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# Religious Expression and Exemptions in the Private Sector Workplace: Spotting Bias

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**Abstract** Courts tasked with ruling on religious freedom claims in the private sector workplace have been faced with the following challenge: too weak a protection of religious freedom and it will become meaningless; too strong, and individual freedom will be stifled. Recently, courts on each side of the Atlantic have, respectively, leant towards each of these two extremes. In Europe, courts have afforded minimalist and, as I will argue, too restrictive a protection to religious interests. Whether out of deference to state constitutional traditions or economic interests, they have often undermined the protection of religious freedom. Conversely, in the United States, the Supreme Court has granted a maximalist and, as I will argue, excessive protection to religious interests. The article will demonstrate the flaws of each approach. It will unravel the main three types of bias that underlie these extreme positions, namely the state, the economic and the religious bias.
**Key words:** ordoliberalism; laïcité; Achbita; Commune d'Ans; 303 Creative.

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Tel est le mystère de la liberté de l'homme, dit Dieu… Si je le soutiens trop, il n'est plus libre. Et si je ne le soutiens pas assez, il tombe.[1]
Charles Péguy[2]

## 1. *Introduction*

The dilemma underlined in Charles Péguy's quote aptly captures the recent challenges faced by courts tasked to rule on religious freedom claims: too weak a protection of religious freedom and it will fall; too strong, and human beings will no longer be free. In recent years, courts

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[1] 'Such is the mystery of the freedom of human beings, says God… If I support human beings too much, they are no longer free. If I support them too little, they fall' (my translation).

[2] Charles Péguy, Le Mystère des Saints Innocents (first published 1912, NRF Gallimard 1963).

on each side of the Atlantic have, respectively, leant towards each of these two extremes. In Europe, courts have afforded minimalist and, as I will argue, too restrictive a protection to religious interests. Whether out of deference to state constitutional traditions or economic interests, courts in Europe, in recent cases, have often undermined the protection of religious freedom. Conversely, in the United States, the United States Supreme Court (USSC) has granted a maximalist and, as I will argue, excessive protection to religious interests. The USSC has in recent years adopted a pro-religious stance which has weakened the commitment to (competing) individual freedoms.

This article will demonstrate the flaws of each approach. It will unravel the main three types of bias that underly these extreme positions, namely the state, the economic and the religious bias. In Europe, courts often justify the minimalist protection offered to religious freedom out of deference to constitutional state traditions and state arrangements in relation to religion. Constitutional traditions pertaining to state/church arrangements are certainly, from a legal perspective, foundational for religious freedom. States' respective constitutional arrangements between state and religion have laid the ground for relationships between state and religion respectful of the state's independent normative power as well as of individual and collective manifestations of religion.[3] The importance of constitutional traditions and arrangements towards religion notwithstanding, they ought only to be relevant when the state is involved. In the private sector workplace, in the context of horizontal relationships between two private individuals or entities, constitutional traditions and arrangements should *a priori* not come into play. Another implicit reason which can be detected in European case law for the undermining of religious freedom is the implicit and systematic priority conferred to economic interests in the private sector workplace. The importance of economic interests and of the right to conduct a business under article 16 of the EU Charter of Fundamental Rights[4] notwithstanding, economic considerations, I will submit, do not warrant greater consideration than competing interests. In a similar unbalanced approach but for opposite reasons, the deference

[3] On the links and interaction between state-church constitutional national arrangements and democratic and human rights requirements under the framework of the European Convention on Human Rights, Carolyn Evans and Christopher A Thomas, 'Church-State Relations in the European Court of Human Rights' (2006) Brigham Young University Law Review 699.

[4] Under this article, 'The freedom to conduct a business in accordance with Union law and national laws and practices is recognised'.

towards religious interests in recent USSC decisions seems to signal a trend towards a systematic preference for religious interests.

This article will reveal the exclusionary implications of these stances as religious freedom, in Péguy's words, is consequently either left to fall (in the European jurisprudence) or becomes a weapon against individual freedom and equality interests (in the US case law). An assumed incompatibility between religion and democracy has guided courts towards these extreme positions in recent decisions, albeit in reverse perspective in Europe and the United States. In Europe, the risks that religion would pose for democracy has led courts to afford minimalist protection to religious interests whilst, in the United States, the risks that democratic majoritarian values would pose for religion has led the USSC to adopt the opposite stance. It is (amongst other reasons) because of these perceived tensions between religious freedom and democracy that courts in Europe often turn to constitutional arrangements and traditions initially designed to solve these tensions, when tasked to rule on controversies over religious expression in the private sector workplace. This 'state bias', however, has exclusionary implications for democracy itself, hereby redefined through the prism of national majority values. As for the economic bias, it not only, as I will show, undermines the protection of religious freedom, whose importance is inherently subject to commercial interests, but dilutes democratic legitimacy itself, by replacing it with an economic normative frame of reference. Finally, in the United States, while the opposite maximalist protection of religious freedom also takes the guise of a deferential approach towards constitutional traditions or economic interests, analysis of the case law gives rise to a suspicion of a religious bias. By this, I mean that the protection of religious interests would occur for the sake of protecting religious interests, in a process of circular reasoning, harmful to non-religious individual interests as well as to democratic common norms, from which religious citizens or organisations may systematically opt-out.

I have argued elsewhere[5] that religious freedom and democracy, far from being incompatible, can enrich and reinforce one another. To that end, I have put forward a democratic approach to religious freedom, designed to strengthen these mutual beneficial connections. The purpose of this article is not to rehearse this demonstration but to unravel a contrary converging methodological trend, which supports the direction towards (opposite) extremes, namely an excessively deferential

[5] Myriam Hunter-Henin, *Why Religious Freedom Matters for Democracy. Comparative Reflections from Britain and France for a Democratic 'Vivre Ensemble'* (Hart 2020).

and biased approach vis-à-vis one set of interests. Mere deference to or preference for one set of interests need not be unfair. Law needs to arbitrate between competing claims and having a hierarchy in favour of one set of interests is not per se illegitimate. The article, however, argues that in recent decisions, courts have drifted from justifiable hierarchy to biased preference. The bias referred here does not therefore equate to the notion of bias studied in psychology and behavioural studies.[6] It is not the cognitive bias that weighs on legal outcomes when stereotypes and prejudices unconsciously affect judges' thinking and perceptions.[7] Rather, the article uses bias in the sense of a systemic flaw in legal reasoning and legal justification when a principle is applied beyond its remit and rationale or competing interests are systematically and totally ignored. In the sections to follow, I will reveal and criticise three types of bias, in recent decisions pertaining to religious freedom, which fall under that definition, namely the state bias (Section 2), the economic bias (Section 3) and the religious bias (Section 4).

## 2. *The State Bias*

When the Court of Justice of the European Union (CJEU) or the European Court of Human Rights (ECtHR) have ruled on the display of religious symbols, they have often granted extensive leeway to member states.[8] This is because religion is deemed to be a particularly sensitive topic, which goes to the heart of member states' immigration policies and narratives of national unity. Certainly, the fear of back-lash[9] and, more

[6] Linda Hamilton Krieger, 'The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity' (1995) 47 Stanford Law Review 1161; Thomas Gilovich and others (eds), *Heuristics and Biases: The Psychology of Intuitive Judgment* (Cambridge University Press 2002).

[7] On this unconscious or implicit bias, Cass R. Sunstein and Christine Jolls, 'The Law of Implicit Bias' (2006) 94 California Law Review 969.

[8] This deference towards state traditions does not apply across the board. It is starker in relation to states with strict separatist traditions and is particularly prominent in religious symbol cases. For illustrations of cases relating to refusals by the state to register religious organisations, in which the ECtHR did not defer to state traditions, see *Bulgarian Orthodox Old Calendar Church and Others v Bulgaria* App no 56751/13 (ECHR 20 April 2021); *Metropolitan Church of Bessarabia and others v Moldova* App no 45701/99 (ECHR 27 March 2002); *Religionsgemeinschaft der Zeugen Jehovas and Others v Austria* App no 40825/98 (ECHR 31 July 2008).

[9] See however, arguing that backlash against international courts such as the ECtHR is not always related to the decision of the international court but corresponds to domestic political strategies, Mikael Rask Madsen, 'Two-Level Politics and the Backlash against International Courts: Evidence from the Politicisation of the European Court of Human Rights' (2020) 22 The British Journal of Politics and International Relations 728, 731.

positively, the respect owed to pluralism across Member States[10] and to national democracies[11] understandably prompts both European courts to tread carefully in matters of religion, lest they be accused of over-stepping their role.[12] Systematic and absolute deference to state positions as soon as religion is involved, however, is I submit one step too far as it reduces the protection of religious freedom to an empty shell. For some, this may be a desirable outcome. Elisabeth Shakman Hurd[13] argued, for example, that the category of religious freedom is so bound up with imperialistic connotations that it should best be abandoned from legal discourse. I would resist such a drastic solution. Erasing religion from discourse would impoverish legal reasoning, potentially undermine protection for religious citizens and hide rather than necessarily remedy imperialistic connotations.

The second reason why courts have given carte blanche to member states is because of their deference to constitutional national traditions. The CJEU's 2017 ruling in the *Achbita* case aptly illustrates this stance.[14] In that case, a receptionist working in a private sector security company in Belgium was dismissed after refusing to remove her hijab, which infringed the company neutrality policy. The national authorities asked the Court to rule on whether the dismissal was compatible with the protection against discrimination laid out under EU directive *2000/78/EC* of 27 November 2000 (the Directive).[15] The opinion delivered by

[10] See, asserting that it is not the role of the court to impose on a respondent State a particular form of cooperation with the various religious communities, *İzzettin Doğan and Others v Turkey* App no 62649/10 (ECHR 26 April 2016 [GC]), para 183 and Article 17 1. of the Treaty of the Functioning of the European Union: 'The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States'.

[11] See for example, arguing that the EU has been cut off from its national democratic roots, thus creating a European democratic deficit whose remedy would be a 'restrained European expansionism', Dieter Grimm, *The Constitution of European Democracy* (Oxford University Press 2017).

[12] More generally, for an argument that human rights should not be construed too broadly and that a human rights overreach is mainly responsible for the backlash against international courts, John Tasioulas, 'Saving Human Rights from Human Rights Law' (2019) 52 Vanderbilt Journal of Transnational Law 1167.

[13] Elizabeth Shakman Hurd, *Beyond Religious Freedom: The New Global Politics of Religion* (Princeton University Press 2015).

[14] C-157/15 *Achbita, Centrum voor Gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions*, Judgment [GC] of 14 March 2017 <eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62015CJ0157>.

[15] EU Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation *OJ L* 303, 2.12.2000, 16.

Advocate General (AG) Juliane Kokott reflects how constitutional traditions weighed on the legal reasoning:[16]

> In Member States such as France, where secularism has constitutional status and therefore plays an instrumental role in social cohesion too, the wearing of visible religious symbols may legitimately be subject to stricter restrictions (even in the private sector and generally in public spaces).[17]

The constitutional standing of secularism in France (via the constitutional principle of laïcité) was, however, irrelevant in that case. Despite the inflationist interpretation of the principle of laïcité in France in recent years, it has never extended to a purely private law setting,[18] outside of any mission of public service. The French Law of 1905 on the Separation between Church and State,[19] to which the concept of laïcité is often traced back, reveals no underlying incompatibility between religious expression and a French way of life in the 1905 legislative framework. The Conseil d'Etat (the highest administrative court in France) had categorically dismissed at the time the argument that because priests wearing their cassocks would stand out from other citizens, religious attire would offend the principle of separation contained in the 1905 law.[20] The notion implicit in *Achbita* that everyone in France would face greater restrictions in religious expression does not match this rationale. Besides, such interpretation of non-discrimination provisions in the shadow of state traditions entrenches the systemic disadvantage of

[16] For a full analysis of the reasoning of the Court in the *Achbita* case and the extent to which it endorsed/departed from the Opinion of AG Juliane Kokott, Lucy Vickers, 'Achbita and Bougnaoui: One Step Forward and Two Steps Back for Religious Diversity in the Workplace' (2017) 8 European Labour Law Journal 232.

[17] AG Juliane Kokott, Opinion 31 May 2016, para 125 <op.europa.eu/en/publication-detail/-/publication/bf51643a-27cd-11e6-914b-01aa75ed71a1>.

[18] The scope of French laïcité is already extensive: it imposes neutrality requirements upon all public agents, including those on temporary work placements and apprenticeships or voluntary work (Loi n.2016-483 of 20 April 2016). Neutrality requirements for the sake of laïcité also affect private law employees working for a company in charge of a public service mission under the control of the State: See Soc. 19 March 2013 *CPAM de Seine Saint Denis,* n.12-11.690. More broadly, since the law of 24 August 2021 strengthening the respect for Republican principles, neutrality requirements will apply as soon as a company is associated with a mission of public service by virtue of a statutory, regulatory or contractual provision, whether the workers concerned are employees of the company in question or sub-contractors: Loi n.2021-1109 of 24 August 2021, JORF n°0197 25/08/2021, Comments V Fortier and G Gonzalez (eds), 2022(13), Special Issue, Revue du droit des religions.

[19] JORF 11/12/1905 <legifrance.gouv.fr/loda/id/LEGISCTA000006085397>.

[20] Conseil d'Etat (CE) 19 February 1909, 27355 <legifrance.gouv.fr/ceta/id/CETATEXT000007633387>.

minority group members, which anti-discrimination law precisely seeks to redress. While deference to constitutional traditions of laïcité where applicable would have been legitimate, the preference for state traditions in *Achbita* therefore amounts to a state bias, one that applies the relevant principle outside of its remit and totally ignores competing rights.

The retreat from the *Achbita* reasoning in the subsequent ruling of *SCRL (Religious clothing)*[21] is therefore welcome in my view. In this dispute between a Muslim employee and a company managing social housing in Belgium, the CJEU asserted that the legitimacy of a company neutrality policy could not be presumed but had to be established by the employer (para 40). However, doubts remain as to how stringent judicial review would have to be in practice since the questions put to the CJEU in the preliminary reference did not directly address this aspect but were directed at the boundaries between direct[22] and indirect[23] discrimination.[24] In a more recent case, *Commune d'Ans,*[25] the CJEU confirmed that its deferential approach remained pertinent. The Court ruled that (subject to minimal conditions)[26] a ban on all visible signs of religious and philosophical affiliations worn by staff working for a Belgian municipality was compatible with the Directive, as the employer was hereby legitimately seeking to ensure an entirely neutral administrative environment (para 39). In contrast to *SCRL (Religious Clothing),* the objective of neutrality is assumed to be legitimate, without the municipality being requested to put forward any reasons for

[21] C-344/20 *SCRL (Religious clothing)* Judgment of 13 October 2022 <eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62020CJ0344>.

[22] Article 2(2)(a) of Directive 2000/78/EC defines direct discrimination as occurring where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on, in this case, the ground of religion or belief.

[23] Article 2(2)(b) of Directive 2000/78/EC defines indirect discrimination as occurring where an apparently neutral provision, criterion or practice would put persons having a particular protected ground of discrimination at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

[24] For a criticism of the characterisation of neutral bans on religious and non-religious signs of affiliation as amounting to indirect discrimination, Joseph Weiler, 'Je Suis Achbita!' (2017) 15 International Journal of Constitutional Law 894.

[25] C-148/22 *Commune d'Ans* Judgment [GC] of 28 November 2023 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62022CJ0148>.

[26] The CJEU concluded that the referring court would have to ensure that 'the neutrality rule is appropriate, necessary and proportionate in the light of that context and taking into account the various rights and interests at stake' (para 41). This guidance is far less prescriptive than in *SCRL (Religious Clothing*) (n 21) or than the guidelines recommended in the Opinion delivered by AG Collins on 4 May 2023 on the case of *OP v Commune d'Ans* <eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62022CC0148>.

wanting to pursue such a neutrality objective. As a commentator has noted, 'It is as if a rule requiring a certain qualification is justified by the desire to have that qualification'.[27] To explain the loosening of its scrutiny, the CJEU invokes deference towards national secularist constitutional traditions, referring explicitly to articles 10 and 11 of the Belgian Constitution (para 32). The ruling of *Commune d'Ans* related to the public sector where constitutional arrangements are normally more pronounced. However, this public sector remit fails in my view to justify or adequately confine the deferential approach adopted in *Commune d'Ans.* The constitutional articles mentioned by the Court do not provide a clearly relevant legal basis, since the principle of state neutrality which the Belgian Constitutional council[28] read into them was related to the public duty of the neutral organisation of state education. Moreover, there is in any case a logical leap from the principle of neutrality of the state to an exclusivist interpretation of the neutrality of public services in an employer–employee dispute. Precisely, unlike the position adopted in France since 2000,[29] and despite intense debates within Belgium on the issue, Belgian law had not endorsed such an exclusive interpretation of neutrality.

Even in the education sector, the Belgian constitutional council has not directly embraced an exclusivist interpretation of neutrality, but merely approved the discretion afforded to higher education institutions,[30] under the relevant decree,[31] to decide whether such exclusivist conception is necessary or not to guarantee 'the recognition and support for pluralism' and 'emphasis on common values'.[32] On its face the decision therefore suggests that had the decree mandated institutions to

[27] Gareth Davies, 'OP v Commune d'*Ans: The* "Entirely Neutral" *Exclusion of Muslim Women From State Employment*', <europeanlawblog.eu/2023/12/14>.

[28] Cour Constitutionnelle 15 March 2011, n° 40/2011, § B.9.5, al 3. Comments Mathias El Berhoumi, 'Les Juridictions Suprêmes Contre le Voile: Commentaire de Deux Arrêts Engagés', in Julie Ringelheim (ed), *Le droit belge face à la diversité culturelle. Quel modèle de gestion de la pluralité?* (Bruylant 2011), 569. Adde, Cour constitutionnelle 4 June 2020, n° 81/2020, B.14.2 (for higher education). For a criticism of the extension of the solution to the higher education sector, Xavier Delgrange, 'Interdiction du Voile dans l'enseignement Supérieur: la Cour Constitutionnelle, Substitut d'un Législateur Paralysé' (2021) 6839 Journal des tribunaux 2.

[29] CE Melle Marteaux 30 May 2000, n°217017.

[30] Cour Constitutionnelle 4 June 2020 (n 28) (n 28) B.18.2.

[31] Décret de la Communauté Française du 31 mars 1994 définissant la neutralité de l'enseignement de la Communauté, Moniteur Belge 18 Juin 1994 (*Decree of the French Community 31st March 1994 on the Definition of Neutrality in Education within the Community*).

[32] Cour Constitutionnelle 4 June 2020 (n 26) B.18.2.

ban all religious and philosophical signs, it would have been disproportionate, hence unconstitutional.[33] In other words, the exclusivist conception of neutrality would only be compatible with the Constitution if it does not exclude other possible versions of neutrality. Paradoxically, the community of Brussels had indeed defended the exclusivist conception of neutrality for the sake of pluralism. Allowing bans on religious and philosophical symbols in some institutions would be required (the argument goes) to increase the diversity within versions of neutrality and satisfy parents who wish their children to be educated in an exclusivist neutral environment.[34] The Belgian story of neutrality highlights, however, how the increased discretion conferred upon local educational institutions to construe the meaning of neutrality has coincided with an increased scope of the exclusivist conception of neutrality.[35] In adopting a similar reasoning in the area of public sector employment, the CJEU is likely to provoke the same consequences.

Naturally, following the *Commune d'Ans* ruling, the referring court *may* still decide that the municipality of Ans should have maintained an inclusive neutrality; the referring court *may* also still decide to perform a strict proportionality test, but it may also decide not to do so, without violating the Directive. The public sector underlying the dispute does not in my view warrant such extensive deference. First, the Directive denies an automatic distinction between the public and private sector since it explicitly applies equally to both sectors.[36] Second, by singling out the public sector, the CJEU is indirectly encouraging secularist separatist states to adopt an exclusivist conception of neutrality in the public sector. Indeed, the CJEU is reasoning in *Commune d'Ans as if* the municipality had legitimate discretion under Belgian law to opt for an exclusivist interpretation of neutrality. Far from being deferential, the CJEU is arguably here weighing on national debates. By glossing over the question of whether a strict interpretation of neutrality requirements would be permitted under domestic law, the Court is

[33] See however, Delgrange (n 28) 5, para 9, observing that a comparison of the phrasing between the two constitutional decisions of 2011 and 2020 reveals that neutrality is evolving towards being less a constraint for public authorities and more a constraint for individuals.

[34] Vincent de Coorebyter, 'Port du Voile à l'Ecole: Une Solution Typiquement Belge' (2020) 8 July Le Soir 13.

[35] When allowed to do so, more and more institutions opt for the exclusivist interpretation of neutrality. See the statistics quoted Delgrange (n 28). To circumvent this conception of neutrality, Muslim parents would need to turn to Muslim schools (of which there are currently too few).

[36] Article 3(1) of the Directive.

issuing a rather abstract ruling, susceptible to apply to either exclusivist or inclusivist interpretations of neutrality requirements. In treating exclusivist and inclusivist interpretations of neutrality on a par,[37] regardless of the intricacies of the domestic law, the Court confers legitimacy to both interpretations, thus making room for the most militant reinterpretation of domestic law. A deferential approach would arguably have meant construing the law as it is entrenched. Nor does the reference to the public sector constitute a sufficiently clear and reliable demarcation. The recent French Law of 24 August 2021[38] is testimony to the potentially expansionist interpretation of what falls under the 'public service' and concomitantly of the increasing scope of neutrality requirements imposed on staff, whether of the public or private sector, as soon as the work undertaken is remotely associated with a public service mission. The ruling of *Commune d'Ans* therefore runs the risk of reintroducing into the private sector of employment the state bias characteristic of the *Achbita* ruling. Rather than a public/private sector divide, the relevant distinction would then lie between non-separatist secularist state traditions (deemed to be in favour of an inclusivist interpretation of neutrality) and separatist secularist state traditions (deemed to be in favour of an exclusivist interpretation of neutrality), in a simplistic and dichotomist reordering of national traditions across the EU. Admittedly, in the private sector, separatist secularist state traditions only came into play in *Achbita* because the employer had put in place a company neutrality policy. Without such a company neutrality policy, the employee's dismissal would have amounted to direct discrimination (as confirmed in the *Bougnaoui* case).[39] This deference towards company policies does not, however, save the reasoning but denotes yet another problematic bias in my view: an economic bias.

## 3. *The Economic Bias*

The presumption of legitimacy conferred upon the employer's company neutrality policy in *Achbita* inhibited the consideration of competing religious interests. The CJEU declared in its *Achbita* ruling that: 'an employer's desire to project an image of neutrality towards both its

[37] *Commune d'Ans* (n 25) para 33.
[38] Law of 24 August 2021 strengthening the respect for Republican principles (n 18).
[39] C-188/15 *Asma Bougnaoui v Micropole SA* Judgment [GC] of 14 March 2017 <eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:62015CJ0188>.

public and private sector customers is legitimate'.[40] The Court did not enquire why Ms Achbita's hijab might have undermined the employer's corporate image as a security company or why an image of neutrality was desirable in the first place.[41] Nor did the Court urge national authorities to subject the resulting restrictions to a thorough contextual proportionality test, merely drawing attention instead to the consistency in the enforcement of the policy. This approach thus places commercial interests as a sort of 'natural' baseline, in a form of reasoning rooted in an ordoliberal conception of normative power.

Ordoliberalism is a theory associated with a group of German authors,[42] whose writings date back from just after the second world war. As Michel Foucault explained,[43] ordoliberalism has had a longstanding effect because it shifted the foundations of the state's normative power. The reasons why the state can legitimately edict coercive norms traditionally lie either in theories of sovereignty (the notion that the state representative would have a divine[44] or democratic right[45] to rule as they

[40] *Achbita* (n 14) para 40–41.

[41] According to Article 267 of the Treaty of the Functioning of the European Union, subsidiarity is inherent in the preliminary reference procedure which limits the role of the CJEU to providing interpretation on EU law and principles, leaving national courts to apply this interpretative guidance. However, the argument presented here postulates that the subsidiarity built into the preliminary reference procedure does not and should not have prevented the court from engaging on the issue of the legitimacy of the neutrality policy. For an elaboration on this question, see Myriam Hunter-Henin, 'Religious Neutrality at Europe's Highest Courts' (2022) 11 Oxford Journal of Law and Religion 23.

[42] For example, Wilhelm Röpke, *La Crise de Notre Temps* (De La Baconnière editors 1945, translation H Faesi and C Reichard), *Die Gesellschaftskrisis der Gegenwart* (original edition E Rentsch 1942, 4th edn 1945). More generally, Thomas Biebricher and others (eds), The Oxford Handbook of Ordoliberalism (Oxford University Press 2022).

[43] Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978-79* (Palgrave Macmillan 2008, translation by G Burchell). I will here be referring to the French original version, *Naissance de la Biopolitique. Cours au Collège de France, 1978-1979* (Gallimard Seuil 2004), esp Leçon du 14 février 1979, 148 ff.

[44] The theory is often associated with Jean Bodin (1530-1596). However, Bodin considered that the absolute right of the sovereign was not limitless but constrained by higher natural laws: *Methodus ad Facilem Historiarum Cognitionem*, Parisiis, apud Martinum Juvenem, 1566, translated from Latin to French in Pierre Mesnard (ed), *Œuvres philosophiques de Jean Bodin* (Presses Universitaires de France 1951), 104. For an overview, Daniel Lee, 'Jean Bodin' in Oliver Descamps and Rafael Domingo (eds), *Great Christian Jurists in French History* (Cambridge University Press 2019), 191.

[45] The notion that the sovereign would have a non-divine legal right to rule as they see fit is often associated with Austin's Jurisprudence. According to Dewey, the reading of Austin in this light is too crude. Austin's conception of sovereignty is geared towards 'the greatest possible advancement of human happiness': John Dewey, 'Austin's Theory of Sovereignty' (1894) 9 Political Science Quarterly 31, 33. Nonetheless, it remains absolute in the sense that this conception of power, defined entirely on the basis of a command by

see fit) or in theories of fundamental rights, in which state power would be legitimate in order and as long as it is exercised to ensure the autonomy and equality of citizens.[46] In contrast, in ordoliberalism, the foundation of state power rests in economic liberty.[47] If we follow Foucault's interpretation, ordoliberalism therefore does not simply carve out areas of economic activities immune from state intervention in a tradition of economic *laissez-faire*,[48] it seeks to ensure that state intervention (wherever it occurs) follows an economic rationality.[49] Under an ordoliberal outlook, the extent to which religious expression may be allowed in the workplace will exclusively depend on its compatibility with economic interests, which will then generally be deemed to be best assessed by the employer under the right to conduct a business. The only question for the court will be whether the request to wear a religious symbol at work conforms to the company's chosen commercial image and policy.[50] The Labour Court of Brussels, in the *Librairie Club* case,[51] followed such a line of reasoning. It held that the dismissal of an employee who had insisted on wearing an Islamic headscarf against the company's commercial image—described as one of sobriety, neutrality and openness—did not raise an issue of religious freedom. The emphasis on economic interests under an ordoliberal outlook therefore absorbs fundamental rights entirely. In that sense, it constitutes not only a preference for economic concerns but an economic bias—one that bars consideration of competing interests.

a superior to an inferior would admit no legally legitimate restrictions on the sovereign's decision power. Constitutional Law, according to Austin, is thus not proper law but positive morality (Dewey, ibid 43). This notion of sovereignty has regained popularity in recent years. See for example, denouncing the ideology of constitutionalism which would unduly restrain democratically elected sovereign power, Martin Loughlin, *Against Constitutionalism* (Harvard University Press 2022).

[46] For a theory linking democracy and human rights, Claude Lefort, *L'Invention Démocratique. Les Limites De La Domination Totalitaire* (1st edn 1981, Fayard 1983) 7, 66–67, 70.

[47] For the argument that ordoliberalism would seek to create 'an economic-legal order', Thomas Lemke, 'The Birth of Bio-Politics: Michel Foucault's lecture at the Collège de France on neo-liberal governmentality' (2001) 30(2) Economy and Society 190, 196.

[48] Foucault (n 43) 81.

[49] ibid 253.

[50] On the economic importance of commercial image, Dallan F Flake, 'Image is Everything: Corporate Branding and Religious Accommodation in the Workplace' (2014) 163 University of Pennsylvania Law Review 699, 754.

[51] C. trav. Bruxelles 4th Chamber, 15 January 2008, Journal des tribunaux du travail 140–141. Comments Louis-Léon Christians and Léopold Vanbellingen, 'Neutralités d'Entreprise et Neutralités d'Etat: Tendances Asymétriques en Droit Belge' (2018) 4(4) Droit social 337, 340; Pierre Joassart, 'Les Convictions Religieuses dans les Relations de Travail' (2016) Orientations 58.

The same conclusion of bias applies when religious expression is allowed since religious expression is not allowed for the sake of promoting employees' religious freedom, but only because religious expression is deemed beneficial for the company's profits and commercial image.[52] Whether employers decide to promote or restrict religious expression in the workplace, religious freedom will remain subordinate in this model to economic interests. Religious expression in the workplace would not signal the presence of *another* rationality, that of individual autonomy; it would merely reflect the economic value for employers of incentivising employees to transform themselves into enterprises, hence adhere within their inner souls to their company's goals.[53] It would therefore be hasty to interpret the presence of religion and spirituality in the workplace as 'politics of recognition'[54] gaining ground into employment relationships. Under an economic model, the aspiration for employees to live authentically in all areas of their lives,[55] including in the workplace, transforms into an injunction to achieve individual well-being, in order to increase one's own individual performance for the sake of the company. The exclusive focus on the corporate image and the economic interests it conveys will bear concrete consequences upon litigation surrounding religion in the workplace. An implicit hierarchy between types of religious requests, depending on the extent to which they depart from the company's image and values, is likely to emerge. Indeed, in *Achbita,* a distinction is established between visible religious signs (deemed inherently more problematic) and discreet religious clothing (deemed inherently more acceptable).[56] It is the omnipresence and exclusivity of the economic rationality, under an ordoliberal outlook, which amounts to a bias.[57]

[52] On this instrumentalisation, Sophie Iozard-Allaux, *Spiritualité et Management. Entre Imposture et Promesse. Une Lecture Théologique* (Cerf 2021).

[53] Tom J Peters, *The Brand You50 or Fifty Ways to Transform Yourself from an Employee into a Brand that Shouts Distinction, Commitment and Passion* (Knopf 1999).

[54] Charles Taylor, *Multiculturalism and The Politics of Recognition* (Princeton University Press 1992).

[55] Gilles Lipovetski, *Le Sacre de l'Authenticité* (NRF Gallimard 2021) 76.

[56] *Achbita* (n 14). See also, AG Rantos, Opinion delivered on 25 February 2021 on *MH Handel Mueller IX v WABE eV* and *MH Müller Handels GmbH v MJ* <eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62019CC0341>, para 62–63. Contra, holding that a company policy which would prohibit only conspicuous or large-sized signs religious signs would amount to direct discrimination, C-804/18 *MH Handel Mueller IX v WABE eV* and *MH Müller Handels GmbH v MJ* Judgment [GC] of 15 July 2021 <curia.europa.eu/juris/liste.jsf?num=C-804/18>, on which see Hunter-Henin (n 41).

[57] This biased legal reasoning unsurprisingly bears exclusionary implications for employees, whether they are religious or not. On the economic exclusion and precarity caused by the omnipresence of economic concerns, Alain Supiot, *L'Esprit de Philadelphie. La Justice Sociale Face au Marché Total* (Seuil 2010) 51.

Without claiming to evaluate ordoliberalism as a theory of governance, this section has therefore challenged the pertinence of the ordoliberal outlook for solving controversies over religious freedom in the private sector workplace. The retreat from the ordoliberal outlook which can be observed in subsequent rulings of the CJEU, notably in the *WABE* and *Müller Handel rulings*,[58] is therefore welcome in my view. The CJEU in these subsequent rulings held that the employer would need to *prove* that the neutrality policy relied on a genuine need[59] and was limited to what was strictly necessary.[60] It also warned that a company policy targeting conspicuous or large-sized religious signs may amount to direct discrimination since the wearing of conspicuous and large-sized religious signs may be connected to one or more specific religions, hence inextricably linked to a protected characteristic.[61] Provided that sufficient judicial scrutiny ensures that these requirements are enforced, the deference towards economic interests would no longer entail disregarding employees' competing religious interests. The ECtHR is also to be applauded for not having endorsed such an economic bias. In its *Eweida* decision,[62] the ECtHR rejected the reasoning that would have placed religious freedom at the mercy of economic interests, as construed by the employer. It abandoned the 'contracting out approach' or 'specific situation rule'[63]—thus refusing to exclude consideration of interferences with rights to religious manifestation in the workplace for the sole reason that they arise in the workplace. Moreover, the ECtHR refused to grant any presumption of legitimacy or higher status upon commercial interests. Through its insistence that the employer bore the burden of proving that interferences to religious interests for the sake of promoting a commercial image were necessary and proportionate to that aim, the ECtHR thus mandated a proportionality analysis weighing all the interests at stake,[64] avoiding the risk that the workplace becomes an area immune from the reach of fundamental rights and entirely subjected to economic considerations. In the United States, religious interests increasingly mingle with economic interests too and like in Europe, feature more and more in private sector employment and occupation disputes. However, unlike in Europe, the fear of bias that emerges from

[58] *WABE* and *MH Müller Handels* (n 56).
[59] ibid para 64.
[60] ibid para 76.
[61] ibid 73.
[62] *Eweida and Others v UK* App no 48420/10 (ECHR, 15 January 2015).
[63] ibid para 83.
[64] ibid paras 94–95.

recent decisions is one that would support, not economic or state interests, but religion.

## 4. *The Religious Bias*

Recent decisions by the USSC have reinvigorated religious expression and religious views in the workplace and beyond. In *Hobby Lobby*,[65] the employers, the Green family, requested for religious reasons to be exempt from paying the insurance contribution owed under the Affordable Care Act for the part corresponding to contraceptive and abortive care of their employees. In *303 Creative*,[66] a web designer requested for religious reasons to be allowed to refuse her services for gay weddings. In *Our lady of Guadalupe School v. Agnes Morrissey-Berru*,[67] a religious school wished to be exempt from an employment discrimination claim by one of dismissed employees. In *Groff v DeJoy*,[68] a mail delivery employee, Groff, requested, for religious reasons, to be exempt from working on Sundays. In all these cases, amongst others, religious interests prevailed. In all these cases, the court interpreted the relevant test in a way more protective a religion. In *Hobby Lobby*, the court thus conferred a (more) expansive scope to the relevant legislation protective of religious interests. In *303 Creative*, it construed the test protecting against compelled speech in a way (more) protective of providers who object, for religious reasons, to serving same-sex couples. In *Groff*, the USSC increased the evidentiary hurdle weighing on the employer who denies a religious accommodation to an employee. Finally, the ministerial exception rule,[69] which places internal actions of religious organisations beyond challenges based on employment discrimination laws, took a turn in favour of religious interests in the case of *Our Lady of Guadalupe School*. In *Our Lady of Guadalupe School*, two primary school teachers had been unfairly dismissed because of sickness (following a diagnosis of breast cancer) and

[65] *Burwell v Hobby Lobby Stores, Inc* (2014) 134 U.S. 2751.
[66] *303 Creative LLC et al. v. Elenis et al* (2023) 600 U.S. 570, 2298.
[67] *Our lady of Guadalupe School v. Agnes Morrissey-Berru* (2020) 140 U.S. 2049.
[68] Groff *v. DeJoy* (2023) 600 U.S. 477.
[69] For contrasting accounts, see Christopher C Lund, 'In Defence of the Ministerial Exception' (2011) 90 North Carolina Law Review 1; Caroline M Corbin, 'Above the Law? The Constitutionality of the Ministerial Exemption from AntiDiscrimination Law' (2007) 75(4) Fordham Law Review 1965; Ira C Lupu and Robert W Tuttle, 'Courts, Clergy, and Congregations: Disputes between Religious Institutions and Their Leaders' (2009) 7 George Washington Journal of Law and Policy 119.

old age, respectively. They argued that the religious school that employed them was hiding behind the ministerial exception rule to escape a review of these unfair practices. The issue echoed that of the previous case of *Hosannah-Tabor*,[70] in which a school had discharged one of its teachers because she threatened to file suit in a civil court. In both cases, the USSC concluded that the employees were covered by the ministerial exception and held in favour of the school. However, whilst the USSC took the pain of noting several factors that arguably connected the teacher's role with the school religious ethos in the case of *Hosannah-Tabor* (notably: the hours spent teaching Religious Education classes, the leading role undertaken by the said teacher in religious activities at the school, the requirement of religious training prior to the appointment to the post), it largely dispensed from such examination in *Our lady of Guadalupe School*. Such pro-religious trend does not per se amount to religious bias.

The preference that emerges for religious interests only constitutes bias if it relies on a principle that is applied beyond its remit and rationale or if competing interests are systematically and totally ignored.[71] Precisely, Carl Esbeck[72] argued that the USSC in *Hobby Lobby* merely followed and applied the principle set out under the Religious Freedom Restoration Act (RFRA),[73] which grants heightened protection against legislation that burdens religious rights. Nor did the court, it seems, ignored competing rights. By considering at length possible alternatives for the coverage of employees' contraceptive and abortive care, the court seems to take on board the harm that would ensue to employees left without full medical care coverage.[74] On closer look, however, the lack of bias is far less obvious. First, the applicability of the legislation was hotly contested. There were lively debates amongst scholars and lawyers in the United States as to whether the RFRA should extend to corporate entities that are run to make profit.[75] Indeed, Hobby Lobby is not a religious organisation founded to promote a religious ethos, but a huge

[70] *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.* (2012) 565 U.S. 171.

[71] Supra introduction.

[72] Carl H Esbeck, 'When Religious Exemptions Cause Third-Party Harms: Is the Establishment Clause Violated?' (2016) 59 Journal of Church and State 357, 370.

[73] Religious Freedom Restoration Act of 1993 (RFRA) 107 Stat. 1488, codified at 42 U. S. C. §2000bb et seq.

[74] *Hobby Lobby* (n 65) 2759, 2782.

[75] Elizabeth Sepper, 'Contraception and the Birth of Corporate Conscience' (2014) 22 American University Journal of Gender, Social Policy & the Law 303; Mark Tushnet, 'Do For-Profit Corporations Have Rights of Religious Conscience?' (2013) 99 Cornell Law Review Online 70, 77; James D Nelson, 'Conscience, Incorporated' (2013) Michigan State Law Review 1573; Jaimie K McFarlin, 'The Associational Hoax: Corporate

art and craft company, with over a thousand stores spread across forty-eight states of the United States. The protection afforded under the RFRA did not obviously extend to such commercial entities. Second, the consideration of competing interests remains abstract: The USSC granted the employer's request, on the assumption that there would be no harm for employees, because employees would supposedly be able to obtain the requisite coverage through alternative plans.[76] However, given the lack of actual existing alternative schemes at the time, this absence of harm is theoretical. The same ambiguities apply in the other abovementioned decisions, reaching their highest level in *303 Creative.* In *303 Creative*,[77] the USSC ruled that the right not to be compelled to endorse a message prevailed over same-sex couples' right to be offered commercial services free of discrimination. The Court consequently held that the First Amendment protecting free speech exempts a website company from a state law[78] that prohibits discrimination on the ground of sexual orientation. Amongst the abovementioned decisions, *303 Creative* is not only the most recent but also the most relevant example of a reasoning leaning towards religious bias. Indeed, the pro-religious lens influences all levels of the reasoning: the decision to grant standing to the applicant;[79] the choice of the legal basis (protected speech under the First Amendment),[80] which circumvents the restrictions on granting exemptions in favour of religion under the precedent of *Employment Division Department of Human Resources of Oregon v. Smith;*[81] the construction of the facts as involving the suppression of disfavoured ideas (rather than the regulating of conduct to ensure protection against discrimination),[82] the interpretation of precedents,[83] or the assumption on

Personhood and Shareholder Rights after Hobby Lobby and Citizens United' (2016) 3 Business & Bankruptcy Law Journal 251; Suneal Bedi, 'Fully and Barely Clothed: Case Studies in Gender and Religious Employment Discrimination in the Wake of Citizens United and Hobby Lobby' (2016) 12 Hastings Business Law Journal 133.

[76] *Hobby Lobby* (n 65) 2759, 2782.

[77] *303 Creative* (n 66).

[78] The Colorado Anti-Discrimination Act (CADA) Colo. Rev. Stat. §24–34–601 (2022).

[79] (n 100).

[80] On the confusion between free speech and Free Exercise doctrine, see Robert Post, 'Public Accommodations and the First Amendment *303 Creative* and "Pure Speech"' (2023) 2 The Supreme Court Review, 1, 20.

[81] (1990) 494 U.S. 872, 878–82.

[82] David D Cole, '"We Do NO Such Thing": *303 Creative v. Elenis* and the Future of First Amendment Challenges to Public Accommodation Laws' (2024) 29 The Yale Law Journal Forum 499, 503.

[83] See Hurley (n 92) and Dale (n 93). See also Linda C McClain, 'Do Public Accommodations Laws Compel "What Shall Be Orthodox"?: The Role of Barnette in 303 Creative LLC v. Eleni' (2024) 68 Saint Louis University Law Journal.

which the outcome rests that 'pure speech' can never be compelled.[84] All these key junctures of the reasoning turned in favour of the applicant's religious interests.

The majority opinion[85] pre-emptively fends any accusations of bias, presenting the solution as a bounded application of existing principles and a balanced consideration of competing interests. Justice Gorsuch, writing for the majority, reasons as follows. First, words and messages contained on websites qualify as speech.[86] Second, this speech is attributable to the designer of the website, Ms Smith, who creates bespoke and original websites using her own words.[87] Third, for the same reason, this customised use of wording is creative and expressive and therefore qualifies as 'pure speech'.[88] Fourth, the corporate form used to convey the speech or the fact that the targeted audience is the general public does not preclude protection.[89] Fifth, forcing Ms Smith to design a website for a same-sex wedding would compel her to adhere to a message to which she strongly objects, for religious reasons.[90] Protection against compelled speech under the First Amendment therefore applies to Ms Smith's activities, a conclusion, according to the majority Opinion,[91] that would conform to the precedents of *Hurley*[92] and *Dale*.[93] Moreover, the majority Opinion suggests that the outcome protects competing interests fairly. Ms Smith, the majority opines, would not be discriminating against customers on the basis of their sexual orientation since

[84] Post (n 80, at 25) thus stresses that the label of 'pure speech' does not trigger a prohibition against compelled speech under the First Amendment: 'Some pure speech may be routinely and constitutionally compelled, and some may not. The real question is how we can tell the difference'.

[85] *303 Creative* (n 66) 2308. Gorsuch, J., delivered the opinion of the Court, in which Roberts, C. J., and Thomas, Alito, Kavanaugh and Barrett, JJ, joined.

[86] ibid 2312.

[87] ibid 2313.

[88] ibid 2312. I am hereby differentiating the categories of 'speech' and 'pure speech' in a way that the Opinion does not since the majority Opinion characterises the speech as 'pure speech' from the outset. The differentiation may, however, implicitly flow from the emphasis on the expressive nature of the website designs, which was here a given. A contrario, had the conduct not been expressive, the speech would not arguably have qualified as 'pure speech', see in that sense, ibid 2314.

[89] ibid 2316. Contra, see the dissenting opinion, ibid, 2325, quoting Joseph W Singer, 'No Right to Exclude: Public Accommodations and Private Property' (1996) 90 Northwestern University Law Review 1283, 1298: 'A business that chooses to sell to the public assumes a duty to serve the public without unjust discrimination'.

[90] ibid 2314, 2318. Contra, dissenting Opinion ibid 2336–2337.

[91] ibid 2311, 2313.

[92] *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* (1995) 515 U. S. 557.

[93] *Boy Scouts of America v. Dale* (2000) 530 U. S. 640.

she would willingly sell other products to same-sex customers and refuse to sell the same product (a website for a same-sex wedding) to opposite-sex customers.[94] The compelling interest of preventing discrimination in public accommodations, which the Tenth Circuit court,[95] whilst reaching the same conclusions as the USSC regarding 'pure speech'[96] and 'compelled message',[97] had found on appeal to be present,[98] is therefore either implicitly dismissed or judged to be irrelevant—as the majority opinion can be seen to suggest that state-compelled endorsement of a message can simply *never* be justified.[99]

On both aspects, namely the scope of the protection against compelled speech and the consideration for competing interests, I submit that the reasoning presents weaknesses that veer to bias. The case is peculiar in that it did not arise from a concrete dispute but was put forward in anticipation by the web designer, Ms Smith, who feared, should she expand her services to weddings and refuse, for religious reasons, to create a website for a same-sex wedding, that she might face an injunction from the Colorado state.[100] In that context, the facts were not disputed but relied on agreed statements by the Colorado state and the applicant. The stipulated facts constrained the analysis, precluding the court from deciding that the website Ms Smith created was not expressive[101] or not customised[102] or that the general public would not know that the websites were Ms Smith's creation.[103] It was therefore not open to the court to decide

[94] *303 Creative* (n 66) 2317.
[95] *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1190 (19th Circ. 2021).
[96] ibid 1176.
[97] ibid 1178.
[98] The Tenth Circuit court had concluded that the burden on free speech withstood strict scrutiny and was therefore constitutional: ibid 1179–1180.
[99] *303 Creative* (n 66) 2318.
[100] Ms Smith therefore sought an injunction to prevent the State of Colorado from forcing her to create wedding websites for gay marriages. For a discussion of the controversies surrounding the procedural aspects of the case and an argument that it was right for the case to reach a decision on merits, see Richard M Re, 'Does the Discourse on 303 Creative Portend a Standing Realignment' (2023) 99 Notre Dame Law Review 67. In contrast, the District Court had denied standing to Ms Smith in relation to some aspects of her claims, 303 Creative, 385 F. Supp. 3d 1153. Adde, arguing that: 'the pre-emptive strategy obfuscated the grave harm that the litigation aimed to authorize. (…) deciding people's right to participate in the market without including them in the litigation instigated a distorted allocation of sympathies in the courtroom', Hila Keren, 'Beyond Discrimination: Market Humiliation and Private Law' (2024) 95 University of Colorado Law Review 87, 93.
[101] Application to Petition for Certiorari 181(a), quoted in *303 Creative* (n 66).
[102] ibid 181(a)-182a.
[103] ibid 187a.

that no speech was involved. Once speech is involved in a conduct, protection against compelled speech requires that the speech be attributable to the author of the conduct and that it not be purely incidental to the conduct. To determine whether the conduct can be linked to a message conveyed by the author, the USSC held in the past that conduct needs to have 'intended to be communicative' and, 'in context, would reasonably be understood by the viewer to be communicative.'[104] In other words, a conduct will not normally fall under the First Amendment protection unless it qualifies as speech both subjectively (in the mind of the service provider) and objectively—it is understood by the general public as a message expressed by the service provider. Arguably, the objective limb of the test was missing in *303 Creative:* most people would not assume that web designers approve, endorse, or otherwise personally associate themselves with every website they design. This line of reasoning was, however, barred from the statement of facts, acknowledging that the public would understand that the websites were Ms Smith's creations. Nonetheless, the Court might still have explained why the speech was more than merely incidental. The (undisputed) fact that the websites were expressive does not as such justify that the speech qualifies as 'pure speech'. Yet, the court seems to take the stance that when *any* speech is involved in *any* activity, it falls under the First Amendment protection.

This all-encompassing position[105] dilutes the sense of *limit* that law ascribes to the protection of speech for the sake of preserving other interests, notably equal access to goods and services. What is concerning in *303 Creative* is not that the court opts, via the protection against compelled speech, for a broader protection of religious interests;[106] revising where to draw the line between competing interests is, as I have argued elsewhere,[107] part of a healthy democratic approach. What is concerning is that the protection of religious interests no longer seems to be confined to identifiable (although revisable) limits at all.[108] The precedents

[104] *Clark v. Community for Creative Non-Violence* (1984) 468 U.S. 288, 294.

[105] See on this point, the strong criticism from the dissent by Justice Sotomayor, joined by Justice Kagan and Justice Jackson, *303 Creative* (n 66) 2334.

[106] For a critical discussion of the possible reasons and implications of the protection of religious interests on a compelled-speech protection basis, see Kenji Yoshino, 'Rights of First Refusal' (2023) 137 Harvard Law Review 244. Compare with Jonathan Turley, 'The Unfinished Masterpiece: Compulsion and the Evolving Jurisprudence over Free and arguing for its extension Speech' (2023) 83 Maryland Law Review 145.

[107] As per the principle of revision put forward in *Why Religious Freedom Matters for Democracy* (n 5).

[108] The majority opinion merely vaguely states, without enquiring or specifying any further, that: 'there are no doubt innumerable goods and services that no one could argue implicate the First Amendment': *303 Creative* (n 66) 2315.

cited in support of the majority position did not dispense with limits. As the dissenting opinion points out,[109] in *Dale*[110] and *Hurley,*[111] the interests of the (non-commercial)[112] association prevailed because the excluded minorities did not merely seek to join the group but wished to display banners and boards, with messages contradicting the ethos of the association. In contrast, the only board to be displayed in *303 Creative* was the board informing customers that same-sex weddings were excluded from the services on offer.[113] No special message or wording was being imposed by same-sex couples onto the provider. Certainly, when the service is intrinsically linked to the use of wording, the line between conduct and message might be fine. According to some,[114] this dimension shifts the balance in favour of the website designer who uses her own words. However, the fact that Ms Smith used her own words can also support the opposite conclusion: that the messages contained on the website were therefore ones she chose and not messages she was compelled to endorse. In any case, the Court does not hint that its solution is to be confined to website designers or activities that include the use of (the provider's) wording.

The Court's decision indeed states that it is not because the service included wording, but because it was customised and communicative that it qualified as protected 'speech'. As the communicative dimension largely seems for the USSC to derive from the customised nature of the product,[115] the only genuine limit following this reasoning would be

[109] ibid 2340.

[110] Dale (n 92).

[111] *Hurley* (n 93).

[112] Underlining the extension to market services, Keren (n 100) 122.

[113] The applicant indeed also (successfully) claimed the right to be allowed to post a notice warning that she would not accept orders for same-sex weddings: *303 Creative* (n 66) 2336.

[114] Dale Carpenter, 'How to Read 303 Creative v. Elenis' (2023) July 3, Reason: Volokh Conspiracy <reason.com/volokh/2023/07/03/how-to-read-303-creative-v-elenis> accessed 22 June 2024.

[115] See already endorsing this line of reasoning, Justice Thomas, joined by Justice Gorsuch in *Masterpiece Cakeshop Ltd v. Colorado C.R Commission* (2018) 138 U.S. 1719, 1740–1744. Contra, Colorado Appeal Court, holding, in a subsequent case involving the same baker, that the creation of a pink case with blue frosting is not inherently expressive and that any message or symbolism it conveys to an observer would not be attributed to the baker, *Scardina v. Masterpiece Cakeshop Inc*. (2023) 528 P.3d 926 (Colo. App. Ct.), at 941 (re a cake ordered to celebrate a transgender customer's birthday and gender transition). Following the decision in *303 Creative,* Alliance Defending Freedom Attorneys (ADF) filed a supplementary notice with the Colorado Supreme Court to 'affirm the baker's free speech rights', <adflegal.org/press-release/adf-co-supreme-court-protect-jack-phillips-expressive-freedom> accessed 27 June 2024.

the tailor-made nature of the item, a limit not likely[116] to be relevant for wedding-related services. If the aim is to exempt wedding services from discrimination law, explicitly saying so would be more transparent and would avoid spill-overs outside of wedding services.[117] By indicating such a limit, the court would moreover invite justification for and possible future revision of that limit. By contrast, the absence of clearly stated limits gives the impression that religious interests should prevail for the sake of religious interests prevailing, whatever the activity.[118] The little attention dedicated to the implications for the competing interests of same-sex couples reinforces the impression. The court does not acknowledge the harm caused to same-sex couples. On the contrary, it denies that any discrimination is taking place, since the objection would be to the service (same-sex wedding) but not to the customer (a same-sex couple). Given that the service (same-sex wedding) is inextricably linked to a protected characteristic,[119] such interpretation of discrimination law considerably undermines equality interests.[120] Not setting limits or even discussing potential limits to its pro-religious reasoning,[121] not considering or even acknowledging the harm to competing interests, the Court, in *303 Creative,* is, I submit, potentially undoing discrimination protection[122] and falling into the definition of bias. Looking at *303 Creative* in its broader context, some liberal US authors like Andrew Koppelman have issued a starker warning:

[116] Wedding products tend to be made upon order, hence adjusted to the particular couple's wedding. Pre-made wedding cakes and other pre-prepared wedding services would, however, logically be excluded. For that argument, Carpenter (n 114).

[117] Alex Deagon, *A Principled Framework for the Autonomy of Religious Communities: Reconciling Freedom and Discrimination* (Hart 2023) 89, 102, suggesting that only objections to abortion and same-sex marriages should be accommodated, and on the condition that the goods and services are reasonably available elsewhere and that the sincerely held religious objections have been clearly publicised in advance.

[118] For the concerns that *303 Creative* will have implications far beyond wedding-related activities or same-sex couples' equality interests, see dissenting opinion *303 Creative* (n 66) 2342. Adde, Yoshino (n 106) 262. Contra, William Eskbridge, predicting that religious people will show self-restraint <org/transcripts/1182121291> accessed 1 July 2024.

[119] *303 Creative* (n 66) 2338–2339.

[120] For that argument, on the basis of a dignitary definition of discrimination which would cover not only the right to access services but also the right to be treated equally, without being ostracised, see dissenting Opinion, ibid 2324.

[121] See dismissing the concerns over potential implications as a 'sea of hypotheticals', Majority opinion, ibid 2319.

[122] See the statement issued by the President's administration in reaction to the decision, 'Administration of Joseph R Biden, Jr., 2023 Statement on the United States Supreme Court Decision in 303 Creative LLC v. Elenis' (2023) Daily Compilation of Presidential Documents 1-1.

> *303 Creative* is perhaps best understood as one of a series of decisions laying down massively overbroad rules with anarchical implications that cannot possibly be followed consistently. The real rule would then: liberty granted selectively without explanation, to the benefit of claimants such as conservative Christians who affiliate with the Republican Party.[123]

Bias would then exist in a far more troubling way: as the enforcement of judges' own political and religious commitments.

## 5. *Conclusion*

On both sides of the Atlantic, disputes over religious interests increasingly arise in the private sector workplace and occupation. Against expectations, this new commercial and private law sector setting for religious controversies, has not hampered the scope of exemptions granted to religious providers in the United States or weakened the potential reach of neutrality requirements in Europe. Whereas religious interests increasingly feature highly in the United States, they are more and more diluted in Europe. Yet, beyond this contrasting treatment of religious interests, I have argued that both the USSC and CJEU have followed a similar (and concerning) pattern of reasoning. On both sides of the Atlantic, courts, I have argued, have adopted an unduly deferential attitude towards one set of interests and veered towards a biased reasoning. Bias in this article has pointed to a systemic flaw in legal reasoning, whereby courts apply principles that support their preferred set of interests beyond their remit and rationale and totally ignore competing interests. The criticism raised here against biased reasoning does not therefore denounce mere preference for one set of interests but a preference that is misplaced and dismissive of conflicting interests. The article has identified three sets of interests that have triggered such biased reasoning in recent decisions concerning religious controversies in the private sector workplace—that of the state, the employer and the religious claimant.

The article has argued that the CJEU has conferred on secularist separatist state traditions an influence that goes far beyond the remit

[123] Andrew Koppelman, 'Why Gorsuch's Opinion in "303 Creative" Is So Dangerous' (2023) 12 July The American Prospect <prospect.org/justice/2023-07-12-gorsuch-opinion-303-creative-dangerous> accessed 8 July 2024. The warning is all the more striking that Andrew Koppelman is in principle favourable to accommodations on religious grounds, Andrew Koppelman, *Gay Rights vs. Religious Liberty?: The Unnecessary Conflict* (Oxford University Press 2020) 73.

of constitutional principles and disproportionately muffles competing rights of employees to manifest their religious convictions in the workplace. Whilst the CJEU retreated from such reasoning in post-*Achbita* rulings,[124] the reiteration of this expansive deferential approach in the public sector workplace in *Commune d'Ans,*[125] combined with the discretion granted to member states to define the boundaries between the public and private sectors of employment, maintains the threat of disregarding religious interests for the sake of (assumed) expansively construed state traditions in private law employer–employee relationships. This all-encompassing one-sided reasoning sometimes doubles up with another layer of bias, in favour of economic interests. By virtue of the right to conduct a business protected under article 16 of the Charter of Fundamental Rights, the CJEU in *Achbita*[126] also conferred upon employers' decision a presumption of legitimacy which largely paralysed the consideration of employees' competing interests. Under this reasoning, characteristic, as I have shown, of an ordoliberal outlook, fundamental rights would be inherently subjected to an economic rationality. Recent rulings from the CJEU and well-established jurisprudence from the ECtHR have (thankfully, as I have argued) reverted to a more demanding stance towards the employer, increasing the burden of justification on the employer, and adopted as a result a more balanced approach to competing interests. Turning to the recent string of pro-religion decisions by the USSC, this article has shown that the USSC is conferring an increasingly questionable large scope to religious views in the private sector employment and occupation sector and concomitantly paying less and less attention to competing rights to equality. In *303 Creative,*[127] the USSC opened a large scope for religious exemptions, by defining categories of protected speech under the First Amendment extensively and dismissing the discriminatory consequences suffered by same-sex couples hereby denied a service.

Such biased reasoning need not stem from judges' own unconscious biased preferences for outcomes that match their personal religious or political convictions. As I have suggested in the introduction, democratic rationales may motivate such moves. The deferential attitude of the CJEU towards state constitutional traditions may thus reflect a conception of democracy grounded into cultural and legal national

[124] *SCRL (Religious clothing)* (n 21); *WABE* and *MH Müller Handels* (n 56).
[125] *Commune d'Ans* (n 25).
[126] *Achbita* (n 14).
[127] *303 Creative* (n 66).

traditions; the (initial) deferential attitude towards economic interests may resonate with a vision of the European Union as a primarily economic alliance, whilst the deferential approach to religion of the USSC may indicate a preference for a loose democratic framework, prioritising respect for conscientious objections over the promotion of common overarching principles and values. While the critical analysis of the democratic motivations and implications of these trends lies outside the scope of this article, I have suggested here that biased reasoning is to be resisted. The exclusionary impact it has on minority religious employees in the private (and public) sector workplace in Europe or on same-sex couples' equal and fair access to commercial services in the United States is concerning because it contradicts the protection afforded by discrimination provisions to protected categories. Discrimination protection need not be the exclusive or prevailing objective, but it should, I have argued, remain one of the considerations. The abovementioned biased trends allow room for the obliteration of discrimination protection, leaving it at the mercy of national authorities (under the state bias), of the employer (under the economic bias) or of self-restraint by religious parties (under the religious bias).

Courts should therefore, on both sides of the Atlantic, avoid the two current extreme opposite temptations, alluded to in Charles Péguy's quote,[128] of a maximalist or minimalist support for religious freedom. Too strong a support for religious freedom, and equality competing interests will dissolve; too weak, and the expression of religious beliefs (as well as the religious citizens of minority religion who hold those beliefs) will be confined to the intimate/non-professional spheres. Whatever conception of democracy underlies judicial reasoning, I submit that it should be built upon equality rights to all. Resisting judicial biased reasoning would constitute a worthwhile step in that direction.

[128] (n 1).