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JAMES D. NELSON

Disestablishment at Work

ABSTRACT. Across the country, courts are inundated with employee claims for religious accommodation. These claims demand exemptions from vaccine mandates, rules against misgendering, diversity programming, and more. But in the wake of *Groff v. DeJoy*, which unsettled nearly fifty years of law on religious accommodation at work, judges are in urgent need of guidance on how to handle this new wave of cases.

This Article excavates and defends three principles to guide adjudication: nondisparagement, reciprocity, and proportionality. Striking a balance between worker free exercise and the disestablishment value of avoiding imposition on third parties, these principles can help judges resolve novel religious-accommodation disputes in coherent and attractive ways. Beyond the courts, they might also anchor alternative strategies to protect the basic rights of employees in a diverse modern workplace.

AUTHOR. Vinson & Elkins Professor, University of Houston Law Center. For helpful comments and discussions, I thank Micah Schwartzman, Liz Sepper, Laura Portuondo, Nelson Tebbe, Elizabeth Pollman, Matt Bodie, Rich Schragger, Jessica Roberts, Dave Fagundes, Doug Moll, Chip Lupu, Kate Redburn, Deborah Widiss, Michael Pollack, Larry Sager, and Jim Oleske. I also thank participants in the Nootbaar Conference at Pepperdine Caruso School of Law; the Religion, Freedom, and Equality Conference at Magdalen College, University of Oxford; and a faculty workshop at the University of Texas School of Law. For excellent research assistance, I thank David Segal and Ben Surrett.

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INTRODUCTION

In recent years, the Supreme Court has been reworking the role of religion in American life. In a series of cases decided during the COVID-19 pandemic, it stretched the Free Exercise Clause to grant religious exemptions from public-health mandates under previously unimaginable circumstances.[1] Around the same time, in cases ranging from state funding for religious schools to state-sponsored display of Christian symbols to prayer in public schools, it eroded the Establishment Clause into a shell of its former self.[2] The combination of an outsize Free Exercise Clause and an emaciated Establishment Clause, in turn, has fundamentally altered the contemporary relationship between church and state. Religious citizens now enjoy immunities from law not shared by their nonreligious compatriots, yet they remain virtually unconstrained in their ability to merge religion with political power.[3]

As dramatic as these changes have been, however, they miss something deeply important about how law shapes the everyday practice of religion. In the legal academy and in popular culture, we tend to think about matters of religious liberty primarily—if not exclusively—in terms of the relationship between the

1. *See, e.g.*, Tandon v. Newsom, 593 U.S. 61, 62 (2021) (per curiam) (granting an exemption from a private-gathering restriction during COVID-19); Roman Cath. Diocese v. Cuomo, 592 U.S. 14, 15-16 (2020) (per curiam) (granting an exemption from an occupancy restriction during COVID-19). *But see* S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (mem.) (denying an exemption from a gathering restriction during COVID-19); Jacobson v. Massachusetts, 197 U.S. 11, 39 (1905) (denying an exemption from a smallpox-vaccination requirement and insisting on deference to state public-health authorities).

2. *See, e.g.*, Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 467 (2017) (holding that a state must provide funds to a church-owned school to resurface its playground if it would provide the same funds to secular schools); Espinoza v. Mont. Dep't of Revenue, 591 U.S. 464, 489 (2020) (holding that a state must fund a religious school as part of a statewide tuition-assistance program); Am. Legion v. Am. Humanist Ass'n, 588 U.S. 29, 66 (2019) (holding that the placement of a forty-foot Latin cross on public land does not violate the Establishment Clause); Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 512-14 (2022) (holding that the Establishment Clause does not justify a high school's refusal to let a football coach pray with students on the fifty-yard line and rejecting the Establishment Clause test articulated in Lemon v. Kurtzman, 403 U.S. 602 (1971)).

3. *See* Ira C. Lupu & Robert W. Tuttle, *The Remains of the Establishment Clause*, 74 HASTINGS L.J. 1763, 1765 (2023) (describing these doctrinal transformations); Richard Schragger, Micah Schwartzman & Nelson Tebbe, *Reestablishing Religion*, 92 U. CHI. L. REV. 199, 201-02 (2025) (explaining how Religion Clause doctrine has developed into a regime of "structural preferentialism"); Elizabeth Sepper & James D. Nelson, *Government's Religious Hospitals*, 109 VA. L. REV. 61, 62-67 (2023) (detailing the merger of state and religion in the healthcare sector).

state and its citizens.[4] But for millions of Americans, their daily routines—what they wear, when they eat, when they rest, who they talk to—are determined not by the government, but instead by where they work. And because, for the majority of Americans, these daily routines include religious practices, workplace rules and structures are of enormous consequence for the practical enjoyment of religious liberty.[5] Instead of resulting from a clash between citizens and their state, the shape of that liberty is often determined through the resolution of conflicts between employers and employees and between employees and their coworkers.[6]

Federal law structures disputes over religion at work. Title VII of the Civil Rights Act of 1964 lays the ground rules in two provisions. The first prohibits employment practices that discriminate on the basis of religion.[7] And the second requires employers to reasonably accommodate employee religious practices unless doing so would be an "undue hardship" on their business.[8] With the exception of its application to religious institutions, the first provision has been

4. *See, e.g.*, 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION 72 (2008); CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 5-6 (2007); IRA C. LUPU & ROBERT W. TUTTLE, SECULAR GOVERNMENT, RELIGIOUS PEOPLE 3-4 (2014); MICHAEL W. MCCONNELL, THOMAS C. BERG & CHRISTOPHER C. LUND, RELIGION AND THE CONSTITUTION 1-2 (5th ed. 2022); Americans United for the Separation of Church and State (@americansunited), INSTAGRAM (Nov. 21, 2023), https://www.instagram.com/americansunited/p/Cz6ZFyasuMZ [https://perma.cc/W32W-9BCR] ("Separating religion and government allows us all to live freely and equally."); Gregory A. Smith, *In U.S., Far More Support than Oppose Separation of Church and State*, PEW RSCH. CTR. 5-6 (Oct. 28, 2021), https://www.pewresearch.org/wp-content/uploads/sites/20/2021/10/PF_10.21.21_fullreport.pdf [https://perma.cc/GH73-XZTJ].

5. *See Religion in Everyday Life*, PEW RSCH. CTR. 4 (Apr. 12, 2016), https://www.pewresearch.org/wp-content/uploads/sites/20/2016/04/Religion-in-Everyday-Life-FINAL.pdf [https://perma.cc/QC8A-ZVDV] (discussing "the ways religion influences the daily lives of Americans"); Elaine Howard Ecklund, Denise Daniels, Daniel Bolger & Laura Johnson, *A Nationally Representative Survey of Faith and Work: Demographic Subgroup Differences Around Calling and Conflict*, 11 RELIGIONS 287, 297-98 (2020) (discussing the conflicts employees face between "their faith and their work").

6. For the recent spike in religion-based charges filed with the Equal Employment Opportunity Commission (EEOC), see *Religion-Based Charges (Charges Filed with EEOC) FY 1997-FY 2022*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/data/enforcement-and-litigation-statistics-0 [https://perma.cc/7UBP-LJ4J].

7. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-2(a)).

8. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103, 103 (codified as amended at 42 U.S.C. § 2000e(j)) ("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."). For further discussion of the circumstances surrounding the amendment, see *infra* Section I.A.

relatively uncontroversial.[9] But since its inception, the reasonable-accommodation provision has provoked serious worries about business disruption and religious favoritism.[10]

And it's not hard to see why. While the general thrust of Title VII—and of the Civil Rights Act more broadly—is equal treatment, the religious-accommodation provision has a different character. Instead of targeting invidious discrimination, that provision imposes an affirmative obligation on businesses to rework their operations for the benefit of religious employees. These special benefits, moreover, are not intended to offset any government-imposed burdens on religion. Instead, the federal government is intervening in private firms to give religion favored treatment.[11] And the costs of this extraordinary intervention reliably fall on businesses and coworkers.

Although third-party burdens are especially acute in the employment context, the source and shape of any limiting principles have become unclear. Early litigation had indicated that a mandate on employers to accommodate religion violates the First Amendment's Establishment Clause.[12] Title VII's religious-accommodation provision, however, survived constitutional challenge in *Trans World Airlines, Inc. v. Hardison*.[13] Still, *Hardison* was highly sensitive to the Establishment Clause's concern for third parties, stating that employers need not accommodate religion if they would incur anything more than "de minimis" costs.[14]

For nearly fifty years, *Hardison*'s constitutionally inflected reading of Title VII limited burdens on employers and coworkers. Courts and regulators forged a working settlement, developing a host of rules that balanced free-exercise interests with the costs imposed on others. Though typically operating offstage,

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9. The controversy over Title VII's mandate not to discriminate on the basis of religion has revolved around issues like the scope of the ministerial exception, the kinds of discrimination in which religious nonprofits may engage, and the extent to which for-profit companies qualify for Title VII's religious-organization exemption. For a better sense of these issues, see Nelson Tebbe, Religious Freedom in an Egalitarian Age 142-63 (2017); and Recission of Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption Rule, 88 Fed. Reg. 12842, 12842-44 (Mar. 1, 2023) (to be codified at 41 C.F.R. pt. 60-1).

10. *See infra* Part I.

11. *See* EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 775 (2015) ("Title VII . . . gives [religious practices] favored treatment . . . ."); *see also* Groff v. DeJoy, 600 U.S. 447, 461 n.9 (2023) (quoting *Abercrombie*'s language about Title VII giving religion favored treatment).

12. *See, e.g.*, Dewey v. Reynolds Metals Co., 429 F.2d 324, 334-35 (6th Cir. 1970). For elaboration, see *infra* note 28 and Section I.A.

13. 432 U.S. 63, 70 (1977).

14. *Id.* at 84.

disestablishment values continued to police the boundaries of religious accommodation at work.[15]

Recently, in *Groff v. DeJoy*, the Supreme Court repudiated *Hardison*'s "de minimis" formulation.[16] Under *Groff*, employers must now reasonably accommodate religious employees unless doing so would impose "substantial increased costs" on their business.[17] What counts as substantial increased costs? The *Groff* Court refused to say. Instead, it left that determination to lower courts and instructed them to use their "common[] sense."[18]

In the short time since *Groff* came down, courts have been flooded with cases asking them to adjudicate religious-accommodation claims under its "clarified standard."[19] But there is something new—and striking—about these cases.

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15. *See infra* Part I.

16. *Groff*, 600 U.S. at 468.

17. *Id.* at 470.

18. *Id.* at 471 (internal punctuation omitted).

19. *Id.* at 473. In just the first six months after the Court handed down its decision, federal district courts applied *Groff* in dozens of cases. *See, e.g.*, Gage v. Mayo Clinic, 707 F. Supp. 3d 870, 878 (D. Ariz. 2023); Witham v. Hershey Co., No. 23-cv-1563, 2023 WL 8702627, at *3 (D. Minn. Dec. 15, 2023); O'Hailpin v. Hawaiian Airlines Inc., No. 22-00532, 2023 WL 8600498, at *11 (D. Haw. Dec. 12, 2023); Isaac v. Exec. Off. of Health & Hum. Servs., No. 22-11745, 2023 WL 8544987, at *2 (D. Mass. Dec. 11, 2023); McNeill v. Tyson Fresh Meats, Inc., No. 23-CV-041, 2023 WL 8532408, at *9 (N.D. Tex. Dec. 8, 2023); Bordeaux v. Lions Gate Ent., Inc., 703 F. Supp. 3d 1117, 1122, 1130 (C.D. Cal. 2023); Zimmerman v. PeaceHealth, 701 F. Supp. 3d 1099, 1107, 1110-11 (W.D. Wash. 2023); Shields v. Main Line Hosps., Inc., 700 F. Supp. 3d 265, 274 (E.D. Pa. 2023); Gamon v. Shriners Hosps. for Child., No. 23-cv-00216, 2023 WL 7019980, at *1 n.1 (D. Or. Oct. 25, 2023); Prida v. Option Care Enters., No. 23-cv-00905, 2023 WL 7003402, at *3 (N.D. Ohio Oct. 24, 2023); Stephens v. Legacy-Gohealth Urgent Care, No. 23-cv-00206, 2023 WL 7612395, at *11 n.4 (D. Or. Oct. 23, 2023); Trinh v. Shriners Hosps. for Child., No. 22-cv-01999, 2023 WL 7525228, at *7 n.2 (D. Or. Oct. 23, 2023); Lee v. Seasons Hospice, 696 F. Supp. 3d 572, 579 (D. Minn. 2023); Adams v. Mass Gen. Brigham Inc., No. 21-11686, 2023 WL 6318821, at *5 (D. Mass. Sept. 28, 2023); Stroup v. Coordinating Ctr., No. 23-0094, 2023 WL 6308089, at *5-6, *8-9 (D. Md. Sept. 28, 2023); Beickert v. N.Y.C. Dep't of Educ., No. 22-CV-5265, 2023 WL 6214236, at *3 (E.D.N.Y. Sept. 25, 2023); Langer v. Hartland Bd. of Educ., No. 22-cv-01459, 2023 WL 6140792, at *5 (D. Conn. Sept. 20, 2023); Brown v. NW Permanente, P.C., No. 22-cv-986, 2023 WL 6147178, at *3-4 (D. Or. Sept. 20, 2023); Trusov v. Or. Health & Sci. Univ., No. 23-cv-77, 2023 WL 6147251, at *3-5 (D. Or. Sept. 20, 2023); Bube v. Aspirus Hosp., Inc., No. 22-cv-745, 2023 WL 6037655, at *3 n.1 (W.D. Wis. Sept. 15, 2023); Ellison v. Inova Health Care Servs., 692 F. Supp. 3d 548, 555-56 (E.D. Va. 2023); Jennings v. St. Luke's Health Network, Inc., No. 23-cv-1229, 2023 WL 5938755, at *5 n.4 (E.D. Pa. Sept. 12, 2023); MacDonald v. Or. Health & Sci. Univ., 689 F. Supp. 3d 906, 912-13 (D. Or. 2023); Conner v. Raver, No. 22-cv-08867, 2023 WL 5498728, at *5 (N.D. Cal. Aug. 24, 2023); Kiel v. Mayo Clinic Health Sys. Se. Minn., 685 F. Supp. 3d 770, 782-83 (D. Minn. 2023); Johnson v. St. Charles Health Sys., Inc., No. 23-cv-00070, 2023 WL 5155591, at *2-3 (D. Or. July 21, 2023); Baugh v. Austal USA, LLC, No. 22-00329, 2023 WL 5125171, at *7 (S.D. Ala. July 21, 2023); Payne v. St. Charles Health Sys., No. 22-cv-01998, 2023 WL 4711431, at *2-

While a vanishingly small percentage involve long-familiar issues like days off for Sabbath observance or shift changes for religious holidays,[20] those cases are vastly outnumbered by accommodation claims that sound in the culture wars. Today, workers are demanding the right to be excused from vaccination requirements.[21] They are asserting an entitlement to misgender others.[22] And they are claiming that corporate diversity policies and trainings violate their sincerely held religious beliefs.[23] In the wake of *Groff*, courts around the country urgently need guidance on the limits of religious accommodation at work.

This Article articulates and defends a set of deeper principles to guide future adjudication. Through close examination of an existing body of legal judgments, three limiting principles emerge.[24] First, the principle of *nondisparagement* secures respect for a diverse workforce by rejecting religious denigration or subordination.[25] Next, the principle of *reciprocity* resists unilateral impositions on employers and coworkers by asking religious employees to share some of the burdens of accommodating their religious practices.[26] And finally, the principle of *proportionality* ensures that the costs of workplace religious accommodation are bounded and equitably distributed.[27] These principles transcend particular

3 (D. Or. July 6, 2023); Demeyer v. St. Charles Health Sys., Inc., No. 23-cv-00069, 2023 WL 5614946, at *2-3 (D. Or. July 3, 2023); Cagle v. Weill Cornell Med., 680 F. Supp. 3d 428, 435 (S.D.N.Y. 2023); Allen v. Benson, 691 F. Supp. 3d 746, 762-63 (E.D. Tex. 2023); Snyder v. Arconic Corp., No. 22-cv-0027, 2023 WL 6370785, at *3 (S.D. Iowa Aug. 31, 2023).

20. *See, e.g.*, Johnson v. York Acad. Reg'l Charter Sch., No. 23-CV-00017, 2023 WL 6448843, at *1-3 (M.D. Pa. Oct. 3, 2023) (involving a claim for a Sabbath accommodation); Complaint at 3, Hamilton v. Drexel Univ., No. 23-cv-04791 (E.D. Pa. Dec. 5, 2023) (involving a religious-holiday accommodation).

21. *See, e.g.*, *Bordeaux*, 703 F. Supp. 3d at 1122-23. For further discussion of vaccine-related accommodation claims, see *infra* Section III.A.1.

22. *See, e.g.*, Kluge v. Brownsburg Cmty. Sch. Corp., 732 F. Supp. 3d 943, 946-47 (S.D. Ind. 2024). For further discussion of misgendering-related accommodation claims, see *infra* Section III.A.2.

23. *See, e.g.*, *Snyder*, 2023 WL 6370785, at *2-3. For further discussion of diversity, equity, and inclusion (DEI)-related accommodation claims, see *infra* Section III.A.3.

24. *See infra* Part II. This Article employs an interpretive methodology that seeks to put existing legal doctrine in its best light. *See* RONALD DWORKIN, LAW'S EMPIRE 225-75 (1986) (describing the role of "fit" and "justification" in legal interpretation); *see also* TEBBE, *supra* note 9, at 25-36 (defending a "coherentist" methodology). This approach does not proceed directly from ideal principles of political theory but instead looks to a body of considered legal judgments and seeks to extract coherent and attractive principles. Those principles can then be synthesized, refined through testing for internal consistency and correspondence with strong convictions about particular cases, and then developed through application to novel problems going forward.

25. *See infra* Section II.A.

26. *See infra* Section II.B.

27. *See infra* Section II.C.

linguistic formulations of what counts as an "undue hardship," cutting to the core issue of when the costs of accommodation amount to religious imposition. Recognizing the need to consider the interests of third parties when accommodating religious employees, they might be thought of as principles for "disestablishment at work."[28]

Having identified and elaborated workplace disestablishment principles, this Article then illustrates how they can be deployed in some of today's most culturally contentious disputes.[29] When workers demand to be excused from

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28. This Article is part of ongoing research about the role of disestablishment values in the private workplace. For earlier work, see generally James D. Nelson, *Corporate Disestablishment*, 105 VA. L. REV. 595 (2019), which explores limitations on religious imposition by corporations. This Article focuses on the disestablishment value of avoiding impositions on third parties. The leading case discussing that value under the Establishment Clause is *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985). In *Caldor*, the Supreme Court held that a Connecticut statute violated the Establishment Clause because it "impose[d] on employers and employees an absolute duty to conform their business practices to the particular religious practices of the employee by enforcing observance of the Sabbath the employee unilaterally designates." *Id.* at 709. By failing to account for the interests of third parties while giving religious employees' interests "unyielding weighting," the Court explained, the statute contravened a foundational First Amendment norm that "no one [has] the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities." *Id.* at 710 (quoting Otten v. Baltimore & Ohio R.R. Co., 205 F.2d 58, 61 (2d Cir. 1953)). In her concurring opinion, Justice O'Connor distinguished the Connecticut statute from Title VII's religious-accommodation provision, observing that the latter passes constitutional muster because it "calls for reasonable rather than absolute accommodation." *Id.* at 712 (O'Connor, J., concurring). A few years later, the Court struck similar notes in *Texas Monthly, Inc. v. Bullock*, holding that a tax exemption for religious publications impermissibly burdened nonbeneficiaries and therefore violated the Establishment Clause. 489 U.S. 1, 14-17 (1989). More recently, in *Cutter v. Wilkinson*, the Court crystalized the disestablishment value of avoiding impositions on third parties. 544 U.S. 709, 720 (2005). Writing for a unanimous Court and citing *Caldor*, Justice Ginsburg insisted that "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Id.* (citing *Caldor*, 472 U.S. 703). Because the religious-accommodation regime at issue—the prisoner provision of the Religious Land Use and Institutionalized Persons Act—was suitably solicitous of third-party interests, it survived a facial Establishment Clause challenge. Nevertheless, the Court left open the possibility of successful as-applied challenges should religious accommodation requests "impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution." *Id.* at 726. Leading scholarly treatments of the Establishment Clause's limitation on third-party impositions include TEBBE, *supra* note 9, at 49-70; Micah Schwartzman, Nelson Tebbe & Richard Schragger, *The Costs of Conscience*, 106 KY. L.J. 781, 782 (2017); and Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 356-71 (2014). As explored throughout this Article, a considerable body of Title VII case law reflects this constitutional concern for avoiding religious impositions on third parties.

29. The principles embedded in workplace religion cases are not hermetically sealed—indeed, in many instances, they will overlap and reinforce each other. Moreover, because of this Article's

vaccination requirements, courts can rely on principles of reciprocity and proportionality to safeguard coworkers' health and stave off business disruption. When workers insist on misgendering colleagues, principles of nondisparagement and proportionality can be invoked to ensure workplace dignity and equality. And when workers lodge religious objections to corporate diversity efforts, courts can draw on all three principles to balance workers' expressive interests with the imperatives of an integrated workplace. Toggling back and forth between these principles and concrete applications, courts can resolve novel religious accommodation cases in coherent and attractive ways.[30]

Finally, this Article considers how disestablishment principles may fare against emerging judicial skepticism and develops a set of alternative strategies to counter it. It argues that although some courts may resist any limits on religious accommodation, those that look carefully and deeply into the decades of jurisprudence in this area will find support for more balanced judgments. The Article then suggests that proponents of workplace disestablishment might call on various nonjudicial actors—from unions to businesses to legislatures—to build toward a freer and fairer workplace for religious and nonreligious employees alike.

This Article proceeds in three Parts. Part I sets the stage by briefly tracing the profound, yet often overlooked, influence of disestablishment values on the interpretation of Title VII. While *Groff* threatens to throw this body of law into disarray, Part II excavates and articulates a set of principles to guide future adjudication. Part III puts these principles into action by applying them to some of today's most polarizing disputes. Having done so, it then explores the prospects of maintaining workplace disestablishment in the courts and beyond.

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interpretive methodology, the principles may not represent all disestablishment values that one may see as normatively attractive. For example, a principle of nonpreferentialism that resists favored treatment for religion has considerable appeal, *see* EISGRUBER & SAGER, *supra* note 4, at 51-77, but it does not adequately "fit" with the body of legal judgments under Title VII. In other words, although there may be cause for regret that Title VII "gives [religious practices] favored treatment," EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 775 (2015), that legal judgment is too prominent to ignore when interpreting the permissible scope of workplace religious accommodations. And so, the question at the heart of this Article is not whether Title VII allows for religious preference—it does—but instead how far that preference may go when it imposes burdens on third parties.

30. On the method of reflective equilibrium, see JOHN RAWLS, A THEORY OF JUSTICE 48-51 (1971); and Norman Daniels, *Wide Reflective Equilibrium and Theory Acceptance in Ethics*, 76 J. PHIL. 256, 257-64 (1979). For a recent discussion of reflective equilibrium in constitutional argumentation, see generally Richard H. Fallon, Jr., *Arguing in Good Faith About the Constitution: Ideology, Methodology, and Reflective Equilibrium*, 84 U. CHI. L. REV. 123 (2017).

I. TITLE VII AND RELIGIOUS DISESTABLISHMENT

This Part recounts the Establishment Clause's deep and lasting influence on the development of Title VII doctrine. In the early years, following the passage of the Civil Rights Act of 1964, there were serious questions about the constitutionality of a religious-accommodation regime in the private workplace. Although the Supreme Court navigated around those constitutional issues, it did so in a way that imbued the statutory regime with disestablishment values, especially the value of avoiding impositions on others. Thereafter, the Establishment Clause itself was buried as a source of doctrine in the area, giving way to a statutory and administrative balancing of free-exercise interests with concerns for third parties. That balancing of interests produced a settlement that persisted for nearly fifty years. During that time, courts and regulators mostly refrained from invoking the Establishment Clause by name. Yet its resonance remained strong as lawmakers developed a large body of Title VII doctrine that moderated workplace religious accommodations.

A. The Establishment Clause in the Spotlight

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of religion.[31] This prohibition was part of a broader mandate aimed at eradicating invidious discrimination against individuals because of certain protected characteristics.[32] Cognizant of its extraordinary intervention into private markets, Congress hoped to achieve its egalitarian goals while preserving managerial and union prerogatives over business affairs.[33]

Consistent with that strategy, the statute did not originally contain a specific provision mandating religious accommodation. Two years later, pursuant to authority delegated to it under Title VII, the Equal Employment Opportunity Commission (EEOC) issued guidance indicating its view that employers are legally obligated to accommodate religious employees "where such

31. 42 U.S.C. § 2000e-2(a)(1) (2018) ("It shall be an unlawful employment practice for an employer . . . 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 . . . .").

32. *Id.*; *see also* 110 CONG. REC. 13079-80 (1964) (statement of Sen. Clark) ("[Title VII] would not deprive anyone of any rights. All it does is to say that no American, individual, labor union, or corporation, has the right to deny any other American the very basic civil right of equal job opportunity. The bill does not make anyone higher than anyone else.").

33. *See, e.g.*, 110 CONG. REC. 13080 (1964) (statement of Sen. Clark) ("[Title VII] leaves an employer free to select whomever he wishes to employ. It enables a labor union to admit anyone it wishes to take in . . . . It merely says, 'When you deal in interstate commerce, you must not discriminate on the basis of race, religion, color, national origin, or sex.'").

accommodation can be made without serious inconvenience to the conduct of the business."[34] The following year, in 1967, EEOC replaced that guidance with new language, stating its view that the duty not to engage in religious discrimination "includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business."[35]

EEOC's 1967 interpretation of Title VII was soon challenged as a violation of the Establishment Clause. The leading case was *Dewey v. Reynolds Metals Co.*, in which an employee was fired because he refused to work on Sundays as required by the seniority provision of a collective-bargaining agreement.[36] The district court found that, under EEOC's 1967 interpretation, the employer was liable for unlawful discrimination, despite the absence of any discriminatory purpose in its work rules.[37] But the Sixth Circuit reversed, stating that "[t]o construe [Title VII] as authorizing the adoption of [r]egulations which would coerce or compel an employer to accede to or accommodate the religious beliefs of all of his employees would raise grave constitutional questions of violation of the Establishment Clause of the First Amendment."[38]

In 1971, the Sixth Circuit was affirmed by an equally divided Supreme Court.[39] But the next year, Congress passed an amendment to Title VII, which adopted EEOC's 1967 interpretation.[40] More specifically, Congress defined

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34. Observance of Sabbath and Religious Holidays, 31 Fed. Reg. 8370, 8370 (June 15, 1966). Despite this language, the guidance also explicitly disclaimed any employer obligation to accommodate religious practices that conflicted with "a normal workweek . . . applicable to all employees." *Id.*

35. Observation of the Sabbath and Other Religious Holidays, 32 Fed. Reg. 10298, 10298 (July 13, 1967).

36. 429 F.2d 324, 327-29 (6th Cir. 1970).

37. Dewey v. Reynolds Metals Co., 300 F. Supp. 709, 714-15 (W.D. Mich. 1969).

38. *Dewey*, 429 F.2d at 334 (denying rehearing); *see also id.* at 330 (majority opinion) ("To accede to Dewey's demands would require Reynolds to discriminate against its other employees by requiring them to work on Sundays in the place of Dewey, thereby relieving Dewey of his contractual obligation."). In support of its analysis, the court cited numerous Establishment Clause cases. *Id.* at 335 (denying rehearing) (citing Everson v. Bd. of Educ., 330 U.S. 1 (1947); Torcaso v. Watkins, 367 U.S. 488 (1961); Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963)).

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

40. The 1972 amendments were at least partially responsive to the *Dewey* decision. *See* 118 CONG. REC. 705-06 (1972) (statement of Sen. Randolph) ("This amendment is intended, in good purpose, to resolve by legislation . . . that which the courts apparently have not resolved."); *see also* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 73 (1977) ("In part 'to resolve by legislation' some of the issues raised in *Dewey*, . . . Congress included the . . . definition of

"religion" to include "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."[41]

Although this amendment placed workplace religious accommodation on firmer statutory ground, its constitutional footing remained shaky. In *Cummins v. Parker Seal Co.*, the Sixth Circuit revisited the question whether mandating employee religious accommodations is consistent with the Establishment Clause.[42] This time, over a blistering dissent highlighting the potential for religious favoritism and unfair burdens on coworkers,[43] Title VII's accommodation provision survived constitutional scrutiny.[44] And just as in *Dewey*, the decision was affirmed by an equally divided Court.[45]

Given this constitutional contestation, it was no surprise that Establishment Clause arguments permeated the litigation leading up to the landmark decision in *Trans World Airlines, Inc. v. Hardison*.[46] In *Hardison*, a former Trans World Airlines (TWA) employee sued the company and his union for failing to accommodate his religious refusal to work on Saturdays.[47] Before the district court, TWA argued that Title VII's duty to accommodate violates the Establishment Clause because it "clearly places the sanction of law behind religion by facilitating and encouraging employees to take time off from their jobs for religious observances so that employees with religious beliefs are aided as against nonbelievers."[48] On appeal, TWA reiterated its constitutional arguments, insisting that Title VII's reasonable-accommodation provision places the interests of religious employees over those of nonreligious employees and therefore violates the Establishment Clause.[49]

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religion in its 1972 amendments to Title VII." (quoting 118 CONG. REC. 706 (1972) (statement of Sen. Randolph))).

41. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(7), 86 Stat. 103, 103 (codified at 42 U.S.C. § 2000e(j)).

42. 516 F.2d 544, 546 (6th Cir. 1975).

43. *Id.* at 558 (Celebrezze, J., dissenting) ("Others are forced to submit to uniform work rules and to bear the burdens imposed by their employers' accommodation to religious practitioners.").

44. *Id.* at 554 (majority opinion).

45. Parker Seal Co. v. Cummins, 429 U.S. 65, 65 (1976) (mem.) (per curiam).

46. 432 U.S. 63 (1977).

47. *Id.* at 66-69.

48. Hardison v. Trans World Airlines, 375 F. Supp. 877, 887-88 (W.D. Mo. 1974) (quoting Brief for Defendant at 24-25, *Hardison*, 375 F. Supp. 877 (No. 75-1126)).

49. Hardison v. Trans World Airlines, Inc., 527 F.2d 33, 43 (8th Cir. 1975).

Despite rejection in the lower courts,[50] both TWA and Hardison's union decided to foreground Establishment Clause challenges in their petitions for certiorari.[51] TWA, for example, insisted that the case raised important constitutional questions, in part because Title VII's religious-accommodation provision "require[s] nonbelieving employees to bear the burden, inconvenience and expense of the deviate religious practices of others."[52] Hardison's union, the International Association of Machinists and Aerospace Workers, argued along similar lines, framing the constitutional question as whether Title VII requires employers and unions to "prejudice the beneficiaries of non-discriminatory seniority and other rights . . . by according privileges to Sabbatarians which deny those rights to others."[53]

Apparently confident in the significance of the constitutional questions, the Supreme Court granted both petitions for certiorari.[54] A large proportion of the briefing that followed—by the petitioners and by numerous amici—focused on Establishment Clause arguments. TWA complained, for example, that Title VII's accommodation requirement violates the First Amendment because it "require[s] a private person to accede to and accommodate another person's religious beliefs" without regard for the fact that "the rights of third parties may be adversely affected."[55] The union's constitutional arguments were even more forceful, contending that a religious accommodation for Hardison would require "conscription of others to the religious observer's convenience" in violation of the "rights and interests of . . . other employees."[56] The common theme of these arguments, though, was that it would be unconstitutional—and fundamentally unfair—to strip coworkers of their rights so that Hardison could practice his religion.

In their briefs to the Court, various amici fiercely contested the Establishment Clause issues. The Equal Employment Advisory Council contended that Title VII's religious-accommodation provision "transgresses into the forbidden

50. *Hardison*, 375 F. Supp. at 888; *Hardison*, 527 F.2d at 43-44.

51. Petition for a Writ of Certiorari at 17-22, *Hardison*, 432 U.S. 63 (No. 75-1126) [hereinafter TWA Cert Petition]; Petition for a Writ of Certiorari at 10-15, *Hardison*, 432 U.S. 63 (No. 75-1385) [hereinafter IAM Cert Petition].

52. TWA Cert Petition, *supra* note 51, at 20.

53. IAM Cert Petition, *supra* note 51, at 3.

54. Trans World Airlines, Inc. v. Hardison, 429 U.S. 958, 958 (1976) (mem.) (granting certiorari).

55. Brief for Petitioner Trans World Airlines, Inc. at 26, *Hardison*, 432 U.S. 63 (Nos. 75-1126, 75-1385).

56. Brief for International Association of Machinists and Aerospace Workers, et al., Petitioners at 66, *Hardison*, 432 U.S. 63 (Nos. 75-1126, 75-1385). For some indication of why unions may be especially attuned to the importance of balancing worker free exercise with the interests of others, see *infra* Section III.C.1.

zone delineated by the Establishment Clause" by telling TWA that it must "rearrange its business affairs, as well as impose upon its other employees."[57] The Chrysler Corporation struck similar notes, arguing that the accommodation provision unconstitutionally "requires that non-believing employees bear the consequential burden imposed by the religious preferences of other employees."[58] On the opposite side, several amici filed briefs vigorously defending Title VII against Establishment Clause attack.[59] Perhaps most notable among them, Leo Pfeffer—a towering figure in the field of law and religion—filed two separate briefs, arguing that the mandate to accommodate religious beliefs in the workplace furthered free-exercise values and survived constitutional review under the Establishment Clause.[60]

B. Disestablishment's Echo

Despite its prominent role in the litigation leading up to *Hardison*, the Court elected to push the Establishment Clause aside and decide the case, at least ostensibly, on statutory-interpretation grounds.[61] While the Eighth Circuit had indicated that Hardison could be accommodated through a shift swap without causing "undue hardship,"[62] the Court disagreed. It began by observing that the nature of TWA's business required around-the-clock coverage by its workforce, which included Saturday shifts.[63] It also noted that the company invited voluntary shift swaps, but that a collective-bargaining agreement governed the system for shift assignments.[64] And since Hardison did not have sufficient seniority to avoid working all Saturday shifts, a religious accommodation would entail violation of his coworkers' contractual rights.[65]

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57. Brief Amicus Curiae of the Equal Employment Advisory Council at 19, *Hardison*, 432 U.S. 63 (Nos. 75-1126, 75-1385).

58. Brief of Chrysler Corporation as Amicus Curiae at 15, *Hardison*, 432 U.S. 63 (Nos. 75-1126, 75-1385).

59. *See, e.g.*, Brief for Amicus Curiae, Worldwide Church of God at 6-14, *Hardison*, 432 U.S. 63 (Nos. 75-1126, 75-1385); Brief of Amicus Curiae State of Michigan at 20-25, *Hardison*, 432 U.S. 63 (Nos. 75-1126, 75-1385).

60. Brief for the American Civil Liberties Union, Amicus Curiae at 8-22, *Hardison*, 432 U.S. 63 (Nos. 75-1126, 75-1385); Brief of Central Conference of American Rabbis et al., Amici Curiae at 8-29, *Hardison*, 432 U.S. 63 (Nos. 75-1126, 75-1385).

61. *Hardison*, 432 U.S. at 70 ("Because we agree with petitioners that their conduct was not a violation of Title VII, we need not reach the other questions presented." (footnote omitted)).

62. Hardison v. Trans World Airlines, Inc., 527 F.2d 33, 39-42 (8th Cir. 1975).

63. *Hardison*, 432 U.S. at 80.

64. *Id.*

65. *Id.* at 80-81.

Although the Court disclaimed reliance on constitutional considerations, its concern about harm to the interests of coworkers evoked ideas of religious disestablishment. To accommodate Hardison, the Court observed, "TWA would have had to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath."[66] Such a deprivation to "accommodate the religious needs of others" was said to be "anomalous," and the Court refused to read Title VII in a way that would require that result.[67]

In a fierce dissent, Justice Marshall accused the *Hardison* majority of gutting Title VII's promise of religious accommodation at work.[68] But even in dissent, Marshall was acutely aware of lurking Establishment Clause concerns. Indeed, he was more forthright than the majority in recognizing the constitutional valence of the Court's opinion, noting that it had the "singular advantage of making consideration of petitioners' constitutional challenge unnecessary."[69] For Marshall, the key issue was about the third-party costs of religious accommodations. Along with Justice Brennan, who joined his dissent, Marshall saw that "important constitutional questions would be posed by interpreting the law to compel employers (or fellow employees) to incur substantial costs to aid the religious observer."[70] He just disagreed that accommodating Hardison would involve such costs.[71]

In a brief yet enduring passage near the end of its opinion, the *Hardison* majority considered whether TWA should have accommodated Hardison by permitting him to work fewer shifts or by paying premium wages to other employees who could cover the gaps.[72] Rejecting these proposed accommodations, it stated that "[t]o require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship."[73] For decades after *Hardison*, the "de minimis" formulation was understood to instantiate Establishment

66. *Id.* at 81.

67. *Id.* at 79-81, 79 n.12.

68. *Id.* at 86-87 (Marshall, J., dissenting) ("[I]f an accommodation can be rejected simply because it involves preferential treatment, then the regulation and the statute, while brimming with 'sound and fury,' ultimately 'signif[y] nothing.'" (second alteration in original)).

69. *Id.* at 89.

70. *Id.* at 90.

71. *Id.* at 90 n.3 ("Because of the view I take of the facts . . . I find it unnecessary to decide how much cost an employer must bear before he incurs 'undue hardship.' I also leave for another day the merits of any constitutional objections that could be raised if the law were construed to require employers (or employees) to assume significant costs in accommodating.").

72. *Id.* at 84-85 (majority opinion).

73. *Id.* at 84 (emphasis omitted).

Clause concerns.[74] Courts and commentators viewed this linguistic choice not as the most natural meaning of "undue hardship," but instead as a way for the Court to render Title VII consistent with constitutional limits.[75] The consensus view was that deployment of the "de minimis" standard was a way to avoid the constitutional difficulties associated with religious accommodations that shifted any serious burdens onto employers or coworkers.

During that time, courts and regulators worked out a settlement that balanced worker free-exercise and disestablishment concerns about burdens on third parties. Although the phrase "de minimis" sounds stingy toward religious employees, in practice their claims for accommodation garnered considerable solicitude.[76] In front of federal courts and EEOC, those employees routinely received accommodations that imposed reasonable costs on their employers and coworkers.[77] And in the shadow of this legal regime, employers often proactively

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74. *See* Nelson Tebbe, Micah Schwartzman & Richard Schragger, *How Much May Religious Accommodations Burden Others?*, *in* LAW, RELIGION, AND HEALTH IN THE UNITED STATES 215, 222-23 (Elizabeth Sepper, Holly Fernandez Lynch & I. Glenn Cohen eds., 2017) ("After *Hardison*, lower courts have appreciated that the Justices' interpretation of the undue hardship standard avoids potential difficulties under the Establishment Clause."); Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 704 (1992) ("[T]he [*Hardison*] Court construed the religious accommodation provision of Title VII as requiring no more than 'de minimis' accommodation—probably out of concern that a more burdensome accommodation requirement would violate the Establishment Clause.").

75. *See, e.g.*, David R. Dow, *Toward a Theory of the Establishment Clause*, 56 UMKC L. REV. 491, 496 n.16 (1988) ("In [*Hardison*] . . . the Supreme Court suggested, although it did not explicitly hold, that when the costs imposed are *de minimis*, there is no violation of the establishment clause."); Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 593 (1991) ("In *TWA v. Hardison*, the Supreme Court reduced the dissonance in the statute by glossing the 'reasonable accommodation' provision to limit an employer's duty to that of providing 'de minimis' accommodations." (footnote omitted)); *see also* Tebbe et al., *supra* note 74, at 225-26 (discussing cases viewing *Hardison*'s "de minimis" language as influenced by Establishment Clause considerations).

76. *See* Tebbe et al., *supra* note 74, at 223 ("Even though the Supreme Court's de minimis interpretation of the undue hardship standard sounds uncompromising, it has, in fact, been applied in ways that are more balanced.").

77. *Id.*; *see also* Brief for the Respondent at 3, Groff v. DeJoy, 600 U.S. 447 (2023) (No. 22-174) ("[T]he Equal Employment Opportunity Commission (EEOC) and many lower courts have long understood [*Hardison*'s holding] to be consistent with greater protection for religious adherents than the *'de minimis'* language read in isolation might suggest."); Brief for the Respondent, *supra*, at 13 ("Many lower courts have likewise interpreted *Hardison* to afford meaningful protection for religious observance without imposing substantial burdens on employers and co-workers."); Caroline Fredrickson, Christopher E. Anders & Terri Schroeder, *ACLU Letter Urging Members of Congress to Oppose the Workplace Religious Freedom Act*, ACLU (Mar. 20, 2007), https://www.aclu.org/documents/aclu-letter-urging-members-congress-oppose-workplace-religious-freedom-act [https://perma.cc/PZ87-HSTK] ("During the quarter-

provided religious accommodations where the imposition on third parties would not be excessive.

The "de minimis" settlement achieved a healthy balance of free-exercise and disestablishment concerns in a variety of factual circumstances. In conflicts over scheduling, for example, employers were routinely required to adjust shift timing so that employees could exercise religion.[78] Similarly, when there was conflict between religion and work rules on dress or grooming, employers were often asked to make an exception, unless doing so would implicate employee safety.[79] And while employers could protect coworkers from religious harassment, they could not insist on a workplace entirely devoid of religious speech or symbols.[80] Within each of these categories, workers received substantial protection for free exercise, but their accommodation claims were bounded by the interest in avoiding serious burdens on others.

Despite decades of evidence that *Hardison*'s "de minimis" standard achieved balanced and sensible results, it recently came under attack by several members of the Supreme Court. In *Patterson v. Walgreen Co.*, Justice Alito criticized the "de minimis" standard on textual grounds, calling on the Court to "grant review in

century after Hardison, employees have won about one-third of their litigated claims for scheduling changes for observance of religious holidays, nearly one-half of claims for having a beard or hairstyle for religious reasons, and roughly one-fourth of claims for wearing religious apparel. In addition, employees have won claims for an array of other requested religious accommodations."); Protos v. Volkswagen of Am., Inc., 797 F.2d 129, 135 (3d Cir. 1986) (holding that Volkswagen should have accommodated an employee's request to observe the Sabbath); Brown v. Gen. Motors Corp., 601 F.2d 956, 959 (8th Cir. 1979) (finding that Title VII compelled General Motors to accommodate an employee's request to observe the Sabbath).

78. *See* Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.2(d) (2024) (outlining guidelines for accommodating schedule-change requests); *see also* Transcript of Oral Argument at 78, *Groff*, 600 U.S. 447 (No. 22-174) (statement of Elizabeth Prelogar, Solicitor General) ("[C]ourts regularly are requiring employers to provide flexible work schedules if the work can be shifted to a different time of day."). By contrast, the EEOC guidance — which reflects decades of case law — explains that employers are not obligated to provide schedule-change accommodations if it would require them regularly to pay premium wages to substitute workers. *See* Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.2(e) (2024); *see also* Brief for the Respondent, *supra* note 77, at 36 ("Title VII was not intended to require employers to operate shorthanded or to regularly pay extra to secure replacement workers.").

79. Transcript of Oral Argument, *supra* note 78, at 79 (statement of Elizabeth Prelogar, Solicitor General) ("[C]ourts are regularly granting accommodations and rejecting undue hardship defenses [in dress and grooming cases]. The narrow category of cases where that's not happening is when there's a . . . legitimate safety concern . . . .").

80. *Id.* (statement of Elizabeth Prelogar, Solicitor General) ("[C]ourts are regularly granting accommodations [for employee expression], and it's only in the circumstances, for example, where the religious speech would amount to harassment of coworkers or customers that the undue hardship defense is credited.").

an appropriate case to consider whether *Hardison*'s interpretation should be overruled."[81] The year after, Justice Gorsuch followed suit in *Small v. Memphis Light, Gas & Water*, accusing the *Hardison* Court of "und[oing] . . . Title VII's undue hardship test."[82] Joined by Alito and citing his opinion in *Patterson*, Gorsuch went on to suggest that the Court should interpret Title VII's undue-hardship test in accordance with the Americans with Disabilities Act,[83] despite the fact that Congress explicitly distinguished its standard from the one used in Title VII.[84] They worried aloud that if the Court did not revisit *Hardison*, religious employees would continue to receive insufficient protection.[85]

When the Court granted certiorari in *Groff v. DeJoy*, it seemed as though Justices Alito and Gorsuch would get their wish.[86] In *Groff*, a postal employee demanded a religious accommodation so that he would not have to work on Sundays.[87] The United States Postal Service (USPS) determined that making this accommodation required major sacrifices by other employees and so denied the accommodation.[88] Arguing that it constituted an undue hardship on their business, USPS prevailed in the district court[89] and in the Third Circuit.[90] In January 2023, the Court agreed to hear the case and decide whether to overturn *Hardison*.[91]

It was unsurprising that Establishment Clause arguments played little role in the *Groff* litigation, given that they had been buried for decades underneath questions of statutory interpretation. But they did not go entirely unmentioned. During oral argument, Justice Alito observed that "[i]t's really hard to understand the decision in *Hardison* except as an exercise in constitutional avoidance" and that the "de minimis" test was a result of the Court's worries about transgressing the Establishment Clause.[92] He then suggested that because the Court

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81. 140 S. Ct. 685, 686 (2020) (Alito, J., concurring in denial of certiorari).

82. 141 S. Ct. 1227, 1228 (2021) (Gorsuch, J., dissenting from denial of certiorari).

83. *Id.*

84. H.R. Rep. No. 101-485, pt. 2, at 68 (1990); *see also* Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 Duke L.J. 1, 6-8 (1996) (contrasting reasonable accommodation under the Americans with Disabilities Act and Title VII).

85. *Memphis Light*, 141 S. Ct. at 1229 (Gorsuch, J., dissenting from denial of certiorari).

86. Groff v. DeJoy, 143 S. Ct. 646, 646 (2023) (mem.).

87. Groff v. DeJoy, 600 U.S. 447, 454-56 (2023).

88. Brief for the Respondent, *supra* note 77, at 49-50 (detailing the coworker sacrifices required to accommodate Groff).

89. Groff v. DeJoy, No. 19-1879, 2021 WL 1264030, at *11-13 (E.D. Pa. Apr. 6, 2021).

90. Groff v. DeJoy, 35 F.4th 162, 173-76 (3d Cir. 2022).

91. *Groff*, 143 S. Ct. at 646.

92. Transcript of Oral Argument, *supra* note 78, at 20.

had altered the prevailing understanding of the Establishment Clause in the time since *Hardison*, its interpretation of Title VII was no longer viable.[93]

In his opinion for the Court, Justice Alito got at least part of what he was after. *Groff* makes clear that "de minimis" is no longer the standard for Title VII religious-accommodation claims. Instead, to demonstrate that an accommodation would impose an undue hardship, an employer must point to "substantial increased costs" for the business.[94] But to achieve this result, Alito had to clip his wings. The *Groff* Court did not overturn *Hardison*.[95] Nor did it indicate that concern over burdens on employers and coworkers should be disregarded. Indeed, the Court noted that it had "no reservations in saying that a good deal of the EEOC's guidance in this area is sensible and will, in all likelihood, be unaffected by our clarifying decision."[96]

Although *Groff* purported to clarify the law in this area, it left lower courts in pressing need of guidance. The "de minimis" test, once thought to stand in for Establishment Clause values, is no more. But the imperative to balance employee free exercise with the interests of third parties remains.[97]

Where are courts to look for guidance? The next Part argues that they can find a deeper set of principles embedded in decades of contextual judgments about when burdens on third parties go too far. Although the Supreme Court has repudiated *Hardison*'s particular linguistic translation of Title VII's "undue hardship" standard, it left intact a rich body of judicial reasoning about how and where to locate the limits of religious accommodation at work.[98] Close and

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93. *Id.* The Solicitor General's brief also included a paragraph pointing out that the Establishment Clause requires lawmakers to take adequate account of third parties. Brief for the Respondent, *supra* note 77, at 24. Justice Kagan resisted discussion of the Establishment Clause, *see* Transcript of Oral Argument, *supra* note 78, at 22-23, likely in a strategic attempt to narrow the scope of the Court's ultimate decision.

94. Groff v. DeJoy, 600 U.S. 447, 469-71 (2023).

95. *See id.* at 468 ("We therefore, like the parties, understand *Hardison* to mean that 'undue hardship' is shown when a burden is substantial in the overall context of an employer's business. This fact-specific inquiry comports with both *Hardison* and the meaning of 'undue hardship' in ordinary speech." (citing Transcript of Oral Argument, *supra* note 78, at 61-62 (statement of Elizabeth Prelogar, Solicitor General))).

96. *Id.* at 471.

97. The Court rejected the idea that the Establishment Clause requires strict neutrality between religion and nonreligion. *See id.* at 461 n.9. Nevertheless, it acknowledged the ongoing need for limits on the extent to which workplace religious accommodations could burden employers and coworkers. *Id.* at 468-73.

98. In the coming years, there is likely to be significant contestation over how much pre-*Groff* case law survives the Court's decision. It is clear that certain cases — for example, ones that allowed employers to justify denying religious accommodations by invoking customer animus against religion — are no longer legally viable. *See, e.g.*, *id.* at 472-73 (abrogating EEOC v. Sambo's of

careful attention to this body of considered judgments, rendered in the midst of real-life employment disputes, reveals a set of guiding principles that vindicate the disestablishment value of avoiding religious impositions.

II. DISESTABLISHMENT PRINCIPLES AT WORK

This Part identifies and articulates three principles that limit religious accommodations at work: nondisparagement, reciprocity, and proportionality. These principles lay scattered across decades of employment-discrimination case law under Title VII that grapples with the fallout from religious-accommodation claims. The remainder of this Part draws out these limiting principles and develops them as guiding norms for the modern workplace.

A. Nondisparagement

The first principle embedded in workplace religion cases is nondisparagement. The principle of nondisparagement arises from the recognition that participants in the modern workplace are deeply divided on religious, philosophical, and moral questions. To sustain cooperation across these deep divisions, it insists on worker dignity and rejects religious disrespect or denigration.

1. The Principle of Nondisparagement

In reviewing employee claims for religious accommodations, courts have repeatedly held that such claims may not come at the price of demeaning coworkers. The leading case is *Peterson v. Hewlett-Packard Co.*[99] In *Peterson*, a longtime Hewlett-Packard employee objected to the company's display of "diversity posters" in the office.[100] Although the posters celebrated various aspects of the company's diverse workforce, the employee took exception to its promotion of

Ga., Inc., 530 F. Supp. 86, 89-91 (N.D. Ga. 1981)). But outside these few exceptions, there is good reason to believe that the bulk of case law adjudicated under the *Hardison* standard remains a live source of legal principles. As explained in more detail in Section III.B, *infra*, *Groff* did not overrule *Hardison*, opting instead to "clarify" the case and "explain [its] contours." *Groff*, 600 U.S. at 454, 456. And although the Court repudiated a literal reading of the "de minimis" formulation, *see id.* at 464, 467, it largely endorsed EEOC's interpretive guidance, which reflects five decades of real-world adjudications that resulted in a sustained pattern of significant religious accommodations, *see id.* at 471. Moreover, as discussed in more detail in Sections III.A-B, *infra*, early evidence suggests that the lower courts share this reading of *Groff*, continuing to rely on cases decided under the *Hardison* standard.

99. 358 F.3d 599 (9th Cir. 2004).

100. *Id.* at 601.

"homosexual activities."[101] Describing himself as a "devout Christian," the employee insisted that he had a religious obligation "to expose evil when confronted with sin."[102] To do so, he posted a series of biblical passages in the office denouncing his gay coworkers. One passage communicated the message that his gay coworkers were sinful, while another indicated that they "have committed an abomination" and "shall surely be put to death."[103]

When these passages were removed by a supervisor, who explained that they violated the company's antiharassment policy, the employee claimed that he was entitled to religious accommodation under Title VII.[104] In support of that claim, he argued that he had a religious obligation to post these passages in the hopes that "his gay and lesbian coworkers would read [them], repent, and be saved."[105] Although the religious employee acknowledged that the scriptural passages were hurtful, he explained that they were intended to be so because "you cannot have correction unless people are faced with truth."[106] And he insisted that he be allowed to continue displaying them as long as the company persisted with its diversity campaign.[107]

In *Peterson*, the Ninth Circuit emphatically rejected the employee's religious-accommodation claim. Although Title VII requires religious accommodations under some circumstances, the court explained, it does not require employers to abide religious messages that "demean or degrade" coworkers.[108] To do so would not only inhibit the company's legitimate efforts to attract and retain a diverse workforce, but it would also facilitate one employee's desire to "impose his religious beliefs upon his co-workers."[109]

In coming to this conclusion, the *Peterson* court also rejected the notion that the company's diversity program "'target[ed]' heterosexual and fundamentalist Christian employees."[110] The religious employee had argued that Hewlett-Packard was on "a crusade to convert fundamentalist Christians to its values," including the value of living "the homosexual lifestyle."[111] But the court found that by promoting tolerance and diversity in the workplace, the company's

101. *Id.*

102. *Id.*

103. *Id.* at 601-02 (describing Peterson's postings, which quoted *Isaiah* 3:9 and *Leviticus* 20:13).

104. *Id.* at 602.

105. *Id.*

106. *Id.*

107. *Id.* at 606-07.

108. *Id.* at 607-08.

109. *Id.* at 607.

110. *Id.* at 602.

111. *Id.* at 603.

programming did no such thing. The company's diversity program and subsequent disciplinary proceedings did not constitute "an inquisition," as the religious employee would have it, but rather an effort to get coworkers to treat one another "with respect."[112]

The Ninth Circuit's reasoning in *Peterson* helps set out some initial markers between permissible religious accommodations and impermissible religious impositions. The court was careful to explain that not all religious messages in the workplace are demeaning or denigrating. Indeed, the company allowed other employees to display religious messages in their cubicles.[113] The difference, according to the court, was that those messages were not "intended to be 'hurtful' to, or critical of, any other employees."[114] Peterson's religious messages, on the other hand, were "demeaning and degrading."[115] The court was also careful to say that coworker grumbling or hypersensitivity would not be enough to defeat a religious-accommodation claim, noting that "[c]omplete harmony in the workplace is not an objective of Title VII."[116] But while the company had to tolerate "some degree of employee discomfort," coworker actions "that demean or degrade, or are designed to demean or degrade, members of its workforce" were beyond the pale.[117]

Likewise, in *Chalmers v. Tulon Co. of Richmond*, the Fourth Circuit elaborated on how religious disparagement exceeds the bounds of reasonable accommodation.[118] In *Chalmers*, an evangelical Christian employee sent letters to her coworkers that contained messages of religious condemnation and proselytization.[119] One letter, which she sent to a coworker's home address, stated that the coworker was "doing something[] . . . that God is not please[d] with and He wants you to stop."[120] The letter continued to insist that the coworker needed "to get right with God" and that he should "go to God and ask for forgiveness before it's too late."[121] This letter was initially received by the coworker's spouse, who interpreted it as alleging marital infidelity and confronted him about it.[122] The

112. *Id.* at 604.

113. *Id.* at 605.

114. *Id.*

115. *Id.*

116. *Id.* at 607.

117. *Id.* at 607-08.

118. 101 F.3d 1012, 1019-21 (4th Cir. 1996).

119. *Id.* at 1014-17.

120. *Id.* at 1015.

121. *Id.*

122. *Id.* at 1015-16.

coworker subsequently reported that the letter "caused him personal anguish and placed a serious strain on his marriage."[123]

In a second letter, the religious employee in *Chalmers* denounced a different coworker for engaging in sexual intercourse out of wedlock. She wrote that God "doesn't like when people commit adultery" and admonished that "[y]ou know what you did is wrong, so now you need to go to God and ask for forgiveness."[124] The letter also blamed her coworker's mysterious illness on sexual promiscuity, stating that "God can put a sickness on you that no doctor could ever find out what it is."[125] When she received this letter, the coworker said that she was "crushed" by its cruel implications and that she wept over them.[126]

After receiving a notice of termination, the religious employee claimed that she was entitled to a religious accommodation under Title VII.[127] The court recognized that the context of religious belief calls for especially cautious analysis, and that it should be hesitant to find that religious messages are "disturbing" to others.[128] Nevertheless, the court drew a line between coworker oversensitivity, on the one hand, and objectively demeaning or disparaging messages, on the other.[129] On this account, as in *Peterson*, Title VII does not require that the workplace be entirely harmonious or free of conflict. But it does insist that "sending personal, distressing letters to coworkers' homes, criticizing them for assertedly ungodly, shameful conduct" exceeds the reach of reasonable accommodation.[130] If such an accommodation were required, the court continued, it would "impose personally and directly on fellow employees," who might then justifiably claim that such messages "violated *their* religious freedoms."[131] Although the line between permissible and impermissible religious messaging may be difficult to draw at times, the court concluded that the law does not require employers to condone such religious impositions on coworkers.[132]

The Seventh Circuit touched on similar themes of nondisparagement in *Ervington v. LTD Commodities, LLC*.[133] The religious employee in *Ervington* objected

123. *Id.* at 1016.

124. *Id.* (quoting a letter from employee Charita Chalmers to coworker Brenda Combs, who Chalmers directly supervised).

125. *Id.*

126. *Id.*

127. *Id.* at 1017-19.

128. *Id.* at 1020.

129. *Id.* at 1021.

130. *Id.* at 1020-21.

131. *Id.* at 1021.

132. *Id.*

133. 555 F. App'x 615, 618 (7th Cir. 2014).

to her company's celebration of Halloween, saying that the holiday "mocked God and praised witches."[134] In protest, the employee handed out candy and "gospel tracts" that "negatively depicted Muslims and Catholics, and stated that they would go to hell."[135] When one coworker attempted to return the tracts, the employee refused to take them back, insisting that "her religion was right."[136] Citing Title VII, the employee claimed that she was entitled to distribute such religious literature in the office because "proselytizing is a part of her religious practice."[137] But the court rejected her claim that she was entitled to a religious accommodation, citing *Peterson* and *Chalmers* for the proposition that employers are not required to accommodate employees who seek to send religiously offensive messages to their coworkers.[138]

Matthews v. Wal-Mart Stores, Inc. provides further support for the nondisparagement principle.[139] In *Matthews*, an employee was reported for telling her coworkers that "God does not accept gays, they should not 'be on earth,' and they will 'go to hell' because they are not 'right in the head.'"[140] The Seventh Circuit rejected the idea that Title VII requires Wal-Mart to accommodate these religious messages, reasoning that to do so would not only constitute an undue hardship on the company but would also place it on the "razor's edge" of liability for permitting religious harassment of its employees.[141]

Relying on *Peterson*, *Chalmers*, and other leading workplace religion cases, the district court in *Averett v. Honda of America Manufacturing, Inc.* rejected the idea that Title VII requires accommodation of employees who issue religious denunciations of their coworkers.[142] In *Averett*, a religious employee repeatedly made statements to the effect that "God would take care of the evildoers" and that they will be "judged according to [their] deeds."[143] Although these statements were religiously motivated, the court rejected her claim that Honda violated Title VII by failing to accommodate her religion. She may have wished to "express her belief that her coworkers were sinful and evil persons whom God

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134. *Id.* at 616.

135. *Id.* at 617.

136. *Id.*

137. *Id.* at 618.

138. *Id.* (citing Peterson v. Hewlett-Packard Co., 358 F.3d 599, 607-08 (9th Cir. 2004); Chalmers v. Tulon Co. of Richmond, 101 F.3d 1012, 1021 (4th Cir. 1996)).

139. 417 F. App'x 552, 554 (7th Cir. 2011).

140. *Id.* at 553.

141. *Id.* at 554 (quoting Flanagan v. Ashcroft, 316 F.3d 728, 729-30 (7th Cir. 2003)).

142. No. 07-cv-1167, 2010 WL 522826, at *10 (S.D. Ohio Feb. 9, 2010).

143. *Id.* at *2.

would one day punish," but the court insisted that Title VII "does not require an employer to allow an employee to impose [her] religious views on others."[144]

2. *Disparagement or Encouragement?*

An initial objection to the principle of nondisparagement is that it misunderstands the motives of religious employees. When religious employees engage in preaching, proselytization, or religious exhortation, or even when they send messages of religious judgment or condemnation, those employees might claim that their messages are meant to express care and concern, not denigration. Although the language chosen can seem harsh, they may feel that such language is necessary to alert coworkers to their evil or fallen ways and to provide motivation for those coworkers to improve their lives by turning to God.[145]

Indeed, the religious employee in *Chalmers* explained her actions largely in these terms. In her first letter, for example, she told her coworker that he was acting against God's will, but that "[a]ll you have to do is go to God and ask for forgiveness before it's too late."[146] In her second letter, she expressed concern that a different coworker was having sex out of wedlock, but that if she "invite[d] God into [her] heart and live[d] a life for him [then] things in [her] life will get better."[147] Both of these messages, she insisted, were sent out of "love" and a genuine desire to see her coworkers live right and be saved.[148]

But benign motives cannot rescue messages that would be perceived as "intimidating, hostile, or offensive to reasonable people."[149] This conclusion stems in part from the text of Title VII, which speaks to the "terms, conditions, or privileges of employment"[150] and therefore proscribes workplace behavior that creates an abusive or hostile environment.[151] In making determinations of hostility,

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144. *Id.* at *9-10 (alteration in original) (quoting Wilson v. U.S. W. Commc'ns, 58 F.3d 1337, 1342 (8th Cir. 1995)).

145. *See supra* notes 118-131 and accompanying text.

146. Chalmers v. Tulon Co. of Richmond, 101 F.3d 1012, 1015 (4th Cir. 1996).

147. *Id.* at 1016.

148. *Id.* at 1015-16.

149. *See Harassment*, U.S. Equal Emp. Opportunity Comm'n, https://www.eeoc.gov/harassment [https://perma.cc/WU7P-K5KA] ("To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable people."). For further discussion of "objective offensiveness" in religious accommodation cases, see Dallan Flake, *Bearing Burdens: Religious Accommodations That Adversely Affect Coworker Morale*, 76 Ohio St. L.J. 169, 199-201 (2015), which discusses the "objective offensiveness" standard as applied in *Chalmers* and *Peterson*.

150. 42 U.S.C. § 2000e-2(a)(1) (2018).

151. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65-67 (1986).

the law adopts the recipient's perspective.[152] It looks at the effects of unwanted messages from their point of view, rather than from the sender's, because those messages jeopardize the recipient's enjoyment of equal opportunity in the workplace. Just as the law does not credit the testimony of alleged perpetrators of sexual harassment, who might insist that their sexually charged messages were meant as a compliment, it does not absolve religious employees who send denigrating messages with loving intentions.

3. Harassment or Hostility Toward Religion?

A critic of the nondisparagement principle might raise a related objection, namely, that perceptions of religious harassment in the workplace are the product of hostility or animus toward religion. Again, consider the *Chalmers* case. The critic might observe that the religious employee only sent two letters that were objectionable.[153] Both were sent to her coworkers' homes, not to invade their privacy, but instead to assure them that her religious views would be kept at some distance from their relationship as colleagues.[154] And there was no evidence that she would have continued to write the letters after her coworkers objected.[155] Indeed, based in part on these observations, Judge Niemeyer dissented from the court's opinion in *Chalmers*, accusing his colleagues of viewing the employee's religious activity "in the worst possible light" and being "hostile to [her] religious practice."[156]

In *Groff*, the Supreme Court urged lower courts to be especially attuned to the possibility of hostility or animus toward religion.[157] Writing for the Court, Justice Alito noted that "employee animosity to a particular religion, to religion in general, or to the very notion of accommodating religious practice" cannot be

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152. To demonstrate illegal harassment based on a hostile work environment, plaintiffs must show both subjective and objective hostility. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993). That is, not only must plaintiffs show that workplace conduct would be perceived as hostile and abusive by a reasonable person, but they must also show that they actually perceived it that way. *See id.* Both of these inquiries, however, take the perspective of the victim of workplace harassment, rather than that of the perpetrator.

153. Chalmers v. Tulon Co. of Richmond, 101 F.3d 1012, 1015-16 (4th Cir. 1996).

154. *See id.* at 1022 (Niemeyer, J., dissenting) ("Chalmers sent the letter to her supervisor's home, explaining, 'I wrote this letter at home so if you have a problem with it you can't relate it to work.'").

155. *See id.* at 1027.

156. *Id.* at 1022.

157. Groff v. DeJoy, 600 U.S. 447, 472 (2023) ("If bias or hostility to a religious practice or a religious accommodation provided a defense to a reasonable accommodation claim, Title VII would be at war with itself.").

the basis for rejecting a religious-accommodation claim.[158] Following this reasoning, if a coworker is offended or disturbed by a colleague's religious messages, courts should inquire into whether those reactions are a product of religious bigotry and, if so, refuse to consider them as cognizable costs of religious accommodation.

But courts hearing workplace religion cases have refused to conflate judgments of religious harassment with antireligious bigotry.[159] In *Chalmers*, for example, the court trained its attention not on the plausibility or attractiveness of the religious ideas expressed in the letters, but instead on their objectively demeaning components.[160] The *Chalmers* court observed that the religious employee's letters "impose[d] personally and directly on fellow employees" and "criticiz[ed] their personal lives."[161] Contrary to Judge Niemeyer's suggestion in dissent, neither of these observations carries any suggestion of hostility to religion or bias against religious employees.[162]

This approach is faithful to the goal of balancing worker free exercise with avoiding impositions on third parties. On the one hand, courts have refused to craft religious-accommodation doctrine around biased or hostile coworkers. But on the other hand, courts have also refused to assume that all opposition to

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158. *Id.*

159. *See, e.g.*, *Chalmers*, 101 F.3d at 1021 ("If Tulon had the power to authorize Chalmers to write such letters, and if Tulon had granted Chalmers' request to write the letters, the company would subject itself to possible suits from [other employees] claiming that Chalmers' conduct violated *their* religious freedoms or constituted religious harassment."); Peterson v. Hewlett-Packard Co., 358 F.3d 599, 605 (9th Cir. 2004) ("It is evident that [Peterson] was discharged, not because of his religious beliefs, but because he violated the company's harassment policy by attempting to generate a hostile and intolerant work environment and because he was insubordinate in that he repeatedly disregarded the company's instructions to remove the demeaning and degrading postings from his cubicle.").

160. *Chalmers*, 101 F.3d at 1016. On objective judgements about social meaning in religious-liberty disputes, see EISGRUBER & SAGER, *supra* note 4, at 124-28; B. Jessie Hill, *Anatomy of the Reasonable Observer*, 79 BROOK. L. REV. 1407, 1412-23 (2014); and TEBBE, *supra* note 9, at 98-112. For leading work arguing that discrimination is wrong because it is demeaning, see DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? 33 (2008); and Deborah Hellman, *Discrimination and Social Meaning*, *in* THE ROUTLEDGE HANDBOOK OF THE ETHICS OF DISCRIMINATION 97, 100 (Kasper Lippert-Rasmussen ed., 2018). On expressive theories of law, see generally Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000).

161. *Chalmers*, 101 F.3d at 1021.

162. For more on the objective character of communication and its effect on social meaning, see Anderson & Pildes, *supra* note 160, at 1574, which argues, "Communication establishes a public space of meanings and shared understandings between the speaker and addressee. . . . The meanings of actions with which expressivists are concerned are normative and cannot be reduced to purely subjective, psychological, or empirical concepts such as speaker intentions and addressee reactions."

religious accommodation stems from coworker hostility. This evenhanded posture reflects an egalitarian instinct in interpreting Title VII, taking worker free exercise seriously without ignoring real and significant burdens on employers and coworkers.

B. Reciprocity

The second major principle embedded in the workplace religion cases is reciprocity. The principle of reciprocity demands that requests for religious accommodation come packaged with a willingness to make mutual adjustments. It recognizes that accommodations require employer and coworker sacrifice and asks that religious employees share some of these burdens rather than insist on one-sided arrangements that favor only their own religious exercise. In doing so, the principle of reciprocity ensures that all employees — religious and nonreligious — enjoy fair terms of cooperation at work.

1. "Mutuality of Obligation"

An early articulation of the reciprocity principle came in *Chrysler Corp. v. Mann*.[163] In *Chrysler*, an employee wished not to work on his Sabbath or on other holy days observed in the Worldwide Church of God.[164] The collective-bargaining agreement in place provided a means by which the employee could meet these obligations by using his allotted paid excused absences.[165] But the employee refused to use those allotted absences for religious purposes, instead insisting that "extraordinary means of accommodation were necessary."[166] The employee expected his employer to yield fully; nothing less would be acceptable.

But the Eighth Circuit emphatically rejected this one-sided view of religious accommodation. The court grounded its argument in the idea that the employment relationship assumes a "mutuality of obligation."[167] Although Title VII places on employers a duty to make reasonable accommodations without undue hardship, the court explained that religious employees must be willing to cooperate and make "mutual efforts" to achieve those accommodations.[168] It would not be acceptable, as the Chrysler employee would have it, to rest on "mere

163. 561 F.2d 1282, 1285-87 (8th Cir. 1977).

164. *Id.* at 1283.

165. *Id.* at 1283-84.

166. *Id.* at 1286.

167. *Id.* at 1285.

168. *Id.*

recalcitrant citation of religious precepts."[169] The company had made numerous avenues available for the employee to meet his religious obligations, all the while being "consistently conciliatory" to his religious needs.[170] But the employee wanted it his way or no way at all, even going so far as to reject the company's offer of reinstatement with full seniority and waiver of punishment for his absences.[171] The court found that this "intransigent" position was inconsistent with Title VII's assumptions of reciprocity and ruled in favor of Chrysler.[172]

Read in its best light, *Chrysler* reflects deeper insights into the principle of reciprocity. To sustain a fair system of social cooperation, whether in the workplace or elsewhere in society, participants must be willing to abide by governing terms that account for the interests of other people.[173] The willingness to abide by these terms stems from a recognition that others have accepted certain constraints on their own behavior or made sacrifices to realize the gains of cooperative endeavor.[174] That recognition then motivates one to return the benefits fairly by constraining one's own behavior. Participants in a fair, cooperative system will resist the idea that their own interests have absolute or overriding priority, and they will recognize unfairness in reaping the benefits of a shared system of social cooperation while insisting on complete satisfaction of their own demands.[175]

Another leading case illustrating the principle of reciprocity is *Wilson v. U.S. West Communications*.[176] In *Wilson*, a telephone-company employee insisted on wearing in the office a "graphic anti-abortion button," which contained "a color photograph of an eighteen to twenty-week old fetus."[177] Her coworkers complained, stating that they experienced "immediate and emotional" reactions that caused serious disruptions in the workplace.[178] They testified that the button was "offensive and disturbing" for reasons unrelated to any stance on abortion,

169. *Id.*

170. *Id.* at 1286.

171. *Id.*

172. *Id.* at 1286-87.

173. *See* JOHN RAWLS, POLITICAL LIBERALISM 49 n.1 (1993) ("[R]easonable people take into account the consequences of their actions on others' well-being.").

174. *See* Allan Gibbard, *Constructing Justice*, 20 PHIL. & PUB. AFFS. 264, 269 (1991) (reviewing BRIAN BARRY, THEORIES OF JUSTICE (1989)) ("You have what you have only because others constrain themselves, in ways that make for a fair cooperative venture for mutual advantage. Constrain yourself by those rules in return, and you give them fair return for what they give you.").

175. *See* RAWLS, *supra* note 173, at 49-54.

176. 58 F.3d 1337, 1341-42 (8th Cir. 1995).

177. *Id.* at 1338-39.

178. *Id.* at 1338.

such as "infertility problems, miscarriage, and death of a premature infant."[179] But the employee resisted requests to remove the button, cover it up, or wear a different one, stating that she took a "religious vow" to wear it and that "[s]he believed that the Virgin Mary would have chosen this particular button."[180] Instead, she claimed that she was entitled to a religious accommodation that would allow her to continue wearing the button, and that any coworkers who are offended "should be asked not to look at it" and should be told to "sit at their desk[s] and do the job U.S. West was paying them to do."[181]

But the Eighth Circuit found that the company need not give in to these rigid demands.[182] The court explained that the employee had been offered several reasonable accommodations, including the suggestions that she wear the button only at her desk, that she cover up the button, or that she wear a button containing the same message without the disturbing graphic.[183] But her position was firm and inflexible: it had to be this button, at all times, no substitutes. The court found this uncompromising position to be "antithetical to the concept of reasonable accommodation."[184] The employee, in other words, had to make some effort to meet the company and her coworkers in the middle. To do otherwise—that is, to demand that she be allowed to continue her religious witness unimpeded by the interests of her coworkers and the requirements of a shared workplace—would be to allow her "to impose her beliefs as she chooses."[185] Title VII, the court concluded, "does not require an employer to allow an employee to impose his religious views on others."[186]

The connection between reciprocity and avoiding religious imposition was plain in *Grant v. Fairview Hospital & Healthcare Services*.[187] In *Grant*, an ultrasound technician claimed that his religious beliefs required him to counsel women against having abortions.[188] After an incident in which he prayed with a patient, encouraged her not to have an abortion, and referred her to a pastor, his employer informed him that "providing pastoral counseling to patients was beyond the scope of his professional duties."[189] Attempting to accommodate his

179. *Id.* at 1339.

180. *Id.*

181. *Id.*

182. *Id.* at 1342.

183. *Id.* at 1339.

184. *Id.* at 1341.

185. *Id.*

186. *Id.* at 1342.

187. No. Civ. 02-4232, 2004 WL 326694, at *4 (D. Minn. Feb. 18, 2004).

188. *Id.* at *1.

189. *Id.*

religious beliefs, however, the employer proposed that he could opt out of performing ultrasounds on women contemplating abortion.[190] If a patient disclosed that she was considering an abortion during an ultrasound, the employer suggested, he could leave the room and discontinue the examination.[191] But despite these efforts to resolve his conflict, the technician insisted that he be allowed to proselytize any patient he suspected was considering an abortion. In his view, the right to religious accommodation includes a right to "share" his religious beliefs with any patient he examined.[192] Citing *Wilson*, however, the district court firmly rejected the idea that Title VII requires employers to permit such religious impositions.[193]

2. *Cooperation and Concession*

Elaborating the idea of mutual obligation, courts have emphasized that employees must cooperate with employers' efforts to accommodate and be willing to make some concessions in the process. In *Lee v. ABF Freight System, Inc.*, for example, a trucker sought to avoid driving on his Sabbath, which ran from sundown Friday to sundown Saturday.[194] He was offered an accommodation, which paired placement of early requests for preferred runs with use of vacation days to minimize the risk of working Fridays or Saturdays.[195] But rather than attempting to make this proposed accommodation work, he rejected it out of hand because it did not *guarantee* he would never work those days.[196] The court held that the company's efforts at reasonable accommodation "triggered [the employee's] duty to cooperate."[197] Citing *Chrysler*, the court said that this duty to cooperate requires a religious employee to make some efforts at personal adjustment in the hopes of reaching a mutual compromise.[198] When religious employees are unwilling to make such adjustments, courts have found that they fail to uphold their end of the bargain under Title VII.[199]

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190. *Id.*

191. *Id.*

192. *Id.* at *4.

193. *Id.* at *4-5 (citing Wilson v. U.S. W. Commc'ns, 58 F.3d 1337, 1342 (8th Cir. 1995)).

194. 22 F.3d 1019, 1020-21 (10th Cir. 1994).

195. *Id.* at 1021.

196. *Id.*

197. *Id.* at 1022.

198. *Id.* at 1022-23 (citing Chrysler Corp. v. Mann, 561 F.2d 1282, 1286 (8th Cir. 1977)).

199. *See, e.g.*, *id.* at 1023.

Similarly, in *Bruff v. North Mississippi Health Services, Inc.*, the court faulted a religious employee for failing to meet her duty of cooperation.[200] In *Bruff*, a counselor refused to provide relationship advice to patients in same-sex relationships, claiming that doing so would violate her religious beliefs.[201] Among various efforts at accommodation, the employer identified other positions that would eliminate the religious conflict and offered to administer two tests that would assess her suitability for transfer.[202] But the employee refused to take either test or to apply for any job other than being a counselor.[203] Finding that she "displayed almost no . . . cooperation or flexibility," the court held that she was not entitled to her preferred accommodation.[204]

In *Brener v. Diagnostic Center Hospital*, the court likewise found a religious employee's efforts at cooperation to be wanting.[205] As in *Bruff*, the employer's behavior was exemplary—it took "active steps" to accommodate its religious employee, administering a rotating shift schedule, minimizing weekend work, and routinely approving voluntary shift swaps.[206] The employer was even willing to experiment with *involuntary* shift swaps to meet the religious employee's needs.[207] But this diligence was not reciprocated by the employee, who made only "haphazard efforts" to trade shifts or otherwise to relieve his religious conflicts.[208] In the absence of employee cooperation, the *Brener* court once again refused to grant an accommodation.[209]

When religious employees demonstrate that they are willing to make some concession or sacrifice, by contrast, courts have been more receptive to their

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200. 244 F.3d 495, 503 (5th Cir. 2001).

201. *Id.* at 497.

202. *Id.* at 497-98.

203. *Id.*

204. *Id.* at 503.

205. 671 F.2d 141, 147 (5th Cir. 1982).

206. *Id.* at 145.

207. *Id.*

208. *Id.*

209. *Id.* at 146-47. In its discussion of reasonable accommodation under Title VII, the EEOC Compliance Manual on Religious Discrimination explicitly recognizes the importance of employee cooperation. *See* U.S. Equal Emp. Opportunity Comm'n, EEOC-CVG-2021-3, Compliance Manual on Religious Discrimination, § 12-IV.A.2 (2021) [hereinafter EEOC Compliance Manual on Religious Discrimination], https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination [https://perma.cc/2QWQ-GASG] ("Employer-employee cooperation and flexibility are key to the search for a reasonable accommodation."). As the *Brener* court made clear, however, employees' duty of cooperation does not require that they change their religious beliefs. *Brener*, 671 F.2d at 146 n.3 ("Of course, an employee is not required to modify his religious beliefs, only to attempt to satisfy them within the procedures offered by the employer." (citation omitted)).

accommodation claims. In *Tooley v. Martin-Marietta Corp.*, for example, Seventh-day Adventist employees asked to be excused from a requirement to pay union dues.[210] As a show of good faith, however, they offered to pay an equivalent sum to charity.[211] Observing that this alternative payment would be in line with Title VII's "balancing of interests" between religious employees and third parties, the court ruled in favor of accommodation.[212]

More recently, in *Patterson v. Walgreen Co.*, the Eleventh Circuit relied on ideas of cooperation and concession to find that an employer had met its duty of reasonable accommodation.[213] In *Patterson*, a customer-care representative and training instructor refused to work on Friday evenings and Saturdays, in accordance with his religious beliefs.[214] As in *Chrysler*, *Wilson*, *Lee*, *Bruff*, and *Brener*, the company went to great lengths to make the schedule work for its observant employee. Among other things, it agreed to schedule regular training sessions from Sunday to Thursday, allowed the employee to seek shift swaps when emergencies arose, and offered to explore the possibility of moving the employee to a different part of the company where he could more easily find shift substitutes when needed.[215] But the employee not only refused to work on his Sabbath but also refused to look for other positions at the company.[216] According to the court, employers have a duty to offer reasonable religious accommodations, but "[t]he other side of the equation is that the employee has a 'duty to make a good faith attempt to accommodate [his] religious needs through means offered by the employer.'"[217]

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The workplace religion cases, in short, show that when religious employees demand sacrifices from businesses and coworkers, they must be willing to make

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210. 648 F.2d 1239, 1241 (9th Cir. 1981).

211. *Id.* During litigation, Congress passed an amendment to the National Labor Relations Act that required a "virtually identical" accommodation. *Id.* at 1242 (citing Act of Dec. 24, 1980, Pub. L. No. 96-593, sec. 1, § 19, 94 Stat. 3452, 3452).

212. *Id.* The idea of bearing alternative burdens when requesting religious accommodation is familiar from the context of objections to military service. *See* KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 53-54 (2006). I thank Alan Brownstein and Stephanie Barclay for making this observation. On the duty to bear one's fair share of burdens to support cooperative social projects, see Alan Patten, *The Normative Logic of Religious Liberty*, 25 J. POL. PHIL. 129, 150-52 (2017).

213. 727 F. App'x 581, 586 (11th Cir. 2018).

214. *Id.* at 583-85.

215. *Id.* at 584-85.

216. *Id.* at 585.

217. *Id.* at 586 (second alteration in original) (quoting Walden v. Ctrs. for Disease Control & Prevention, 669 F.3d 1277, 1294 (11th Cir. 2012)).

their own adjustments and compromises in return. This principle of reciprocity, in other words, holds that religious accommodation is a two-way street. Religious accommodations "need not be on the employee's terms only,"[218] but instead "bilateral 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."[219]

C. Proportionality

The third major principle embedded in the workplace religion cases is proportionality of coworker burden. The law of reasonable accommodation demands that employers make some sacrifices to meet employees' religious needs, and the costs of those sacrifices typically (if not always) fall on coworkers. But while employees may be made to bear some burdens to accommodate their coworkers' religious beliefs and practices, those burdens must be limited in their magnitude and equitably distributed among nonaccommodated employees.

1. Magnitude

The leading case explicating limits on the magnitude of coworker burdens is *EEOC v. Firestone Fibers & Textiles Co.*[220] In *Firestone*, a member of the Living Church of God sought accommodation for his Friday and Saturday Sabbath and other religious holidays totaling fourteen additional days off.[221] The company diligently investigated several potential means of accommodation—including shift change, job change, and leaving his shift uncovered—but ultimately determined that none were capable of satisfying the employee's accommodation request under the company's collective-bargaining agreement.[222] When the employee was terminated for excessive absence, he sued Firestone, alleging that the company had violated Title VII by failing to accommodate his religious practice.[223]

Rejecting the employee's claim, the Fourth Circuit emphasized that religious accommodations cannot result in unreasonable demands on others.[224] For

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218. Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141, 146 (5th Cir. 1982).

219. Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 69 (1986) (quoting *Brener*, 671 F.2d at 145-46).

220. 515 F.3d 307, 315 (4th Cir. 2008).

221. *Id.* at 309.

222. *Id.* at 310.

223. *Id.* at 311.

224. *Id.* at 313.

starters, the court explained, the secular interests of employers and coworkers cannot be ignored or unduly discounted.[225] Noting that "[r]eligion does not exist in a vacuum in the workplace," and that religious interests cannot take unyielding preference, the court counseled that religious-accommodation law "is a field of degrees, not a matter for extremes."[226] Employers must make efforts to accommodate religion in the workplace, but not at all costs to businesses and "the legitimate rights of other employees."[227]

The proportionality principle's magnitude limitation is perhaps most salient in cases involving threats to coworker safety. In one such case, *EEOC v. Oak-Rite Manufacturing Corp.*, a company operating a metalworking factory refused to waive its policy requiring employees to wear long pants for an employee who wished to wear dresses for religious reasons.[228] The company's safety policy had been in place for over forty years, but the religious employee contended that she should be excused from compliance because the company had insufficient evidence that a close-fitting dress would get caught in the machinery or otherwise undermine employee safety.[229] The court rejected this argument, however, holding that Title VII does not require the company to engage in a "novel experiment in industrial safety."[230] Such a requirement would risk not only the religious employee's own safety but also that of coworkers who might become endangered if something went wrong.[231] Quoting an earlier Sixth Circuit case, the *Oak-Rite* court noted that "Title VII does not require that safety be subordinated to the religious beliefs of an employee."[232]

The Ninth Circuit reached a similar conclusion about jeopardizing coworker safety in *Bhatia v. Chevron*.[233] In that case, Chevron had a safety policy that required all employees who might be exposed to toxic gases to shave any facial hair

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225. *See id.*

226. *Id.*

227. *Id.* Although costs can be difficult to quantify in some circumstances, courts can make — and have made — practical judgments about the magnitude of workplace costs and their distribution. For an illuminating discussion of analogous assessments under Establishment Clause doctrine, see LUPU & TUTTLE, *supra* note 4, at 232-37. For philosophical reflections on the limits of cost-shifting in religious-accommodation law and the concern with imposing disproportionate burdens, see CÉCILE LABORDE, LIBERALISM'S RELIGION 227-28 (2017). Where religious accommodations are costless — for example, where a coworker agrees to a mutually beneficial shift swap — such judgments will not be necessary.

228. No. IP 99-1962-C H/G, 2001 WL 1168156, at *1 (S.D. Ind. Aug. 27, 2001).

229. *Id.* at *4-5.

230. *Id.* at *9.

231. *Id.* at *10.

232. *Id.* at *11 (quoting Draper v. U.S. Pipe & Foundry Co., 527 F.2d 515, 521 (6th Cir. 1975)).

233. Bhatia v. Chevron U.S.A., Inc., 734 F.2d 1382, 1384 (9th Cir. 1984) (per curiam).

that could impede a tight seal when wearing a respirator.[234] A devout Sikh employee requested an accommodation that would allow him to keep his facial hair as required by his religion.[235] One proposal he made was that the company might only assign him work that involved no exposure to toxic gas.[236] But the court observed that such an accommodation would increase his coworkers' share of dangerous work and was therefore not required under Title VII.[237]

2. *Distribution*

In addition to considering the magnitude of coworker costs, the *Firestone* court articulated the importance of fair or equitable distribution of religious accommodation's burdens.[238] It is one thing to ask that a large group of coworkers be willing to swap shifts of reasonably equivalent value so that religious accommodation will be possible. But it is quite another to require a "small group of coworkers" to take on "the most undesirable hours," and to do so in perpetuity.[239] For the *Firestone* court, the costs of accommodating the religious employee's desire to have *all* Friday evenings and Saturday afternoons off would have fallen disproportionately on a discrete and identifiable set of coworkers. And so, to avoid the "sting of unfairness," the court held that these employees "are not required to work other, less-preferred shifts on an inordinate number of occasions."[240] Finishing the opinion with a rhetorical flourish, the Fourth Circuit encapsulated the proportionality principle's distributional component by stating that "even-handedness and fairness are of paramount importance to the functionings of any workplace" and that "[c]o-workers have their rights, too."[241]

In a recent case, *EEOC v. Walmart Stores*, the Seventh Circuit echoed these concerns about equitable distribution of burdens.[242] In *Walmart*, an assistant manager wished to observe his Sabbath on Fridays and Saturdays, but those

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234. *Id.* at 1383.

235. *Id.*

236. *Id.*

237. *Id.* at 1384.

238. EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307, 318 (4th Cir. 2008).

239. *Id.* at 318-19.

240. *Id.* at 318.

241. *Id.* at 319. For more critical readings of *Firestone*, see Dallan F. Flake, *When "Close Enough" Is Not Enough: Accommodating the Religiously Devout*, 49 BYU L. Rev. 49, 71-72, 87 (2023); and Debbie N. Kaminer, *Religious Accommodation in the Workplace: Why Federal Courts Fail to Provide Meaningful Protection of Religious Employees*, 20 Tex. Rev. L. & Pol. 107, 148 (2015).

242. EEOC v. Walmart Stores E., L.P., 992 F.3d 656, 658-59 (7th Cir. 2021).

were especially busy days at the store.[243] To accommodate his religious observance, the store would have had to assign "the other seven assistant managers to additional Friday night and Saturday shifts, even though they prefer to have weekends off."[244] The court was sensitive not only to the fact that employees generally prefer not to work on weekends, but also to the fact that a small number of coworkers would be forced to bear the brunt of the requested religious accommodation. Some coworker sacrifice might be required to meet the demands of Title VII, but the *Walmart* court indicated that shifting large burdens onto a relatively small number of coworkers would require inordinate sacrifice on their part.[245]

The concentration of coworker costs was especially pronounced—and therefore especially problematic—in *Patterson*.[246] To accommodate the employee's religious obligations there, the company would have had to shift all work on Friday nights and Saturdays in the immediate future from the religious employee to the one other Walgreens employee who was qualified to take it on.[247] The court was quick to conclude that forcing an employer to effect such a particularized shift of costs would constitute an undue hardship.[248]

A critic here might wonder what normative difference it makes whether the costs of religious accommodations are borne by a subset of coworkers rather than distributed among coworkers more broadly. That is, if there is something wrong with shifting the costs of religious accommodations onto a small number of coworkers, why is there not also something wrong with shifting those costs to a larger group? In either case, some employees are forced to bear the costs of another person's religious observance.[249] Indeed, when costs are particularized

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243. *Id.* at 657.

244. *Id.* at 658.

245. *Id.* at 659. *Groff v. DeJoy* abrogated *Walmart* to the extent that it suggested the nation's largest private company would suffer an undue hardship if it were required to facilitate voluntary shift swaps. Groff v. DeJoy, 600 U.S. 447, 466-67, 466 n.12 (2023). But *Groff* said nothing to undermine *Walmart*'s distinct concerns about inequitable and involuntary distribution of burdens on a small subset of coworkers. *Cf. id.* at 472 ("[A]n accommodation's effect on co-workers may have ramifications for the conduct of the employer's business.").

246. Patterson v. Walgreen Co., 727 F. App'x 581, 588-89 (11th Cir. 2018).

247. *Id.* This qualified employee was also in the process of leaving the Walgreens facility, which would have left Walgreens without any qualified trainers on these days. *Id.*

248. *Id.* at 586, 588-89.

249. On the harms to conscience from being forced to subsidize the religious practices of others, see Thomas Jefferson, A Bill for Establishing Religious Freedom, *in* 2 THE PAPERS OF THOMAS JEFFERSON 545, 545 (Julian P. Boyd, Lyman H. Butterfield & Mina R. Bryan eds., 1950), which stated that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves . . . is sinful and tyrannical." *See also* James Madison,

rather than spread, one might even think that fewer employees are being adversely affected by the religious accommodation.

The answer, it would seem, is that when a small subset of employees is forced to bear the costs of workplace religion, those employees have a stronger claim to be the victims of religious imposition. That is, there is a special sense of coerciveness to the particularized shift of religious costs, a coerciveness that appears to dissipate, if not disappear, when they are spread more generally. If the costs of the same accommodation were distributed evenly among a larger group of employees, those employees would seem to stand on weaker ground in claiming to be victims of impermissible religious imposition. To be sure, those employees could still claim that they were forced to subsidize their colleagues' religious practice. But that subsidy would be better characterized as the ordinary cost of rights, including rights of religious accommodation in the workplace.[250]

This point about religious imposition becomes all the more compelling in cases where the small subset of coworkers who are forced to bear the costs of another's religious practice is least able to bear them.[251] Consider the examples offered by Judge Wilkinson in the *Firestone* case. Wilkinson observed that if the company were required to grant a religious accommodation for one worker to meet his religious obligations, the costs of that accommodation might fall on an employee who needs that time to take care of a child who is home sick or a spouse in poor health.[252] The "sting of unfairness" felt by those coworkers would be understandable.[253] Although they might appreciate the religious sincerity of their coworker and the urgency of his religious commitments, it would be hard not to feel as if the accommodation regime were kicking them when they were down.

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Memorial and Remonstrance Against Religious Assessments, *in* JAMES MADISON, WRITINGS 29, 31 (Jack N. Rakove ed., 1999) ("[T]he same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment[] may force him to conform to any other establishment in all cases whatsoever . . . ."). For contemporary articulations of the harms stemming from compelled subsidy, see Micah Schwartzman, *Conscience, Speech, and Money*, 97 VA. L. REV. 317, 359-71 (2011); and Schwartzman et al., *supra* note 28, at 809.

250. *See* Schwartzman et al., *supra* note 28, at 808-12 (discussing "the cost of rights"); TEBBE, *supra* note 9, at 60-67 (discussing the conditions under which religious accommodations that burden others are permissible); *see also* Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1322 (1992) ("It ought to be troubling whenever the cost of a general societal benefit must be borne exclusively or disproportionately by a small subset of the beneficiaries.").

251. *See* Schauer, *supra* note 250, at 1322.

252. EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307, 318 (4th Cir. 2008).

253. *Id.*

The principle of proportionality, in short, recognizes that employee religious accommodations may be costly for companies and coworkers, but at the same time insists that those costs must be limited. The workplace religion cases indicate at least two kinds of limitations—burdens on others must not be excessive in magnitude, and they should not fall too heavily on particular coworkers. Together, these limitations reflect the idea that the costs of religious accommodation must be circumscribed and equitably distributed among the affected parties.

III. THE FUTURE OF WORKPLACE DISESTABLISHMENT

With disestablishment principles for the modern workplace now in view, this Part turns to applications. It begins by looking at how the principles might guide decisions in a concrete set of impending cases. It then counters a skeptical charge, namely, that the principles rest on precedents that courts may now reject. Finally, it explores how proponents of workplace disestablishment might leverage various nonjudicial strategies to vindicate religious liberty and equality at work.

A. After Groff

In the wake of *Groff*, courts face urgent questions about the limits of religious accommodation at work. Should companies be required to grant religious accommodations for employees who object to workplace rules that mandate vaccination for COVID-19 or other dangerous diseases?[254] Are companies allowed to discipline or terminate employees who are religiously motivated to misgender coworkers?[255] Will employees be entitled to skip programming on workplace diversity, equity, and inclusion when it conflicts with religious beliefs?[256] Drawing on principles of nondisparagement, reciprocity, and proportionality, this Section takes up these questions in turn.[257]

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254. *See infra* Section III.A.1.

255. *See infra* Section III.A.2.

256. *See infra* Section III.A.3.

257. This Section focuses on cases that are testing the limits of religious accommodation in the workplace. Doing so not only helps to identify the boundaries between permissible accommodation and impermissible religious imposition, but it also provides helpful guidance to courts and lawmakers who may be struggling to reach appropriately balanced judgements when facing less familiar factual circumstances. During the final stages of editing this Article, the Trump Administration issued executive orders relating to gender identity and DEI programming. *See* Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government," Exec. Order No. 14,168, 90 Fed. Reg. 8615 (Jan. 30,

1. Vaccines

Companies are facing many religious-accommodation claims brought by employees who object to workplace vaccination requirements, especially requirements to be vaccinated against COVID-19. As of this writing, there are dozens of these cases making their way through the federal courts.[258] Do workplace disestablishment principles provide any guidance on how these claims should be adjudicated?

At first blush, it would seem that the nondisparagement principle has little bite. Refusing to be vaccinated against COVID-19 (or other communicable diseases) does not denigrate one's coworkers or demean them in any obvious way. To be sure, coworkers might perceive vaccine objection as demonstrating a lack of adequate respect for their interests in health and safety. But it would seem like a stretch to bring that perception of disrespect within the reach of the nondisparagement principle.

The principle of reciprocity, however, might have more to say about vaccine-exemption cases. Employees who are willing to propose and abide by fair cooperative terms should be willing to make some sacrifices when asking others to accommodate their religious exercise. When it comes to requests for accommodation from workplace vaccine requirements, those sacrifices may include taking alternative measures to ensure that coworkers remain safe from a deadly virus. Among other possible mitigation strategies, objecting employees may be asked to comply with requirements including daily screening, regular testing, social distancing, or the use of personal protective equipment such as masks or face shields.

2025); Ending Radical and Wasteful Government DEI Programs and Preferencing, Exec. Order No. 14,151, 90 Fed. Reg. 8339 (Jan. 29, 2025); Ending Illegal Discrimination and Restoring Merit-Based Opportunity, Exec. Order No. 14,173, 90 Fed. Reg. 8633 (Jan. 31, 2025). The gender-identity order directs the Attorney General to "issue guidance to ensure the freedom to express the binary nature of sex . . . in workplaces and federally funded entities covered by the Civil Rights Act of 1964" and orders rescission of EEOC's Enforcement Guidance on Harassment in the Workplace. Exec. Order No. 14,168, 90 Fed. Reg. at 8617, 8618. The anti-DEI orders predominantly address federal agencies and federal contractors, though the third order "encourag[es] the private sector to end illegal DEI discrimination and preferences" and asks the Attorney General to identify "the most egregious and discriminatory DEI practitioners." Exec. Order No. 14,173, 90 Fed. Reg. at 8633. None of these orders, however, alter the statutory requirements under Title VII.

258. *See* cases cited *supra* note 19. For recent discussions of some of these cases, see Michelle M. Mello & Wendy E. Parmet, *Accommodating Religious Objections to Vaccination Mandates—Implications of* Groff v. DeJoy *for Health Care Employers*, 4 JAMA HEALTH F. art. no. e233672, at 1-2 (2023); and Debbie Kaminer, Religious Accommodation in the Workplace, Undue Hardship, and the Impact on Coworkers 27-33 (Mar. 19, 2023) (unpublished manuscript), https://ssrn.com/abstract=4393316 [https://perma.cc/23GP-6E8V].

Where religious employees refuse these alternative measures and demand accommodation on their own terms, courts could reasonably conclude that those employees violate the principle of reciprocity. A recent case, involving an employee at a home healthcare company, illustrates the point. In the throes of the pandemic, the company instituted a policy requiring employees to be vaccinated against COVID-19.[259] Anticipating requests for exemptions, the company offered to provide accommodations for religious employees that called for weekly testing in lieu of vaccination.[260] Rather than accept this proposed accommodation, however, the employee declared flatly that she "would not subject [herself] to testing either," repeatedly refusing to be tested for weeks prior to her eventual termination.[261] Such intransigence on the part of religious employees, who demand that others make sacrifices to satisfy their religious needs but who are unwilling to offer anything in return, fails to fulfill the mutual obligations that undergird the principle of reciprocity.

In other circumstances, employers may conclude that alternative mitigation strategies are insufficient to secure the health and safety interests of coworkers.[262] For example, an employer might determine that screening, testing, and masking protocols, even if followed diligently by objecting employees, are not as effective as vaccination in preventing spread of the virus. To be sure, those employers may consider whether the use of remote-work technology could provide a solution. But many jobs require physical presence and call for a high degree of employee interaction with coworkers, customers, suppliers, and other corporate constituencies.[263]

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259. Prida v. Option Care Enters., Inc., No. 23-cv-00905, 2023 WL 7003402, at *1 (N.D. Ohio Oct. 24, 2023).

260. *Id.*

261. *Id.*

262. *See, e.g.*, Bordeaux v. Lions Gate Ent., Inc., 703 F. Supp. 3d 1117, 1127 (C.D. Cal. 2023) ("It is undisputed that Defendants determined that Plaintiff could not wear a mask at all times while on set for the filming of [*Run the World*'s] second season. It is also undisputed that Defendants determined that increased testing would not be a viable alternative to mandatory vaccination to prevent the spread of COVID-19 on set.").

263. *See, e.g.*, DeVore v. Univ. of Ky. Bd. of Trs., 693 F. Supp. 3d 757, 765 (E.D. Ky. 2023) (observing that a department manager was "the face of the Office" and that a "fundamental aspect of the Department Manager job is to be present in the department to welcome students and visitors, support faculty, and answer questions as needed"); Beickert v. N.Y.C. Dep't of Educ., No. 22-CV-5265, 2023 WL 6214236, at *6 (E.D.N.Y. Sept. 25, 2023) ("As a special education teacher, [the employee's] in-person presence within a special education classroom would have been of paramount value and importance to effectively teach and attend to the individualized needs of her special needs students."); Conner v. Raver, No. 22-cv-08867, 2023 WL 5498728, at *6 (N.D. Cal. Aug. 24, 2023) (discussing the difficulty of granting remote-work accommodation to the Executive Assistant to the City Manager and City Attorney, given the need for the employee to deliver in-person support).

Where alternative mitigation strategies are not viable, the normative force of the reciprocity principle may be less clear-cut. If employees have sincere religious objections to vaccination, workplace mandates will place a burden on religious exercise. Those employees may be willing to make some sacrifices—that is, to take on some alternative burdens—to protect the health and safety of their coworkers, but those alternative measures would be insufficient. It might be tempting to assert that, when alternative arrangements are unavailable, the principle of reciprocity nevertheless demands that employees take a demonstrably safe and effective vaccine to protect coworkers from a deadly disease. But that conclusion would seem to flow from an appraisal of the grievous costs of accommodation rather than the principle of reciprocity.

The judgment that certain costs are unbearable finds stronger support in the principle of proportionality. Even assuming that compulsory vaccination imposes a serious burden on employee religious liberty, and that no alternative measures are available to mitigate the spread of disease, it might be that accommodation simply comes at too high of a cost to coworkers. Being forced to work alongside coworkers who pose a serious risk to life or long-term functioning easily exceeds the limitation on the magnitude of costs that third parties must bear in the name of religious freedom. To put the point differently, it is one thing to ask a colleague to come in on the weekend or to work late to support someone else's religious practice; it is another thing to insist that they put their life and livelihood on the line.

The proportionality principle may provide especially strong guidance in cases where those exposed to infection are vulnerable.[264] Where, for example, religious accommodation would expose coworkers who cannot afford to miss work, such accommodation would be particularly unjust. The same would go for exposing coworkers with inadequate health insurance, immunocompromising conditions,[265] or special reasons to be fearful or mistrustful of healthcare institutions.[266] In each of these cases, courts might worry that the costs of religious accommodation would fall on those least able to bear them. Relying on the principle of proportionality, courts should be sensitive to this sort of distributional concern.

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264. *See, e.g.*, *Beickert*, 2023 WL 6214236, at *5 (discussing the risk to special-education students who required individualized instruction from a teacher who requested an accommodation from a school vaccine mandate).

265. Indeed, the presence of coworkers with disabilities raises the prospect of dueling accommodation claims under Title VII and the Americans with Disabilities Act. I thank Deborah Widiss for raising this point.

266. *See* Alice Abrokwa, *Too Stubborn to Care for: The Impacts of Discrimination on Patient Noncompliance*, 77 VAND. L. REV. 461, 471-88 (2024) (discussing systemic discrimination in health care).

Although the principles of reciprocity and proportionality support limitations on workplace vaccine accommodations, they do not justify denials of accommodation for reasons unrelated to the equitable distribution of costs. For example, in a spate of recent cases, courts have denied vaccine accommodations on the grounds that the plaintiffs' claims were insufficiently "religious" in nature.[267] In one case, an employee objected to vaccination by saying that "her body was a Temple to the Holy Spirit," and so she believed that vaccination would pollute her with a foreign substance, and that vaccines are derived from aborted fetuses, so vaccination would make her a "participant in the abortion that killed an unborn baby."[268] But the court rejected her claims, stating that she "fail[ed] to tie her opposition to the vaccine to any particularized religious belief."[269]

The judicial impulse to reject vaccine accommodations in this manner is understandable. One worry might be about the escalating stringency of religious-accommodation doctrine. Once a court acknowledges that an employee's claim is sincere and religious, the thought would go, it has become increasingly difficult to avoid granting accommodation. A related worry might be that employees who object to workplace vaccine mandates on ordinary health and safety grounds will have incentives to dress up those objections in religious language to increase their chances of successful accommodation. Cutting these claims off at the outset is especially attractive for judges who worry about an onslaught of accommodation claims with no doctrinal safety hatch.

But robust application of workplace disestablishment principles offers a better way forward. Those principles are grounded in existing legal doctrine, which takes seriously the costs of workplace religious accommodation and limits the extent to which employees can impose religion on their coworkers. And those principles do not invite courts to cast aspersions on anyone's religious commitments, especially those that may be unpopular or unfamiliar. With a focus on principles of reciprocity and proportionality, courts can avoid the devastating

267. *See, e.g.*, Ellison v. Inova Health Care Servs., 692 F. Supp. 3d 548, 557 (E.D. Va. 2023) (rejecting accommodation claims because "they are not rooted in concerns that are religious in nature"); Gamon v. Shriners Hosps. for Child., No. 23-cv-00216, 2023 WL 7019980, at *2 (D. Or. Oct. 25, 2023) ("Plaintiff's Complaint lacks sufficient factual content regarding the conflict between her religious beliefs and a COVID-19 vaccine mandate to survive Defendant's Motion to Dismiss."); Kiel v. Mayo Clinic Health Sys. Se. Minn., 685 F. Supp. 3d 770, 783-84 (D. Minn. 2023) (finding that opposition to vaccines based on beliefs that the "body is a Temple to the Holy Spirit" and that taking the vaccine makes one "a complicit participant in abortion" are not sufficiently tied to religion to state a claim for religious accommodation under Title VII), *rev'd sub nom.* Ringhofer v. Mayo Clinic, Ambulance, 102 F.4th 894 (8th Cir. 2024).

268. Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of Appellants Ringhofer and Kiel and in Favor of Reversal at 4, *Ringhofer*, 102 F.4th 894 (Nos. 23-2994, 23-2996).

269. *Kiel*, 685 F. Supp. 3d at 784.

consequences of unfettered vaccine accommodations—and they can do so for the right reasons.[270]

2. *Misgendering*

The new wave of workplace religious accommodation cases also pits religious employees against work rules on misgendering. Some religious employees claim that referring to coworkers by their names and pronouns is at odds with their religious beliefs and validates or makes them complicit in a sinful social practice. Again, as with claims to be exempt from workplace vaccine requirements, there are already a series of misgendering accommodation cases making their way through lower federal courts.[271] Although these sorts of cases have been around for years, the Court's decision in *Groff* will reinvigorate—and likely escalate—religious employees' requests to misgender their colleagues.

The most immediately relevant principle from the workplace religion cases would seem to be the principle of nondisparagement. That principle was derived largely from workplace accommodation cases that involved religious condemnation or proselytization. Although the refusal to use accurate names or pronouns is not factually identical to those circumstances, it is a short step from denouncing coworkers for disappointing religious expectations to insisting on an entitlement to use language that is known to be perceived as insulting and demeaning. When an employee insists on misgendering a coworker, that insistence communicates a message of subordination. It tells the subject that they are not worthy of respect as a moral equal by denying the validity of their identity. In short,

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270. The recent opinion in *Bordeaux v. Lions Gate Entertainment, Inc.*, 703 F. Supp. 3d 1117 (C.D. Cal. 2023), provides a good model. In rejecting an employee's claim for a religious accommodation from a workplace vaccination requirement, the court first considered the possibility that she had not demonstrated "a bona fide religious belief." *Id.* at 1132. That contention was supported by evidence that she wished to avoid vaccines because she feared getting sick, and that she began avoiding vaccination before she came to accept the religious beliefs in question. *Id.* at 1133. Nevertheless, the court assumed arguendo that her objection was based on sincere religious beliefs and proceeded to analyze her accommodation claim under the undue-hardship standard. *Id.* at 1134. Finding that a religious accommodation from the vaccine requirement would present an unacceptable risk to coworker health and safety, and thus to the accomplishment of the business's goals, the court rejected her claim. *Id.* at 1135. In line with this analysis, the Eighth Circuit recently reversed the district court's decision in *Kiel* and remanded for further proceedings. *Ringhofer*, 102 F.4th at 900-03.

271. *See, e.g.*, Haskins v. Bio Blood Components, No. 22-cv-586, 2023 WL 2071483 (W.D. Mich. Feb. 17, 2023); Kluge v. Brownsburg Cmty. Sch. Corp., 732 F. Supp. 3d 943 (S.D. Ind. 2024); Polk v. Montgomery Cnty. Pub. Schs., No. 24-cv-1487, 2025 WL 240996 (D. Md. Jan. 17, 2025); Complaint, Cernek v. Argyle Sch. Dist., No. 24-cv-00447 (W.D. Wis. July 8, 2024); Trueblood v. Valley Cities Counseling & Consultation, 748 F. Supp. 3d 988 (W.D. Wash. 2024).

when employees claim a right to misgender their colleagues, they denigrate those colleagues and undermine their interests in social equality.[272]

The closest analogy from the workplace religion cases is *Peterson*.[273] In *Peterson*, Hewlett-Packard had put in place an antiharassment policy to "respect the dignity" of its employees.[274] Countless companies across the country have instituted similar policies, hoping to guard against workplace expressions of exclusion or inferiority. When the employee in *Peterson* posted biblical passages specifically chosen to condemn his gay and lesbian coworkers, he sent a clear message of disparagement—that a deep aspect of those coworkers' identities was of diminished moral value and, thus, that they were entitled to less than the ordinary respect accorded to others.[275] The situation is much the same when employees misgender their colleagues, thereby depriving them of equal recognition.[276]

A response to this account might resist the idea that misgendering—in the workplace or elsewhere—necessarily sends a message of social inferiority. Indeed, a common argument from skeptics of inclusive language is that it is too unfamiliar or grammatically difficult to get right all the time.[277] Even with the best intentions, in other words, coworkers cannot be blamed for slipping up, and therefore it would be unreasonable to interpret their acts of misgendering as a sign of disrespect.

But the nondisparagement principle is sensitive to speaker intent and the moral difference it can make. It does not support the conclusion, that is, that all acts of misgendering are created equal. When a coworker intentionally and

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272. On the harms of misgendering, see generally Chan Tov McNamarah, *Misgendering*, 109 CALIF. L. REV. 2227 (2021). On the value of social equality in employment, see generally Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225 (2013).

273. Peterson v. Hewlett-Packard Co., 358 F.3d 599 (9th Cir. 2004).

274. *Id.* at 602.

275. *Id.* at 601-02.

276. *See* McNamarah, *supra* note 272, at 2270 (discussing terms of address as "ordinary signs of social equality"). As Chan Tov McNamarah explains, in addition to diminishing social equality, misgendering also inflicts harms to employee autonomy by interfering with their ability to craft a narrative about themselves and to live it out as they wish. *See id.* at 2283; *see also* James D. Nelson, *Corporations, Unions, and the Illusion of Symmetry*, 102 VA. L. REV. 1969, 2008 (2016) (discussing the narrative aspects of identity). Our identities are, in large part, constituted by the stories that we tell about ourselves. *See* Nelson, *supra*, at 2008. But identity construction does not rest on negative freedom alone—it also depends on social recognition of the projects and commitments we take to be at the core of our lives. On the social construction of identity, see James D. Nelson, *Conscience, Incorporated*, 2013 MICH. ST. L. REV. 1565, 1578-81. On the "social bases" of self-respect as a "primary good," see RAWLS, *supra* note 30, at 396, 546.

277. *See* Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 961-63 (2019) (discussing these objections).

repeatedly misgenders a colleague, the communication of disrespect is unmistakable. It is a knowing disregard or trivialization of coworker interests and a refusal to extend those interests equal respect to one's own.[278] But the social meaning of misgendering is quite different when it is accidental. When coworkers "slip up," there is no warranted inference of denigration or disparagement, especially if they have made an active effort to get it right. That is not to say that accidental misgendering causes no harm – even with benign intentions, misgendering can be hurtful and trigger a range of negative emotional reactions.[279] But the social meaning of accidental misgendering remains distinct from that of intentional misgendering, leading to very different conclusions about the types of harm inflicted on coworkers.[280]

Again, *Peterson* illustrates the relevance of intentions for the principle of nondisparagement. Recall that in *Peterson*, there was nothing accidental about the demeaning effects of posting Bible passages condemning gays and lesbians.[281] Indeed, the religious employee who posted those passages said that they were "intended to be hurtful" and that he "hoped that his gay and lesbian coworkers would read the passages, repent, and be saved."[282] These intentions are highly relevant not just for the moral culpability of the religious employee but also for the objective social meaning of his workplace expression.[283] The principle of nondisparagement stands in opposition to objective communications of disrespect, whether they are directed toward coworkers' sexual orientation, gender identity, or other deep projects, commitments, or aspects of the self.

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278. *See* McNamarah, *supra* note 272, at 2261-64. For further discussion of why intent is a relevant feature for moral evaluation of actions, see generally Micah J. Schwartzman, *Official Intentions and Political Legitimacy: The Case of the Travel Ban*, *in* NOMOS LXI: POLITICAL LEGITIMACY 201 (Jack Knight & Melissa Schwartzberg eds., 2019).

279. *See* McNamarah, *supra* note 272, at 2288-93 (reviewing social-scientific evidence of measurable psychological harms caused by misgendering).

280. It is worth noting here that this distinction between intentional and accidental misgendering tracks harassment law more generally, which does not cover "accidental or isolated" misgendering. *See* Clarke, *supra* note 277, at 957-58 (discussing Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993)).

281. Peterson v. Hewlett-Packard Co., 358 F.3d 599, 602 (9th Cir. 2004).

282. *Id.*

283. On the objective social meaning of misgendering, see Clarke, *supra* note 277, at 958-62, which argues that misgendering expresses disrespect for gender identity and challenges its validity.

In an active and high-profile case,[284] *Kluge v. Brownsburg Community School Corp.*, the principle of nondisparagement is being put to the test.[285] In *Kluge*, a high-school orchestra teacher claims that referring to his students by their (gendered) first names and pronouns conflicts with his religious beliefs.[286] He requested an accommodation that would allow him to refer to his students using only their (ungendered) last names.[287] After granting his proposed accommodation and receiving complaints from students and coworkers, the school adopted a policy according to which all teachers would be required to refer to students by the names designated in the school's official electronic database.[288] Refusing to do so, the teacher resigned.[289] He then sued, claiming entitlement to a religious accommodation under Title VII.[290]

In *Kluge*, the Seventh Circuit found that accommodating the teacher would impose an undue hardship on the school.[291] But after that decision came down, the Supreme Court decided *Groff v. DeJoy*, disavowing the idea that anything more than "de minimis" costs were sufficient to satisfy the undue-hardship standard.[292] In light of *Groff*, the Seventh Circuit vacated its decision and remanded the case to the district court for reconsideration.[293]

In April 2024, the district court reaffirmed that accommodating the teacher would be an undue hardship.[294] After rehearsing the facts of the case at length, it held that allowing him to use only last names would lead to "substantially increased costs" in the form of harm to students and a disrupted learning

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284. *See, e.g.*, Eli Rosenberg & Moriah Balingit, *A Teacher Refused to Use Transgender Students' Names. His Resignation Was Just Approved.*, WASH. POST (June 11, 2018), https://www.washingtonpost.com/news/education/wp/2018/06/11/a-teacher-refused-to-use-transgender-students-names-his-resignation-was-just-approved [https://perma.cc/D99U-QLVB] (discussing *Kluge*); Brian McDermott & Tina Dukandar, *Applying* Groff*, Indiana District Court Rules in Favor of Employer in Religious Accommodation Claim*, NAT'L L. REV. (May 14, 2024), https://natlawreview.com/article/applying-groff-indiana-district-court-rules-favor-employer-religious-accommodation [https://perma.cc/Q4FB-VPGE] (same).

285. 64 F.4th 861 (7th Cir. 2023), *vacated*, No. 21-2475, 2023 WL 4842324 (7th Cir. July 28, 2023).

286. *Id.* at 864.

287. *Id.*

288. *Id.*

289. *Id.* at 876.

290. *Id.* at 864.

291. *Id.* at 894.

292. 600 U.S. 447, 467-68 (2023).

293. *Kluge*, 2023 WL 4842324, at *1.

294. Kluge v. Brownsburg Cmty. Sch. Corp., 732 F. Supp. 3d 943, 970-71 (S.D. Ind. 2024).

environment.[295] Accordingly, it denied the teacher's motion for summary judgment and granted the school's cross-motion.[296]

On appeal, the principle of nondisparagement should provide helpful guidance. Faithfully applied, it can aid the court in specifying the nature and weight of the costs that would be imposed by an accommodation. On the one hand, the religious teacher argues that he was not trying to be hurtful to his students, which makes his case more sympathetic than *Peterson*. On the other hand, his persistent refusal to refer to students by their first names was not accidental. Indeed, as the filings make clear, he viewed this refusal as essential to maintain fidelity to his deeply held religious commitments.[297] This was not an instance in which the teacher was unsure of students' gender identities or was confused about how they wished to be addressed. Instead, the teacher knew exactly what students wanted to be called and deliberately called them something else.

A critic here might concede that misgendering is offensive and yet insist that using only last names is a reasonable compromise.[298] Indeed, at least initially, the school seemed to agree. It may have been persuaded by the teacher's analogy to the common practice of coaches calling players by their last names. If the basketball coach can use last names without giving offense, the teacher suggested, so could he.[299]

But again, the social context of misgendering can make all the difference. According to students and staff, everyone knew that this teacher was using last names because he denied the validity of some students' gender identity.[300] That is, it was obvious to everyone involved that the policy was in place because of the teacher's desire to repudiate the self-conception of certain gender-minority students. To make matters worse, the misgendering was carried out by a teacher—someone in an inarguable position of asymmetrical power. And it was done

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295. *Id.* at 968.

296. *Id.* at 971. Although this case takes place in the public-school context, which adds potential legal complications, the district court limited its analysis on remand to the question of reasonable accommodation under Title VII. *See id.*

297. *See, e.g.*, First Amended Complaint and Demand for Jury Trial at 7, Kluge v. Brownsburg Cmty. Sch. Corp., 548 F. Supp. 3d 814 (S.D. Ind. 2019) (No. 19-02462) (stating that using transgender students' first names "contradicts—and would force [the teacher] to violate—his sincerely-held religious beliefs").

298. *See* Clarke, *supra* note 277, at 963 ("Those who object to gender-neutral pronouns may use proper names to refer to everyone . . . ."). Had Kluge insisted on "deadnaming" his students (that is, referring to a transgender or nonbinary person by the name they used prior to transitioning), the nondisparagement analysis here would be more clear-cut.

299. *See Kluge*, 732 F. Supp. 3d at 949 ("Mr. Kluge proposed that he be permitted to address all students by their last names only, similar to a sports coach . . . and the administrators agreed.").

300. *Id.* at 950, 952.

publicly, in front of classmates, almost certainly exacerbating the sense of humiliation that they suffered.[301] Under these circumstances, the school could reasonably conclude that the existence of a last-names-only accommodation communicated the teacher's view that some students' identities are not worthy of respect and that he is willing to do what it takes to make sure he does not extend it to them.[302]

Similar points might be rearticulated in terms of proportionality. The proportionality principle places limits on the weight of costs that coworkers must be made to bear in support of religious accommodation as well as the distribution of those costs. The preceding account of how misgendering harms gender minorities suggests that coworker costs for misgendering accommodations will be significant. Attending carefully to the work misgendering does in social context should disabuse courts of the notion that the coworker interests at stake are trivial or insubstantial. Moreover, part of the work done by misgendering gender-minority colleagues is to make them more vulnerable in the future. As misgendering diminishes the status of those coworkers, their social subordination deepens, and they become targets of repeated and escalating diminishment. Misgendering begets more misgendering, as well as the sort of stigma that leads to exclusion and violence — and the costs of religious accommodation multiply.[303]

In addition to the weight of these costs, they are likely to fall on a small and socially vulnerable population. According to the best available estimates, transgender persons make up less than one percent of the overall population.[304] In any given workplace, then, they are likely to constitute only a "small subset" of employees. Moreover, gender minorities are already subject to social isolation and marginalization across many domains of life. According to the principle of proportionality, courts should be especially concerned about placing the costs of religious accommodation on coworkers who can least afford to bear them. Although the power differential between coworkers may not be as extreme as that

301. For an argument that misgendering inflicts a sense of humiliation when done publicly, see McNamarah, *supra* note 272, at 2269.

302. *See id.* at 2307 ("A person who avoids all pronouns and titles expresses an unmistakably stigmatizing message to their gender minority colleagues: *I would rather go to extreme lengths than respect you*.").

303. *See id.* at 2273, 2289-90.

304. *See* Jody L. Herman, Andrew R. Flores & Kathryn K. O'Neill, *How Many Adults and Youth Identify as Transgender in the United States?*, WILLIAMS INST. 4 (June 2022), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Pop-Update-Jun-2022.pdf [https://perma.cc/R3VD-6L6K] ("Nationally, we estimate that 0.6% of those ages 13 and older identify as transgender in the United States, which is about 1.6 million individuals based on current U.S. population size. Among adults, 0.5% (over 1.3 million adults) identify as transgender. Among youth ages 13 to 17, 1.4% (about 300,000 youth) identify as transgender.").

between a teacher and students, workplace accommodations allowing employees to misgender their colleagues trigger analogous worries about maldistributed costs.

3. Diversity, Equity, and Inclusion

In the last few decades, companies across the country have embraced workplace efforts to promote diversity, equity, and inclusion (DEI). There is wide variation in the content of DEI programming, but many companies seek to foster equal opportunity at work by disseminating educational materials, conducting trainings and seminars, and requiring employees to acknowledge receipt and understanding of company policies.[305] In the wake of widespread protests following the killings of George Floyd and Breonna Taylor, many companies renewed their focus on — and commitment to — such programming.[306]

Some religious employees have objected to corporate DEI efforts as contrary to their sincerely held religious beliefs. For example, in *Buonanno v. AT&T Broadband, LLC*, an employee refused to sign an agreement to comply with the company's diversity policy, because he said doing so would be "approving, endorsing, or esteeming behavior or values that are repudiated by Scripture."[307] More recently, in *Rogers v. Compass Group USA, Inc.*, an employee requested a religious accommodation excusing her participation in the company's diversity programming — entitled "Operation Equity" — claiming that it is racist and therefore violates her religious beliefs.[308]

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305. *See* Chris Brummer & Leo E. Strine, Jr., *Duty and Diversity*, 75 VAND. L. REV. 1, 48-65 (2022) (discussing a range of DEI programming and objectives but foregrounding equal-opportunity goals). For further exploration of such efforts, see Jamillah Bowman Williams, *Breaking Down Bias: Legal Mandates vs. Corporate Interests*, 92 WASH. L. REV. 1473, 1478-80 (2017); and Veronica Root Martinez, *Reframing the DEI Case*, 46 SEATTLE U. L. REV. 399, 400-08 (2023). For a discussion of the wider universe of DEI trainings and their mixed results, see Monica L. Wang, Alexis Gomes, Marelis Rosa, Phillipe Copeland & Victor Jose Santana, *A Systematic Review of Diversity, Equity, and Inclusion and Antiracism Training Studies: Findings and Future Directions*, 14 TRANSLATIONAL BEHAV. MED. 156, 157 (2024), which explains that these "mixed findings may partially be attributed to the wide heterogeneity of training characteristics."

306. Brummer & Strine, *supra* note 305, at 4; *see* Gina-Gail S. Fletcher & H. Timothy Lovelace, Jr., *Corporate Racial Responsibility*, 124 COLUM. L. REV. 361, 363 (2024) (providing historical context for contemporary DEI efforts).

307. 313 F. Supp. 2d 1069, 1074-76 (D. Colo. 2004).

308. Complaint at 15-16, Rogers v. Compass Grp. USA, Inc., No. 23-cv-1347 (S.D. Cal. July 24, 2023).

In light of *Groff* and the Court's subsequent repudiation of affirmative-action programs in higher education,[309] these claims are sure to multiply.[310] Indeed, one prominent advocacy group has signaled that seeking religious accommodations from corporate DEI measures is now a part of their litigation strategy.[311] A senior litigator with the group, for example, remarked that "employees can now raise religious freedom complaints against mandated diversity, equity, and inclusion trainings if those trainings force an ideology on them or make them less able to live out their faith."[312] Another pointed to *Groff* as a new way to fight corporate DEI measures, stating that "[t]he same agenda that promises to increase diversity, equity and inclusion is wreaking havoc—and it's religious employees who are paying the price when they're treated like second-class citizens."[313]

As with all cases in this area of the law, details matter for courts seeking to resolve particular cases. For example, proper application of the nondisparagement principle will likely depend on *how* employees object to company policies. A religious objection that is expressed defiantly in front of an office full of coworkers communicates a more demeaning message than one expressed discreetly to a supervisor or human-resources coordinator. Similarly, an objection that targets particular protected groups for disapprobation diminishes the equal status of group members to a greater degree than an objection to inclusive practices more generally.

A recent EEOC adjudication illustrates how religious objections to particular aspects of DEI programming run a greater risk of disparagement. In *Barrett V. v. Vilsack*, an employee requested a religious accommodation that would excuse him from the portion of mandatory training that covered treatment of LGBTQ+

309. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 230 (2023).

310. The primary challenge to corporate DEI programs is likely to come from various "reverse racial discrimination" suits, alleging that they contravene Title VII or another antidiscrimination statute by favoring some employees on the basis of race. *See* GEORGE RUTHERGLEN, AFTER AFFIRMATIVE ACTION: THE FUTURE OF THE PAST IN EMPLOYMENT DISCRIMINATION LAW 139-57 (2024) (anticipating these developments). Nevertheless, religious-accommodation claims are an alternative—and largely complementary—method of resisting such programs.

311. Tyler O'Neil, *Christian Employees Can Challenge Mandated DEI Trainings on Religious Freedom Grounds, Lawyer Says*, DAILY SIGNAL (Mar. 11, 2024), https://www.dailysignal.com/2024/03/11/christian-employees-can-challenge-mandated-dei-trainings-religious-freedom-grounds-lawyer-says [https://perma.cc/TV98-G5QW].

312. *Id.*

313. Danielle Runyan, *First Liberty Attorney: DEI Is No Excuse to Openly Discriminate Against Religious Employees*, FIRST LIBERTY (Feb. 9, 2024), https://firstliberty.org/news/dei-is-no-excuse-to-discriminate [https://perma.cc/BU2M-3TSS].

persons.[314] He claimed that "[t]his subject matter contradicts [his] sincerely held religious beliefs," and he asked that he be allowed to "excuse himself during this portion of the training."[315] Although he was only asking to leave the room for a small percentage of the overall presentation, his exit would likely send a clear signal of disparagement to members of the LGBTQ+ community. And while EEOC did not explicitly rely on notions of disparagement in resolving the case, it did cite both *Groff* and *Peterson* in finding that the accommodation would be an undue hardship.[316]

But even when lodged discreetly and without targeting a particular group, demands for accommodation from workplace DEI measures will likely implicate the principle of proportionality. Here the basic intuition is that the costs of undermining equal opportunity in the workplace are severe, and they are overwhelmingly likely to fall squarely on the shoulders of employees who already suffer social disadvantages. Employers seeking to maintain an equitable and inclusive environment for all their workers, therefore, have a strong interest in implementing educational and training programs designed to achieve that result.[317] Doing so may help remove barriers to equal participation in the workplace and enable peaceful and productive relations among a diverse workforce. And so, even if DEI objections are religiously sincere, and compliance would impose a burden on religious employees, courts will often be justified in concluding that accommodating those objections would offend the proportionality principle.

There is a deeper point here. In contemporary American society, the workplace is a central site of social integration.[318] Whereas our voluntary associations often depend on shared identity and deep bonds of affection, the workplace brings together people from all walks of life and calls on them to build weaker ties to carry out cooperative endeavors.[319] As Cynthia L. Estlund memorably put the point, Americans may be "bowling alone," but they are "working together."[320] Whatever their flaws, corporate DEI programs are part of an effort to bridge divides among diverse people so that they can participate alongside one another

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314. Barrett V. v. Vilsack, EEOC Appeal No. 2019005478, at 1 (2024).

315. *Id.* at 2 (first alteration in original).

316. *Id.* at 10-11 (citing Groff v. DeJoy, 600 U.S. 447, 468-73 (2023); Peterson v. Hewlett-Packard Co, 358 F.3d 599, 606-08 (9th Cir. 2004)).

317. *See* Michael Z. Green, *(A) Woke Workplaces*, 2023 Wis. L. Rev. 811, 868 (discussing Starbucks's efforts to modify, implement, and communicate inclusive policies).

318. *See* Cynthia Estlund, Working Together: How Workplace Bonds Strengthen a Diverse Democracy 7-12 (2003).

319. *Id.* at 8-9, 180-81.

320. Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 Geo. L.J. 1, 5 (2000); *see also id.* at 1-2 (discussing the thesis in Robert D. Putnam, Bowling Alone: The Collapse and Revival of American Community 48-64 (2000)).

in the modern economy. The stakes of openly hostile resistance to such programming, then, may not be limited to social and political disagreement in particular workplaces. Instead, to the extent that religious objections make serious inroads on corporate DEI efforts, those objections may cut against broader visions of equal citizenship in a diverse polity.

One might object here that this conclusion gives short shrift to the liberty interests of religious employees. On this account, corporate DEI mandates force religiously devout individuals not merely to tolerate diversity in the workplace, but instead to express agreement with values that they reject. To put this objection another way, DEI programming not only aims to foster an inclusive workplace, but it also compels religious employees to endorse ideas they think evil or behavior they deem sinful.[321]

Once again, details matter—here the details about a particular employer's programming. If a company were to demand that religious employees swear an oath to the values of diversity, equity, and inclusion—that is, to affirm that they agree with or endorse the moral correctness of the company's policies—there could be a legitimate complaint that those employees are compelled to speak against conscience. Under these circumstances, the idea that DEI trainings "force an ideology," to borrow a phrase from anti-DEI advocates, might be plausible.[322]

But if policies and programming focus on cultivating an environment that affords equal opportunity to all members of a diverse workforce, then concerns about religious coercion would dissipate. The decision in *Barrett V.* emphasized this point, noting that "[t]he training did not require [the employee] to affirmatively profess support for values that are contrary to his religious beliefs."[323] Instead, the training was "designed to promote compliance with [equal employment opportunity] laws and with [the employer's] standards of conduct with respect to customers and coworkers."[324] The Commission drew the same distinction in a subsequent case, *Collin R. v. Vilsack*, explaining that the employer's training was meant to "enable [workers] to communicate with everyone in a respectful manner as required by [the employer's] policy and federal law," and not to "modify their religious beliefs or require[] them to attest to any such change in their beliefs."[325]

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321. *See* Buonanno v. AT&T Broadband, LLC, 313 F. Supp. 2d 1069, 1078 (D. Colo. 2004) (discussing testimony on the distinction between agreeing to comply with antidiscrimination policies and being compelled to affirm the moral value of coworker behavior).

322. *See supra* note 313 and accompanying text.

323. Barrett V. v. Vilsack, EEOC Appeal No. 2019005478, at 11 (2024).

324. *Id.*

325. Collin R. v. Vilsack, EEOC Appeal Nos. 2020000512, 2020000513, 2020000611, at 8 (2024).

By carefully designing DEI programming to respect the expressive interests of religious workers, companies might then activate the principle of reciprocity. Such efforts fulfill the legal and moral obligation to minimize, if not to eliminate, the burden of work rules on employee religion. But under the reciprocity principle, obligations run both ways. Courts might conclude that religious employees may fairly be asked to share in the responsibilities of maintaining basic conditions of equal opportunity. In doing so, those employees would satisfy the "mutuality of obligation" on which a diverse modern workplace depends.[326]

B. Judicial Skepticism

One potential objection to the argument for workplace disestablishment is that it rests on a set of legal judgments that have fallen out of favor among some federal judges. These judges may believe that the three limiting principles are embedded in cases that gave insufficient weight to worker free exercise while showing inordinate solicitude for third parties. In their courtrooms, principles of nondisparagement, reciprocity, and proportionality could encounter a chilly reception.

A recent episode in the Northern District of Texas bolsters this skeptical stance. *Carter v. Transport Workers Union of America Local 556* involved a dispute between Southwest Airlines and one of its flight attendants.[327] The flight attendant, a devout Christian who objected to her union's support for pro-choice causes, repeatedly sent harassing and denigrating messages—which included graphic pictures of aborted fetuses—to coworkers and the president of the union.[328] When she was fired by Southwest, she sued for religious discrimination and obtained a judgment in her favor.[329]

Southwest was ordered to communicate this result, along with a statement that it may not discriminate on the basis of religion, to its employees.[330] Unhappy with the text of that communication, Judge Starr issued another order chastising Southwest's in-house lawyers and requiring them to undergo religious-liberty training, to be conducted by the Alliance Defending Freedom, a conservative Christian advocacy group.[331] In doing so, he provided a vivid

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326. Chrysler Corp. v. Mann, 561 F.2d 1282, 1285 (8th Cir. 1977).

327. 353 F. Supp. 3d 556, 563 (N.D. Tex. 2019).

328. *Id.* at 563-65.

329. Carter v. Transp. Workers Union of Am., Loc. 556, 686 F. Supp. 3d 503, 510 (N.D. Tex. 2023).

330. Carter v. Transp. Workers Union of Am., Loc. 556, 644 F. Supp. 3d 315, 337 (N.D. Tex. 2022).

331. *Carter*, 686 F. Supp. 3d at 509-10. The Alliance Defending Freedom (ADF) advertises itself as "one of the leading Christian law firms" and offers employees "a job where you can glorify

illustration of what it looks like to elevate the free-exercise interests of a religious employee above concerns about religious impositions on others.

But the Southwest example is extreme and not necessarily representative of the federal judiciary's approach as a whole. Over the last five decades, federal judges across the political and ideological spectrum have taken a different tack.[332] In case after case, they have recognized that religious accommodations can impose serious burdens on others and insisted that the law requires some limits on those accommodations.[333] Today, judges who thoughtfully engage this body of jurisprudence will find support for a more balanced approach.

Indeed, the *Groff* Court seemed to anticipate that such balanced assessments would continue in the wake of its "clarifying" decision.[334] For example, it characterized EEOC's guidance—which reflects decades of case law that provided consistent and substantial religious accommodations while recognizing the significant interests of third parties[335]—as "sensible" and predicted it would likely undergo "little, if any, change."[336]

Early evidence suggests that lower courts remain sensitive to impositions on third parties. In *Chavez v. San Francisco Bay Area Rapid Transit District*, for example, the court rejected the argument that *Groff* requires vaccine exemptions as a matter of law.[337] Contrary to the religious employee's argument that *Groff* marked a radical change, the court observed that the case "did not, and indeed declined to, remake the law."[338] Even more forcefully, the *Chavez* court rejected the contention that employers may not consider health risks of religious accommodations because they are not "primarily financial," noting that the Court "did not limit undue hardship to a dollars-and-cents showing."[339] *Chavez* then

God while making a difference working for a leading Christian legal non-profit." *About*, ALL. DEFENDING FREEDOM, https://adflegal.org/about [https://perma.cc/G2T9-ZMRP]. ADF's website describes its continuing legal education training in the following manner: "Legal Academy seamlessly combines outstanding legal training with an unwavering commitment to Christian principles." *Legal Academy*, ALL. DEFENDING FREEDOM, https://adflegal.org/training/legal-academy [https://perma.cc/M8DC-ZTT7].

332. *See, e.g.*, EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307 (4th Cir. 2008) (Wilkinson, J.); Peterson v. Hewlett-Packard Co., 358 F.3d 599 (9th Cir. 2004) (Reinhardt, J.).

333. *See supra* Part II.

334. Groff v. DeJoy, 600 U.S. 447, 471 (2023).

335. *See* Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605 (2024); EEOC COMPLIANCE MANUAL ON RELIGIOUS DISCRIMINATION, *supra* note 209, § 12-IV; *see also supra* notes 76-80 and accompanying text (discussing balanced assessments in religious accommodation cases for nearly fifty years after *Hardison*).

336. *Groff*, 600 U.S. at 471.

337. 723 F. Supp. 3d 805, 820 (N.D. Cal. 2024).

338. *Id.*

339. *Id.* at 821.

pointed to "*several* post-*Groff* decisions" that shared this view of the enduring limits on workplace religious accommodations.[340]

To be sure, in some cases judges will conclude—as they have done since Title VII's inception—that particular employers have given insufficient weight to workers' free-exercise interests or overestimated the burdens an accommodation would impose on others.[341] But the central argument of this Article is that if one were to approach the body of considered judgments in this area of the law and ask whether there are principles that organize the doctrine in a coherent and attractive way, one would arrive at something like the principles of nondisparagement, reciprocity, and proportionality. Among a larger group of legal interpreters, these principles will remain helpful to lower-court judges who seek to achieve fair resolutions of disputes over religion at work.

C. Nonjudicial Strategies

To the extent that judicial skepticism is warranted, however, the remainder of this Part considers a suite of alternative strategies that might be available to proponents of workplace disestablishment. It highlights three institutional avenues outside the judiciary through which advocates might promote its limiting

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340. *Id.* (citing Bordeaux v. Lions Gate Ent., Inc., 703 F. Supp. 3d 1117, 1135 (C.D. Cal. 2023); Denison v. Bon Secours Charity Health Sys. Med. Grp., P.C., No. 22-CV-2929, 2023 WL 3467143, at *6 n.7 (S.D.N.Y May 15, 2023); Beickert v. N.Y.C. Dep't of Educ., No. 22-cv-5265, 2023 WL 6214236, at *5 (E.D.N.Y. Sept. 25, 2023)). Other courts have recognized *Groff*'s limited effect since *Chavez* was decided. *See, e.g.*, Trinh v. Shriners Hosps. for Child., No. 22-cv-01999, 2024 WL 4356501, at *3 (D. Or. Sept. 27, 2024) ("*Groff* did not change longstanding Title VII principles . . . . If *Groff* intended to fundamentally change Title VII case law in this area, it would have done so explicitly."); Hall v. Sheppard Pratt Health Sys., Inc., 749 F. Supp. 3d 532, 546 (D. Md. 2024) ("[T]he Supreme Court has expressly directed that *Groff* is intended to clarify—not change—the legal standard for undue hardship under Title VII . . . . [T]here is little if any daylight between the EEOC's pre-*Groff* guidance . . . and *Groff* itself."); MacDonald v. Or. Health & Sci. Univ., No. 22-cv-01942, 2024 WL 3316199, at *6 (D. Or. July 5, 2024) ("Following *Groff*, district courts have continued to consider both economic and non-economic costs when conducting the undue hardship analysis." (citing *Bordeaux*, 703 F. Supp. 3d at 1135; Kluge v. Brownsburg Cmty. Sch. Corp., 732 F. Supp. 3d 943, 966-67 (S.D. Ind. 2024))); Hampton-Davis v. Froedtert Health, Inc., No. 22-CV-1437, 2024 WL 3410700, at *7 (E.D. Wis. July 15, 2024) (explaining that undue hardship can be found as a matter of law "when the proposed accommodation would 'either cause or increase safety risks'" (quoting EEOC v. Oak-Rite Mfg. Corp., No. IP 99-1962-C H/G, 2001 WL 1168156, at *10 (S.D. Ind. Aug. 27, 2001))); White v. Univ. of Wash., No. 22-cv-01798, 2024 WL 1241063, at *8 (W.D. Wash. Mar. 22, 2024) ("The Ninth Circuit has long recognized valid safety concerns as establishing undue hardship." (citing Bhatia v. Chevron, U.S.A., Inc., 734 F.2d 1382, 1384 (9th Cir. 1984) (per curiam))). *But see* United States v. Cal. Dep't of Corr. & Rehab., 737 F. Supp. 3d 977, 998 (E.D. Cal. 2024) (deeming *Bhatia* "of little value" because it is a "pre-*Groff* case").

341. *See* EEOC Compliance Manual on Religious Discrimination, *supra* note 209, § 12-IV.C (discussing examples).

principles. By engaging with unions, businesses, and lawmakers around the country, they might contribute to a growing movement concerned with protecting basic rights in the workplace.

1. *Labor and Collective Bargaining*

A nonjudicial effort to promote disestablishment values at work might begin with unions. Consider, first, their institutional advantages over the federal judiciary in balancing diverse employee interests. In the workplace religion cases, judges grasped toward principles for fair cooperation, helping to police the terms of peaceful and productive relations among employees.[342] But they did so ex post—that is, judges sought to identify the proper allocation of burdens for religious accommodation after efforts to forestall workplace conflict had already failed.

Rather than attempt to reconstruct the proper balance of employee interests through judicial resolution of Title VII claims, unions might attempt to strike that balance ex ante. Through procedures of collective bargaining, unions can anticipate the inevitable conflicts that arise between religious employees and their coworkers. In doing so, they can set fair terms of workplace cooperation before it breaks down. Indeed, there is a long history of unions taking account of employees' diverse interests and forging workplace agreements in a spirit of solidarity and mutual compromise.[343]

Although some commentators worried that *Groff* would undermine such labor agreements,[344] it ended up preserving—or perhaps even bolstering—their value. In his opinion for the Court, Justice Alito explicitly confined his analysis to religious accommodations that do not involve seniority rights.[345] One reason for doing so is that Title VII contains a separate statutory provision exempting routine application of "a bona fide seniority or merit system" from its reach.[346]

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342. *See supra* Part II.

343. *See* James D. Nelson, Elizabeth Sepper & Kate Redburn, *How the Court Is Pitting Workers Against Each Other*, LPE PROJECT (Apr. 10, 2023), https://lpeproject.org/blog/how-the-court-is-pitting-workers-against-each-other [https://perma.cc/X529-JEE4]; Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1455 (1993).

344. *See, e.g.*, Nelson et al., *supra* note 343.

345. Groff v. DeJoy, 600 U.S. 447, 462 n.10 (2023) ("We do not understand Groff to challenge the continued vitality of *Hardison*'s core holding on its 'principal issue' (bracketing his disputes that the memorandum of understanding set forth a seniority system)." (quoting Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 83 n.14 (1977))).

346. 42 U.S.C. § 2000e-2(h) (2018); *see also* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 352 (1977) ("[T]he unmistakable purpose of § 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII.").

But a deeper justification for special treatment of seniority systems is that they emerge from a carefully designed process that balances a wide range of employee interests. This process, moreover, is part of a larger system of industrial government designed to encourage amicable relations among workers. Given that labor agreements are the product of a collective-bargaining process that aims to head off future conflicts through efforts at mutual compromise ex ante, there are good reasons to avoid judicial rebalancing of those interests after the fact.[347]

Indeed, in *Hardison*, the Court seemed to reach precisely this conclusion.[348] It described how the seniority system in place at TWA contained provisions enabling shift swaps for religious employees as well as section changes that could be coordinated by the union.[349] The Court then observed that "the [seniority] system itself represented a significant accommodation to the needs, both religious and secular, of all of TWA's employees."[350] In other words, the seniority system had already taken into account employee interests in free exercise and forged an agreement that delicately balanced those interests against the needs and interests of other employees.

To be sure, union power in the private sector is not what it once was. According to the most recent data from the Bureau of Labor Statistics, union density among private-sector workers stands at only 5.9%.[351] But there is emerging evidence that public sentiment toward unions is improving, which may in turn bolster nascent efforts to build collective power among workers.[352] For proponents of workplace disestablishment, this should be a welcome development. To the extent that disestablishment values are concerned with striking appropriate balances between worker interests in religious exercise and the many other interests that workers have, they may wish to join the cause of organized labor.

2. *Businesses and Cost-Spreading*

Proponents of workplace disestablishment should also direct their advocacy toward businesses. When faced with a legal mandate to accommodate religious employees, corporate managers may be tempted to offload the costs onto certain

347. *See* Nelson et al., *supra* note 343.

348. *Hardison*, 432 U.S. at 78.

349. *Id.*

350. *Id.*

351. *See* Press Release, Bureau of Lab. Stat., U.S. Dep't of Lab., Union Members—2024, at 1 (Jan. 28, 2025), https://www.bls.gov/news.release/pdf/union2.pdf [https://perma.cc/7EUT-UWXM]. Union density in the public sector is considerably higher, standing at 32.2%. *Id.*

352. *See* Diana S. Reddy, *After the Law of Apolitical Economy: Reclaiming the Normative Stakes of Labor Unions*, 132 YALE L.J. 1391, 1394 (2023) (discussing the rise in public support for unions over the last decade).

coworkers. Indeed, one longtime observer of workplace accommodation worries that this cost-shifting will be *Groff*'s immediate effect.[353] She anticipates that the Court's focus on business cost will lead managers to discount—or disregard—the burdens that religious accommodation places on coworkers.[354]

But such business cost-shifting would be shortsighted. Recall that the workplace religion cases emphasized that there is some special injury involved when the costs of a religious accommodation fall on a "small subset" of coworkers. The reasoning behind this judgment seemed to be that when a small subset is forced to bear the costs of their coworkers' religious practices, they can rightly object to being victims of religious imposition. The corollary to this point was that if those losses were more widely spread—perhaps among the entire workforce at a large company—then employees would have less reason to complain about religious imposition and more reason to accept their fair share of costs to support a basic liberty.[355]

Recognizing that cost-spreading may ease employee indignation and frustration, managers of diverse workforces should be persuaded to adopt such practices proactively. Maintaining employee morale is of paramount importance to any competent corporate manager. Indeed, businesses spend millions of dollars annually on programs designed to promote employee well-being and mitigate the kind of workplace strife that eats away at business value.[356] And as a general matter, businesses are often well situated to spread costs, either by distributing them broadly across the workforce or by passing costs along to customers through the price of goods or services sold.[357] Proponents of workplace disestablishment can make the business case to corporate managers that equitable distribution of burdens carries long-term benefits for their bottom lines.

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353. *See* Debbie Kaminer, *Religious Accommodation Ruling Raises More Workplace Questions*, BLOOMBERG L. (July 3, 2023, 4:00 AM EDT), https://news.bloomberglaw.com/us-law-week/religious-accommodation-ruling-raises-more-workplace-questions [https://perma.cc/NCL3-BBUX] ("[I]t's uncertain . . . whether coworkers will end up bearing the brunt of the increased religious accommodation requirement [in *Groff*]—possibly being forced to work on weekends and subject to derogatory speech that wouldn't be tolerated if it didn't originate from religious beliefs.").

354. *See* Bloomberg Law Podcast, *The Pitfalls of Accommodating Religious Employees*, BLOOMBERG L., at 04:56 (July 26, 2023), https://www.bloomberg.com/news/audio/2023-07-26/the-pitfalls-of-accommodating-religious-employees-podcast [https://perma.cc/TY2N-2J5M].

355. *See supra* Section II.C.2 (discussing the proportionality principle's distributional component).

356. *See* Jennifer Moss, *Creating a Happier Workplace Is Possible—And Worth It*, HARV. BUS. REV. (Nov. 7, 2023), https://hbr.org/2023/10/creating-a-happier-workplace-is-possible-and-worth-it [https://perma.cc/6FFQ-BS6F] (discussing various contemporary business efforts to keep employees happy).

357. *See* GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 50-54 (1970) (discussing enterprise liability in tort law).

To be sure, not every business is optimally situated to spread the costs of religious accommodations. As the *Groff* Court observed, whether a religious accommodation amounts to an undue hardship depends on the "nature, 'size and operating cost of [an] employer.'"[358] Larger businesses may have deeper pockets and so may be in a better position than small businesses to absorb the costs of accommodation. So, too, these businesses may have the ability to spread the costs of religious accommodation over a larger pool of employees. And businesses operating in markets with high margins may be able to cover accommodations' costs while maintaining profitability, whereas businesses operating in markets with low margins will not be similarly situated.

Nevertheless, there are countless employees working at large and prosperous businesses who could benefit from corporate efforts to spread the costs of religious accommodation. Indeed, as the economy grows more concentrated,[359] the number of employees who benefit from corporate cost-spreading is likely to rise. Large businesses that operate with significant market power may be in the best position to spread the costs of religious accommodations. When faced with a choice of whether to spread the costs of those accommodations or to pass the buck to particular coworkers, businesses should be encouraged to diffuse the burdens as widely as possible.

3. Lawmakers and the Workplace Constitution

Perhaps the most direct nonjudicial avenues for promoting workplace disestablishment run through the other branches of government. To begin with, there is a long history of Congress acting to promote constitutional values in the workplace.[360] During the New Deal, it primarily did so through labor law. For

358. Groff v. DeJoy, 600 U.S. 447, 470-71 (2023) (alteration in original) (quoting Brief for the Respondent, *supra* note 77, at 7).

359. For recent empirical work on industrial concentration, see David Autor, Christina Patterson & John Van Reenen, *Local and National Concentration Trends in Jobs and Sales: The Role of Structural Transformation* 1-3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 31130, 2023), https://www.nber.org/system/files/working_papers/w31130/w31130.pdf [https://perma.cc/A5J2-8V6P].

360. *See* Cynthia Estlund, *Rethinking Autocracy at Work*, 131 HARV. L. REV. 795, 807 (2018) (reviewing ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) (2017)) (discussing the "constitution of the workplace"); RUTHERGLEN, *supra* note 310, at 103 ("Title VII . . . impos[es] prohibitions against discrimination, derived mainly from the Constitution, on private employers."). For more on promotion of constitutional values outside the courts, see Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2306-42 (2021), which considers nonjudicial protections for free speech; and Laura M. Weinrib, *Civil Liberties Outside the Courts*, 2014 SUP. CT. REV. 297, 298, which discusses "extrajudicial approaches to advancing civil rights."

example, Section 1 of the National Labor Relations Act promotes employee associational rights, declaring a national policy to protect workers' "full freedom of association, self-organization, and designation of representatives of their own choosing."[361] When Congress turned away from labor legislation and toward direct regulation of employers, it continued to fill out the "workplace constitution."[362] The Civil Rights Act of 1964, for example, extends nondiscrimination norms to private employment, serving as an "equal protection clause for the workplace."[363]

As discussed throughout this Article, the religious-accommodation provision of Title VII also promotes a balance of constitutional values. If that balance comes to be threatened by a federal judiciary increasingly solicitous of free exercise and hostile to disestablishment, Congress could intervene to correct those developments. It might do so by codifying the principles that protect third parties from religious imposition. Or it might point to exemplary cases, directing future courts to adjudicate disputes consonant with the judgments contained therein.[364] In the current political environment, such intervention might seem unlikely.[365] Yet there are several instances in which Congress has overridden what it took to be judicial misunderstanding of the relevant values at stake in civil-rights legislation.[366]

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361. National Labor Relations Act § 1, 29 U.S.C. § 151 (2018).

362. *See generally* SOPHIA Z. LEE, THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT (2014) (describing the history of the "workplace constitution" from the 1930s to the 1980s).

363. Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 331 (2005).

364. This was part of the drafting strategy for the Religious Freedom Restoration Act of 1993. *See* Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 2(b)(1), 107 Stat. 1488, 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4) (seeking "to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972)"). If Congress were to become unsatisfied with judicial applications of the "undue hardship" standard after *Groff*, it could pass legislation directing courts to apply it consistent with EEOC's longstanding interpretation of *Hardison*. In the alternative, Congress could point to leading cases from lower courts discussed in this Article — for example, *Peterson*, *Chalmers*, *Chrysler*, *Wilson*, *Firestone*, and *Patterson* — as examples of proper judicial analysis in Title VII religious accommodation cases. For an illuminating discussion of this legislative strategy in other areas of employment-discrimination law, see RUTHERGLEN, *supra* note 310, at 45-52.

365. For an indication of the difficulties involved with legislating in this area, see Congress's repeated failure to pass the Workplace Religious Freedom Act. *E.g.*, Workplace Religious Freedom Act of 1994, H.R. 5233, 103d Cong.; Workplace Religious Freedom Act of 2013, S. 3686, 112th Cong.

366. *See, e.g.*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 2(2), 105 Stat. 1071, 1071 (codified as amended at 42 U.S.C. § 1981 note (Congressional Findings)) (responding to Wards Cove

But Congress is not the only legislative avenue for developing the workplace constitution. State governments across the country, for example, have acted to protect employee free speech, at least to some degree. The most extensive scholarly survey to date concludes that "[a]bout half of Americans live in jurisdictions that protect some private employee speech or political activity from employer retaliation."[367] Within the confines of federal law, state legislatures might also work to codify the principles of workplace disestablishment. They might do so by enacting laws addressing religious harassment by coworkers. They might specify that an employer's duty to accommodate depends on a religious employee's willingness to make reasonable compromises. Or they might impose a duty on employers, perhaps above a certain size, to spread the costs of religious accommodation across the workforce or to pass those costs along to customers. Too often, political organizers neglect subfederal avenues of reform. But in the context of workplace disestablishment, they do so at their peril.

Finally, advocates might engage federal and state administrative agencies to promote workplace disestablishment values. The most important player here is EEOC, which has broad authority to enforce federal employment-discrimination law, including the provisions relating to religion.[368] It also provides highly influential interpretive guidance on its view of the law and how employers can meet their compliance obligations.[369]

When issuing interpretive guidance, EEOC routinely solicits input from the public.[370] Similar procedures for public engagement exist at the state and local levels as well.[371] Through public comment, proponents of workplace disestablishment can make the case for principles that limit the manner and extent to which accommodation burdens others.

Packing Co. v. Atonio, 490 U.S. 642 (1989), among other cases); Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 2(1), 123 Stat. 5, 5 (codified as amended at 42 U.S.C. § 2000) (responding to Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. 618 (2007)). In her concurring opinion in *Groff*, Justice Sotomayor mentioned both of these legislative responses to Supreme Court decisions with which Congress disagreed. *See* Groff v. DeJoy, 600 U.S. 447, 475 n.2 (2023) (Sotomayor, J., concurring).

367. Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 Tex. Rev. L. & Pol. 295, 297 (2012).

368. *See* 42 U.S.C. § 2000e-4 (2018).

369. *See generally, e.g.*, EEOC Compliance Manual on Religious Discrimination, *supra* note 209 (providing guidance to employers on meeting their obligations under Title VII's prohibition against religious discrimination).

370. *See Proposed Guidance*, U.S. Equal Emp. Opportunity Comm'n, https://www.eeoc.gov/proposed-guidance [https://perma.cc/2ZM8-R353].

371. *See, e.g.*, Tex. Gov't Code Ann. § 2001.029(a) (West 2023) ("Before adopting a rule, a state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing.").

For example, in the coming years, EEOC may seek public comment on proposed revisions to its Compliance Manual on Religious Discrimination. Among other things, that document provides a detailed assessment of Title VII's reasonable-accommodation requirement.[372] Currently, the document contains a short section explaining how employers and employees should discuss religious-accommodation requests, focusing almost exclusively on information sharing.[373] And in a footnote, it endorses the "interactive process" utilized under the Americans with Disabilities Act to reach suitable religious accommodations in the workplace.[374]

Although information sharing is an important aspect of resolving religious-accommodation claims, proponents of workplace disestablishment should urge EEOC to go deeper. More specifically, the principle of reciprocity suggests that religious employees must go beyond explaining to an employer how work requirements conflict with their religious beliefs and what accommodation could alleviate that conflict. To fulfill their obligations of "bilateral cooperation," they must also be willing to bear some of the costs of that accommodation.[375] Whenever EEOC next proposes revisions to its Compliance Manual, advocates should encourage the agency to supplement its discussion of the duty to share information about a desired accommodation with one that emphasizes the duty to share its burdens.[376]

Proponents of workplace disestablishment recently missed an opportunity for this kind of advocacy. In 2023, EEOC proposed revisions to its enforcement guidance on harassment in the workplace.[377] Although that guidance addressed harassment based on a variety of protected characteristics, including race and sex, it contained several provisions that implicate employee religious

372. EEOC Compliance Manual on Religious Discrimination, *supra* note 209, § 12-IV.

373. *Id.* § 12-IV.A.2.

374. *Id.* § 12-IV.A.2 n.221. For a helpful discussion of the interactive process under Title VII, see Dallan F. Flake, *Interactive Religious Accommodations*, 71 Ala. L. Rev. 67, 80-89 (2019).

375. *See supra* Section II.B.

376. The discussion in the current version of the Compliance Manual contains one sentence along these lines. It states, "[E]ven if the employer does not grant the employee's preferred accommodation but instead provides a reasonable alternative accommodation, the employee must cooperate by attempting to meet his religious needs through the employer's proposed accommodation if possible." EEOC Compliance Manual on Religious Discrimination, *supra* note 209, § 12-IV.A.2 (citing *Ansonia*, *Brener*, and *Chrysler*). As explored in Section II.B, *supra*, much more could be said in the EEOC guidance about the meaning of "bilateral cooperation" and the support it finds in the principle of reciprocity.

377. *See* U.S. Equal Emp. Opportunity Comm'n, EEOC-2023-0005-0001, Proposed Enforcement Guidance on Harassment in the Workplace (2023).

expression.[378] When opened for public comment, religious organizations blitzed the Commission with complaints about its potential impact on employee free exercise.[379] Various civil-rights groups submitted comments of their own, mostly aimed at commending the Commission for its sensitivity to issues of workplace harassment or proposing technical revisions.[380]

Absent from the comment file, however, were arguments about the deeper principles that govern religion at work. As this Article reveals, those principles emerged from decades of real-world judgments about the proper balance between worker free exercise and concern for the interests of third parties. Going forward, proponents of workplace disestablishment can—and should—use the public-comment process to articulate and defend its principles.

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Workplace-disestablishment principles may encounter some judicial skepticism in the coming years, but that is no reason to abandon them. After *Groff*, conscientious judges need to resolve some of the most explosive workplace disputes. For them, principles of nondisparagement, reciprocity, and proportionality will prove powerful. But even when principled adjudication is not in the cards, proponents of workplace disestablishment have a variety of institutional avenues to advance their arguments. By engaging with unions, businesses, and lawmakers around the country, they might counter any judicial erosion of disestablishment at work.

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378. *See, e.g.*, *id.* at 9-10 ("Sex-based harassment also includes harassment based on . . . a woman's reproductive decisions, such as decisions about contraception or abortion." (footnotes omitted)); *id.* at 10-11 ("Sex-based discrimination includes . . . intentional and repeated use of a name or pronoun inconsistent with the individual's gender identity (misgendering)." (footnotes omitted)).

379. *See, e.g.*, Off. of Gen. Couns. of U.S. Conf. of Cath. Bishops, Comment Letter on Proposed Enforcement Guidance on Harassment in the Workplace 1-4 (Oct. 27, 2023), https://www.usccb.org/sites/default/files/about/general-counsel/rulemaking/upload/2023.10.27.final_.eeoc_.comments.usccb_.pdf [https://perma.cc/M8BX-F8FY] (objecting to guidance on employee speech related to abortion, contraception, and misgendering). In total, EEOC received more than 38,000 comments on this proposed guidance between October 5 and November 6 of 2023. *See* U.S. Equal Emp. Opportunity Comm'n, *Proposed Enforcement Guidance on Harassment in the Workplace*, REGULATIONS.GOV, https://www.regulations.gov/document/EEOC-2023-0005-0001/comment [https://perma.cc/TU3A-TRA9].

380. *See, e.g.*, Lambda Legal, Comment Letter on Proposed Enforcement Guidance on Harassment in the Workplace 1 (Nov. 1, 2023), https://downloads.regulations.gov/EEOC-2023-0005-37156/attachment_1.pdf[https://perma.cc/6QBW-EXMV].

CONCLUSION

For nearly fifty years, disestablishment values influenced the development of religious-accommodation doctrine under Title VII. During that time, courts routinely balanced worker free exercise against burdens on third parties. *Groff v. DeJoy* threatens to upend this careful settlement, leaving courts in need of guidance on how to resolve a new wave of culturally contentious workplace disputes. But this Article excavates and articulates a set of deep principles that govern employee religious accommodations. As caseloads mount, judges can rely on these principles to navigate the next generation of religious conflict at work. Outside the courts, ideas of workplace disestablishment can anchor ongoing efforts to secure basic rights for religious and nonreligious workers alike.