

## RELIGION IN THE WORKPLACE: A REPORT ON THE LAYERS OF RELEVANT LAW IN THE UNITED STATES

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### I. INTRODUCTION AND RONDO CAPRICCIOSO

As this conference convened in Nantes, France, it would be a most suitable way of introducing this review of religion in the American workplace, if one could begin with an apt comparison drawn from Julius Caesar's famous first sentence in his Notes on Gaul—that much like Caesar's Gaul, the subject of this Report is divided into three parts.<sup>1</sup> The “three parts” in consideration of this review (unlike Caesar's) would be these:

- (a) Workplaces maintained under the authority of the United States—all of which must be operated in a manner consistent with the First Amendment of the Constitution;<sup>2</sup>
- (b) Workplaces maintained under the authority of the fifty states and their various political subdivisions—all of which must be operated in a manner consistent with the Fourteenth Amendment of that same Constitution;<sup>3</sup> and,

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1. “Gallia est omnis divisa in partes tres . . .”

2. The most relevant provision of the First Amendment (1791) that limits the power of the national government to determine federal workplace rules in respect to “religion,” is this: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .” U.S. CONST. amend I. The Supreme Court has held that such rules as apply to federal workplaces—and to federal employees—are directly challengeable under the First Amendment (i.e., that the particular rule is the immediate product of administrative or executive design rather than commanded as part of some “law” made by “Congress,” is neither here nor there—it is as challengeable as though it were prescribed by “law”). There is, however, this distinction, in respect to taxpayer standing to contest executive actions favoring religion: only when Congress expressly stipulates that an appropriation it provides for use or disbursement by the executive branch includes some religiously-linked use may an ordinary individual federal taxpayer draw it into question. *Compare* *Hein v. Freedom From Religion Found., Inc.*, 127 S. Ct. 2553 (2007) *with* *Flast v. Cohen*, 392 U.S. 83 (1968).

3. The relevant provision of the Fourteenth Amendment (1868) as applied by the Supreme Court to limit the power of state governments to determine state-and-local-government workplace rules in respect to religion, is set forth in Section One of that Amendment: “[N]or shall any State deprive any person of . . . liberty . . . without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

- (c) All other workplaces, namely, all those *not* maintained under governmental authority (whether national, state, or local), but by *private* employers—employers not in any way restricted by the First or Fourteenth Amendments in settling their workplace rules.<sup>4</sup>

This last group of workplaces is by far the largest of the three, not just in respect to the number of workplaces but in total number of employees. Indeed, the whole number of employees *not* constitutionally protected in

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Despite the conspicuous absence of *specific* language in this clause to suggest that it has anything to do with “religion,” “religious establishments,” or “the free exercise of religion,” the Supreme Court has nonetheless held that it is this “due process” clause that is the relevant clause in the Fourteenth Amendment, and, moreover, that it is to be read as though it contained the very same words as the First Amendment itself, adjusted simply to make clear that they apply to the States (and not merely, as previously, only to the national government as such). *See, e.g.*, *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (applying the “free exercise” clause to a state via the due process clause of the Fourteenth Amendment); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (applying the “no law respecting an establishment of religion” clause to a state via the due process clause of the Fourteenth Amendment). Accordingly, for our purposes, we may act as though the Fourteenth Amendment copied the clause from the First Amendment, merely substituting the phrase, “No State shall make any law respecting an establishment of religion (etc.)” for the corresponding phrase, “Congress shall make no law respecting an establishment of religion (etc.)” to make them read exactly parallel.

There is, to be sure, as many academic commentators have noted, an illogic and an embarrassment in the U.S. Supreme Court’s reliance on the “due process” clause as the correct clause of the Fourteenth Amendment for the Court to have seized upon to hold that the various provisions of the First Amendment were—by *this* clause—made equally applicable to the States. The “illogic” of the Court’s reliance becomes obvious once one notes a striking similarity between the phrasing of the “due process” clause of the Fourteenth Amendment and the virtually identical phrasing of the pre-existing “due process” clause in the Fifth Amendment—an amendment binding on the national government, but not of itself binding on any of the states. Nor is this merely some odd coincidence. Indeed, it is quite plain that the phrasing of “the due process clause” in the Fourteenth Amendment was neither original nor just coincidental. Rather the phrasing was obviously lifted from (or “borrowed” from) the same “due process” language as it appears in the Fifth Amendment, neither more nor less. Of course, no one contends that the due process clause in the *Fifth* Amendment “incorporates” the religion clauses (or any other clauses) of the *First* Amendment (that would be quite a remarkable state of affairs!). All of that being so, accordingly, it has seemed very odd indeed to treat a clause (the “due process” clause) in the later-in-time Fourteenth Amendment—as copied from the Fifth Amendment—as somehow embracing more than what is embraced by the very clause *from which it was copied!* Nevertheless, this *is* the settled view of the Supreme Court, and we shall not reconsider it here except, perhaps, to ask this niggling question: “May water sometimes rise higher than its source?” (Evidently it may . . . at least it seems to do so when it comes to reckoning with the interpretive prerogatives of the U.S. Supreme Court!)

4. Private employers may, of course, sometimes act jointly with others in setting their workplace rules, as in the case of members of a particular trade association agreeing to particular standard practices, or, in other instances, in setting workplace rules consistent with agreements with labor unions with whom a broad range of private-sector employers are under statutory obligation to negotiate the terms of collective bargaining contracts inclusive of provisions affecting “workplace” rules. Even so, none of these joint actions *within* the private sector ordinarily subjects them to any constitutional accountability. *See, e.g.*, *NCAA v. Tarkanian*, 488 U.S. 179 (1988). Compare *Black v. Cutter Laboratories*, 351 U.S. 292 (1956) (dismissal of an employee by a private company for membership in Communist Party, held, *not* reviewable under the First Amendment insofar as the action was that of a private employer acting in a manner permitted by the negotiated terms of its collective bargaining agreement), with *United States v. Robel*, 389 U.S. 248 (1967) (dismissal of *government* shipyard worker pursuant to Act of Congress for Communist Party membership reversed). See cases cited *infra* note 8 (for the different cases in which a private sector party acts jointly with government parties).

respect to *whatever* rules *their* employers (regardless of size<sup>5</sup>) deem most suitable for themselves is vastly greater than the number of those who can claim some protection furnished by the Constitution against just such kinds of workplace rules—when a “government employer” is involved. In brief, while roughly twenty million employees (those in government service of some kind, whether national,<sup>6</sup> state, or local<sup>7</sup>) *may* assert various constitutional claims in respect to their conditions of employment, more than 116 million—those in the vastly greater private sectors of the U.S. economy—may not.<sup>8</sup>

*Why* is this the case in the United States? It is the case, of course, because the relevant constitutional provisions in the United States<sup>9</sup> are

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5. Whether very small businesses, with but few employees, or giant corporations (such as General Motors or the Boeing Company) with thousands.

6. A reasonably current best estimate of the number of federal civilian employees is in excess of 2,500,000 (exclusive of some unreported agencies, e.g., the Central Intelligence Agency and the National Security Agency). See <http://www.opm.gov/feddata/html/2007/September/table1.asp>. To that number, another 1,500,000 personnel should be added, for an overall total of more than four million “federal” employees. The larger overall number reflects the inclusion of 1,500,000 active duty *military* personnel in the armed services of the United States. See <http://siadapp.dmdc.osd.mil/personnel/MILITARY/history/hst0803.pdf>. This inclusion of military personnel is warranted because, despite the obvious distinctions of military service, the national government (as “employer” of military personnel in its service as well as its civilian workforce) is *still* constrained by the First Amendment provisions in respect to what it may provide, what it may forbid, or what it may require of its personnel. So, for example, one such kind of “workplace” assuredly includes military bases as such. See, e.g., *Goldman v. Weinberger*, 475 U.S. 503 (1986) (five-to-four decision denying First Amendment “free exercise” claim of exemption from general ban on wearing any “headgear” while indoors and on duty, to orthodox Jewish officer bound by faith to wear a yarmulka) (a decision nonetheless at once effectively “reversed” by Act of Congress pursuant to its constitutional power to “make Rules for the Government and Regulation of the land and naval forces,” as provided in Article I, Sec. 8. See 10 U.S.C. § 774 (2009)).

7. A reasonably current estimate of “full-time equivalent” state and local government employees—in respect to whom all states and local governments “as employers” are deemed by the Supreme Court to be as much constrained by the quoted provisions of the Fourteenth Amendment as the federal government is constrained by the First Amendment in setting and enforcing federal workplace rules—places the total in excess of sixteen million. See

8. This observation needs but one modest qualification. Depending on the degree or extent of “entwinement” or “joint action” of particular private entities with government agencies of various sorts, certain ostensibly private entities may become accountable for their actions as though they were public entities (i.e., as though they were operated under government auspices). See, e.g., *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Assn.*, 531 U.S. 288 (2001); *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374 (1995); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961). And, very occasionally, large enterprises corporately owning whole towns, have been subjected to constitutional restraints. See, e.g., *Marsh v. Alabama*, 326 U.S. 501 (1946). Additionally, in some few states (for example, California is such a state—see *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980)), a particular state’s constitution may contain certain provisions that apply to private employers in equal fashion as those same provisions apply to public sector employers. Such state constitutional provisions are highly exceptional, however, and beyond the scope of our immediate review.

9. See *supra* notes 1 and 2 and accompanying text (quoting the relevant clauses from the First and Fourteenth Amendments and noting that the relied-upon clause in the Fourteenth Amendment has been construed by the Supreme Court to impose the same constraints on the States as the First Amendment imposes upon the National Government). Hereafter, therefore, merely to avoid unnecessary redundancy, this paper will simply refer to the “First Amendment” without regard to whether the government workplace under discussion is one maintained under federal or under state authority insofar as both are, constitutionally speaking, treated the same in cases before the Supreme Court.

framed solely as restrictions on government and *not* as restrictions on nongovernmental entities such as they may be. And so, accordingly, even from this brief preliminary review, we can see that our initial effort—to divide the subject initially into “*three parts*”—will not do. Rather, simply as a first cut, i.e., as a division marker traced along a dotted *constitutional* line, it divides into two: (a) the workplaces of public employers, and (b) the workplaces of private employers, the first set of which is governed by the First Amendment, and the second of which is not. Accordingly, any “rights” (such as they may be) as employees of private employers may claim against their employers in respect to workplace conditions, must spring from *other* sources of law, i.e., “nonconstitutional” sources—such as these: (a) statutory provisions (federal, state, or local); (b) collectively-bargained (or individually-bargained) contract provisions; or, (c) provisions derived simply from the common law as such.<sup>10</sup>

Finally, then, simply to illustrate the manner in which the Constitution applies to government workplaces but not to private-sector equivalent workplaces, it may be useful to consider at least one example of a matched set and compare the results. First, a government workplace suffused with a Christian decor, where the government employees would be expected to assemble at their work stations at the beginning of each day, say, to recite—or at least listen to—“The Lord’s Prayer.”<sup>11</sup> This arrangement, in *both* its

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In addition to these two most crucial clauses, however, there is one other in the Constitution that bears at least some passing mention on its own account. It is a clause in Article VI, expressly providing that “[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.” U.S. CONST. art. VI. In so providing, the Constitution of the United States thus deliberately set a new course from prior English and continental practice (where religious test oaths were common and frequently productive of considerable civil strife).

10. We shall get to some of these in due course, in Section II, identifying all of the principal relevant federal statutes. See *infra* notes 18, 25, 26, and 33 and accompanying text.

11. We are deliberately skipping the (far-easier) case where, for example, the religious favoritism reflected in the government’s employment practice would go not merely to the conditions and practices *within the workplace* itself (the principal subject of this particular conference), but would begin even earlier “at the front gate,” e.g., a hiring practice wherein employment preference would turn on the religion, or lack thereof, of those applying for work. The First Amendment as construed by the Supreme Court, all-but-categorically forbids *any* such discriminatory practice, whether it be a government preference merely for one particular type of religion, a preference for those affiliated with at least *some* religion (thus “neutral” *among* religions but not “neutral” insofar as it favors the religious over the nonreligious) or, for that matter, the reverse (namely, a preference for those without religious affiliation of any kind). The First Amendment generally forbids government from making any person’s religion or lack thereof a relevant consideration for public employment. See, e.g., *Torcaso v. Watkins*, 367 U.S. 488 (1961); *McDaniel v. Paty*, 435 U.S. 618 (1978).

To be sure, there are exceptions (aren’t there always?), and because that is so, the preceding paragraph has to be modestly hedged as it is. So, for example, certain state and federal prisons are authorized to provide religious counselors to prisoners otherwise lacking pastoral recourse, even as, likewise, there are government-employed chaplains affiliated with various military bases, on a similar rationale. It is also true, however, that some other “chaplain exceptions” can and do raise First Amendment issues that spill over to affect a particular government “workplace” as such. See, e.g., *Marsh v. Chambers*, 463 U.S. 783 (1983) (legislative chaplain on the state payroll who opened each legislative session with “nondenominational” prayer, unsuccessful suit by an objecting member of the legislature to enjoin the practice—the practice was sustained despite its manifest ensconcing of a

aspects,<sup>12</sup> would be readily subject to successful constitutional objection virtually by any employee directly affected by the arrangement.<sup>13</sup> But, the identical arrangement at a private plant would not. Accordingly, in the latter case, a disaffected worker in the workplace would be obliged to seek relief (whether to compel changes to be made in the workplace decor or whether merely to enjoin the requirement of prayer participation), if at all, exclusively pursuant to some *other* source of legal protection,<sup>14</sup> failing that, he or she would have to acquiesce, like it or not.

## II. UNRAVELING A TANGLED GORDIAN KNOT

The action of a state<sup>15</sup> that is accountable to the First Amendment, however, certainly includes *any* “state action” it takes in respect to workplaces, and not merely such action it presumes to take—or fails to take—in respect to *its own* workplaces as such. Thus understood, it necessarily includes such actions as the state presumes to take in its regulation of private sector workplace conditions, *whatever* they—those regulations—may be, thus preempting whatever rules would otherwise prevail within each such workplace *absent* the preemptive statutes as enacted by the state. In brief, whatever the nature of its intervention in the private sector, it—the state—is always constitutionally accountable to answer for whatever *it*—the government—has presumed to do.

As much as this is utterly uncontroversial and perfectly well-established in the United States, as is generally true in most other nations as well. It is, one might say, moreover, obvious to the point of obtuseness and thus hardly worthy of mention. Even so, when it comes to the particular subject of religion in the workplace and the operative clauses of the First Amendment, it is a proposition that needs to be kept particularly well in mind. Why . . . or why “*particularly*”? It is because there is something different about the First Amendment’s religion clause that distinguishes it from any other in the Constitution. It is a difference easily overlooked or—

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particularized religious ceremony in the heart of the legislative “workplace,” namely, the central legislative chamber where the members assemble to do the people’s work).

12. *I.e.*, the pervasive Christian decor itself, as well as the rule re daily Christian prayer. As to the first, the pervasive Christian décor, *see, e.g.*, *County of Allegheny v. ACLU*, 492 U.S. 573 (1989); *McCreary County v. ACLU of K.*, 545 U.S. 844 (2005). As to the second, *see, e.g.*, *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 271 (2000). *See also* *Torcaso v. Watkins*, 367 U.S. 488 (1961).

13. The objection would be based on that portion of the First Amendment forbidding Congress to make any law “respecting an establishment of religion” (quite apart from the portion that forbids it to abridge “the free exercise thereof”). And, indeed, for the standing of a mere visitor or taxpayer to file a suitable case to present the issue. *See, e.g.*, *County of Allegheny v. ACLU*, 492 U.S. 573 (1989); *see also* *Flast v. Cohen*, 392 U.S. 83 (1968); *Everson v. Bd. of Educ.*, 33 U.S. 1 (1947).

14. *See supra* note 4, ¶ 1, for a list of such other sources, including federal or state statutes and local ordinances (with specific references provided hereafter in Section II).

15. Or, once again, of *any* level of government . . . national, state, or local, as the case may be.

when noticed—easily misunderstood. And the difference plays a critical monitoring role in determining just what a government may do in providing for degrees of religious freedom that it wants to extend to those employed in the private sector, and not merely for those who work for the government itself.

The relevant clause of the First Amendment concerns a single subject (religion), but treats it *twice*, i.e., in two respects rather than merely one. Accordingly, it is not enough that one may correctly observe of a particular law affecting various workplaces that it does not restrict, rather it “enhances” (rather than “prohibits”) the “free exercise” of religion. Even supposing that it incontrovertibly does so, as, for example, would surely be true of a law providing that “all employers must accommodate the dress requirements of religiously-observant employees” (e.g., yarmulkas for faith-obedient male Jewish employees; hijabs, niqabs, or burkhas for faith-obedient Muslim women, etc.), it must still be checked against the *other* admonition built into the First Amendment—the other “pillar” at the front end of that Amendment, on which are inscribed these words: “Congress shall make no law *respecting an establishment of religion*.” So, obviously, laws must be checked against *this* part of the Amendment as well, i.e., checked to determine whether the law conforms with this limitation, and not checked merely to determine whether the law might be seen as merely “enhancing” (rather than “prohibiting”) the free exercise of religion as such. In brief, the first clause may itself be indifferent on its face as to whether a law “enhances” (rather than inhibits or prohibits) the free(er) exercise of religion, whether in the workplace or anywhere else.<sup>16</sup> Indeed, on its face, the first clause may very well carry the strong implication that it is precisely laws that “unduly” (i.e., *specially*) favor, promote, or advance “religion”

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16. Indeed, in the Court’s first systematic address to the Establishment Clause, *Everson v. Bd. of Educ. of Ewing Township*, 330 U.S. 1, 16 (1947), the Opinion by Justice Hugo Black for the Court included the following statements (emphases added):

The “establishment of religion” clause of the First Amendment means *at least* this: Neither a state nor the Federal Government can set up a church. Neither can pass laws *which aid religion*, aid *all religions*, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. *No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion*. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups, and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect “a wall of separation between church and State.”

The whole quotation, and particularly the italicized portion, surely speaks very “strongly,” expressing the view that the “wall of separation” equally forbids laws “which *aid religion*” just as it likewise forbids laws that would presume to call it into question in any way (e.g., to forestall its free exercise, to interrogate its practices or seek to undermine its standing in the eyes of those who freely choose to adhere to it as they elect to do without fear or favor from the state).

that *this* clause means to *forbid*, e.g., laws that seek to advance religious interests as *superior to other interests*, or laws *exalting* “religion” (so, for example, laws drawn to favor those who have at least *some* kind of religion over those who have none).<sup>17</sup>

Of course, the clause may be far narrower (and some have claimed that it is) and that it has none of the effect as just suggested. Perhaps, that is, it has nothing to say insofar as legislative bodies wish to “promote” the free(r) exercise of religion, and may mean, strictly in reinforcement of the “free exercise clause,” merely (yet significantly) that Congress shall make no law respecting “*an establishment*” of religion in the more literal sense of presuming to prescribe or dictate the layout or interior features of a *religious establishment* as such, and even less authority to presume to “fix” the liturgy, the content of devotional practices, or standards of ministerial or membership eligibility, of any religion<sup>18</sup>—that each religion “establishes” all such matters in keeping with its own views (for after all, this is the

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17. As, for example, would plainly seem to apply to a law providing that insofar as a mode of dress is “*religiously*” prescribed, employers must make due allowance in the workplace, but unless *religiously* prescribed, *no* allowance need be made. (Chadors “in,” but baseball caps “out,” unless one is prepared to say that one’s devotion to the Chicago Cubs is a “religion,” and that “devoted” Cubs fans are expected at all times to wear a suitable Cubs cap.)

18. A straightforward example of this sort would be one involving a state or federal law flatly forbidding “sex discrimination in employment.” As applied to a “religious employer” (say, a Catholic diocese strictly limiting employment as a ministering priest to persons who are (a) Catholic (rather than of some other faith or no faith) and (b) male (“no women need apply”)), of course it may be accurately observed that the diocesan employer is engaging in “employment discrimination” of a sort (indeed, actually, of *two* sorts—sex and religion) that the state is “forbidden to forbid” (i.e., forbidden *to forbid to the church*). As it happens, however, altogether to avoid litigious disputes respecting whether certain employment positions held under church auspices are or are not in fact “pastoral” posts (e.g., distinguishing gardeners who attend the roses rather than the rosary, so to speak, as distinct from priests or sextons, etc.), Congress itself has granted a “*blanket exemption*” so no church shall be called upon to “prove” that, according to its tenets, the particular position is predominantly or even at least significantly pastoral in point of fact. This is a considerable dispensation, nonetheless upheld in the Supreme Court. See *Corporation of the Presiding Bishop of the Church of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) (sustaining 42 U.S.C. § 2000e-1 (1991), an amendment to the Civil Rights Act of 1964 that exempts any “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,” from the nondiscrimination provisions of the Civil Rights Act of 1964). Note the breadth of this statute-provided exemption as set out in italics. The Act unquestionably provides religiously-operated enterprises “safe cover” for covert discrimination but, granted that may be so, the First Amendment has been construed to permit Congress so to “favor” the “free exercise” of religion in just this highly favored way. And note, too, that the exemption covers a very wide swath of establishments, i.e., *much* wider than merely “churches” (or their equivalents), in their prerogative to determine whom to employ and what to allow (or not allow) in the “workplace.” See, e.g., *E.E.O.C. v. Presbyterian Ministries, Inc.*, 788 F. Supp. 1154 (W.D. Wash. 1992) (“Exeter House,” a nonprofit retirement home operated by Presbyterian Ministries, dismissed a receptionist for wearing a “head scarf” required by her Muslim faith: holding, as a religiously-operated facility choosing to project a “Christian atmosphere,” the employer was “exempt” from the nondiscrimination provision of Title VII. Thus, being *exempt*, it had *no* obligation under Title VII to make any showing of how or why an accommodation would be incompatible with its mission, such as it was. For an able essay on this general problem, see Laura Undercuffer, “*Discrimination*” *on the Basis of Religion: An Examination of Attempted Value Neutrality in Employment*, 30 WM & MARY L. REV. 581 (1989)).

essence of religious freedom, one would say, such matters not being “appropriate” for the secular state to invade). If so, the clause thus would indeed have its own separate work to do, but only *this* kind of “separate work,” nothing beyond.

A third possibility<sup>19</sup> lies in between, i.e., that the clause does both things at once, so it may in some measure strongly *reinforce the “free exercise” clause*,<sup>20</sup> even as it may, however, *also* be meant to reinforce a principle of *civil equality among citizens*—to do so by providing a constitutional assurance that the state will not bestow significant advantages on “believers” over “nonbelievers” or the reverse.<sup>21</sup> And, indeed, several justices have taken precisely this very strong first amendment stance,<sup>22</sup>

19. Actually, there are several other possibilities as well, e.g., the reference to “an establishment” of religion as a reference to “state-favored,” i.e., “*state-established*,” religions that the clause simply means to forbid Congress from interfering with any state laws favoring such state-supported religion(s) as each state may think suitable thus to favor (much in the same fashion as the Church of England is the “established” church and, accordingly, both subsidized and protected by anti-blasphemy laws, as other churches and religions are not). See William Van Alstyne, *What Is “An Establishment of Religion”?*, 65 N.C. L. REV. 909 (1987).

20. For a suitable example of just this sort, the clause re “no law respecting an establishment of religion,” has been utilized by the Supreme Court to preclude *civil courts from presuming to resolve schismatic differences within a church* by presuming to determine which view is the “true” view and, which the errant; rather, in respect to all hierarchically-organized religions, the civil courts accept the determination of the highest ecclesiastical authority re what the religion “believes,” or requires or forbids, i.e., they accept that determination whether or not, in their own view, they might think it mistaken in point of fact—that the ecclesiastical authority has simply got it wrong. See, e.g., *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440 (1969); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94 (1952); *Watson v. Jones*, 80 U.S. 679 (1872). See also *United States v. Ballard*, 322 U.S. 78 (1944).

21. See, e.g., *Bd. of Educ. of Cent. Sch. Dist. v. Allen*, 392 U.S. 236 (1968) (Harlan, J., concurring) (“The attitude of government toward religion must, as this Court has frequently observed, be one of neutrality.”). JAMES MADISON, MEMORIAL AND REMONSTRANCE (1785) (opposing legislative religious support on the basis that, “[i]t degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority \*\*\* [and] it will have a like tendency to banish our Citizens.”); *Lynch, Mayor of Pawtucket v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring)

The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person’s standing in the civil community.\*\*\* Endorsement (of religion by government) sends a message to non adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.

Note again, also, the “no religious test” provision in Article VI, and the lengthy seminal paragraph by Justice Black, from *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 16 (1947).

22. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Stevens, J., concurring) (emphasis added)

In my opinion the Religious Freedom Restoration Act of 1993 (RFRA) is a ‘law respecting an establishment of religion that violates the First Amendment to the Constitution. \*\*\* If the historic landmark [a church] on the hill in Boerne happened to be an art museum or art gallery owned by an atheist, it would not be eligible for an exemption from the city ordinances that forbid an enlargement of the structure. \*\*\* [T]he statute has provided the Church with a legal weapon that no atheist or agnostic can claim. *This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment.*”

See, e.g., *Welsh v. United States*, 398 U.S. 333, 357 (1970) (Harlan, J., concurring) (emphasis added) (“[Congress] cannot draw the line between theistic or non-theistic beliefs on the one hand and secular beliefs on the other. *Any such distinctions are not, in my view, compatible with the Establishment Clause of the First Amendment*”); *Walz v. Tax Comm’r of New York*, 397 U.S. 664, 693–97 (1970)



albeit they have never constituted a majority of the Supreme Court. Rather, as matters turn out to be in point of fact, the Court's current position turns out to be . . . somewhere in the middle. (Some might say, indeed, if it just for the sake of greater accuracy, rather, "somewhere within a muddle.")<sup>23</sup>

Tacking somewhat closely between the Scylla of the establishment clause and the Charybdis of the free exercise clause, legislative bodies in the United States need not<sup>24</sup> but may—and do—quite freely "accommodate" religious employees in the *public* workplace<sup>25</sup> and, beyond

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(Harlan, J., concurring); *Abington School Dist. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961); *McGowan v. Maryland*, 366 U.S. 420, 465 (1961) (Frankfurter, J., concurring) ("The purpose of the Establishment Clause was to assure that the national legislature would not exert its power in the service of any purely religious end; that it would not, as Virginia and virtually all of the Colonies had done, make of religion, as religion, an object of legislation."). *See also* Philip Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 96 (1961) (emphasis added)

The freedom and separation clauses should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion *either to confer a benefit or to impose a burden.*"

23. For a brief review of the manner in which the Supreme Court is seriously divided on the proper understanding and application of the establishment clause, see William Van Alstyne, *Ten Commandments, Nine Judges, and Five Versions of One Amendment—The First*. ("Now What?"), 14 WM. & MARY BILL OF RTS. J. 17 (2005).

24. That they "need not provide religious exemptions from otherwise-valid workplace rules of general application, neutrally applied, is well established. *See, e.g., Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) ("[Our] decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)'""). *See also Lyng v. Northwest Indian Cemetery Ass'n*, 485 U.S. 439 (1988).

To be sure, however, if it can be shown that the particular government workplace rule was enacted out of religious animus (for example, in order to discourage members of a particular religion or particular religions from seeking employment opportunities with that particular public employer, as by enacting a workplace rule forbidding "veils" in order to discourage Muslim women from applying for work), then it *can* be appropriately challenged on constitutional grounds under the First and Fourteenth Amendments. *See, e.g., Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993). Moreover, privately-brought cases complaining of religious discrimination by state or local government entities or agencies or individuals acting under their authority, are authorized under congressional authority, at 42 U.S.C. § 1983. And such cases, i.e., "§ 1983 cases" as they are familiarly referred to by lawyers, are made commercially attractive even where only preventive relief is sought in that Congress has further provided that prevailing plaintiffs may recover attorney fees at standard commercial rates (pursuant to 42 U.S.C. § 1988).

25. And to do so without extending any similar accommodation to "nonreligious" employees (thus, in point of fact, accommodating only the former and ignoring the latter insofar as this is what they choose to do). Thus, a major and quite sweeping Act of Congress, The Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb (1993). RFRA requires that, in respect to any U.S. government workplace, no person's "exercise of religion" may be "substantially burden[ed] even if the burden results from a rule of general applicability," unless the rule applicable to the particular workplace, as applied to one resisting it for religious reasons, satisfies both of the following demands: (a) that it serves a "compelling" governmental interest, i.e., "compelling" as distinct from merely a "legitimate" or otherwise "proper" interest (either of which is sufficient to maintain it as applied to all other employees but not sufficient to maintain it as against those asserting a religion-based claim for noncompliance); and (b) that it is the "least restrictive means" of doing so (i.e., that it is virtually the only kind of rule adequate to meet the government's "compelling" need. Moreover, the burden in respect to both requirements falls to the government to establish, failing that, the religious person's "exercise" of *religious* practice prevails.

that, also require a considerable degree of accommodation to be provided by the private sector as well.<sup>26</sup> The establishment clause, however, does

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This same Act also subjected all state and local governments to the same requirements, but in that respect was held by the Supreme Court to be *ultra vires* Congress's legislative power, in *City of Boerne v. Flores*, 521 U.S. 507 (1997). Yet, this decision by the Supreme Court has not in fact relieved units of state and local government from the strictures of RFRA insofar as, in nearly a dozen states, laws modeled precisely on the language of RFRA were promptly enacted to "mimic" RFRA and thus, in each of these states, as a matter of *state* law, all public sector employers are under the same degree of obligation, to "accommodate" employees (i.e., to abstain from enforcing a workplace rule applicable to others) who object on religiously-based grounds that compliance would be a "substantial" burden for them, *given* their religious beliefs and *given* what their particular religious beliefs require of them (e.g., in how to dress or not, when to be at work or not, what to eat or not, what kind of work to do or not, to pay union dues or not, etc.). For a suitable listing of these state statutes and state constitutional provisions, see Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 U.C.L.A. L. REV. 1465, 1468 n.6 (1999).

26. The most prominent federal statute, popularly known as "Title VII of the Civil Rights Act of 1964," 42 U.S.C. § 2000e-2(a)(1)-(2), forbids employers to "discriminate against any individual with respect to . . . terms, conditions, or privileges of employment, because of such individual's . . . religion." It is not, however, as *this* quoted portion of the act would suggest on its face, a simple "anti-discrimination" law. Rather, 42 U.S.C. § 2000e(j) (1982), as subsequently added by Congress, then further provides (emphasis added): "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."

The clear and intended effect of § 2000e (j) (like the clear and intended effect of provision in RFRA, see the discussion in *supra* note 24) is to *deviate* from a "nondiscrimination" standard (i.e., of simply treating all employees alike, without advantage or disadvantage linked to their religion or lack thereof). Instead, like the RFRA provision, it requires an employer to "accommodate" "*all aspects*" of each employee's *religious* "observance(s)" and "*practice(s)*," such as they may be, and to do so except to such extent as the employer can make a suitable showing of "*undue*" hardship, neither more nor less. And note, "hardship" to the employer is expressly *not* enough, for though yielding to employees' various religiously-based claims for exceptional treatment may result in some demonstrable *actual* "hardship," under the terms of this statute *only* if it can be said to be "*undue*" hardship (as distinct from what?—presumably as distinct from "*due* hardship"?!), may the employer be entitled to decline to accede to the employee's request in respect to the "accommodation" the employee seemingly requires in order to maintain the adequate "observance" and "practice" of his or her faith. *But see* *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977); *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986) (*dicta*) (narrowly construing the employer's obligation, suggesting that a more demanding requirement beyond that of making reasonably simple adjustments when readily feasible for the employer to do so, would raise substantial establishment clause questions).

And for still another example of an express, congressionally enacted right to claim exemption in a federal workplace from otherwise controlling rules and regulations, see 10 U.S.C. § 774 (1988). This is an Act of Congress expressly providing (in 10 U.S.C. § 774(a)) (emphasis added), that, if so inclined, "a member of the armed forces may wear an item of *religious* apparel" even while on duty as well as elsewhere, if he or she is so inclined to do. Here, again, "religion" is favored, i.e., it is only items of "*religious* apparel" as one may feel moved thus to wear on or about one's military uniform, that can qualify under the act. To be sure, under 10 U.S.C. § 774(b) of the act, such adornments may be disallowed, but *only* if and to the extent that they would "interfere with the performance of the member's military duties," or only if and to the extent that they are "not neat and conservative." By this reckoning, small crosses, six-pointed stars, ankhs, or yarmulkas are presumptively "in" (though most likely, veils, chadors, hijabs, and Rastafarian locks, are almost certainly not). And a handsome turban for a Sikh? In any event, note still again, that under this Act of Congress, *unless* the item is of a "*religious*" nature, whether "neat and conservative" or otherwise, it may *not* be worn with or on one's uniform, indeed, it may be—and usually is—altogether forbidden consistent with standard military regulations prescribing proper military dress.) So, what shall one say? Is this a law that "accommodates" religion? Surely it is. Is this a law that also privileges objections to certain workplace rules *only* insofar as they are "religious" objections and *not otherwise*? Yes, that is also surely true. *See also* 42 U.S.C. § 2000e(j) (1982), for still another act, exceptionally generous in the scope of its "accommodation" provision, the amendment

impose a limit on the enactment of such laws, even as the following case may itself illustrate, to help one identify where that limiting line may fall.

The case in question before the Supreme Court involved a state law pursuant to which employers were: (a) *forbidden* to make any inquiry of any job applicant's religion (or lack thereof)<sup>27</sup> and (b) *required* to grant all employee requests to be excused from work on their "Sabbath Day." We may well (and rightly) suppose that there can no constitutional objection to such a policy *voluntarily* put into effect by a private employer, i.e., when *not* directed by the state.<sup>28</sup> Conceding that easy point, however, does the case remain the same when the state *commands* this practice under threat of legal sanction, neither more nor less? In other words, may all employers subject to its jurisdiction thus be made to subsidize (or as some will want to say, thus to "accommodate") a specific religious practice the state regards as sufficiently worthy to warrant *its* endorsement in this particular way, i.e., its endorsement to the extent of enacting this degree and kind of "*state-coerced*" private employer subsidy and support?

The case is a worthy one to consider, as it trembles on the very edge of much that concerns this comparative (and constitutional) law review of religion in the workplace, and of the different levels and kinds of law thus to be compared, in the United States. The question, as put forward up to this point, has more generally concerned preliminary comparisons between *state* practices (on the one hand) and *private* practices (on the other hand). This case is the more typical one, however, raising the "cross-over" question respecting the extent to which the former (the state) may *command* the latter in what it may and may not do.

The "modeled" case as we have framed it here is, as already suggested, essentially the same as a case decided relatively recently in 1985, in the Supreme Court.<sup>29</sup> The legislature of the State of Connecticut required private employers not to discriminate in any way (indeed, not to seek any information whatever) respecting any job applicant's religion or lack

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provision, altogether exempting from the anti-discrimination provisions of Title VII all jobs—without regard to their pastoral relevance (such as they may or may not possess)—in the case of religious establishments, or, indeed, merely religiously-linked, establishments and not otherwise.

27. Thus, in this aspect of the law, the measure was simply "protective." i.e., it secured job applicants from what might be difficult-to-detect-and-prove job discrimination because of their religion (or lack thereof) by prohibiting any inquiry into an applicant's religion or lack thereof. In this respect, that is, the statute was purely an "anti-discrimination" law. As applied to the general run of employers, it raises—and raised—no constitutional questions.

28. And this is a reasonably safe assumption, for whether "the state" as employer might encounter constitutional objections (as arguably it might under one view of the "establishment" clause, pursuant to a taxpayer suit objecting to the state using common tax funds thus to subsidize a purely religious practice), certainly no similar "taxpayer" claim could be asserted against a private company that, simply as a generous business policy, might well see fit so to accommodate all of its "Sabbath-observant" employees in just this way. *See, e.g., Metz v. Leininger*, 57 F.3d 618 (7th Cir, 1995).

29. *See Thornton v. Caldor*, 472 U.S. 703 (1985).

thereof. It also required, however, the same private employers to excuse any employee from work on any day he or she identified as his or her "Sabbath" day (i.e., whatever day it might be that their particular religion directed them to abstain from any commercial activity or work). Insofar as the legislature of Connecticut thus sought to compel the affected employers to yield to all such (strictly religiously-based) employee requests regardless of number and adverse effects on each employer's business, and regardless also of such default burdens as might then fall on *other* employees—those having no religion or none "entitling" them to some "Sabbath" day off), the Supreme Court held that Connecticut had enacted a measure forbidden by the First Amendment's anti-establishment clause.

To be sure, *Caldor* is an exceptional case insofar as, far more generally, state and federal statutes requiring private employers to make "reasonable accommodations" of the personal religious requirements of their employees, when drawn less rigidly than the act involved in *Caldor*, have generally been sustained.<sup>30</sup> And, again, very tellingly, this has been so even though the acts in question are otherwise like the very one involved in *Calder*, in that they may not impose any similar duty on employers to alter their workplace or workplace requirements for any *other* kind of employee special request or special need (e.g., to miss work on account of a sick child). We previously noted that *this* kind of discrimination has itself, for some Justices, been regarded as fatal insofar as they understood the First Amendment to forbid Congress or any state legislature from giving special advantages based on religion, whether the advantage might be some particular tax exemption or something else (e.g., a "right" to miss work others would then have to be rescheduled to perform).<sup>31</sup> Even so, a majority of the Court, has not come 'round to share this view, though plainly there is surely much to be said for it, both consistent with a "neutrality" principle of the First Amendment and, quite arguably, as a matter of "equal protection" as well.<sup>32</sup>

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30. See, e.g., *Cutter v. Wilkinson*, 544 U.S. 709, (2005) ("Our decisions recognize that there is room for play at the joints between the Clauses, some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause."). See the cases cited in *supra* notes 17, 24–25 for numerous specific examples of various federal and state statutes compelling various kinds and degrees of "accommodating" religiously-motivated practices in the workplace in the public sector of employment, and very substantially in the (larger) private sector (as well as federal statutes exempting enterprises operated under religious auspices from having to "answer" to ordinary anti-discrimination laws).

31. See *supra* note 21, and cases cited therein.

32. The reference to "equal protection," in quotations marks, is in the first instance to the express clause in the Fourteenth Amendment ("[N]or shall any State deny to any person within its jurisdiction the equal protection of the laws."). In the second instance, i.e., as applied to acts of the national government, it is a reference to the "due process" clause of the Fifth Amendment that the Supreme Court has held to house an (implied) Equal Protection Clause identical.

Nevertheless, as concretely illustrated by *Calder*, there are constitutional limits in the United States on the scope of legislative discretion to compel private sector employers to adjust conditions within the workplace to “accommodate” whatever particular varieties of religious needs the state thus sees fit to endorse, as well as limits on how far it may grant dispensations favoring religious claims in respect to its own workforce and workplaces. So, as this case appropriately indicates, it may fairly be said that while significant degrees of “reasonable accommodation” of religiously-based employee workplace claims may be commanded by law, *as indeed is commonly the case throughout the United States both within the public sector and otherwise* (i.e., the vast private sector as well), even without similarly obliging employers to accommodate employees unable to frame their desire for privileged treatment in religious terms, the state may *not* seek to insulate every devoutly religious person from meeting an ordinary employer’s good faith concern in the efficient and nondiscriminatory management of its workforce, much less to yield to every kind of religiously-claimed need. In brief, within the decisional law of the Supreme Court, both Congress and the States *may—and do—*favor the free exercise of religion in crafting layers of law governing private employment practices as well as their own, and, indeed, they *may—and do—even* while granting no equivalent protection for workers unable to frame their requests for exceptional treatment in “religious” terms such as they may be, yet in the United States it is true only up to a certain point at which the provision of the “no establishment” clause steps in—as *Thornton v. Calder* shows.<sup>33</sup>

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33. For a recent and helpful review of *Calder* case (analyzing specific elements determining whether a law *overextends* religious “rights” in the workplace as against the establishment clause), see Kent Greenawalt, *Establishment Clause Limits on Free Exercise Accommodations*, W. VA. L. REV. 343, 345–57 (2007) (“Part II. The Puzzle of Estate of Thornton v. Calder, Inc.”). For another useful example of the manner in which the “no establishment” clause puts limits on the extent to which state or federal laws may “accommodate” religion, see *Larkins v. Grendel’s Den*, 459 U.S. 116 (1982) (local zoning ordinance leaving it to the discretion of any “church” within 500 feet of which a business serving alcoholic beverages would be located to grant or withhold permission, holding: any delegation of zoning authority to an ecclesiastical authority is forbidden by the First Amendment prohibition against an establishment of religion being vested with the power to determine whether a business may or may not be situated, whether nearby or otherwise).

And for still one more example of an Act of Congress providing unique privileges for persons belonging to a “bona fide religion” (but not otherwise), namely an act requiring that any such person belonging to a “traditional” religion the “tenets or teachings” of which forbid “joining or financially supporting labor organizations” is to be excused from having to contribute any measure of financial support to help defray labor union costs in negotiating or administering collective bargaining contracts, see 29 U.S.C. § 169 (1980). The act is noted here, separately, rather than with the earlier examples of “religion-accommodating” laws already listed in *supra* notes 17, 24, and 25, because while not yet reviewed in the Supreme Court, this act, like that in *Calder*, may eventually also be determined to transgress the establishment clause just as in *Calder* itself. For a court of appeals decision holding the act to be invalid pursuant to the Court’s reasoning in *Calder*, see *Wilson v. N.L.R.B.*, 920 F.2d 1282 (6th Cir. 1990), *cert. denied* 505 U.S. 1218 (1990). See also W. Sherman Rogers, *Constitutional*

Of course, no doubt that leaves a great deal still to be discussed, as indeed it has been, but elsewhere<sup>34</sup> and not still again here—not in this brief overview of the “layered” law affecting religion in the public and private workplace, within the twinned constitutional boundaries etched in the Constitution of the United States.

### III. A CODA

The essential constitutional dilemma in the United States has been whether those drawn toward varieties of anthropomorphic metaphysics (“religion” in a word) should be able to *insist* upon varieties of “accommodation” or “exemption” or “privilege” that their more agnostic fellow citizens are quite unable to claim. It is a very nice question, indeed. The general answer, constitutionally speaking, is that they may not so “insist.” But they may nevertheless succeed in achieving that favored position in substantial measure, through variously constituted legislative bodies, predisposed to make it so. Whether or not this is as it “ought” to be is a matter not easily answered, certainly not here, and, indeed, perhaps not at all except as each person finds an answer satisfactory within himself.

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*Aspects of Extending Section 701(J) of Title and Section 19 of the NLRA to Religious Objections to Union Dues*, 11 T. MARSHALL L. REV. 1, 25, 44–45 (1985).

34. Perhaps a forgiving reader will yield to the author’s preference not now to extend this paper, for in fact to extend it would but be a largely redundant exercise “piggybacking” on (and substantially plagiarized from) a number of readily available standard and specialized law reviews and specialized treatises on employment law. For those interested in pursuing particular questions and issues, i.e., in seeing the case law treatment of how particular statutes in the United States have been construed and applied, often in quite confusing fashion, a suitable place to start (collecting dozens of “religious accommodation” cases arising under the most frequently litigated federal Act (the Title VII provision)) is Andrew M. Campbell, Annotation, *What Constitutes Employer’s Reasonable Accommodation of Employee’s Religious Preferences Under Title VII of Civil Rights Act of 1964*, 134 A.L.R. FED. 1 (2008). For a suitable beginning place similarly collecting dozens of “religious accommodation” cases litigated pursuant to the vastly larger sprawl of overlapping state and local laws, see Marjorie A. Shields, Annotation, *Necessity of and What Constitutes, Employer’s Reasonable Accommodation of Employee’s Religious Preference Under State Law*, 107 A.L.R. 5th 623 (2008). For the most comprehensive detailed practitioner-oriented collection of cases, statutes, regulations, etc., both federal and state, see LEX K. LARSON, *EMPLOYMENT DISCRIMINATION* (2d ed. 1994); see also BARBARA L. SCHLEI & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* (2d ed. 1983). For two more general recent books, see LUCY VICKERS, *RELIGIOUS FREEDOM, RELIGIOUS DISCRIMINATION AND THE WORKPLACE* (2008) (a light review of U.S. law in ch. 6) and DOUGLAS HICKS, *RELIGION AND THE WORKPLACE: PLURALISM, SPIRITUALITY, LEADERSHIP* (2003) (less useful as a legal reference, principally a work of moral advocacy, i.e., of the author’s view of what enlightened employers “ought” to do, whether obliged by law or not).