University of Dayton Law Review

Volume 5 | Number 1 Article 5

1980

Title VII of the Civil Rights Act of 1964—An Unconstitutional Attempt to Establish Religion

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TITLE VII OF THE CIVIL RIGHTS ACT OF 1964—AN UNCONSTITUTIONAL ATTEMPT TO ESTABLISH RELIGION

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I. INTRODUCTION

In 1964, the Congress of the United States took a bold step toward erasing discrimination in an important area. Title VII of the Civil Rights Act of 1964[1] sought to end employment discrimination and provide equal opportunity in the job market. Without this statute, unprotected minorities and women could not expect to become full participants in the economic society of the United States. The purpose of this legislation was admirable, but the legislation was flawed in one respect. In an attempt to solve various ills with one statute, Congress violated the first amendment of the Constitution. The prohibition of discrimination based on religion, as set out in Title VII, is contrary to the establishment clause and possibly the free exercise clause of that amendment. A detailed review of both the first amendment and Title VII will indicate the nature of the defect.[2]

II. THE RELIGION CLAUSES OF THE FIRST AMENDMENT

A. *The Test to Determine Whether a Statute Violates the Establishment Clause*

The first amendment to the Constitution contains, of course, two prohibitions against congressional action in the area of religion. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[3] These two prohibitions have received extensive attention by the United States Supreme Court in an attempt to determine their meanings when applied to actual legislation passed by Congress and the states.[4] Because the primary concern is

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1. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, *as amended by* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (current version at 42 U.S.C. §§ 2000e to 2000e-17 (1976)).

2. *See also* Edwards & Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII*, 69 MICH. L. REV. 599 (1971), for a discussion of this conflict as it existed prior to the 1972 amendment to Title VII, with attention focused on arbitration problems.

3. U.S. CONST. amend. I.

4. The prohibitions against legislation concerning religion have been extended to the states by the 14th amendment. Because the test applied against the states is iden-

that Title VII may violate the establishment clause, particular attention must be given to cases dealing with that part of the first amendment.

In dealing with the establishment clause, the Supreme Court has found it necessary to review the history of the first amendment and religious practices in the United States several times.[5] Based on the historical overview, the Court has come to some general conclusions concerning the relationship between government and religion. In *Everson v. Board of Education*,[6] the Court spoke of early actions taken by the State of Virginia. "The people there, as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group."[7] The Supreme Court went on to express what was then intended to be prohibited by the establishment clause. "The establishment of religion clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. *Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.*"[8]

The absolute language used in the *Everson* case has not been easy to follow. Even in the decision where that language was found, legislation was approved which reimbursed parents for the expense of transporting their children to church supported schools.[9] In attempting to promulgate a viable test, the Court stated the program under consideration would be valid if it was found to be "neutral." "Neutral" meant that the legislation would neither aid nor hinder religion.[10]

From the later 1940's into the 1960's the Supreme Court continued to use the test of "neutrality" in considering the constitutionality of legislation. Use of this test produced several important cases in the areas of school release time, prayer and bible reading in schools, and Sunday closing laws.[11]

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tical to the test used against Congress, first amendment cases involving a state or congressional enactment may reflect on the meaning of both the establishment and free exercise clauses. *See, e.g.*, School Dist. of Abington Township v. Schempp, 374 U.S. 203, 215-16 (1963); Everson v. Board of Educ., 330 U.S. 1, 15 (1947).

5. *See, e.g.*, Engel v. Vitale, 370 U.S. 421, 425-36 (1962); McGowan v. Maryland, 366 U.S. 420, 432-42 (1961); Everson v. Board of Educ., 330 U.S. 1, 8-15 (1947).

6. 330 U.S. 1 (1947).

7. *Id.* at 11.

8. *Id.* at 15 (emphasis added).

9. *Id.* at 18.

10. *Id.*

11. The Supreme Court also held that requiring a religious test in order to hold political office was an unconstitutional aid to religion. Torcaso v. Watkins, 367 U.S. 488, 495 (1961). In Epperson v. Arkansas, 393 U.S. 97 (1968), a statute prohibiting the teaching of evolution was also held invalid.

The first school release time case was *McCollum v. Board of Education*,[12] in which a state law allowed religious doctrine instructors to come into the public schools to hold classes. Students who did not wish to participate had to leave their classroom and go elsewhere in the school building.[13] The Supreme Court recognized this as an obvious use of tax money to aid religion and, as such, found it invalid.[14] In 1952, however, a more subtle use of school time was reviewed by the Court in *Zorach v. Clauson*.[15] In *Zorach*, the State of New York allowed children to leave schools to attend religion classes on a regular basis.[16] The Court noted that because this program involved no cost to the school, it could be distinguished from the *McCollum* case.[17] Moreover, the program merely involved an attempt by schools to adjust their schedules to student needs, and, in this respect, was similar to the common practice of releasing students for holidays. The Court stated that government is not to be "hostile" to religion and found this program valid because, on the contrary, it was an attempt by the state to be neutral toward religion.[18]

The school prayer and bible reading cases decided in the early 1960's gave additional insight into the meaning of the "neutrality" test. In *Engle v. Vitale*,[19] the State of New York authorized recitation of a nondenominational prayer in the public schools. Even though New York allowed individual student exemptions in reciting the prayer, the program was held invalid. This case illustrated that coerced involvement in a religious exercise does not have to be present for a statute to violate the establishment clause. "[The Constitution] is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not."[20]

In *School District of Abington Township v. Schempp*,[21] the Supreme Court extended its school prayer decision to make invalid any program of required devotionals. The Court relied on the reasoning in *Everson v. Board of Education*.[22] Although daily devotionals did not

12. 333 U.S. 203 (1948).
13. *Id.* at 205-09.
14. *Id.* at 210.
15. 343 U.S. 306 (1952).
16. *Id.* at 308.
17. *Id.* at 309.
18. *Id.* at 313-14. Justice Black dissented. He felt that this was an example of a state favoring religion. *Id.* at 316 (Black, J., dissenting).
19. 370 U.S. 421 (1962).
20. *Id.* at 430. *See also* School Dist. of Abington Township v. Schempp, 374 U.S. 203, 223 (1963).
21. 374 U.S. 203 (1963).
22. *See* notes 6-10 and accompanying text *supra*.

appear to be a serious step towards the creation of a state church, the Court found any deviation from a neutral position improper stating: "The breach of neutrality that is today a trickling stream may all too soon become a raging torrent . . . ."[23]

Sunday closing laws have provided a third category of important decisions with respect to the establishment clause. The cases decided by the Supreme Court have approached the issue in several ways, but each concluded that Sunday closing requirements merely serve the secular ideal of providing one day of rest each week for all working people.[24]

As early as the *School District of Abington Township* case, however, it became apparent that the term "neutral" did not, by itself, provide a satisfactory test. In an attempt to explain the "neutrality" test the Court indicated that it would look at the purpose and the primary effect of an enactment, stating: "If either [the purpose or effect] is the advancement or inhibition of religion then the enactment exceeds the scope of legislation power as circumscribed by the Constitution."[25] The purpose of the legislation has to be secular and the primary effect may neither advance nor inhibit religion.[26] A good example of the Court's attempt to use the purpose and primary effect test is found in *Board of Education v. Allen*.[27] In that case the state had a program of lending textbooks free of charge to all school children in public and private schools.[28] Because some textbooks obviously were being loaned to students attending church supported schools, the purpose and primary effect test was applied.[29] It was found that the purpose of the legislation was to aid the education of all children. The fact that the books went to the students and not to the schools was evidence of that purpose.[30] The primary effect was also neutral because only secular textbooks were available for loan.[31]

Although it aided understanding to break the "neutrality" test into two parts, purpose and primary effect, the Supreme Court found it necessary to add a third element to the test. In *Walz v. Tax Commis-*

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23. 374 U.S. at 225.

24. McGowan v. Maryland, 366 U.S. 420, 434-35 (1961). *See, e.g.*, Gallagher v. Crown Kosher Super Mkt., 366 U.S. 617 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961). In *Braunfeld*, the day of rest was found to constitute a state interest sufficient to override indirect burdens on the free exercise of religion.

25. 374 U.S. at 222.

26. *Id.*

27. 392 U.S. 236 (1968).

28. *Id.* at 238.

29. *Id.* at 243.

30. *Id.* at 243-44.

31. *Id.* at 243-45.

sion,[32] a property tax exemption for churches was reviewed. In addition to scrutiny of the purpose and primary effect, the Court realized that the establishment clause was intended to prevent excessive governmental entanglement in religion. This element required a finding of "official and continuing surveillance"[33] by the government. The Court concluded that the exemption in *Walz* would probably create less governmental entanglement than would a program of taxing church property.[34]

Following the *Walz* decision, the United States Supreme Court has had occasion to consider the three element test of purpose, primary effect, and entanglement in order to determine if other legislative programs have violated the establishment clause. In *Committee for Public Education & Religious Liberty v. Nyquist*,[35] for example, it was necessary to review various forms of financial support being provided to church supported schools.[36] The Court began the opinion by explaining the three elements of the test as discussed above. It then considered each in turn. It first found that the support of education is a secular purpose.[37] Nonetheless, it was recognized that the funding had the effect of aiding religion because it was made available to schools sponsored by churches. The funding was, therefore, unconstitutional.[38] Finally, the Court indicated that because the legislation failed the effect test, there was no need to discuss entanglement.[39] As this case illustrates, the Court will carefully consider each of the three elements of the test if necessary, but a failure in any one element is sufficient to invalidate the legislation.[40]

B. *The Free Exercise of Religion Compared*

Although it is not necessary to use the free exercise clause to invalidate the religious discrimination section of Title VII, a brief overview of the free exercise test is useful in understanding the interplay between the free exercise and establishment clauses. In *Sherbert v. Verner*,[41] the Supreme Court illustrated the test used for free exercise

32. 397 U.S. 664 (1970).
33. *Id.* at 674-75.
34. *Id.*
35. 413 U.S. 756 (1973).
36. *Id.* at 761-65.
37. *Id.* at 773.
38. *Id.* at 774-94.
39. *Id.* at 794.
40. For cases after *Walz* holding legislation valid see, for example, Hunt v. McNair, 413 U.S. 734 (1973), and Tilton v. Richardson, 403 U.S. 672 (1971). For cases holding legislation unconstitutional see, for example, Sloan v. Lemon, 413 U.S. 825 (1973), and Lemon v. Kurtzman, 403 U.S. 602 (1971).
41. 374 U.S 398 (1963).

cases. In that case a woman had been fired from her job for not working on Saturday due to religious beliefs. The state denied her unemployment compensation because she was not available for work on Saturdays.[42] Although the Court recognized that conduct may be regulated by the state to some extent, it held that if a regulation infringes on the free exercise of religion then the state must show a compelling interest in such regulation.[43] Because this statute forced the woman to choose between her religion and receiving state unemployment benefits,[44] and because the Court found that there was no compelling state interest in this infringement,[45] the regulation was unconstitutional.

It should be apparent that the religion clauses of the first amendment are an attempt to keep government out of religion. The government cannot condition state benefits on a nonobservance of religion because such condition would violate the free exercise clause.[46] In addition, government must maintain a strictly neutral position among religions, and between religion and non-religion. The test for this neutrality requires a review of the purpose, primary effect, and entanglement factors.[47]

III. THE INTENDED PROTECTION FROM RELIGIOUS DISCRIMINATION UNDER TITLE VII

A. The 1964 Act and Regulations Thereunder

In the great tradition of protecting citizen rights, Congress included protection from religious discrimination in Title VII of the 1964 Civil Rights Act.[48] Unfortunately, when Congress forces some private citizens to conform their conduct with the religious demands of other citizens, serious establishment clause questions are raised. A review of the legislative history of Title VII, however, reveals that at the time of

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42. *Id.* at 399-402.

43. *Id.* at 403.

44. *Id.* at 404.

45. *Id.* at 406-07. The Court specifically noted that this case did not involve the establishment clause. *Id.* at 409-10. For additional discussion of the free exercise clause see Wisconsin v. Yoder, 406 U.S. 205 (1972); Braunfeld v. Brown, 366 U.S. 599 (1961); Cantwell v. Connecticut, 310 U.S. 296 (1940); Reynolds v. United States, 98 U.S. 145 (1878).

46. *See* notes 41-45 and accompanying text *supra.*

47. *See* notes 5-40 and accompanying text *supra.*

48. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (current version at 42 U.S.C. §§ 2000e to 2000e-17 (1976)). 42 U.S.C. § 2000e-2 provides: "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion . . . ."

passage of the Act the issue of religious discrimination was not avidly debated. The primary concern was an end to racial discrimination in employment.[49] Even though there was a committee minority report filed in opposition to passage of the Act, the religion issue was not raised.[50] The inclusion of protection against religious discrimination was done without debate or explanation, and no definition appears in the Act to illustrate the types of discrimination which were intended to be outlawed.

Although the statute did not explain what the term "religious discrimination" was intended to encompass, the Equal Employment Opportunity Commission (EEOC) issued the first "Guidelines on Discrimination Because of Religion," on July 10, 1967.[51] This initial guideline provided that no violation would arise if an employer set up a normal work week absent an intent to discriminate.[52] The guideline specifically stated that so long as a uniform work week was recognized, the mere fact that the business closed on one day would not be considered discrimination when the employer required employees to be available on all other days.[53] The guideline did state that reasonable accommodation should be made for "special religious holidays observance."[54]

The following year the EEOC revised the guideline and adopted a stricter position on religious discrimination.[55] The guideline placed the burden of "reasonable accommodation" on the employer in all cases where accommodation could be made without undue hardship on the conduct of the employer's business.[56] In addition, the EEOC declared that it would consider each case individually "in an effort to seek equitable application of these guidelines."[57] This second guideline brought the EEOC and the courts into the business of determining, firstly, what is religion and secondly, when is an accommodation reasonable.

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49. *See generally* S. REP. NO. 872, 88th Cong., 2d Sess. 2693, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2355; H.R. REP. NO. 914, 88th Cong., 2d Sess. 22550, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2391.

50. MINORITY REPORT UPON PROPOSED CIVIL RIGHTS ACT OF 1963, COMMITTEE ON JUDICIARY SUBSTITUTE FOR H.R. 7152, H.R. REP. NO. 914, 88th Cong., 2d Sess. 22550, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2431.

51. 29 C.F.R. § 1605.1 (1967).

52. *Id.* § 1605.1(b)3.

53. *Id.* § 1605.1(a)3.

54. *Id.* § 1605.1(b)2.

55. 29 C.F.R. § 1605.1 (1968).

56. *Id.* § 1605.1(b). In addition, the burden of proof was placed on the employer to show that "undue hardship [would] render the required accommodation . . . unreasonable." *Id.* § 1605.1(c).

57. *Id.* § 1605.1(d).

In interpreting its own guideline, the EEOC had to decide which "religions" were protected. The Commission stated that any personal conviction held with the strength of traditional religion would be entitled to protection against discrimination.[58] Thus, the regulation would not protect those who wished to change work patterns for non-religious needs.[59] This particular issue however has not been dealt with extensively. The more significant issue, whether private employers can be required to make "reasonable accommodation" for the religious beliefs of individual employees, has received greater attention.

In issuing its own decision the EEOC, of course, has required employers to provide "reasonable accommodation," and these decisions have required accommodation in areas ranging from work schedules to manner of dress.[60] The first serious court challenge to the "reasonable accommodation" rule, however, appeared in *Dewey v. Reynolds Metals Co.*[61]

In *Dewey* the employee was required to work on Sunday in accordance with his union's agreement with the employer. He was fired after he refused to do so. An action was brought under Title VII to challenge the discharge, and the district court ordered reinstatement of the employee.[62] The appellate court found, however, that the discharge was proper, and that "reasonable accommodation" had been made by allowing the employee to seek replacements.[63] The court further noted that, in any event, the "reasonable accommodation" guideline was inconsistent with Title VII. Neither the Act nor the legislative history indicated any intention of Congress to coerce employers to submit to the religious demands of employees.[64] The opinion then stated that if the Act were construed to allow such coercion serious first amendment issues would arise.

> It is settled that the Government, in its relations with religious believers and non-believers, must be neutral. The Government is without power to support, assist, favor or handicap any religion.
>
> . . . .
>
> No one disputes Dewey's right to his religious beliefs. The question

58. [1973] EEOC DEC. (CCH) ¶ 6180 (1970). *Cf.* [1973] EEOC DEC. (CCH) ¶ 6338 (1972); [1973] EEOC DEC. (CCH) ¶ 6283 (1971); [1973] EEOC DEC. (CCH) ¶ 6062 (1969).

59. *See, e.g.*, [1973] 5 EMPL. PRAC. GUIDE (CCH) (Empl. Prac. Dec.) 7560.

60. *See* note 58 *supra.*

61. 429 F.2d 324 (6th Cir. 1970), *aff'd by equally divided court per curiam*, 402 U.S. 689 (1971).

62. 429 F.2d at 327-28.

63. *Id.* at 328-31.

64. *Id.* at 334.

is whether he has the right to impose his religious beliefs on his employer and interfere with the operation of its plant.

. . . .

The simple answer, however, to all of Dewey's claims is that the collective bargaining agreement was equal in its application to all employees and was uniformly applied, discriminating against no one.[65]

The Supreme Court of the United States heard the case and affirmed by an equally divided court.[66] With the validity of the guideline left in doubt, Congress moved to give its approval to the "reasonable accommodation" criteria.

B. The 1972 Amendment to Title VII

In an apparent attempt to make it clear that the EEOC's "reasonable accommodation" guideline was consistent with Title VII, an amendment to that statute was passed in 1972. Although the Equal Employment Opportunity Act of 1972 was primarily intended to only add enforcement procedures to Title VII, a definition of "religion" sponsored by Senator Randolph was added to the legislation on the floor of the Senate.[67] "The term 'religion' includes all aspects of religion 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 religion observance or practice without undue hardship on the conduct of the employer's business."[68]

In explaining the purpose of the definition, Senator Randolph noted that employer demands of Saturday work have hurt religions which hold that day as the sabbath.

So there has been, because of understandable pressures, such as commitments of a family nature and otherwise, a dwindling of the membership of some of the religious organizations because of the situation to which I have just directed attention.

. . . .

My own pastor in this area, Rev. Delmer Van Horn, has expressed his concern and distress that there are certain faiths that are having a very difficult time, especially with the younger people, and understandably so, with reference to a possible inability of employers on some occasions to adjust work schedules to fit the requirements of the faith of some of their workers.[69]

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65. *Id.* at 334-36.

66. *See* note 61 *supra.*

67. No detailed discussion of the religion definition appears in the congressional conference report. *See* H.R. REP. NO. 899, 92d Cong., 2d Sess. (1972).

68. 118 CONG. REC. 705 (1972).

69. *Id.*

Senator Randolph expressed the opinion that the cases decided under the 1964 Act had clouded the issue and the amendment was needed to state clearly what Congress intended.[70] The additional definition was then approved by the Senate and became a part of the proposed Equal Employment Opportunity Act of 1972.[71] With the passage of this Act, the EEOC requirement of "reasonable accommodation" received the congressional approval that *Dewey* had doubted, and placed the constitutional question clearly in focus.[72]

After the passage of the 1972 Act several cases were decided which either approved the validity of the Act or did not question it.[73] The Sixth Circuit, which had decided *Dewey,* dealt directly with the constitutional issue in *Cummins v. Parker Seal Co.*[74] The *Cummins* case arose prior to the 1972 amendment but, because the court of appeals was aware that the amendment was similar to the EEOC guideline then in force, the "reasonable accommodation" test set forth in the amendment was found to be applicable.[75] The plaintiff had joined a religious organization which forbade work on Saturday. His employer substituted other employees for a time but when these employees complained the plaintiff was fired. The district court found, without explanation, that "reasonable accommodation" had been made and that any further accommodation would place "undue hardship" on the employer.

The court of appeals found insufficient evidence to support the district court's conclusion and, instead, recognized that the actual grounds for discharge were the other employees' complaints. Inconvenience to the other employees and the effect on employee morale, generally, would not constitute an "undue hardship" to the employer as required by the amendment.[76]

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70. *Id.* at 706. The *Dewey* case is reprinted in its entirety in the *Congressional Record.*

71. On the day the religion definition was added to the Act by the Senate, forty-five Senators did not vote. *Id.* at 731.

72. *See* notes 64-65 and accompanying text *supra.*

73. *See, e.g.,* Cooper v. General Dynamics, 533 F.2d 163 (5th Cir. 1976), *cert. denied sub nom.* Int'l Ass'n of Machinists & Aerospace Workers v. Hopkins, 433 U.S. 908 (1977); Yott v. North Am. Rockwell Corp., 501 F.2d 398 (9th Cir. 1974); Riley v. Bendix Corp., 464 F.2d 1113 (5th Cir. 1972); Blakely v. Chrysler Corp., 407 F. Supp. 1227 (E.D. Mo. 1975), *rev'd sub nom.* Chrysler Corp. v. Mann, 561 F.2d 1282 (8th Cir. 1977), *cert. denied,* 434 U.S. 1039 (1978); Claybaugh v. Pacific Northwest Bell Tel. Co., 355 F. Supp. 1 (D. Or. 1973).

74. 516 F.2d 544 (6th Cir. 1975), *aff'd by equally divided court per curiam,* 429 U.S 65 (1976), *vacated per curiam,* 433 U.S. 903, *aff'd per curiam,* 561 F.2d 658 (6th Cir. 1977). The Sixth Circuit also dealt with the issue in Reid v. Memphis Publishing Co., 468 F.2d 346 (6th Cir. 1972).

75. 516 F.2d at 546-47.

76. *Id.* at 550.

The court then discussed the constitutionality of the accommodation standard, set forth in the amendment and EEOC guideline, realizing it had expressed some reservations in this area in *Dewey*.[77] Upon application of the three element test of secular purpose, primary effect, and excessive governmental entanglement the court found no violations.[78] A secular purpose was found in Senator Randolph's remarks when he stated that the objective of the amendment was to "assure freedom from religious discrimination."[79] It was noted that because some people would not compromise their religion, they required secular protection from "punish[ment] for the supremacy of conscience."[80] The primary effect was not to aid religion because no financial support was provided.[81] There were also no entanglement problems because the statute required little or no contact between government and religion.[82]

The majority opinion in *Cummins* drew a dissent from Judge Celebrezze, who believed that the requirement of "reasonable accommodation" was clearly unconstitutional. He stated that "[t]here is no valid secular legislative purpose behind the rule. Its purpose is to protect and advance particular religions."[83] In referring to *Sherbert v. Verner*,[84] Judge Celebrezze stated that although the government cannot penalize religion, this does not mean government can aid religion.[85]

The *Cummins* case, therefore, provided an excellent vehicle for review of the constitutional problem by the Supreme Court. Again, however, the decision was affirmed by an equally divided Supreme Court.[86]

C. *TWA v. Hardison*

In the case of *TWA v. Hardison*,[87] the Supreme Court was again presented with an opportunity to address the constitutional issue. The employee refused to work on his sabbath and was discharged.[88] The

77. *Id.* at 551.
78. *Id.* at 551-52.
79. *Id.* at 552 (quoting 118 CONG. REC. 705 (1972)).
80. *Id.* at 552-53.
81. *Id.* at 553.
82. *Id.*
83. *Id.* at 558 (Celebrezze, J., dissenting).
84. 374 U.S. 398 (1963).
85. 516 F.2d at 557 (Celebrezze, J., dissenting).
86. 429 U.S. 65 (1976).
87. 432 U.S. 63 (1977).
88. 375 F. Supp. 877 (W.D. Mo. 1974), *rev'd in part*, 527 F.2d 33 (8th Cir. 1975), *rev'd*, 432 U.S. 63 (1977).

district court reviewed the three element test and held that the statutory accommodation standard was constitutional.[89] The court found for the employer, however, saying it had tried to accommodate and to require further effort would constitute an undue hardship.[90] The court of appeals also held the statute constitutional but reversed, finding that the defendants had not made a "reasonable accommodation."[91] This left the case in an appropriate posture for a Supreme Court opinion on the constitutionality of the statute.

The Supreme Court began its opinion by reviewing the facts of the case. It noted that TWA could have allowed the employee to work an alternative schedule but that such conduct would have violated the union seniority system.[92] The question before the Court, was, therefore, whether TWA's accommodating actions, short of violation of the union agreement, were sufficient to meet an employer's obligation to accommodate under Title VII.[93] In framing the issue in these terms, the Court again avoided answering the constitutional problem, stating "[b]ecause we agree with [TWA] that their conduct was not a violation of Title VII, we need not reach the other questions presented."[94]

The opinion did not conclude at that point but attempted to explain what was meant by "reasonable accommodation." The Court spent a good part of the opinion discussing the confusion in the area citing, of course, *Dewey v. Reynolds Metals Co.*, and also noting that the legislative history offered no help in explaining the "reasonable accommodation" rule.[95] The Court then declared what it viewed as the proper scope of "reasonable accommodation," commenting that "to require TWA to bear more than a *de minimus* cost in order to give Hardison Saturdays off is an undue hardship."[96] The Court concluded its opinion by noting that Title VII was intended to eliminate discrimination, not to create it. It recognized the possibility of constitutional problems noting that even if the cost of the employee's day off would not be an objectionable hardship, "it would not change the fact that the privilege of having Saturdays off would be allocated according to religious beliefs."[97]

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89. *Id.* at 877-88.
90. *Id.* at 890-91.
91. 527 F.2d at 43-44.
92. 432 U.S. at 68.
93. *Id.* at 66.
94. *Id.* at 70 (footnotes omitted).
95. *Id.* at 75.
96. *Id.* at 84.
97. *Id.* at 85.

In essence, the Court, again avoided the constitutional issue by deciding the case on narrower grounds. In fact the opinion further confused the area of the law by substituting the phrase *de minimus* for "reasonable accommodation," neither of which provide much explanation of what Congress intended by the 1972 amendment.[98]

IV. THE CONFLICT BETWEEN PROTECTION FROM RELIGIOUS DISCRIMINATION AND THE FIRST AMENDMENT

In order to determine the constitutionality of the section of Title VII which prohibits religious discrimination, the courts must apply the three element test discussed in *Nyquist*. It must be recognized that at least two courts have considered the three element test in this context and declared Title VII constitutional. Nonetheless, these opinions, by the Sixth Circuit in *Cummins v. Parker Seal Co.*[99] and the trial court in *Hardison*,[100] are not convincing.

A. The Purpose of Title VII's Protection of Religion

Although the two courts mentioned above both found that Title VII has a secular purpose, that purpose does not appear to be secular when the explanation of each court is considered. The Sixth Circuit, for example, explained that the amendments to Title VII were merely intended to strengthen the older Act.[101] But that court also recognized that the religion definition, in particular, was added to provide congressional protection for certain religions.[102] The trial court in *Hardison*, similarly categorized the "secular" purpose of the amendment by saying that it guaranteed to an employee "that he will not be discharged from his job merely *because of his religion*."[103]

Although the constitutionality of the statute was not fully discussed by the Supreme Court in *TWA v. Hardison*, the primary purpose was addressed in a dissent by Mr. Justice Marshall. "The primary purpose of the amendment [Senator Randolph] explained was to protect

98. The Sixth Circuit faced a most peculiar problem. On rehearing by the Supreme Court, the decision in *Cummins v. Parker Seal Co.* was vacated and remanded for a decision consistent with *TWA v. Hardison*, 433 U.S. 903 (1977). The Sixth Circuit also avoided the constitutional problem, stating in a *per curiam* opinion only that "the decision of the district court dismissing the action is affirmed on authority of *Hardison*." 561 F.2d 658, 659 (6th Cir. 1977).

99. 516 F.2d 544 (6th Cir. 1975). *See* notes 74-86 & note 98 and accompanying text *supra*.

100. 375 F. Supp. 877 (W.D. Mo. 1974). The court of appeals also upheld the constitutionality of the "reasonable accommodation" test on appeal in *Hardison*. 527 F.2d 33 (8th Cir. 1975). *See* notes 87-98 and accompanying text *supra*.

101. 516 F.2d at 552.

102. *Id.* at 553.

103. 375 F. Supp. at 888 (emphasis added).

Saturday Sabatarians like himself from employers . . . ."[104] The dissenting opinion also noted that the purpose of the legislation was to secure equal economic benefits for members of certain religions.[105]

When these opinions are considered, along with the remarks of Senator Randolph,[106] it is apparent that the purpose of the legislation was to provide statutory protection for individual religious preferences in the job market. When this purpose is compared with purposes previously determined to be secular, it fails the test. Prior decisions have found a secular purpose, for example, where legislation was intended to aid the education of all children, whether they attended secular or religious schools.[107] The benefits of this part of Title VII, however, were intended to be claimed only by those who allege some religious belief. The statute, therefore, clearly has the nonsecular objective of improving the employment position of religious employees, rather than improving the status of all employees, religious or nonreligious.

B. The Primary Effect of Title VII's Protection of Religion

In considering the primary effect of the legislation, the Sixth Circuit also found in *Cummins* that the amendment neither aided nor hindered religion. The reason for this conclusion was that no financial support for religion is required of employers.[108] The district court in *Hardison* agreed with that position and noted that any benefit would be indirect.[109] These arguments, however, overlook the fact that in every case brought under this part of Title VII, the effect was to provide special consideration to an employee for no other reason than his religion.[110] More significantly, the effect explicitly sought by Senator Randolph in sponsoring the amendment was an increase in the membership of his church and other religions similarly situated.[111] The Supreme Court has specifically held that it is not necessary to show coercion of nonobserving individuals, such as is lacking in the typical

104. 432 U.S. at 89 (Marshall, J., dissenting). Justice Marshall's dissent was in opposition to the Court's decision holding that the employer, TWA, was not liable under Title VII. The dissent acknowledged that the "reasonable accommodation" rule received unanimous approval in a Senate roll call vote but failed to indicate that this unanimous approval was received on a day when forty-five Senators were not present. *See* note 71 *supra*.

105. 432 U.S. at 90-91 n.4 (Marshall, J., dissenting).

106. *Id.* *See* note 69 and accompanying text *supra*.

107. *See* text accompanying notes 30 & 37 *supra*.

108. 516 F.2d at 553.

109. 375 F. Supp. at 888.

110. *Cf.* note 59 *supra*.

111. *See* note 69 and accompanying text *supra*.

Title VII case. The official support of religion is sufficient to violate the establishment clause of the first amendment.[112] The protection of religion under the reasonable accommodation requirement in Title VII, therefore, fails the primary effect test.

C. *Governmental Entanglement Required by Title VII's Protection of Religion*

As with the other elements of the *Nyquist* test, the Sixth Circuit found no constitutional flaws in Title VII when it considered the problem of governmental entanglement in *Cummins*. This position was supported by declaring that little or no contact between religion and government was required by Title VII.[113] The district court in *Hardison*, also believed that little entanglement would result because the EEOC was only required to approve or disapprove of employer attempts to accommodate.[114]

In order to correctly apply the test of governmental entanglement, the decision in *Walz v. Tax Commission*[115] must be reviewed. In *Walz*, the Supreme Court held that any program of general taxation necessarily involves some entanglement with religion, whether churches are taxed or exempted. Approval of the religious exemption in that case was based on the view that an exemption would provide less opportunity for entanglement than taxation.[116] In contrast, the requirement of "reasonable accommodation" under Title VII unnecessarily thrusts the EEOC into the position of an arbiter, requiring that it decide whether an employee has a religion, what religious practices he wishes protected, and what accommodation is to be made.[117] The involement mandated by the amendment, whether considered *de minimus* or extensive, is not predicated on a neutral purpose, such as general taxation, but solely on the objective of giving protection to the preferences of individual employees who profess some religious belief. Thus, the courts in *Cummins* and *Hardison* understood the entanglement test as one of the degree of intrusiveness, although the context suggests analysis of the choice between EEOC intrusion and no intrusion at all.

D. *The Dissenting Opinion in TWA v. Hardison*

When the Supreme Court issued its opinion in *TWA v. Hardison*,

112. *See* note 20 and accompanying text *supra*.
113. 516 F.2d at 553.
114. 375 F. Supp. at 888.
115. 397 U.S. 664 (1970).
116. *See* note 34 and accompanying text *supra*.
117. *See* notes 57 & 58 and accompanying text *supra*.

a dissenting opinion was filed by Mr. Justice Marshall, joined by Mr. Justice Brennan.[118] The dissent posited that reasonable accommodation should be made, and that further accommodation could have been made in that case without hardship to TWA.[119] Therefore, no constitutional issues were raised.[120] Because the dissent refused to directly address the constitutional question, it did not discuss the three element test in detail.

After avoiding a direct discussion of the problem, however, the dissent did advance two claims. First, it stated that the constitutionality of a program should not be doubted merely because the program mandates an exception from a general practice. But the cases cited in support of this proposition[121] each involved a religious exemption from a practice or duty imposed by the state in the first place. The authorization of such exemptions is mandated by the free exercise clause. There is no requirement in the first amendment, however, that a private citizen not infringe on the free exercise of religion by another citizen. Therefore, the dissent's analogy to cases of exemption from state-imposed duties is questionable.[122] With respect to non-free exercise cases, the dissent overlooked the fact that in each such instance the state was merely refusing to take a stand on religion. But in Title VII, Congress had gone one step further and required one individual, the employer, to aid another individual, the employee, in the practice of a religion.

The second claim made by the dissent was that it would be ironic to deny the employee reinstatement because, under *Sherbert v. Verner*,[123] the employee would be entitled to receive welfare.[124] While this argument may have some emotional appeal, it certainly does not change the Constitution. The *Sherbert* case merely held that states could not force citizens to give up their religions in order to take advantage of available state supported benefits.[125] This, again, is a result of the application of the free exercise clause to the activities of state

118. 432 U.S. at 85 (Marshall, J., dissenting).

119. *See* 432 U.S. at 90 n.3, 92 n.6 (Marshall, J., dissenting).

120. *Id.* The dissent refused to speculate on what level of employer cost would be necessary to raise a constitutional issue.

121. *Id.* at 90-91 (citing, for example, Wisconsin v. Yoder, 406 U.S. 205 (1972)).

122. The following language in the dissent most clearly suggests the defect: "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*." *Id.* (emphasis added).

123. 374 U.S. 398 (1963).

124. *See* 432 U.S. at 97 n.14 (Marshall, J., dissenting).

125. *See* note 44 and accompanying text *supra*.

governments. *Sherbert* did not say that Congress should or could therefore step in and force other private citizens to support certain religions, or religion generally, in order to keep individuals off welfare.[126]

V. CONCLUSION

A review of the establishment clause clearly indicates that the protection of religion in the 1972 amendment to Title VII violates the first amendment of the Constitution. Although a few courts have sought to declare the legislation valid, Title VII's protection of religion does have a religious purpose and the primary effect of aiding religion. It also requires governmental entanglement with religion. Even if a future decision might develop an argument to avoid one or two elements of the test, it is doubtful that a way would be found for the legislation to pass all three elements of the *Nyquist*[127] test.

The Supreme Court has confronted the issue on three occasions but has not yet promulgated a definitive opinion, thus leaving the question unresolved.[128] The only reasonable course is for the Supreme Court to clearly deal with the issue as soon as possible. A holding and rationale in favor of the statute's constitutionality might be preferred to the state of the law left in the wake of *TWA v. Hardison*.

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126. Judge Celebrezze explained this argument in his dissent to *Cummins v. Parker Seal Co.*, 516 F.2d at 554.

127. *See* notes 39 & 40 and accompanying text *supra*.

128. *See* note 94 and accompanying text *supra*. Most subsequent court decisions have been using the *Hardison* case in their opinions without reviewing the constitutional problems. *See, e.g.*, Burns v. Southern Pac. Transp. Co., 589 F.2d 403 (9th Cir. 1978); Chrysler Corp. v. Mann, 561 F.2d 1282 (8th Cir. 1977), *cert. denied*, 434 U.S. 1039 (1978); Ward v. Allegheny Ludlum Steel Corp., 560 F.2d 579 (3rd Cir. 1977).