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Brendan M. Cournane

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Title VII and Religious Discrimination: Is Any Accommodation Reasonable Under the Constitution?

Congress enacted the Civil Rights Act of 1964 (the Act) to prohibit various forms of racial discrimination throughout the nation. Specifically, Title VII of the Act was designed to eliminate racial discrimination in employment practices. This Title also includes a broad catch-all clause which prohibits employers or prospective employers from basing employment or discharges of workers on religious beliefs. However, by not defining "religion" in the original

6. It was not until 1972 that an amendment was added to §701 of the Act defining religion to include "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 a prospective employee's religious observances or practices without undue hardship on the
enactment and by failing to promulgate guidelines to determine religious discrimination until 1966, congressional action indicated that this proscription was added as an afterthought.

Regardless of whether or not religious discrimination was a catalytic force behind the Act, it remained uncertain how pervasive the legislation would be. Under the original guidelines an employer was permitted to establish a normal work schedule, affecting all workers equally, regardless of whether or not the schedule infringed upon the religious observances of some employees. Intentional discrimination was obviously prohibited under both the Act and these guidelines, but where unintentional discrimination resulted from seemingly normal work schedules, courts invoked the statute without examination to see if any legitimate basis could support the schedule. New guidelines were enacted in 1967 and were incorporated into


7. The 1966 guidelines state in pertinent part:

[T]he duty not to discriminate on religious grounds includes an obligation on the part of the employer to accommodate to the reasonable religious needs of employees and . . . prospective employees where such accommodation can be made without serious inconvenience to the conduct of the business. However, . . . an employer is free under Title VII to establish a normal workweek generally applicable to all employees, notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees. 31 Fed. Reg. 8370 (1966).


9. Compare Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), aff'd by an equally divided Court, 402 U.S. 689 (1971) with Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975), aff'd by an equally divided Court, 429 U.S. 65 (1976) and Hardison v. Trans World Airlines, 527 F.2d 33 (8th Cir. 1975). In Dewey, the court recognized that some practices, while perhaps discriminatory in effect, are not intentional and held that the employer should not be penalized for any and all unusual beliefs of employees which serve to disrupt normal and accepted business practices and work schedules. This is consistent with the remarks of Sen. Humphrey before the Senate committee, note 8 supra. In both Cummins and Hardison this theory was not applied. There, discrimination in effect was prima facie evidence of intentional discrimination and any damage to the employer's business was incidental. Since Dewey was decided prior to the 1972 amendment and at a time when the original guidelines were effective, the decisions can be reconciled as following the law in existence at the time the controversy arose.

10. See text accompanying notes 50 through 57 infra.

11. The new regulations differed from the old in one very important respect—they compelled the employer to accommodate religious beliefs in virtually every circumstance. The 1967 guidelines state, in pertinent part:
the Act by amendment in 1972. Under the amended provisions an employer is required to make a “reasonable accommodation” to the “religious beliefs” of all employees or prospective employees unless such accommodation would inflict an undue hardship upon the employer’s business. Because these new guidelines favor minority religions, particularly Sabbatarian faiths which proscribe members from working Saturdays, employers claim that the provision is violative of the establishment clause of the Constitution which states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”

The Commission believes that the duty not to discriminate on religious grounds includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer’s business. Such undue hardship may exist where the employee’s needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

29 C.F.R. §1605.1(b) (1975). The purpose for changing the language of the guidelines was the decision in Dewey and Congressional intent to prevent such a ruling in the future. 118 Cong. Rec. 7167 (1972).


13. Congress did not define “reasonable accommodation” in the amendment. Furthermore, only one example of an undue hardship was provided where the employee’s work is needed and cannot readily be completed by another worker. As noted in Hardison, this example was not meant to be exhaustive. 97 S. Ct. 2264, 2271 n.7 (1977). Judicial determination of the parameters of the phrase has led to extensive litigation as to what amount of accommodation, if any, is reasonable. See, e.g., Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975). The litigation culminated recently in Trans World Airlines v. Hardison, 97 S. Ct. 2264 (1977), where the Supreme Court delimited the term somewhat. The Court articulated that an employer is not required to breach a collective bargaining agreement in order to appease the claims of one employee, but did not go so far as to define the boundaries of reasonable accommodation. Id.

14. See note 6 supra. For a compilation of various factual settings which have been claimed to be within the provision, see Note, Accommodation of an Employee’s Religious Practices Under Title VII, 1976 U. Ill. L. Forum 867.

15. Indeed, Senator Jennings Randolph of West Virginia, the sponsor of the amendment and himself a Sabbatarian, when speaking before the Senate, noted that only a few religions would be affected by the addition. He specifically mentioned Orthodox Jews, Seventh Day Adventists and Seventh Day Baptists, while stating there may be a few others. He opined that the amendment would affect a total of about 1.25 million members of the American work force who observe Saturday as the Sabbath. 118 Cong. Rec. 705 (1972). He did not, however, declare what portion of this figure, if any, had actually experienced inconvenience or discriminatory practices due to their religious beliefs. Rather, his calculations were based upon the estimated number of Sabbatarians throughout the nation. Id.

16. U.S. Const. amend. 1. The amendment reads, in full: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

Constitutional claims were raised in Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), aff’d by an equally divided Court, 402 U.S. 689 (1971); Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975), aff’d by an equally divided Court, 429 U.S. 65 (1976); Reid v.
When faced with establishment clause attacks in the areas of education and Sunday closing laws, the Supreme Court has developed and applied a tripartite test. To pass constitutional muster, a statute must: (1) reflect a clearly secular legislative purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion. Failure to meet any standard will render the statute unconstitutional.

This article examines the basis and evolution of each criterion and its application to the religious discrimination clause of Title VII. By applying the tripartite test to the religious discrimination clause of Title VII, the article will demonstrate that the reasonable accommodation-undue hardship demand of Title VII is clearly violative of the Establishment Clause.

**Secular Legislative Purpose**

*Elements Considered by the Courts*

The establishment clause unequivocally prohibits any governmental action either fostering or subsidizing any religious belief. The groundwork for this prohibition is traceable to colonial times prior to the adoption and ratification of the Constitution. In *Everson v. Board of Education,* Justice Black set out the history and rationale of the clause. He traced the plight of the early settlers who came to America to escape religious persecution in Europe. Once in the new world, many of the previously persecuted settlers soon became persecutors imposing their religious beliefs upon all who came to their colony and exacting harsh penalties upon non-conformers.

When it came time to draft and ratify the Constitution, Thomas Jefferson and James Madison strove to protect individual beliefs from any form of government intrusion. Madison's *Memorial and
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Remonstrance Against Religious Assessments, originally written in opposition to a tax imposed by Virginia to support churches, also served as the keystone in the struggle to ratify the religious protection clauses of the first amendment. The crux of Madison's argument was man's inalienable right to believe in the faith of his choice, completely free from legislative interference. He argued that by requiring a citizen to contribute even three pence to support any religion under governmental direction was an impermissible fostering of religion.

Once enacted, the establishment clause and Madison's theories were unchallenged until the twentieth century when disputes arose centering on two areas, education and Sunday closing laws. The result of these challenges was the development of a sliding scale examination based on the proposition that the first amendment minimally requires that "[n]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."

This examination initially considers whether a public benefit is involved. Moreover, any benefit to religion must undergo a direct-indirect scrutiny to determine the constitutionality of the statute. For example, in those cases dealing with various state procedures conferring benefits on private schools, the Court has consistently determined the beneficiaries of the legislation. Where the public at large is the intended and direct beneficiary, the state action has gained approval even though some religion may benefit indirectly. Similarly, in the Sunday closing law cases the Court has upheld the statutes because the general public again benefits the most. By establishing a uniform day of rest, on which all stores must close,

26. See the Appendix to Justice Rutledge's dissenting opinion in Everson which sets out Madison's Memorial and Remonstrance Against Religious Assessments in full. 330 U.S. at 63-72.
27. Id. at 39-43.
28. Id. at 34-35.
32. When children are provided transportation to and from school, Everson v. Board of Educ. 330 U.S. 1 (1947), or given schoolbooks for classroom study, Board of Educ. v. Allen, 392 U.S. 236 (1968), the benefit is balancing the right of providing education to all students in order to avoid overburdening the public school system which would be unable to cope with the number of students if private schools closed.
the state is providing a means whereby the public health is preserved, leading to a more fruitful society.\footnote{33}

The public benefit theory is not without limit; countervailing factors must also be considered. Although the general public may benefit from legislation, state enactments providing a directly beneficial or preferential treatment to one or all religions and which are only indirectly or secondarily beneficial to the society as a whole will violate the Constitution.\footnote{34} Often, this determination has been made by looking to legislative purpose.

\textit{Everson v. Board of Education}\footnote{35} was the first Supreme Court decision examining a state statute to discern whether there was a proper legislative purpose sufficient to overcome an establishment clause challenge. In \textit{Everson} the New Jersey legislature had enacted a provision authorizing local school boards to reimburse parents of non-public school children for transportation costs incurred in busing their children to private schools.\footnote{36} Upholding the statute, the Court recognized that the state had a proper, secular interest in promoting education. Furthermore, despite the fact that the children attended predominantly Catholic schools, the legislation was religiously neutral, merely providing a means whereby parents could send their children "safely and expeditiously to and from accredited schools."\footnote{37}

\footnote{33. An anomalous pre-Title VII case was Sherbert v. Verner, 374 U.S. 398 (1963). Although this case did not deal with education or Sunday closing laws, it may have been the precursor of religious discrimination cases. Again the Court espoused a public benefit theory upholding an individual's right to entertain religious beliefs apart from governmental intrusion or coercion. The Court noted that where a direct public benefit inures to the society as a whole, individual benefits may not be compromised by the state legislation. In \textit{Verner} a South Carolina welfare agency was brought to court for failure to pay an individual who was unemployed. The state claimed the refusal to pay was justifiable on grounds that the individual would not seek employment; therefore, under state law, welfare payments could properly be withheld. The Court held that a person could not be forced to accept a job which would cause her to violate her religious beliefs in order to qualify for welfare benefits. In striking down the application of the statute, the Court again focused on the public benefit theory similar to that expounded in the Sunday closing law cases. \textit{Id.}}

\footnote{34. Application of the sliding scale examination resulted in findings of establishment clause violations where public school facilities were used for parochial education, Illinois ex \textit{rel.} McCollum \textit{v. Board of Educ.}, 333 U.S. 203 (1948); and where parochial school teachers were subsidized by tax revenues, Lemon \textit{v. Kurtzman}, 403 U.S. 602 (1971). However, no violation was found where private schools received books from local government agencies, \textit{Board of Educ. v. Allen}, 392 U.S. 236 (1968), and where children received reimbursement for transportation expenses, \textit{Everson v. Board of Educ.}, 330 U.S. 1 (1947), and where government funds were provided to religiously operated universities in order to construct classroom facilities, \textit{Tilton v. Richardson}, 403 U.S. 672 (1972).}

\footnote{35. 330 U.S. 1 (1947).}

\footnote{36. \textit{Id.}}

\footnote{37. \textit{Id.} at 23.}
Everson does not suggest, however, that a state may enact legislation which serves to benefit religion, albeit indirectly, under the guise of educational benefits. A distinction must be drawn where the state undertakes some overt action involving close cooperation of a state and religious institution. In such a case, a proper purpose may be invalidated on grounds that the government action is benign. For example, in Illinois ex rel. McCollum v. Board of Education,\(^\text{38}\) decided a year after Everson, the Court invalidated an Illinois law which permitted the use of public school facilities for religious instruction.\(^\text{39}\) The principal factor distinguishing McCollum from Everson was that the Illinois law fostered religion by permitting the state's compulsory public school machinery to aid religious instruction, whereas the New Jersey statute employed a purely secular means of providing education. Thus, in McCollum there was no direct public benefit with a tangential effect on a religious institution, but rather a direct benefit to certain parochial schools at the expense of the general public.

Underlying these decisions is the notion that to withstand an establishment clause challenge, legislation must not intend to or actually benefit any religion directly. Where the purpose is truly secular, such as promoting education, any benefit must be tangential and brought about through attempted government neutrality or the purpose will be invalid.\(^\text{40}\) An impermissible purpose was found in Engel v. Vitale\(^\text{41}\) where a New York law authorized the reading of a non-denominational prayer at the beginning of public school classes despite the fact that participation in the recitation of the prayer was voluntary.\(^\text{42}\) The Court reasoned that the law served to coerce non-believers or atheistic children to a particular belief and that such action violated the neutrality imposed under the Constitution. Even when cloaked with a legitimate and secular purpose such as promoting education, the law violated the Constitution since it had a direct effect and an improper purpose.\(^\text{43}\) While it is arguable that prayer-reading is a valuable learning experience that

\(^{38}\) 333 U.S. 203 (1948).

\(^{39}\) Id. Compare Zorach v. Clauson, 343 U.S. 306 (1952). In Zorach the Court upheld a statute very similar to that struck down in McCollum. The difference between the two laws was that Illinois allowed parochial instruction to be held on public school grounds, while New York only provided for an early release of students so that children whose parents so desired could attend religious instruction at parochial schools.


\(^{41}\) 370 U.S. 421 (1962).

\(^{42}\) Id.

\(^{43}\) Id.
exposes the pupils to various beliefs and spurs religious tolerance, the direct effect does not promote constitutional objectives. Prayer-reading can have a coercive effect; such coercion does not work for society's benefit. Therefore, the statute must fall under the first amendment.\footnote{See notes 73-103 infra and accompanying text.}

The secular purpose criterion was expanded in cases which dealt with Sunday closing laws.\footnote{McGowan v. Maryland, 366 U.S. 420 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961).} In both McGowan v. Maryland\footnote{366 U.S. 420 (1961).} and Braunfeld v. Brown,\footnote{366 U.S. 599 (1961).} public welfare considerations served to overcome statutory deficiencies even though the result was an indirect benefit to some religions. In both cases Sabbatarian merchants claimed that Sunday closing laws violated their first amendment rights because, as non-Christians, they observe Saturday as a day of rest.\footnote{Both cases dealt with allegations by Orthodox Jews that Sunday closing laws in the respective states inhibited their freedom of religion and served to impermissibly benefit Christian merchants. The Court noted in McGowan that only economic injury was claimed and held that injury was insufficient when challenging a law on first amendment grounds. Moreover, in Braunfeld the Court mentioned the legitimate state interest involved in protecting the health of its citizens by providing for a uniform day of rest.} Rejecting these constitutional claims, the Court held that the purpose of the state legislature was to provide a uniform day of rest for all citizens. This entailed legitimate concerns promoting the health and safety of the general public.\footnote{366 U.S. at 431, 607.} The fact that the legislatures chose Sunday, a day of particular significance for Christian sects, was deemed irrelevant in comparison to the secular purpose involved.\footnote{Id.} Again, religions benefited only secondarily, while the general public was the primary beneficiary.

\textit{Application of the Criterion to Title VII}

The original provisions of the Civil Rights Act of 1964 were passed to assure equal treatment for all citizens.\footnote{110 CONG. REc. 7207 (1964).} Employment guidelines promulgated in 1966 were consistent with this concept.\footnote{For the pertinent language of the original guidelines see note 7 supra.} They set forth requirements designed to avoid discrimination in employment practices, while permitting employers to establish work schedules suitable to the needs of the business.\footnote{31 Fed. Reg. 8370 (1966).} In Griggs v. Duke Power Co.,\footnote{401 U.S. 424 (1971).} the Court examined the context and purpose of Title VII. Although
the Court was concerned with racial discrimination, Chief Justice Burger was clear in his interpretation of the Act when he stated:

Congress did not intend by Title VII . . . to guarantee a job to every person regardless of qualifications . . . . Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification . . . .

Justice Burger held further that, "Congress had made [job] qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract."56

The original guidelines dealing with religious discrimination were consistent with both statements. The duty placed on the employer was to treat all employees equally, without overt or subtle preference for the religious beliefs of any group of workers. When the Act was amended in 1972, and the language of the guidelines broadened, the employer became obligated to make "exceptions" for certain employees—those whose religious beliefs demanded work schedules different from the general work force.57

The 1972 amendment was designed to supplement the Act and embody judicial interpretations of the 1967 guidelines.58 Laudable as this goal may be, the purpose and effect run counter to the Supreme Court's interpretation of the Act set forth in Griggs; for courts have not applied the "business necessity" test in religious discrimination cases.59 Both the 1967 guidelines and the 1972 amendment require an overt preference for the religious beliefs of certain employees and dictate that an employer must go out of his way to accommodate minority beliefs, even if such accommodation is detrimental to other employees.60 When ruling on constitutional chal-

55. Id. at 430-31.
56. Id. at 436.
57. For the pertinent language of the amendment see note 6 supra.
59. 401 U.S. at 431. The Court held that, "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." Id.
60. It is necessary to examine the criteria utilized by courts in determining when there is religious discrimination. The most critical factor is the nature of the employee's position in conjunction with the work force available to the employer. If the individual's job is highly
challenges, courts have recurrently dissociated religious discrimination charges, unlike other suspect employment practices, from any claim or nexus with the business necessity test and have not considered whether any legitimate public welfare or health and safety specialized or unique, a discharge for refusing to work certain times is permissible. Reid v. Memphis Publishing Co., 521 F.2d 512 (6th Cir. 1975); Roberts v. Hermitage Cotton Mills, 8 Fair Empl. Prac. Cas. 315 (D.C.S.C. 1973). If the job requires little or no special skill, or if the work force available to the employer is such that other employees could easily substitute for the Sabbatarian worker, courts have found a violation of Title VII. Claybaugh v. Pacific Bell Tel. Co., 355 F. Supp. 1 (D.C. Ore. 1973); Dixon v. Omaha Pub. Power Dist. 385 F. Supp. 1382 (D.C. Neb. 1972). Even in situations where the employee maintains a highly specialized position, if there is a sufficient number of employees equally capable of substituting for the discharged person, any discharge in connection with one's religious beliefs is prohibited. However, if there is a collective bargaining agreement involved, the employer may rely on it to limit the amount of accommodation required of him. Trans World Airlines v. Hardison, 97 S. Ct. 2264 (1977).

Transferring employees from one position to another is one alternative accommodation that has been attempted in some cases. Problems arise, however, and the accommodation is deemed inappropriate if the transfer results in monetary loss either to the individual, as in Dixon v. Omaha Pub. Power Dist., 385 F. Supp. 1382 (D.C. Neb. 1972), or to the employer. In Reid v. Memphis Publishing Co., 521 F.2d 512 (6th Cir. 1975), the court held that a replacement for Reid on Saturdays would be an undue hardship since it would cost the employer $77 per week extra in salary. In contrast, the Court of Appeals in Hardison v. Trans World Airlines, 527 F.2d 33 (8th Cir. 1975), stated that some monetary loss to the employer does not necessarily result in an undue hardship. Id. at 40. This problem was sidestepped for the most part by the Supreme Court in Hardison, although the opinion mentions that monetary claims may supply the basis for a constitutional challenge. See notes 148-49 and accompanying text.

Another consideration is whether the transferred employee is still being used to his fullest capabilities and qualifications. Draper v. United States Pipe and Foundry, 527 F.2d 515 (6th Cir. 1975); Ward v. Allegheny Ludlum Steel Co., 397 F. Supp. 375 (W.D. Pa. 1975). Morale problems of other employees is yet another consideration. In Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), aff'd by an equally divided Court, 402 U.S. 689 (1971), the Sixth Circuit found that the imposition placed upon other employees in covering for Dewey posed an undue hardship, at least under the original guidelines. Since Dewey, courts have looked upon morale problems as just another element in determining undue hardship, and this criteria is not as determinative as Dewey might have originally indicated. See, e.g., Draper v. United States Pipe and Foundry, 527 F.2d 515 (6th Cir. 1975); Reid v. Memphis Publishing Co., 521 F.2d 512 (6th Cir. 1975); Johnson v. United States Postal Serv., 364 F. Supp. 37 (N.D. Fla. 1973). In Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975), aff'd by an equally divided Court, 429 U.S. 65 (1976), the court went so far as to say that morale problems would be a plausible defense only where "chaotic personnel problems" arose. Id. at 550.


62. The language of the test is set out at note 59 supra. Although business necessity was the key factor in Griggs, cases dealing with religious discrimination allegations have not focussed on the necessity test. Instead, courts have centered their attention on whether the individual's religious beliefs are threatened by loss of employment. Compare Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975); Hardison v. Trans World Airlines, 527 F.2d 33 (8th Cir. 1975) with Reid v. Memphis Publishing Co., 521 F.2d 512 (6th Cir. 1975); Johnson v. United States Postal Serv., 364 F. Supp. 37 (N.D. Fla. 1973).
Religious Discrimination considerations are involved.\textsuperscript{63} If either theory was applied to religious discrimination allegations, the statute would fail the criteria of \textit{Griggs}. When the business necessity test was mentioned in \textit{Trans World Airlines v. Hardison},\textsuperscript{64} the Court simply noted that the amendment did provide for permissible discharges in some situations.

In the Senate discussions prior to the passage of the 1972 amendment, no legitimate secular purpose for the legislation was expressed or intimated. Indeed, Senator Jennings Randolph of West Virginia, the sponsor of the amendment and himself a Sabbatarian, stated that his purpose in sponsoring the amendment was to assure increased religious attendance by those whose religious beliefs prohibited work on certain days. Randolph made no mention of any business necessity exceptions to the application of the provision. Moreover, no benefit to the general public was proffered. The intent was unequivocal when he noted:

\begin{quote}
[T]here has been a partial refusal at times on the part of employers to hire or continue in employment employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days. So there has been . . . a dwindling of the membership of some religious organizations because of the situation . . . \textsuperscript{65}
\end{quote}

The reason for Randolph's support for the amendment was reiterated later in a discussion before the Senate when he referred to statements made by his pastor.\textsuperscript{66} These remarks apparently served as the real catalyst for the amendment.

Clearly then, this legislation cannot be rationalized as being consistent with those purposes enumerated in \textit{Everson v. Board of Education}\textsuperscript{67} or \textit{McGowan v. Maryland}.\textsuperscript{68} No considerations of the health and safety of Sabbatarians were advanced and no indication was made to justify the proposal as anything but purely sectarian.

\textsuperscript{63} \textit{See notes 32-34 supra and accompanying text.}
\textsuperscript{64} 97 S. Ct. 2264 (1977).
\textsuperscript{65} 118 CONG. REC. 705 (1972).
\textsuperscript{66} \textit{Id.} Indeed, Senator Randolph admitted his amendment was spurred by his pastor when he stated:

My own Pastor in this area, Rev. Delmer Van Horn, has expressed his concern and distress that there are certain faiths that are having a very difficult time, especially with younger people, and understandably so, with reference of a possible inability of employers on some occasions to adjust work schedules to fit the requirements of the faiths of some of their workers.

\textit{Id.}

\textsuperscript{67} 330 U.S. 1 (1947).
\textsuperscript{68} 366 U.S. 420 (1961).
Given the nature of the amendment and the fact that the legislation was enacted after *Griggs v. Duke Power Co.*, it is most presumptuous for courts to assume such a legislative purpose existed where none was articulated. There simply is no inherent policy in upholding statutes giving preference to one religion over another, albeit indirectly, absent those recognized in the areas of education or Sunday closing laws. This has been the mainstay of establishment clause cases since *Everson*. Because no prevailing or proposed secular legislative purpose can be found to underlie the 1972 amendment, the first element of the establishment clause test has not been met.

**Primary Effect**

Even where a proper secular purpose is present, a statute must not have a primary or principal effect that either advances or inhibits religion. Again the Court walks a fine line in distinguishing violations of the establishment clause when challenges to the primary effect of a statute are raised.

In *Board of Education v. Allen*, the Court noted that there may be a separation of religious and secular functions, as where textbooks are provided to children in non-public schools. Recognition of these separate functions permitted New York school boards to furnish, free of charge, purely secular textbooks to parochial school children. The Court emphasized that the state was effectuating a legitimate, secular state interest in providing educational materials and further emphasized that textbooks were critical to the teaching process. The weight given by the Court to the secular purpose of the legislature and the resultant effect on religious institutions was similar to that found in *Everson*. In both cases parents of parochial school children indirectly benefited through state aid. Thus, a secondary benefit inured to the various religions involved. Examining

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73. Id. at 240.
74. Id. at 246.
75. The distinction to be drawn here is that unlike cases such as *Walz v. Tax Comm'n*, 397 U.S. 664 (1970); *Zorach v. Clauson*, 343 U.S. 306 (1952); and *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948), the religious denomination itself does not benefit directly. Rather, the parents of children here are aided by a partial alleviation of the burden of paying for private schools. Any benefit received by the denomination is incidental and entirely dependent on the amount the parents return to the church through contributions, with no requirement that they return anything at all. See generally Clark, supra note 70.
the religious discrimination clause in this regard, it cannot be said that Sabbatarian beliefs benefit only indirectly. Prior to *Trans World Airlines v. Hardison*, courts have suggested that employers must breach union contracts to accommodate Sabbatarians. Even after *Hardison* it seems that anything short of breaking a collective bargaining agreement can be required. At least one court has expressly recognized and stated a direct benefit to Sabbatarian beliefs contrary to the neutrality required under the first amendment.

Neutrality in effect was further stressed in *Abington School District v. Schempp*. There the Court rejected a Pennsylvania law which provided for daily Bible readings, without religious comment, in public schools. The Court held that the neutrality requirement would not tolerate official government sanction of religious tenets, whether supportive of any one or of all orthodoxies. By permitting Bible readings, the state fostered religious exercises in violation of the constitutional rights of those of other faiths or those who were atheists. The distinction to be drawn from *Allen* is that religious readings of any nature, unlike textbooks, cannot be dissociated from religious connotations. Because any religious readings, whether non-denominational or eclectic, serve to promote religion in general, the readings serve an impermissible function in light of first amendment prohibitions. The primary fear was that atheistic children or non-believers would be subjected to governmental approval of certain religious activities; such tacit approval serves to coerce non-observing individuals to accept the beliefs of some religion approved by the school board. Neutrality, said the Court, was essential.

If religious discrimination in employment cases were examined in light of *Allen*, the 1972 provision of Title VII would fall. Coercion in the Bible reading cases is subtle, since the state attempts to demonstrate neutrality by having readings of various religious beliefs. However, Title VII is overtly coercive, since workers may convert to Sabbatarian beliefs in order to obtain a better working

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76. 97 S. Ct. 2264 (1977).
77. Id. at 2271 n.7.
80. Id.
81. Id.
82. Id.
schedule.\textsuperscript{84} Indicative of this contention is \textit{Trans World Airlines v. Hardison}.\textsuperscript{85} In that case a worker voluntarily changed positions within the same company and invoked Title VII when his seniority rights also changed. Hardison was aware that by requesting a new position his seniority privileges would also be curtailed. Nevertheless, he sought to acquire rights superior to workers with more seniority by bringing an action under the religious discrimination clause.

The Supreme Court has said in reference to neutrality: "[T]he Establishment Clause prohibits [the] government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization."\textsuperscript{86} This statement has either been overlooked or completely ignored in religious discrimination cases, for advantages accruing to Sabbatarians in light of the 1972 amendment to Title VII have been recognized but discarded by the courts. In \textit{Cummings v. Parker Seal Co.},\textsuperscript{87} the Court of Appeals for the Sixth Circuit reasoned that the amendment only served to "put teeth in the prohibition of religious discrimination,"\textsuperscript{88} thereby dismissing the constitutional challenge. The actual effect of the amendment, however, and the effect apparently contemplated by Senator Randolph, is a preconceived and direct benefit to Sabbatarian religions.\textsuperscript{89}

Justice Phillips, speaking for the Sixth Circuit in \textit{Cummins}, stated: "It cannot be denied that some religious institutions will derive incidental benefits from [the religious discrimination provisions]. For example, churches holding services on Saturday may enjoy a somewhat larger attendance with a correspondingly fuller collection plate."\textsuperscript{90} Despite the rationalization of the court in \textit{Cummins}, this benefit differed from that in \textit{Allen} where the effect was incidental. The purpose of the 1972 amendment and the logical result of permitting a Sabbatarian to take certain days off is to assure compliance with the worker's religious beliefs, with a corresponding sanction of those religions.

In \textit{Cummins}, the court ignored the warning in \textit{Gillette v. United States}\textsuperscript{91} and misapplied the establishment clause test by declaring,

\textsuperscript{84} This theory is suggested although none of the cases examined in preparation for this article challenged the sincerity of the beliefs of self-proclaimed Sabbatarians.
\textsuperscript{85} 97 S. Ct. 2264 (1977).
\textsuperscript{87} 516 F.2d 544 (6th Cir. 1975), \textit{aff'd by an equally divided Court}, 429 U.S. 65 (1976).
\textsuperscript{88} \textit{Id.} at 552.
\textsuperscript{89} See remarks of Senator Randolph before the Senate at 118 CONG. REC. 705-31 (1972).
\textsuperscript{90} 516 F.2d at 553.
\textsuperscript{91} 401 U.S. 437 (1971).
"[T]he statute and regulation are applicable to all members of all religious faiths who observe Saturday as the Sabbath." The error of this logic is the comparison to determine whether one Sabbatarian belief is preferred over another. However, the test put forth in Gillette stated that no imprimatur be placed on any religion whatsoever. While the Sixth Circuit recognized beneficial treatment to Sabbatarian beliefs at the expense of all other beliefs, no violation of the Constitution was found.

The preferred standard should reject any involvement of religious groups and secular purposes, especially where the involvement would encroach upon another's religious liberties. This standard is not met by Title VII demands. Those workers most damaged are atheists. Conceivably, Christian workers could raise the provision to escape working on Sundays, but atheists may not avail themselves of the amendment at all. Because non-believers are disadvantaged, and only a small number of religious groups are actually benefited, the statute should be declared unconstitutional as fostering religious beliefs.

Title VII, as it now stands, fosters Sabbatarian beliefs by requiring an employer to accommodate all religious observances and practices of his employees, save in exceptional circumstances where accommodation would work an undue hardship upon the business. In application, an undue hardship has been found only in rare instances where the individual's job was unique or where the available work force was so small that any rescheduling proved unreasonable. Unlike cases involving Sunday closing laws, there is no public benefit in these situations. Nor have any arguments been advanced that there can be a proper division of religious and secular purposes.

92. 516 F.2d at 553 (emphasis by the court).
93. Based on United States v. Seeger, 380 U.S. 163 (1965) and Welsh v. United States, 398 U.S. 333 (1970), an atheist ought to be afforded the same protection as those who hold religious beliefs. Yet this is rarely the case. There has been only one case which has allowed an atheist to avail herself of the amendment. In Young v. Southwestern Sav. and Loan, 509 F.2d 140 (5th Cir. 1975), an atheist was held to be constructively discharged for failing to attend monthly meetings as required by her employer. The reason she did not attend was because the meetings always began with a prayer and the employer refused to permit her to arrive late. This case is an anomaly and unlikely to occur often. The primary purpose of the amendment was to aid Sabbatarian beliefs and to date that has been its overwhelming use.
as there has been in education cases.

Like the circumstances in *Abington School District v. Schempp*, the burden placed on employers by virtue of the reasonable accommodation clause of Title VII violates the constitutional rights of others who do not ascribe to Sabbatarian observances. Those who are non-Sabbatarian believers can be called upon to replace a Sabbatarian worker, and *must* be called upon if the employer is to raise a defense of attempted accommodation. This duty also violates the doctrine of *Gillette v. United States* because the government is sanctioning those religions which demand that followers not work certain days or hours.

An additional benefit accrues directly to the religion itself in that higher attendance at services is presupposed, as is a corresponding increase in the collection plate. Thus, the obvious, primary, and direct effect of the reasonable accommodation clause advances the beliefs of several religions. In so doing, Title VII violates the neutrality test set forth by the Supreme Court.

**Excessive Entanglement**

The final criterion to be overcome in establishment clause challenges is that the statute must not involve excessive government entanglement with religion. This test has evolved primarily from cases dealing with government grants to educational facilities.

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98. In *Hardison v. Trans World Airlines*, 527 F.2d 33 (8th Cir. 1975), the court noted that "before an employer can assert the defense of non-cooperation, it is incumbent upon it to establish the accommodation which it has tendered and with which the employee has refused to cooperate." *Id.* at 39. This differs from the conclusion of the Sixth Circuit in *Cummins v. Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975), *aff'd by an equally divided Court*, 429 U.S. 65 (1976). In *Cummins* it was held that the employer had accommodated Cummins for over a year prior to discharge, thereby estopping the company from raising an undue hardship defense. The results of these two cases place an employer in a very tenuous position. The employer must decide at the outset of a religious discrimination charge whether or not to attempt to accommodate. Regardless of whether he chooses to attempt accommodation or not, he could be in violation of Title VII. If the employer decides that any accommodation would work an undue hardship on the business, a prima facie case of discrimination is presented under *Hardison* and he cannot raise the defense of employee non-cooperation. If, on the other hand, he chooses to try to accommodate the worker, the employer may be barred from later claiming any undue hardship exists. The question has become one of mixing fact and law, determinable only by looking at the precise set of facts involved.
101. *Id.*
Public policy and a balancing of the degree of government interaction are the crucial standards. As the Court stated in *Walz v. Tax Commission:* 104

The question is inescapably one of degree . . . . The statute involved necessarily operates to afford an indirect economic benefit and also gives rise to some . . . involvement . . . . In analyzing either alternative the questions are whether the involvement is excessive and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. 105

This test was propounded when the Court considered a challenge to a state statute granting a tax exemption for churches. It recognized the impossibility of constructing a wall totally separating all functions of the church and state. 106 Some government involvement is essential, for example, where police or fire protection is afforded. 107 This inseparability of state involvement permits a legislature to define what should be included in determining taxable property; the legislature may exempt certain properties which are used solely for religious purposes. Thus, the Court in *Walz* opted to uphold the exemption privilege on the grounds that it constituted a lesser government entanglement than no exemption. Likewise, entanglement was deemed not to be excessive in providing religiously operated universities with construction grants to be used exclusively for educational purposes. 108 The reasoning of the Court in school construction cases was based on the theory that the construction grant was a one-time, single-purpose loan entailing no continuing governmental involvement. 109

Analysis of permissible state interest cases and excessive entanglement decisions reveals that government intervention is impermissible where continual and burdensome inspection by a government agency results. 110 In *Lemon v. Kurtzman,* 111 the Court invalidated a state statute which authorized payment of supplemental income to non-public school teachers. The Court pointed out that

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105. Id. at 674-75.
106. Id.
107. Id.
109. Id. In *Tilton* the Court rejected the argument that an impermissible entanglement would ensue since continuous inspection would be required to assure no sectarian use was made of the buildings.
111. 403 U.S. 602 (1971).
teachers, unlike schoolbooks, cannot be inspected once to determine the extent and intent of secularization, nor could there be assurances of compliance with established limitations. The same concept was followed in Committee for Public Education and Religious Liberty v. Nyquist and Meek v. Pittinger. The statute challenged in Nyquist was similar to that invalidated in Kurtzman, and the Court had little trouble in again denying subsidizing plans. In Pittinger, the Court allowed textbooks to be loaned to non-public schools, as previously permitted, but refused to allow the state to provide instructional materials and equipment or auxiliary services by public school personnel.

Although reasonable accommodation violations involve a different type of scrutiny than required in education cases, an impermissible and inevitable entanglement problem remains. Under Title VII, an individual may take a grievance to the Equal Employment Opportunity Commission (EEOC) and also may file a court action. While entanglement in this area does not involve a religious institution per se, the investigations require inspection of work schedules allegedly disfavoring particular religions. This is done without focusing on a business necessity test or on overt discrimination.

The 1972 amendment provides that the employer must observe "all aspects of religious observances, practice and belief." As such, the provision is so far-reaching as to be ambiguous. Religious beliefs have been judicially defined as "sincere and meaningful feelings which occupy in the life of its possessor a place parallel to that filled by . . . God." The definition has been broadened to include moral and ethical beliefs as well. However, although religion may have some definition, the scope of the qualifying term "all aspects of observance, practice, and belief" is unclear. Congress did not indi-

112. Id.
116. Meek v. Pittinger, 421 U.S. 349 (1975). It was feared that items such as projectors and the like could too easily be converted to use for sectarian purposes. To guarantee that this would not occur would entail an enormous amount of examination by some government agency. Such a burden would be intolerable.
118. Id. See, e.g., Hardison v. Trans World Airlines, 527 F.2d 33 (8th Cir. 1975); Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975).
119. See text accompanying notes 56-64 supra.
cate how broadly the term was to be interpreted, nor did it indicate whether the definition of religion delimited in *United States v. Seeger*\(^{123}\) and *Welsh v. United States*\(^{124}\) was applicable to employment discrimination cases.

Intentional discrimination can take one of two forms: (1) obvious and wilful discrimination, such as refusal to hire Jews or Catholics simply because they are Jews or Catholics; or (2) overtly neutral practices that are intentionally designed to affect disparately employees holding certain religious beliefs.\(^{123}\) Both types of intentional discrimination are prohibited under Title VII,\(^{126}\) but discerning discrimination in the latter category can be a difficult and time-consuming process. To facilitate religious discrimination cases, while also protecting legitimate discriminatory practices, it has been proposed that a broad but malleable definition of religion be employed.\(^{127}\) Discrimination, on the other hand, should be construed narrowly thus avoiding undue burdens on employers while allowing for a wide range of religious beliefs.\(^{128}\) Only by construing religion and discrimination in this way can the problem be well covered without overtaxing either employer or employee.

Admittedly, problems inherent in proving subjective discriminatory intent in employment practices make this theory difficult to effectuate,\(^{129}\) but the alternative is to overburden courts and the EEOC with claims of employees, especially where an individual does not get satisfaction through his chosen forum.

The result of this ambiguity would necessitate extensive review before the EEOC and federal courts. Both forums would be required to interpret the statute, perhaps inconsistently, or at least in such a variety of circumstances as to be extremely burdensome.\(^{130}\) Inconsistent or overreaching determinations concerning the extent of proper religious practices and observances is directly contrary to the desire of the Court to weed out spurious claims.\(^{131}\)

Because of the overlap in litigation, and the potential for inconsistent and recurring litigation before the courts and government agencies, the reasonable accommodation clause of Title VII causes

\(^{123}\) 380 U.S. 163 (1965).


\(^{125}\) Edwards and Kaplan, note 8 supra, at 619.

\(^{126}\) Id. See also remarks of Senator Humphrey, note 8 supra.

\(^{127}\) Edwards and Kaplan, note 8 supra, at 619.

\(^{128}\) Id.

\(^{129}\) See, e.g., Blumrosen, note 8 supra.

\(^{130}\) See, e.g., Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975).

excessive government entanglement with religion. Consequently, the provision fails the third test in establishment clause criteria.

WHEN ACCOMMODATION BECOMES UNREASONABLE

The opportunity to decide the constitutionality of the reasonable accommodation clause has been presented to the Court on three occasions in recent years. In Cummins v. Parker Seal Co. and Dewey v. Reynolds Metals Co. the Court did not render an opinion on the constitutional merits. The effect of these decisions was inconclusive on the question of the statute, since the Sixth Circuit reached different results in each case.

The most recent opportunity for the Court to address the issue was Trans World Airlines v. Hardison. In Hardison the glaring impropriety of the amendment and concurrent potential for abuse of first amendment privileges was clearly manifested. The Court finally issued an opinion on the reasonable accommodation claim of an employer, but both Justice White, speaking for the majority, and Justice Marshall in dissent, stated that the decision was not based on first amendment grounds. That portion of the appeal was left unanswered. The Court only decided whether an employer was required to breach a collective bargaining agreement in order to accommodate the religious beliefs of an employee.

The Court of Appeals held that TWA could have breached its agreement with Hardison's union and must do so in order to make a reasonable accommodation. The court also rejected TWA's contention that the employee had placed himself in the predicament by voluntarily transferring shifts, even though cognizant that he

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132. 516 F.2d 544 (6th Cir. 1975), aff'd by an equally divided Court, 429 U.S. 65 (1976).
133. 429 F.2d 324 (6th Cir. 1970), aff'd by an equally divided Court, 402 U.S. 689 (1971).
134. An explanation for the discrepancies could be that Dewey was decided under the old guidelines while Cummins was decided after the 1967 guidelines were effected. As the Court pointed out in Hardison, neither of these cases can be given much precedential value since each caused an equal split of the Court. 97 S. Ct. at 2271 n.8.
136. Id. at 2269.
137. Id. at 2279-80 n.3.
138. The majority twice intimated limitations of the establishment clause with regards to Title VII. At 97 S. Ct. 2275-76, Justice White states that Title VII does not require an employer to violate a contract with a union in order to accommodate an employee's beliefs. Justice White also noted the inherent fairness of a proper seniority system and again referred to first amendment restrictions by proclaiming that a seniority system which takes root in the religious preferences of employees would also be violative of the Constitution. Id. at 2274, 2277. Justice Marshall dismissed the constitutional problem by deciding that neither party was concerned with the issue. Id. at 2280 n.4.
139. Id. at 2276.
140. See id. at 2273-77.
would irretrievably lose his seniority rights by doing so. The court stated that "before an employer can assert the defense of non-cooperation, it is incumbent upon it to establish the accommodation which it has tendered and with which the employee has refused to cooperate." Furthermore, "to limit an employee's right of transfer within the company as a condition of accommodation would be to discriminate against him with respect to his . . . conditions, or privileges of employment, because of his . . . religion."

The Eighth Circuit's decision permitted an employee to escape the unfavorable consequences generated by his voluntary creation of a situation necessitating a choice between his religious beliefs and employment. This notion is repulsive to the first amendment and should not be tolerated.

In reversing the appellate court, the Supreme Court emphasized the role of the collective bargaining agreement in force between TWA and Hardison's union. Paying homage to the purpose of the Act as expressed in Griggs v. Duke Power Co., the Court refused to go further than to declare that TWA had attempted a reasonable accommodation within the meaning of the statute and was not required to violate its agreement with the union.

CONCLUSION

While Hardison admittedly limits the scope of the 1972 amendment, the Court circumvented the most pressing issue before it—whether the reasonable accommodation requirement is constitutional at all. The intimation of the Court is that first amendment considerations need not be examined until the law is construed to force the employer or employee to assume significant costs in the attempted accommodation. If so, the ramifications of the requirements under Title VII and first amendment criteria may have been ignored or misapplied. The prayer reading cases indicate that it is not necessary that monetary contributions to religions, either direct or indirect, be present in order to trigger establishment clause scrutiny.

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141. See note 100 supra.
142. 527 F.2d at 39. The Eighth Circuit also proposed alternatives which had not been suggested by the parties nor the district court, 375 F. Supp. 877 (W.D. Mo. 1974), which bordered or transcended the collective bargaining agreement. The Supreme Court rejected all of these out of hand as constituting an undue hardship. 97 S. Ct. 2272-77.
143. This was the same position taken by the Sixth Circuit in Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), aff'd by an equally divided Court, 402 U.S. 689 (1971).
144. 401 U.S. 424 (1971).
145. 97 S. Ct. at 2279-80 nn. 3 & 4 (Marshall, J., dissenting).
146. See notes 79-83 supra and accompanying text.
Madison's warning of "three pence . . . for the support of any [religious] establishment" should not be read literally as being the only time to invoke constitutional examination. Hopefully, the Court will accept the next opportunity to examine the purpose and effect of the reasonable accommodation clause and squarely face the constitutional questions presented.

When these questions are answered, it is believed that the Court will find that the purpose of the 1972 amendment was to foster attendance at Sabbatarian services, thus aiding those religions; that the primary effect of the amendment is directly beneficial to those same religions; and that claims involving religious discrimination are becoming more complex and more remote from the original purposes of the Act. Thus, it is suggested that the reasonable accommodation clause be declared violative of the first amendment at the earliest opportunity.

Brendan M. Cournane