free exercise clause required the Civil Rights Commission to be enjoined.[510] On appeal to the United States Supreme Court, the Court reversed in a five-four decision in which five justices said the district court should have abstained[511] under *Younger v. Harris*,[512] and four said the dispute was not ripe.[513]

Much of the decision in *Dayton Christian Schools*[514] seems relatively easy. If one accepts the distinction between status-based discrimination

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503. 766 F.2d 932 (6th Cir. 1985).

504. *Id.* at 934.

505. *Id.*

506. *Id.*

507. *Id.*

508. Ohio Civil Rights Comm'n v. Dayton Christian Schs., 578 F. Supp. 1004 (S.D. Ohio 1984).

509. Ohio Civil Rights Comm'n v. Dayton Christian Schs., 766 F.2d 932 (6th Cir. 1985).

510. *Id.*

511. Ohio Civil Rights Comm'n v. Dayton Christian Schools, 477 U.S. 619, 625 (1986).

512. 401 U.S. 37 (1971) (holding that a federal court cannot enjoin a pending state criminal proceeding except when necessary to prevent great and immediate irreparable injury).

513. *Dayton Christian Schools*, 477 U.S. 619 (1986).

514. 766 F.2d 932 (6th Cir.1985).

and belief-based discrimination, then the actions surrounding firing the woman because she was pregnant seems an easy one of sex discrimination, not religious discrimination. Even religious institutions are prohibited from discriminating on the basis of race or sex except to the extent sex is a BFOQ.[515] But the case still highlights the problem of determining the extent to which the freedom of religion should insulate an employer. Where the employment action is taken not on the basis of sex per se, but rather on the basis of religious convictions about proper roles in society, then it gets close to a belief-based claim of discrimination. Nonetheless, allowing society to set limits on certain conduct, such as polygamy, seems fair.

Dayton Christian Schools raises one new interesting issue: The woman was ultimately fired not because of gender, but because she appealed to secular authorities for redress.[516] That is, she went outside the chain of Biblical command to air her grievance. On this issue too I believe the school must lose. Unless the school qualifies as a religious institution and the issue qualifies as a matter of theology, or is of such intimate connection to the religion as to permit no severance, the school must be subject to ordinary civil processes. The principles of accommodation and tolerance require employer concessions as well as employee. The employer must concede the power of the state to regulate certain types of conduct, or the *Reynolds*[517] risk of each becoming a law unto himself, each person being able to effect a unit veto of general social welfare laws, arises.

V. CONCLUSION

Employment discrimination on the basis of religion is not like employment discrimination based on birthright. The most significant differences arise from the real conflict between Title VII and the First Amendment's guarantees of free exercise of religion and free speech. For secular employers a co-employee harassment claim founded on religious-related discourse or taunting or arguments is a disquieting reality. Unlike racial epithets and sexual innuendo, religious discourse can be deemed denigrating merely because of difference of opinion.

To date courts have been largely dismissive of the employer's interest.[518] The statute itself requires employers, not employees, to accommodate the other. And courts have not modified this requirement,

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515. 42 U.S.C.§ 2000e-2 (Supp. V. 1993).

516. *Dayton Christian Schools*, 766 F.2d at 934.

517. Reynolds v. United States, 98 U.S. 145 (1879).

518. *See id.*

even when employers raise free exercise, or undue hardship, objections.[519] The religious secular employer has been treated as almost a per se violator of the law.[520] Even in circumstances where an employee can show no religious belief of the employee which has been infringed or not accommodated courts have found mere employee dislike or discomfort enough.[521] The theory is that the right to be free from religious discrimination, i.e., free from adverse employment consequences because of one's religion, carries with it the right to be free from religious influences.

Fashioning clear rules to be applied to the protean situations in a syllogistic fashion is nearly impossible. Consequently I have proposed moving to an explicitly principle-based analysis in which the discourse is built around accommodation, tolerance, inclusion, neutrality and equality. Ultimately, courts should give greater weight to the religious claims of employers and attempt to reach more carefully honed solutions. The injunctions issued to date have been broad and blunt. Employers should be accorded the same human dignity as employees in any assessment. In some cases the determining factor will still be the propriety of requiring the employer to go the extra mile because of the employer's position of power. But, that should not be the starting point.

The approach I have presented should be applied by courts with an eye to achieving deeper, meaningful tolerance on all sides. Decisions should be made which encourage the individuals involved to be more tolerant of diversity. That is, the public interest, in the broadest sense, should be explicitly used in reaching decisions and fashioning remedies. Accommodation is the polestar; and equality its closest companion.

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519. *See, e.g.*, EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 615, 619 (9th Cir. 1988).

520. EEOC v. Kamehameha, 990 F.2d 458 (9th Cir. 1993).

521. *See, e.g., Townley Eng'g & Mfg.*, 859 F.2d 610; Brown Transp. Corp. v. Pennsylvania., 578 A.2d 555 (Pa. 1990).