ESTABLISHMENT CLAUSE NEUTRALITY AND THE REASONABLE ACCOMMODATION REQUIREMENT

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Introduction

The Civil Rights Act of 1964[1] was amended in 1972 to require an employer to "reasonably accommodate" his employees' religious needs unless such accomodation would impose an "undue hardship" on the employer's business.[2] Many workers have taken advantage of this provision to obtain an exemption from a job-related rule that would in some way force them to violate their religious conscience. The reasonable accommodation requirement has most often been applied where the tenets of an employee's religion prevent him from accepting Saturday work assignments. By compelling an employer to "reasonably accommodate" such religious practices, *e.g.*, to allow the employee to take Saturdays off, the 1972 amendment alleviated the need for the employee to choose between job and religion when a conflict arose. Critics of the accommodation rule, however, perceived the amendment as preferential treatment of some employees on the

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1. 42 U.S.C. §§ 2000e to 2000e-17 (1970 & Supp. V 1975).

2. 42 U.S.C. § 2000e(j) (Supp. V 1975). *See generally* Edwards & Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII*, 69 MICH. L. REV. 599 (1971) [hereinafter cited as Edwards & Kaplan]; Wolkinson, *Title VII and the Religious Employee: The Neglected Duty of Accommodation*, 30 ARB. J. (N.S.) 89 (1975); Note, *Title VII—Religious Discrimination—Employer's Duty to "Reasonably Accommodate" Employee's Religious Practices*, 9 CREIGHTON L. REV. 795 (1976) [hereinafter cited as *Employer's Duty*]; Comment, *Religious Discrimination in Employment: Striking the Delicate Balance*, 80 DICK. L. REV. 717 (1976); Note, *Religious Discrimination in Employment: The 1972 Amendment—A Perspective*, 3 FORDHAM URB. L.J. 327 (1975); Note, *Title VII: An Employer's View of Religious Discrimination Since the 1972 Amendment*, 7 LOY. CHI. L.J. 97 (1976); Note, *Is Title VII's Reasonable Accommodations Requirement a Law "Respecting an Establishment of Religion"?*, 51 NOTRE DAME LAW. 481 (1976); Comment, *Religious Observance and Discrimination in Employment*, 22 SYRACUSE L. REV. 1019 (1971) [hereinafter cited as *Religious Observance*]; Note, *Title VII Standards of "Reasonable Accommodation" and "Undue Hardship" Are Constitutional, but Recent Cases Illustrate Judicial Overzealousness in Enforcement*, 54 TEX. L. REV. 616 (1976) [hereinafter cited as *Title VII Standards*]; Note, *Accommodation of an Employee's Religious Practices Under Title VII*, 1976 U. ILL. L.F. 867; 3 CUM.-SAM. L. REV. 497 (1972); 45 FORDHAM L. REV. 967 (1977); 22 N.Y.L. SCH. L. REV. 143 (1976); 44 N.Y.U. L. REV. 1147 (1969); 62 VA. L. REV. 237 (1976); 16 WAYNE L. REV. 327 (1969).

basis of religion; the requirement has thus been challenged as violative of the First Amendment's establishment clause.[3]

In *Trans World Airlines, Inc. v. Hardison*,[4] the United States Supreme Court, in a 7-2 decision, narrowly construed the reasonable accommodation requirement. Larry Hardison, a TWA employee, was required to work Saturdays because of the operation of a seniority system provision in a collective bargaining agreement between TWA and the local union. The Court held that the duty of reasonable accommodation did not require TWA to vary the seniority system to allow Hardison Saturdays off.[5] This holding was based on the argument that unequal treatment of a religious minority was not required by Title VII. Specifically, the Court concluded that Congress never intended that an employer deny the shift preferences of some employees, as well as deprive them of their contractual rights under a union agreement, in order to accommodate the religious needs of other employees.[6] The Court also held that the "undue hardship" factor of the reasonable accommodation equation means that an employer is not required to bear anything greater than a *de minimus* cost in order to accommodate.[7] This holding was similarly grounded on the rationale that incurring significant costs to accommodate an employee would entail preferential treatment for certain persons on the basis of religion. Use of such reasoning—that Title VII does not require privileged treatment for some religious employees—enabled the Court to resolve the case without addressing the establishment clause issue.[8]

The establishment clause questions raised by the reasonable accommodation requirement had been examined in 1975 by the Court of Appeals for the Sixth Circuit in *Cummins v. Parker Seal Co.*[9] This opinion remains the only significant evaluation of the establishment clause issue. The majority upheld the accommodation requirement by applying the establishment clause test developed chiefly in the context of government aid to parochial schools. The dissent argued that the accommodation rule *did* violate the establishment clause. The theme of the dissent's argument was that the reasonable accommodation requirement does not treat religious and non-

3. "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.

4. 97 S. Ct. 2264 (1977).

5. *Id.* at 2274-76.

6. *Id.* at 2275.

7. *Id.* at 2277.

8. To the extent that the accommodation requirement affords preferential treatment for *religious* minorities, *see id.* at 2270, 2275, the Court may have been influenced by the current issue of the constitutionality of preferential treatment for *racial* minorities. *See* Bakke v. Regents of the Univ. of Cal., 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *cert. granted*, 45 U.S.L.W. 3570 (U.S. Feb. 22, 1977) (special medical school admissions program for members of racial minorities violates the equal protection clause).

9. 516 F.2d 544 (6th Cir. 1975), *aff'd per curiam by an equally divided court*, 429 U.S. 65 (1976).

religious persons neutrally. Considering *Cummins* on a writ of certiorari, the Supreme Court was equally divided,[10] thus indicating that it was apparently unable or unwilling to settle the difficult establishment clause issue. Against this background, the *Hardison* Court construed the accommodation rule to prohibit preferential treatment of some religious persons. It thereby nullified the contention that the rule is non-neutral because it favors the religious over the non-religious.

The thesis of this note is that the Supreme Court need not have been so inflexibly neutral in *Hardison*, and that the statutory reasonable accommodation requirement can be upheld against any future establishment clause attack by applying the principles of a more benevolent neutrality. The note first traces the statutory development of the reasonable accommodation requirement. The pertinent establishment clause law is then set out, with an emphasis on the neutrality theory. Next, the *Cummins* case is discussed in order to highlight the establishment clause issue and the constitutional analysis that was applied by the Sixth Circuit; *Hardison* is examined with particular attention given to the Supreme Court's opinion. These cases are then analyzed to contrast the two major approaches to establishment clause neutrality. In conclusion, the note suggests that the theory of benevolent neutrality imparts sufficient flexibility to the two religion clauses of the First Amendment[11] for Congress to accommodate the needs of religious employees without running afoul of the establishment clause.

I. Statutory Development

The foundation for an employee's claim of religious discrimination was laid in Title VII[12] of the Civil Rights Act of 1964 (CRA).[13] The key provision of Title VII makes it illegal for employers to discriminate on the basis of race, color, religion, sex, or national origin:

10. Parker Seal Co. v. Cummins, 429 U.S. 65 (1976) (Stevens, J., did not participate).

11. The two religion clauses—the establishment clause and the free exercise clause—are contained in the first sentence of the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

12. Equal Employment Opportunities Act, 42 U.S.C. §§ 2000e to 2000e-17 (1970 & Supp. V 1975).

13. 28 U.S.C. § 1447; 42 U.S.C. §§ 1971, 1975a-1975d, 2000a to 2000h-6 (1970 & Supp. V 1975). The constitutional basis for the Civil Rights Act is the commerce clause. *See, e.g.*, 110 CONG. REC. 1528 (1964) (remarks of Rep. Celler); Edwards & Kaplan, *supra* note 2, at 603. With respect to Title VII, this foundation has never been attacked. But the commerce clause basis for Title II, 42 U.S.C. §§ 2000a to 2000a-6 (1970), of the CRA was upheld in Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) and Katzenbach v. McClung, 379 U.S. 294 (1964). Justices Douglas and Goldberg urged in *Heart of Atlanta Motel* that the legislation should also rest on the Fourteenth Amendment. 379 U.S. at 279, 291 (Douglas & Goldberg, JJ., concurring separately). The majority, however, declined to adopt that basis, a decision that has been commended. *See* Cooksey, *The Role of Law in Equal Employment Opportunity*, 7 B.C. INDUS. & COM. L. REV. 417, 422 (1966). The commerce clause foundation of Title VII could also be upheld on the basis of the "obstruction of commerce" theory of NLRB v. Jones

> It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .[14]

Although it is generally acknowledged that the primary purpose of Title VII was to eliminate *racial* discrimination in employment,[15] the other categories have also been subject to judicial scrutiny.[16]

Religion as a prohibited criterion for discrimination[17] seems to have been included in Title VII in part because the CRA is modeled on state fair employment practices legislation, which typically prohibits religious discrimination.[18] Such inclusion also reflects a recognition of religious freedom as a fundamental right in American society.[19] The sparse legislative history concerning religion[20] suggests that the evil Congress intended to remedy was intentional religious discrimination, resulting from prejudice toward another based *solely* on membership in a particular religion.[21] Such blatant religious discrimination was clearly proscribed by the original enactment of

& Laughlin Steel Corp., 301 U.S. 1 (1937). *See* Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449, 462 (1974).

14. 42 U.S.C. § 2000e-2(a) (1970).

15. *See, e.g.*, Edwards & Kaplan, *supra* note 2, at 599-600; *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1113-14 (1971). There are many references in the legislative history of the CRA to its intended remedial effect on racial discrimination. *E.g.*, H.R. REP. NO. 914, 88th Cong., 1st Sess. 18 (1963); 110 CONG. REC. 1517 (1964) (remarks of Rep. Celler); 109 CONG. REC. 3245-49 (1963) (remarks of President Kennedy).

16. *E.g.*, General Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (denial of pregnancy benefits not discrimination on basis of sex); Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973) (refusal to hire a non-U.S. citizen not discrimination on basis of national origin); Ochoa v. Monsanto Co., 473 F.2d 318 (5th Cir. 1973) (company's hiring practices not discrimination on basis of national origin); Morris v. Texas & Pac. Ry., 387 F. Supp. 1232 (M.D. La. 1975) (hair length regulation not discrimination on basis of sex).

17. "Religion" differs from the other discriminatory criteria in that it is not immutable. Unlike race, color, and national origin, which never change, or sex, which usually does not change, *see Forum: Equal Protection and the Burger Court*, 2 HASTINGS CONST. L.Q. 645, 668 (1975), people often change their religion, either by outright conversion, *e.g.*, Claybaugh v. Pacific Northwest Bell Tel. Co., 355 F. Supp. 1 (D. Ore. 1973), or by a growing conviction within their present faith, *e.g.*, Dewey v. Reynolds Metal Co., 300 F. Supp. 709 (W.D. Mich. 1969), *rev'd*, 429 F.2d 324 (6th Cir. 1970), *aff'd per curiam by an equally divided court*, 402 U.S. 689 (1971).

18. Edwards & Kaplan, *supra* note 2, at 600-02. *See, e.g.*, KAN. STAT. § 44-1001 (Supp. 1976); OR. REV. STAT. § 659.030 (1975).

19. Edwards & Kaplan, *supra* note 2, at 602-03; *Title VII Standards, supra* note 2, at 618 n.9.

20. *See, e.g.*, 110 CONG. REC. 1528-29 (1964). *See generally* Edwards & Kaplan, *supra* note 2, at 600 n.10 and sources cited therein.

21. *See Religious Observance, supra* note 2, at 1019.

Title VII.[22] The issue soon arose whether Title VII also protected an employee who refused to conform to an employer's normal workweek because of his religious beliefs.[23]

Pursuant to its rulemaking authority,[24] the Equal Employment Opportunity Commission (EEOC)[25] issued an interpretive ruling in 1966[26] that established an affirmative obligation for an employer to accommodate his employees' religious practices unless such accommodation would cause "serious inconvenience to the conduct of the business."[27] The EEOC set forth guidelines to aid the employer in determining the degree of accommodation expected;[28] in particular, the employer was permitted to schedule a regular workweek to which all of his employees were expected to conform.[29]

In 1967, the EEOC promulgated an amendment[30] to the original guidelines that changed the degree of difficulty necessary to excuse an employer's duty to reasonably accommodate from "serious inconvenience" to "undue hardship" on the operation of the employer's business.[31] The

22. *Id.* at 1020. *See* Annot., 22 A.L.R. Fed. 580, 620-23 (1975) (discrimination on basis of religion per se).

23. *See Religious Observance, supra* note 2, at 1019-20.

24. 42 U.S.C. § 2000e-12(a) (1970).

25. Title VII established the EEOC, 42 U.S.C. § 2000e-4 (1970 & Supp. V 1975), and gave it enforcement powers, 42 U.S.C. § 2000e-5 (1970 & Supp. V 1975). *See generally* Gardner, *The Procedural Steps Of Title VII Of The Civil Rights Act of 1964*, 29 ALA. LAW. 80 (1968).

26. 29 C.F.R. § 1605.1 (1966) (amended 1967) (31 Fed. Reg. 8370 (1966)).

27. *Id.* at § 1605.1(a)(2).

28. *Id.* at § 1605.1(b)(1)-(4).

29. *Id.* at § 1605.1(b)(3).

30. "(a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days.

"(b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, 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, for example, 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.

"(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

"(d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people." 29 C.F.R. § 1605.1 (1976).

31. 29 C.F.R. § 1605.1(b) (1976).

prior supplementary guidelines were eliminated[32] with the result that the employer is no longer permitted to avoid accommodation merely by prescribing a regular workweek for his employees.[33] The EEOC did not specify what accommodation would be "reasonable" or when inconvenience to an employer becomes "undue" hardship. Perhaps most significantly, the burden of proving that undue hardship would result from the accommodation of a religious employee was shifted to the *employer*.[34]

The validity of the 1967 guideline was first questioned in *Dewey v. Reynolds Metal Co.*[35] Robert Dewey was discharged by Reynolds Metal when, pursuant to his religious convictions, he refused to work compulsory Sunday overtime.[36] The district court applied the 1967 guideline and held that Reynolds Metal had violated Title VII.[37] On appeal, the Sixth Circuit reversed. Although Dewey's religious beliefs dictated that he not ask other employees to work for him on Sundays,[38] the court held that Reynolds Metal had accommodated Dewey by permitting him to secure a replacement for his Sunday shifts.[39] Judge Weick contended that the guideline was not consistent with Title VII, since there was no Congressional intent that an employer be required to accommodate the religious beliefs of his employees. He also noted that the collective bargaining agreement by which Dewey could be compelled to work Sundays was uniformly applied to all employees in a non-discriminatory manner.[40] Furthermore, Judge Weick continued, to con-

32. The EEOC reaffirmed its policy of deciding claims on an individual basis. 29 C.F.R. § 1605.1 (d) (1976); *see* Dewey v. Reynolds Metal Co., 429 F.2d 324, 330 (6th Cir. 1970), *aff'd per curiam by an equally divided court*, 402 U.S. 689 (1971).

33. *Cf., e.g.*, [1973] EEOC Dec. (CCH) ¶ 6120 (1973) (EEOC Dec. 70-580) (plant normally closed on Sundays).

34. 29 C.F.R. 1605.1(c)(1976). The 1966 guideline, with its correlative standard of "serious inconvenience," was *silent* on the burden of proof. *See* 29 C.F.R. § 1605.1(a)(2) (1966) (amended 1967) (31 Fed. Reg. 8370 (1966)). Thus, according to the Administrative Procedure Act, the burden of proof would be on the employee: "Except as otherwise provided by statute, the proponent of a[n] . . . order has the burden of proof." 5 U.S.C. § 556(d) (1970). The EEOC has been criticized for transgressing its authority by shifting the burden of proof to the employer in the 1967 guideline. Riley v. Bendix Corp., 330 F. Supp. 583, 588 (M.D. Fla. 1971), *rev'd on other grounds*, 464 F.2d 1113 (5th Cir. 1972). Another criticism is that it is "unreasonable and impractical to require the complex American business structure to prove why it cannot gear itself to the 'varied religious practices of the American people.'" *Id.* at 588-89 (citation omitted). *But see Religious Observance, supra* note 2, at 1030.

35. 429 F.2d 324 (6th Cir. 1970), *aff'd per curiam by an equally divided court*, 402 U.S. 689 (1971) (Harlan, J., did not participate).

36. *Id.* at 329. The company's collective bargaining agreement with the UAW permitted it to require its employees to work overtime when asked. *Id.*

37. Dewey v. Reynolds Metal Co., 300 F. Supp. 709, 714-15 (W.D. Mich. 1969), *rev'd*, 429 F.2d 324 (6th Cir. 1970), *aff'd per curiam by an equally divided court*, 402 U.S. 689 (1971). *See generally* 44 N.Y.U. L. REV. 1147 (1969); 16 WAYNE L. REV. 327 (1969).

38. 300 F. Supp. at 711.

39. 429 F.2d at 335. The narrow basis for the decision was that the district court had erroneously applied the 1967 guideline since Dewey was fired when the 1966 guidelines were still in effect. *Id.* at 329-30.

40. *Id.* at 334.

strue the Act to compel an accommodation by the employer would raise "grave constitutional questions" of violation of the establishment clause since the government is obliged to be "neutral" toward believers and non-believers.[41] The significance of *Dewey* is twofold. On one hand, the circuit court in effect confined religious discrimination to intentional discrimination.[42] On the other hand, the court challenged the EEOC's authority to issue guidelines to administer Title VII's prohibition against religious discrimination.[43]

In 1972, Congress acted to clear up the questions raised by *Dewey*. By an amendment to the Equal Employment Opportunity Act of 1972,[44] the Senate adopted the EEOC's reasonable accommodation rule as the Title VII definition of religious discrimination: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to *reasonably accommodate* to an employee's or prospective employee's religious observance or practice without *undue hardship* on the conduct of the employer's business."[45] The amendment was introduced from the floor of the Senate by Senator Jennings Randolph.[46] The gist of his speech was that the amendment was intended to overrule the *Dewey* opinion and to make clear that Title VII prohibited religious discrimination by effect (*i.e.*, discrimination that is the effect of strict application of a work rule that conflicts with an employee's religious practices) as well as intentional discrimination.[47] This amendment firmly

41. *Id.* at 334-35. This argument was the first hint of establishment clause difficulty and it formed the nucleus of the dissenting opinion in Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975), *aff'd per curiam by an equally divided court*, 429 U.S. 65 (1976). See notes 128-33 and accompanying text *infra*.

42. *See, e.g.*, *Employer's Duty*, *supra* note 2, at 798. *See generally* Edwards & Kaplan, *supra* note 2.

43. 429 F.2d at 331 n.1. Two other cases prior to the 1972 amendment came to conflicting conclusions as to whether the 1967 guideline expressed the will of Congress. *Compare* Jackson v. Veri Fresh Poultry, Inc., 304 F. Supp. 1276 (E.D. La. 1969) *with* Kettell v. Johnson & Johnson, 337 F. Supp. 892 (E.D. Ark. 1972).

44. Pub. L. No. 92-261, 86 Stat. 103 (1972).

45. 42 U.S.C. § 2000e(j) (Supp. V 1975) (emphasis added). Drafted as a definition of "religion," the amendment operates to define religious discrimination. *See* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 185 (student ed. 1976).

46. 118 CONG. REC. 705-06 (1972). Senator Randolph is a Seventh-day Baptist and his speech is the focal point of analysis of the amendment's legislative history. *See* Cummins v. Parker Seal Co., 516 F.2d 544, 552, 558 (6th Cir. 1975), *aff'd per curiam by an equally divided court*, 429 U.S. 65 (1976); Riley v. Bendix Corp., 464 F.2d 1113, 1116 (5th Cir. 1972); Hardison v. Trans World Airlines, 375 F. Supp. 877, 887 (W.D. Mo. 1974), *aff'd in part and rev'd in part*, 527 F.2d 33 (8th Cir. 1975), *rev'd*, 97 S. Ct. 2264 (1977). Both Senator Randolph and Senator Williams felt the amendment was to further rights under the free exercise clause. *See* 118 CONG. REC. 705-06 (1972). *But cf.* 44 N.Y.U. L. REV. 1147, 1150 (1969) (Title VII does not affirmatively protect free exercise). Senator Williams also thought that the amendment presented no establishment clause problem. *See* 118 CONG. REC. 706 (1972).

47. The theoretical basis for legislating to prevent employment discrimination by effect was laid down in the leading case of Griggs v. Duke Power Co., 401 U.S. 424 (1971). In *Griggs*, the employer had in the past intentionally discriminated against blacks but had stopped after the

established an employer's duty to accommodate. It did not, however, define the scope of that duty clearly.

Subsequent to the 1972 amendment, the courts attempted to delineate the extent of an employer's duty to accommodate. Some courts have held that the employer must actually attempt some accommodation.[48] As for undue hardship, the courts usually required that the employer prove more than mere inconvenience.[49] Undue hardship has been demonstrated when

passage of Title VII. The Supreme Court held that the employer was still violating Title VII because its neutral employment policy had a discriminatory effect on blacks. *Id.* at 430-31.

The *Griggs* discrimination-by-effect theory has been acknowledged by the courts in reasonable accommodation cases. *See* Hardison v. Trans World Airlines, 527 F.2d 33, 38 (8th Cir. 1975), *rev'd*, 97 S. Ct. 2264 (1977); Cummins v. Parker Seal Co., 516 F.2d 544, 551 (6th Cir. 1975), *aff'd per curiam by an equally divided court*, 429 U.S. 65 (1976); Yott v. North Am. Rockwell Corp., 501 F.2d 398, 402 (9th Cir. 1974); Reid v. Memphis Publishing Co., 468 F.2d 346, 350 (6th Cir. 1972); *cf.* Riley v. Bendix Corp., 464 F.2d 1113, 1115 (5th Cir. 1972) (*Griggs* discussed, but not used to support EEOC guideline). *Contra*, Reid v. Memphis Publishing Co., 521 F.2d 512 (6th Cir. 1975), *cert. denied*, 429 U.S. 964 (1976). No case, however, has made a detailed analysis of exactly how and why it applies to *religious*, as opposed to racial, discrimination. Undeniably, a neutral work rule requiring employees to work on Saturdays has a discriminatory impact on Saturday Sabbatarians. (A "Sabbatarian" is "one who regards and keeps the seventh day of the week as holy in conformity with the letter of the decalogue." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1969).) Thus, the rule of *Griggs* is implemented by obliging employers to accommodate their employees' religious practices.

The primary argument against applying *Griggs* to religious discrimination is that *Griggs* was directed toward remedying the present discriminatory effects of *past intentional* racial discrimination. Therefore, the argument runs, since there is no history of intentional religious discrimination *per se* against Saturday Sabbatarians, *Griggs* does not apply and religious discrimination should remain narrowly defined as intentional discrimination. *See generally* Edwards & Kaplan, *supra* note 2. A broad reading of *Griggs* is preferable, however, and properly subordinates the element of past intentional discrimination to the discrimination by effect interpretation of Title VII. The courts have so broadened *Griggs*, the first step being to apply it to classifications other than race that have been the subject of past intentional discrimination. *E.g.*, Espinoza v. Farah Mfg. Co., 414 U.S. 86, 92 (1973) (national origin); Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971) (sex). The next step has been to apply *Griggs* to grant relief from de facto discrimination where there has *not* been a showing of a history of intentional discrimination by the employer. *See* Wallace v. Debron Corp., 494 F.2d 674 (8th Cir. 1974) (wage garnishment); Gregory v. Litton Systems, Inc., 472 F.2d 631 (9th Cir. 1972) (employment questionnaire that asked for arrest record); Yuhas v. Libbey-Owens-Ford Co., 411 F. Supp. 77 (N.D. Ill. 1976) (policy of not hiring spouse of hourly employee); Johnson v. Pike Corp. of America, 332 F. Supp. 490 (C.D. Cal. 1971) (wage garnishment). To use *Griggs* as the theoretical foundation for the reasonable accommodation requirement requires that one further step be taken: considering the discriminatory effects of present employment practices where there has been no showing of past intentional discrimination by the employer *or by anyone else*. This step should be taken, especially since discrimination is as burdensome to religious minorities as it is to racial minorities. *Title VII Standards, supra* note 2, at 625 n.47.

48. *See, e.g.*, Roberts v. Hermitage Cotton Mills, 8 Empl. Prac. Dec. ¶ 9589 (D.S.C.), *aff'd*, 8 Empl. Prac. Dec. ¶ 9596 (4th Cir. 1974); Claybaugh v. Pacific Northwest Bell Tel. Co., 355 F. Supp. 1 (D. Ore. 1973).

49. *E.g.*, Shaffield v. Northrop Worldwide Aircraft Serv., Inc., 373 F. Supp. 937, 941 (M.D. Ala. 1974); Kettell v. Johnson & Johnson, 337 F. Supp. 892, 895 (E.D. Ark. 1972).

the employee's job affected public safety,[50] when the employer would have to bear overtime expense,[51] and when there was a conflict with a collective bargaining agreement.[52] In short, the emphasis was on *undue* hardship.[53]

The evolution of the reasonable accommodation requirement has on the whole been marked by increasing sympathy for the plight of workers who wish to observe their religious practices and keep their jobs. Title VII's prohibition of religious discrimination was interpreted by the EEOC to mean that an employer was required, absent undue hardship, to accommodate his employees' religious needs. After the *Dewey* decision, which undermined the validity of the EEOC's interpretation, Congress responded by including the duty to accommodate in Title VII. But the legitimacy of the accommodation rule remained unsettled. The next conflict was whether the requirement violated the First Amendment's establishment clause by giving preferential treatment to certain religious employees. The context of the accommodation rule is sharply different from any area in which establishment clause problems have previously been considered. It is thus necessary to survey the relevant establishment clause principles before examining how they apply to the reasonable accommodation requirement.

50. United States v. City of Albuquerque, 423 F. Supp. 591 (D.N.M. 1975), *aff'd*, 545 F.2d 110 (10th Cir. 1976) (firemen); Dixon v. Omaha Pub. Power Dist., 385 F. Supp. 1382 (D. Neb. 1974) (electrical lineman).

51. *E.g.*, Reid v. Memphis Publishing Co., 521 F.2d 512 (6th Cir. 1975), *cert. denied*, 429 U.S. 964 (1976). *Contra*, Ward v. Allegheny Ludlum Steel Corp., 397 F. Supp. 375, 377 (W.D. Pa. 1975).

52. *E.g.*, Hardison v. Trans World Airlines, 375 F. Supp. 877 (W.D. Mo. 1974), *aff'd in part and rev'd in part*, 527 F.2d 33 (8th Cir 1975), *rev'd*, 97 S. Ct. 2264 (1977); Dawson v. Mizell, 325 F. Supp. 511 (E.D. Va. 1971). *But see* Ward v. Allegheny Ludlum Steel Corp., 397 F. Supp. 375, 377 (W.D. Pa. 1975); Shaffield v. Northrop Worldwide Aircraft Serv., Inc., 373 F. Supp. 937, 942 (M.D. Ala. 1974).

53. For a more detailed summary of the factors considered by the courts, *see Title VII Standards, supra* note 2, at 620-22.

A problem that continued to plague the Sixth Circuit after passage of the 1972 amendment was whether the 1967 guideline expressed the original intent of Congress. This issue was important because the Sixth Circuit was deciding cases in which the employee had been fired before the 1972 amendment. In Reid v. Memphis Publishing Co. (Reid I), 468 F.2d 346 (6th Cir. 1972), the court held that the 1967 guideline expressed the Congressional intent. Subsequent to *Cummins* and on the second *Reid* appeal, however, a different Sixth Circuit panel decided that the 1967 guideline did *not* express the prior intent of Congress in passing the original Title VII. Reid v. Memphis Publishing Co. (Reid II), 521 F.2d 512, 518-19 (6th Cir. 1975), *cert. denied*, 429 U.S. 964 (1976). Judges Edwards and Celebrezze, the majority in *Reid I*, were divided in *Reid II*, with Judge Celebrezze agreeing that the guideline was not consistent and Judge Edwards dissenting. *See generally* 22 N.Y.L. SCH. L. REV. 143 (1976).

It appears that the Supreme Court's decision in *Hardison* has finally settled the issue. "[T]he [1967] guideline is entitled to some deference, at least sufficient in this case to warrant our accepting the guideline as a defensible construction of the pre-1972 statute . . . ." Trans World Airlines, Inc. v. Hardison, 97 S. Ct. 2264, 2272 n.11 (1977).

II. The Establishment Clause

The establishment clause is one of the First Amendment's twin guarantees of religious liberty.[54] The other guarantee is that of the free exercise of religion.[55] Ideally, the two clauses should work together to ensure religious freedom. Yet, since both the establishment and free exercise clauses are "cast in absolute terms," they may conflict if either clause is "expanded to [its] logical extreme."[56]

Establishment clause issues have most frequently arisen in the context of government aid to parochial schools[57] and religious programs in public schools.[58] The Supreme Court has also been called upon to decide whether the establishment clause is violated by Sunday closing laws[59] or by property tax exemptions for churches.[60] In cases considering challenges to laws on

54. *See generally* P. KAUPER, RELIGION AND THE CONSTITUTION (1964).

55. "Congress shall make no law . . . prohibiting the free exercise [of religion] . . . ." U.S. CONST. amend. I. See note 11 *supra*. Note that the free exercise clause is not sufficient without more to compel a private employer to accommodate his employees' religious practices because there is no state action infringing upon the employees' religious freedom.

56. Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970).

57. *E.g.*, Wolman v. Walter, 97 S. Ct. 2593 (1977); Roemer v. Board of Pub. Works, 426 U.S. 736 (1976); Meek v. Pittenger, 421 U.S. 349 (1975); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Hunt v. McNair, 413 U.S. 734 (1973); Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1973); Tilton v. Richardson, 403 U.S. 672 (1971); Lemon v. Kurtzman, 403 U.S. 602 (1971); Board of Educ. v. Allen, 392 U.S. 236 (1968); Everson v. Board of Educ., 330 U.S. 1 (1947).

An extended discussion of these cases is beyond the scope of this note. *See generally* Giannella, *Lemon and Tilton: The Bitter and Sweet of Church-State Entanglement*, 1971 SUP. CT. REV. 147; Kauper, *Public Aid for Parochial Schools and Church Colleges: The Lemon, DiCenso, and Tilton Cases*, 13 ARIZ. L. REV. 567 (1971) [hereinafter cited as *Public Aid*]; Kauper, *The Supreme Court and the Establishment Clause: Back to Everson?*, 25 CASE W. RES. L. REV. 107 (1974); Kirby, *Everson to Meek and Roemer: From Separation to Détente in Church-State Relations*, 5 N.C.L. REV. 563 (1977); Kurland, *Politics and the Constitution: Federal Aid to Parochial Schools*, 1 LAND & WATER L. REV. 475 (1966); Morgan, *The Establishment Clause and the Sectarian Schools: A Final Installment?*, 1973 SUP. CT. REV. 57; Piekarski, *Nyquist and Public Aid to Private Education*, 58 MARQ. L. REV. 247 (1975) [hereinafter cited as Piekarski]; Zoeteway, *Excessive Entanglement: Development of a Guideline for Assessing Acceptable Church-State Relationships*, 3 PEPPERDINE L. REV. 279 (1976); Note, *Establishment Clause Analysis of Legislative and Administrative Aid to Religion*, 74 COLUM. L. REV. 1175 (1974); Note, *Establishment Clause: No Tuition Grants, No Tax Benefits for Parents of Nonpublic School Children*, 50 WASH. L. REV. 653 (1975); 45 FORDHAM L. REV. 979 (1977).

58. Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (Bible reading); Engel v. Vitale, 370 U.S. 421 (1962) (prayer); Zorach v. Clauson, 343 U.S. 306 (1952) (released time); Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948) (released time). For a definition of "released time," see note 65 *infra*.

59. McGowan v. Maryland, 366 U.S. 420 (1961); Two Guys v. McGinley, 366 U.S. 582 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); Gallagher v. Crown Kosher Super Market, 366 U.S. 617 (1961).

60. Walz v. Tax Comm'n, 397 U.S. 664 (1970). *See generally* Katz, *Radiations from Church Tax Exemption*, 1970 SUP. CT. REV. 93 [hereinafter cited as Katz]; Kauper, *The Walz Decision: More on the Religion Clauses of the First Amendment*, 69 MICH. L. REV. 179 (1970) [hereinafter cited as Kauper].

free exercise grounds, the Court has been careful to note that the establishment clause was not violated by granting exemptions from the laws to protect an individual's religious freedom.[61] The converse is also true. In resolving its establishment clause cases, the Court has endeavored to forge principles that do not infringe on the free exercise of religion.[62] Out of these cases, a morass of frequently conflicting doctrines has developed.[63] The first of these, formulated by Justice Black in *Everson v. Board of Education*,[64] is the separationist or "no-aid-to-religion" theory.[65] But that theory is by now primarily of historical interest[66] and the Court has turned to the elusive doctrine of neutrality.

Neutrality, observed the late Justice Harlan, is a "coat of many colors."[67] A precise definition has not been attempted by the Court nor has one been agreed upon by commentators.[68] Although the term had appeared in

61. Wisconsin v. Yoder, 406 U.S. 205, 234 n.22 (1972); Sherbert v. Verner, 374 U S. 398, 409 (1963).

62. *Cf.* Moore, *The Supreme Court and the Relationship Between the "Establishment" and "Free Exercise" Clauses*, 42 TEX. L. REV. 142 (1963) (explores the interface between the two religion clauses).

63. These doctrines have not been clearly defined by the Court; the commentators on the subject have attempted to weave the doctrinal fabric from threads picked from the Court's opinions. See notes 64-95, 222-30 and accompanying text *infra*.

64. 330 U.S. 1 (1947).

65. The "no aid to religion" theory derives its name from the following words of Justice Black: "Neither [a state nor the federal government] can pass laws which aid one religion, aid all religions, or prefer one religion over another." *Id.* at 15; *accord*, Torcaso v. Watkins, 367 U.S. 488, 492-93 (1961); McGowan v. Maryland, 366 U.S. 420, 443 (1961); Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 210-11 (1948). Notwithstanding such absolute language, the statute under consideration which, as applied, reimbursed parents of parochial school children for money spent using public transportation to and from their schools, was upheld. 330 U.S. at 18. This result has been explained as supported by the "child benefit" doctrine, which "is the name given to the concept that the state may extend certain welfare aid to students attending church-related schools in situations where general aid to the parochial schools themselves would be unconstitutional." La Noue, *The Child Benefit Theory Revisited: Textbooks, Transportation and Medical Care*, 13 J. PUB. L. 76, 79 (1964); *see* Board of Educ. v. Allen, 392 U.S. 236 (1968) (textbooks); *cf.* Piekarski, *supra* note 57, at 257. The two foundation cases in the child benefit line are Borden v. Louisiana State Bd. of Educ., 168 La. 1005, 123 So. 655 (1928), and Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930). *See* La Noue, *supra*, at 80-82. The no-aid theory was next used in Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948), by Justice Black to invalidate a "released-time" program whereby children were released from regular classes to attend religious instruction held in regular school classrooms.

66. *See, e.g., Public Aid, supra* note 57, at 582. In the most recent case dealing with aid to parochial education, however, Justice Stevens advocated abandoning the current three-prong establishment clause test and returning to the absolutist no-aid principle of *Everson*. *See* Wolman v. Walter, 97 S. Ct. 2593, 2614 (1977) (Stevens, J., separate opinion).

67. Board of Educ. v. Allen, 392 U.S. 236, 249 (1968) (Harlan, J., concurring). One may raise an eyebrow at Justice Harlan's use of a Biblical allusion, *see Genesis* 37:3 (King James), in the context of an establishment of religion clause doctrine.

68. Professor Giannella envisions two types of neutrality: (1) a *free exercise neutrality* that "permits, and sometimes requires, the state to make special provision for religious interests in

earlier cases,[69] the Bible-reading case, *Abington School District v. Schempp*,[70] was the first to fully develop neutrality as a "central canon of interpretation" of the establishment clause.[71] To facilitate application of this neutrality theory, which will be referred to in this note as absolute neutrality,[72] Justice Clark fashioned the following test:

> If either the purpose or the primary effect of the enactment is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[73]

Applying the test, Justice Clark held that Bible-reading exercises in public schools violated the establishment clause because the exercises were intended to be religious in character or, at the least, they used an instrument of religion.[74] The *Schempp* test was subsequently used in *Board of Education v. Allen*[75] to uphold a law providing textbooks for parochial school children since the law had the secular purpose of furthering educational opportunities

order to relieve them from both direct and indirect burdens placed on the free exercise of religion by increased governmental regulation," and (2) a *political neutrality* that aims "to assure that the establishment clause does not force the categorical exclusion of religious activities and associations from a scheme of governmental regulation whose secular purposes justify their inclusion." Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 518, 519 (1968). Professor Schwarz takes sharp issue with Giannella's views. *See* Schwarz, *The Nonestablishment Principle: A Reply to Professor Giannella*, 81 HARV. L. REV. 1465 (1968). A wholly different approach is Professor Kurland's "strict neutrality." See note 85 *infra*. One commentator, struggling to capture the essence of neutrality, gave up and merely defined it by example. Piekarski, *supra* note 57, at 262.

69. Zorach v. Clauson, 343 U.S. 306, 314 (1952); Everson v. Board of Educ., 330 U.S. 1, 18 (1947). The term "neutral" in the context of the religion clauses has been traced back to an 1870 Ohio trial court opinion, Minor v. Board of Educ. (Super. Ct. of Cincinnati, Feb., 1870) (published under the title THE BIBLE IN THE COMMON SCHOOLS (1970)). *See* Abington School Dist. v. Schempp, 374 U.S. 203, 214-15 & n.7 (1963).

70. 374 U.S. 203 (1963).

71. Kauper, *The Warren Court: Religious Liberty and Church-State Relations*, 67 MICH. L. REV. 269, 281-82 (1968); *accord*, Katz, *supra* note 60, at 95.

72. *Cf.* Note, *Establishment Clause Analysis of Legislative and Administrative Aid to Religion*, 74 COLUM. L. REV. 1175, 1176 (1974).

73. 374 U.S. at 222. As a preface to the test, Justice Clark had indicated that the free exercise and establishment clauses "overlap." *Id.* The very language of the test reflects the trade-off between the two clauses. It seems that the concern over the undesirable advancement of religion is dictated by the establishment clause and that the apprehension of the improper inhibition of religion is compelled by the free exercise clause. Absolute neutrality bends to allow breathing room for free religious exercise in the face of a violation of the free exercise clause; this fact is illustrated by Sherbert v. Verner, 374 U.S. 398 (1963), which was decided the same day as *Schempp*, and granted a Seventh-day Adventist woman an exemption from a South Carolina unemployment compensation law. *Id.* at 407-08. In contrast to the flexibility of the benevolent neutrality approach, see notes 222-30 and accompanying text *infra*, it appears that absolute neutrality softens *only* if the free exercise clause has first been violated.

74. 374 U.S. at 223-24.

75. 392 U.S. 236 (1968).

and there was no evidence that its effect was contrary to that purpose.[76] This test was also used in *Epperson v. Arkansas*[77] to strike down an "anti-evolution" law because passage of the law was motivated by the desire to suppress the teaching of a theory thought by some to deny the divine creation of man.[78]

In *Walz v. Tax Commission*,[79] the Court retreated from the absolute neutrality of the *Schempp* secular purpose and effect test and stopped at a position referred to by Chief Justice Burger as "benevolent neutrality." In upholding a property tax exemption for religious organizations, Chief Justice Burger summarized the prior First Amendment decisions:

> The general principle [is] that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a *benevolent neutrality* which will permit religious exercise to exist without sponsorship and without interference.[80]

The appellant real property owner had challenged a real property tax exemption for churches and other eleemosynary institutions[81] on the basis that it indirectly compelled him to contribute to religious bodies.[82] Rejecting this establishment clause argument, Chief Justice Burger noted that the purpose of the tax exemption was neither to advance nor to inhibit religion,[83] and he continued by inquiring whether there was an "excessive government entanglement with religion."[84] Relying largely on the long history of granting tax exemptions to religious organizations, he found no excessive entanglement and concluded that the church tax exemption at issue did not violate the establishment clause.[85]

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76. *Id.* at 243.

77. 393 U.S. 97 (1968).

78. *Id.* at 109. Justice Fortas, writing for the Court, indicated continuing adherence to the concept of neutrality. "Government in our democracy . . . must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *Id.* at 103-04 (footnote omitted).

79. 397 U.S. 664 (1970).

80. *Id.* at 669 (emphasis added).

81. N.Y. REAL PROP. TAX LAW § 421(1)(a) (McKinney 1972) (formerly at *id.* § 420(1)).

82. 397 U.S. at 666-67.

83. *Id.* at 672.

84. *Id.* at 674. The portion of the *Schempp* test that was absent was inquiry into the primary effect of the law. *See* Katz, *supra* note 60, at 98.

85. 397 U.S. at 675-80.

Another version of neutrality is associated with Professor Phillip Kurland and is referred to as "strict neutrality." *See, e.g.*, Giannella, *supra* note 68, at 513. Professor Kurland proposed that "the [free exercise] and [establishment] clauses should be read as a single precept that government cannot utilize religion as a standard for action or inaction because these clauses prohibit classification in terms of religion either to confer a benefit or to impose a burden." P. KURLAND, RELIGION AND THE LAW 18 (1962). Kurland's theory, however, has never been

The year after the *Walz* decision, the Court revived the *Schempp* absolute neutrality purpose and effect test in *Lemon v. Kurtzman*[86] and added to it the requirement, taken from *Walz*, that there must not be excessive government entanglement with religion.[87] The Court in *Lemon* applied the test to hold unconstitutional provisions for salary supplements to nonpublic elementary and secondary school teachers since the ancillary regulatory schemes involved the state in excessive entanglement with religion.[88] The next major establishment clause decision, *Committee for Public Education and Religious Liberty v. Nyquist*,[89] also used this test. Three types of programs designed to aid education in nonpublic elementary and secondary schools were at issue: tuition reimbursements for parents, tax benefits for parents, and maintenance and repair grants for the schools.[90] The Court held that all three had the impermissible effect of advancing religion by providing financial assistance, directly or indirectly, to the religious institutions.[91] The three-prong test used by the *Nyquist* Court is stated as follows: "[T]he law in question, first, must reflect a clearly secular legislative purpose, . . . second, must have a primary effect that neither advances nor inhibits religion, . . . and, third, must avoid excessive government entanglement with religion . . . ."[92] Since then, the *Nyquist* test has been consistently used by the Court to evaluate statutes and programs designed to aid parochial education.[93]

accepted by the Supreme Court as a whole, Note, *The Constitutionality of the 1972 Amendment to Title VII's Exemption for Religious Organizations*, 73 MICH. L. REV. 538, 557 & n.121 (1975), or by any other court, Marcus, *The Forum of Conscience: Applying Standards Under the Free Exercise Clause*, 1973 DUKE L.J. 1217, 1235-36. Justice Harlan, however, *did* accept Kurland's theory. *Compare* Welsh v. United States, 398 U.S. 333, 356-61 (1970) (Harlan, J., concurring) *and* Walz v. Tax Comm'n, 397 U.S. 664, 696 (1970) (Harlan, J., concurring) *with* Kauper, *supra* note 60, at 198. Professor Kurland was "of counsel" on an amicus brief filed in *Cummins*. Brief of the General Conference of Seventh-day Adventists as Amicus Curiae, Parker Seal Co. v. Cummins, 429 U.S. 65 (1976). One may wonder why he would support the reasonable accommodation requirement since it admittedly uses a religious classification to confer a benefit and thus seems inconsistent with his strict neutrality. A possible answer is found in one of his more recent articles. "If I were compelled to read the establishment and freedom clauses separately, I should think that . . . the establishment clause speaks for a ban on assistance, *not to individuals*, but to churches." Kurland, *The Supreme Court, Compulsory Education, and the First Amendment's Religion Clauses*, 75 W. VA. L. REV. 213, 241 (1973) (emphasis added). It therefore appears that Professor Kurland perceives the reasonable accommodation rule not as assistance to churches, but, at most, to individuals.

86. 403 U.S. 602 (1971).

87. *Id.* at 612-13.

88. *Id.* at 619-22. Another form of entanglement was recognized in the "divisive political potential" of the programs. *Id.* at 622.

89. 413 U.S. 756 (1973).

90. *Id.* at 761-69.

91. *Id.* at 774-94.

92. *Id.* at 773 (citations omitted).

93. *See* Wolman v. Walter, 97 S. Ct. 2593, 2599 (1977); Roemer v. Board of Pub. Works, 426 U.S. 736, 748 (1976); Meek v. Pittenger, 421 U.S. 349, 358 (1975); Hunt v. McNair, 413 U.S. 734, 741 (1973); Tilton v. Richardson, 403 U.S. 672, 678 (1971); Lemon v. Kurtzman, 403 U.S.

As previously observed,[94] the *Nyquist* test had its genesis in the *Schempp* neutrality theory, which has herein been termed absolute neutrality. The absoluteness of the test's application, and of the Court's view of neutrality, is illustrated by the refusal of the *Nyquist* Court to accept the state's argument that the programs should pass constitutional muster because they were designed to foster the free exercise of religion.[95] The *Cummins* and *Hardison* cases provide further insight into the inflexible nature of this form of neutrality.

III. Reasonable Accommodation and the Supreme Court

Three reasonable accommodation[96] cases have reached the Supreme Court since 1970. In each of the first two, an equally divided Court affirmed an opinion by the Sixth Circuit Court of Appeals. In 1971, the decision was *Dewey v. Reynolds Metal Co.*,[97] which provided the impetus for the 1972 amendment to Title VII.[98] *Cummins v. Parker Seal Co.*[99] was affirmed in 1976, but since no opinion was written, the statutory and constitutional issues remained unsettled. The Court's 1977 opinion in *Trans World Airlines, Inc. v. Hardison*[100] was the third case; although the Court had been expected to settle both issues, it spoke only to the statutory issue and left unresolved the question of whether the reasonable accommodation requirement violates the establishment clause.

The initial focus of this section is the *Cummins* case, which was the first appellate court decision to discuss the establishment clause issue.[101] *Cummins* remains the most extensive judicial analysis of that question and sets the consitutional background for the *Hardison* case. *Hardison* is then discussed to illustrate the Supreme Court's interpretation of the reasonable

602, 612-13 (1971); *cf.* Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472, 479 (1973) (test not explicitly stated). For a succinct summary of the subtle distinctions drawn by the Court in these cases, see 45 FORDHAM L. REV. 979 (1977).

94. See text accompanying notes 86-92 *supra*.

95. 413 U.S. at 788-89.

96. For a brief overview of the reasonable accommodation requirement, see notes 45-53 and accompanying text *supra*.

97. 429 F.2d 324 (6th Cir. 1970), *aff'd per curiam by an equally divided court*, 402 U.S. 689 (1971).

98. See text accompanying note 44 *supra*.

99. 516 F.2d 544 (6th Cir. 1975), *aff'd per curiam by an equally divided court*, 429 U.S. 65 (1976).

100. 97 S. Ct. 2264 (1977).

101. Three district courts, however, had previously upheld the requirement. In Scott v. Southern Cal. Gas Co., 7 FEP Cases 1030 (C.D. Cal. 1973), the court merely stated that the 1972 amendment did not violate the establishment clause. *Id.* at 1036. The district court in Hardison v. Trans World Airlines, 375 F. Supp. 877, 887-88 (W.D. Mo. 1974), *rev'd in part and aff'd in part*, 527 F.2d 33 (8th Cir. 1975), *rev'd*, 97 S. Ct. 2264 (1977), applied the *Nyquist* three-prong establishment clause test. The third challenge was met in Jordan v. North Carolina Nat'l Bank, 399 F. Supp. 172 (W.D.N.C. 1975), by applying a free exercise analysis. *Id.* at 179-80.

accommodation requirement. The two opinions are then analyzed; first, to contrast the different interpretations given to the accommodation rule, and second, to demonstrate how the *Cummins* dissent's use of the establishment clause theory of neutrality may have strongly influenced the *Hardison* Court's views on the statutory issue. In conclusion, some attention is directed to how a more flexible use of neutrality might have led to a different result in *Hardison* and may still be utilized in future adjudication of the constitutional issue.

A. *Cummins v. Parker Seal Co.*

In *Cummins v. Parker Seal Co.*,[102] the facts show that appellant Paul Cummins had worked for Parker Seal for twelve years when in July, 1970 he began observing the Saturday Sabbath as a member of the World Wide Church of God. At first his manager accommodated Cummins' religion by permitting him not to work Saturdays and having one of his fellow supervisors cover for him. But in the summer vacation period of 1971, when the substituting supervisors were working extra overtime while Cummins was not, they complained to the plant manager. The plant manager insisted that Cummins start working Saturdays. Cummins refused and was dismissed in September 1971.[103] After following the EEOC administrative procedure, he filed his complaint of religious discrimination in district court. The court dismissed his complaint with the conclusory holding that Parker Seal had made a reasonable accommodation and that any further accommodation would create an undue hardship.[104]

Cummins appealed and the Sixth Circuit reversed, holding that Parker Seal had not complied with the reasonable accommodation requirement, and further, that the requirement did not violate the establishment clause.[105] The court summarized the record and concluded that the major reason for Cummins' discharge was "the considerable consternation and problems with the rest of [the Parker Seal] employees who were being required to work a full shift, [*i.e.*, Cummins'] fellow supervisors resented having to work on Saturdays while [he] was not forced to do so."[106]

On this basis, the appellate court found no substantial evidence to support the district court's conclusion that accommodating Cummins would have imposed an undue hardship.[107] The court conceded that employee discontent may constitute hardship if it is severe enough to produce "chaotic personnel problems" but held that Parker Seal had not met the burden of proving that the grumbling of Cummins' fellow supervisors met that stan-

102. 516 F.2d 544 (6th Cir. 1975), *aff'd per curiam by an equally divided court*, 429 U.S. 65 (1976).

103. *Id.* at 545, 547-50.

104. *Id.* at 545-46 (citing the district court's memorandum opinion).

105. 516 F.2d at 551, 554.

106. *Id.* at 550.

107. *Id.*

dard.[108] The court noted that undue hardship is "something greater than hardship" and further that it may be demonstrated by a showing of an "unreasonable strain" on the employer's business.[109] The court felt that Parker Seal had not made such a showing, however, since the company had "lived with the situation" for over a year before Cummins was fired.[110] Thus by not reasonably accommodating Cummins, Parker Seal was held to have violated Title VII's prohibition against religious discrimination.[111]

The court next grappled with the establishment clause issue. It applied the three-prong *Nyquist* establishment clause test: does the reasonable accommodation requirement have a secular purpose, does it have a primary effect that neither advances nor inhibits religion, and does it avoid excessive governmental entanglement with religion?[112] The majority held on the basis of this test that the reasonable accommodation requirement did not violate the First Amendment.[113] The court held that the secular purpose of the accommodation rule was to prevent discrimination in employment.[114] The primary effect of the accommodation requirement was held to be one that neither advances nor inhibits religion.[115] Rather, the practical effect was seen as preventing employers from enforcing work rules that have a discriminatory effect on certain religious workers. Therefore, the court reasoned, the rule operates to guarantee job security.[116] The court thought it significant that the accommodation requirement did not compel financial support for religious institutions.[117] The court did, however, admit that

108. *Id.*

109. *Id.* at 551.

110. *Id.* A "more active course of accommodation" could have been taken by Parker Seal by requiring Cummins to work longer hours on weekdays or Sundays, by reducing his salary to reflect his shorter workweek, or by ensuring that Cummins substituted for the other supervisors to even the hours out. *Id.* at 550.

111. *Id.* at 551.

112. *Id.* at 551-52.

113. *Id.* at 551-54.

114. *Id.* at 552. In particular, the court viewed the rule as "designed to put teeth in the existing prohibition of religious discrimination." *Id. But see* Yott v. North Am. Rockwell Corp., 428 F. Supp. 763, 766 (C.D. Cal. 1977). The court contrasted such a purpose with the one that had voided an anti-evolution statute in Epperson v. Arkansas, 393 U.S. 97 (1968). The impermissible purpose in *Epperson*, the only case to invalidate a statute solely on basis of purpose, was suppression of a theory that conflicted with the religious views of some people. *Id.* at 107-09. The court also drew support from Gillette v. United States, 401 U.S. 437 (1971), which had upheld against an establishment clause challenge the conscientious objector (CO) draft exemption by finding that protecting conscientious action is a valid secular purpose.

115. 516 F.2d at 553.

116. *Id.* This view is shared by Justice Marshall and Justice Brennan. "The purpose and primary effect of requiring [exemptions from work rules] is the wholly secular one of securing equal economic opportunity to members of minority religions." Trans World Airlines, Inc. v. Hardison, 97 S. Ct. 2264, 2280 n.4 (1977) (Marshall, J., dissenting) (joined by Justice Brennan).

117. The court cited Lemon v. Kurtzman, 403 U.S. 602 (1971), and Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970), as indicating that such support is one of the chief evils to be thwarted by the establishment clause. 516 F.2d at 553.

some religious institutions might receive an incidental benefit, such as a fuller collection plate, by application of the reasonable accommodation rule.[118] The majority then pointed out that the Court in *Nyquist* had emphasized that "a law is not necessarily unconstitutional merely because it confers incidental or indirect benefits upon religious institutions."[119] Thus, the primary effect of the accommodation rule was viewed as being to "inhibit discrimination, not to advance religion."[120] The court then applied the final prong of *Nyquist* and found that the accommodation requirement does not foster excessive governmental entanglement with religion.[121] There is no governmental surveillance in the sense that had been the fatal defect in *Lemon v. Kurtzman*,[122] the only contact between government and religion being a determination in the labor relations context of whether a reasonable accommodation had been made.[123] The court also thought that any issue of the validity of the employee's religious practices would not be seriously disputed and even if the issue *did* arise there would be no more entanglement than that which occurs in determining whether a church qualifies for a tax exemption.[124]

The court concluded with a comparison to the Sunday closing law cases[125] in which the Supreme Court had held that laws requiring many businesses to close on Sundays did not violate the establishment clause.[126] The *Cummins* court noted that Sunday closing laws *also* accommodated the religious needs of much of the Christian population. Therefore, the court felt

118. 516 F.2d at 553.

119. *Id.* (citing Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 771-72 (1973)).

120. *Id.*

121. *Id.* at 553-54.

122. 403 U.S. 602 (1971); *cf.* Meek v. Pittenger, 421 U.S. 349 (1975) (loans of instructional materials and equipment; auxiliary services).

123. 516 F.2d at 553-54.

124. *Id.* at 554.

125. McGowan v. Maryland, 366 U.S. 420 (1961); Two Guys v. McGinley, 366 U.S. 582 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); Gallagher v. Crown Kosher Super Market, 366 U.S. 617 (1961).

126. The Supreme Court conceded the religious origins of the laws, *see* McGowan v. Maryland, 366 U.S. 420, 431-34, 446-49 (1961), but held that the present purpose and effect of the closing laws were to provide a uniform day of rest and recreation for everyone, rather than to aid religion. "After engaging in the close scrutiny demanded of us . . . , we accept the State Supreme Court's determination that the statutes' present purpose and effect is not to aid religion but to set aside a day of rest and recreation." *Id.* at 449. The Court's "close scrutiny," however, was focused almost exclusively on the purpose of the statute, and no real thought was directed to whether there might be any religious effect. *Id.* at 445-49. Furthermore, regarding the state supreme court's determination, it should be noted that the state court confined its establishment clause analysis to a single sentence. McGowan v. State, 220 Md. 117, 122-23, 151 A.2d 156, 159 (1959), *aff'd sub nom.* McGowan v. Maryland, 366 U.S. 420 (1961). Professor Schwarz has commented that Chief Justice Warren's reasoning "all but ignores the pronounced religious effect [of the laws]." Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L.J. 692, 703 (1968).

that those cases supported its ruling on the reasonable accommodation requirement.[127]

Judge Celebrezze's dissent took a different approach than that taken by the majority opinion.[128] The majority adhered to a straightforward application of the three-prong test; the dissent also applied the three-prong test, but it cloaked its opinion in the theoretical aspects of the establishment clause.[129] The heart of Judge Celebrezze's argument was that the constitutionally mandated stance of neutrality toward religion was violated by a rule that gives preferences to certain employees solely on the basis of their religious beliefs.[130] Applying the *Nyquist* test, Judge Celebrezze first found that the non-secular purpose of the rule was to "protect and advance particular religions."[131] He then contended that the accommodation requirement has a non-neutral primary effect in that it discriminates both between religion and non-religion and among religions.[132] As for the entanglement prong, he noted that resolution of religious employees' complaints would necessitate inquiry into both the sincerity of the employees' convictions and the validity of their religious beliefs.[133]

Parker Seal appealed to the Supreme Court and certiorari was granted in March 1976.[134] This opportunity for a definitive statutory interpretation and for a resolution of the establishment clause issue was, however, lost due to the Court's equally divided two-sentence *per curiam* affirmance of *Cummins*.[135]

127. 516 F.2d at 554.

128. The dissent was directed entirely toward the establishment clause issue; no views were expressed on the factual issue.

129. See notes 64-95 and accompanying text *supra*.

130. This argument is apparently based on Judge Weick's suggestion in *Dewey* that requiring accommodation would raise "grave constitutional questions of violation of the Establishment Clause" since the government must be neutral in its relations with religious believers and non-believers. Dewey v. Reynolds Metals Co., 429 F.2d 324, 334-35 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971).

131. 516 F.2d at 558 (Celebrezze, J., dissenting). He perceived the purposes relied on by the majority as preferential treatment on the basis of religion, and rejected them since such treatment is not *required* by the free exercise clause. *Id.* at 556-57.

132. *Id.* at 558. He thought that the rule's "sole . . . impact . . . is to aid particular persons on the basis of their religion." *Id.* at 559.

133. *Id.* Judge Celebrezze also commented that striking down the "accommodation rule would not change the law requiring employers to disregard religion in employment decisions." *Id.* He pointed out that a Saturday Sabbatarian would *still* have a claim of religious discrimination if he could prove that a "similarly situated employee" was *not* required to work on Saturdays. *Id.* at 559-60. If by "similarly situated employee" Judge Celebrezze meant one in the same job category as the Sabbatarian, he missed the real dilemma—most such employees would not have the same religious objection to working Saturdays.

134. Parker Seal Co. v. Cummins, 424 U.S. 942 (1976) (mem.).

135. Parker Seal Co. v. Cummins, 429 U.S. 65 (1976) (Stevens, J., did not participate).

B. *Trans World Airlines, Inc. v. Hardison*

A second chance for the Court to decide the statutory and constitutional issues pertaining to the reasonable accommodation requirement was presented when the Court granted certiorari in *Trans World Airlines, Inc. v. Hardison*[136] two weeks after it had decided *Cummins*.[137] This time the Court finally reached the statutory issue, but once again it left the establishment clause issue unsettled.

1. *Facts of the Case*

Larry Hardison started work in 1967 as a stores clerk in Trans World Airlines' Kansas City airport maintenance and overhaul facility. The essential role of Hardison's department required it to operate twenty-four hours a day throughout the year. TWA had a collective bargaining agreement with the International Association of Machinists and Aerospace Workers (IAM or the union), and Hardison was subject to a seniority system that was part of the agreement.[138] In 1968 Hardison became interested in the World Wide Church of God, and began to observe the Saturday Sabbath. This practice at first presented no serious problem because he had sufficient seniority to adjust his schedule to avoid having to work Saturdays.

Hardison subsequently transferred to another department and thereby dropped to second from the bottom on its seniority list. When another employee went on vacation, Hardison was asked to work on Saturdays. Although TWA was willing to allow the union to seek a change of shifts for Hardison, the union would not consent to a violation of the seniority provision of the collective bargaining agreement. Hardison volunteered to work a four-day week, but his offer was rejected by TWA. To implement this plan would have required TWA either to leave Hardison's position empty, to fill it with a supervisor or an employee from another area, or to pay premium wages to someone not already assigned Saturday work. Hardison did not report for work on Saturdays and was fired on grounds of insubordination. After exhausting his administrative remedies, Hardison brought an action for injunctive relief in the federal district court for the

136. 97 S. Ct. 2264 (1977).

137. The petitions for certiorari of both TWA and the International Association of Machinists and Aerospace Workers, Hardison's employer and union, respectively, were granted on November 15, 1976. 429 U.S. 958 (1976).

138. The agreement provides in pertinent part: "The principle of seniority shall apply in the application of this Agreement in all reductions or increases of force, preference of shift assignment, vacation period selection, in bidding for vacancies or new jobs, and in all promotions, demotions, or transfers involving classifications covered by this Agreement.

"Except as hereafter provided in this paragraph, seniority shall apply in selection of shifts and days off within a classification within a department." 97 S. Ct. at 2268 n.1 (quoting the agreement). The employees with the most seniority had first choice for shift assignments and the most junior employees were required to take shifts for which there were no volunteers. *Id.* at 2268.

western district of Missouri, claiming his discharge was religious discrimination in violation of Title VII.[139]

2. *The Lower Courts*

The district court held that neither TWA nor the union had violated Title VII.[140] The court first held that the union, as well as the employer, had a duty to accommodate[141] but that the union's only way of accommodating, waiver of the seniority rules, would impose an undue hardship on the union.[142] Turning to TWA's responsibility, the court applied the *Nyquist* three-prong test and concluded that the accommodation requirement did not violate the establishment clause.[143] The court then noted that TWA had accommodated Hardison by meeting with him and agreeing to let the union look for substitutes.[144] The court finally held that any additional accommodation would have been an undue hardship on TWA.[145]

On appeal the Eighth Circuit reversed the district court's holding that TWA had not violated Title VII.[146] The circuit court found that the three possible accommodations rejected by TWA would not have been an undue hardship. Consistent with the collective bargaining agreement, TWA could have permitted Hardison to work a four-day week and have filled his position with another employee already on duty. The court rejected TWA's

139. This statement of facts is taken from the Supreme Court's opinion. *Id.* at 2268-69.

140. Hardison v. Trans World Airlines, 375 F. Supp. 877 (W.D. Mo. 1974), *rev'd in part and aff'd in part*, 527 F.2d 33 (8th Cir. 1975), *rev'd*, 97 S. Ct. 2264 (1977).

141. *Id.* at 881-82. The issue was raised because the EEOC guideline only gave the *employer* the obligation to accommodate. 29 C.F.R. § 1605.1(b) (1976). The court noted that another portion of Title VII, drafted only in terms of the employer, 42 U.S.C. § 2000e-2(h) (Supp. V 1975), had been interpreted to apply to unions. *See, e.g.*, Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

142. The rationale was that "[t]he hardship on employees [due to shifting them out of seniority] should certainly be considered hardship on the conduct of business, for the management of employees . . . is the chief concern [of a labor union]." 375 F. Supp. at 883. The court drew additional support from the portion of Title VII that permits bona fide seniority systems. "[I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system . . . ." 42 U.S.C. § 2000e-2(h) (Supp. V 1975).

For a related decision in which the reviewing court split one way on whether the union had a duty to accommodate an employee who objected to paying union dues and a different way on whether the union could invoke the undue hardship defense, see Cooper v. General Dynamics, 533 F.2d 163 (5th Cir. 1976), *cert. denied*, 97 S. Ct. 2972 (1977).

143. The court found the purpose and effect of the accommodation rule to be one of guaranteeing job security by preventing employers from implementing rules that discriminate in effect and intent. The court perceived the only government involvement as a judgment by courts or the EEOC concerning whether an accommodation was made. 375 F. Supp. at 887-88.

144. *Id.* at 888-89. The record, however, showed that TWA took no part in this search and that the union itself made no real effort. *Id.* at 888.

145. *Id.* at 889-91.

146. Hardison v. Trans World Airlines, Inc., 527 F.2d 33 (8th Cir. 1975), *rev'd*, 97 S. Ct. 2264 (1977).

argument that this would create an undue hardship by causing another area to be short.[147] Alternatively, a substitute could easily have been found for Hardison.[148] TWA contended that since it would be necessary to pay that employee overtime, this possibility was also an undue hardship. The court did not agree: "The regulation does not preclude some cost to the employer any more than it precludes some degree of inconvenience to effect a reasonable accommodation."[149] Although apparently willing to accept the overtime defense if an *undue* hardship could be shown, the court held that TWA had not met its burden of proof on the issue.[150] As for the possibility of varying the seniority system to permit Hardison to exchange shifts, the court came to no definite conclusion on whether that would be an undue hardship, since TWA had not sought a variance.[151] The court did observe that the Supreme Court had not yet settled the proper relationship between the accommodation rule and bona fide seniority systems.[152] The union's liability was not challenged on appeal and the court therefore did not rule on the substantive correctness of the district court's conclusions as to that issue.[153] As dicta, however, the court agreed that in a proper case the union would also have a duty to accommodate.[154]

3. *The Supreme Court*

a. The majority opinion

The Supreme Court reversed the judgment of the court of appeals against TWA. It therefore did not need to consider the establishment clause issue or the issue of union liability.[155] The Court framed the issue on appeal as that of determining the extent of an employer's duty to accommodate a Sabbatarian employee.[156]

Justice White, writing for the Court, first emphasized that Title VII prohibits discrimination in employment against majorities as well as

147. *Id.* at 39-40. The court noted that the EEOC had rejected similar arguments. *See* [1973] EEOC Dec. (CCH) ¶ 6120 (1970) (EEOC Dec. 70-580) (another employee would have to work a double shift).

148. TWA could either have asked another employee to do a double shift or have asked one of the two hundred workers who were qualified for the job to come in. 527 F.2d at 40.

149. *Id.*

150. *Id.* at 40-41.

151. *Id.* at 42.

152. *Id.* at 41. Other courts and the EEOC have required some flexibility in collective bargaining agreements in order to accommodate. *See* Ward v. Allegheny Ludlum Steel Corp., 397 F. Supp. 375 (W.D. Pa. 1975); Drum v. Ware, 7 Empl. Prac. Dec. ¶ 9244 (W.D.N.C. 1974); [1973] EEOC Dec. (CCH) ¶ 6367 (1973) (EEOC Dec. 72-2066); *Employer's Duty*, *supra* note 2, at 813-16. *But see* Dawson v. Mizell, 325 F. Supp. 511 (E.D. Va 1971). For an appeal to union arbitrators to be sensitive to the reasonable accommodation requirement, see Wolkinson, *Title VII and the Religious Employee: The Neglected Duty of Accommodation*, 30 ARB. J. (N.S.) 89 (1975).

153. 527 F.2d at 43. See notes 141-42 and accompanying text *supra*.

154. *Id.* at 42.

155. Trans World Airlines, Inc. v. Hardison, 97 S. Ct. 2264, 2270 & n.5 (1977).

156. *Id.* at 2268.

minorities.[157] He reviewed the legislative history and concluded that while the employer clearly has a statutory obligation to make a reasonable accommodation, the extent of the obligation had never been precisely defined by Congress or the EEOC.[158] Turning to the merits, Justice White accepted the district court's view that TWA's attempts to find a workable solution for Hardison's problems were the only accommodations reasonably expected within the constraints of the seniority system.[159] The Court held that, absent a "clear and express indication from Congress," TWA was not required to carve out an exception to its seniority system to accommodate Hardison's religious practices.[160] A significant factor in this ruling was that collective bargaining is at "the core of our national labor policy."[161] Justice White reasoned that Title VII did not contemplate the unequal treatment involved in denying another employee his shift preference, "at least in part because he did not adhere to a religion that observed the Saturday Sabbath,"[162] that would be the inevitable consequence if TWA arranged an involuntary exchange of shifts in order to give Hardison his Saturdays off.[163]

Justice White drew support for his conclusion from the Title VII provision stating that application of different privileges of employment pursuant to a "bona fide" seniority system is not unlawful if there is no intent to discriminate.[164] He incorporated the Court's finding in *International Brotherhood of Teamsters v. United States*[165] that the legislative history of Title VII, in addition to the text of the statute, makes "clear that the routine application of a bona fide seniority system [is not] unlawful under Title VII."[166] Therefore, he continued, the operation of a seniority system that has no discriminatory purpose is not an unlawful employment practice[167] even though it has some discriminatory consequences.[168] Justice

157. *Id.* at 2270. He cited McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976), which held that Title VII prohibited discriminatory firing of white employees who, along with a black employee, allegedly misappropriated goods from their employer. *Id.* at 280.

158. 97 S. Ct. at 2270-72. He also dismissed much of the reasonable accommodation case law as providing but little guidance. *Id.* at 2272 n.10.

159. *Id.* at 2273. See note 144 and accompanying text *supra*. The Court also commented that the seniority system itself was a "significant accommodation" to the religious, as well as secular, needs of TWA's employees. *Id.* at 2274.

160. *Id.* at 2274.

161. *Id.*

162. *Id.* at 2275.

163. *Id.* at 2274-75.

164. 42 U.S.C. § 2000e-2(h) (Supp. V 1975). See note 142 *supra* for the pertinent text of the statute.

165. 97 S. Ct. 1843 (1977).

166. 97 S. Ct. at 2275 (quoting International Bhd. of Teamsters v. United States, 97 S. Ct. 1843, 1863 (1977)). The Court supported its point by citing United Air Lines, Inc. v. Evans, 97 S. Ct. 1885 (1977) (no retroactive seniority for stewardess rehired after she was fired when married).

167. A missing link in the Court's analytical chain is a finding that TWA's seniority system was bona fide. The *Teamsters* case suggests that a seniority system is "bona fide" if it is currently applied equally to all employees. *See* 97 S. Ct. at 1865. Justice White's reference to

White finished this portion of his opinion by reiterating the district court's finding that TWA's system was not intended to discriminate against religion.[169]

Justice White next considered whether allowing Hardison to work a four-day week and either replacing him with other personnel or paying premium wages to a substitute would be an undue hardship. He thought both such options "would involve costs to TWA, either in the form of lost efficiency in other jobs or as higher wages."[170] He then made the following statement: "To require TWA to bear more than a *de minimus* cost in order

Teamsters in *Hardison* will probably be read as a tacit assumption that TWA's system was bona fide.

In *Teamsters*, the Court drastically restricted the scope of Title VII regarding seniority systems. The Court rejected the government's argument that a seniority system that perpetuates past intentional discrimination can never be "bona fide." 97 S. Ct. at 1860-64. As for systems that perpetuate the effects of discrimination *prior* to the effective date of Title VII, the Court bluntly held that they are not unlawful even though they do not grant retroactive seniority. *Id.* at 1861-64. Regarding victims of discrimination *subsequent* to Title VII's effective date, the Court pointed out that Franks v. Bowman Transp. Co., 424 U.S. 747 (1976), permitted those individuals to obtain retroactive seniority without attacking the legality of the seniority system itself. 97 S. Ct. at 1860. The Court then directly addressed the legality of a seniority system that perpetuates post-Act discrimination and relied on United Air Lines, Inc. v. Evans, 97 S. Ct. 1885 (1977), which held that such a system is not unlawful if the employee has not filed a timely charge with the EEOC, as being "largely dispositive of [the] issue." 97 S. Ct. at 1861 n.30. The Court probably relied on the following language from *Evans*: "A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed." United Air Lines, Inc. v. Evans, 97 S. Ct. 1885, 1889 (1977). The *Teamsters* Court then emphasized that "[s]ection 703(h) [42 U.S.C. § 2000e-2(h) (Supp. V 1975)] on its face immunizes all bona fide seniority systems, and does not distinguish between the perpetuation of pre- and post-Act discrimination." 97 S. Ct. at 1861 n.30. In sum, a seniority system that is currently bona fide, *i.e.*, neutral, can not be held unlawful, regardless of whether it perpetuates earlier discrimination. This position of the Court in effect overrules a long line of lower court decisions. *See id.* at 1860 n.28. As for a grant of retroactive seniority, it can only be given to victims of the continuing impact of post-Act discrimination. Victims of pre-Act discrimination are accorded no relief.

168. 97 S. Ct. at 2275. The care taken to emphasize that the mere presence of discriminatory consequences is not sufficient to invalidate a seniority system is apparently an attempt to distinguish the rule of Griggs v. Duke Power Co., 401 U.S. 424 (1971), which had held a neutral employment policy that had a discriminatory effect violated Title VII. *Id.* at 430-31. In *Teamsters*, however, the Court pointed out that although the rationale of *Griggs* might serve to invalidate a seniority system having a discriminatory effect, the bona fide seniority system statute in effect immunizes seniority systems from the rule of *Griggs*. *See* 97 S. Ct. at 1860-62.

169. 97 S. Ct. at 2276. The Court recognized that Franks v. Bowman Transp. Co., 424 U.S. 747 (1976), in its award of retroactive seniority to victims of post-Act discrimination, permitted the modification of employee expectations arising out of seniority systems, and further recognized that *Franks'* interpretation of the reasonable accommodation requirement was aimed at *preventing* the alteration of other employees' seniority expectations. The Court distinguished *Franks*, however, by emphasizing that retroactive seniority was awarded only to remedy past discrimination and that past discrimination was not evident in *Hardison*. 97 S. Ct. at 2274 n.12, 2276 n.13.

170. 97 S. Ct. at 2276-77.

to give Hardison Saturdays off is an undue hardship."[171] The reason tendered for such a rule was that it would be "unequal treatment of employees on the basis of their religion" to incur extra costs for Hardison.[172] The Court noted that such costs would not likewise be expended to give other employees a requested day off. As a result, "the privilege of having Saturdays off would be allocated according to religious beliefs."[173] Recapitulating his theme, Justice White closed with the observation that Title VII would not be interpreted to require an employer to discriminate against some employees in order to permit others to observe their Sabbath.[174]

b. The dissent

Justice Marshall, joined by Justice Brennan, was highly critical of the majority's conclusions. Justice Marshall read the majority as essentially holding that

> although the EEOC regulations and the Act state that an employer must make reasonable adjustments in his work demands to take account of religious observances, [they] don't really mean what they say. An employer, the Court concludes, need not grant even the most minor special privilege to religious observers to enable them to follow their faith.[175]

This result troubled Justice Marshall as a matter of social policy because it compelled some workers to make the "cruel choice of surrendering their religion or their job."[176] Furthermore, as a matter of law, he criticized the majority for adopting the position expressly rejected by Congress when it passed the reasonable accommodation amendment in 1972.[177]

Justice Marshall noted that the Court's opinion characterized each of the possible accommodations as involving unequal treatment in favor of the religious employee. His response was that accommodation should not be rejected simply because of preferential treatment. He pointed out that the reasonable accommodation rule comes into play only when an employee seeks an exemption from a neutral work rule with which he could comply only by compromising his religious beliefs.[178] To grant an exemption will, by definition, "always result in a privilege being 'allocated according to religious beliefs.' "[179]

The dissent attributed much more significance to the legislative history of the 1972 amendment than did the majority. Specifically, Justice Marshall

171. *Id.* at 2277.
172. *Id.*
173. *Id.* Justice White also commented that incurring extra costs would effectively require TWA to "finance an additional Saturday" off for a Sabbath-keeping employee. *Id.*
174. *Id.*
175. *Id.* at 2278 (Marshall, J., dissenting).
176. *Id.*
177. *Id.* See notes 44-47 and accompanying text *supra*.
178. *Id.*
179. *Id.* (quoting the majority, *id.* at 2277).

argued that the amendment was passed "to make clear that Title VII requires religious accommodation, *even though unequal treatment would result*."[180] He then observed that the Court, by rejecting any accommodation requiring preferential treatment, followed the *Dewey* decision "in direct contravention of Congressional intent."[181]

Addressing the establishment clause issue, Justice Marshall found that "the constitutionality of the statute is not placed in serious doubt simply because it sometimes requires an exemption from a work rule."[182] Referring to a substantial body of free exercise case law, he made the following observation: "If the State does not establish religion over nonreligion by excusing religious practitioners from obligations owed the State, I do not see how the State can be said to establish religion by requiring employers to do the same with respect to obligations owed the employer."[183]

Upon the foregoing premises, Justice Marshall proceeded to attack the specific points of the majority opinion. He disagreed with the idea that requiring TWA to do anything more than hold meetings with Hardison and permit the union steward to look for volunteers for Hardison's shift would constitute an undue hardship.[184] In his view, the record did not support the Court's finding that either paying overtime or not securing a replacement would be more than a *de minimus* cost.[185] Furthermore, he disagreed with the majority's interpretation of "undue hardship" as being anything "more than *de minimus* cost."[186] He also took issue with the Court's flat statement that there were no volunteers to relieve Hardison.[187] He then discussed two other options open to TWA that would not have violated other employees' seniority rights, and would not have been an undue hardship.[188] In sum, Justice Marshall's dissent can be characterized as a more compassionate interpretation of the reasonable accommodation rule.

180. *Id.* at 2279 (emphasis added) (interpreting the intent of Senator Randolph).

181. *Id.* Justice Marshall referred to language in the Sixth Circuit's opinion in *Dewey* that had talked of accommodations as discrimination against other employees and amounting to unequal administration of the collective bargaining agreement. *Id.* (quoting Dewey v. Reynolds Metal Co., 429 F.2d 324, 330 (6th Cir. 1970), *aff'd per curiam by an equally divided court*, 402 U.S. 689 (1971)).

182. *Id.* at 2280. He carefully excluded any constitutional questions that might arise if the statute were construed to require an employer to incur substantial costs to accommodate. *Id.* at 2279-80, 2281 n.6. The reluctance to venture into this issue speaks an awareness that it would bring the aid-to-parochial-education decisions, see note 57 *supra*, to a greater relevance in determining the constitutionality of the reasonable accommodation rule.

183. 97 S. Ct. at 2280.

184. *Id.*

185. *Id.* at 2281 n.6. For example, it had been stipulated that the additional overtime would cost only $150 for the three-month period before Hardison could transfer back to his old department. *Id.*

186. *Id.*

187. *Id.* at 2281-82.

188. *Id.* at 2282-83 & nn.11-12. TWA could either have paid premium wages to a substitute and passed the cost on to Hardison or it could have transferred Hardison back to his old department. *Id.* at 2282.

C. Statutory Interpretation

Two key statutory issues are to be considered. The varying constructions of "undue hardship" by the Sixth Circuit in *Cummins* and by the Supreme Court in *Hardison* are first noted; the discussion then turns to the influence of the seniority system on the result in *Hardison*.

The different interpretations of "undue hardship" in the two cases provide a sharp contrast. The Sixth Circuit in *Cummins* showed a deference for employees and set forth a strenuous measure for employers to meet. With respect to the employees' complaints, the court indicated that evidence of "chaotic personnel problems" would be necessary to establish undue hardship.[189] Stemming from dicta in *Dewey*,[190] approved by the EEOC[191] and adhered to by the Sixth Circuit subsequent to *Cummins*,[192] this exacting standard has never been met.[193] And now that *Hardison* has been decided, with its interpretation of undue hardship as meaning anything greater than *de minimus* costs,[194] it is not likely that the Sixth Circuit's standard will ever again be followed. The *de minimus* cost interpretation cuts harshly against the employee, since an employer is apparently no longer required to expend much effort to accommodate. In effect, the Court has interpreted "undue" out of "undue hardship." Since the Court provided no guidelines by which an employer can judge his compliance with the law, the *de minimus* cost construction is vague and will require further adjudication before it is adequately defined. The two cases taken together evince a significant shift in emphasis from the rights of religious employees, as seen in *Cummins*, to the prerogatives of employers and the other employees who do not request an accommodation as maintained by the Supreme Court in *Hardison*.

The presence of the collective bargaining agreement's seniority system in *Hardison* presented to the Court a factual situation entirely different from the one presented by *Cummins*. It is perhaps the existence of this factor that

189. 516 F.2d at 550.

190. Dewey v. Reynolds Metal Co., 429 F.2d 324, 330 (6th Cir. 1970), *aff'd per curiam by an equally divided court*, 402 U.S. 689 (1971).

191. [1973] EEOC Dec. (CCH) ¶ 6310 (1971) (EEOC Dec. 72-0606); [1973] EEOC Dec. (CCH) ¶ 6206 (1970) (EEOC Dec. 71-463).

192. Draper v. United States Pipe & Foundry Co., 527 F.2d 515, 521 (6th Cir. 1975).

193. Regardless of the "chaotic personnel problems" standard, the *Cummins* court's disposition of employee grumbling as not being undue hardship seems correct. The evidence indicates that Parker Seal had "lived with" Cummins' Sabbatarian practices for a year because the other supervisors had not started complaining until the heavy vacation period of July 1971. 516 F.2d at 549, 551. Even then, the complaints were "mild and infrequent," *id.* at 550, and arguably would have ceased once the vacation period was over. Furthermore, the supervisors' complaints were generally *not* that they had to work extra Saturdays, but were merely that Cummins was not required to work any Saturdays. Hence, to the extent that the complaints were grounded on Cummins' Sabbath observances, the circuit court was warranted in finding the district court's conclusion that there was an undue hardship to be clearly erroneous—hardship was not imposed on the supervisors by the customary practice of supervising two departments.

194. See note 171 and accompanying text *supra*.

enabled the Court to break its 4-4 deadlock in *Cummins* and reach a 7-2 decision in *Hardison*. The Court in *Hardison*, however, failed adequately to justify its resolution of the conflict between reasonable accommodation and seniority systems. Although Justice White held that it would have been an undue hardship for TWA to have arranged a shift change for Hardison by breaching the seniority system,[195] he never clearly explained *how* it would have been an undue hardship on TWA's business. He instead relied upon the argument that there was no clear Congressional intent that such an exception to seniority systems be made.[196] This argument was supported by the Court's reference to the bona fide seniority system provision of Title VII.[197] While reliance on this provision may properly buttress the Court's conclusion that Title VII does not require TWA to make an exception to its seniority system, it does not indicate in what manner varying the seniority system would have imposed an undue hardship on TWA. The primary strength of the Court's analysis of the seniority issue may be that the dissent apparently did not disagree with the majority.[198] In short, the Court's opinion suggests extreme reluctance to infringe upon collective bargaining agreements.

The Court's analysis of the statutory issues is important to employers in ascertaining what they must do to accommodate workers and also to courts that must decide whether the employer has complied with the accommodation requirement. For the purposes of this note, however, the statutory interpretation by the *Hardison* Court is significant primarily as a foundation upon which to discuss establishment clause neutrality.

D. Two Approaches to Establishment Clause Neutrality

A discussion of the Sixth Circuit's opinion in *Cummins* and the Supreme Court's *Hardison* decision is useful to illustrate how the neutrality theory, as espoused by the *Cummins* dissent, may have affected the Court's decision in *Hardison*. The argument can then be made that the Court's application of this theory in *Hardison* was unnecessarily harsh and that the Court could have avoided such a result by using the precepts of a more benevolent neutrality. First, the *Cummins* majority's application of the *Nyquist* three-prong test is briefly discussed. The dissent is then examined to determine what form of "neutrality" it advocated and to show the extent to which it may have contributed to the result in *Hardison*. Since the Court in *Hardison* did not reach the issue of whether the accommodation rule violates the establishment clause, its view on that issue can only be inferred. By construing the statute so as to thwart any accusations that the government was being non-neutral in favor of religious employees, the Court avoided the constitutional issue. This treatment of the statutory issue permits the

195. 97 S. Ct. at 2273.

196. See note 160 and accompanying text *supra*.

197. See notes 164-68 and accompanying text *supra*.

198. Justice White noted the dissent's lack of disagreement. 97 S. Ct. at 2276 n.14.

inference that the Court adopted an interpretation of the establishment clause similar to that taken by the *Cummins* dissent. The section concludes with a criticism of this approach and a discussion of the possible application of a more benevolent form of neutrality to the reasonable accommodation requirement.

The only direct light on the establishment clause issue is shed by the Sixth Circuit's opinion in *Cummins*. The *Cummins* majority simply applied the *Nyquist* three-prong test: does the reasonable accommodation requirement have a secular purpose, does it have a primary effect that neither advances nor inhibits religion, and does it avoid excessive governmental entanglement with religion?[199] The majority held that the accommodation rule passed constitutional muster in all three respects.[200]

An important point in the *Cummins* majority's evaluation of the effect of the accommodation requirement is that any financial benefit that accrues to religious institutions is incidental to the requirement's primary effect of inhibiting religious discrimination.[201] As the court noted, lack of financial support to religious institutions is *very* significant. The "child benefit"[202] line of cases turned on a finding that financial aid flowed *not* to religious schools but to the students (or their parents).[203] In other cases, forms of financial aid that were ostensibly given to parents of parochial school children were held invalid because the Court understood the aid as actually going to the religious institutions.[204] The lesson to be drawn is that there is a constitutional difference under the establishment clause when the government helps a religious individual as opposed to when it aids a religious organization.[205] The only arguably "excessive entanglement" revealed by *Cummins* is possible inquiry into the validity or sincerity of the individual's religious beliefs. As the majority observed, most cases do not dispute the beliefs' validity.[206] And, under existing precedent,[207] inquiry into the *validity* of the religious belief is not approved, the only question being the

199. 516 F.2d at 551-52.

200. *Id.* at 551-54. See notes 113-24 and accompanying text *supra*.

201. 516 F.2d at 553.

202. See note 65 *supra*.

203. Meek v. Pittenger, 421 U.S. 349 (1975) (textbooks); Everson v. Board of Educ., 330 U.S. 1 (1947) (transportation).

204. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 780-85 (1973) (tuition grants, income tax benefits); Sloan v. Lemon, 413 U.S. 825, 830-32 (1973) (tuition reimbursements).

205. *See* Jordan v. North Carolina Nat'l Bank, 399 F. Supp. 172, 180 (W.D.N.C. 1975).

206. *But see* Cooper v. General Dynamics, 378 F. Supp. 1258, 1262 (N.D. Tex. 1974), *rev'd*, 533 F.2d 163 (5th Cir. 1976), *cert. denied*, 97 S. Ct. 2972 (1977) (questions validity of refusal to join union).

207. The test for "religion" as developed in the conscientious objector cases requires "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the draft exemption." United States v. Seeger, 380 U.S. 163, 176 (1965); *accord*, Welsh v. United States, 398 U.S. 333, 339 (1970). *See* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 185-87 (student ed. 1976).

sincerity with which the beliefs are held.[208] Although some cases have noted that an employee is sincere in his beliefs,[209] there has seldom been any serious discussion of this issue[210] and it certainly has not been a greater problem than the non-fatal inquiry into a conscientious objector's sincerity.[211]

The *Cummins* majority applied the *Nyquist* test without referring to any of the establishment clause theories. The dissent also used the *Nyquist* test, but it placed primary emphasis on the neutrality principle as "the core of the First Amendment."[212] The maxim that government must be neutral toward religion was often repeated, but the dissent did not specify which type of neutrality it was referring to. It appears, however, that it subscribed to an inflexible form of neutrality.

There is evidence that the dissent accepted Professor Kurland's strict neutrality theory.[213] The argument that the rule is non-neutral because it gives preferences to religious workers corresponds to Professor Kurland's idea that no classification should be made on the basis of religion. The dissent also relied on the absolute neutrality theory developed in *Abington School District v. Schempp*.[214] Such reliance is seen in part by the use of the *Schempp* secular purpose and effect test, which is now part of the *Nyquist* three-prong test. But there are more telling clues of the absoluteness of the neutrality evinced by the opinion. The dissent first acknowledged that Congress thought the accommodation requirement promoted the free exercise of religion[215] and then the dissent disclaimed such thinking as a proper ground for legislation.[216] Also, the dissent conceded that the free exercise clause prevents government from penalizing religion,[217] but it was adamant against permitting Congress sufficient discretion to legislate in favor of free exercise values.

By its failure to address the establishment clause issue in *Hardison*, the Supreme Court left the question undecided. But the Court's treatment of the

208. Cooper v. General Dynamics, 533 F.2d 163, 166 n.4 (5th Cir. 1976), *cert. denied*, 97 S. Ct. 2972 (1977) (criticizing the district court's evaluation of validity).

209. *See, e.g.*, Johnson v. United States Postal Serv., 497 F.2d 128, 129 (5th Cir. 1974); Reid v. Memphis Publishing Co., 468 F.2d 346, 348 (6th Cir. 1972); Riley v. Bendix Corp., 464 F.2d 1113, 1114 (5th Cir. 1972).

210. *But see* Hansard v. Johns-Manville Products Corp., 5 FEP Cases 707 (E.D. Tex. 1973).

211. The situation that has been referred to as stretching the question of sincerity and validity to its limit, *e.g.*, an employee who sincerely believes going bowling is central to his existence, has not arisen. *See* Edwards & Kaplan, *supra* note 2, at 618. Fear of a situation of this sort should not by itself invoke accusations of excessive entanglement.

212. 516 F.2d at 558.

213. *See id.* at 555 n.1 (citing Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 96 (1962)). See note 85 *supra*.

214. 374 U.S. 203 (1963). See notes 70-73 and accompanying text *supra*.

215. 516 F.2d at 556.

216. *See id.* at 556-58.

217. *Id.* at 557 & n.5.

statutory issue does cast some illumination on how the majority of the Court may have viewed the constitutional question. The primary rationale for Justice White's rejection of the possible accommodations suggested by the Court of Appeals was that each would require unequal treatment for certain employees on the basis of their religion.[218] Use of this reasoning enabled the Court to forestall any charge that the reasonable accommodation requirement places the government in the position of being non-neutral in favor of religion. It is suggested that the Court employed such a tactic because it understood establishment clause neutrality as having an inflexible nature resembling in many ways that which was advocated by Judge Celebrezze in his *Cummins* dissent.

The *Hardison* decision is a severe blow to many workers who desire to practice their religion without being fired. The decision subordinated the right of these workers to the dictates of a secular collective bargaining agreement. To the extent that these results grew out of the Court's inflexible view of the neutrality theory, it is precisely such use of the neutrality doctrine against which Justice Goldberg warned in his *Schempp* concurrence:

> [U]ntutored devotion to the concept of neutrality can lead to . . . results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are . . . not compelled by the Constitution . . . .[219]

Courts could maintain some semblance of neutrality and yet accommodate religious employees so as not to be hostile to religion by applying the benevolent neutrality of *Walz v. Tax Commission*,[220] which has been termed a "tutored" neutrality designed to set at ease Justice Goldberg's fears.[221]

Benevolent neutrality is rooted in Justice Douglas' majority opinion in *Zorach v. Clauson*.[222] Under this theory, the concern for being absolutely

218. See notes 162-63, 172-73 and accompanying text *supra*.

219. Abington School Dist. v. Schempp, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring).

220. 397 U.S. 664 (1970). See note 80 and accompanying text *supra*.

221. Katz, *supra* note 60, at 104.

222. 343 U.S. 306 (1952). In *Zorach*, the Court upheld the second released-time-for-religious-education case that it had considered. Perhaps in large part to counteract the controversial trend signaled by Justice Black's absolutist no-aid-to-religion theory, *see* Katz, *Freedom of Religion and State Neutrality*, 20 U. CHI. L. REV. 426, 426-28 (1953), Justice Douglas penned these famous lines: "We are a religious people whose institutions presuppose a Supreme Being . . . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs." Zorach v. Clauson, 343 U.S. 306, 313-14 (1952); *accord*, Meek v. Pittenger, 421 U.S. 349, 395-96 (1975) (separate opinion of Rehnquist, J.). *See* Kauper, *supra* note 60, at 199; 62 VA. L. REV. 237, 247 n.65.

neutral need not be compelling. "The constitutional obligation of 'neutrality' . . . is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation."[223] In contrast to absolute neutrality, which permits a court to make an exception from laws for religious reasons only if *not* to make any exception would violate the free exercise clause,[224] benevolent neutrality allows religious accommodations *regardless* of whether the free exercise clause would otherwise be violated.[225] This aspect of benevolent neutrality was perceived, though not named, by Justice Marshall in his *Hardison* dissent when he noted that the "Court has repeatedly found no Establishment Clause problems in exempting religious observers from state-imposed duties . . . , *even when the exemption was in no way compelled by the Free Exercise Clause* . . . ."[226]

A characterization of benevolent neutrality would be one of a broad area between "what is prohibited by the establishment clause and what is required in the name of free exercise" within which the legislature has the flexibility to act in order to favor the policy of free exercise.[227] This concept

223. Sherbert v. Verner, 374 U.S. 398, 422 (1963) (Harlan, J., dissenting). Justice Harlan later modified his view of neutrality so as to adopt the strict neutrality of Professor Kurland. *Compare* Welsh v. United States, 398 U.S 333, 358 n.9 (1970) (Harlan, J., concurring in result) *and* Walz v. Tax Comm'n, 397 U.S. 664, 696-97 (1970) (Harlan, J., separate opinion) *with* Kauper, *supra* note 60, at 199-200.

224. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963). Professor Katz observed that discussions of the religion clauses "often [suggest] that the provision in question is either required by the Free Exercise Clause or forbidden by the Establishment Clause." Katz, *supra* note 60, at 104. See note 73 *supra*.

225. *See, e.g.*, Welsh v. United States, 398 U.S. 333 (1970); Walz v. Tax Comm'n, 397 U.S. 664 (1970). *See* notes 227-30 and accompanying text *infra*.

226. 97 S. Ct. at 2280 (emphasis added) (citations omitted). To support the italicized phrase, Justice Marshall cited cases referring to three different types of religious exemptions: (1) exemptions from the draft for conscientious objectors, Gillette v. United States, 401 U.S. 437 (1971); Welsh v. United States, 398 U.S. 333 (1970); (2) exemptions consistent with Justice Harlan's argument that exceptions for Seventh-day Adventists from unemployment laws were *not required* by the free exercise clause although the state was *permitted* to create them, Sherbert v. Verner, 374 U.S. 398 (1963) (Harlan, J., dissenting); and (3) permissible exemptions from Sunday closing laws for Sabbatarians, Braunfeld v. Brown, 366 U.S. 599, 608 (1961); McGowan v. Maryland, 366 U.S. 420, 520 (1961).

227. Kauper, *supra* note 60, at 198; *see* Shetreet, *Exemptions and Privileges on Grounds of Religion and Conscience*, 62 KY. L.J. 377, 420 (1974); *cf.* King's Garden, Inc. v. FCC, 498 F.2d 51, 56 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974); Note, *Title VII's Exemption for Religious Institutions: Constitutionally Required or Constitutionally Forbidden?*, 9 LOY. L.A. L. REV. 124, 141-42 (1975). Thus, benevolent neutrality seems consistent with the thesis that religious liberty is the contral concern of the First Amendment religion clauses. *See generally* P. KAUPER, RELIGION AND THE CONSTITUTION (1964); Katz, *Freedom of Religion and State Neutrality*, 20 U. CHI. L. REV. 426 (1953).

The operation of benevolent neutrality is illustrated by Mr. Justice White's separate opinion in Welsh v. United States, 398 U.S. 333, 367 (1970). Dissenting from the majority's extension of the conscientious objector exemption to persons whose views about war were not necessarily due to religious training, he did not think that confining the exemption to those who

was described by Professor Katz: "The First Amendment leaves an area where religious freedom may (but need not) be extended, in the discretion of Congress and the state legislatures."[228] It is apparently this flexible concept of neutrality that Chief Justice Burger's phrase "there is room for play in the joints productive of a benevolent neutrality"[229] attempted to convey.[230]

If the *Hardison* Court had acknowledged the flexibility provided Congress by this more benevolent form of neutrality, it would not have found it necessary to construe the accommodation requirement narrowly to avoid the non-neutral establishment clause arguments. The Court could have adopted a more lenient interpretation of the accommodation rule and held that TWA had not demonstrated undue hardship. Since the Court would then have been required to reach the establishment clause issue, the principles of benevolent neutrality would also have bolstered a conclusion that the reasonable accommodation requirement does not conflict with the establishment clause.

Conclusion

The Supreme Court's narrow interpretation of the reasonable accommodation requirement in *Hardison* is an unfortunate blow to religious freedom. It remains to be seen, however, whether it is, as Justice Marshall portrays it, a "fatal blow" to all efforts to accommodate.[231] The Court's construction seems to leave reasonable accommodation more a rule of preference than a requirement. The message to employers now appears to be that if it is possible for them to accommodate their employees' religious practices, then they should do so. But apparently they are not expected to try very hard. Further litigation will be necessary to spell out the parameters of this reinterpreted reasonable accommodation doctrine. In particular, the Court's vaguely defined "*de minimus* cost" rule will have to be applied, as the undue hardship test has been, on a case-by-case basis. Assuredly, the establishment clause issue will again be presented. It is submitted that the courts should handle it by basing their analysis upon the following principle of benevolent neutrality: the reasonable accommodation requirement is

opposed war solely on the basis of religious training violated the establishment clause. He considered a possible free exercise basis and, recognizing that the Court had not yet *required* a draft exemption, he argued that "[i]t is very likely [the draft exemption] is a recognition by Congress of free exercise values and its view of desirable or required policy in implementing the Free Exercise Clause." *Id.* at 371.

228. W. KATZ, RELIGION AND AMERICAN CONSTITUTIONS 75 (1964).

229. Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970).

230. It is not surprising that neutrality is not always given absolute effect. The Court has long recognized that the protection of the free exercise clause is not absolute. Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) (the freedom to believe is absolute, the freedom to act is not); Reynolds v. United States, 98 U.S. 145 (1878) (Mormons cannot have more than one wife). Similarly, where absolute neutrality impedes private choice, one commentator has observed that it should give way to benevolent neutrality. Note, *Establishment Clause Analysis of Legislative and Administrative Aid to Religion*, 74 COLUM. L. REV. 1175, 1176 & n.7 (1974).

231. 97 S. Ct. at 2278.

legislation in a discretionary zone between the free exercise and establishment clauses to further the value of religious freedom. Such a principle would allow courts to be less absolutely neutral toward religion and accord them sufficient flexibility to require employers to accommodate with sensitivity the religious practices of their employees.