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David L. Gregory

THE ROLE OF RELIGION IN THE SECULAR WORKPLACE

DAVID L. GREGORY*

I have been asked to sort out the implications of first amendment religion clauses jurisprudence for labor and employment law. I deliberately will not attempt to elucidate yet another taxonomy, topography, meta-theory, or some other polysyllabic, multi-part constitutional law test seemingly so certain to harmonize the law, and thus even more certainly destined for frustration. I do want to share some thoughts and concerns with you from my perspective as a labor and employment academic lawyer.

Title VII of the Civil Rights Act of 1964 generally prohibits discrimination in most employment on the basis of religion; the federal statute also requires the employer to accommodate reasonably the employee's religious practice. Thus, Title VII, as well as the first amendment religion clauses must be brought to bear upon considerations of the role of religion in the secular workplace.

The intersections of Title VII and the first amendment religion clauses hardly mark smooth thoroughfares. The law remains fragmented by a seemingly never-ending series of intellectual collisions. The recent pertinent Title VII and first amendment decisions of the United States Supreme Court can be briefly surveyed, and then we can perhaps begin to search for jurisprudential survivors.

The requirement of Title VII of the Civil Rights Act of 1964 that the secular employer reasonably accommodate[1] the

* Professor of Law, St. John's University School of Law.

1. Section 701(j) was added to Title VII by amendment in 1972. It defines "religion" as follows:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. § 2000e(j). This Title VII language concerning religion is much closer to Professor Milner Ball's important and valuable sense of the manifestations of a dynamic biblical faith, as distinguished from institutional religion's usual subservience to the state. *See* Ball, *Normal Religion in America*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 397 (1990).

religious practices of the religiously-identified employee has been minimized by the Court. In 1986, the decision of the Supreme Court in *Ansonia Board of Education v. Philbrook*[2] reaffirmed and strengthened *TWA v. Hardison*,[3] with a vengeance.[4] In both cases, the Court supported collective bargaining agreement constraints on the scope of reasonable accommodation. The Court has consistently been solicitous of the labor contract institutional prerogatives of seniority systems in this line of cases. Hardison, a Sabbatarian, was employed as a union-represented TWA clerk in a 24 hour, 365 day operation at the Stores Department of the airline's Kansas City base. While working on the 11 P.M. - 7 A.M. shift, he had sufficient seniority to avoid working on his Sabbath. When he transferred to another building and shift, he lacked seniority. When he refused to work on his Sabbath, he was discharged. Because of labor contract terms, further alternative reduced work schedules or substitutions were not feasible and would have been unreasonable accommodations, not required by law.

Philbrook, a teacher, had three paid days annually for religious observance, pursuant to the terms of the labor contract. He wanted to use additional contractual personal leave time for additional religious observance, or for his employer to allow him to pay a substitute on these occasions. As in *Hardison*, the Court in *Philbrook* found that these alternative proposals of the employee would constitute unreasonable accommodations of the employee's religious practices and observances by the employer, not required by law. After these cases, the religiously observant employee in the secular corporation is left with very little (Title VII) protection for religious practices and observances. Concomitantly, in *Presiding Bishop v. Amos*,[5] nonprofit institutional religious employers were granted wide discretion,[6] and may require secular employee formal membership in, and compliance with the tenets of, the institu-

2. 479 U.S. 60 (1986).

3. 432 U.S. 63 (1977).

4. For recent comprehensive assessment of these two salient Title VII cases, see generally, Brierton, *Religious Discrimination In The Workplace: Who's Accommodating Who*, 39 LAB. L.J. 299 (1988); and Tushnet, *The Emerging Principle of Accommodation of Religion* (Dubitante), 76 GEO. L.J. 1691 (1988).

5. 483 U.S. 327 (1987).

6. Section 702 of Title VII provides some exemptions.

> This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

tional religion. In *Amos*, the Court upheld the discharge from employment of a building engineer for a nonprofit health and fitness facility operated by the Church of Jesus Christ of Latter-day Saints because he failed to qualify for a temple recommend—a certificate indicating that he was a member of the Church in good standing and able to attend its temple services.

Thus, the pertinent Title VII provisions have been rendered largely meaningless as protection for the religiously observant employee of the secular employer, and have remarkably strengthened the discretion granted the institutional nonprofit religious employer to require employee membership in the religion. *Amos*, a private sector case brought on Title VII grounds rather than on first amendment bases, sent a markedly different signal than did *Alamo Foundation v. Secretary of Labor*[7] in the 1984 Term.

In *Alamo*, the Court unanimously affirmed the application of the federal minimum wage law to protect persons employed in the commercial enterprises of a religious foundation.[8] This did not interfere with the free exercise rights of the employees, nor did it excessively entangle the federal government in the affairs of the religious foundation. Unlike Title VII, the free exercise clause recently has been strengthened as a protection for the Sabbatarian unable to work on his Sabbath. *Hobbie v. Unemployment Appeals Commission of Florida*,[9] in 1987, reaffirmed and strengthened the line of Supreme Court decisions from *Sherbert v. Verner*[10] in 1963 through *Thomas v. Review Board*[11] in 1981. Now, most recently with *Frazee v. Illinois Department of Employment Security*[12] in 1989 extending unemployment compensation eligibility to even a generic Christian who refuses to work on Sunday, this peculiar line of the "free exercise to unemployment compensation" cases seems firmly established.

One surely senses that the unsuccessful employees in the *Amos* and *Ansonia* cases, standing on the rapidly eroding grounds of Title VII, look enviously and quizzically at their successful free exercise plaintiff counterparts in *Frazee* and *Hobbie*, and perhaps at the even more unconventional situation of Native American peyote users now seeking to retain their

7. 471 U.S. 290 (1985).

8. For comprehensive discussion of *Alamo* and related cases, see Gregory, *The First Amendment Religion Clauses And Labor and Employment Law in The Supreme Court, 1984 Term*, 31 N.Y.L. SCH. L. REV. 1 (1986).

9. 480 U.S. 136 (1987).

10. 374 U.S. 398 (1963).

11. 450 U.S. 707 (1981).

12. 109 S. Ct. 1514 (1989).

employment as drug counselors or to qualify for unemployment compensation in the alternative.[13]

How can these anomalies between Title VII and the first amendment religion clauses jurisprudence be explained and reconciled? They cannot. At best, free exercise champions may endeavor to throw a lifeline from constitutional shores to Title VII individual plaintiffs before the latter go over the falls. But this would require an extension of the Constitution into the private sphere. Despite elegant scholarship,[14] the chasm between the public and private spheres is unlikely to be bridged by the Constitution in the foreseeable future. Meanwhile, if employees have an option, it is clear that the free exercise clause offers far more protection for their religious practices in the workplace than does the severely debilitated Title VII.[15]

With this case law overview of recent pertinent Supreme Court opinions, I now want to shift the focus of my remarks. Let us consider the legal aspects of attempting to live the integrated life of prayer and work in contemporary secular employment settings.

Work, or at least the aspiration to work, is pervasive. Prayer, the attempt to acquire and appreciate a sense of the presence of God, one would like to think, is likewise pervasive. This tradition with which I personally identify has common roots in characters as diverse as Socrates, Jesus, St. Augustine, St. Benedict, St. Francis, Natty Bumpo, Tecumseh, Wokova, Black Elk, Peter Maurin, Dorothy Day, Teilhard de Chardin, Thomas Merton, Oscar Romero, Daniel Berrigan, Helder Camara, John XXIII and John Paul II.[16]

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13. Employment Div. v. Smith, 108 S. Ct. 1444 (1988); Smith v. Employment Div. II, 763 P.2d 146 (Or. 1988), *cert. granted*, 109 S. Ct. 1526 (1989). *See generally* Collins, *Oregon Decision In Peyote Case Grants First Amendment Relief.* 11 NAT'L L.J., Feb. 6, 1989, at 22.

14. *See, e.g.*, *The Public/Private Distinction* (Symposium), 130 U. PA. L. REV. 1289 (1982).

15. *See generally Developments—Religion and The State*, 100 HARV. L. REV. 1606, 1703-1781 (1987).

16. This is an eclectic, ecumenical, and fully catholic group of religious "heros." Most are familiarly within the Christian and Catholic traditions. In this sort of article, some personal background is appropriate. I am a practicing Roman Catholic. Throughout college, I was a seminarian. My wife and son are Jews. My father was part Cherokee, and was very comfortable with his immanent, relatively pantheistic Native American beliefs. Tecumseh, Wokova, and Black Elk are among the important mystics of the native peoples of North America. *See generally* BLACK ELK, BLACK ELK SPEAKS (1932); DEE BROWN, BURY MY HEART AT WOUNDED KNEE (1971).

Lawyers are privileged to work for justice. Indeed, law professors enjoy the ultimate luxury—the joy of a life engaged in the affirming work of teaching and writing that we all presumably love. By dealing in the rarefied realm of high concept, academics can aspire to the work and prayer mode of classic contemplation: at least in part, professors are the contemplative Trappists of the academy. Although no lawyer would ever take a vow of silence, many professors may initially be very comfortable with this cloistered notion. It is elegant, serene, platonic, idyllic and ideal. But Trappists also make cheese. Likewise, law professors presumably prepare students for the professional career of the active practicing lawyer, necessarily grounded in the realm of praxis. How does the law professor harmonize the integrated life of work and prayer, of theory and praxis? This is done through the integrated life of teaching and scholarship. They are both very hard work. They both require thought and action. They both combine aspects of the monastic and of the communal. One need only consider the profound scholarship of Milner Ball, Robert Rodes, Thomas Shaffer, Kent Greenawalt and Michael Perry as prominent academic lawyers offering examples of integrated lives of work and prayer. A Simone Weil or Dorothy Day may partially disagree, but manual labor is not the exclusive means for the integrated life of prayer and work.

Pray and work. *Ora et labora.* For more than a millennium, this has been the motto of the Benedictine monastic order. One need not be a Benedictine monk to appreciate that the synergy of prayer and work is very important to the integrated secular and spiritual life, but consider the beautifully inspirational tradition of Jesus and His followers, such as the Papal encyclicals and Bishops' letters on the fundamental importance of the integrated life of prayer and work.[17]

The United States has always been deeply and positively influenced by religious values. Theologians from St. Augustine to Harvey Cox have long puzzled over how to live a holy life in the secular city.[18] The Constitution expressly protects the free exercise of religion as one of our most important rights.[19]

17. I have extensively explored Catholic social teaching on labor in my recent article, Gregory, *Catholic Labor Theory and The Transformation of Work*, 45 WASH. & LEE L. REV. 119 (1988); *See also* Gregory, *Overcoming* NLRB v. Yeshiva University *by the Implementation of Catholic Labor Theory*, 41 LABOR L.J. 55 (1990).

18. AUGUSTINE, CITY OF GOD (1950); H. COX, THE SECULAR CITY (1965).

19. U.S. CONST. amend. 1.

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of religion.[20] Title VII requires employers to provide reasonable accommodation of employees' religious practices. The statute also grants the religious employer great discretion in mandating that its employees adhere to the tenets of the religion. The Supreme Court has held that these Title VII provisions do not violate the establishment clause of the first amendment, despite the obvious potential tensions between the statute and the Constitution.[21] There have been a plethora of important court decisions that have upheld the right to pray in a variety of settings. Perhaps most prominently in *Marsh v. Chambers*,[22] the Supreme Court upheld the right of the Nebraska state legislature to open its public sessions with a prayer by the legislature's chaplain, without a violation of the establishment clause.

To be sure, religion clauses jurisprudence often teeters on the edge of doctrinal incoherence. Despite the Supreme Court's trend in the mid-1980s toward accommodation,[23] not all religious practices of employees have been protected by the courts. The late 1980s have witnessed yet another pendulum swing from accommodationism to separationism. For example, in *Goldman v. Weinberger*,[24] the Court ruled that uniform military dress regulations could prohibit an Orthodox Jewish officer working as a clinical psychologist in the Air Force from wearing

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20. Section 703 of Title VII states in pertinent part:

> [I]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms conditions, or privileges of employment because of such individual's . . . religion.

42 U.S.C. § 2000-2(a).

21. *See* TWA v. Hardison, 432 U.S. 63 (1977); Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1987); Presiding Bishop v. Amos, 483 U.S. 327 (1987).

22. 463 U.S. 783 (1983).

23. *See* Allegheny County v. ACLU, 109 S. Ct. 3086 (1989) (Menorah on public property did not violate establishment clause); Lynch v. Donnelly, 465 U.S. 668 (1984) (city funded nativity crèche on private property near city hall did not violate establishment clause); Marsh v. Chambers, 463 U.S. 782 (1983) (chaplain opening sessions of state legislature with prayer did not violate establishment clause); Mueller v. Allen, 463 U.S. 388 (1983) (state law allowing tax deductions for tuition, textbooks, and transportation costs for children attending public and private schools did not violate establishment clause, even though the tax deduction primarily benefited parents of children attending private parochial schools). For a powerful critique of the Burger Court's increasing trend toward accommodationism in the early 1980s, see L. PFEFFER, RELIGION, STATE, AND THE BURGER COURT (1984). For an important recent discussion, see Tushnet, *supra* note 4.

24. 475 U.S. 503 (1986).

his yarmulke in accord with his religious beliefs. The courts have also been quite solicitous of the rights of religious institutions to dictate terms of doctrinal compliance to their employees in nonprofit religious, as opposed to purely secular, environments.[25] I will not exhaustively recross this already familiar ground.[26]

Rather, I want to explore the constitutional and Title VII dimensions of the role of prayer and related religious practices in the secular workplace. Obviously, public-sector employers are governed by both the first amendment clauses and by Title VII. Private sector employers are bound by Title VII, but not directly by the first amendment religion clauses. The American Bar Association advertises a members' prayer group session at its annual meeting. Members of the United States Congress hold prayer meetings. Can private employers do the same? More specifically, can executives and managers within private secular corporations condition employment opportunities on subordinates' attendance at religiously affiliated meetings, or upon subordinates' compliance with, or acquiescence to, religious practices of senior managers and supervisors within the otherwise secular business organization?

While the negative answer seems obvious, it may not invariably be so simple. Assuming *arguendo* that this question can be resolved, what then of the free exercise rights of the religiously observant individual senior executives of the private secular corporation? Have their religious rights not been reasonably accommodated, in violation of Title VII? By the terms of their religion, they may be commanded by scriptures to preach, teach, baptize and convert universally, as "fishers of men." If they must preach from the rooftops, is the secular employment setting exempted? The Hegelian sense of tragedy is exquisitely posed here as the tension between two rights, rather than the easy choice between an obvious right and a clear wrong.

Notice that the first amendment religion clauses are not directly at issue in these private sector employment settings. Prayer and related religious practices in the secular workplace present situations that test the farthest bounds of civil rights employment discrimination law, transcending the classic public sector setting of the Constitution.

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25. Presiding Bishop v. Amos, 483 U.S. 327 (1987).

26. I have extensively discussed many of these themes in Gregory, *supra* note 8.

When Title VII was enacted, the emphasis of the statute was on protecting the religious practices of those discrete and insular minorities not fully able to otherwise assert their religious rights in majoritarian environments.[27] The current situation in employment contexts is often markedly different. It may not always be the subordinate religious practitioner who must be protected from antireligious secular employers.[28] Rather, in a fashion that the drafters of Title VII never anticipated, the atheist, agnostic, nonaligned, or otherwise aligned subordinate employee may assert the protections of the statute, and, additionally, in public sector employment, of the Constitution, from the religious practices of senior management in otherwise primarily secular employment.

There may be some loose analogies from other areas of civil rights law. The initial request or suggestion or invitation extended by senior management to subordinate employees to attend, for example, a prayer meeting or a prayer breakfast, or the opening of a business meeting with a prayer, will more likely be unexpected or surprising rather than inherently unwelcome or repugnant. Employees may feel nonplussed, embarrassed, curious, or uncomfortable, but it is not likely that most employees would find the first overture to pray inherently reprehensible. This is not to say that, as in tort law, the first bite is free and that there can never be any harm caused by asking.[29] Religion rarely leaves one completely unaffected. While adult employees are not as susceptible to institutional prayer as the public school children in *Engle v. Vitale*,[30] the initial exposure to prayer may quickly transmogrify into an unwelcome, unpleasant experience for the subordinate employee.

But neither is this to equate prayer with, for example, sexual harassment. Prayer is inherently affirming. Sexual harassment has nothing whatever affirming about it, and is inherently

27. U.S. v. Carolene Products, 304 U.S. 144, 152, n. 4 (1938).

28. The Supreme Court usually has been very solicitous of protecting the free exercise right of the religious minority practitioner in secular employment. *See* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) (Florida's denial of unemployment compensation to Sabbatarian who refused to work on her sabbath violated her free exercise right). *But see* TWA v. Hardison, 432 U.S. 63 (1977); Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1987) (Title VII reasonable accommodation duty of employer towards religious employee's practices is no more than *de minimis*).

29. Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1055 (1936).

30. 370 U.S. 421 (1962); *See also* Wallace v. Jaffree, 472 U.S. 38 (1985) (Alabama moment of silence statute, which expressly encouraged silent prayer, violated establishment clause).

repulsive. For committed atheists, prayer is a silly waste of time. Of course, for the atheist or for the employee identified with another religion, coerced, involuntary submission to prayer certainly could quickly become fully as unwelcome as sexual harassment. Coerced prayer potentially can be religious harassment (to say nothing of how the prayer itself is also thereby debased). The core test to determine whether unlawful employee sexual harassment has occurred is whether the overture is unwelcome.[31] Objectively, sexual harassment is egregiously, tortiously offensive by its very essence; prayer is not. But if the prayer environment becomes coerced and involuntary, it potentially can become as offensive and as repugnant as unlawful sexual harassment.

In the secular workplace, can the law simultaneously protect the rights of religiously identified persons and of those who wish to be free from such practices, without the inevitable tensions that otherwise occur between the free exercise and establishment clauses? Can the Hegelian tragedy of two competing rights be resolved? Thus far, the few cases on point suggest that an adequate but imperfect balance can be achieved.

Young v. Southwestern Savings and Loan Association[32] perfectly illustrates the tensions that occur when a secular private sector employer has managerial agents imposing unwelcome religious practices on subordinate employees as a condition of employment.

Mrs. Young began employment as a teller for the bank in February, 1971. She knew that all employees were required to attend a monthly staff meeting at the downtown office of the bank. Employees were paid for these 45 minute meetings, which reviewed bank business, ranging from organization policy to future planning. The problem for Mrs. Young, a former Unitarian and now an atheist, was that the monthly meeting began with "a short religious talk and a prayer, both delivered by a local Baptist minister."[33]

Mrs. Young attended the first two monthly meetings, but thereafter resolved no longer to attend because she felt that her freedom of conscience was being violated by the convocation prayers. She did not mention this to anyone. She simply ceased her attendance. Her absence was finally noted at the

31. Meritor v. Savings Bank, 477 U.S. 57, 68 (1986) ("The correct inquiry is whether [the victim] by her conduct indicated that the sexual advances were unwelcome"). *See also* Equal Employment Opportunity Commission's Guidelines on Sex Discrimination, 29 C.F.R. § 1504.11 (1986).

32. 509 F.2d 140 (5th Cir. 1975).

33. *Id.* at 142.

September, 1971 monthly meeting. Management informed her that her attendance was mandatory and that the primary purpose of the monthly meeting was discussion of bank business. She was told that she "had an obligation to attend the entire meeting, and advised her that if she objected to the devotionals, she could simply 'close her ears' during that time."[34] She disclosed her reason for not attending the meetings, and because she would not compromise her beliefs, she involuntarily resigned "in order to escape intolerable and illegal employment requirements."[35] She was constructively discharged.

The Fifth Circuit found in her favor and reversed the discharge. The court found "that Mrs. Young was constructively discharged in circumstances which amounted to religious discrimination against her by Southwestern."[36]

The court immediately focused on the opening prayer at the mandatory monthly bank business meeting as unlawful employment discrimination on the basis of religion, in violation of Title VII. "This theological appetizer, nondenominational though it might be, was somewhat uncongenial to plaintiff, who is an atheist,"[37] they wrote.

Most recently, in September of 1988, the Ninth Circuit further incisively elucidated the spectrum of complex issues in *E.E.O.C. v. Townley Engineering and Manufacturing Company*.[38] Although the Supreme Court denied certiorari[39] in March, 1989, the issue is certain to again come before the Court. Meanwhile, the Ninth Circuit's opinion and the formidable dissent of Judge John Noonan[40] crystalize these novel problems. The court of appeals held that an atheist employee who affirmatively objected could not be compelled to attend the religious services sponsored upon the premises of the employer, a mining equipment manufacturer. The court found that the free exercise rights of the religiously identified owners of secular corporations must, on balance, yield to the Title VII protection afforded objecting employees.

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34. *Id.*

35. *Id.* at 144.

36. *Id.* at 143.

37. *Id.* at 142.

38. 859 F.2d 610, 47 Fair Empl. Proc. Cas. (BNA) 1601 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1527 (1989).

39. *Id.*

40. Prior to his appointment to the Ninth Circuit by President Reagan, Judge Noonan was a professor of law at Notre Dame and at the University of California at Berkeley Boalt Hall School of Law. He has a Ph.D. in philosophy from the Catholic University of America and law degree from Harvard, and he has written extensively about legal ethics.

> "Where the practices of employer and employee conflict, as in this case, it is not inappropriate to require the employer, who structures the workplace to a substantial degree, to travel the extra mile in adjusting its free exercise rights, if any, to accommodate the employee's Title VII rights."[41]

The closely held corporation at issue was founded in 1964 by Jake and Helen Townley, who own 94% of the stock. It manufactures mining equipment for commercial profit at several different facilities. When the Townleys, who are born again Christians, founded the business, they "made a covenant with God that their business 'would be a Christian, faith operated business.' "[42] The company prints and encloses Gospel quotes on all of its documents and all of its mail, and financially supports missionaries.

It held weekly religious devotional services in the workplace. "They typically last from thirty to forty-five minutes, and may include prayer, thanksgiving to God, singing, testimony, and scripture reading, as well as discussion of business-related matters. Townley required all employees to attend the weekly services; failure to attend was regarded as equivalent to not attending work."[43] These services were conducted at the corporation's Florida facility since it commenced operations in 1963. It opened an Arizona facility in 1973, but did not institute the weekly religious devotional services there until 1984. An atheist employee, hired at the Arizona facility in 1979, objected to the services shortly after they were instituted in 1984.[44] The trial court granted summary judgment in favor of the plaintiff, ruling that requiring employees to attend its religious services and failing to accommodate the requests of the atheist employee to be excused violated Title VII.

Upon review, the Ninth Circuit held that

> Congress did clearly intend for Title VII to cover Townley's mandatory devotional services. Sections 701(j) and 703(a) of Title VII make clear that requiring employees over their objections to attend devotional services cannot be reconciled with Title VII's prohibition against religious discrimination. Furthermore, we hold that Con-

41. 859 F.2d at 621.

42. *Id.* at 612.

43. *Id.*

44. The atheist employee shortly thereafter left the company, claiming constructive discharge. In April, 1988, the district court ruled in favor of the employee; that issue, however, was not before the Ninth Circuit.

> gress did not intend section 702's exemption for religious corporations to shield corporations such as Townley. We do hold, however, that Jake and Helen Townley have certain rights under the Free Exercise Clause that Title VII cannot infringe.[45]

Although the owners were devoutly religious, their corporation was secular in its purpose and operation; it manufactured mining equipment. Therefore, it could not claim the status of a religious corporation within the meaning of § 702 of Title VII. The religious affiliations and practices of the individual owners did not transform the secular corporation into a religious organization. "We merely hold that the beliefs of the owners and operators of a corporation are simply not enough in themselves to make the corporation 'religious' within the meaning of section 702,"[46] the court wrote.

The employer admitted that it never attempted to accommodate the atheist employee's objections to the religious services. The employee was told he could wear earplugs and/or read a newspaper, but that otherwise he had to be physically present. Despite the dissent's view that these conditions were a sufficient accommodation, the majority of the court agreed with the employee's proposal that the employer reasonably accommodate his request to be excused from attendance, ruling that "the burden of attempting an accommodation rests with the employer rather than the employee."[47] The spiritual cost to the owners' free exercise rights would have to be borne, and thus yield to the Title VII right of the objecting employee to be excused from attending the employer's religious services. The court emphasized that the employer's Arizona facility operated for its first eleven years, from its opening in 1973 to 1984, without the weekly religious services. The inclusion of some business discussions in the weekly meeting was not sufficient to free the weekly meeting of its inherently religious nature.

In summing up, the Ninth Circuit defined the heart of the employee's Title VII protections. "Protecting an employee's right to be free from forced observance of the religion of his employer is at the heart of Title VII's prohibition against religious discrimination."[48]

Nevertheless, the Ninth Circuit concomitantly recognized the owners' admittedly subordinated free exercise rights, and

45. 859 F.2d at 613.
46. *Id.* at 619.
47. *Id.* at 615.
48. *Id.* at 620-21.

narrowed the scope of the lower court's injunction. Title VII does not require employers to abandon religion, but rather attempts to achieve an accommodation of conflicting employer and employee practices in our pluralistic society. The district court improperly enjoined all mandatory religious services at the employer's Arizona facility. This was unduly broad, and unnecessarily trammelled the owners' free exercise rights. Rather, only those employees who objected to attending the religious services and asked to be excused from physically attending would be protected. Otherwise, the mandatory nature of the services alone was not a sufficient basis upon which to support the original injunction.

Even if they wear earplugs and read a newspaper, adults can no more "close their ears" to the spiritual ambience created by vocalized prayer in the private-sector work environment than can children in the public schools. The former clearly violates Title VII, the latter, the first amendment religion clauses.

The pivotal factor is not the employer's endorsement and sponsorship of prayer *per se*. In an adult employment environment, there ought not be any harm in the initial invitation to join in prayer. But it is essential that the religious activity be optional, and that no adverse employment consequences occur because one chooses not to participate.

While the initial offer can be unexpected, it must not be pursued so as to transform an informal invitation into a coerced, unwelcome condition of employment. At that point, unlawful religious harassment and sexual harassment become virtually indistinguishable.

Private-sector secular employers need not abolish all religious activities that they had previously permitted, sponsored, or endorsed. Similarly, the meticulous employer who wishes to prevent sexual harassment need not abolish all business lunches or office parties simply because these are opportunities where unlawful overtures may occur. Rather, the more prudent and realistic alternative is to scrutinize and prohibit any unlawful conduct that might occur in these otherwise lawful and appropriate settings. This can be difficult, but certainly not impossible, for a conscientious employer to do. Employers must carefully ensure that employees who choose not to attend employer sponsored prayer meetings do not unlawfully suffer any deprivation of employment opportunities by their nonparticipation—admittedly a task that will require careful personnel administration, and a task that must be accomplished without separating non-participants as any isolated control group.

The Ninth Circuit decision provides a potentially workable and pragmatic schematic to safeguard the rights of all parties. But the majority opinion did not fully address the perhaps ultimately more important, nonnegotiable rights highlighted by Judge Noonan in his formidable dissent,[49] namely, the rights of those who wish to pray in the secular workplace. Because so much of modern life is bound up with work, the workplace is a fully appropriate setting to integrate the life of prayer and work. According to the dissent, the owners who wished to pray with their employees should not be forced to bifurcate the integrated dimensions of prayer and work.[50] It is a critically important theme that, despite the Supreme Court's recent denial of certiorari, seems certain to appear again before the Court and demand a resolution. Forms of mandated practice may be quite different from Christian evangelism. If the integrated life of prayer and work prevails over pragmatic separation of various employees' interests to respect everyone's rights, the dissent in *Townley* may eventually prevail.

Essentially, I am a separationist and I am troubled and saddened by the potential bastardization of publicized prayer, whether in schools, in factories, or in offices. Yet, I am also a practicing Roman Catholic and therefore necessarily I am also one who strives to live an integrated life of prayer and work.

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49. *Townley*, 859 F.2d at 622.

50. Judge Noonan's sharp critique of the bifurcated life merits quotation at length.

> The agency and the court appear to assume that there must be a sharp division between secular activity and religious activity. . . . But of course such a dichotomy is a species of theology. The theological position is that human beings should worship God on Sundays or some other chosen day and go about their business without reference to God the rest of the time. Such a split is attractive to some religious persons. It is repudiated by many, especially those who seek to integrate their lives and to integrate their activities. Among those who repudiate this theology is the Townley Manufacturing Company.
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> . . . .For an agency of the government, or Congress, or a court to say that the Townleys are mistaken in their beliefs or that the Townley Manufacturing Company cannot have the purpose ascribed to it and shall not carry out the program of devotion it has set up is to make a theological judgment—a theological judgment fairly characterized as reflecting either a secularism skeptical of God's existence and power or a species of deism that radically isolates God from the world that believers believe God created and animates and directs. The First Amendment prohibits an agency of government, or Congress, or even a court, from imposing such a theological judgment to curb the free exercise of religion.

859 F.2d at 624-25.

The free exercise clause has as much vitality for me on the microcosmic, individual level as the separationist foundation of the establishment clause has appeal on the conceptual, structural, macrocosmic level. The establishment clause can perhaps yield justice, or at least keep us from killing one another in the name of religion. The free exercise clause is much riskier, but in that risk perhaps exists the potential for the full flowering of justice into the love of one another.

The tensions in our religion clauses and Title VII jurisprudence can never be fully harmonized. However, with sensitivity and concern for everyone's rights, delicate balances can be achieved, if carefully and constantly recalibrated. But maybe to choose the lawyer's safe balance is dry and arid. Maybe we should take some risks, even in law. I shall end on an affirming, risky note. *Oremus*. Let us pray.