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THE JUSTICES FIND RELIGION: WHY THE SUPREME COURT OUGHT TO EXPAND RELIGIOUS ACCOMMODATION RIGHTS

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Religion matters to people. It matters a great deal to religious believers who wish to be free from discrimination and who believe the law should protect them from harassment and allow for accommodation of their religious requirements. It matters to those who do not ascribe to any religion because they want to be assured that religion is not encroaching on their rights and wish to remain free from harassing believers. This tension plays out most forcefully in two places in American society: the public sphere (e.g., public property and public schools) and the workplace. The public sphere is the forum where communities gather and express certain (often majority but also sometimes controversial) viewpoints. Yet the workplace is where most people spend most of their waking time, and therefore bump up against others of different views most frequently.

There is reason to believe that the Supreme Court, with its recent personnel changes, will be supportive of more accommodation for religious expression in the workplace. If the Justices expanding public religious expression (such as Ten Commandments displays on public property) are to be consistent, they must revive the largely dormant religious accommodation clause of Title VII. The current statutory rule, that employers need undertake only de minimis accommodations of employee religion, flies in the face of the Court’s recent pronouncement, in expanding religious expression under the Establishment Clause, that “morality [is] essential to the well-being of society and that encouragement of religion [is] the best way to foster morality.”

This article urges greater judicial recognition of workplace religious expression rights as the only result consistent with both the Court’s Establishment Clause jurisprudence and the legislative intent of statutory religious accommodation provisions. Respectful religious pluralism in the workplace should become the norm, through judicial requirements of best practices in the workplace. Such a view should be wholly supported by the current Court because it is consistent with the Establishment Clause case law stating that religion fosters moral good and that in a pluralistic society religious expression cannot automatically be deemed threatening to those with different views.

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INTRODUCTION

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

-- Justice Antonin Scalia in
McCreary County v. ACLU of Kentucky

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

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

What happens when believers express themselves religiously, and what should the law do to protect that expression in the workplace? And when do the
rights of secularists become trumped or devalued? Read at face value, the Free Exercise Clause protects religious expression against governmental power, while the Establishment Clause bars government from adopting a religion itself. In the private sector, Title VII has been explicitly amended to broaden protections for religious expression. In response to the narrow interpretation the Title VII protections have been given by the Supreme Court, Congress has repeatedly tried to strengthen those protections through various iterations of the Workplace Religious Freedom Act.

In the public sphere, courts allow many flowers to bloom. Nativity scenes next to menorahs, as well as Ten Commandments displays with historical (rather than exclusively religious) significance are allowed to flourish in the public domain. However, in the workplace, the Supreme Court has allowed employers to restrict religious expression. Legislative efforts to protect religious expression have been stymied by judicial refusal to protect such expression.

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6 E.g., Capital Sphere Review & Advisory Bd. v. Pinette, 515 U.S. 753, 762 (1995) (ruling that the state did not violate the Establishment Clause by permitting a private party to display an unattended cross on the grounds of the state capitol); County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 621 (1989) (holding that a Chanukah menorah display next to a Christmas tree outside a city-county governmental building did not violate the Establishment Clause); Lynch v. Donnelly, 465 U.S. 668, 686 (1984) (holding a city’s inclusion of a nativity scene in its Christmas display did not violate the Establishment Clause).
7 E.g., Van Orden v. Perry, 545 U.S. 677, 690-91 (2005) (ruling a Ten Commandments display on the grounds of the state capital was constitutional when the display had an undeniable historical meaning). But see McCreary County, Ky., v. American Civil Liberties Union of Ky., 545 U.S. 844, at 871-72 (2005) (holding displays of the Ten Commandments at courthouses violated the Establishment Clause when the counties’ purpose was to emphasize a religious message).
8 See, e.g., Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, at 67 (1986) (holding an employer is not required to bear more than a de minimis cost in accommodating an employee’s religious beliefs); Thornton v. Calder, 472 U.S. 703, 710-11 (1985) (ruling a state statute that provides Sabbath observers with an absolute and unqualified right not to work on their Sabbath violates the Establishment Clause); Trans World Airlines, Inc., v. Hardison, 432 U.S. 63, 84 (1977) (holding an employer is not required to bear more than a de minimis cost in accommodating an employee’s religious beliefs).
meaningfully. This stems from the courts’ predisposition towards viewing “accommodation” as an entirely different concept than “nondiscrimination,” viewing the former far more skeptically than the latter.

When faced with challenges by both believers and secularists, the Supreme Court treats the public sphere and the workplace very differently. What is striking is that the newly powerful conservative bloc of Justices (namely Scalia, Thomas, Roberts, and Alito) are quick to support religious believers in the public sphere cases, such as McCreary, yet they have joined a Court with a tradition of refusing to grant the same rights to believing workers. This article explores whether the new Court will overturn its Title VII precedents to grant the same expansive religious rights in the workplace that it increasingly has granted in the public sphere.

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

This article first examines how religious belief is an intrinsic and undeniable part of many people’s identity, and how refusing to acknowledge believers as religious people and allow them to express themselves as such is similar to keeping gays and lesbians in the closet. From that viewpoint, allowing religious expression is not an adventurous “accommodation” asking for different or “special” rights.

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Next, in Part II, an examination of the Supreme Court’s jurisprudence on the public sphere and religion cases showcases the trend of allowing religious expression because it fosters moral goodness in society and because in a pluralistic society religious expression cannot be seen as threatening to nonbelievers.

Part III details the refusal of courts to protect workers who express themselves religiously, even though such protection is mandated by Title VII and consistent with the Court’s public sphere Establishment Clause doctrine.

Lastly, Part IV attempts to solve this inconsistency by creating a path for the new Supreme Court to follow: interpret the Establishment Clause in alignment with the congressional intent in Title VII, an intent that is echoed in pending legislation that would expand protections for workers who express themselves in religious ways. Specifically, I propose a middle way of respectful pluralism, which can both protect religious expression and protect nonreligious workers from disrespectful expression.

I. THE IMPORTANCE OF PROTECTING RELIGIOUS EXPRESSION

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

Religious expressions in particular can communicate many deeply held views. What people wear (such as a head scarf or prayer beads), what they eat...
(including strict dietary guidelines such as no pork or no meat on certain days), and what holiday they find important (such as Rosh Hashanah or Good Friday) are expressions communicating both religious identity and the level of commitment that person holds. In many instances, these expressions cannot be changed, at least not without altering the core of one’s identity.

As members of particular societies, in order to assimilate, we learn to filter some individual expression to various degrees. This is especially true in the workplace, in keeping with particular norms of business or professions, as well as the public forum, where we want to “fit in” with our community members. However, certain intrinsic characteristics express themselves without much alteration, either because they are unalterable to the person or because they are too important to try to hide or change. Said another way, people feel they should not have to alter who they are by pretending to be something they are not—i.e., “passing” or “closeting” their true identities.14

This is because religious identity (and consequently its expression) is an integrated part of one’s self. Although conversion happens and new faith beliefs evolve, many people’s religion is set at a very early age and is an authentic expression of one’s world view.15 Much like it is difficult for the majority racial group to understand the primary importance of racial identity to a person in a minority race group, secularists often do not understand the commitment a believer has to her own religious identity.

Asking religious believers to suppress or deny their religious identity can be likened to the closeting of certain sexual orientations. Beyond the “nature or nurture” debate, it has been well established that being gay or straight is part of one’s intrinsic being.16 In situations of extreme societal pressures and intolerance, some GLBT members of society “closet” themselves by refusing to communicate their sexual orientation to others. Similarly, in many professional

and educational sectors and culturally elite settings, expressing one’s religious identity is likewise disfavored. Both should be antithetical to a tolerant society. Yet, we should be just as uncomfortable requiring a religious observer to hide their expression\textsuperscript{17} because while a person’s sexual orientation rarely requires particular dress, eating, or other observances, religious believers’ expressions of those things are mandatory to orthodox or fundamentalist believers. While closets should be unnecessary in either case, tolerant society members should be compelled to protect those who are put to an untenable choice between following their faith and avoiding backlash from non-adherents.\textsuperscript{18}

Europe has seen significant recent examples of crackdowns on religious expression fundamental to people’s identities. Recently, the French Parliament adopted a law that forbids teachers and students at public schools to wear ostentatious religious signs and apparel.\textsuperscript{19} In Germany, the German Federal Constitutional Court made a controversial decision in its “headscarf-decision” of 2003, where a teacher intended to wear a Muslim headscarf during school and was rejected by the government of the State Baden-Württemberg.\textsuperscript{20} Public outcry sparked global discussions about religious pluralism and the relationship between state and religion.

As the world’s population becomes more transient and integrated, and diverse cultural identities collide, respect for religious pluralism takes on greater importance. In the early United States, religious diversity was minimal compared to today, given the country’s Christian roots. But during the last century or so, the influx of immigrants bringing many different religions has made this topic more critical. Today, it should come as no surprise that many of the world’s religions are being practiced in America.\textsuperscript{21} But where are they being practiced? Privately, but also in the public sphere and in workplaces – and, as Sections II and III document, the courts treat the public sphere and workplaces strikingly differently when it comes to religious expression.

\begin{itemize}
  \item \textsuperscript{17} As one commentator eloquently asked, “Why should an employee be forced to surrender his or her right to communicate with coworkers who share a similar cultural world view in the language of that culture, at least where no immediate danger to person or property is at stake?” 76 TEX. L. REV. 317, 324 fn. 16 (quoting Bill Piatt, \textit{Language on the Job: Balancing Business Needs and Employee Rights}, (1993)).
  \item \textsuperscript{18} Prenkert & Magid, \textit{supra} note 8, at 468.
  \item \textsuperscript{19} Article L 141-5-1 (March 2004).
  \item \textsuperscript{20} Decision of September 24, 2003- 2 BvR 1436/02, available at http://www.bundesverfassungsgericht.de
  \item \textsuperscript{21} http://www.census.gov/compendia/statab/tables/07s0073.xls
\end{itemize}
II. THE SUPREME COURT’S SHIFT TO STRONG SUPPORT FOR RELIGIOUS EXPRESSION IN THE PUBLIC SPHERE

Protecting religious expression and prohibiting the state from mandating any one particular religion to the exclusion of others are fundamental foundations of the Constitution’s Bill of Rights. The Free Exercise Clause promotes religious expression by prohibiting any intentional burden on its practice.22 Conversely, the Establishment Clause “protects religious liberty and autonomy, including the protection of taxpayers from being forced to support religious ideologies to which they are opposed.”23

Conservative jurists point out that the Framers intentionally carved out protections for religion because of the important place religion holds in American life.24 As George Washington noted in his Farewell Address, "[o]f all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports."25 This sentiment remains alive today in the hearts of many conservative jurists, and increasingly so in the Court’s religion jurisprudence.

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

In religious display cases, the Supreme Court has often pledged its support for the role religion plays in American society. In 1952, Justice Douglas wrote that “[w]e are a religious people whose institutions presuppose a Supreme Being. We guarantee freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary.”26

22 U.S. CONST. amend. I.
24 See e.g., McCreary County, Ky., v. American Civil Liberties Union of Ky., 545 U.S. 844, 887 (2005) (Scalia, J., dissenting) (“Those who wrote the Constitution believed that morality was essential to the well-being of society and that encouragement of religion was the best way to foster morality.”).
Ten years later, the Court declared (in grandiose fashion) that “[t]he history of man is inseparable from the history of religion.” 27 And in 1984, Justice Burger wrote that “[t]here is an unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789.” 28

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

“In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an establishment of religion or a step toward establishment; it is simply a tolerable acknowledgement of beliefs widely held among people in this country.” 29

Religious holiday observers have also fared well in the Supreme Court, as witnessed in the seminal case of Sherbert v. Verner, in which the Court recognized that an employer cannot deny employment benefits to an applicant who refused to accept work on her Sabbath because such denial violated the Free Exercise clause. Instead, the Court requires that laws do not “constrain a worker to abandon his religious convictions” in the workplace. 30

B. The Supreme Court Ups the Ante, Allowing Still More Religious Expression in the Public Sphere.

In Establishment Clause jurisprudence, the Court grapples with how much religion government can support or participate in. During most of the mid-twentieth century, the prevailing view was to bar most government religious expression, such as voluntary school prayer 31 and financial support for activities that in any way related to religion, such as state aid to religious schools for

31 Engle, 370 U.S. 421.
secular subjects. As was made clear in the seminal case of *Lemon v. Kurtzman*, the Court placed a high burden on this uneasy relationship, requiring that in order for a government activity to pass constitutional muster, the government must prove the following: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’”

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

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

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33 403 U.S. 602 (1971).
34 *Id.* at 612-13 (citations omitted).
35 For a comprehensive address on this subject, see Scott A. Moss, *Where There’s a Will, There are Many Ways: Redressing the Increasing Incoherence of Employment At Will*, 67 U. Pitt. L. Rev. 295, 336-41 (2005).
37 *Agostini v. Felton*, 521 U.S. 203 (1997) (allowing public school teachers to be sent to parochial schools to provide remedial education; expressly overruled the contrary holding of *Aguilar v. Felton*, 473 U.S. 402 (1985)).
39 *Rosenberger v. Rector and Visitors of the Univ. of VA*, 515 U.S. 819 (1995) (holding that the state violated the First Amendment in refusing to provide funds to a Christian student group that published a religious magazine).
40 See, e.g., *Books v. Elkhart County*, 401 F.3d 857, 858-59 (7th Cir. 2005); *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 696 (7th Cir. 2005); *Modrovich v. Allegheny County*, 385 F.3d 397, 399 (3d Cir. 2004); *Freethought Soc. Of Greater Philadelphia v. Chester County*, 334 F.3d 247, 249 (3d Cir. 2003); *King v. Richmond County*, 331 F.3d 1271, 1273-74 (11th Cir. 2003).
41 See e.g., *Van Orden v. Perry*, 545 U.S. 677 (2005) (ruling a Ten Commandments display on the grounds of the state capital was constitutional when the display had an undeniable historical meaning); *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844 (2005).
opinions were issued in the two cases, reflecting the splintered Court’s views on the subject. Given the recent personnel changes on the Court, taking a close look at the conservative justices’ messages on religion is instructive as to the role they believe religion plays in private and public life.

In *Van Orden v. Perry*,\(^\text{42}\) a Court majority allowed a Ten Commandments monument to remain on state capitol grounds. In doing so, the plurality opinion (written by Chief Justice Rehnquist) was explicit in wanting to allow the state to “encourage[]” religion and “widen the effective scope of religious influence”:

> When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. We find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.\(^\text{43}\)

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

In the companion case, *McCreary County v. ACLU*,\(^\text{44}\) the Court came to the opposite conclusion. In another 5-4 decision, the Court held that displaying framed copies of the Ten Commandments in a county courthouse was improper because the hanging of the religious display was a government action with a religious purpose, in violation of the Establishment Clause.\(^\text{45}\)

\(^\text{42}\) 545 U.S. at 691.
\(^\text{43}\) Id. at 684 (quoting Zorach v. Clauson, 343 U.S. 306, 313-14 (1952)).
\(^\text{44}\) 545 U.S. at 850.
\(^\text{45}\) Id. at 884.
Justice Breyer, the swing vote in both cases, wrote separately in Van Orden. In doing so, he took pains to reach out to religious believers, stating that “to reach a contrary conclusion here . . . would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions.”

As the swing vote, Justice Breyer’s views and his reconciliation of religion in the hearts of many Americans with our nation’s tradition is important. But with the Court appearing to shift further in the direction of allowing public religious expression since these two cases (with Justice O’Connor, who voted to disallow both Ten Commandments displays, being replaced by Justice Alito), it is instructional to look at the writings of the Court’s most longstanding advocate of more religion in public life, Justice Scalia.

In McCreary, Justice Scalia wrote, in his trademark style, a pointed dissent for four Justices (Justices Rehnquist, Thomas, and in part Kennedy) – and, with Justice Alito having since joined the Court, Justice Scalia’s views may well now command a majority. In his McCreary dissent, Justice Scalia argued that the majority’s assertion that the Establishment Clause mandates neutrality towards religion is not supported by the Constitution, nor is it consistent with our nation’s history and tradition. Justice Scalia made clear his view that “morality was essential to the well-being of society and that encouragement of religion was the best way to foster morality.” This quote, more than any other, signals the Court’s likely journey forward: encourage religion in order to foster morality in our world.

Ironically, another theme of Justice Scalia’s dissent is the requirement that legal principles be applied consistently. Yet as discussed below, it is with great inconsistency that the Court approaches religion in the workplace, never expressing the same respect for religion in employment cases that it has in its public sphere cases. In its employment law cases, the Court largely fails to protect religion in the workplace to any appreciable degree.

46 Van Orden, 545 U.S. at 704 (Breyer, J., concurring).
47 McCreary, 545 U.S. at 886 (Scalia, J., dissenting).
48 Id. at 890-91.
III.

HOW THE COURTS DENY RELIGIOUS EXPRESSION IN THE WORKPLACE

A. Congress’s Call: Protect Religious Expression and Practice

Beginning in the Civil Rights era, the United States has endeavored to eliminate workplace discrimination for workers who might suffer because of certain characteristics. In 1964, Title VII made it unlawful for an employer to “discriminate against any individual” with respect to employment “because of such individual’s race, color, religion, sex, or national origin.”\(^49\) In amending the Act in 1972, Congress went further by requiring employers to provide “reasonable accommodation” of an employee’s religious beliefs unless such accommodation would impose an “undue hardship” on the employer’s business.\(^50\) Congress took an unusual step in defining “religion” for purposes of the accommodation mandate (as “includ[ing] all aspects of religious observance and practices, as well as belief”)\(^51\) but leaving the terms “reasonable accommodation” and “undue hardship” undefined.

The scope and magnitude of this Congressional grant of “positive rights”\(^52\) for religious observers is profound, especially when contrasted to the lack of such protection for other categories, such as race and sex.\(^53\) Arguably there now exist “accommodation” requirements for sex (such as 1993’s family and medical leave law,\(^54\) which was conceived largely as an accommodation for women with family responsibilities\(^55\) ) and race (under the “disparate impact” doctrine requiring elimination of even neutrally intended practices that negatively


\(^{50}\) 42 U.S.C. § 2000e(j) (2000) (“The term ‘religion’ includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.”).


affect racial minorities, a doctrine the Court established in 1973\textsuperscript{56} and Congress strengthened in 1991) – but neither of these “accommodation mandates”\textsuperscript{57} existed at the time Congress legislated the requirement that employers accommodate their employees’ religions.

A look into the legislative history suggests that the lawmakers’ intent was to protect employees from losing their jobs solely because their religious beliefs required them to do certain things, such as observe particular holidays, that the rules of their workplace otherwise might not allow.\textsuperscript{58} This understanding comes from the two cases that Congress included in the legislative record, \textit{Dewey v. Reynolds Metal Company}\textsuperscript{59} and \textit{Riley v. Bendix Corporation}.	extsuperscript{60} Both cases stand for the proposition that there is no actionable religious discrimination so long as employers’ actions are based on uniformly applied, religion-neutral rules or working conditions. In \textit{Dewey}, the plaintiff was discharged for refusing to work Sundays and the court holding (which was affirmed by the Supreme Court) was that the duty to accommodate based just on EEOC Guidelines was without statutory basis.\textsuperscript{61} In \textit{Riley}, the court had expressed doubt that employers should be forced to accommodate all religious beliefs: “[S]urely the great and diversified types of American business cannot be expected to accede to the wishes of every doctrine or religious belief.”\textsuperscript{62}

The outcome of both cases was enough of a concern that Congress included them in the legislative record as specific examples of judicial reasoning that the accommodation mandate was intended to overturn. The sponsor of the bill, Senator Jennings Randolph, urged Congress to “assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law.”\textsuperscript{63} The lawmakers hoped that the accommodation mandate would then

\textsuperscript{57} Christine Jolls, \textit{Accommodation Mandates}, 53 STAN. L. REV. 223 (2000) (noting how disparate impact and medical leave requirements similarly are “accommodation mandates”).
\textsuperscript{58} 118 CONG. REC. 705-06 (1972) (statement of Senator Jennings Randolph, sponsor and chief proponent of the 1972 Amendments).
\textsuperscript{59} 429 F.2d 324 (6th Cir. 1970).
\textsuperscript{60} 330 F. Supp. 583 (M.D. Fla. 1971).
\textsuperscript{61} Dewey, 429 F.2d at 334.
\textsuperscript{62} Riley, 330 F. Supp. at 590.
\textsuperscript{63} 118 Cong. Rec. 705 (1972).
save employees from having to choose between their religious beliefs and their jobs. The measure passed overwhelmingly in both houses.

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

B. The Courts’ Answer: Protect Employer Interests

The Supreme Court was unwilling to consider the expansive nature of the legislative history in interpreting the reasonable accommodation provision. Instead, the Court severely limited employers’ obligations to accommodate religious employees. In 1977’s *TWA, Inc. v. Hardison*, the employee had a religious objection to working on his Sabbath day. The Court held that an accommodation causes “undue hardship” whenever that accommodation results in “more than a de minimis cost” to the employer. The only other Supreme Court decision addressing religious accommodation under Title VII was in 1986, *Ansonia Board of Education v. Philbrook*. In *Ansonia*, the Court rejected an employee’s claim for religious accommodation, and in doing so, repudiated the requirement of employers having to reach a reasonable accommodation.

Outside these two opinions, the Court has never addressed religious accommodation under Title VII, and those two decisions merely address a facet of religious expression: employee requests for accommodation in work schedule conflicts. As the EEOC Guidelines suggest, other important conflicts between workplaces rules and religious observances exist, such as dress and grooming.

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64 Id.
67 *Id.* at 84. This definition was later reaffirmed by the Court in *Ansonia Board of Education v. Philbrook*, *479 U.S. 60, 67* (1986).
68 *479 U.S.* at 63.
69 *Id.* at 74-75.
requirements, the need for prayer breaks, dietary requirements, and prohibitions on certain medical procedures.\textsuperscript{70}

Most courts post-	extit{Hardison} and 	extit{Ansonia} have uncritically embraced the Court’s stringent standard of requiring only de minimis accommodations, effectively stripping the accommodation down to a “dead letter.”\textsuperscript{71} Indeed, courts routinely take a “per se” approach: “virtually all cost alternatives have been declared unduly harsh simply because a loss is involved.”\textsuperscript{72} Additionally, judges are sympathetic to employers’ arguments that co-employees would be negatively affected by a proposed accommodation for a religious employee, finding such arguments a basis for deeming a requested accommodation to cause the employer undue hardship\textsuperscript{73}. In such holdings, as one commentator notes, “[a]lthough the Supreme Court set a reasonable ceiling, the ceiling appears to have fallen to the floor.”\textsuperscript{74}

The well-known case of 	extit{Wilson v. U.S. West Communications} highlights this judicial philosophy when courts attempt to balance the needs of religious employees and employers’ business.\textsuperscript{75} The employee made a religious vow to express her opposition to abortion and, in keeping with her religious views, wore a button depicting a photograph of second trimester fetus (one that does not appear to be particularly graphic),\textsuperscript{76} with the slogans “Stop Abortion” and “They’re forgetting someone.” Wilson’s co-workers opposed her wearing of the button at work and the message it delivered, claiming that the button amounted to harassment and charging the supervisor with harassment for failing to stop her from wearing it. The employer offered three accommodations: (1) Wilson could wear the button in her cubicle; (2) she could wear the button but cover it while she worked in the office; and (3) she could wear a different button that did not

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\item[\textsuperscript{70}] 29 C.F.R. § 1605.2(d)(1) (2004).
\item[\textsuperscript{71}] Prenkert & Magid, supra note 8, at 468.
\item[\textsuperscript{73}] See e.g., Peterson v. Hewlett-Packard Co., 358 F.3d 599 (9th Cir. 2004); Chalmers v. Tulon Co. of Richmond, 101 F.3d 1012 (4th Cir. 1996); Wilson v. U.S. West Communications, 58 F.3d 1337 (8th Cir. 1995).
\item[\textsuperscript{74}] Sonny Franklin Miller, \textit{Religious Accommodation under Title VII: the Burdenless Burden}, 22 J. CORP. L. 789, 795 (1997)
\item[\textsuperscript{75}] 5358 F.3d 1337, 1338-40 (8th Cir. 1995).
\item[\textsuperscript{76}] Picture on file with author.
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have a photograph of a fetus on it. When Wilson brought suit, claiming the employer failed to reasonably accommodate her, the trial court held that Wilson’s religious beliefs (although sincerely held) did not require her to engage in this expression and that the accommodations offered by her employer were reasonable.

The Eight Circuit upheld the trial court’s ruling. In an opinion fraught with derision towards Wilson’s religious beliefs, the court held that it would be unduly burdensome to allow her to wear her button because of the impact her chosen expression had on her co-workers. The court characterized her requested accommodation as requiring her employer to “allow Wilson to impose her beliefs as she chooses.” This “heckler’s veto” trumped Wilson’s position that she was expressing her religious beliefs and stymied any discussion on what reasonable accommodations did exist to minimize the impact of her expression.

In another example, in EEOC v. Sambo’s, Inc., the district court rejected the claim of a Sikh worker that a uniform grooming policy proscribing facial hair constituted unlawful discrimination. These cases exemplify the approach taken by courts in reviewing religious accommodation suits: the balance swings in favor of the employer under the “de minimis” standard and deference is given to any employer’s concern for possible offense over religious expression.

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

Of course, there is a line at which an employee’s religious expression crosses over into harassment. In Peterson v. Hewlett-Packard Company, the employee, in response to diversity posters, posted Biblical scriptures in his work

77 Id. at 1339.
79 Wilson, 58 F.2d at 1341.
80 Prenkert & Magid, supra note 8, at 497-98 (2006).
space, including one that condemned homosexuality. His supervisors determined that the scripture postings were offensive and violated its policy prohibiting workplace harassment. Subsequently, the employee was fired for insubordination when he refused to remove the scripture postings. In response to the employee’s claims that his employer failed to accommodate his religious beliefs, the Ninth Circuit held that it would create an undue hardship for the employer to accommodate him by allowing him to post messages intended to demean and harass his co-workers.

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

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

IV. SOLVING THE INCONSISTENCIES: DRAWING NEW PROTECTION FOR RELIGIOUS EXPRESSION IN THE WORKPLACE

A. Why the Court Should Expand Title VII Religious Accommodation Rights Based on Its Commitment to Expanding the Role of Religion in the Public Sphere.

In order to be consistent with its pro-religion stance in the Religious Clause jurisprudence, the Supreme Court must broaden the current “de minimis” standard for workplace accommodation—if the legislature does not beat it to the punch with a statutory reinvigoration of the religious accommodation requirement. It is unlikely that the Court will overtly overturn the Harrison

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82 358 F.3d 599 (9th Cir. 2004).
decision on its own because it was a statutory interpretation by the Court, and “considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation.”\textsuperscript{83} The Court, however, can broaden the protections afforded employees without admitting a wholesale abandonment\textsuperscript{84} of the “de minimis” standard because that standard is, in essence, a balancing test – just one that, to date, has been weighted too heavily against employees’ rights.

This broadening of employee protections might also come about through legislative reform, but such a turn of events still would require courts to struggle with the appropriate standard for balancing employee religious rights against employer prerogatives. If new laws are passed to strengthen current accommodation laws, such as the WRFA efforts,\textsuperscript{85} the new laws will require courts to weigh the competing interests with a stronger emphasis on accommodating religious expression. These new laws will surely be quickly tested in litigation, given the balancing of interests such laws require. Thus, legislative reform would not obviate the need for courts to revisit the question of workplace religious accommodations.

Moreover, workplace norms can begin to change through employer-led initiatives, which are all the more likely for businesses fearful of legal exposure. In either event, the question remains: how will, and should, the Court view the newly-emerging religious accommodation right in order to be in line with the principles of tolerance and inclusion outlined above? Put another way, with religious expression in the public sphere enjoying significant support from the Court, how should it balance employee religious rights, coworker rights not to be degraded, and employer business interests?

B. Three Approaches to Balancing Religious Accommodation in the Workplace

In accommodating religion in the workplace, courts necessarily face a balancing act. Courts must balance the right of employees to be free to express their religious identities with other employees’ right not to work in a hostile environment and employers’ interests in maintaining a respectful atmosphere conducive to productivity. When faced with having to balance competing rights and interests, judges are in the inevitable position of line drawing. So how can


\textsuperscript{84} See, e.g., Burdine, Hicks.

\textsuperscript{85} See WFRA, \textit{supra} note 4.
courts draw lines that foster workplace norms that include tolerating differing forms of religious expression?

This Subpart offers three suggestions, none of them mutually exclusive or complete answers, of legal tests to replace the current “de minimis” standard. First, as Subpart (1) discusses, courts could rely on workplace harassment law to define the point at which one employee’s religious expression begins to infringe upon another’s right to a non-hostile workplace; harassment law also helpfully distinguishes between harassing conduct by supervisors and coworkers, deeming the former to be more troubling. Second, as Subpart (2) discusses, courts could apply the constitutional Establishment Clause concepts of noncoercion and nonendorsement to define the point at which employer accommodation of workplace religious expression begins to infringe on the rights of workers holding different religious beliefs. Third, as Subpart (3) discusses, courts could look to various constitutional rights doctrines and the Americans with Disabilities Act, which do a more balanced job of weighing rights and costs, as a way to analyze similar issues of accommodating employee religious needs.

1. Non-Degradation and Anti-Harassment Models

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

In this light, much “accommodation” is simply a rule of nondiscrimination.\textsuperscript{87} To be sure, coworker disturbances can result from allowing such pluralism, but that was the case with the original discrimination laws’ mandates that men must interact with women and that whites must interact with blacks.

Religious diversity, like other forms of diversity, can be embraced by employers who foster a workplace that allows employees to express their religious beliefs fully. As Douglas A. Hicks writes, in “constructing respectful pluralism,” employers should presume inclusion.\textsuperscript{88} Employers can promote inclusion by encouraging a level of understanding and flexibility amongst coworkers about diverse religious backgrounds and the accompanying expression that stems from such identity.\textsuperscript{89}

Hicks extols “limiting norms” to address the potential pitfalls that can emerge in the workplace. The first is a non-degradation policy prohibiting disrespect of co-workers.\textsuperscript{90} If an expression is aimed at degrading another (such as the anti-gay message of the employee in the \textit{Peterson} case), then such expression is not protected and should be prohibited.

Courts can evaluate co-worker complaints regarding unwelcome religious expression by borrowing from another established legal doctrine: the anti-harassment framework under Title VII. In sexual harassment law, there are two types of claims: quid pro quo and hostile work environment.\textsuperscript{91} Quid pro quo harassment is when a supervisor's sexually discriminatory behavior “compels an employee to elect between acceding to sexual demands and forfeiting job benefits, continued employment or promotion, or otherwise suffering tangible job detriments.”\textsuperscript{92} Under the EEOC guidelines, quid pro quo sexual harassment occurs when “submission to or rejection of (unwelcome sexual) conduct by an


\textsuperscript{89} For a critique on the limits of Hick’s religious pluralism, see Achim Seifert, \textit{Respectful Religious Pluralism in the Workplace}, 25 Comp. Lab. L. & Pol’y J. 463 (Spring 2004).

\textsuperscript{90} Hicks, supra note 85, at 174.


individual is used as the basis for employment decisions affecting such individual."93 A quid pro quo religious harassment suit would likewise analyze whether a supervisor or manager is compelling an employee to elect between participating or attending religious proselytizing or practices in order to continue employment or suffer negative employment consequences.

The second harassment model that can be utilized in the religious expression context regards hostile work environments. Hostile work environment sexual harassment is defined by the EEOC guidelines as “conduct that has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."94 In the well-known Meritor Savings Bank, FSB v. Vinson case,95 the Supreme Court recognized the hostile work environment as sex discrimination in violation of Title VII. The Court adopted the language of the EEOC Guidelines and found that a plaintiff could establish a prima facie case of sexual harassment even when no tangible or economic benefits are forfeited. Specifically, the Court articulated the rule that hostile environment claims constitute unlawful sexual harassment when the allegedly hostile acts are “sufficiently severe or pervasive ‘to alter the conditions of [the victim's] employment and create an abusive working environment."96

Currently, courts will recognize religious hostile work environment claims when confronted with overtly egregious harassment. For example, in Weiss v. United States,97 the employee was subjected to continuous religious slurs from both his coworkers and supervisor. The religious slurs included: "such taunts as 'resident Jew,' 'Jew faggot,' 'rich Jew,' 'Christ killer,' 'nail him to the cross,' and 'you killed Christ, Wally, so you'll have to hang from the cross."98 The court recognized the hostile work environment these obviously demeaning and patently offensive comments constituted: “continued abusive language, [which,] whether racist, sexist, or religious in form, can often pollute a healthy working environment . . . ”99 Most commentators would agree that this was not a close call.

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95 477 U.S. 57 (1986).
96 Id. at 67.
98 Id. at 1053.
99 Id. at 1056.
The true test will be the extent to which courts will recognize religious harassment claims in cases with behavior that is less outrageous, but still goes beyond the workplace norms of inclusiveness and respect for religious pluralism in the workplace. For example, in a workplace that allows all forms of idle conversation, an employee discussing her religious beliefs during breaks ordinarily would not be considered harassing. But if other employees perceive, with reasonable basis, that the religious employee is degrading or insulting them, or is pushing too hard for others to adopt her beliefs (such as a fervent proselytizer who doesn’t take “no” for an answer), then the religious speech could approach the level of actionable harassment, and an employer would be entitled to put a halt to it before it became “pervasive” enough to amount to a violation of the harassment prohibition.

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

2. Non-Coercion and Non-Endorsement Models

Another limiting principle to the general acceptability of religious expression is one of non-coercion. Workplace policies can require employers not to use their authority (both formal and informal) over subordinates to influence them with regard to their religious beliefs.\(^{100}\) Likewise, employees can be discouraged from imposing dogmatic views onto their co-workers. This includes “proselytizing” and other forms of coercive efforts by workers with the aim of changing another’s beliefs about religion. If a religious supervisor required an atheist employee to attend prayer meetings or be fired, although the supervisor also has a religious expression right, she cannot coerce her employees under this standard.\(^{101}\)

This would also include prohibiting employers from endorsing one particular religion over others in the workplace. Much like an Establishment Clause on private employers, this limiting principle would combat the coercive effects of an “institutional preference for a specific religious worldview.”\(^{102}\)

\(^{100}\) Id.

\(^{101}\) These facts are similar to the case of EEOC v. Townley Engineering & Manufacturing Co., 859 F.2d 610 (9th Cir. 1988), which instead relied upon anti-discrimination standards that seem to conclude that religion has no place in the workplace. See Troy A. Price, Preemption “Between the Poles:” ERISA’s Effect on State Common Law Actions Other Than Benefit Claims, 19 U. Ark. Little Rock L.J. 557, 618-19.

\(^{102}\) Id.
Courts can borrow from the Establishment Clause model for evaluating the effects of employers’ religious expression by using the “endorsement” test.

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

The reason that employers’ religious expression would be curtailed more than employee religious expression under this test is because of the inherent power dynamic at play in the employment relationship that so heavily favors employers. Because employees are in a subservient role vis-à-vis their employer, the employer cannot go too far in expressing one particular religion because of the chilling effect it has on employee religious expression. If an employer promoted its own religious views, the coercive effect of that seeming “endorsement” would prevent employees from expressing their own religious beliefs if they diverged from their employers’ religion. Accordingly, the Establishment Clause test of “coercion,” where the Court allows government religious expression as long as it would not “coerce anyone to support or

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104 *See* Berry v. Department of Social Svs., 447 F.3d 642 (9th Cir. 2006).
105 Good News Club v. Milford Central School, 533 U.S. 98 (2001) (holding unconstitutional a public school’s exclusion of a Christian children’s club from after-hours use of school facilities that ordinarily were open to groups of all kinds).
participate in religion or its exercise, or otherwise act in a way which ‘establishes a [state] religion or religious faith, or tends to do so,’” 107 would go too far in chilling employee religious expression.

With the aforementioned principles of religious pluralism in mind, courts can encourage employers to institutionalize policies on respectful religious expression in the workplace. Grievances (both internally and in the courts) can be evaluated based on principles that balance workplace ideals, such as accommodation, equality, neutrality, tolerance, and inclusion. These five ideals, as outlined by Steven D. Jamar, 108 would foster a workplace that allows for religious expression without fear of coercion and intimidation.

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

3. Discouraging Employer Defenses That Costly Accommodation is Unduly Burdensome

The balancing of religious expression in the workplace requires the courts to assess what is truly “unduly burdensome” for employers to undertake to accommodate their employees. In reevaluating what “unduly burdensome” means in a pluralistic society, the Court need only look to its “undue burden” jurisprudence in various fundamental constitutional rights. Analogizing workers’ statutory religious rights to fundamental constitutional rights makes sense for two reasons. First, religion is given special protection under a variety of constitutional and statutory doctrines, and is especially important to the current conservative bloc of Justices, as outlined above. Second, a person’s religious identity, although mutable, is a fundamental personal decision on par with recognized fundamental rights such as marriage and procreation, and arguably more important to many people than association and political speech.

Fundamental rights under the Constitution traditionally merit strict scrutiny, but given that Title VII religious rights extend further than constitutional religious rights (both by reaching into private workplaces and by requiring accommodations against neutral workplace rules\textsuperscript{109}), it is appropriate to use the more lenient “undue burden” test applicable to constitutional rights such as abortion that do not require restrictions to be justified with strict scrutiny.\textsuperscript{110} That exact language – “undue burden” – is used in Title VII\textsuperscript{111} and the lawmakers arguably used that language for a reason: to provide substantial protection to religious workers’ rights.\textsuperscript{112}

Under an “undue burden” standard, limits on religious expression would be lawful only if such limitations were not a “direct legal obstacle”\textsuperscript{113} to expressing one’s religion, or put another way, if the limitations on religious expression had a “purpose or effect . . . [of] plac[ing] a substantial obstacle in the path.”\textsuperscript{114} Accordingly, laws or employer policies and practices that were a substantial obstacle to religious expression in the workplace would be struck down.

Employers may argue that accommodating religious workers simply costs too much. As commentator Achim Seifer has acknowledged, religious pluralism principles are effective in the private work sphere only so long as they are compatible with the ultimate goal of business: profit making.\textsuperscript{115} While these


\textsuperscript{111} 42 U.S.C. § 2000e(j) (2000) (“The term ‘religion’ includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.”).

\textsuperscript{112} See Engle, \textit{supra} note 50, at 388-89.

\textsuperscript{113} Zablocki v. Redhail, 434 U.S. 374 (1978) (regarding the fundamental right to marriage).

\textsuperscript{114} Planned Parenthood v. Casey, 505 U.S. 833, 877 (1992) (regarding the women’s fundamental right to a choose whether to have an abortion).

\textsuperscript{115} Achim Seifert, \textit{supra} note 86, at 467.
principles are seemingly not inconsistent with profit-seeking, the courts are likewise sympathetic to the employer’s interest in the productivity lost as these interests are sorted out.116 There are three responses to courts’ concern about putting employers’ profits at risk.

First, eradicating discrimination in the workplace often comes with a price tag, but courts still mandate compliance in the interest of furthering a just society (or at least in the interest of effectuating a clear congressional intent to further a just society by imposing a rights mandate on businesses). For example, in the disability context, the ADA requires that employers comply with its provisions for equal accessibility for disabled employees.117 Although these provisions can cost employers thousands, or tens of thousands, of dollars per accommodated employee,118 the courts have upheld this costly burden because of the justice it serves in assuring equal access for all.

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

Additionally, where a requested religious accommodation is relatively modest, courts should not hesitate to require it when the only objection is that it would make other employees unhappy. After all, courts have never recognized an “upset co-worker” exception to anti-discrimination laws, even to accommodation mandates. Rejecting religious accommodation because coworkers are upset is no more justified than letting coworker preferences trump requirements of disability accommodations, medical leave, anti-harassment policies, etc.

This argument against a “co-worker veto” does not diminish the point made above that religious expression that is aimed at demeaning secularist

116 See 58 F.2d at 1339.
118 Peter David Blanck, Transcending Title I of the Americans with Disabilities Act: A Case Report on Sears, Roebuck and Co., 20 MENTAL & PHYSICAL DISABILITY L. REP. 278, 279-280 (1996) (noting that while many disability accommodations are low-cost, accommodations such as automatic door openers (a common accommodation for wheelchair-using employees) cost over a thousand dollars, and the cost of visual impairment accommodations (such as Braille displays and related technologies) can exceed $20,000).
workers should not be protected or accommodated. Like prohibited hate speech (in the constitutional context) or sexual harassment (in the statutory context), speech and conduct that courts find violates these principles should not be deemed acceptable (and protectable) religious expression. In this way, content matters and, as in other content-based inquiries, courts will have to balance the rights of religious expression with the rights of other workers to be free from harassment.

Lastly, a proactive approach for employers to create a respectful workplace for religious diversity is arguably good for business, as well as good for employees. As any good motivational speaker will tell you: “Happy employees are productive employees.”119 In order to keep both the religious believer and the secularist happy, employers can promote a set of “best practices” guidelines120 for managers and supervisors that incorporates the values of inclusion and nondiscrimination outlined here.

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

Courts have the tools to balance the competing interests of employees’ right to express their religion with employers’ interests in productivity. By using

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119 See, e.g., Peter R Garber, “99 WAYS TO KEEP EMPLOYEES HAPPY, SATISFIED, MOTIVATED AND PRODUCTIVE” Business & Legal Reports, Inc. 11 (1994) (http://books.google.com/books?id=y8XopNIT721C&dq=happy+employees+are+productive+employees&pg=PA91&ots=sdkEYi4W38&sig=7c3d7GI0Fk7SrHMr2IB36qsUMY&prev=http://ww
w.google.com/search%3Fsourceid%3Dfnavclient%26ie%3DUTF-8%26rlz%3D1T4GGIG_enUS232US232%26q%3Dhappy%2Bemployees%2Bare%2Bproductive%2Bemployee&sa=X&oi=print&ct=result&cd=1#PPA11,M1).

120 See NYCLU Free Speech in the Workplace: Policy 193, on file with author.
a true “undue burden” test, instead of a *de minimis* standard, courts could enforce the true legislative intent of the accommodation laws. This approach supports workplace norms that include respectful religious pluralism. Further, anti-discrimination and anti-harassment laws are already in place and can be used to curb the threat of coercive expression.

Through this self-correction, the courts will be addressing three important, converging issues identified in this article: (1) workplaces are increasingly public sites; (2) American workplaces are experiencing broad religious diversity in their employees; and (3) believing workers are unable (or unwilling) to sever their religious identities when they enter work. A self-correction is necessary when these factors play out so forcefully in the today’s American workplace.

**CONCLUSION**

In this new era of support for religion in American society, the Supreme Court, with its new personnel changes, will likely be supportive of more accommodation for religion expression in the workplace. Justice Scalia’s dissent in *McCreary County v. ACLU* is a harbinger of the new Supreme Court’s views of religion and society. According to Justices Scalia, Breyer, and Thomas (and with the likely promise of Justices Alito and Roberts’ support), governmental religious expression does not violate constitutional principles because our country is based upon a belief of a Creator, which can be celebrated by the government.

If this conservative bloc of the Court is going to be consistent, the previously perceived “dead letter”\(^\text{121}\) of the religious accommodation clause of Title VII should rise from the dead. The *de minimis* standard of the undue burden requirement enunciated in *TWA v. Hardison* flies in the face of the dogma of *McCreary*. The *TWA* Court held that “we will not readily construe [Title VII] to require an employer to discriminate against some employees in order to enable others to observe their Sabbath.”\(^\text{122}\) Juxtapose that with the conservative trend voiced in *McCreary* that government can favor religious practices: “morality [is] essential to the well-being of society and that encouragement of religion [is] the best way to foster morality.”\(^\text{123}\)

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\(^{121}\) 43 AMBLJ 467 (2006).

\(^{122}\) 432 U.S. at 85.

\(^{123}\) 545 U.S. at 886.
In essence, with a conservative Court encouraging the fostering of religion for a moral world, and with growing religious diversity in the workplace, the Court in future religious accommodation cases should find that employers must make a strong showing of an actual burden instead of only a *de minimis* one. This new perspective would result in a co-mingling of two important concepts: first, fostering religious pluralism and freedom of religious expression; second, strengthening accommodation rights to allow anti-discrimination laws to be fully realized. This self-correction harkens back to the original intent of the First Amendment, as well as the congressional intent of Title VII. Most importantly, it recognizes and supports a workplace that allows for an expansion of acceptable workplace communication and practices that respect each others’ believing and secularist identities.