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STUDENT NOTES

THE “MORAL HAZARDS” OF TITLE VII’S RELIGIOUS ACCOMMODATION DOCTRINE

STEPHEN GEE*

INTRODUCTION

Legal commentators have been pushing for a stronger employer duty to accommodate religious beliefs and practices vis-à-vis Title VII for quite some time.¹ In particular, they have been pushing for that duty to be on par with an employer’s duty to its disabled workers under Title I of the Americans with Disability Act (“ADA”).² However, elevating the duty required under Title VII will have serious consequences by creating a “moral hazard” for employees to “pick and choose” a religion to avoid compliance with neutral employer rules. Among many other problems, this heightened duty will most importantly raise constitutional issues, notably the Establishment Clause.³

Commentators positing that Title VII standards should be in line with the ADA standards have put forth thorough and well-articulated arguments on the ideas preventing the Title VII standards from raising, such as neutrality, constitutional concerns, and the Court’s consistent opinion.⁴ However, the literature on this subject is one-sided and in dire need of a devil’s advocate arguing why Title VII standards for reasonable accommodation and undue hardship should not be elevated to the ADA’s, and further, why the current standards should not be elevated at all.

Part I of this article chronicles the background of Title VII and the ADA, along with introducing any other important considerations to the issue at hand. Part II addresses a recent Seventh Circuit ADA accommoda-

* Chicago-Kent College of Law, Class of 2014. A tremendous amount of thanks is owed to Professor Carolyn Shapiro, whose guidance and support helped ensure my voice came out in this note.

1. See, e.g., Keith S. Blair, *Better Disabled Than Devout? Why Title VII Has Failed to Provide Adequate Accommodations Against Workplace Religious Discrimination*, 63 ARK. L. REV. 515, 531 (2010).

2. 42 U.S.C. §§ 12111-12117 (West, Westlaw through P.L. 113-92 (excluding P.L. 113-76, 113-79, and 113-89)) (effective Jan. 1, 2009).

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

4. See, e.g., Blair, *supra* note 1, at 531.

tion decision, which renders nearly all arguments that Title VII and ADA standards should move together whenever one of them is altered highly questionable, while also quickly noting how Title VII decisions are rigid in their application of rules. Part III, the core of this article, posits why Title VII should not be heightened to the ADA standards represented by the proposed Workplace Religious Freedom Act (“WRFA”),⁵ as well as how no religious accommodation should be able to trump an employer’s strictly enforced or provable neutral rule or law of general applicability. Finally, Part V proposes how aspects of the ADA’s accommodation process and “best practices” seen in certain Title VII cases can alleviate commentators’ concerns.

I. BACKGROUND

In order to understand the issues pertaining to Title VII religious accommodation claims and ADA accommodation claims, one needs a background on both statutes’ larger schemes and purposes, as well as what specific provisions within the statutes are important. Furthermore, it is important to understand the non-statutory concerns and issues raised about accommodations in regard to constitutional issues, choice issues, and so forth. Finally, summarizing the pertinent Supreme Court cases for both will help one understand the subject matter herein.

A. Title VII of the Civil Rights Act of 1964

Congress enacted the Civil Rights Act of 1964 mainly to eradicate racial discrimination within the United States.⁶ The Act contained multiple titles to address discrimination in various settings.⁷ Title VII of the Act is aimed at discrimination within the workplace.⁸ Most importantly, Title VII holds that it is unlawful “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.”⁹ An “employer” under Title VII is essentially anything or anyone

5. S. 4046, 111th Cong. (2010); see Nantiya Ruan, *Accommodating Respectful Religious Expression in the Workplace*, 92 MARQ. L. REV. 1, 3 (2008).

6. Blair, *supra* note 1, at 521.

7. See 42 U.S.C. §§ 2000a-2000h-6 (2012).

8. *Id.* §§ 2000e-2000e-17.

9. *Id.* § 2000e-2(a)(1). Title VII also applies to employment agencies and labor organizations in similar ways, but that is beyond the scope of this note. *Id.* § 2000e-2(b)-(c).

engaged in commerce with at least fifteen employees.¹⁰ Of note, Title VII includes a provision that affords employers a defense for intentionally discriminating based on religion, national origin, or sex, if there is a bona fide reason, such as a nondiscriminatory seniority system.¹¹

Racial discrimination was the impetus for passing the Act and thus little, if any, legislative history was available and reliable on what originally constituted religious discrimination.¹² Instead, the Equal Employment Opportunity Commission ("EEOC") was initially the agency charged with providing guidelines to employers and the courts on religious accommodations.¹³ The general view with regard to religion and the workplace has been that Title VII seeks to prevent an employee from choosing between his religion and his job if he does not have to.¹⁴

Where an employer has taken an adverse employment action solely based on an applicant or employee's religion on its face, Title VII religious discrimination claims typically have not been "status-based".¹⁵ Instead, most religious discrimination claims arise out of a conflict between an employee's religious belief or practice and an employer's workplace expectations.¹⁶ In other words, employers were sued for not "accommodating" an employee's religion. However, Title VII did not initially place the burden of accommodating on employers. This was made clear in *Dewey v. Reynolds Metals Co.* where the court held that:

Nowhere in the legislative history of the Act do we find any Congressional intent to coerce or compel one person . . . to accommodate the religious beliefs of another. The requirement of [religious]

10. *Id.* § 2000e(b). Additionally, one should note that the definition of an employee under § 2000e(f) has been an area of dispute with regard to meeting the employer requirement. *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202 (1997). Also, please note that this note will not touch upon non-secular employers (i.e. "churches") as they are subject to certain exemptions that are beyond the scope and focus of this note. 42 U.S.C. § 2000e-1(a).

11. *Id.* § 2000e-2(h). Additionally, religious institutions are accorded an exemption from religious discrimination claims as to all its requisite human resources decisions. *Id.* § 2000e-1(a). Furthermore, religious institutions have a "ministerial exception" which exempts any and all discrimination claims related to its ministers. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706-07 (2012).

12. *See* H.R. REP. NO. 88-914 (1964).

13. *See* 42 U.S.C. § 2000e-5. The guidelines were last substantively updated in 1980 and can be found at 29 C.F.R. §§ 1605.1-3 (2012).

14. *See, e.g.,* Alan D. Schuchman, Note, *The Holy and the Handicapped: An Examination of the Different Applications of the Reasonable-Accommodation Clauses in Title VII and the ADA*, 73 IND. L.J. 745, 757 (1998).

15. Blair, *supra* note 1, at 546.

16. *Id.*

accommodation . . . is contained only in the EEOC Regulations, which in our judgment are not consistent with the Act.¹⁷

In response to *Dewey*, Senator Jennings Randolph successfully pushed forth an amendment to Title VII in 1972, which burdens employers with accommodating an employee's religious beliefs or practices.¹⁸ As a result, Congress amended the definition of "religion" under Title VII to make an employer also liable for religious discrimination from failure to accommodate "unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."¹⁹

In order for an employee to bring a Title VII religious discrimination claim based on a failure to accommodate, he must establish a prima facie case of religious discrimination by showing:

(1) [H]e had a bona fide religious belief, the practice of which conflicted with an employment duty; (2) he informed his employer of the belief and conflict; and (3) the employer threatened him with or subjected him to discriminatory treatment, including discharge, because of his inability to fulfill the job requirements.²⁰

With regard to the bona fide religious belief, the courts have made a compromise in handling Title VII religious accommodation cases by not inquiring into the validity of a plaintiff's alleged religious bona fide belief or practice in any significant way, and instead focusing on the reasonableness of the accommodation.²¹ If the plaintiff is successful, the burden then shifts to the employer to prove he "initiated good faith efforts to reasonably accommodate the employee's religious practices."²² If the employer's ef-

17. 429 F.2d 324, 334 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971), *superseded by statute*, 42 U.S.C. § 2000e(j) (2006), *as recognized in* *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1087 (6th Cir. 1987).

18. *See* Equal Employment Opportunity Act of 1972, § 2(7), 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e(j) (2012)).

19. 42 U.S.C. § 2000e(j).

20. *E.g.*, *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1438 (9th Cir. 1993).

21. *See, e.g.*, *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004) (ruling whether plaintiff's membership to the Church of Body Modification was a bona fide religious practice protected by Title VII was not necessary since defendant established reasonable accommodations would have imposed undue hardship); Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317, 361-62 (1997). Cloutier's church is all online and formed in 1999, has roughly 1000 members, and its mission statement is "to grow as individuals through body modification and its teachings, to promote growth in mind, body and spirit, and to be confident role models in learning, teaching, and displaying body modification." *Cloutier*, 390 F.3d at 129; *see Mission Statement*, CHURCH OF BODY MODIFICATION, <http://uscobm.com/mission-statement/> (last visited May 2, 2014).

22. *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 606 (9th Cir. 2004); *see* Sarah Abigail Wolkinson, Comment, *A Critical Historical and Legal Reappraisal of Bhatia v. Chevron U.S.A., Inc.: Judicial Emasculation of the Duty of Accommodation*, 12 U. PA. J. BUS. L. 1185, 1190-91 (2010).

forts do not result in an accommodation that the employee feels eliminates the conflict, then the employer must prove that reasonably accommodating the employee would cause an undue hardship.²³ If the employer successfully proves undue hardship, then he is excused from liability.²⁴

Since the 1972 amendment, Congress has not enacted legislation further elaborating upon what constitutes a “reasonable accommodation” and “undue hardship,” despite numerous other amendments made to Title VII.²⁵ Instead, the Court and EEOC have had to determine what each means. Despite no clear definition from the Court on what a “reasonable accommodation” is, the Court has held that once an employer proves he “has offered a reasonable accommodation to the employee” which resolves the religious conflict, then he has fulfilled his duty.²⁶ Furthermore, despite EEOC objections,²⁷ an employer does not need to offer multiple reasonable accommodations or accept a proposed accommodation from the employee if the employer has already offered a reasonable accommodation.²⁸ Finally, in relation to defining reasonable accommodation, there is some disagreement between courts on whether the accommodation must “eliminate” or “resolve” the religious conflict.²⁹

Unlike reasonable accommodation, the Court has defined “undue hardship” as being when an employer would “bear more than a *de minimis* cost” in order to reasonably accommodate an employee’s religion.³⁰ However, this definition left very little guidance to the lower courts. The various federal circuit courts have articulated a variety of different standards.³¹ However, the biggest disagreement among the circuit courts is whether any standard can be proven with a factual hypothetical posed by an employer or whether actual factual evidence is required.³²

23. Wolkinson, *supra* note 22, at 1190.

24. *Id.*

25. Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended by 42 U.S.C. § 2000e(k) (2012)); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended by 42 U.S.C. §§ 2000e-2000e-5, 2000e-16 (2012)); Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5, 7 (codified as amended by 42 U.S.C. §§ 2000e-5, 2000e-16 (2012)).

26. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 69 (1986).

27. *See* 29 C.F.R. § 1605.2(c) (2012).

28. *Philbrook*, 479 U.S. at 69.

29. *See id.* at 69-70.

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

31. Wolkinson, *supra* note 22, at 1191-92.

32. *Id.*

According to many commentators, failure to accommodate claims arise in three different ways that represent the general scope of the issue:³³ employer scheduling, whether it is for a certain day of the week,³⁴ certain days during the year,³⁵ or daily prayer conflicts;³⁶ employer grooming requirements, whether for safety³⁷, employer's public image³⁸, or uniformity;³⁹ and religious attire conflicts similar to the grooming ones.⁴⁰ Alternatively, courts analyzed the scope of the issue based on whether the timing of the employer's implementation of the conflicting facially neutral policy was before⁴¹ or after⁴² the plaintiff-employee started working for the employer.⁴³

33. Not included, or particularly relevant in the three types, is a special case that only arises when an employer becomes unionized and an employee alleges their faith opposes paying union dues. *Yott v. N. Am. Rockwell Corp.*, 602 F.2d 904 (9th Cir. 1979). Initially, the most complicated of the types due to Establishment Clause and contract rights issues, courts have generally come to agree the only accommodation available is if the employee pays the same amount of dues to a charity that is chosen by the employee, the union, or both. *See id.* at 906; *Burns v. S. Pac. Transp. Co.*, 589 F.2d 403 (9th Cir. 1978); *see also Reed v. Intl. Union, United Auto., Aerospace & Agr. Implement Workers of Am.*, 569 F.3d 576 (6th Cir. 2009) (holding payment of dues to one of three charitable organizations was a reasonable accommodation of religious objector's faith).

34. *Opuku-Boateng v. California*, 95 F.3d 1461 (9th Cir. 1996).

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

36. *See Elmenayer v. ABF Freight System, Inc.*, 318 F.3d 130 (2d Cir. 2003); *Knight v. Conn. Dept. of Pub. Health*, 275 F.3d 156 (2d Cir. 2001); *see also Berry v. Dept. of Soc. Servs.*, 447 F.3d 642 (9th Cir. 2006).

37. *See, e.g., Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382 (9th Cir. 1984) (holding Sikh employee's beard would compromise OSHA safety standards if allowed to maintain role as machinist surrounded by toxic gases).

38. *EEOC v. Sambo's of Georgia, Inc.*, 530 F. Supp. 86 (N.D. Ga. 1981) (holding employer's conditioning Sikh applicant's employment on shaving his beard was valid as clean shaven appearance was a bona fide qualification of a manager in family restaurant).

39. *See, e.g., Weaver v. Henderson*, 984 F.2d 11 (1st Cir. 1993).

40. *See Steven D. Jamar, Accommodating Religion at Work: A Principled Approach to Title VII and Religious Freedom*, 40 N.Y.L. SCH. L. REV. 719, 746 (1996).

41. *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) (analyzing a seniority system in a collective bargaining agreement).

42. *See Brown v. F.L. Roberts & Co., Inc.*, 419 F. Supp. 2d 7, 15-16 (D. Mass. 2006) (grooming policy).

43. *See Piraino v. Intl. Orientation Res., Inc.*, 84 F.3d 270, 274-76 (7th Cir. 1996). In some disparate treatment claims, plaintiffs can present circumstantial evidence of an employer's "suspicious timing" of implementing a new employment policy, which if proven, the defendant-employer must rebut. This "suspicious timing" evidence is the basis for a potential new burden upon employers in accommodation cases where the conflicting policy is implemented after the plaintiff-employee had been working for the employer for some time. As to when the policy is implemented before, a unique consideration of whether the unclean hands defense, which in employment contexts includes lying or withholding important information on a resume or in an interview, should be allowed narrowly only for an employer in a failure to accommodate suit. *See McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 360-61 (1995). With regards to this note, I do not address blatant purposeful lies, but only an applicant who withholds important information. An employer would be ill advised to ask or require someone to divulge certain personal information, such as religious belief during an interview or in a job posting. *See Best Practice for Eradicating Religious Discrimination in the Workplace*, EEOC, http://www.eeoc.gov/policy/docs/best_practices_religion.html (last modified July 23, 2008). However,

B. The ADA

Congress passed the ADA in 1990 largely in order to counteract disability discrimination in private-sector employment by expounding upon the foundations of the prior Rehabilitation Act.⁴⁴ In the ADA's findings section, Congress made clear that until 1990, disabled individuals had no legal recourse for discrimination based on their disability, unlike religious discrimination, and as a result of disability discrimination, the United States had spent "billions of dollars in unnecessary expenses resulting from dependency and non-productivity."⁴⁵ The ADA covers discrimination in various settings, but Title I of the ADA is relevant to disability discrimination in the workplace.⁴⁶ As such, it is unlawful for any covered entity⁴⁷ to "discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."⁴⁸

Of the different types of ADA discrimination claims, an employee seeking a "failure to accommodate a disability" claim must establish:

- (1) [He] is a person with a disability under the meaning of the ADA; (2) an employer covered by the statute had notice of his disability; (3) with

asking whether one can work on certain days and at certain times is perfectly legal as long as the questions are pertinent to the job. Therefore, if an employee lies or errs in response to one of these questions and is subsequently hired and then informs the employer of the lie or error, an employer is placed in a difficult position that may not be easily remedied. *See Crider v. Univ. of Tenn., Knoxville*, No. 11-5511, 2012 WL 3002756, at *8-10 (6th Cir. July 23, 2012) (McKeague, Cir. J., dissenting). The inquiry is again beyond the scope of this article, but under a failure to accommodate situation, if during discharge the employer lacks the discriminatory animus that has been seen in other cases, it may follow that upon hiring the misleading employee, he bears all the burden and risk. In this scenario, the employee has everything to gain with the only risk being terminated from a position she knew she could not fulfill at the outset. *See id.*

44. 42 U.S.C. §§ 12101-12213 (2009); S. Elizabeth Wilborn Malloy, *Something Borrowed, Something Blue: Why Disability Law Claims Are Different*, 33 CONN. L. REV. 603, 603 n.1 (2001); Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1121 (2010).

45. 42 U.S.C. § 12101(a); *see Vande Zande v. Wis. Dept. of Admin.*, 44 F.3d 538, 543 (7th Cir. 1995) (finding ADA is meant to benefit the economy by ensuring accommodation costs employer's bear are outweighed by productivity gains from disabled employees).

46. §§ 12111-12117.

47. § 12111(2). The definition for employer is in the same section as well. *Id.*

48. § 12112(a). For the purposes of this article, an employee-plaintiff is assumed to have a "disability," § 12102(1), § 12102(2) ("Major Life Activities"), § 12102(3) (regarded as having such an impairment), § 12102(4) (Rules of construction regarding the definition of disability), and be a "qualified individual," § 12111(8), under the ADA in order to fairly compare Title VII to the ADA. Examples of disabilities that are covered include diseases such as diabetes, *Rohr v. Salt River Project Agric. Imp. & Power Dist.*, 555 F.3d 850 (9th Cir. 2009), and physical limitations resulting from injury on the job or from birth, among others. *See U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 391 (2002) (back pain); *EEOC v. United Airlines, Inc.*, 693 F.3d 760, 762 (7th Cir. 2012) (injured arm). Finally, it should be noted the EEOC provides administrative guidelines on compliance with the ADA, as well as enforcing the ADA. § 12117(a); § 12116.

reasonable accommodation, plaintiff could perform the essential functions of the job at issue; and (4) the employer has refused to make such accommodations.⁴⁹

Notice to an employer results in the employer learning the employee has a disability and wants an accommodation.⁵⁰ The notice does not need to be explicit and does not even need to come from the employee himself. Determining when and how the employer has the minimal requisite notice typically is an easy inquiry of what information was available to the employer, whether it be the employee's statements, various records such as job performance evaluation, or simply a third party bringing a concern about the employee to the manager's attention.⁵¹

Reasonable accommodation is not statutorily defined; instead, the statute simply gives a few examples of accommodations:

(A) making existing facilities used by employees readily accessible . . . and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.⁵²

Once notice is given, the "interactive process" required by the ADA becomes crucial in determining a reasonable accommodation.⁵³ If notice has been established, and if any of the parties refuses to engage in good faith bargaining over the accommodation, the opposite party is entitled to judgment as a matter of law.⁵⁴ An employee is not entitled to their preferred accommodation, only one that is reasonable and allows him to work comfortably and on par with other non-disabled workers.⁵⁵ While the employee lacks the right to choose his accommodation, he does have the right

49. *McBride v. BIC Consumer Prods. Mfg. Co.*, 583 F.3d 92, 97 (2d Cir. 2009); *see* § 12112(b)(5)(A)-(B); *Hoppe v. Lewis Univ.*, 692 F.3d 833, 838-39 (7th Cir. 2012).

50. *See Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 313 (3d Cir. 1999) ("stating that [w]hat matters under the ADA are not formalisms about the manner of the request, but whether the employee or a representative for the employee provides the employer with enough information that, under the circumstances, the employer can be fairly said to know of both the disability and desire for an accommodation.").

51. John E. Matejkovic & Margaret E. Matejkovic, *What Is Reasonable Accommodation Under the ADA? Not an Easy Answer; Rather A Plethora of Questions*, 28 *MISS. C. L. REV.* 67, 77-78 (2009).

52. § 12111(9).

53. 29 C.F.R. § 1630.2(o) (2012).

54. *See Steffes v. Stepan Co.*, 144 F.3d 1070 (7th Cir. 1998) (holding employer was entitled to summary judgment since employee failed to provide employer with requested details about disability); *EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 806 (7th Cir. 2005) (holding that "an employer cannot sit behind a closed door and reject the employee's requests for accommodation without explaining why the requests have been rejected or offering alternatives.").

55. *Hoppe v. Lewis Univ.*, 692 F.3d 833, 838 (7th Cir. 2012).

to an explanation as to why his proposed accommodation is not reasonable.⁵⁶ Finally, the EEOC has created regulations that the employer must consider with regard to the accommodation, which ensures the fulfillment of the “essential job function.”⁵⁷

Outside of facially valid, bad-faith assertions, whether an employer failed to accommodate depends upon whether the reasonable accommodation required would impose an undue hardship upon an employer.⁵⁸ Undue hardship is defined as “requiring significant difficulty or expense” on the employer based on factors laid out in the statute, such as the accommodation’s cost, size of the employer, and industry the employer is in.⁵⁹

Unlike Title VII, the ADA does not contain an explicit provision exempting liability on the basis of a seniority provision or similar neutral workplace rules of general applicability akin to a collective-bargaining agreement.⁶⁰ With regard to hiring practices, employers can only request information about or test certain physical and mental capacities if the inquiry is requested of all applicants and is essential to the job-related functions.⁶¹

C. Other Considerations for Religious Discrimination

While discrimination based on religion is similar to race, color, national origin, sex and disability, religion involves unique considerations and differs from the others in a few ways. All of the considerations essentially involve a balancing of the employee and employer interests.⁶² Though status claims can arise with all of bases for discrimination, religion is the least likely to be provable since most religious discrimination claims involve minority faiths with small numbers which, sans direct evidence, are hard to prove by implication.⁶³ The right to reasonable accommodation is only afforded to religion and disability.⁶⁴

56. *See Sears*, 417 F.3d at 807.

57. *Hoppe*, 692 F.3d at 838 (citing 29 C.F.R. § 1630.2(n)(3) (2012)).

58. *See* 42 U.S.C. § 12111(10) (2009).

59. *Id.*; *see* 29 C.F.R. § 1630.15(d) (2011).

60. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 420 (2002) (Souter, J., dissenting) (stating that “[n]othing in the ADA insulates seniority rules from the ‘reasonable accommodation’ requirement, in marked contrast to Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967, each of which has an explicit protection for seniority.”).

61. 42 U.S.C. § 12112(d) (2009) (relating to medical examinations and inquiries); *see* 29 C.F.R. § 1630.15(b)-(c) (“requirement is job-related and consistent with business necessity”).

62. *See Engle*, *supra* note 21, at 361; § 12111(9)-(10).

63. *See Jamar*, *supra* note 40, at 720-21.

64. *Blair*, *supra* note 1, at 531.

The extent of the accommodation and standards applied to disability is more burdensome on employers than religion under Title VII. Why the ADA is more burdensome than Title VII has been the subject of many academic articles that revolve around the topics of choice,⁶⁵ neutrality,⁶⁶ constitutional issues,⁶⁷ meaning of accommodation in both contexts,⁶⁸ and religion in general.⁶⁹

The Establishment Clause, Free Exercise Clause, and Section 5 of the Fourteenth Amendment with respect to state employers, are acknowledged as potential barriers to further burdening employers under Title VII akin to the ADA. Many commentators argue the current Title VII accommodations already are preferential, Free Exercise is important enough to negate any Establishment clause issues, or both.⁷⁰

Commentators on Heightened Title VII standards admit one's religion is a choice, unlike disability.⁷¹ However, once someone makes their choice, scholars feel it is a permanent part of how people identify themselves and, as such, is a moot difference between disability and religious accommodations analysis.⁷²

D. Relevant Supreme Court Holdings on Reasonable Accommodation

In light of the academically written articles, an understanding of the three seminal Supreme Court cases on reasonable accommodation for both the ADA and Title VII is necessary.

In *Trans World Airlines v. Hardison*, Plaintiff Hardison worked in an around-the-clock Trans World Airlines ("TWA") maintenance department and was a follower of a faith that observed the Sabbath by not working from sunset on Friday until sunset on Saturday.⁷³ When Hardison decided to transfer buildings within the facility, he became a junior employee subject to a seniority list. This designation meant he would be forced to violate the Sabbath when other employees went on vacation.⁷⁴ Despite the union,

65. *Id.* at 546-48.

66. See Engle, *supra* note 21, at 358-59.

67. See Robert A. Sedler, *Essay: The Protection of Religious Freedom Under the American Constitution*, 53 WAYNE L. REV. 817, 817-20 (2007).

68. See Malloy, *supra* note 44, at 624-25.

69. See Blair, *supra* note 1, at 515.

70. *Id.* at 548-55; Schuchman, *supra* note 14, at 757-59.

71. See, e.g., Blair, *supra* note 1, at 546-47.

72. See, e.g., *id.* at 547 ("That choice may be a conscious choice made because of attending worship services or some life-changing experience. The decision can be a choice that is made over time, as when a person is born into a particular religion. In any event, a choice is ultimately made.")

73. 432 U.S. 63, 67 (1977).

74. *Id.* at 68.

TWA, and Hardison's best efforts, no deal was reached, and Hardison was subsequently terminated for insubordination and filed his claim.⁷⁵

Hardison's failure to accommodate claim reached the Supreme Court in 1977. The Court held for the employer and union since Title VII was meant to eliminate discrimination in employment. Additionally, in light of the 1972 amendment that defined religion under Title VII, "[i]t would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others."⁷⁶ Regarding the 1972 amendment by Senator Randolph and its legislative history, the Court found nothing in it that would "require an employer to discriminate against some employees in order to enable others to observe their Sabbath."⁷⁷ The Court found anything more than a *de minimis* cost would constitute an undue hardship.⁷⁸

In *Ansonia Board of Education v. Philbrook*, a unionized teacher with the same faith as Hardison, brought a claim against his school for not accepting either of his proposals for accommodating his religion.⁷⁹ The Court ruled for the school because it had offered a reasonable accommodation of allowing unpaid leave for days the teacher needed to take off for religious reasons.⁸⁰ In reviewing its interpretation of § 701(j)⁸¹ in *Hardison*, the Court renewed its holding that the 1972 amendment and legislative history "is of little help in defining the employer's accommodation obligation."⁸²

75. For all intents and purposes, the union, TWA, and Hardison, came to an impasse. The union would not allow the violation of seniority provisions for a *forced* job swap of an unwilling employee without allowing other employees to bid on the swap to get overtime pay, and TWA was not willing to accept a four day a week proposal since the department Hardison worked in always required being fully staffed. *Id.* at 68-69.

76. *Id.* at 81.

77. *Id.* at 85.

78. *Id.* at 84. Since the decision in 1977, Congress has yet to successfully amend Title VII to overcome the pivotal ruling that a religious reasonable accommodation can never trump a strictly enforced neutral law or rule of general applicability such as a seniority system within a collective-bargaining agreement. *See id.* at 79-81. The Court discusses how the inclusion of the seniority provision in Title VII was indicative of how no accommodation could involve being exempt. *Id.*

79. The school denied both proposals because either one would represent an exception to a strictly enforced neutral policy of allowing employees to utilize paid contractual days off for certain reasons and not allowing teachers to pay substitute teachers directly on other certain days off. 479 U.S. 60, 63-65 (1986); *see* *United States v. Bd. of Educ. for Sch. Dist. of Phila.*, 911 F.2d 882 (3d Cir. 1990) (holding school accommodating Muslim teacher by allowing her to wear her religious garb would impose undue hardship by violating a state law prohibiting public school teachers from wearing anything denoting that the teacher is part of a religious sect).

80. 479 U.S. at 70-71.

81. 42 U.S.C. § 2000e-2(j) (2012).

82. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 69 (1986).

Thus the Court held an employee is not entitled to the accommodation of their choice and “an employer has met its obligation under § 701(j) when it demonstrates that it has offered a reasonable accommodation to the employee.”⁸³

In 2002, the Supreme Court faced an ADA failure to accommodate claim in *U.S. Airways v. Barnett*, where an employee was reassigned to the mailroom post-injury, but later, despite requesting an accommodation to be allowed to maintain in the mailroom, he lost the position when it became subject to a seniority provision.⁸⁴ The situation was akin to *Hardison* and *Philbrook* wherein the accommodation requested was for the employer to make a personal exception to a neutral rule or law of general applicability, except here there was no collective bargaining agreement.⁸⁵

The Court had to interpret the purposes of the ADA and determine to what extent employers were supposed to accommodate.⁸⁶ In response to the employer arguing that strictly enforced neutral workplace rules of general applicability can never be trumped, the Court held that an ADA accommodation in certain instances, if proven by a plaintiff, would trump the strictly enforced neutral rule and not impose undue hardship.⁸⁷ The Court ruled the collective-bargaining aspect of *Hardison* and *Philbrook* were not distinguishing factors in its ruling. Instead, it held unilaterally, uniformly applied and imposed rules and policies require the same analysis as if there were a collective bargaining agreement.⁸⁸ Though the Court ultimately held for the employer since the seniority system was strictly enforced,⁸⁹ it ruled that unlike Title VII, ADA plaintiffs’ accommodations may be preferential. This was because the ADA’s purpose and findings are more explicit than Title VII in regards to accommodations, and the ADA lacks similar Title VII seniority-system limitations which Congress was likely to be privy to because the ADA was written based on Title VII language.⁹⁰

II. WHERE THE STANDARDS ARE TODAY

Both ADA and Title VII reasonable accommodation and undue hardship standards have changed since their respective enactments. Whereas

83. *Id.*

84. For five months, U.S. Airways allowed him to keep his role while investigating the matter, but decided not to allow an exception. 535 U.S. 391, 394 (2002).

85. *Id.* at 403.

86. *Id.* at 394-403.

87. *Id.* at 397-98.

88. *Id.* at 403.

89. *Id.* at 405.

90. *See id.* at 397-403.

Title VII's has become more pragmatic in attempting to apply rigid rules of the past,⁹¹ the ADA burden continues to rise with no indication of leveling off in light of a recent Seventh Circuit opinion representing a trend of certain ADA accommodations becoming potentially mandated.⁹² As a result, any argument for the ADA and Title VII standards to move step-in-step with each other is highly questionable due to significant Establishment Clause concerns for Title VII.⁹³

In *EEOC v. United Airlines*, the Seventh Circuit Court of Appeals had to determine whether the ADA could mandate “employers to appoint employees who are losing their current positions due to disability to a vacant position for which they are qualified.”⁹⁴ Circuit Court Judge Richard D. Cudahy recognized *Barnett's* ultimate holding, but found that the Court specifically pointed out that a “plaintiff . . . nonetheless remains free to show that special circumstances warrant a finding that, despite the presence of a seniority system . . . the requested ‘accommodation’ is ‘reasonable’ on the particular facts.”⁹⁵ As a result, Judge Cudahy found that *Barnett* created a two-step process in evaluating whether an accommodation would not impose undue hardship by violating an otherwise strictly enforced neutral rule or law of general applicability.⁹⁶ Judge Cudahy remanded the case to determine whether a mandated reassignment passes the *Barnett* two-step analysis.⁹⁷ Furthermore, his dicta notably rejected the purported United Airlines preferential transfer policy as being a reasonable accommodation on its face and that ultimately “[w]hile employers may prefer to hire the best qualified applicant, the violation of a best-qualified selection policy

91. Compare *Brown v. F.L. Roberts & Co.*, 419 F. Supp. 2d 7 (D. Mass. 2006), with *EEOC v. Sambo's of Georgia, Inc.*, 530 F. Supp. 86 (N.D. Ga. 1981). In *Brown*, the court emphasizes how prior black line rulings from circuit courts may have been more on decisional grounds and thus courts should read rulings narrowly. 419 F. Supp. 2d at 16.

92. See *EEOC v. United Airlines, Inc.*, 693 F.3d 760 (7th Cir. 2012) (holding that in light of the *Barnett* case, “the ADA does indeed mandate that an employer appoint employees with disabilities to vacant positions for which they are qualified, provided that such accommodations would be ordinarily reasonable and would not present an undue hardship to that employer”).

93. See *id.* at 761; James M. Oleske, Jr., *Federalism, Free Exercise, and Title VII: Reconsidering Reasonable Accommodation*, 6 U. PA. J. CONST. L. 525, 537 (2004).

94. 693 F.3d at 761.

95. *Id.* at 763 (citing *U.S. Airways v. Barnett*, 535 U.S. 391, 405 (2002)).

96. Step one is to determine if the accommodation, which is violative of a strictly enforced neutral rule, would be reasonable “in the run of cases.” If so, then step two determines “if there are fact-specific considerations particular to [defendant-employer's situation] that would render [the accommodation] unreasonable.” *Id.*

97. *Id.* at 764-65; see *id.* at 763 n.1; cf. *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480 (8th Cir. 2007).

does not involve the property-rights and administrative concerns (and resulting burdens) presented by the violation of a seniority policy.”⁹⁸

The most crucial takeaway from this case is that a disabled employee’s accommodation could trump a strictly enforced neutral rule of general applicability if he can prove in the run of cases it is not unreasonable (e.g., not “requiring significant difficulty or expense”) and even if it is, he still can prove his specific circumstances would not.⁹⁹ If a religious employee were ever accorded such preference under Title VII, § 701(j)’s constitutionality would be highly questionable since the government would become significantly entangled in almost every private business in America. Additionally, any strictly enforced policy could be subject to judicial scrutiny in which an employee may be exempted solely based on his religion.¹⁰⁰ However, no commentator is seeking such heightened standards for Title VII.¹⁰¹

Title VII religious accommodations cases continue a trend of moving away from drawing stark lines and rules to becoming more pragmatic in its case review, but the courts have struggled in rigidly applying precedential rules. Representative of this difficulty are *United States v. New York Transit Authority*¹⁰² and *Brown v. F.L. Roberts & Co.*,¹⁰³ two cases out of the First Circuit involving employees whose personal appearance did not conform to their employer’s generally applied neutral rule. Both cases call into question the broad-based rule from the circuit precedent of *Cloutier v. Costco Wholesale Corp.*, which held an employee seeking “an outright

98. *United Airlines*, 693 F.3d at 764. The preferential transfer policy (the accommodation) that gave preference (i.e. guaranteed interview and priority over another “equally qualified” candidate) to recently disabled employees in seeking reassignment through an admittedly “competitive process.” See *id.* at 761-62.

99. See, e.g., *id.* at 762-65; *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999) (hearing en banc); *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284 (D.C. Cir. 1998) (hearing en banc).

100. See *McCreary Cnty., Ky. v. ACLU*, 545 U.S. 844, 860-64 (2005). Justice Souter’s opinion in this case deals with the presence of the Ten Commandments on state property in various forms, but what is significant from this opinion is the concern of what would happen if larger religions received preferential treatment within the workplace. This note acknowledges no commentator aspiring for such treatment to any religion, but implied in seeking more protection for religious practices within the workplace there is always a risk, though admittedly weak, that it could lead to a slippery slope. Additionally, whereas disabled employees’ accommodations will cost money, most accommodations for religion do not, and so the issue of what constitutes a “significant difficulty” (undue hardship standard for the ADA) under Title VII may be issuesome.

101. Ms. Wolkinson’s article could be read as requiring something akin to such a standard; however, her point in rebuking the *Bhatia* safety decision is simply to propose a business necessity standard for employers to prove undue hardship would come of an accommodation. Wolkinson, *supra* note 22, at 1206-08.

102. No. 04-CV-4237(SLT)(MDG), 2010 WL 3855191 (E.D.N.Y. Sept. 28, 2010).

103. 419 F. Supp. 2d 7 (D. Mass. 2006).

exemption from a neutral dress code ‘would be an undue hardship because it would adversely affect the employer’s public image.’”¹⁰⁴

In *New York Transit Authority*, the issue was whether exempting Sikh and Muslim transit employees from the transit authority dress code, specifically as to wearing their turbans and khirmars in place of transit authority official headwear, would place undue hardship upon the transit authority.¹⁰⁵ Despite years of negotiations resulting in an agreement that the plaintiff-employees could wear their turbans and khirmars as long as they matched the transit authority uniform colors, the plaintiffs still refused to place the transit authority logo on their headwear.¹⁰⁶ The transit authority filed for summary judgment relying on *Cloutier*’s holding that seemingly barred ultimatums.¹⁰⁷ The court found *Cloutier* wholly inapplicable since the employees were not seeking a complete exemption from the policy as they had agreed to wear headwear that matched the uniforms.¹⁰⁸ Furthermore, the court held *Cloutier* was only applicable where the employee made no effort to compromise or where the only accommodation possible was a complete exemption, but in the latter situation the employer-defendant still needed to prove the exemption would place undue hardship upon it.¹⁰⁹ In the end, the court ruled the case may continue and the transit authority’s motion for summary judgment was denied.¹¹⁰

In *Brown v. F.L. Roberts & Co.*, the court ruled on whether an oil-change employee, who never shaved or cut his hair based on his Rastafarian religion, was reasonably accommodated when his employer moved him to the lower bay, denying him the customer interaction he had before the employer implemented its new grooming policy.¹¹¹ The Rastafarian employee sought an exemption from the new policy so that he could have his desired client interaction and not be relegated to the cold and isolated lower bay. The court, bound by *Cloutier*, ruled for the defendant that the reassignment to the lower bay was a reasonable accommodation.¹¹²

104. *Id.* at 15 (citing *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 136 (1st Cir. 2004)); see Part II *infra* for more detail on this case.

105. 2010 WL 3855191, at *1.

106. *Id.* at *8. This case is likely representative of the employer policy existing before the employees were hired, but focusing on this aspect is unimportant since the original policy employees were subject to has been modified through negotiations between the transit authority and the religious employees.

107. *See id.* at *19.

108. *See id.* at *20-21.

109. *See id.*

110. *Id.* at *23.

111. *See* 419 F. Supp. 2d 7, 9-11 (D. Mass. 2006). This is a textbook case of how an employer’s policy was implemented *after* the employee had already been working there.

112. *See id.* at 15-20.

In ultimately holding as it did, the court went to great lengths to make clear *Cloutier* should be very narrowly construed and that *Cloutier* standards for proving undue hardship in personal-appearance cases was too stark and in need of flexibility.¹¹³ The opinion makes clear that affording a private employer the virtual affirmative defense of “public image” without any evidence weighs too heavily on the employee’s religion.¹¹⁴ Therefore, it found *Cloutier* should be read as an employee’s take-it-or-leave-it accommodation demand from an appearance policy places undue hardship because of the precedent set by the demand, but the case should not be read as granting a company’s “insistence on virtually complete autonomy in shaping its public image.”¹¹⁵

The rest of the opinion voices its concerns with how “employer’s preferences, or . . . prejudices,” in maintaining a certain “public image” are given significant weight as long as his policy is facially neutral.¹¹⁶ Commentators in favor of raising the Title VII burdens on employers have brought up this relevant issue with regard to situations like *Brown*.¹¹⁷ The employer’s grooming policy in *Brown* does not qualify as a strictly enforced neutral policy because it was adopted after the plaintiff had worked there for some time. Therefore, when an employer institutes a new neutral policy of general applicability that conflicts with current employees’ religious beliefs or practices, the employer should have a more significant burden to prove¹¹⁸ undue hardship than in cases where the employer policy

113. *See id.*

114. *See id.*

115. *Id.* at 17.

116. *See id.* at 15-20. The best quote to sum up the district court’s uneasiness of the First Circuit standards is:

The proper balancing of bona fide religious practices against an employer’s policy decisions remains a difficult issue, as the struggles exhibited by these cases demonstrate. Still, it is a matter of concern when the balance appears to tip too strongly in favor of an employer’s preferences, or perhaps prejudices. An excessive protection of an employer’s “image” predilection encourages an unfortunately (and unrealistically) homogeneous view of our richly varied nation. Worse, it places persons whose work habits and commitment to their employers may be exemplary in the position of having to choose between a job and a deeply held religious practice. It is unclear whether the decision being made in this memorandum strikes the balance properly, but there is no question that it is compelled by controlling authority.

Id. at 18-19.

117. *See* Wolkinson, *supra* note 22, at 1205-06.

118. What “prove” should mean in terms of an evidentiary burden or burden of proof involves topics beyond the scope of this article, but I will say an employer can “prove” undue hardship by showing the new *neutral policy of general applicability* was adopted based on something akin to a consultant’s analysis and recommendation like in *Brown* as opposed to asserting a mere “public image” defense without further elaboration.

pre-dated the plaintiff's employment.¹¹⁹ The First Circuit's judicial standards are more pro-employer than other circuits that require more.¹²⁰ While this case may seem counter to a "neutral rule" thesis, Title VII cases are extremely fact intensive. If this case were tried in a different circuit, the plaintiff might win since the facts do not indicate a rise in business after the employee was relegated to the lower bay.¹²¹

III. WHY TITLE VII RELIGIOUS ACCOMMODATIONS SHOULD NOT TRUMP A STRICTLY ENFORCED OR PROVABLE NEUTRAL RULE OR LAW OF GENERAL APPLICABILITY

This part of the article serves as a "devil's advocate" to a WRFA proposal and commentators, suggesting the Title VII and ADA standards for "reasonable accommodation" and "undue hardship" should be the same at the ADA levels. Both statutes involve highly fact-intensive inquiries,¹²² where subjective context and the circuit the case is tried in may vary the amount of protection afforded. However, from a comprehensive point of view, a religious accommodation cannot trump a strictly enforced or provable neutral rule or law of general applicability without imposing undue hardship, while a disability accommodation can.¹²³ Therefore, Title VII

119. The burden upon the employer based on whether the conflicting policy implementation happened before or after plaintiff's employment is based on the employee's "choice" to become a tenet of a certain faith covered in *supra* Part III(C).

120. See Wolkinson, *supra* note 22, at 1191-92. Wolkinson points out, for example, the different standards for *de minimis* costs in the First, Eighth, Ninth, and Tenth.

121. See *Brown*, 319 F. Supp. 2d. at 9-11. In Plaintiff's Reply Memorandum in Support of Motion for Summary Judgment and Opposition to Defendant's Motion for Summary Judgment, the attorney pointed out how the "no beard policy" had any real effect on business, and even if it did, the employer could not point to anything concrete. Specifically, the brief said:

F.L. Roberts claims now that the personal appearance policy change was a change which increased revenues. However, when pressed to provide facts to support this claim, the defendant admits that it does not know whether the "no beard" policy had any bearing on sales from the 2002-2002 year, or whether it was other changes, like a new sales model, which led to any increase. Mr. Smith has admitted that, as a point of fact, he cannot prove that the "no beard" rule had any impact at all. As to customer feedback on the appearance of employees, Mr. Smith can only state that "more than one" person over an eighteen month period commented on the personal appearance of Jiffy Lube personnel.

Brief for Petitioner, *Brown v. F.L. Roberts*, 2005 WL 6259501 (D.Mass. 2006) (No. 04-30105-MAP). Part V of this article deals with the disconnect between circuits to propose an ideal set of burdens on the parties in order to ensure employees do not have to choose between their faith and job, while still maintaining a neutral governmental position and respect for employers' and coworkers' rights.

122. See 42 U.S.C. § 12111(9)-(10) (2012); *Berry v. Dept. of Soc. Servs.*, 447 F.3d 642, 655 (9th Cir. 2006) (Title VII).

123. See *U.S. Airways v. Barnett*, 535 U.S. 391, 398 (2002); Engle, *supra* note 21, at 360 (holding that "[d]espite all the shifts that have occurred over the years in Title VII religious accommodation doctrine, which are discussed in this Part, courts have had a difficult time requiring employers to make exceptions to their 'neutral' rules."). As discussed in Section II, the Seventh Circuit recently held a disabled employee might be entitled to an accommodation that trumps an employer's otherwise *strictly* enforced neutral rule of general applicability. See *EEOC v. United Airlines, Inc.*, 693 F.3d 760 (7th Cir.

accommodations should always be held unreasonable and thus impose an undue hardship whenever it would trump a strictly enforced¹²⁴ or provable neutral rule or law of general applicability.¹²⁵

The reasons for why the two statutes should not afford the same amount of protection to employees or, put another way, to burden the employers and coworkers, range from the economic to the judicial-legislative interactions that imply constitutional concerns with the Establishment Clause. Most of these reasons are addressed by heightened Title VII standards' commentators. However, these commentators either did not address or glossed over one common theme throughout most of the reasons why the line of "neutrality" must never be crossed:¹²⁶ the potential for "moral hazards," as defined as incentivizing people to become "religious" solely for the preferential treatment and safeguards afforded by the government, resulting from the heightened standards interplay with how Title VII accommodation cases are judicially handled.¹²⁷

2012); *see supra* Part II. This potential "mandate" to employers in certain instances as applied in Title VII religious accommodations is analogous to a Connecticut statute that was held unconstitutional in *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985). The important part of the statute was: "No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day. An employee's refusal to work on his Sabbath shall not constitute grounds for his dismissal." *Estate of Thornton*, 472 U.S. at 706. Under Title VII, such a mandate would fail under the *Lemon v. Kurtzmann* test, which courts use for Establishment Clause violation inquiries like in *Caldor*. 403 U.S. 602, 612-13 (1971). "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Id.* Regardless of the first part of the test, the highly preferential mandate language would primarily promote religion in its effects due to the strong governmental entanglement with private and state employers' ability to operate and their right to craft neutral workplace policies to avoid conflicts between fellow workers and the company or state itself. *See Caldor*, 472 U.S. at 712 (O'Connor, J., concurring). Therefore, if Title VII standards adopted the mandate option the ADA potentially could gain, then there is a substantial chance the altered § 701(j) provision could not withstand an Establishment Clause challenge. *See Oleske, supra* note 93, at 537. Since the ADA standards only recently changed, utilizing the newfound ADA standard as the one commentators seek Title VII to be like is unfair and thus this article will be comparing Title VII's standard to the preferential, yet non-mandatory ADA standards on par with what was adopted in the Eighth Circuit Court of Appeals in *Huber v. Wal-Mart Stores*, 486 F.3d 480 (8th Cir. 2007), or the thirteen-time-proposed WRFA. S. 4046, 111th Cong. (2010).

124. As a reminder, *strictly* enforced means the policy is enforced so consistently as to create an implied contractual right to every employee of consistent performance, which if breached would require a remedy to the harmed employee.

125. As a side note, plaintiffs are always able to prove the employer's supposed "neutral policy" is either not neutral or not applied consistently. Those types of claims would likely fall under a disparate treatment (intentional discrimination) cause of action. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

126. By "never crossed," I mean that the spirit of a truly bona fide neutral policy must never be cast aside in favor of a religious accommodation without more (i.e., mitigation or inconsistent application by employer).

127. Judges refrain from deep inquiry into whether someone's religious belief is bona fide. *See Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 129 (1st Cir. 2004); Engle, *supra* note 21, at 362.

A. Economic Rationale for the ADA Heightened Standards is not Present for Title VII

Looking to the legislative history of a statute for its purpose is usually an exercise in “looking out over a crowd and picking out your friends,”¹²⁸ but when a statute states its purpose in explicit terms, then the legislature really was trying to drive the point home.¹²⁹ Therefore, when Congress passed the ADA in 1990, they were signaling to the courts, employers, employees, and the EEOC, that this law was about more than just anti-discrimination but also about helping the economy. Congress stated:

[T]he continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.¹³⁰

In contrast, there is no legislative history or related purpose section within Title VII or any of its amendments advocating any sort of economic benefit derived from strong religious accommodations on par with the ADA. The overall purposes served by Title VII and the ADA are incredibly different.

Some commentators look at how both the ADA and Title VII are alike in creating economic benefits, but their support is based mostly on the normative observation that the employer’s intolerance of religion will cause him to make “economically unsound” judgments just as he does for the disabled.¹³¹ However, these commentators overlook two things in making this argument. The ADA was an express act by Congress to root out the subconscious discrimination of disabled workers while also transferring the government’s financial burden¹³² to private employers to accommodate them, but only as long as the employer makes a net profit off them.¹³³ Also,

128. Stanley A. Halpin, *Looking over a Crowd and Picking Your Friends: Civil Rights and the Debate over the Influence of Foreign and International Human Rights Law on the Interpretation of the U.S. Constitution*, 30 HASTINGS INT’L. & COMP. L. REV. 1, 2 (2006) (citing Sheryl Gay Stolberg & Adam Liptak, *Courts In Transition: The Overview; Roberts Fields Questions on Privacy and Precedents*, N.Y. TIMES, Sep. 14, 2005, at A1 (Chief Justice Roberts’ comment on legislative history during his confirmation)).

129. See Abbe R. Gluck, *The States As Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1769 (2010).

130. 42 U.S.C. § 12101(a)(8) (2012); see 42 U.S.C. § 12101(a)(4)(6) (2012).

131. See Blair, *supra* note 1, at 530; Malloy, *supra* note 44, at 617-18; Ruan, *supra* note 5, at 29; see also Wolkinson, *supra* note 22, at 1207-08.

132. Social-welfare programs and America’s generally untapped economic productivity of unemployed or underemployed disabled workers. 42 U.S.C. § 12101(a)(8) (2012).

133. See *Vande Zande v. Wis. Dept. of Admin.*, 44 F.3d 538, 543 (7th Cir. 1995); Malloy, *supra* note 44, at 617-18; Stewart J. Schwab & Steven L. Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 WM. & MARY L. REV. 1197, 1272 n.199 (2003).

since Congress enacted the ADA, studies have shown that companies benefitted as both employers¹³⁴ and as manufacturers.¹³⁵ To be fair, ADA standards may seem to cost employers a lot of money on their face. However, studies have shown the average accommodation costing around \$500, but those employers saw a return in the form of savings in the ballpark of \$5,000 from accommodating.¹³⁶ However, no substantive economic proof has been proffered for the idea that raising the Title VII reasonable accommodation to the point of undue hardship at a “significant difficulty or expense” will take Muslims, Sikhs, Roman Catholics, or any other faiths off of welfare and cut down on the national debt.

Another economic argument a heightened Title VII standards proponent could make is normative in that the accommodated employee will be happier and more productive. However, that argument carries equal weight regardless of whether the employer accommodates an employee’s religion or something else such as parental commitments. Additionally, one could argue some ADA accommodations involve time where the disabled worker might have to leave for doctor appointments. However, unlike asking for taking the Sabbath off, the disabled employee simply works with his employer to move appointments or other paid time off around each other’s schedules. Therefore, the lack of a substantive report displaying derived economic benefits from religious accommodations hampers the cause of heightened Title VII standards’ commentators. This is especially true since very few Title VII religion claims are based on invidious discrimination that could motivate Congress and the electorate to justify economic costs for the further promotion of religion. But even then, certain religious practices that would be asserted as accommodations are counter-productive to national policies such as those on drugs.¹³⁷

B. Choice or No Choice, too Many Subjective Factors to Allow a Title VII Accommodation to Trump a Neutral Line

Most heightened Title VII standards commentators deal with the “mutability” issue of religion in adamantly pushing for ADA-level standards.¹³⁸

134. See Malloy, *supra* note 44, at 617-18.

135. See Heidi M. Berven & Peter David Blanck, *The Economics of the Americans with Disabilities Act Part II-Patents and Innovations in Assistive Technology*, 12 NOTRE DAME J.L. ETHICS & PUB. POL’Y 9, 18-19 (1998).

136. See Peter David Blanck & Mollie Weighner Marti, *Attitudes, Behavior and the Employment Provisions of the Americans with Disabilities Act*, 42 VILL. L. REV. 345, 377-78 (1997).

137. See *Emp’t Div. v. Smith*, 494 U.S. 872 (1990) (holding plaintiffs being discharged and subsequently denied unemployment benefits directly as a result of their religious practice of smoking tribal peyote did not violate their rights under the Free Exercise Clause of the First Amendment).

138. See, e.g., Blair, *supra* note 1, at 546-48.

They put forth primarily that one's religion is immutable, permanent, and unchangeable like skin color, race, and akin to the specific characteristics of the disabled as defined by the ADA.¹³⁹ However most commentators cede that religion can be seen as a choice at the point someone devotes their life to it, yet as time goes on the religion becomes as much a part of someone as his skin color.¹⁴⁰ Regardless of the commentators' exercise in semantics and inquiry into the metaphysical aspects of religion, and whether there is a choice and if it truly becomes permanent, the answers and views commentators put forth are highly subjective, theoretical, and likely more informative in a non-legal setting. Simply put, the only important and relevant answer arising from the commentators' analysis is that there is an element of choice for many in their religion. Whether that choice becomes permanent or not is an inquiry akin to the never-ending debate over whether there is a God. This article assumes most, if not all, people make a choice to follow a religion, and that at some point, that religious choice becomes permanent to a point where denial of their beliefs and practices would be akin to a denial based on any other immutable aspect.

Heightened Title VII standards' commentators cite religious "choice" being protected when the Supreme Court ruled in *Wisconsin v. Yoder* that an Amish family could withhold their child from attending public school in contradiction of a compulsory-attendance state law due to their religious beliefs.¹⁴¹ However, they forget the ruling was based on a parent's right to care for their child as he or she sees fit.¹⁴² More importantly, holding otherwise would result in criminal sanctions being levied against any and all Amish religious followers with children, which would be a violation of the Establishment Clause.¹⁴³

Allowing the parents in *Yoder* to exempt their child did not afford them any preference or special treatment. If the Court had held otherwise, the parents would have been forced to send their child to school, conforming to society in complete contradiction of their religious tenets.¹⁴⁴ If an employer in a customer-service-driven industry has a neutral rule of being clean-shaven that is uniformly applied, a Sikh is not forced to work there, since he is free to work wherever he wants. Whatever other issues com-

139. 42 U.S.C. § 12102 (2012).

140. See, e.g., Blair, *supra* note 1, at 546-48; Schuchman, *supra* note 14, at 756-57.

141. 406 U.S. 205 (1972); see Jamar, *supra* note 40, at 771-72.

142. See *Yoder*, 406 U.S. at 218.

143. See *id.* ("The impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs.").

144. See *id.* at 216-18.

mentators may raise with the Sikh hypothetical may be fair, but no one is forcing him to choose his job or his religion, if in fact at the outset he knew his religion forbade him to working under such terms.¹⁴⁵

An often-forgotten point of view in analyzing mutability and its effect on Title VII is that when someone chooses a religion, he knows what he is sacrificing. For example, between the ages of 14-16, every Amish child goes through a *Rumspringa* wherein he or she leaves home for a period of time to experience outside culture before deciding whether to devote his or her entire life to the Amish faith or to leave the community.¹⁴⁶ Those who choose to be baptized into the Amish faith afterwards knows he or she will likely never live in a city, own a car, or be able to drink or smoke.¹⁴⁷ Most children who are raised under a certain faith will at some point have to face a similar choice, and most know what he or she generally can and cannot do as a result. He or she makes his or her choice freely, uncompelled by any legally binding forces. However, if anyone is worth heightened legal protection of their faith, it is children going through this choice process since the family and community they grew up in are likely subscribers to that faith.¹⁴⁸ Adults not raised under any certain faith who choose to become a member of a faith are, for all intents and purposes, free of any legal forces and most normative defensible (family, community, etc.) sources of influence. When that adult, like the child, chose, he knew which limits were being placed upon what he could do with his life if he were to be a devout member. He likely has an even greater appreciation of the real world implications of that choice. Therefore, logically and ethically, a religious plaintiff claiming a known, strictly enforced, common neutral rule of general applicability, forcing him to choose between his faith and his job unless the claimed “neutral rule” is implemented after he started working there, seems indefensible. Even then, an employer can make certain accommodations, which do not force a “yes” or “no” as to one’s job.¹⁴⁹

145. A situation wherein the employer adopts a policy after the employee has already been working there is a different situation, and a “neutral rule” cannot be said to have been generally applied if in fact it was new. See *Brown v. F.L. Roberts & Co.*, 419 F. Supp. 2d 7 (D. Mass. 2006) (Rastafarian had been working in customer service for some time before clean-shaven policy was adopted). The case involved a franchisee adopting a clean-shaven policy for just his stores, but the franchisor (i.e., the main entity) did not mandate the policy.

146. Lisa Biedrzycki, “Conformed to This World”: A Challenge to the Continued Justification of the Wisconsin v. Yoder Education Exception in A Changed Old Order Amish Society, 79 TEMP. L. REV. 249, 252-53 (2006).

147. *Id.*

148. See Blair, *supra* note 1, at 546-48.

149. See *United States v. N.Y.C. Transit Auth.*, No. 04-CV-4237(SLT)(MDG), 2010 WL 3855191 (E.D.N.Y. Sept. 28, 2010) (holding that Sikh and Muslim transit employees agree to wearing headwear which matches the transit employer’s uniform); *Brown*, 419 F. Supp. 2d at 8 (D. Mass. 2006) (working in lower bay where no client contact is present).

Another issue with regard to mutability and religion is the highly subjective and individualized nature of each person's personally held beliefs based on the institutional religious tenets.¹⁵⁰ Professor Kaminer highlighted this subjectivity and where "choice" is the largest issue in three types of cases: "[(1)]where an employee does not follow a traditional institutional majority religion . . . [(2)] where an employee follows some but not all church dogma . . . [and (3)] where an employee becomes more observant over the course of [their] employment and requests additional accommodations."¹⁵¹

As to minority faiths, Professor Kaminer is correct in stating that courts are skeptical of how bona fide the belief is, but incorrect as to her rationalizing the courts' denial of accommodations on the basis "of personal choice."¹⁵² Rather, a lack of communication by the employer, employee, or both, is more likely the source. For example, in *Cloutier v. Costco Wholesale Corporation*, the employee was a member of the Church of Body Modification and did not indicate her religious beliefs and practices until after numerous confrontations with management.¹⁵³ The court held for Costco because the employee made an ultimatum in seeking her accommodation as a complete exemption from the company's neutral policy.¹⁵⁴ Contrast *Cloutier* with *New York City Transit Authority* wherein the Sikh and Muslim employees made a good faith effort to find a compromise.¹⁵⁵ Furthermore, on the issue skepticism regarding minority religions, the courts compromised in handling Title VII religious accommodation cases by not inquiring into the validity of a plaintiff's alleged religious bona fide belief or practice in any significant way; instead courts focus on the reasonableness of the accommodation.¹⁵⁶

150. See Debbie N. Kaminer, *Religious Conduct and the Immutability Requirement: Title VII's Failure to Protect Religious Employees in the Workplace*, 17 VA. J. SOC. POL'Y & L. 453, 471 (2010).

151. *Id.*

152. See *id.* at 472.

153. 390 F.3d 126 (1st Cir. 2004). The employee was asked to remove her facial jewelry in keeping with the company policy numerous times, but it was not until later that she informed the employer of her religious reasons for doing so. Despite a compromise offered by the employer, that she wear clear retainers in the piercings while at work, the employee refused. *Id.* at 129-30.

154. *Id.* at 132-33; see *Endres v. Ind. State Police*, 349 F.3d 922, 925 (7th Cir. 2003); *Wilson v. U.S. W. Comm'n*, 58 F.3d 1337, 1342 (8th Cir. 1995). The court specifically held, "[w]e find dispositive that the only accommodation Cloutier considers reasonable, a blanket exemption from the no-facial-jewelry policy, would impose an undue hardship on Costco. In such a situation, an employer has no obligation to offer an accommodation before taking an adverse employment action." *Cloutier*, 390 F.3d at 132-33 (citation omitted) (footnote omitted).

155. *United States v. N.Y.C. Transit Auth.*, No. 04-CV-4237(SLT)(MDG), 2010 WL 3855191 (E.D.N.Y. Sept. 28, 2010).

156. See *Cloutier*, 390 F.3d at 129; Engle, *supra* note 21, at 362; Kaminer, *supra* note 150, at 472.

Professor Kaminer's second category where the plaintiff only ascribes to some, but not all, of the church dogma is, according to her, likely the most widespread.¹⁵⁷ However, Professor Kaminer's characterization and understanding of this problem, as courts holding someone's partial dogmatic belief as not bona fide, is questionable. The issue is actually how each person "chooses" to practice his bona fide religious beliefs in his own way, such as a Roman Catholic pharmacist who decides he is going to effectuate the church's abstinence stance by refusing to help, talk to, or even acknowledge anyone who looks like he or she would inquire about contraceptives.¹⁵⁸ Under current Title VII standards, employees are not free to practice their beliefs to such extremes and the heightened standards commentators are likely not in favor of allowing this type of practice. However, upon crossing the line of neutral policy, lesser examples become questionable in imposing an undue hardship, such as whether wearing an anti-abortion button by any faith imposes an undue hardship within an office setting, a retail store, a drug store, a warehouse and so forth.¹⁵⁹ Though work-scheduling and personal-appearance cases may be the primary cases alluded to by commentators, the pharmacist and button cases are significantly more questionable as to reasonability. In the current workplace, where so many rights collide, do Americans want to have as politically divisive topic as religion to gain a potential trump card within the workplace? This area of law is highly sensitive, and the courts have mostly agreed to skirt over the element of whether the plaintiff's belief was bona fide and instead focus on the accommodation.¹⁶⁰ The courts' compromise has resulted in a policy of neutrality as to the accommodations that would be accorded where a strictly enforced generally applied neutral rule of applicability by an employer exists.¹⁶¹

Professor Kaminer's view on her final category of "choice" issues, wherein the employee becomes more devout over time and requests further accommodations as time progresses, is the one area of "choice" that is agreeable.¹⁶² An employee who has made a choice to join a religion be-

157. Kaminer, *supra* note 22, at 476-77. She cites *EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49 (1st Cir. 2002), as a case displaying how courts are skeptical of someone's beliefs when there is evidence of employee conduct contrary to the tenets of his faith. However, this case seems to turn on the contradictory behavior as providing a justifiable skepticism to how bona fide his anti-union membership belief in light of the fact he denied the union offered accommodation to the certain parts of union membership he initially sought. *See id.* at 56-57.

158. *See Noesen v. Med. Staffing Network, Inc.*, 232 F. App'x. 581 (7th Cir. 2007) (unpublished).

159. *See Wilson v. U.S. W. Comm'n*, 58 F.3d 1337, 1339 (8th Cir. 1995).

160. *See Cloutier*, 390 F.3d at 129; Engle, *supra* note 21, at 362.

161. Kaminer, *supra* note 150, at 472.

162. *Id.* at 477-79.

comes more connected with the faith and community as time goes on.¹⁶³ At the point where the religion conflicts with work in the slightest, the employer will have been put on notice and should be communicating with the employee about how his newfound faith will impact his work (e.g., holidays, daily practices, and potential work requirements). Therefore, an employee should bring up any potential conflicts, and, depending on the degree of conflict, the employer can make a good faith effort to accommodate those conflicts (i.e. use vacation day for a non-traditional holiday or voluntary shift swaps). In a majority of the cases Professor Kaminer alludes to, there was a lack of communication between parties.¹⁶⁴ Employees who choose or change their religion as an adult should be aware of the ramifications of their choice, and thus, the employee's knowledge of potential appearance or scheduling conflicts at the time of choosing a faith should be crucial in the accommodation inquiry. If a reasonable employee knows becoming a Sikh would violate Occupational Safety and Health Administration rules at his current job,¹⁶⁵ then he should know his religious choice likely means he needs to seek a transfer or new job wherein his beard will not cause compliance or safety issues.¹⁶⁶

Finally, "choice" is not present in the ADA setting, since no sane individual would choose to become disabled. The court adjudicating an ADA accommodation case can look to objective measurements, such as how disabled the employee was (e.g., doctors evaluations), what kind of accommodations are available,¹⁶⁷ and whether the minimum requisite accommodation would impose undue hardship.¹⁶⁸ While some subjectivity is still involved, the sources, such as doctors, are held to objective standards such as being Board Certified. Title VII religious accommodation cases, in contrast, are more likely to encounter a plethora of subjective choices ranging from why the employer implemented the conflicting policy to the employee's specific religious practice. Most importantly though, the source of why there is a need for an accommodation is subject to significantly more judicial scrutiny under the ADA. A Title VII plaintiff's choices in why he practices his specific belief, why a certain religion has certain practices

163. See Blair, *supra* note 1, at 547-48.

164. Kaminer, *supra* note 150, at 477-79.

165. Due to him having to grow a beard of which an accommodation to bring the employer in compliance is either unavailable or significantly expensive.

166. See Bhatia v. Chevron U.S.A., Inc., 734 F.2d 1382 (9th Cir. 1984) (holding Sikh employee's beard would compromise OSHA safety standards if allowed to maintain role as machinist surrounded by toxic gases).

167. 42 U.S.C. § 12111(9) (2012).

168. § 12111(10).

based on its beliefs, or both, are not subject to significant judicial scrutiny.¹⁶⁹

In closing, “choice” is a significant issue with respect to Title VII accommodations. Consensus says at some point an individual confirms their religion and thus the reasonable knowledge of career limitations should be held against them since they freely chose the faith fully understanding those limitations. Minority religions are fairly dealt with, as courts require minimal evidence of a bona fide religious belief. Finally, every person’s right to mold and practice one’s beliefs as one sees best is laudable, but within the workplace, where many interests conflict, a neutral policy which is truly generally applied with strict enforcement should not be trumped by religion.

C. Supreme Court in Trans World Airlines v. Hardison Signaled the 1972 Amendment’s Language was not Strong Enough

Commentators in favor of higher Title VII standards allude to the 1972 congressional amendment to Title VII.¹⁷⁰ *Hardison* held the amendment, and EEOC guidelines based on the amendment, were of no help in defining the parameters of the employers’ duty.¹⁷¹ The legislative history of the amendment is scant,¹⁷² and the actual amendment says nothing about what exactly a “reasonable accommodation” or “undue hardship”¹⁷³ is as of 2012, 40 years since it was enacted and 35 years since *Hardison* was decided. The commentators’ reliance is understandable, but unpersuasive because Congress never directly replied. With so little to go on, the Court was walking a “tightrope” in interpreting the 1972 amendment out of fear that Establishment Clause issues might arise if a worker’s accommodation would require the violation of a strictly enforced neutral rule of general applicability in the form of a collectively bargained seniority system.¹⁷⁴ By holding neutrality principles applied to the accommodation, the Court was avoiding an Establishment Clause issue, preserving Congress’ legislation,

169. See *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 129 (1st Cir. 2004); Engle, *supra* note 40, at 361-62.

170. See, e.g., Blair, *supra* note 1, at 523-24.

171. See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 73-79 (1977).

172. See 118 CONG. REC. 705-06 (1972) (statement of Sen. Randolph).

173. See, e.g., Schuchman, *supra* note 14, at 751-52.

174. See *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) (“By preserving doctrinal flexibility and recognizing the need for a sensible and realistic application of the Religion Clauses ‘we have been able to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion. This is a ‘tight rope’ and one we have successfully traversed.”).

and likely signaling to Congress that a higher standard required explicit language by them and not the EEOC.¹⁷⁵

D. Congress Never Successfully Responded to Hardison, but has Elsewhere with Mixed Results

From 1996 to 2012, versions of the Workplace Religious Freedom Act (“WRFA”) were introduced thirteen times in Congress, but little resulted.¹⁷⁶ WRFA adopts the undue hardship language of the ADA into Title VII, specifically rebukes *Hardison*, and makes many of the current accommodations typically offered by employers unreasonable.¹⁷⁷ Though looking to legislative history is not always indicative on legislative intent, thirteen attempts from 1996 onward, in either the House of Representatives or Senate, indicates that the national electorate does not want heightened standards. However, a more viable theory is likely Establishment Clause concerns since the 1972 amendment has been referred to as the low-hanging fruit of Title VII ripe for invalidation.¹⁷⁸ Furthermore, in light of Congress’s response to *Employment Division v. Smith*,¹⁷⁹ with the Religious Freedom Restoration Act¹⁸⁰ being essentially invalidated subsequently in *City of Boerne v. Flores*,¹⁸¹ the Court made it quite clear that further raising the standard may not only implicate Establishment Clause issues, but also potentially implicates state sovereign immunity issues via the limits on Section 5 of the Fourteenth Amendment as well with respect to Title VII as applied to public employers.¹⁸²

E. “Moral Hazards” with Employees and an Unknowable Effect on Private and State Employers

The ADA affects roughly 43 million people,¹⁸³ whereas Title VII with respect to religion has an unlimited scope to roughly all 300 million Amer-

175. See *Hardison*, 432 U.S. at 73-79; see also *McCreary Cnty., Ky. v. ACLU*, 545 U.S. 844, 863 (2005).

176. See, e.g., S. 3686, 112th Cong. (2012); S. 4046, 111th Cong. (2010); S. 3628, 110th Cong. (2008); H.R. 1431, 110th Cong. (2007); H.R. 1445, 109th Cong. (2005); S. 893, 108th Cong. (2003); S. 2572, 107th Cong. (2002). Many others exist.

177. S. 3686, 112th Cong. (2012).

178. See Oleske, *supra* note 93, at 537.

179. 494 U.S. 872 (1990) (holding plaintiffs being discharged and subsequently denied unemployment benefits directly as a result of their religious practice of smoking tribal peyote did not violate their rights under the Free Exercise Clause of the First Amendment).

180. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb-bb-4 (2012)).

181. 521 U.S. 507, 536 (1997).

182. See Oleske, *supra* note 93, at 536-37, 570-71.

183. *Vande Zande v. Wis. Dep’t of Admin.*, 44 F.3d 538, 543 (7th Cir. 1995).

icans. Some commentators view the 300 million point as misleading because most Title VII claims come from minority religions, which is probably the truth under the current standard.¹⁸⁴ Over the course of our nation's history, it's likely that the traditions of the majority religions (i.e. Judeo-Christian faiths except Islam) became embedded in the American workplace to the point where those traditions are assumed to be secular and thus little, if any, rational accommodation the followers of those large religions would really push for.¹⁸⁵ However, in order to raise the Title VII standards, Congress will have to raise it as applied to all faiths because the promotion of specific religions renders the legislation per se invalid under the Establishment Clause.¹⁸⁶

The more "radical" elements of the majority faiths could seek accommodations under this new standard, and the potential for labor unrest seems high where, for example, a Roman Catholic worker seeks the accommodation of being allowed to wear an anti-abortion button to work.¹⁸⁷ Admittedly, the worker's accommodation would likely impart undue hardship in a face-to-face customer-service context, but within a private office context, it would be a closer question. The employer will not be able to prove the accommodation places "significant difficulty" upon it since fellow co-worker grumblings and uneasiness with a particular view are not enough to prove undue hardship under the current standards in certain circuits.¹⁸⁸ Worst-case scenario for this situation would be if the employer had a strictly enforced neutral policy of no buttons to be worn, which the Roman Catholic's accommodation trumps, and an agnostic worker who wears a "pro-choice" button in response. The agnostic worker has no protection due to the employer's no-button policy, thus showing freedom of religion trumps freedom of speech. Though knowing the extent to which majority faiths would have an effect on the workplace is theoretical, the outward appearance of preferential treatment for those faiths could be more overt with raised standards than they may currently be under the current standard.

In connection with the majority faith issue is that a "moral hazard" for employees arises with higher Title VII standards as people could potentially pick and choose certain faiths with the knowledge that they can take certain days off, wear piercings to work with no worry of an employer's

184. See Blair, *supra* note 1, at 535-36.

185. See Noesen v. Med. Staffing Network, Inc., 232 F. App'x. 581 (7th Cir. 2007) (unpublished).

186. See McCreary Cnty., Ky. v. ACLU, 545 U.S. 844, 860 (2005).

187. See Wilson v. U.S. W. Comm'n, 58 F.3d 1337, 1339 (8th Cir. 1995).

188. See, e.g., Crider v. Univ. of Tenn., Knoxville, No. 11-5511, 2012 WL 3002756, at *4 (6th Cir. July 23, 2012); Opuku-Boateng v. California, 95 F.3d 1461, 1473 (9th Cir. 1996).

policy trumping, and as a pharmacist, ignore anyone who looks like they might inquire about contraceptives among other practices.¹⁸⁹ If a 1,000-member, online-only church can survive the bona fide belief inquiry, then anything an employee can practically imagine based off a religious belief is possible. Thus, would deeper inquiry by the courts into the bona fide belief be required to stem this “moral hazard?” This highly sensitive issue likely would create a split among the circuits and thus would probably reach the Supreme Court where they would have to answer with a standard, or at least Americans would hope the Court would. In all, a legal and political mess potentially could ensue if the Court gives no clear standard. As a final statement on this issue, one must remember under the ADA a plaintiff’s disability is subject to vast objective inquiry by the courts, whereas the inquiry under Title VII for religion is highly subjective and a mere formality.

F. Constitutional Issues

In order for Title VII accommodation standards to trump a strictly enforced or provable neutral rule of general applicability, it must not violate the Establishment Clause. It must also not go beyond the scope of Congressional power under Section 5 of the Fourteenth Amendment with regard to public employers.

1. Establishment Clause

Heightened Title VII standards commentators accept that the Establishment Clause is the biggest hurdle the higher standard faces.¹⁹⁰ In any challenge, the three-part test from *Lemon v. Kurtzman* is applicable.¹⁹¹ The commentators put forth multiple specific arguments for why a heightened standard would not fail the test, but ultimately their argument can be generalized as the “accommodation[s] allow [] the government to take steps to favor religion ‘by allowing it room to exist.’”¹⁹²

Commentators base their argument erroneously on what they call the current “preferential treatment” religion gets in the form of its institutions receiving tax-exempt status, schools receiving funding from the state, and

189. See *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004).

190. See, e.g., *Engle*, *supra* note 21, at 392-93; *Jamar*, *supra* note 40, at 770-72.

191. 403 U.S. 602, 612-13 (1971) (“Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’”); see *Blair*, *supra* note 1, at 550.

192. See *Blair*, *supra* note 1, at 552 (internal quotations omitted).

exemptions from Title VII in certain regards.¹⁹³ The tax-exempt status religious institutions receive has been held by the Court as not violative of the Establishment Clause because of historical precedent¹⁹⁴ and because “the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state.”¹⁹⁵ More importantly, the Court has found the tax-exempt status helps promote the Establishment Clause’s purpose of separation of church and state.¹⁹⁶ As to state funding of religious schools, the commentators miss how the Court has found religious school funding constitutional only where the same funding or tax breaks to parents of religious school children have been extended to public schools and its parents.¹⁹⁷ Finally, the Title VII exemptions to religious institutions have been recently re-affirmed as non-violative in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* because without these exemptions, particularly the ministerial exception, the government would become involved in “ecclesiastical decisions”, and a significant concern could arise for more traditional religions being afforded more deference than minority religions.¹⁹⁸

All three arguments by commentators for a higher standard are erroneous because in all three instances the Court has found the government, both legislatively and judicially, is doing less to inhibit or promote religion than the alternative.¹⁹⁹ Not granting religious institutions tax-exempt status would inhibit religion by treating it like a for-profit corporation, thus almost explicitly telling citizens to donate money to secular non-profits for tax deductions and potentially even stigmatizing religious donors as being no better than a stockholder. State funding to public and secular private schools, as well as tax breaks to those schools’ parents for education expenses, similarly inhibits religion by denying the religious schools and parents of its students’ benefits simply because they teach religion in addi-

193. *See id.* at 552-53.

194. *See Walz v. Tax Comm’n*, 397 U.S. 664, 678 (1970) (“Nothing in this national attitude toward religious tolerance and two centuries of uninterrupted freedom from taxation has given the remotest sign of leading to an established church or religion and on the contrary it has operated affirmatively to help guarantee the free exercise of all forms of religious belief. Thus, it is hardly useful to suggest that tax exemption is but the ‘foot in the door’ or the ‘nose of the camel in the tent’ leading to an established church. If tax exemption can be seen as this first step toward ‘establishment’ of religion, as Mr. Justice Douglas fears, the second step has been long in coming. Any move that realistically ‘establishes’ a church or tends to do so can be dealt with ‘while this Court sits.’”).

195. *Id.* at 675.

196. *See id.* at 676-77.

197. *See Mitchell v. Helms*, 530 U.S. 793, 809 (2000); *Mueller v. Allen*, 463 U.S. 388, 397-98 (1983).

198. 132 S. Ct. 694, 706-07 (2012).

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

tion to the state-mandated curriculum. Finally, subjecting religious institutions' hiring decisions, especially ones involving its ministers, to the same standards as secular employers inhibits religion by denying religious organizations the right to employ those promoting its values and thus integrating the government into the church as opposed to keeping them both separate.²⁰⁰

An argument one commentator mentions in regard to *Employment Division v. Smith* is that “[t]he Court clearly was uncomfortable with evaluating the religious practices of individuals,” which actually points to a potential issue courts would face with a heightened Title VII standard.²⁰¹ As previously mentioned, the courts have made a compromise in handling Title VII religious accommodation cases by not inquiring into the validity of a plaintiff's alleged religious bona fide belief or practice in any significant way, instead focusing on the reasonableness of the accommodation.²⁰² Thus courts would have to inquire into the validity of each plaintiff's alleged religious belief or practice, which is something commentators agree courts are uneasy with doing.²⁰³ The new accommodation standards alone raise serious Establishment Clause questions, but now so does the highly probable new judicial inquiry of religious beliefs or practices.²⁰⁴ The potential for inconsistent court rulings between majority and minority religion plaintiffs, on whether their alleged religious belief or practice is bona fide, raises Establishment Clause concerns, since the government could promote certain religions at the expense of others.²⁰⁵ Furthermore, the fact that the government, through the courts, is now integrating itself into each religion by inquiring into and deciding which beliefs or practices of a religion are bona fide raises significant Establishment Clause concerns.²⁰⁶ If the courts actually adopted a new practice of significantly inquiring into plaintiffs' alleged beliefs, then the practice violates the Establishment Clause. Even if a secular purpose could be found, it would be far outweighed by the judicial practice primarily advancing certain majority religions and inhibiting lesser-known religions in combination with a newly “excessive govern-

200. See, e.g., *id.*

201. Blair, *supra* note 1, at 551-52.

202. See *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 129-30 (1st Cir. 2004); Engle, *supra* note 21, at 362.

203. See, e.g., Engle, *supra* note 21, at 362.

204. See *Cloutier*, 390 F.3d at 129-30.

205. See *id.*

206. See, e.g., *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706-07 (2012).

mental entanglement” with religion in deciding the validity of religious beliefs and practices.²⁰⁷

Regardless of whether the new practice comes to fruition, a legislative enactment or the Supreme Court could create the new standard. The Supreme Court is a highly unlikely source based on its consistent holdings on the Title VII accommodations standards²⁰⁸ and the federal courts’ general uneasiness in dealing with religion cases.²⁰⁹ Therefore, Congress would likely be the one, and the standard would likely look like the most recent WRFA.²¹⁰

Though the previously mentioned commentators’ arguments are somewhat strong, the WRFA, which strengthens Title VII’s religious accommodations by adopting the ADA language, would violate the Establishment Clause.²¹¹ The purpose of the WRFA is not likely to be held as being non-secular since it articulates the importance of religion being helped by it.²¹² Though, the WRFA could be passed along with other secular amendments, like the original 1972 amendment, the Court is likely to still rule that the WRFA is non-secular because of the strong religious language.²¹³ Since the WRFA would allow plaintiffs to trump strictly enforced neutral rules of general applicability, the WRFA would thus raise extreme questions of whether it has the effect of the government promoting religion. Referring back to the example where the Roman Catholic employee wore a pro-life button at a secular accounting office with no customer interaction and a strictly and uniformly applied policy of no buttons of any kind, the court could hold allowing the Roman Catholic employee to wear the button is a reasonable accommodation that does not place significant difficulty upon the employer.²¹⁴ Add in the agnostic pro-choice employee who feels she must reply by wearing a pro-choice button the next day. Since the employer strictly enforces the no button policy, the employer could reprimand, demote or terminate the agnostic worker. However, the employer legally can do nothing to the Roman Catholic employee wearing the pro-life button

207. See, e.g., Blair, *supra* note 1, at 550-51.

208. See *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002); *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

209. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) (“By preserving doctrinal flexibility and recognizing the need for a sensible and realistic application of the Religion Clauses ‘we have been able to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion. This is a ‘tight rope’ and one we have successfully traversed.’”).

210. S. 3686, 112th Cong. (2012).

211. See Oleske, *supra* note 93, at 537.

212. See S. 3686, 112th Cong. (2012); CONN. GEN. STAT. § 53-303e (1985), *invalidated by* *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985).

213. See *Thornton*, 472 U.S. 703.

214. See *Wilson v. U.S. W. Comm’n*, 58 F.3d 1337, 1339 (8th Cir. 1995).

because she is wearing it as a way of practicing her religious belief. In a sense, the court will have ruled freedom of religion trumps freedom of speech. WRFA would be subject to serious questions of causing the government to entangle itself with religion as the example above would give the Roman Catholic the governmental sword to cut through the employer's no button policy in forcing the employer to make an exception.

2. Free Exercise Clause

With regard to the Free Exercise Clause, the commentators are mixed on whether the clause affords them an argument in favor of raising Title VII religious accommodation standards.²¹⁵ Regardless, the Free Exercise rights of employees would only be raised in the event heightened standards of WRFA were enacted on its face.

The issue the commentators do not address is what kind of effect those rights would face if the courts decided to now inquire significantly into whether a plaintiff's alleged religious belief or practice is bona fide. Serious questions of governmental interference would likely arise since every denial of a plaintiff's religious belief or practice as being bona fide could restrict a person's right to later assert that belief is worthy of constitutional protection outside of work.²¹⁶ With regard to the previously-stated button example,²¹⁷ if the court held the Roman Catholic employee's pro-life button is not a bona fide religious practice, then questions could arise as to whether she and other Roman Catholics can defend wearing the button in the public square on Free Speech rights. Furthermore, unlike the ADA, which has (yet again!) very objective standards of measuring whether someone is disabled and to what extent, Title VII religious inquiries would be extremely subjective and thus potentially create unequal Free Exercise rights accorded to different religions.²¹⁸

3. Scope of Congress' Section 5 Power

Finally, in light of *City of Boerne v. Flores* a heightened Title VII religious accommodation standard would likely face significant questions of whether Congress exceeded the scope of its powers under Section 5 of the Fourteenth Amendment.²¹⁹ Unless the state employer has a historic pattern

215. See Blair, *supra* note 1, at 552-55. For example, one of the commentators thinks the *Employment Division v. Smith* case "has left the Free Exercise Clause virtually meaningless." *Id.* at 556.

216. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706-07 (2012).

217. See *supra* Section III.E.

218. See 42 U.S.C. § 12111(8) (2009).

219. See 521 U.S. 507, 532-36 (1997).

or practice of unlawfully discriminating in the application of its neutral laws of general applicability, a plaintiff arguing “congruence” between Title VII’s newly heightened standard means used by Congress and the end of ensuring religious employees practices are not restrained by strictly enforced neutral rules of general applicability would be highly questionable.²²⁰ If the Court rules the new standard exceeds the scope of Congressional power under Section 5 of the Fourteenth Amendment, then private employees would be afforded more protection than public employees.²²¹

IV. COMMON SENSE RELIGIOUS ACCOMMODATIONS DOCTRINE THAT PROMOTES WORKPLACE PEACE AND PREVENTS EMPLOYER “MORAL HAZARDS”

Title VII should maintain its current “reasonable accommodation” and “undue hardship” standards that an accommodation can never trump a strictly enforced neutral rule or law of general applicability. However, certain employer-employee and Title VII religious accommodations litigation aspects need to be uniformly altered and applied across the circuits to make the outcomes in the employment or judicial context more cooperative, fairer, and more common-sense based. The “interactive process” within the ADA needs to be uniformly adopted by the circuit courts for Title VII religious accommodations to minimize the amount of litigation and promote communication between an employer and its employees.²²² The conflict between the religious practice and the employer policy should not have to be eliminated by the accommodation, but rather the conflict should have to at least be resolved to the point where the “spirit” of the employer’s work policy and the employee’s religious belief or practice is respected.²²³ Finally, where the religious employee worked for the employer before the conflicting policy was implemented, the employer will have to prove the policy was implemented for rational, non-arbitrary reasons.²²⁴

Reasonable accommodation and undue hardship standards should depend upon the amount of negotiations in good faith by both parties akin to the ADA’s “interactive process.”²²⁵ The more the two sides discuss their

220. *See id.* at 530.

221. *See id.*

222. *See, e.g.,* Hoppe v. Lewis Univ., 692 F.3d 833, 840 (7th Cir. 2012).

223. *See, e.g.,* United States v. N.Y.C. Transit Auth., No. 04–CV–4237(SLT)(MDG), 2010 WL 3855191 (E.D.N.Y. Sept. 28, 2010).

224. *See* Piraino v. Int’l Orientation Res., Inc., 84 F.3d 270, 274-76 (7th Cir. 1996).

225. *Compare* Rohr v. Salt River Project Agric. Imp. & Power Dist., 555 F.3d 850 (9th Cir. 2009), with *Opuku-Boateng v. California*, 95 F.3d 1461, 1473 (9th Cir. 1996).

concerns and reasons behind their policy and religious practices, the more likely they can find a compromise.²²⁶ The transit authority negotiated extensively with its Muslim and Sikh employees in order to seek a compromise where its desire for uniformity and the spirit of the employees' religious practice of wearing certain headwear could be respected.²²⁷ Both sides agreed the employees' religious headwear would match the color of the transit authority uniforms.²²⁸

The "interactive process" is partially seen in Title VII religious accommodation cases since an employer has a duty to negotiate with the employee in good faith.²²⁹ However, the burden upon the employee is simply to "cooperate" with the employer after informing him of the need for an accommodation.²³⁰ Therefore, the religious employee's duty is passive since he is not required to present any real "proof" of his religious belief or practice.²³¹ The employer should not be under the burden to research each employee's faith and guess for himself what type of an accommodation would resolve the conflict. Instead, like in the ADA cases, the employee should be required to bring forth the requisite information about his practice and belief, while the employer is burdened with determining a proposed accommodation based on the employee's information.²³² The type of information the employee should bring forth depends on the situation, but could range from anything as small as an online link to the church's official site to something as formal as a letter from the "minister" of the employee's faith. The employer's request for any clarifying information would have to be reasonable²³³ and would only arise with respect to temporal accommodations as religious days of observance or timing of daily practic-

226. See *N.Y.C. Transit Auth.*, 2010 WL 3855191, at *3.

227. See *id.*

228. See *id.* at *5. Note, however, that the case was in court because the negotiations reached an impasse on the final point of whether the employees had to place a transit authority patch on their religious headwear. *Id.* The conflicting transit authority uniform policy gave employees the option of wearing no headwear at all or a transit hat. In my opinion, whether "undue hardship" is placed on the transit authority by not having its logo on the religious employees uniform headwear is something reasonable minds can differ upon.

229. See, e.g., *Opuku-Boateng*, 95 F.3d at 1467.

230. See, e.g., *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1085 (6th Cir. 1987).

231. See *id.*

232. See *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 314 (3d Cir. 1999) (finding that the plaintiff presented multiple documents the defendant-employer could use to determine a proper accommodation).

233. For accommodation, the requested clarifying information would have to be central to the spirit of the employee's belief or practice just like under the ADA where the employer asks for more specifics about its employee's disability and his doctor's recommendations. See *Rohr v. Salt River Project Agric. Imp. & Power Dist.*, 555 F.3d 850, 856-57 (9th Cir. 2009).

es are more set in stone.²³⁴ In all, adopting the “interactive process” requirement into Title VII would prevent situations leaving an employer guessing whether its employee’s hard line “complete exemption” from the policy stance will be held as a reasonable accommodation.²³⁵

The current Title VII requirement of the reasonable accommodation “eliminat[ing] the conflict between employment requirements and religious practices”²³⁶ should not be read to eliminate the conflict, but to ensure that the “spirit” of the employee’s religious practice and the employer’s policy remain intact.²³⁷ For example, in the *New York Transit Authority* case discussed above, the employer allowed religious headwear as long as it matched the uniform’s colors.²³⁸ This accommodation maintained the employer’s professional appearance and uniformity and allowed the religious employee to maintain the spirit of their religious practice. The employer may not obtain its logo on the employee’s headwear, but the uniformity sought by the employer is still intact.²³⁹ In situations where one might argue the only accommodation possible was a complete exemption from the employer policy, typically neither party was likely creative within the “interactive process” as those all-or-nothing situations are illusory. However, where there truly is a complete conflict, the employee and employer need not worry since the employee will now have to prove he substantially complied with the “interactive process” under the proposed modifications, and the employer still has the same good faith burden to prove undue hardship. In some instances, the religious employee will be denied protection, but under my proposal, denial would happen less often due to the “interactive process” and even if the Title VII standards were set on par with the ADA, there would still be some religious employees denied.²⁴⁰

Another reason why religious employees’ accommodations will be denied less often is because my proposal places a heavier burden upon employers who implement the conflicting facially neutral policy of general applicability *after* the religious employee had already been working there.

234. See *Loftus v. Blue Cross Blue Shield of Mich.*, No. 08–13397, 2010 WL 1139338 (E.D. Mich. Mar. 24, 2010) (ruling employee’s “desire to travel to the Holy Land for six months was based on his personal preference rather than a religious obligation”).

235. See *Noesen v. Med. Staffing Network, Inc.*, 232 F. App’x. 581 (7th Cir. 2007) (finding that an employer made multiple attempts to accommodate pharmacist who refused to acknowledge anyone who he thought might inquire about contraceptives).

236. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 70 (1986).

237. See *United States v. N.Y.C. Transit Auth.*, No. 04–CV–4237(SLT)(MDG), 2010 WL 3855191 (E.D.N.Y. Sept. 28, 2010).

238. *Id.* at *5.

239. See *id.*

240. See *Noesen*, 232 F. App’x. 581.

In order for an employer to show any accommodation would cause it undue hardship, the employer needs to additionally prove the new neutral policy or rule of general applicability was implemented for “proven rational, non-arbitrary reasons.”²⁴¹ The *Brown* case best represents this situation since the Rastafarian employee’s role involved substantial customer service before the employer implemented a no beard policy, based on a consultant’s recommendation, and subsequently assigned the employee to the lower bay.²⁴² Under my “proven rational, non-arbitrary reasons” solution, the employer needs to show the policy was implemented based on sound business principles,²⁴³ has been strictly enforced since being implemented, and the policy has caused the desired effect by show of some noticeable tangible evidence. This strong burden is placed upon the employer here because the policy it is implementing may be “neutral,” but the policy has yet to be proven as strictly enforced. More importantly the burden is meant to prevent the “moral hazard” an employer has to implement any facially neutral policy it wants with the superficial rationale akin to “public image” or “uniformity”; neither of which requires any real evidence to be proven by the employer and yet is almost impossible to disprove because those rationales are mostly intangible and highly subjective in effect.²⁴⁴ Additionally, the higher burden may help smoke out any invidious intent.

CONCLUSION

With so many rights in play within the workplace, religion is something that should be merely tolerated, not promoted or denounced. The ADA is afforded a stronger accommodation standard due to societal and economic concerns as well as because of the immutability of disability. A more preferential Title VII standard could be struck down in violation of the Establishment Clause due to the potential governmental entanglement with religion either by affording religion a sword to cut through employers’ strictly enforced or provable neutral rules or laws of general applicability, or by a newly strengthened judicial inquiry into deciding what aspects of religion are bona fide. The commentators in favor of heightened standards, while sound in some of their arguments, ultimately fail to see that at some point an employee’s religion was a choice, and as such, should deal with

241. See *Piraino v. Int’l Orientation Res., Inc.*, 84 F.3d 270, 274-76 (7th Cir. 1996).

242. *Brown v. F.L. Roberts & Co.*, 419 F. Supp. 2d 7, 15-16 (D. Mass. 2006).

243. The exact extent of what this would mean in terms of evidentiary proof or burden of proof is beyond the scope of this article, but suffice it to say the consultant report in the case would be sufficient in my opinion. See *id.*

244. See, e.g., *Wolkinson*, *supra* note 22, at 1185-86.

the consequences of their actions. Title VII's issues may be fixed with some common sense modifications, but increasing the reasonable accommodation standard will only lead to chaos and "moral hazards" for employees.