

A Hijab and a Hunch: *Abercrombie* and the Limits of Religious Accommodation

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“This is really easy,” ad-libbed Justice Antonin Scalia from the bench just before announcing the Court’s decision in *EEOC v. Abercrombie & Fitch Stores*, the hijab case.¹ And indeed, amid the term’s storms and squalls, *Abercrombie* came off as something of a respite of sunny harmony. It united justices across the usual lines and Scalia’s opinion for all but one of his colleagues was hailed by liberal Court-watchers. Even the lone naysayer, Justice Clarence Thomas, expressed relatively cordial disagreement, suggesting the plaintiff might have won her case on a different theory.²

The Equal Employment Opportunity Commission, a federal agency oft battered by Roberts Court jurisprudence, found solace as well. It had represented a sympathetic young plaintiff, Samantha Elauf, the largely undisputed facts of whose case were both easy to grasp (she wanted to wear her religious head covering while working at a clothing store) and literally colorful (the hue of a scarf figured as one bit of evidence). The direct stakes were unusually low for a Supreme Court case—Elauf had won a trial verdict of just \$20,000, which the appellate court had snatched away—but that just underscored that everyone was in the case for the principle of the thing.

Public discussion of the case, too, managed to be lively but mostly not strident. This was remarkable because *Abercrombie* assembled elements that in other contexts might have made for a combustible mix: stereotyping, Islam, and the exposure of women’s bodies to the male gaze, just for a start. The year before, the collision of religious accommodation in the workplace with women’s interests and gender

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¹ 135 S. Ct. 2028 (2015).

² *Id.* at 2037–38 (Thomas, J., concurring in part and dissenting in part).

roles had generated nationwide fits of hyperbole in the case of *Burwell v. Hobby Lobby*, with a Supreme Court majority said to be on the verge of imposing on a once-free nation a *Handmaid's Tale*-like dystopia of gender inequality and subordination. In fact, even as it calmly discussed the *Abercrombie* case, America's pundit class was gripped by a fury of contention over attempts in Arizona and Indiana to adopt local versions of the Religious Freedom Restoration Act, based on the 1993 federal enactment at issue in *Hobby Lobby*. Perhaps one difference—but surely not the only one—was that in the A&F case conservative religious belief and the interests of employers were ranged against each other rather than being on the same side.

The breadth of amicus support on *Elauf's* side was impressive: the Becket Fund for Religious Liberty, Americans United for Separation of Church and State, the Orthodox Church in America, the gay-advocacy Lambda Legal Defense and Education Fund, the American Jewish Committee, and so on. The ACLU, National Association of Evangelicals, American Islamic Congress, and Christian Legal Society not only backed the plaintiff, but did so all on the same brief.

The resulting decision seemed to be a crowd-pleaser as well, perhaps because it quietly kicked some of the more difficult issues down the road. It was hailed by groups on every side of law-and-religion debates, by feminists and anti-feminists, by supporters and scathing critics of Islamic practices. And when so many contestants can see their own hopes reflected in a Court pronouncement, one thing seems sure: someone is going to wind up disappointed.

Would a Headscarf Fit the Look?

If you were committed to the virtue of bodily modesty, *Abercrombie & Fitch* (A&F) might sound like the very last place you'd want to work. Described by the *New Yorker* as "one of the most successful—and most hated—brands in retail history,"³ A&F had built its business plan around what had been called the "sexualized marketing"⁴ of "young, beautiful, and barely clothed" models whose "sculpted

³ Christopher Glazek, *The Story Behind 'Fitch the Homeless'*, *New Yorker*, June 19, 2013.

⁴ David Yi, *Abercrombie & Fitch Kicks Out Shirtless Models, Ending an Era of Abs*, *Mashable*, Apr. 24, 2015, available at <http://mashable.com/2015/04/24/abercrombie-fitch-end-of-an-era/>.

torsos” and suggestive postures hinted at an anything-goes party scene.⁵ Appalled parents wrote letters of protest to its Columbus, Ohio headquarters, which (at least for a time) only seemed to help its sales.

It’s not quite so paradoxical, though, that 17-year-old Samantha Elauf might find herself filling out an application form there. Along with its main college-age brand, the company also ran a middle- and high-schooler chain called Abercrombie Kids. The tamer apparel items on offer at Kids, unlike the crop tops and tight shorts for which its older sibling was known, would probably not get you sent to the principal’s office. (The retailer, which has more than 400 locations in the United States as well as operations overseas, also operates under the Hollister brand.) There was a Kids store at Woodland Hills Mall in Tulsa, Oklahoma, and Samantha’s friend Farisa Sepahvand, who worked there, urged Samantha to apply.

A&F was famously obsessed with presentation, its outlets often resembling theatrical sets as much as conventional stores. Sales-floor staffers were called “models” and had to have a consistent look that promoted the type of garments the company sold, though they didn’t have to be actual A&F goods. Certain types of shoes were required, female employees were forbidden to wear necklaces and bracelets, and so forth. It was called the Look Policy.

Would Samantha Elauf’s headscarf, which she wore in line with her Islamic faith, be acceptable? She approached an acquaintance who was a manager at the store—he wasn’t going to be a decision maker on her own application—who remembered having worked with a sales staffer who wore a yarmulke, which had been fine even though the Look Policy banned “caps.” He thought a headscarf would be okay too, even though the company didn’t sell scarves, but advised her to wear a color other than black. A&F didn’t like black clothes and found them inconsistent with the Look.

At the interview, Elauf did wear a black headscarf; applicants were not required to wear clothing compliant with the Look Policy at this meeting, although the company did use it to evaluate their overall fashion sense. It was something of a scripted affair, and neither the

⁵ Robert Klara, *The Rise and Fall of the World’s Most Hated Clothing Brand*, *AdWeek*, Nov. 2, 2014, available at <http://www.adweek.com/news/advertising-branding/rise-and-fall-worlds-most-hated-clothing-brand-161153>.

topic of the headscarf nor religion, it was later agreed, had come up. In any event, Elauf must have made a good impression, because the hiring manager recommended she be offered a job. But the manager was unsure how to proceed on the headscarf question. Piecing together bits of information—the teenager had never been seen around the mall bareheaded, for example—the manager “assumed” that she was probably Muslim and “figured” that was why she wore the scarf.⁶ These words would prove significant later.

When she (the local hiring manager) consulted a district manager to ask how the company’s policy would apply, he vetoed the hiring. As far as he was concerned, a headscarf violated the Look Policy, period. Later, there was a conflict of testimony: the hiring manager said the topic of religion came up and the district manager had dismissed it as no reason to make an exception. But the district manager denied that and remembered no discussion of religion. (That was one of the few conflicts in what was otherwise largely an agreed factual record in the case.) Although testimony indicated that he was aware that many Muslim women cover their heads as a religious practice, he saw the situation at hand as a simple breach of company policy.

Had he called corporate headquarters on that, it is not impossible that they might have given him the go-ahead for the scarf. As early as 2006, A&F had approved a headscarf exception to its policy. In the next few years, it began granting many more exceptions; of course, this was the period in which the Elauf case was going public, and lawyers would have been getting involved. By 2010, A&F’s general counsel specifically said the company made every reasonable effort to grant head-covering as a religious accommodation. But by then it was in court with Elauf, who had never gotten a call back after the district manager’s decision. Her friend at the store passed along word that it had been because of the headscarf, and the EEOC filed suit on her behalf in 2009.

Up Through the Courts

Title VII of the Civil Rights Act of 1964, as amended, makes it an unlawful employment practice “to fail or refuse to hire” any individual “because of such individual’s . . . religion,”⁷ and provides that

⁶ EEOC v. Abercrombie & Fitch Stores, Inc., 731 F.3d 1106, 1113, 1128 (10th Cir. 2013).

⁷ 42 U.S.C. § 2000e-2(a).

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.”⁸ The District Court for the Northern District of Oklahoma, applying this law to the facts as submitted by the parties, granted the EEOC summary judgment as to liability. It also determined that the accommodation sought would not pose an undue hardship to the company. In a religious-accommodation dispute under Title VII of the Civil Rights Act an employer can establish undue hardship by proving that cost or disruption exceeds a *de minimis* level, but the court found A&F had failed to meet even that not-very-demanding hardship standard. Following a trial, a jury awarded Elauf \$20,000.

A panel of the U.S. Court of Appeals for the Tenth Circuit, in an opinion by Judge Jerome Holmes, joined by Judge Paul Kelly, Jr., overturned the EEOC’s grant of summary judgment and instead granted summary judgment to Abercrombie. In partial dissent, the third judge on the panel, Senior Judge David Ebel, agreed with the overturning of the summary judgment to the EEOC but would have remanded for trial, finding that the disputable issues were too great to justify a counter-award to Abercrombie.⁹

Along the way, Abercrombie had struck out on various points. Aside from its arguments on undue hardship, it had gotten nowhere trying to challenge whether Elauf really held (to quote a formula announced in earlier cases) “a bona fide religious belief that conflicts with an employment requirement.”¹⁰ It got her to admit, for example, that she went to mosque only occasionally, and didn’t pray daily. She regarded female relatives who didn’t cover their heads as still being good Muslims. Although she did follow some observances such as refraining from drink and gambling and observing the Ramadan fast, it was hard to classify her as a purist or strict Muslim.

⁸ 42 U.S.C. § 2000e(j).

⁹ 731 F.3d at 1143 (10th Cir. 2013) (Ebel, J., concurring in part and dissenting in part).

¹⁰ See, e.g., *Knight v. Connecticut Dep’t of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001); *Bruff v. North Mississippi Health Services, Inc.*, 244 F.3d 495, 500 (5th Cir. 2001); *EEOC v. USPS*, 94 F.3d 314, 317 (7th Cir. 1996); *Chalmers v. Talon Co. of Richmond*, 101 F.3d 1012 (4th Cir. 1996), cert. denied 522 U.S. 813 (1997).

Not only did this line of argument probably cost the company sympathy, but it was almost a sure loser legally as well. The courts have been generous toward religious accommodation complainants on what qualifies as a bona fide religious belief. Title VII itself by its terms protects “all aspects of religious observance and practice,” and the courts have interpreted that in what has been called an individualist spirit, not requiring participation in or obedience to a well-established church (or any church at all), or what any book or authority may deem correct theological views or behavior. So long as the religious belief that generates a workplace conflict is sincere, they will ordinarily not inquire as to whether it hangs together logically or plausibly with other religious views or practices. And there was no hint that Elauf was in any way insincere, or had any deceptive or self-serving reason to wear the covering.

In principle, showing that a complainant does not consistently follow a religious tenet might help a defendant with the “conflict” part of the formula. That’s because a bona fide belief that is sincerely held, but which the believer seldom gets around to acting on, may not truly come into conflict with a job requirement. (A Christian believer who sleeps in and misses church nearly every Sunday, even if feeling sincerely guilty about that failing, is not necessarily entitled to get out of a Sunday assignment at work.) But that was a useless argument here: Elauf had worn a headscarf in public consistently since age 13. For her the conflict was indisputably genuine.

But Had There Been Notice?

Abercrombie’s winning argument at the Tenth Circuit, and the one that reached the high court, was on the issue of notice: the courts had recognized reasonable accommodation as a process departing from the ordinary course of an employment relationship, and the law put control over when to initiate it in the hands of the employee alone. In the 2000 case of *Thomas v. National Association of Letter Carriers*, the Tenth Circuit had declared that to have a case for failing to accommodate a religious belief an employee must “show that . . . he or she informed his or her employer of this belief.”¹¹ Other circuits’ opinions had used similar language,¹² and so had the EEOC’s own 2008 compliance manual:

¹¹ *Thomas v. Nat’l Assoc. of Letter Carriers*, 225 F.3d 1149, 1155 (10th Cir. 2000).

¹² See, e.g., *Dixon v. Hallmark Cos.*, 627 F.3d 849, 855 (11th Cir. 2010).

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An applicant or employee who seeks religious accommodation must make the employer aware both of the need for accommodation and that it is being requested due to a conflict between religion and work. The employee is obligated to explain the religious nature of the belief or practice at issue, and cannot assume that the employer will already know or understand it.¹³

According to yet another EEOC document, “obligation to accommodate begins when an individual notifies the employer of the need for an accommodation.”¹⁴ That seemed clear enough.

The EEOC’s comeback to this was basically: stop being so literal-minded. The “critical fact is the existence of the notice itself, not how the employer came to have such notice,” its brief argued.¹⁵ Suppose Elauf had sent a relative to the store to explain her need for an accommodation. Would the company not be on notice simply because the message had come from someone other than her? Notice could be given implicitly, by the circumstances of the situation. Cases from the U.S. Courts of Appeals for the Eighth, Ninth, and Eleventh Circuits could be read as holding that the notice requirement was met once the employer had enough information to figure out a conflict, whether or not the employee had stated it in so many words.¹⁶

Besides, the Supreme Court itself had warned in its foundational pronouncement on the subject, *McDonnell Douglas*, that the elements of a plaintiff’s initial discrimination case might need to be modified to fit particular factual situations.¹⁷ In a 1983 case, the Court had confirmed that the application of the well-known *McDonnell Douglas* formula was “never intended to be rigid, mechanical, or ritualistic.”¹⁸

The functional point being served here (continued the EEOC and its amici) was that ordinarily in an accommodation situation the

¹³ EEOC Compliance Manual, No. 915.003 § 12-IV (July 2008), available at www.eeoc.gov/policy/docs/religion.html.

¹⁴ 45 Fed. Reg. 72610 (Oct. 31, 1980).

¹⁵ *Abercrombie*, 731 F.3d at 1122 (10th Cir. 2013) (quoting the EEOC’s brief).

¹⁶ *Brown v. Polk Cnty.*, 61 F.3d 650, 654 (8th Cir. 1995) (en banc); *Heller v. Ebb Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993); *Dixon v. Hallmark Cos.*, 627 F.3d 849 (11th Cir. 2010).

¹⁷ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

¹⁸ *USPS Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) (quoting *Furnco Constr. Co. v. Waters*, 438 U.S. 567, 577 (1978)).

worker knows something that the employer does not know, and the analysis might be different if an employer had somehow been ambushed by a worker withholding the need for an accommodation on purpose, say to build a legal case. But that's not what had happened here: A&F *did* have a reasonable grasp of the likelihood that Elauf would need an accommodation, and she had not tried to keep it hidden; she had even inquired of a manager, even if he couldn't speak for the company. She simply had no reason to expect that the scarf would leave her without so much as a callback.

Judges Holmes and Kelly were unconvinced. To begin with, the weight of legal authority supported actual notice to the employer, not implied notice by roundabout means. But Elauf would lose even under a standard below that of actual notice, they said, because the company's awareness did not amount to knowing for a fact that she needed an accommodation; at most, it rose to a level of informed guesswork.¹⁹

As it happened, the EEOC itself could be cited as authority on this point too. The commission had called as an expert witness an authority on Islam, Georgetown professor John Esposito, who testified that many women adopt the hijab for non-religious reasons; it can make it easier to fit in with a circle of friends, be a way of signaling membership in family or nationality, and so forth. The EEOC's own guidance, the judges noted, had pointed out that some persons follow practices for religious reasons that others follow for purely secular reasons, and that the same person may switch from one motive to another at different times in life. A cross worn daily around the neck might betoken a devout Christian faith or might be a remembrance of a beloved grandmother who had worn it.

In other words, knowing that Elauf was of Muslim background and regularly wore a headscarf didn't add up to "knowing" that it would clash with her job duties. For all the company could predict, she might have been wearing it diffidently to please elders in her family, and be glad of the excuse of a new job to tell them she would now sometimes be going bareheaded. After the Tenth Circuit refused to grant en banc rehearing, the Court granted certiorari on the question of the role of notice and knowledge.

¹⁹ *Abercrombie*, 731 F.3d at 1142.

Employers' Burden of Knowledge

At oral argument, these were the first questions out of the gate. Can someone have knowledge without notice, or notice without reasonable grounds for knowledge? If you come up with an informed guess that X is true, have you been put "on notice of" X? What if you instead have a wild, reckless hunch about something that turns out to be true?

Ian Gershengorn, the principal deputy solicitor general, represented the EEOC before the Supreme Court and began his oral argument by criticizing the Tenth Circuit for requiring an allegation that an employer "know, rather than just correctly understand" the need for an accommodation. "I don't understand," Justice Scalia broke in. "What is the difference between knowing and correctly understanding?" Gershengorn tried to clarify: "Our position is that when you figure, when you assume, when you—when it signifies to you that a religious accommodation is needed, that is sufficient notice for an employer to be on notice." Justice Kennedy wondered why the commission seemed to be taking care to stay away from the word "know." If the standard were "less than certainty, how much less than certainty is it?" asked Justice Elena Kagan. "Two out of three. Is that sufficient? . . . Under 50 percent? . . . Or even a 40 percent chance [that] this practice is religious"? But Justice Sonia Sotomayor, foreshadowing the Court's eventual direction, said the percentages weren't what mattered: "Isn't the issue the reason that they acted?" If they turned someone down because they didn't want to get into some hassle over accommodation, wasn't that the problem right there, even if the accommodation need wouldn't have been very likely to pan out? ²⁰

But if the advice was "have as much of a hunch as you like about someone's religious scruples, just don't act on it," that was advice not easily taken. In a case like this, acting on the hunch would often be indistinguishable from not acting on it; a manager who failed to draw any scarf-religion connection in his mind, but simply stuck with the facially neutral job rule, might have made the same decision as one with a bad motive. Neither the EEOC nor anyone else was claiming that employers had to drop any and all rules that might sometimes conflict with someone's religious observance. So

²⁰ Transcript of Oral Argument at 3–9, *Abercrombie & Fitch*, 135 S. Ct. 2028 (2015).

it seemed that what was being asked of employers was some sort of positive action-taking.

That led to the question on almost everyone's mind: if managers were worried about something, why didn't they just ask? "You could raise the policy," the EEOC lawyer offered at oral argument.²¹ Then the applicant would have a chance to answer the question or respond to the overture, putting the employer closer to a resolution of some kind. Title VII's demand for religious accommodation of workers had itself often been described as a process of mutual (if awkward and, on one side, forced) dialogue: the two sides would go back and forth exploring the possibilities until finding (if they could) some arrangement agreeable to both. For the employer to initiate such a conversation, if the worker hadn't, would seem to fit that spirit.

Of course, there were a few problems with that. "Questions about an applicant's religious affiliation or beliefs," according to the EEOC's own guidance, "are generally viewed as non job-related and problematic under federal law."²² In line with that guidance, Abercrombie itself at the time of the Tulsa incident had told its managers not to inquire about religion.

What about getting at the issue less directly: "Would wearing our standard employee attire pose a problem for you?" Well, questions in a job interview intended to flush out protected-group status are held suspect, no less than direct questions. As A&F's brief pointed out, under EEOC guidelines "employers generally may not ask applicants whether they are available during normal business hours. . . . If an employer asks anyway and then declines to hire someone who said she needed an accommodation, "[t]he Commission will infer that the need for an accommodation discriminatorily influenced a decision to reject [the] applicant" and will put the "burden . . . on the employer to demonstrate that factors other than the need for an accommodation were the reason for rejecting the qualified applicant."²³ Lawyers representing the employee in a private claim for damages likewise

²¹ *Id.* at 20.

²² EEOC, Pre-Employment Inquiries and Religious Affiliation or Beliefs, available at http://www.eeoc.gov/laws/practices/inquiries_religious.cfm.

²³ Brief of Respondent at 55, *Abercrombie & Fitch*, 135 S. Ct. 2028 (2015) (referring to 29 C.F.R. § 1605.3(b)(2) and (b)(3)).

can introduce such questions as evidence that religion was on the employer's mind.

The EEOC is not so unrealistic as to think employers can be kept entirely from asking about, say, schedule availability before taking on new staff. What it prescribes instead is a painfully artificial structuring of the process: the employer is supposed to advise applicants to answer scheduling questions *as if* they could be sure of getting reasonable accommodation for religious conflicts, and then, after a job offer is made, reveal the truth in a further round of disclosure, with the employer left in the position of withdrawing the job offer if it doesn't like the news (thus painting the biggest possible sue-me target on its chest).²⁴ Bizarre and strained as this process may sound, it actually parallels the longstanding trend in employment law on other topics where information that is obviously job-related may still furnish grounds for discrimination. In the context of the Americans with Disabilities Act, for example, disability-related inquiries are barred outright, rather than merely discouraged as suspect, and the employer is supposed to ask about the ability to handle job prerequisites with roundabout language along the lines of "Given reasonable accommodation, would you be able to lift fifty pounds / climb a ladder / lead a building evacuation in an emergency?" If such formulas are vaguely workable at companies with legal staffs and large human resources departments, yet not in informal hiring at smaller employers, well, those are just the rules of the game.

Probing for more information from certain applicants who look as if they might need one, or pre-emptively offering an accommodation, runs into a further problem: which applicants should be singled out for such special handling? How much of a hunch does it take, and what happens if the hunch is itself based on imperfect, perhaps stereotypical information?

The set of practices the EEOC was now urging, A&F protested in its brief, "necessarily devolves into a totality-of-the-stereotypes standard."²⁵ Yet according to the commission's own "Best Practices" compilation, employers should "avoid assumptions or stereotypes

²⁴ On requiring employers to don sue-me vests, compare the recent movement for "ban the box" laws prohibiting pre-offer inquiries about criminal records (employer must make job offer before opening envelope that reveals rap sheet, and then withdraw offer if it dislikes the envelope's contents).

²⁵ Brief of Respondent, *supra* note 23, at 53.

about what constitutes a religious belief or practice or what type of accommodation is appropriate.” Moreover, managers “should be trained not to engage in stereotyping based on religious dress and grooming practices.”²⁶ Just as it knew its interviewers were not supposed to ask questions that might flush out religious practices and beliefs, so Abercrombie had also instructed its managers not to make assumptions about employees or their wishes based on presumed religion. It had been a diligent honor student in following the guidance from the federal teacher, only to be flunked after all. Once again, employers were being placed in a sued-if-you-do, sued-if-you-don’t position.

There remained possible but one final, headlong leap into the chasm of utter absurdity: why not ask *all* the applicants *all* the questions? Specifically, if employers couldn’t probe about religious objections, and couldn’t ask different questions from one applicant to the next, why couldn’t they compile ahead of time a list of all the ways a job listing might conflict with anyone’s religious practices—scheduling, garb, contact with taboo substances, non-availability of prayer breaks, and so forth—and pre-announce to each applicant the whole list to start a discussion? Some did take that idea seriously, which is why the Court at oral argument that morning found itself staring into that very chasm. As Chief Justice John Roberts mused, it would take a “code of conduct that presumably would go on for several pages,” or perhaps recited over 20 minutes to make sure the applicant had heard and understood. And yet inevitably even then it would fall short of achieving its goal fully. There is not some set, countable number of sincerely held religious beliefs held within the human heart, but an infinite potential for them. Some believers sincerely ascribe a pious or taboo significance to a particular number or letter of the alphabet, or a certain form found in a shape or picture, or a certain direction from which to walk into or out of a building, or the presence or absence of a certain animal. As the EEOC’s compliance manual noted, Title VII protects a religious belief or practice that may happen to arise “in the person’s own scheme of things” and “even if few—or no—other people adhere to it.” Even if seven lawyers on seven laptops spent seven years working up the resulting

²⁶ EEOC, Best Practices for Eradicating Religious Discrimination in the Workplace, available at http://www.eeoc.gov/policy/docs/best_practices_religion.html.

checklist, they could never hope to anticipate every accommodation request in a truly exhaustive way.

Public Employers' Anxieties

While dozens of religious and social-change organizations joined amicus briefs on the EEOC's side, the only ones to file on Abercrombie's—aside from the Cato Institute, which publishes this journal—were major employer organizations. Some represented the private sector, including the National Federation of Independent Business, U.S. Chamber of Commerce, and Equal Employment Advisory Council. But public-sector employer groups, which are sometimes hesitant to step into disputes about discrimination law, were perhaps even more notable in their outspokenness; they included the National Council of State Legislatures, the National League of Cities, the National Association of Counties, the National School Boards Association, and quite a few more.

Why would they find significant questions of public-sector management lurking in this dispute about teen clothing sales? In part it's because on issues of religion in the workplace, public-sector employers are distinctively whipsawed by multiple sources of liability. On display of religious symbols at a workplace, for example, they may have to contend with possible liability under the First Amendment (if, say, they restrict employees' speech improperly) and the Establishment Clause (if, say, they give the impression of endorsing that same speech). Title VII liability for not accommodating employees' religious practices—an exposure they share with private employers—then gets layered on top of that.

For the EEOC, as for Abercrombie, some of its legal tactics worked better than others. The commission's briefs held discussion of its own former employer guidance to a minimum, even as it quietly revamped its guidance to reflect its new litigating positions.²⁷ As was its custom, it also asked the Court to give deference as an expert

²⁷ EEOC, *Religious Garb and Grooming in the Workplace: Rights and Responsibilities*, available at http://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm ("Religious Garb Guidance"). On the EEOC's change of guidance on notice, see Brief for National Council of State Legislatures et al. as Amici Curiae Supporting Respondent at 22, *EEOC v. Abercrombie & Fitch*, 135 S. Ct. 2028 (2015), available at <https://www.nsba.org/sites/default/files/reports/EEOC%20v.%20AF%20-%20Amicus%20Brief%20January%202015.pdf>.

agency to its latest (as distinct from its recent) interpretation of the law.²⁸ It refrained from proposing the drawing of any clear line on what should count as sufficient implicit notice, for all the attention being paid to that troublesome question. And—shrewdest of all, perhaps—it changed its underlying theory of the case from the one that had lost below. Instead of presenting the case as an accommodation case *simpliciter*, a theory it had advanced as recently as its certiorari briefing, it urged that it be considered as a matter of “intentional discrimination” falling under the heading of “disparate treatment.”²⁹

The Supreme Court’s Ruling

A. *The Majority: Motive Matters, Not Knowledge*

Whether as an elaborate collective prank or simply because it enjoys thinking issues through, the Court often gives its liveliest attention in oral argument to points that do not wind up forming the basis of its decision. And so it was again this time. Justice Scalia, writing for the Court, found that notice, knowledge, and certainty were not, after all, the crux of this case: motive was. To prove intentional discrimination under Title VII, Scalia wrote, “an applicant need only show that his need for an accommodation was a motivating factor in the employer’s decision.” Title VII makes it unlawful for an employer to refuse to hire “because of” a religious practice, and unlike some other branches of discrimination law, it has settled on a relatively relaxed standard for “because of”; namely, that the employee’s religious practice be a “motivating factor.” “It is significant that § 2000e–2(a)(1) [the central ban on discrimination, or disparate treatment, in

²⁸ *Abercrombie* was the second case of the term in which the Court, while giving the EEOC a victory, had disregarded its claims to be owed expert agency deference; in both cases the commission had recently altered its position. See Walter Olson, *Young v. UPS: Bias Plaintiffs Win at the Supreme Court*, Cato at Liberty (Mar. 25, 2015) (discussing *Young v. UPS*, 135 S. Ct. 1338 (2015)), available at <http://www.cato.org/blog/young-v-ups-job-bias-plaintiffs-win-scotus>. On the commission’s less-than-stellar track record in recent cases, see Walter Olson, *The EEOC Loses (and Loses. and Loses.) in Federal Court Again*, Cato at Liberty (Sept. 30, 2014), available at <http://www.cato.org/blog/more-courts-smack-down-eeoc>.

²⁹ Brief of Petitioner at 19, *Abercrombie & Fitch*, 135 S. Ct. (2015).

Title VII] does not impose a knowledge requirement. As Abercrombie acknowledges, some antidiscrimination statutes do.”³⁰

So the law in this case bans acting on bad motive, without directly inquiring into knowledge. Scalia offers an example: an employer who “thinks” but does not “know for certain” that a certain applicant will need Sabbath accommodation and acts with that as “a motivating factor” will be liable, at least in cases where the applicant actually does need it. In passing, he dismisses Abercrombie’s argument that it had treated religious practice no worse than non-religious practice: “Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them favored treatment.”³¹ This was the same decision promptly hailed in the newspapers by Americans United for Separation of Church and State.³²

B. Justice Thomas: Accommodation Not a Freestanding Claim

Used to going his own way on employment discrimination issues—he was the longest serving chairman of the EEOC—Justice Clarence Thomas wrote a separate concurrence/dissent that was mostly a dissent. He quoted the Court’s own words in a 1979 case, which themselves invoked a quote from decades earlier (hence the nested quotes): “‘Discriminatory purpose’—i.e., the purpose necessary for a claim of intentional discrimination—demands ‘more than . . . awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.’”³³ A&F had plainly adopted its Look Policy for non-religious and facially neutral reasons. To be sure, sometimes an employer applying a neutral rule has nonetheless engaged in intentional discrimination, if, for example, it turns down a religious exemption though routinely granting secular ones. But A&F’s decision

³⁰ 135 S. Ct. at 2032.

³¹ *Id.* at 2034.

³² Robert Barnes, Supreme Court Allows Suit by Muslim Woman Who Says Headscarf Cost Her a Job, Wash. Post, June 1, 2015 (quoting Gregory Lipper of Americans United), available at http://www.washingtonpost.com/national/supreme-court-allows-suit-by-muslim-woman-who-says-head-scarf-cost-her-a-job/2015/06/01/977293f0-088c-11e5-9e39-0db921c47b93_story.html.

³³ *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

maker appeared to have applied the policy mechanically, with no special animus or worse treatment, and in the absence of an outright request for accommodation. To Thomas, this was a “classic case of an alleged disparate impact.” It would still be open to challenge on that basis, and might result in liability unless A&F could prove that the policy was grounded in “business necessity.”³⁴

All nine justices united on one point of importance to practicing lawyers: these religious accommodation cases had all up to now been put in the wrong box. Thomas: “many lower courts, including the Tenth Circuit below, wrongly assumed that Title VII creates a freestanding failure-to-accommodate claim distinct from either disparate treatment or disparate impact.”³⁵ While Thomas would have put accommodation into the disparate-impact rather than the disparate-treatment box, there was not a single vote on the court for keeping to the three-box arrangement that had heretofore been standard teaching. Not only had lower courts routinely accepted a three-box scheme, but the EEOC had done so too, both in its compliance manual—“A religious accommodation claim is distinct from a disparate treatment claim, in which the question is whether employees are treated equally,” it had recited³⁶—and even in its argument petitioning for certiorari in this very case. But if everyone had behaved up to now as if there were three boxes, so much the worse for everyone. From now on, there would be only two.

C. *The Aftermath: “Really Easy”*

In a separate concurrence, Justice Samuel Alito wrote to warn the Court that it did not dispose of the knowledge-and-notice problem quite so easily. An inquiry into motive is still going to raise questions of knowledge, since it would be absurd to impose liability on an employer with no “inkling” that a religious conflict tended to disqualify a potential worker. The majority opinion dismissed this point as dicta, though Scalia conceded in a footnote that it is at least “arguable” that an employer shouldn’t be legally expected to offer

³⁴ 135 S. Ct. at 2037–38. (Thomas, J., concurring in part and dissenting in part).

³⁵ *Id.* at 2041.

³⁶ *Id.* (quoting the EEOC Compliance Manual, *supra* note 13).

an accommodation unless it at least “suspects” a given worker will need one.³⁷

It is perhaps a tribute to Justice Scalia’s high tolerance for complication that a case like this could strike him as “really easy.” The lower courts had divided among three viewpoints in their consideration, and the Supreme Court then divided between two viewpoints neither of which agreed with any of those below. The EEOC changed the theory on which it argued the case partway through, and then suffered the mild indignity of seeing all five camps of judicial sentiment reject years’ worth of its own (the EEOC’s) regulatory guidance on multiple points. If that counts as “really easy,” what would a hard case look like?

At any rate, the justices sent the case back for further consideration, which didn’t last long; the parties settled almost immediately for a modest sum. Shortly before, in the spring of 2015, the parent Abercrombie company had announced that it planned to tone down its sexualized promotions and fashion photography, and would also move away from its former “controversial long-standing policy of hiring based on body type or physical attractiveness.”³⁸

Employment Law: The Age of Accommodation

For all that the *Abercrombie* case ended in some semblance of accord, the remarkable array of constituencies it brought together on the plaintiff’s side is not likely to reunite in future cases. Accommodation mandates have been one of the huge growth areas of employment law over the past generation, a trend that shows every sign of continuing. Yet religious accommodation in some ways runs along its own track, and it is worth looking more closely at how the two came to diverge.

It can truly be said that we live in an age of accommodation in employment law, and the most powerful force in ushering in that age was the 1990 enactment of the Americans with Disabilities Act (ADA).³⁹ Like earlier civil rights laws, it set forth a protected group, in this case the disabled, against whom discrimination is prohib-

³⁷ *Id.* at 2035. (Alito, J., concurring in the judgment).

³⁸ Yi, Mashable, *supra* note 4.

³⁹ See Walter Olson, *The Excuse Factory: How Employment Law Is Paralyzing the American Economy* Chs. 6 & 7 (1997).

ited. Unlike most earlier laws, it also instituted far-reaching new requirements for “reasonable accommodation” of covered persons in employment and other areas. And while Title VII had earlier incorporated a mandate of accommodation of employees’ religious practice, ADA went so much farther that its difference of degree amounted to something of a difference in kind.

This marked an important shift in thinking. Discrimination law, even as slightly modified by the religious accommodation mandate, had long been driven by concepts of equal treatment, in which differing talents could make their way once prejudice and animus were removed. Now, increasingly, the goal was to correct inequalities of endowment: the employer would be asked to invest freely to provide the deaf with captioning, the paraplegic with a new built environment suited for wheelchairs, the slow with extra time to complete tasks, and so forth. For some years the tendency in the courts was to confine the right to accommodation to “traditional” disabled groups such as the blind and deaf, but advocates were deeply discontented at these limits, and persuaded Congress by an overwhelming majority that the law should cover a much wider range of impairments. At this point, lawyers often advise employers that it is not worth a losing ADA fight on whether an employee qualifies as disabled, and the goal should be to keep some control over the cost of accommodation.

Other laws have followed a similar path, with the ban on pregnancy discrimination now including a right to accommodation, which can often involve light duty, reassignment of duties, and extra time spent away from work. The milestone Family and Medical Leave Act,⁴⁰ while not quite couched in terms of discrimination per se, sought to extend the idea of scheduling accommodation, already familiar from the religious and disability areas, to workers more broadly. Moves were soon afoot to establish a more general entitlement to paid leave, with no reasons given.

As accommodation advanced as an objective, the tone and language used to describe it also began to change. With organized disability advocates in the lead, it was argued that accommodation was not just an exercise in generosity that a wealthy society might be asked to extend, but a matter of rights being denied: the failure to build more ramps was akin to laws enforcing racial separation.

⁴⁰ 29 U.S.C. § 2601 et seq.

Accommodation rights needed to be absolute, immediate, and as little constrained by cost as possible.

Unless you were an employer, this was immensely popular stuff—new benefits for all these nice people, maybe even for everyone, and the boss is paying! It also guaranteed a healthy docket for enforcers of the new laws and private lawyers, because the supply of possible accommodations is without end, even as employers resist demands that they see as expensive or disruptive. In 2014 the EEOC received 9,765 filings alleging lack of reasonable ADA accommodation, compared with 1,541 complaints of disability discrimination for hiring and 14,736 for discharge. Religion was a far less active area, with 582 filings for failure to extend accommodation, compared with 1,748 for discharge and 313 for hiring. Even so, religious discrimination has been a growth area at the EEOC, with filings more than doubling from 1997 to 2014, and its share of the overall commission docket nearly doubling from 2.1 to 4.0 percent, with a particularly sharp increase in the years 2004–2008.⁴¹

If most human resources managers experience disability accommodation as far more of a headache than religious accommodation, one reason lies in the way courts have interpreted the two statutes in starkly different fashions. One key term that appears in both areas of law—“undue hardship” to an employer—gets defined in almost comically opposite ways. In disability accommodation, courts routinely refuse to find undue hardship even when employers have been battered by the cost, disruption, and inconvenience of trying to accommodate a worker. In religious accommodation, by contrast, they follow a *de minimis* standard; even a little bit of employer cost, disruption, or inconvenience is undue.

The history of the Title VII religious accommodation requirement sheds light on this divergence. While the Civil Rights Act of 1964 said nothing on the topic of accommodation for employees’ religious practices, the newly established EEOC three years later issued regulations proclaiming such a right as an implication of the law. But a

⁴¹ EEOC, Enforcement and Litigation Statistics, available at <http://www.eeoc.gov/eeoc/statistics/enforcement>. For a recent survey of developments in religious accommodation, see J. Gregory Grisham & Robbin W. Hutton, Religious Accommodation in the Workplace: Current Trends Under Title VII, 15 Engage 60 (July 2014), available at <http://www.fed-soc.org/publications/detail/religious-accommodation-in-the-workplace-current-trends-under-title-vii>.

closely divided Supreme Court declined to go along, in the case of *Dewey v. Reynolds Metals* affirming a Sixth Circuit ruling that the terms of a union contract did not have to be set aside to accommodate a worker's Sabbath observance.⁴² In 1972 Congress proceeded to introduce a new statutory right to accommodation, in an amendment offered by Democratic Sen. Jennings Randolph of West Virginia, himself a member of the Saturday-Sabbath-keeping Seventh Day Baptists. Curiously—and introducing an element of confusion whose echo can still be heard more than 40 years later in the *Abercrombie* case—Randolph inserted the relevant language not as a new section of prescriptions or prohibitions, as might seem natural, but as a change to the definition of religion itself, which he altered 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 an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.⁴³

As one commentator observed, it was almost as if Congress was saying that if a religious observance or practice couldn't feasibly be accommodated in the workplace, it didn't really count as religion.⁴⁴

The Randolph Amendment in its terse language left plenty of leeway for interpretation, and in two major cases that followed, the Court gave accommodation rights a narrow reading. In *TWA v. Hardison*, announcing the rule that still prevails today, it decided that undue hardship was reached when an employer's cost exceeded *de minimis* levels.⁴⁵ In *Ansonia Board of Education v. Philbrook*, it further found that so long as an employer had offered some reasonable accommodation that would permit the employee to work without

⁴² *Dewey v. Reynolds Metals Co.*, 402 U.S. 689 (1971).

⁴³ See, e.g., Sara S. Silbiger, Heaven Can Wait: Judicial Interpretation of Title VII's Religious Accommodation Requirement Since *Trans World Airlines v. Hardison*, 53 *Fordham L. Rev.* 839 (1985).

⁴⁴ See Andrew Little, Title VII and Religious Accommodation: An Evidentiary Approach To the Undue Hardship Standard Under *Trans World Airlines v. Hardison*, 21 *Southern L. J.* 225 (2011).

⁴⁵ *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

violating his beliefs, it did not have to engage in further exploration or agree to some other accommodation that might work better for the employee.⁴⁶

No one doubted the ideological polarities in these cases: the support for a broader mandate of religious accommodation was coming from the Court's left wing. The dissenters in *Hardison* were Justices William Brennan and Thurgood Marshall, while in *Philbrook* they were Marshall and John Paul Stevens, Brennan having cast his vote with the conservatives.

Law school commentators criticized these rulings as too lenient toward employers, suggesting that a threshold of, say, "significant" difficulty or expense would be preferable to the *Hardison* standard, and that some obligation to follow through on an affirmative and interactive search for better accommodation would be preferable to *Philbrook's* "if some reasonable fix has been offered, call it a day" standard.⁴⁷ The EEOC, trying to make the best of it for plaintiffs, promoted a liberal position on many of the issues courts had not settled: for example, it sought to minimize customer and co-worker morale and upset as factors that might enter into undue hardship.

In 1994 Rep. Jerry Nadler (D-N.Y.) introduced the first version of the Workplace Religious Freedom Act (WRFA), a measure soon taken up and long championed in the Senate by Sen. John Kerry (D-Mass.) with support from liberal stalwarts like Sen. Ted Kennedy (D-Mass.) and later Sen. Hillary Rodham Clinton (D-N.Y.). The exact provisions of WRFA changed over the years, but the idea was to toughen accommodation burdens on employers, often in ways reminiscent of the ADA.⁴⁸ The version considered in 2004, for example, would have (1) obliged employers to make a wider range of accommodations having a "temporary or tangential impact on the [employee's] ability to perform" so-called "essential" job functions; (2) replaced the *de minimis*

⁴⁶ *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986).

⁴⁷ See, e.g., Dallan Flake, *Bearing Burdens: Religious Accommodations That Adversely Affect Coworker Morale*, 76 *Ohio State L. J.*, 169 (2015), available at <http://moritzlaw.osu.edu/students/groups/oslj/files/2015/07/10-Flake.pdf>. See also, EEOC Religious Garb Guidance, *supra* note 27 ("Customer preference is not a defense to a claim of discrimination.").

⁴⁸ See also, Gregory M. Baxter, Note, *Employers Beware: The Workplace Religious Freedom Act of 2000*, 2 *Rutgers J. L. & Religion* 6 (2000) (analyzing the 2000 version), available at <http://lawandreligion.com/sites/lawandreligion.com/files/Baxter.pdf>.

cost standard with one of “significant difficulty and expense” taking into account the employer’s size and number of facilities, so that larger employers would be expected to bend further; and (3) required that an accommodation “remove” the underlying conflict, a phrase with imprecise meaning but which was expected to stiffen the limp *Philbrook* standard. But WFRA was and is stoutly resisted by employer groups, and none of the bills have picked up enough support to pass.

The Parallel Track: *Employment Division* and RFRA

Meanwhile the groundwork was being laid for a controversy much better known in our own day, that over the Religious Freedom Restoration Act (RFRA). The Court’s resistance to religious accommodation demands in the statutory Title VII environment of *Hardison* and *Philbrook* were advance tremors of a far bigger jolt to come, this time in First Amendment law itself. That earthquake came with *Employment Division v. Smith* in 1990, and it confirmed that the accommodationist zeal for which the Warren Court had been known was no more.⁴⁹ For 30 years, during the so-called *Sherbert/Yoder* era, the Court had construed the Free Exercise Clause to encompass broad rights of accommodation for religious belief and practice when they came into conflict with otherwise applicable law.⁵⁰ Writing for the majority in *Smith*, Justice Scalia rang down the curtain on this experiment; henceforth the Court would decline a broad constitutional role in heading off conflicts between religious conviction and legal duties, though it recognized Congress as having broad discretion to step into the gap to do so through legislation. The line-up of dissenters was familiar: Blackmun, Brennan, and Marshall.

Congress promptly took up the challenge: it passed RFRA by a unanimous House and near-unanimous Senate vote. The law, which was signed and took effect in 1993, pushed further than *Sherbert/Yoder* in one important respect: it required the government to use the least restrictive means when accommodating belief, a distant echo of the literature criticizing the *Philbrook* court for contenting itself with a bare minimum of accommodation. A minority of states proceeded

⁴⁹ *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). Another important precursor case was *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985) (Connecticut law mandating that private employers grant Sabbath leave to employees violates Establishment Clause).

⁵⁰ *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

to enact individual “mini-RFRAs.” At the federal level, at least, statutory RFRA now filled the crater where constitutional *Sherbert/Yoder* had late stood.⁵¹

Over the next 20 years, RFRA and its state equivalents were to change from a progressive enthusiasm (albeit one also widely supported by conservatives and centrists) to something drawing ardent support on the Right amid increasingly heated criticism from the Left. And yet this whole curious trajectory could have been observed earlier in the parallel, smaller-gauge politics of WRFA. The first signs must have seemed promising for supporters: prominent Republicans identified with their party’s social-conservative wing, including future presidential candidates Sen. Rick Santorum (R-Pa.) and Rep. Bobby Jindal (R-La.), began speaking up enthusiastically for WRFA. At the same time, the coalition on the left for the bill began to show signs of fracturing. Matters came to a head in 2004 when the previously supportive American Civil Liberties Union declared that in its view the legislation needed to be rethought and rewritten. In a letter, the ACLU released an analysis of the 113 reported federal cases between 1977 (the *Hardison* year) and 2002 in which employees had lost Title VII religion cases on issues of either reasonable accommodation or undue hardship.⁵² Of these, it said, 83 “involved the scheduling of religious holidays or the wearing of religious clothing or a beard.” Those were not so controversial. However, of the other 30, it found many alarming. The plaintiffs included:

- employees who wished to chide co-workers or agency clients about lifestyles they saw as sinful, or proselytize retail customers, mental patients and prison inmates at their workplace;⁵³

⁵¹ See Marci A. Hamilton, *The Establishment Clause During the 2004 Term: Big Cases, Little Movement*, 2004–2005 *Cato Sup. Ct. Rev.* 159 (post-Smith developments); Richard W. Garnett & Joshua D. Dunlap, *Taking Accommodation Seriously: Religious Freedom and the O Centro Case*, 2005–2006 *Cato Sup. Ct. Rev.* 257, 264 (“[T]he doctrinal landscape—if not the results for litigants in actual cases—changed markedly” after *Smith*).

⁵² Laura Murphy & Christopher Anders, *ACLU Letter on the Harmful Effect of S. 893, The Workplace Religious Freedom Act, on Critical Personal and Civil Rights*, ACLU, June 2, 2004, available at <https://www.aclu.org/letter/aclu-letter-harmful-effect-s-893-workplace-religious-freedom-act-critical-personal-and-civil>.

⁵³ *Spratt v. County of Kent*, 621 F. Supp. 594 (W.D. Mich. 1985), *aff’d*, 810 F.2d 203 (6th Cir. 1986) (prison inmates); *Baz v. Walters*, 782 F.2d 701 (7th Cir. 1986) (psychiatric patients); *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012 (4th Cir. 1996) (co-

- two truck drivers and an emergency worker who asked to avoid overnight shifts spent in the company of women;⁵⁴
- employees seeking to display symbols that they held to be of religious significance, but which co-workers found upsetting⁵⁵;
- police officers who asked to be excused from protecting abortion clinics;⁵⁶
- a counselor who gave advice on relationship issues as part of an employee assistance counseling program, but believed it wrong to counsel gay employees on relationships.⁵⁷

To make religious accommodation law more stringent across the board would be to tip some of these cases from losers to winners. While the ACLU said it would continue to support a scaled-down version of the bill to cover garb, grooming, and holidays issues, it opposed the broad forms of the bill it had previously supported. Social-conservative backers of WRFA, not surprisingly, took a different view. They saw some or many of the cases that bothered the ACLU as deserving sympathy or outright support.⁵⁸ In their view, adherents of conservative religious views were emerging as (in effect) a religious minority whose interests were stepped on by the dominant culture. The pharmacy employee who wished to ask co-workers to

workers); *Knight v. Conn. Dep't of Public Health*, 275 F.3d 156 (2nd Cir. 2001) (visiting nurse's clients); *Anderson v. U.S.F. Logistics (IMC), Inc.*, 274 F.3d 470 (7th Cir. 2001) (clients).

⁵⁴ *Virts v. Consolidated Freightways Corp. of Delaware*, 285 F.3d 508 (6th Cir. 2002); *Weber v. Roadway Express, Inc.*, 199 F.3d 270 (5th Cir. 2000); *Miller v. Drennon*, 1991 WL 325291 (D.S.C. 1991), *aff'd*, 966 F.2d 1443 (4th Cir. 1992) (emergency medical technician).

⁵⁵ *Wilson v. U.S. West Commc'ns*, 58 F.3d 1337 (8th Cir. 1995) (anti-abortion button); *Kaushal v. Hyatt Regency Woodfield*, 1999 WL 436585 (N.D. Ill. 1999) (swastika); *Swartzentruber v. Gunitite Corp.*, 99 F. Supp.2d 976 (N.D. Ind. 2000) (burning cross).

⁵⁶ *Rodriguez v. City of Chicago*, 156 F.3d 771 (7th Cir. 1998); *Parrott v. District of Columbia*, 1991 WL 126020 (D.D.C. 1991).

⁵⁷ *Bruff v. N. Miss. Health Servs., Inc.* 244 F.3d 495 (5th Cir. 2001), cert. denied 534 U.S. 952 (2001).

⁵⁸ While not all the case dismissals on the ACLU list were controversial in their outcome, many set out fact patterns that were to recur repeatedly in the years since then. See, for example, *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 602 (9th Cir. 2004) (employee's religious objections to employer's pro-gay messages). For more discussion of a number of cases on the ACLU list, see EEOC Informal Guidance Letter, Dec. 21, 2004, available at http://www.eeoc.gov/eeoc/foia/letters/2004/titlevii_religious_expression.html.

handle requests for contraception, or the office worker who wished to sit out pro-alternative-lifestyle sensitivity training, were not asking for anything more radical than those before them who refused to serve in the wartime military, recite the Pledge of Allegiance, or comply with official school-leaving ages. Now that it was their turn to ask for protection, why weren't they getting more help from those who had long spoken up for the practice of minority religions?

Those who follow Title VII issues had had at least 10 years' advance warning when, in 2014, the once-sleepy RFRA issue burst into furious headlines with *Hobby Lobby*, Arizona, and Indiana. And the same was true a few months later when some conservative governors announced that they would seek to recognize accommodation rights for county and other local clerks not to sign certificates for same-sex marriages.⁵⁹

Conclusion: A Consensus Unlikely to Last

For almost as long as there has been an ideological spectrum, religious accommodations have tended to cut across it both ways. The Right tends to prize the role religion plays in society, yet also prizes the rule of law with its dispassionate application of neutral rules to all. And as regards Title VII in private employment, at least, each advance for obligatory accommodation represents a retreat for the principles of freedom of association and employment at will that undergird the liberty of the marketplace. Even in the government workplace, conservatives might have mixed feelings about widening the scope for litigation or giving public employees new ways of digging in against managers, as new rights sometimes do.

Progressives, for their part, have often spoken up for religious minorities scorned and misunderstood by American elites and majorities. Yet an equally durable strain of progressive thought finds democratic value in the equal application of law, and fears that public programs and standards will disintegrate if individual opt-out rights are provided too freely under the heading of conscience exemptions. Religion-based exceptions, unless accompanied by equal

⁵⁹ For a legal critique of the clerk exemptions, see Kara Loewentheil & Katherine Franke, Public Rights/Private Conscience Project Memorandum, Proposed Conscience or Religion-Based Exemption for Public Officials Authorized to Solemnize Marriages, (June 30, 2015), available at http://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/marriage_exemptions_memo_june_30.pdf.

rights of accommodation for strongly held secular scruples of conscience, also grant official elevation to religion over the secular—“gives them favored treatment,” as Scalia noted in passing.⁶⁰

EEOC v. Abercrombie & Fitch was the rare case in which an expansion of workplace religious accommodation managed to slip through without tripping these alarms. It seems unlikely that the next big case will be as uncontroversial.

⁶⁰ *Abercrombie*, 135 S. Ct. at 2034.