Caesar and God: A Statutory Balance—Union Security and Religious Discrimination Under the Title VII Requirement of Reasonable Accommodation

Philip L. Ross†

The author discusses the dilemma faced by certain employees, who are required to pay union dues under union security agreements, but whose religious beliefs preclude membership in or financial support for unions. The author specifically addresses the treatment of this problem under the provisions of Title VII which declare that an employer must reasonably accommodate the religious beliefs of his employees absent an undue hardship on the employer's business. After arguing that these provisions should apply to the religious employee's union security dilemma, the author then attempts the statutory balance of reasonable accommodation and undue hardship, and concludes that charity substitution plans best respect the interests of all involved. Finally, the author describes the problems of inflexibility in the statute's provisions created by the Supreme Court ruling in TRANS WORLD AIRLINES v. HARDISON. He considers the potential effects of that decision on the union security conflict and discusses how the decision can be interpreted or circumvented so that the reasonable accommodation requirement of Title VII will continue to have sufficient strength to protect the religious employee.

I

INTRODUCTION

Render, therefore, unto Caesar the things which are Caesar's; and unto God the things that are God's.


Title VII of the Civil Rights Act of 1964† makes it unlawful for an employer to discriminate in employment, or for a labor organization to cause an employer to so discriminate, against an individual on the basis

† B.A. 1976, University of California, Los Angeles; J.D. 1979, University of California, Berkeley (Boalt Hall).
† 42 U.S.C. §§ 2000e to 2000e-17 (1976) [hereinafter sometimes referred to as Title VII or the Act].
of that individual's religious beliefs.\(^2\) One of the several areas of friction in employment relations which involve religion occurs when an employee's religious principles clash with the requirements of union security.\(^3\)

Union security provisions condition employment upon either membership in or financial support for the employee's collective bargaining representative.\(^4\) Under a "union shop" provision, an employee must become a member of the union within a specified period of time (usually thirty days) after being hired or after the security provision goes into effect. In an "agency shop" setting, an employee, rather than become a union member, need only pay to the union an amount of money, often equal to the dues and fees paid by union members, for services rendered to the employee by the union in negotiating and administering the collective bargaining agreement.\(^5\) In practical terms, however, the difference between these two primary forms of union security is not significant. The Supreme Court has held that "membership" in a labor organization for purposes of employment under union security is limited to the requirement that the member pay periodic dues and fees.\(^6\)

---

2. Section 703(a) of the Act, 42 U.S.C. § 2000e-2(a) (1976), declares:
   It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or 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; . . .

Section 703(c) of the Act, 42 U.S.C § 2000e-2(c) (1976), declares:
   It shall be an unlawful employment practice for a labor organization— . . . (3) to cause or attempt to cause an employer to discriminate against an individual [because of such individual's race, color, religion, sex or national origin.]

3. The other principal source of religious conflict in employment which has also been vigorously litigated under Title VII involves sabbatarians—employees who observe a particular day of the sabbath. Conflicts arise when an employee is absent from work due to religious beliefs during a day or shift when the employer's operation requires his presence. Much of the Title VII doctrine concerning religious discrimination which is applicable to union security conflicts evolved in response to the sabbatarian conflict. Thus, while the sabbatarian issue will not be directly discussed in this article, relevant case law involving that issue will be considered in discussing religious objections to union membership or support. For an early discussion on several sources of religious discrimination in employment see Note, Religious Observance and Discrimination in Employment, 22 Syracuse L. Rev. 1019 (1971).

4. Most union security provisions are authorized either by § 2, Eleventh (a) of the Railway Labor Act, 45 U.S.C. § 152, Eleventh (a) (1976) [hereinafter sometimes referred to as the RLA], or § 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3) (1976) [hereinafter sometimes referred to as the NLRA].


6. In NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963), the Supreme Court stated: "It is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues. 'Membership' as a condition of employment is whittled down to its financial core." Thus a "member" is not required to attend union meetings. Nor is he required to engage in concerted
Despite the fact an employee need only pay union dues and fees, this financial support requirement causes a direct conflict with the strongly and sincerely held religious beliefs of a substantial number of American workers. One such is that of the Seventh-day Adventist Church, whose governing body teaches that:

While Seventh-day Adventists sympathize with the worthy objectives of labor unions, it is well known that occasions arise when, failing to obtain these objectives through peaceful processes of negotiation, mediations and arbitrations, measures of coercion are resorted to, taking the forms of boycotts, strikes, picketings, and similar methods of enforcing their demands. Being under the scriptural injunctions, as Christians, that 'the servant of the Lord must not strive,' and that he is to 'do violence to no man,' Seventh-day Adventists believe sincerely they must stand apart from a relationship which requires participation in such procedures.

For some employees the mere financial support of a union would jeopardize their eternal salvation.
On the other side are the interests of the union and of its membership in ensuring the continued support of all employees. The strength and effectiveness of a labor organization depend upon its size and cohesiveness. If an employee is relieved by religious beliefs of a duty to join or to support a union, not only is the union deprived of economic assistance, the financial obligations of the remaining members are increased. Thus, any solution to this conflict requires a balancing of these competing interests—the freedom of an individual to follow his religious beliefs and the economic needs of the mass of his fellow employees.

In an initial series of cases dealing with constitutional challenges to union security agreements, the courts weighed these competing interests and found that the balance fell in favor of the majority of employees. The courts held that an individual must accommodate his "idiosyncracies, religious as well as secular, to the compromises necessary in communal life." The governmental interest in fostering stable industrial relations, as manifested by federal labor legislation authorizing union security agreements, was seen as compelling.

The passage of Title VII of the Civil Rights Act of 1964 and its amendment in 1972 were attempts by Congress to define specifically the characteristics of the balancing process. Initially the Act was very broad in its proscription against religious discrimination in employment, stating simply that such discrimination was unlawful. The Equal Employment Opportunity Commission, in attempting to ensure proper implementation of the Act, issued guidelines clarifying this proscription. These guidelines, however, received only limited acceptance by the courts, and largely in response to this, Congress, in each member, the Church teaches that once an Adventist understands what the Bible says, and then rejects it, he does so at the danger of losing his eternal salvation. Brief for Appellant at 5-6, Anderson v. General Dynamics, 589 F.2d 397 (9th Cir. 1978).

10. See text accompanying notes 23-48 infra.


14. See note 2 supra.

15. Hereinafter sometimes referred to as the Commission or the EEOC.

16. The current guidelines are found at 29 C.F.R. § 1605.1. Also see text accompanying notes 53-69 infra.

enacting the Equal Employment Opportunity Act of 1972,18 amended Title VII to include the EEOC standards.

The Act currently holds that an employer has an obligation to "reasonably accommodate" the religious practices, observances, and beliefs of an employee or a prospective employee unless the employer can demonstrate that such accommodation would result in "undue hardship" on the conduct of his business.19 The reasonable accommodation requirement was an attempt by the Congress to provide a clear statutory framework for balancing religious and secular interests in the employment sector. The courts, however, have been inconsistent in their application of this statutory framework to the conflicts between union security and religion.

It was not until 1977 that the Supreme Court authoritatively examined the nature and scope of the duty of reasonable accommodation under Title VII.20 In Trans World Airlines v. Hardison,21 the Court found the scope of that duty to be limited. While the Hardison decision was narrowly decided on the facts presented, which involved the reasonable accommodation of a sabbatarian in light of a bona fide seniority provision which determined weekend work schedules, the decision nevertheless has tremendous significance for the accommodation of religious beliefs to union security clauses. The extremely narrow reading given to the scope of reasonable accommodation by Hardison has led to increased uncertainty about the ability of Title VII to prevent religious discrimination in employment.

This article shall consider the various attempts by the EEOC, Congress, and the courts to balance the interests and needs of the employer, the mass of employees as represented by the union, and the religious employee. It will also present and consider alternative methods for effectuating that balance in light of the Supreme Court's narrow ruling in Hardison. The fundamental premise of this article is that religious objections to union security are protected by Title VII. While such protection is not absolute, a reasonable accommodation can be achieved in

---

Among the judicial challenges made to the reasonable accommodation framework is that such a statutory approach violates the establishment clause of the First Amendment. This issue has been hotly debated by both the courts and commentators as described infra at note 83. Accepting the conclusion of a majority of commentators that the reasonable accommodation framework will withstand constitutional challenge, I shall not address that constitutional question in this article.

20. In two earlier cases the Supreme Court failed to reach a consensus concerning either the EEOC guidelines or their statutory reformulation. See Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), aff'd per curiam by an equally divided Court, 402 U.S. 689 (1971); and 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).
most instances without undue hardship, by the use of a charity substitu-
tion plan wherein the religious employee pays the equivalent of union
dues to a nonreligious charity.\textsuperscript{22} It is further asserted that the current
statutory approach to this or to any other religious conflict under Title
VII involves an equitable weighing of the interests in light of the fac-
tual variances between cases. Such an approach acknowledges the im-
possibility of setting specific standards of reasonable accommodation
and undue hardship which would be applicable in every situation.

II

CONSTITUTIONAL CHALLENGES TO UNION SECURITY

Religious challenges to union security provisions initially arose
under the claim that the statutes which authorized those provisions im-
pinged upon the first amendment's guarantee of free exercise of reli-
gion.\textsuperscript{23} The first series of cases that were litigated involved the union
shop provision found in section 2, Eleventh of the Railway Labor
Act.\textsuperscript{24} In Otten v. Baltimore & Ohio Railroad Co.\textsuperscript{25} the Second Circuit
Court of Appeals affirmed a denial of injunctive relief which had been
sought to prevent the railroad from discharging the plaintiff for failure
to pay union dues against his religious beliefs. In an opinion by
Learned Hand, the court of appeals, first addressing the need for a
three-judge court below, held that none was required, as no constitu-
tional issue was properly raised.\textsuperscript{26} Section 2, Eleventh was held to be
merely permissive, and thus there was no government action, as the
statute did not affirmatively legalize the union shop.\textsuperscript{27} The court, turn-
ing to the merits, recognized that conflicts between religious beliefs and
the desires of others to form union shops are inevitable, but it implicitly
agreed with the district court ruling that religious rights are not abso-
lute in the face of the general welfare of all union members.\textsuperscript{28} Judge

\begin{footnotes}
\item 22. See text accompanying notes 163-174 and 184-213 infra.
\item 23. See generally, Note, The "Free Exercise" Clause of the First Amendment to the United
States Constitution is No Defense to a Union Shop Agreement Allowed under the Railway Labor
\item 24. That section of the RLA provides:
Notwithstanding any other provisions of this Act, or any other statute or law of the
United States . . . any carrier or carriers as defined in this chapter and a labor organiza-
tion or labor organizations duly designated and authorized to represent employees in
accordance with the requirements of this Act shall be permitted—(a) to make agree-
ments, requiring, as a condition of continued employment, that within sixty days follow-
ing the beginning of such employment, or the effective date of such agreements,
whichever is later, all employees shall become members of the labor organization repre-
senting their craft or class . . . .
\item 25. 205 F.2d 58 (2nd Cir. 1953).
\item 26. Id. at 60.
\item 27. Id. at 60-61.
\end{footnotes}
Hand declared in conclusion:

The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his religious necessities. . . . We must accommodate our idiosyncracies, religious as well as secular, to the compromises necessary in communal life. . . .

The validity of section 2, Eleventh of the RLA was reaffirmed by the Supreme Court against nonreligious challenges in *Railway Employees Department v. Hanson.* 30 The Court, while acknowledging that the section was permissive, nonetheless disagreed with the *Otten* decision and found that a justiciable constitutional controversy was raised. The Court held that the enactment of a federal statute authorizing union security provisions is the type of governmental action upon which the Constitution is brought to bear even though the federal sanction was invoked by private agreement. 31 Stressing that “[i]ndustrial peace along the arteries of commerce” is a legitimate congressional objective, 32 the Court found that “financial support of the collective bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce clause. . . .” 33 The Supreme Court therefore held section 2, Eleventh of the RLA was not violative of either freedom of association under the first amendment or due process under the fifth amendment.

In rejecting the secular challenge to the union security provision in *Hanson,* the Supreme Court expressly reserved opinion on other potential violations of the first amendment which were not before the Court in that case. 34 Five years later, some of the questions reserved in *Hanson* were addressed by the Supreme Court in *International Association of Machinists v. Street.* 35 In that case, Street claimed that the monies he was required to pay to the union to maintain his employment were being used to finance candidates for political office and to “promote the propogation of political and economic doctrines, concepts and ideologies with which he disagreed.” 36 While the Supreme Court again upheld the validity of union security agreements, it found that the use of union dues for political purposes antithetical to the individual em-

---

31. *Id.* at 232.
32. *Id.* at 233.
33. *Id.* at 238.
34. The Court stated that “if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case.” *Id.*
36. *Id.* at 744.
ployee’s beliefs was not sanctioned by the Railway statute. The Court consequently forbade the union from using such dues and assessments for political purposes which the individual opposed.

The Court in Street, although upholding compulsory dues for collective bargaining purposes under the statute, acknowledged that union security provisions are not always inviolate against the conflicting interests of the individual employee. Upon examining the legislative history and the language of the statutory authorization of union shops, the Court found a discernible congressional concern over “possible impingements on the interests of individual dissenters from union policies.”

Yet, despite this acknowledged congressional concern, the Supreme Court’s decision in Street was narrowly read by the Fifth Cir-

37. Id. at 768-69.
38. Id. at 771-75.
39. The Supreme Court in Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977), recently addressed the constitutional issue raised but not decided in Street. Abood involved an agency shop arrangement, authorized by Michigan law, which was established between the Detroit Federation of Teachers and the Detroit Board of Education. Appellants, public school teachers, refused to pay dues under the requirements of the security provision on several grounds including the ground that the dues were used to finance “economic, political, professional, scientific and religious” activities and programs of which the appellants did not approve. Id. at 213. The teachers sought to have the agency shop declared unconstitutional as a violation of their freedom of association protected by the first and fourteenth amendments.

The Supreme Court, citing the language of the Michigan Court of Appeals which held that the state law “sanction[ed] the use of nonunion members’ fees for purposes other than collective bargaining,” noted that it was now confronted with the constitutional issue avoided by its statutory interpretation of the RLA in Street. Id. at 232. In examining the issue the Court declared that “at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one’s beliefs should be shaped by his mind and his conscience rather than coerced by the State,” and concluded that these principles “prohibit the appellees from requiring any of the appellants to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher.” Id. at 243-35. The Supreme Court indicated, however, that a union could constitutionally spend funds on behalf of political views not germane to its duties as a collective bargaining representative so long as those funds came from employees who do not object to advancing those beliefs. The Court also noted that while there might be difficulties in drawing lines between “collective bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited,” it was not forced to decide that issue in the instant case. Id. at 235-36.

40. 367 U.S. at 766. The Court noted that Congress had incorporated safeguards in the statute to protect dissenter’s rights. The original draft of the statute placed only one qualification on the authorization proposal—that membership had to be available on the same terms and conditions to all employees. This was primarily designed to prevent racial discrimination in employment through denial of membership in the union. During hearings and debate, however, Congress became concerned that “the Union Shop might be used to abridge freedom of speech and beliefs.” Therefore a second proviso was proposed and adopted by both Houses which would prevent loss of employment except for failure to pay dues, fees and other assessments. Fees meant initiation fees, and dues and assessments were meant to finance the activities of the general negotiating committee. Id. at 765-66. See Hearings on S. 295 Before the Subcomm. of the Senate Comm. on Labor and Public Welfare, 81st Cong., 2d Sess. (1950) passim, and Hearings on H.R. 7789 Before the House Comm. on Interstate and Foreign Commerce, 81st Cong., 2d Sess. (1950) passim.
cuit Court of Appeals in *Gray v. Gulf, Mobile & Ohio Railroad* \(^41\) not to invalidate the requirements of an agency shop as applied to religious objectors. The circuit court cited *Street* for the proposition that only when union dues are expended for non-collective bargaining purposes would application of a union shop be prohibited, and then only to the extent of such an invalid expenditure. In the case of the religious objector there is no claim that the funds are being misused; rather it is claimed that union membership, or a demand for financial support of the union, is in and of itself objectionable. On that issue the Fifth Circuit felt that the holdings in *Hanson* and *Street* made it clear that Congress had the right to enact a provision requiring a fair share payment by all who receive the benefits of the union's collective bargaining activities.\(^42\)

While the Fifth Circuit in *Gray* summarily noted that first amendment religious freedoms were not absolute and would fall before a compelling state interest,\(^43\) no actual balancing of the interests under the Supreme Court's "compelling state interest" test\(^44\) occurred until *Linscott v. Miller Falls Co.*\(^45\) was decided the following year. In *Linscott*, the Fifth Circuit undertook that balancing test on the assumption that the Supreme Court in *Hanson* dealt only with the more general freedom of association issue. The court of appeals found that union security agreements under the NLRA were supported by a compelling governmental interest in fostering collective bargaining and industrial peace.\(^46\) The court noted that the *Sherbert* balance took into account not only the interests of government and religion, but also the degree of interference with the religious practice. Applying this to the situation before it, the court found that the burden placed on religious employees was not as severe as the burden found unconstitutional in *Sherbert*, since the cost imposed was not destitution but rather lower salary in a non union shop.\(^47\) Thus the court of appeals, consistent with earlier

\(^{41}\) 429 F.2d 1064 (5th Cir. 1970), cert. denied, 400 U.S. 1001 (1971).

\(^{42}\) Id. at 1071.

\(^{43}\) Id. at 1072.

\(^{44}\) The "compelling state interest" test was first advanced by the Supreme Court in *Sherbert v. Verner*, 374 U.S. 398 (1963). In that case the Court held unlawful a denial of unemployment compensation funds to the plaintiff by the South Carolina Employment Security Commission on the grounds the plaintiff's failure to accept employment on her sabbath was a refusal to accept "suitable work when offered." The Court declared that only a compelling state interest could justify an infringement on the individual's first amendment right to the free exercise of religion. 374 U.S. at 403.


\(^{46}\) 440 F.2d at 17-18. In so holding, the court of appeals specifically rejected the argument that the fact the statute allows states to adopt "right to work" laws which forbid union shops suggests that Congress did not believe compulsory unionism was central to industrial stability. Id. at 18.

\(^{47}\) Id.
decisions, upheld the validity of union security agreements against religious constitutional attack.

While religious objectors were unable to secure relief from the obligations of union security under the first amendment, these early constitutional challenges to union security agreements established several important points which provide the foundation and impetus for statutory actions under Title VII. First, the cases show a recognition on the part of the courts that Congress was cognizant of the desires and interests of the individual employee and was concerned with protecting those interests. As the Supreme Court noted in its Street decision:

It is not as though Congress had believed it was merely removing some abstract legal barrier and not passing on the merits. It was made fully aware that it was deciding the critical issue of individual rights versus collective interests which have been stressed in this proceeding.48

Additionally, the cases show an increasing recognition by the courts themselves of the importance of individual rights. The courts had moved from a rejection of any protected individual interests, "religious as well as secular," in the Otten case to a limited protection of some individual interests in Street. Finally, along with recognition of the importance of individual rights was the development and acceptance of a balancing approach. Under this approach, no interest is absolute; rather, the divergent interests are weighed to create a just result.

III

TITLE VII AND RELIGIOUS DISCRIMINATION

The inability of religious employees to obtain relief from the obligations of the agency shop through use of the first amendment caused those employees to seek protection from Title VII of the Civil Rights Act of 1964.49 Although passage of the original Act in 1964 was seen primarily as an attempt to end racial discrimination,50 Congress in creating Title VII proscribed religious discrimination as well.51 Due in part to the fact that little discussion was given by Congress to the prob-


49. An early attempt by a religious objector to use Title VII as a source of protection came in Hammond v. United Papermakers & Paperworkers Union, 462 F.2d 174 (6th Cir.), cert. denied, 409 U.S. 1028 (1972). In Hammond, the Sixth Circuit Court of Appeals ruled that since the appellant's discharge occurred prior to the enactment of the Equal Employment Opportunity Act, 42 U.S.C. § 2000e(15)-(17) (1976), he could not rely on those provisions of Title VII, but rather must base his case on the first amendment. Citing Linscott and Gray, the court summarily held that appellant's right not to pay dues was not constitutionally protected. 462 F.2d at 175.


51. See note 2 supra.
lem of religious discrimination in employment,\textsuperscript{52} the wording of the original proscription was general and unclear in scope. The original Act neither defined religion nor explained what constituted religious discrimination.

Congress left it to the EEOC to secure proper implementation of the Act.\textsuperscript{53} The Commission, among its powers, was given authority to issue "rules and regulations to carry out the provisions of the title."\textsuperscript{54} Pursuant to this rulemaking authority, the EEOC first issued guidelines on religious discrimination in employment on June 15, 1966.\textsuperscript{55} These

\begin{itemize}
\item \textsuperscript{52} Debate on the House floor showed that the Judiciary Committee heard little testimony on religious discrimination. See Edwards & Kaplan, \textit{supra} note 50, at 600-01 n.10 (quoting 110 \textsc{Cong. Rec.} 1528-29 (1964)). Edwards & Kaplan suggest that religious discrimination was introduced into the title largely because of its traditional inclusion in earlier state fair employment practice legislation. They go on to note, however, that its inclusion is not surprising, as it "merely reflects a recognition that the exercise of religious freedom in the United States has always been considered a fundamental right that lies at the heart of a free society." \textit{Id.} at 602.
\item \textsuperscript{53} 42 U.S.C. \textsection 2000e-4 (1976).
\item \textsuperscript{54} 42 U.S.C. \textsection 2000e-12(a) (1976).
\item \textsuperscript{55} \textit{EEOC Guidelines on Discrimination because of Religion}, 31 \textsc{Fed. Reg.} 8370 (1966). The 1966 EEOC guidelines stated:
\end{itemize}

\begin{itemize}
\item \textsection 16.05.1 Observance of the Sabbath and religious holidays.
\begin{enumerate}
\item Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or to refuse to hire a person whose religious observances require that he take time off during the employer's regular workweek. These complaints arise in a variety of contexts, but typically involve employees who regularly observe Saturdays as the Sabbath or who observe certain special holidays during the year.
\item The Commission believes that the duty not to discriminate on religious grounds includes an obligation on the part of the employer to accommodate to the reasonable religious needs of employees and, in some cases, prospective employees where such accommodation can be made without serious inconvenience to the conduct of the business.
\item However, the Commission believes that an employer is free under Title VII to establish a normal workweek (including paid holidays) generally applicable to all employees, notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees. For example, an employer who is closed for business on Sunday does not discriminate merely because he requires that all his employees be available for work on Saturday. Likewise, an employer who closes his business on Christmas or Good Friday is not thereby obligated to give time off with pay to Jewish employees for Rosh Hashanah or Yom Kippur.
\item While the question of what accommodation by the employer may reasonably be required must be decided on the peculiar facts of each case, the following may prove helpful:
\begin{enumerate}
\item An employer may permit absences from work on religious holidays, with or without pay, but must treat all religions with substantial uniformity in that respect. However, the closing of a business on one religious holiday creates no obligation to permit time off to work on another.
\item An employer, to the extent he can do so without serious inconvenience to the conduct of his business, should make a reasonable accommodation to the needs of his employees and applicants for employment in connection with special religious holiday observances.
\item The employer may prescribe the normal work week and foreseeable overtime requirements, and, absent an intent on the part of the employer to discriminate on religious grounds, a job applicant or employee who accepted the job knowing or having reason to believe that such requirements would conflict with his religious obligations is not entitled to demand any alteration in such requirements to accommodate his religious needs.
\end{enumerate}
\end{enumerate}
\end{itemize}
initial guidelines required that only a limited accommodation be made by an employer to the religious practices of his employees. The guidelines held that no accommodation whatsoever was required where it would cause "serious inconvenience" to the conduct of the employer's business. These guidelines also saw discrimination in employment strictly in terms of intent, stating that absent an intent to discriminate, a normal work schedule would not be found violative of the Act despite a disproportionate impact on employees with certain religious beliefs.

Application of these guidelines to the union security conflict was apparently never attempted, as challenges were still being made under the first amendment. Had such application been sought, however, relief under the guidelines would undoubtedly have been denied, since the regulations made no reference to the union security conflict and appear to have been formulated expressly to deal with the problems of the sabbatarian. In fact, on January 26, 1967, the EEOC General Counsel, as part of a series of opinions interpreting the guidelines, declared that an employer would not violate Title VII by discharging an employee for failure to pay union dues under a lawful agency shop clause even though the refusal was based upon sincerely held religious beliefs. The General Counsel based his opinion on the ground that

(4) Where an employee has previously been employed on a schedule which does not conflict with his religious obligations, and it becomes necessary to alter his work schedule, the employer should attempt to achieve an accommodation so as to avoid a conflict. However, an employer is not compelled to make such an accommodation at the expense of serious inconvenience to the conduct of his business or disproportionate allocation of unfavorable work assignments to other employees.

56. See § 1605.1(a)(2), supra note 55.

57. See Edwards and Kaplan, supra note 50, at 619. Edwards and Kaplan suggest that three different definitions of religious discrimination under Title VII are possible. First, Title VII could seek to prohibit only intentional acts of discrimination. Second, the Act could prohibit discrimination by effect, which would prohibit actions by an employer which while otherwise neutral have a disparate impact on employees with different religious beliefs. Third, Title VII could act to prohibit discrimination by effect not exculpated by a showing "the employer has attempted to reasonably accommodate his employees religious needs or that any accommodation would create undue hardship on the business." This last definition takes into account the 1967 EEOC guidelines, codified in 1972 which are discussed infra at the text accompanying notes 62-90. Edwards and Kaplan conclude that the legislative history suggests that the original statute sought to prohibit only intentional discrimination. Id. at 620-21.


59. The guidelines are entitled "Observance of the Sabbath and religious holidays" and were created in response to "several complaints [which] question whether it is discrimination on account of religion to discharge or refuse to hire a person whose religious observances require he take time off during the employer's regular workweek." 31 Fed. Reg. 8370 (1966).

60. The General Counsel declared, "I do not believe it would be appropriate to read Title VII to make enforcement of a union shop agreement a case of religious discrimination simply because the terms of the agreement impose [an assessment at odds with] religious convictions." Opinion Letter of EEOC Acting General Counsel, Jan. 26, 1967, in BNA LAB. POLICY & PRAC. 401:3033 (1967). This was a reaffirmation of a position originally taken before the formulation of any guidelines. See Opinion of the EEOC General Counsel, G.C. 641-65, Dec. 29, 1965, in BNA LAB. POLICY & PRAC. 401:1006 (1967).
the National Labor Relations Act specifically permitted union shops without providing an exception for religious objectors. Thus it was initially felt that Title VII provided no assistance to the religious employee in avoiding the obligations of union security.

The EEOC, however, soon found the need to clarify their guidelines. The next year the Commission issued a new set of regulations on religious discrimination which placed a much stricter obligation on the employer by declaring that the duty not to discriminate on religious grounds included "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 such conduct of the employer's business." While the new guidelines did not attempt to define what would constitute "undue hardship," the new standard clearly required an employer to bear a greater burden or expense before he could avoid the statutory duty of accommodation than did the previous "serious inconvenience" standard. The 1967 guidelines, by eliminating much of the supplementary language found in the earlier regulations, resulted in an employer no longer being able to avoid the accommodation requirement by providing a regular workweek for all employees. This suggested that the uniform treatment of employees which results in a harsher impact on some than on others due to their religious beliefs was no longer protected, and in turn expanded the proscriptions on religious discriminations under Title VII from intentional discrimination to include

---


62. 29 C.F.R. § 1605.1 (1967). The new guidelines were issued and took effect on July 10, 1967. The 1967 guidelines stated:

§ 1605.1 Observance of the Sabbath and religious holidays.

(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 employer 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.

63. 29 C.F.R. § 1605.1(b) (1978) (emphasis added).
discrimination by effect. The guidelines, recognizing the "particularly sensitive nature" of the issues involved, placed the burden of proving undue hardship on the employer. Finally, the 1967 regulations specifically noted that in order to achieve an equitable application of the guidelines it would be necessary for problems to be examined on a case by case basis.

The new guidelines did not expressly repeal the old guidelines, and the 1967 regulations were again formulated in response to questions concerning the employment rights of sabbatarians. The new guidelines, however, state that they will be applied "to the variety of situations which arise due to the varied religious practices of the Amer-

64. Discrimination by effect occurs where there is uniform treatment of all employees, but the treatment results in a harsher impact on some employees than on others. See note 57 supra. The discrimination by effect standard was first given judicial support in Griggs v. Duke Power Co., 401 U.S. 424 (1971). In Griggs, the Supreme Court held certain employment tests violative of the Act even though they were facially neutral, as they resulted in a disparate and discriminatory impact on blacks.

Griggs has been expanded from racial discrimination to other types of discrimination outlawed by the Act. See, e.g., Dothard v. Rawlinson, 433 U.S. 321 (1977) (sex discrimination); Espinoza v. Farah Mfg. Co., 414 U.S. 86, 92 (1973) (national origin). It is argued, however, that Griggs should not be applied to religious discrimination, for the Griggs case specifically concerned itself with preventing the discriminatory effects of past intentional discrimination. The Court in Griggs declared:

The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of their intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.


65. 29 C.F.R. § 1605.1(c) (1978). The 1966 guidelines had been silent on who would bear the burden of proof as to the existence or absence of "serious inconvenience." 31 Fed. Reg. 8370 (1966). Under the Administrative Procedure Act, the burden of proof would be on the employee as that Act states "Except as otherwise provided by statute, the proponent of the order has the burden of proof." 5 U.S.C. § 556(d) (1976). The EEOC was criticized by several courts for exceeding its authority by shifting the burden of proof to the employer in the 1967 guidelines. See 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). This issue was also argued but not reached in Daniels v. Pacific Northwest Bell Tel. Co., 7 Fair Empl. Prac. Cas. 1323, 1324 (D. Ore. 1972).


67. 29 C.F.R. § 1605.1(a) (1978). The guidelines retained their original title which stated the guidelines purport to deal with "the Sabbath and other religious holidays."
ican people." This language suggests the Commission intended that the new guidelines be applied to all religious practices, which would include a refusal to pay union dues for religious reasons. This interpretation is supported by several EEOC decisions applying the guidelines to a number of religious practices not involving sabbath observance.

The 1967 guidelines received a mixed reception from the courts. While some courts accepted and applied the guidelines, others either ignored them or specifically rejected them. The most serious challenge to the guidelines occurred in Dewey v. Reynolds Metals Co. In that case an employee, discharged in 1966 for refusal to work compulsory overtime on Sundays because of his religious beliefs, filed suit under Title VII claiming religious discrimination. The employer, in defense, challenged Dewey's right to bring an unlawful employment action since a grievance had been adjudicated against Dewey in arbitration. On the merits the employer argued that in distributing overtime duties he merely followed the seniority provisions in the collective bargaining agreement which applied uniformly to all workers. No attempt was made to accommodate Dewey's religious beliefs except to allow him the normal practice of seeking a replacement on his own. The district court in applying the 1967 guidelines found that under these circumstances the employer had violated Title VII.

The Sixth Circuit Court of Appeals reversed the district court's ruling. Judge Weik, speaking for the circuit court, held that the arbitration should have precluded the equal employment opportunity action and that the district court had incorrectly applied the 1967 guidelines retroactively to the 1966 discharge. The judge then went...

68. 29 C.F.R. § 1605.1(d) (1978).
69. See EEOC Dec. No. 71-2620 (June 25, 1971), 4 Fair Empl. Prac. Cas. 23 (constructive discharge for refusing to allow worker to wear ankle length dress violates Title VII); EEOC Dec. No. 71-779 (Dec. 21, 1970), 3 Fair Empl. Prac. Case. 172 (constructive discharge for refusing to allow worker to keep head covered at all times for religious reasons violates Title VII).
72. 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).
73. 429 F.2d at 327-38.
74. Id. at 331.
76. 429 F.2d at 332.
77. Id. at 329-30.
on to attack the validity of the 1967 guidelines themselves, finding that the guidelines were inconsistent with Title VII and could not be followed. The court noted that there was no evidence in the legislative history of any congressional intent that an employer be compelled to "reasonably accommodate" the religious beliefs of his employees.\textsuperscript{78} No discrimination was found in the employer's failure to make an accommodation, and the court stated that it was a "fundamental error" to equate religious discrimination with a failure to accommodate, as the "two concepts are entirely different."\textsuperscript{79} Consequently, a collective bargaining agreement which imposed a uniform work rule on all employees was not discriminatory, even if it had an unequal impact on the religious needs of individual employees.\textsuperscript{80} Indeed, the court felt that the application of an accommodation rule that required unequal administration of the collective bargaining contract would create "chaotic personnel problems."\textsuperscript{81} The Sixth Circuit, challenging the EEOC's authority to create the reasonable accommodation requirement, stated:

> It should be observed that it is regulation 1605.1(b) and not the statute (§ 2000e-2(a)) that requires an employer to make reasonable accommodation to the religious needs of its employees. As we have pointed out, the gravamen of an offense under the statute is only discrimination. The authority of EEOC to adopt a regulation interfering with the internal affairs of an employer, absent discrimination, may well be doubted.\textsuperscript{82}

Finally, the court indicated its belief that application of the reasonable accommodation standard would raise "grave constitutional questions of violation of the Establishment Clause of the First Amendment" since the government is required to be neutral in its treatment of believers and non-believers.\textsuperscript{83} The Dewey decision thus limited religious dis-

\begin{itemize}
\item \textsuperscript{78} Id. at 334.
\item \textsuperscript{79} Id. at 335.
\item \textsuperscript{80} Id. at 329.
\item \textsuperscript{81} Id. at 330.
\item \textsuperscript{82} Id. at 331 n.1.
\item \textsuperscript{83} Id. at 334-35. The constitutionality of the 1967 guidelines and the 1972 amendment under the establishment clause of the first amendment has been repeatedly examined by both the courts and the commentators. In order for a statute to be constitutional under the establishment clause it must first have a secular legislative purpose; second, its principle or primary effect must neither advance nor inhibit religion; and finally the statute must avoid "excessive government entanglements" with religion. See Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 773 (1973); Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

The reasonable accommodation standard was examined under these requirements 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). The majority in Cummins upheld the validity of the statute. It found a secular purpose in the standard's attempt to end discrimination in employment and in protecting employees from discipline for following the dictates of their conscience. Id. at 552-53. The circuit court declared the standard has a neutral effect in that it acts primarily to ensure continued job security for people whose religious beliefs conflict with uniform work rules. The standard, the majority stated "does not treat different religions differently." Id. at 553. Finally, the court noted that
RELIGIOUS DISCRIMINATION

1979

discrimination in employment under Title VII to intentional discrimination and at the same time challenged the power of the EEOC to develop and issue guidelines to help implement the provisions of the statute.\textsuperscript{84}

Largely in response to \textit{Dewey} and similar judicial objections to the 1967 guidelines, Congress, in enacting the Equal Employment Opportunity Act of 1972,\textsuperscript{85} amended Title VII by inserting into the statute as section 701(j) the following definitional language:

The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to \textit{reasonably accommodate} to an employee's or prospective employee's religious observance or practice without \textit{undue hardship} on the conduct of the employer's business.\textsuperscript{86}

The amendment was introduced on the floor of the Senate by Senator Jennings Randolph, and was passed unanimously with little de-

application of the standard causes no excessive government entanglement, as the EEOC and the courts need only consider whether the employer has made a reasonable accommodation and whether undue hardship will result. \textit{Id.} at 533-34.

The dissent in \textit{Cummins} argued that the standard violated all three constitutional requirements. First, the standard, by protecting only certain religious views which conflict with neutral work requirements, was said to allow preferential treatment because of religion. This departs from the secular purpose of Title VII to make religion a meaningless factor in employment decisions. \textit{Id.} at 556. The standard also was seen to violate the neutral effects rule by discriminating between religious and nonreligious employees, and between certain types of religious employees—those whose beliefs do and do not conflict with neutral work rules. \textit{Id.} at 558. Additionally, the dissent suggested that the reasonable accommodation standard calls for an inquiry into the sincerity of the employee's religious beliefs which would call for excessive government entanglement. \textit{Id.} at 559. See generally \textit{Yott v. North American Rockwell Corp.}, 428 F. Supp. 763 (C.D. Cal. 1977).

Most recently, the Supreme Court in \textit{Trans World Airlines v. Hardison}, 432 U.S. 63, 70 (1977), specifically avoided this constitutional issue. Justice Marshall in dissent, however, did address the issue and concluded "[i]f 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 employer to do the same with respect to obligations owed the employer." 432 U.S. at 90-91.


bate. The legislative history that is available centers around the introductory remarks of Senator Randolph which make clear that his amendment was offered in response to the courts' inconsistent application of the rights of religious workers to be free from discrimination in employment. The Senator had printed in the record as examples the decisions in two cases, Dewey v. Reynolds Metals Co., described above, and Riley v. Bendix Corp., a district court ruling which also rejected application of the 1967 guidelines. Congress in creating section 7010 thus specifically rejected the holding in the Dewey case. Additionally, by incorporating into the statute the language of the 1967 guidelines Congress formally established not only the duty of reasonable accommodation but also that Title VII prohibits religious discrimination in employment by effect as well as religious discrimination by intent.

IV

APPLICABILITY OF TITLE VII TO THE UNION SECURITY CONFLICT

A. Title VII Implications

In passing the 1972 amendment Congress did not expressly address the question of whether the reasonable accommodation standard was meant to apply to religious employees who object to the requirements of union security as well as to those employees who refuse to work on the sabbath. As noted above, the original EEOC position was that Title VII did not prevent normal application of agency shop agreements to religious employees. The EEOC General Counsel in early 1967 based this opinion on the grounds that the NLRA permitted union security agreements. Yet the EEOC General Counsel never explained why a union shop provision was entitled to this type of special treatment. Moreover, in late 1970, the EEOC seemed to retreat from the General Counsel's position when it declared that "matter appearing in the commercial reporting services erroneously entitled, 'opinion let-

88. Id. at 705. The Senator noted, "our courts have on occasion determined that this freedom is nebulous, at least in some ways. So in presenting this proposal . . . it is my desire and I hope the desire of my colleagues, to assure that freedom from religious discrimination in the employment of workers is for all times guaranteed by law."
89. 330 F. Supp. 583 (M.D. Fla. 1971), rev'd, 464 F.2d 1113 (5th Cir. 1972). These cases were reprinted at 118 Cong. Rec. 706-13 (1972).
90. In addition to the remarks of Senator Randolph in the Senate (see note 88 supra), the legislative history shows approval of the amendment in the House of Representatives after the Chairman of the House Committee explained, "[t]he purpose of this subsection is to provide the statutory basis for EEOC to formulate guidelines on discrimination because of religion such as those challenged in Dewey v. Reynolds Metals Company."
91. See note 60 supra.
RELIGIOUS DISCRIMINATION

Four years later, in 1974, the EEOC expressly reversed its position on religious objectors and union security when it held that the discharge of a Seventh-day Adventist for refusing to pay union fees and dues constituted unlawful religious discrimination violative of the Act, absent a showing of an attempt at reasonable accommodation. The EEOC declared:

We are aware of the First Amendment cases holding that when religious practices come into conflict with labor practices authorized by statute, a balancing of the interests involved requires that free exercise of religion yield, in part, to the Congressionally supported principle of the union shop. Those cases involve fact situations virtually identical to that presented here—the refusal of a Seventh-Day Adventist to join a labor organization because of his convictions in the face of a union shop clause in the collective bargaining agreement. But those are not Title VII cases. In those Title VII cases where an employee refused to work on the Sabbath, in conflict with rules or policies of the employer, an attempt at reasonable accommodation by the employer has been required.

In that same year, Title VII's section 701(j) was applied to a union security conflict by a federal circuit court in Yott v. North American Rockwell Corp. While the Ninth Circuit agreed with the EEOC's new position and held that an attempt at reasonable accommodation was necessary before a religious employee could be discharged for failure to pay union dues, the court did not clearly explicate its reasons for this conclusion. Rather, the court noted only that the subsequent amendment of the Act in 1972 removed any doubts raised by Dewey about the application of the 1967 guidelines.

An in-depth analysis of this issue was, however, provided by another circuit court of appeals in Cooper v. General Dynamics. In that case, the Fifth Circuit reversed by a 2-1 decision the holding of the district court below that had found no conflict under Title VII in the

---

94. Id. (citations omitted).
95. 501 F.2d 398 (9th Cir. 1974).
96. Id. at 402-03.
plaintiffs' discharge for failure to pay union dues. The district court based its decision on the grounds that union dues were merely a "tax" to support collective bargaining, that the plaintiffs had not been asked to subscribe to any tenets or doctrines of unionism, and that the plaintiffs' religious beliefs, while sincerely held, were illogical. In overturning the district court, the Fifth Circuit rejected the argument that Title VII's proscriptions should be narrowly applied to sabbatarians, thus excluding protection for religious opponents of union security.

Looking at the express language of the amendment, the majority concluded that the definition of religion in the Act was an "operative one," in which "all forms and aspects of religion, however eccentric, are protected except those that cannot be, in practice and with honest effort, reconciled with a business like operation." The dissent disputed this conclusion, arguing that nowhere in the legislative history of the amendment was mention made of union security provisions. The dissent noted, in addition, that Congress had at the same time rejected separate legislative efforts to exempt religious objectors from the obligations of the agency shop. Consequently, the dissent concluded that since the amendment was adopted unanimously in both houses, Congress did not intend to apply section 701(j) to union security provisions.

As the dissent in Cooper stated, there is no express indication that Congress considered applying the 1972 amendment to union security provisions. It is equally true that Congress repeatedly rejected other independent legislative attempts to create special exemptions for reli-

99. Id. at 1262. The plaintiff-appellants criticized the district court's characterization of union dues as a "tax." A tax is defined as "a rate or sum of money assessed on a ... citizen by the use of a nation or state." 84 C.J.S., Taxation § 1 (1954). Plaintiffs argued that taxation, being an attribute of the sovereign, has a special significance and force union dues do not have. Brief for plaintiff-appellants at 14-15. The district court's decision can be further criticized in that it fails to understand the compulsion that exists in forcing religious employees to pay dues even if they are not forced to subscribe to any of the tenets of unionism. As one commentator has declared, "[p]erformance of a compulsory act is likely to cause a greater loss of moral self-respect than mere abstinence from a religious practice, because performance of an affirmative act may force the individual to retreat from his present moral plane." See Note, Accommodation of an Employee's Religious Practices under Title VII, 1976 U. ILL. L.F. 867, 875.
100. 533 F.2d at 167-69. The court of appeals declared:

We are unable to reconcile with Section 701(j)'s sweeping language ("all aspects of religious observance and practice, as well as belief. . . .") the Union's suggestion that Congress intended by it to protect the Sabbath observance only. When the legislator speaks plainly, he is entitled to be taken at face value. The language chosen is broad—broadener can hardly be imagined—and entirely extravagant to a mere concern for Sabbatarianism or any other particular doctrine or observance.

Id. at 168.
101. Id. at 168-69.
102. Id. at 175.
103. See generally 118 CONG. REC. 705-31 (1972).
gious employees from the NLRA union security provision. It is thus reasonable to conclude that Congress, at the time of the 1972 amendment, did not consider potential claims arising under the amendment which would involve union security.

This conclusion, however, should not preclude application of Title VII to the union security conflict. The conclusion merely recognizes an absence of legislative consideration, not a legislative intent not to apply the amendment to union security objections. Title VII provides a limited exception to union security, as opposed to the absolute exemptions rejected at other times. Congress has also subsequently shown a concern over and an interest in protecting the rights of religious opponents of the agency shop. In 1974, for example, in amending the NLRA to include jurisdiction over the health care industries, Congress added a new section 19 to that Act which expressly created an absolute exemption from union security requirements for religious employees in the health care industries. More recently, almost unanimous support was given to the section of the Labor Law Reform Bill of 1978 which would have extended this absolute exemption to all employees covered


Any employee of a health care institution who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required, in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious charitable fund. . . .

The dissent in Cooper argued that passage of this provision signified a belief by Congress that Title VII did not apply to union security for otherwise there would be no need for this provision. 533 F.2d at 176. The legislative history of the health care amendments does not substantiate this argument. No mention is made of the Title VII provision. See generally, 120 CONG. REC. 16914-15 (1974). Moreover, Congress in passing section 19 of the N.L.R.A. in 1974 went farther than the proscriptions of Title VII by creating an absolute exemption for employees in the health care field. Under Title VII a showing of undue hardship is necessary to preclude any accommodation. As discussed below in the text accompanying note 197 infra, such undue hardship could arguably result where there is an especially high concentration of religious objectors within a certain industry. This is exactly the situation in the health care industry where Seventh-day Adventists alone have "47 health care institutions across the country [in which] many of their members work. . . ." 120 CONG. REC. 16914 (1974) (remarks of Rep. Erlenborn.) Thus, without an amendment such as section 19, these religious adherents might remain unprotected. That Congress was especially concerned with the health care fields is shown by the report of the Joint Conference Committee where it is noted, "[t]he Senate receded with a clarifying amendment under which, in recognition of the special humanitarian character of health care institutions an employee may be required to make payments to a non-religious charitable fund in lieu of periodic dues and initiation fees. . . ." H.R. REP. NO. 1051, 93rd CONG., 2d Sess. (1974), reprinted in LEGISLATIVE HISTORY OF NONPROFIT HOSPITALS UNDER THE NATIONAL LABOR RELATIONS ACT, 1974, at 348 (1974). In creating an absolute exemption for an industry where undue hardship might exist, rather than signifying a belief Title VII did not apply to union security conflicts, Congress could be seen as acting in a manner complementary to such coverage under Title VII.
by the NLRA.106

A second reason to apply section 701(j) to union security conflicts is that the language of the 1972 amendment passed by Congress is wide enough to encompass both this and other religious observances.107 Senator Randolph intentionally placed such flexibility in the language of the amendment.108 The legislative history of section 701(j) notes that "[t]he term 'religion' as used in the Civil Rights Act of 1964 encompasses . . . the same concepts as are included in the first amendment—not merely belief, but also conduct; the freedom to believe, and also the freedom to act."109 In passing the amendment, Congress showed its desire, in Senator Randolph's words, "to assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law."110 In order to fulfill this desire, Title VII's reasonable accommodation standard must extend to union security conflicts. No distinction should be drawn between the protection of sabbatarianism and religious opposition to union security, since both require affirmative acts in contravention of important and strongly held religious beliefs.111 Courts are now implicitly acknowledging this, and while they

107. See Redmond v. GAF Corp., 574 F.2d 897, 900 (7th Cir. 1978).
108. This intent can be seen in the following interchange between Senator Dominick and Senator Randolph during debate on the amendment:

MR. DOMINICK. . . . I think this amendment will be helpful. All of these various situations keep arising because of our pluralistic method of conducting our business in this country. It is hard to foresee far enough ahead so that each specific type of case can be anticipated.

Am I correct in understanding that the amendment allows flexibility both to the EEOC and to its investigators to determine whether or not any particular group of religious adherents are having their customary observance of their religious activities unduly interfered with? In other words, flexibility is provided so that someone could make a discretionary judgment on it?

MR. RANDOLPH. The Senator from Colorado correctly follows me in the thinking that I have placed in the language of the amendment, that there would be such flexibility, there would be this approach of understanding, even perhaps of discretion, to a very real degree.

I agree with the Senator's feeling, and I am sure that that is what is meant and would flow from the adoption of the practice under the amendment.

118 CONG. REC. 706 (1972).
110. Id.
111. See generally Edwards & Kaplan, supra note 50, at 628. For such a distinction to be drawn, it is necessary to differentiate either between the religious practices (refusal to work on the sabbath versus religious objection to financial support of certain union activities), or between the secular interests which conflict with those religious practices (the employer's interest in uninterrupted production from employees versus the union members' interest in preventing free riders). The courts cannot distinguish between the religious beliefs holding one is more valid or important than the other, for not only would this violate the congressional policy against classifying religious beliefs (see, e.g., United States v. Seeger, 380 U.S. 163, 176 (1965)) but it would also arguably violate the establishment clause of the first amendment by giving one religion greater legal protection than another. A distinction can thus only be based on differences between the secular inter-
have not always found a violation of section 701(j), no court since Cooper has seriously questioned the rationale for applying the reasonable accommodation standard to the union security conflict.112

B. National Labor Relations Act Implications

Nonetheless, challenges to the applicability of Title VII to union security provisions authorized by either the National Labor Relations Act or the Railway Labor Act continue to be made. It is claimed that the NLRA and the RLA by their express language preclude application of the reasonable accommodation standard. The proviso to section 8(a)(3) of the NLRA, for example, provides:

[N]othing in this subchapter or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later. . . .

This language, it is argued, is in effect a "supremacy clause" which requires that where the provisions of Title VII and the NLRA come into conflict regarding that section, the NLRA must control. Since the section authorizes union security, Title VII cannot provide exceptions to that authorization.

This argument was addressed in part by the majority opinion in Cooper, which concluded that this reasoning fails to take into account the fact that the proviso to section 8(a)(3) also plays an important function within the NLRA itself.114 Without the proviso, union security agreements would conflict with the primary language of section 8(a)(3) as well as with several other sections of the Act.115 With this in mind,


113. See Note, Religious Accommodation and Agency Shops, supra note 97, at 101 n.78 (citing Brief for Appellants at 18-19).


115. See Note, Religious Accommodation and Agency Shops, supra note 97, at 101 n.78 (citing Brief for Appellants at 18-19).
the Cooper court concluded, “[i]t is, therefore, not surprising that the section incorporated language making plain that, despite these seeming conflicts, union security agreements are authorized, anything in the statutory system as then constituted notwithstanding.”116 Subsequent congressional action supports this conclusion of the circuit court. For example, Congress did not feel the need to distinguish section 8(a)(3) when it passed the 1974 exception to union security requirements under the Health Care industries in section 19 of the NLRA. If the language of section 8(a)(3) were to be taken literally and held to be a supremacy clause, the actions of Congress in 1974 would be meaningless. The fact that Congress either implicitly rejected or failed to consider such a result suggests that Congress did not consider the 8(a)(3) proviso to be a supremacy clause.

Moreover, the Supreme Court has conclusively defined the proper relationship between rights conferred on the individual by Title VII and rights conferred on others through the collective bargaining process protected by the NLRA. In Alexander v. Gardner-Denver Co.,117 the Supreme Court found that arbitration under a labor contract does not preclude a subsequent action brought in federal court under Title VII. In so deciding, the Supreme Court declared that Title VII “stands on plainly different ground; it concerns not majoritarian processes, but an individual’s right to equal employment opportunities. Title VII’s strictures are absolute and represent a congressional command that each employee be free from discriminatory practices.”118 On one hand, union security agreements, by preventing free riders, play an important role in promoting effective collective bargaining and therefore industrial peace;119 the proviso to section 8(a)(3) looks mainly to the relationship between the parties en masse. On the other hand, Title VII is concerned with the rights of the individual. Alexander v. Gardner-Denver Co. makes clear that in balancing majoritarian interests as provided in the NLRA against the individual’s right to equal employment, Title VII’s strictures must predominate.120 When Congress enacted Title VII it was not seeking to promote harmony or to nurture the collective interests of the majority, but rather to end discrimination in employment. Thus under the Supreme Court’s pronouncement in Alexander v. Gardner-Denver Co., the proviso to section 8(a)(3) of the NLRA cannot be held to be a controlling supremacy clause.

Proponents of union security still argue that even if section 8(a)(3)

---

116. 533 F.2d at 169 (5th Cir. 1976) (emphasis in the original).
118. Id. at 51.
is not controlling, the application of Title VII to authorized union security agreements would destroy "the heart of the NLRA . . . and with it the delicate balance of power between labor and management that has been fashioned in our country's laws only after decades of violent conflict."\textsuperscript{121} The response to this argument is that Title VII should not be considered a repeal of union security; rather, the two statutes should be read together to arrive at the proper congressional policy. The Supreme Court has chosen to read federal statutes in a complementary manner. In \textit{Boys Markets, Inc. v. Retail Clerks Local 770},\textsuperscript{122} the Court dealt with the effects of section 301 of the Labor Management Relations Act\textsuperscript{123} on the previously enacted Norris-LaGuardia Act,\textsuperscript{124} and set forth the following policy of statutory construction:

> The literal terms of § 4 of the Norris-LaGuardia Act must be accommodated to the subsequently enacted provisions of § 301(a) of the Labor Management Relations Act and the purposes of arbitration. \textit{Statutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions.}

> The Norris-LaGuardia Act was responsive to a situation totally different from that which exists today. . . .

> As labor organizations grew in strength and developed toward maturity, congressional emphasis shifted from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes. This shift in emphasis was accomplished, however, without extensive revision of many of the older enactments, including the anti-injunctive section of the Norris-LaGuardia Act. \textit{Thus it became the task of the courts to accommodate, to reconcile the older statutes with the more recent ones.}\textsuperscript{125}

This rule of construction is applicable, since the NLRA and Title VII of the Civil Rights Act were created thirty years apart and were enacted for different purposes in response to different societal needs. The National Labor Relations Act was enacted in 1935 to foster collective bargaining and prevent industrial strife, while Title VII of the Civil Rights Act was enacted in 1964 in an attempt to end the use of "irrelevant and stigmatizing criteria to bar persons from employment. . . ."\textsuperscript{126}

> Reading section 701(j) with section 8(a)(3) under the doctrine of \textit{Boys Markets} leads to the conclusion that, although Congress was con-

\textsuperscript{121} \textit{Id.} at 1347.
\textsuperscript{122} 398 U.S. 235 (1970).
\textsuperscript{125} 398 U.S. at 250-51 (1970) (citations omitted, emphasis added).
\textsuperscript{126} Bald v. RCA Alascom, 569 P.2d 1328, 1335 (Alas. 1977).
cerned in most instances with the needs of the majority, it was also concerned with the protection of individual needs. Thus, majoritarian rights protected by section 8(a)(3) should not be completely ignored and will always control except when they come into conflict with individual religious rights protected by section 701(j). In those instances Congressional intent must be read to imply that the individual rights guaranteed by Title VII must predominate and the majoritarian interests protected by the NLRA must yield.

V
REASONABLE ACCOMMODATION AND UNDUE HARDSHIP

A. Reasonable Accommodation

1. General Principles—Affirmative Duties under the Act

a. The Employer’s Duty

In codifying the 1967 guidelines, the 1972 amendment placed an affirmative duty on the employer to attempt to reasonably accommodate his employee’s religious beliefs.\(^{127}\) One of the primary distinctions between the 1966 and the 1967 guidelines was the creation of this affirmative duty. Under the 1966 rules, so long as an employer did not intentionally discriminate he was free to establish normal work schedules and requirements. Employees who accepted employment with knowledge of such requirements were not entitled to demand any alteration in those requirements in order to accommodate their religious needs.\(^{128}\) The EEOC, however, dropped this language from the 1967 guidelines, thus rejecting this passive approach. The current EEOC position under the statute states that “[a]n employer must make reasonable accommodations for employees whose religion may include observances, practices and beliefs . . . which differ from the employer’s requirements concerning standards, schedules or other business related employment conditions.”\(^{129}\)

The wording of the 1972 amendment makes clear that before an employer can claim the defense of undue hardship he must demonstrate that he has attempted to make some type of reasonable accommodation to his employees’ religious needs.\(^{130}\) The EEOC under the 1967 guide-

\(^{127}\) This affirmative obligation has been held to require attempts at permanent, or, if that is not feasible, temporary accommodation. This effort must be continued until such time as no further accommodation is possible or any accommodation would result in undue hardship. See Jordan v. North Carolina National Bank, 399 F. Supp. 172 (W.D.N.C. 1975), rev’d on other grounds, 565 F.2d 72 (4th Cir. 1977); Riley v. Bendix Corp., 464 F.2d 1113 (5th Cir. 1972).


\(^{129}\) 81 LABOR LAW REPORT ¶ 215.2, 335 (1975), Guidebook to Fair Employment Practices (1975).

\(^{130}\) In Young v. Southwestern Savings & Loan Ass’n, 509 F.2d 140 (5th Cir. 1975) the court of
lines and section 701(j) has held that failure to show an inability to accommodate may create the presumption that the employer could have made a reasonable accommodation, 131 or will at least support a finding that the employer has failed to meet his statutory obligations. 132 Under this approach, reasonable accommodation and undue hardship can be seen as two separate concepts, each of which requires a separate showing. A two-step approach is created by the guidelines and the amendment. Once a prima facie case of religious discrimination has been made by the employee, in order for an employer to meet his statutory obligation he must first show that a good faith attempt at a reasonable accommodation was undertaken. If the accommodation was unsuccessful, the employer must then show that it failed because no reasonable accommodation was possible without undue hardship. 133

While some courts have required a showing of actual accommodation and actual hardship, 134 others have held that an employer may prove undue hardship even without having attempted any accommodation. 135 These latter decisions fail to comprehend that the duty of accommodation imposed by the Act is meant to be more than a mere procedural step prior to the company's showing of undue hardship. Rather, the duty to demonstrate an attempt at reasonable accommodation effectuates the national policy enunciated by the Supreme Court in Griggs v. Duke Power Co., 136 where the Court noted that "Congress has placed on the employer the burden of showing that any given requirement [has] a manifest relation to the employment in question." 137

b. The Union's Duty

Section 701(j) speaks only of the employer's duty to reasonably accommodate as a defense must be unsubtle, direct, undelayed and communicated without equivocation. The statutory defense of accommodation is not met by some post hoc hypothesis." 509 F.2d at 145.


137. Id. at 432.
accommodate the religious needs of his employees. Yet the employer-employee relationship involves more than those two parties; it also involves the union, which as representative of the collective mass of employees maintains a contractual relationship with the employer. Many of the employer's work provisions and requirements which can create conflict with certain employee religious beliefs are based on collective bargaining agreements negotiated by the employer and the union. Any employer action regarding these provisions affects and interests the union. This is especially true of union security provisions which are included in collective bargaining contracts specifically to safeguard and protect the interests and needs of the union. The question thus becomes one of what obligations are imposed on the union by the Title VII framework of reasonable accommodation. While it is true that the language of section 701(j) charges only the employer and places no corresponding duty on the union, this should not automatically be read as a congressional intent to exclude the union from any obligations under that section. Congress' language speaks of the employer's duty presumably because religious conflicts in employment most often involve work rules of the employer as opposed to union requirements. Moreover, the definition of religion found in section 701(j) seeks to clarify the other provisions and proscriptions found in the Act, which outlaw both employer and union discrimination. Section 703(c), for example, defines some union unlawful employment practices in terms of employer action. That section makes it unlawful for a union "to cause or attempt to cause an employer to discriminate against an individual [on the basis of religion]." The usual manner in which a union enforces an agency shop provision is by demanding that an employer discharge the employee who has failed to pay his dues and fees. As the Fifth Circuit noted in Cooper v. General Dynamics, "for the Union to demand [an employee's] discharge for delinquency in dues-equivalent payments, when that delinquency is a consequence of [his] religious belief [when reasonable accommodation might be possible] would be to do precisely what section 703(c)(3) denounces." Thus, even though the union is not expressly included in section 701(j), statutory construction implicitly requires that the reasonable accommodation requirement also be applied to union actions.

138. Section 701(j) declares, "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. . . ." 42 U.S.C. § 2000e(j) (1976) (emphasis added).
141. Id. at 172 n.1.
142. Similar statutory construction has also been applied to other Title VII provisions. Thus, § 703(h), 42 U.S.C. § 2000e-2(h) (1976), the language of which is addressed only to the employer,
A second reason for requiring a union to fulfill the obligations of the reasonable accommodation standard is that any other approach would place the employer in a "catch-22" posture. If the employer does not follow the provisions of the union security agreement in a collective bargaining contract, the employer may be subject to penalties under the NLRA. Yet, if the employer follows the contract and discharges the religious employee, he may then be in violation of Title VII under section 701(j). The EEOC has addressed this issue and the role of contracts in administration of the Act, declaring:

A contract between an employer and a union will not serve as a defense by the union to charges of unlawful discrimination. This is true whether the contract specifically provides for an unlawful employment practice or omits any procedure for processing grievances against an unlawful practice. If an employer . . . is required under law . . . to revise its union contract in order to comply with the law . . . then the union is expected to cooperate in the revision.

Based upon these considerations, it appears that a union is under an affirmative obligation both to acquiesce in the employer's attempts to reasonably accommodate his employees religious needs and also to attempt reasonable accommodations of its own where necessary and appropriate. This is the view generally adopted by the courts.

The nature of the union's duty under the statute, once such a duty is established, corresponds with that of the employer. As noted, the union's duty includes both the requirement that it accept accommodations made by the employer (such as the adjustment of collective bargaining provisions) and the requirement that it affirmatively attempt accommodations which can be made by the union alone. Again, as with the employer, there must be an actual showing that the union has attempted an accommodation before it can claim undue hardship.

143. Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) (1976), makes it an unfair labor practice for an employer to refuse to bargain collectively with a certified union. If an employer refuses to apply the provisions of a valid collective bargaining agreement, such as refusing to discharge an employee for failure to pay dues as required by a union security clause, a refusal to bargain violation could result.


Since conflicts between religious employees and their unions occur much less frequently than conflicts between those employees and their employers, the union’s duty under section 701(j) is not yet as firmly established as that of the employer. Nonetheless, where religious conflicts with unions do arise, the union’s duty to reasonably accommodate its members should be no less rigorous than that of the employer.

c. The Employee’s Duty

Although the Act seems to place the entire burden of accommodation on the employer and implicitly on the union, many courts have held that the duty to accommodate requires that the employee must also be willing to help bring about the accommodation. Thus it has been held that while the employer and the union have the burden of proof regarding reasonable accommodation and undue hardship, the employee must first establish a prima facie case of religious discrimination. In order to establish a prima facie case of religious discrimination under section 701(j), the employee must prove: (1) that he has a bona fide religious belief which causes conflict with an employment requirement; (2) that he informed the employer and the union of his religious views; and (3) that he was discharged or discriminated against for a practice required by his religious beliefs.146 The first two requirements need some explanation. While the employee must show that he has a bona fide religious belief to satisfy the first requirement, this should not include the practice adopted by some courts of inquiring into the rationality of the employee’s religious beliefs.147 As the Supreme Court declared in United States v. Seeger:

“Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs . . . .” Local boards and courts in this sense are not free to reject beliefs because they consider them ‘incomprehensible.’ Their task is to decide whether the beliefs professed by [an individual] are sincerely held and whether they are, in his own scheme of things, religious.148

The courts in determining the sincerity of religious beliefs must be careful not to inject into their decisions value judgments about those religious beliefs. In most instances the sincerity of the employee’s religious beliefs has not been in question.149 Only when it is determined that the employee’s position is based on “convenience rather than con-
viction" should a case be dismissed.\textsuperscript{150}

As for the second requirement that the employee must inform the employer of his religious needs, the courts have consistently held that an employee who fails to inform the employer of religious beliefs forfeits the right to an accommodation.\textsuperscript{151} Some courts, however, have further required the employee to cooperate with an employer in achieving an accommodation—to meet the employer half way. Courts that consider the employee's position inflexible and unreasonable have found no reasonable accommodation possible.\textsuperscript{152} The Ninth Circuit has recently rejected this latter requirement, declaring that the employee is not required "to show that he . . . made some efforts to compromise or accommodate his own religious beliefs before he can seek an accommodation from his employer."\textsuperscript{153}

While requiring some compromise on the part of the employee is not mandated by the language of the statute, such compromise does seem in accord with the intent of Congress. In passing section 701(j) Congress did not seek to place an absolute protection on employees' religious beliefs; rather, it sought to balance the conflicting interests involved. In seeking such a balance, it would be inequitable to require only one side, the employer and/or the union, to give ground if the other side, the religious employee, could also move toward a mutually acceptable accommodation without compromising his or her religious views. As the legislative history shows, Senator Randolph premised his amendment on the assumption that "usually the persons on both sides of this situation, the employer and the employee, are of an understanding frame of mind and heart."\textsuperscript{154}

Requiring some cooperation and ac-

\begin{thebibliography}{100}
\item The Supreme Court in \textit{Railway Clerks v. Allen}, 373 U.S. 113 (1963), established a similar requirement where employees seek to challenge a union's use of their dues for political purposes they oppose. Quoting \textit{International Assm. of Machinists v. Street}, 367 U.S. 740, 774 (1961), the Court reiterated that "dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee." 373 U.S. at 119. The Court held that the employee need not object to every use of dues for political purposes, so long as "he manifests his opposition to any political expenditures by the union." \textit{Id.} at 118.
\item 118 CONG. REC. 706 (1972).
\end{thebibliography}
accommodation on the part of the employee, short of a compromise of religious beliefs, merely reflects this understanding, and should be required by the courts. In requiring such cooperation by the employee, however, it bears re-emphasis that the courts should not require actions in conflict with employees basic religious beliefs.

2. Accommodation of the Union Security Conflict

While Congress in its codification of the 1967 guidelines gave statutory approval to the reasonable accommodation standard, it failed to delineate the meaning or the scope of the terms "reasonable accommodation" or "undue hardship." The legislative history suggests that this failure may have reflected a recognition by Congress of the impossibility of formulating specific criteria in light of the wide divergence among types of protected religious beliefs. The result has been that the courts are forced to grapple with the facts of each case under the balancing process to determine the correct perimeters of the reasonable accommodation standard.

Proponents of union security argue that such grappling need not occur when a religious practice conflicts with union security provisions, since the courts have already undertaken such a balancing of the interests and have found that individual religious interests must fall before the collective interests of the majority. It is argued that Title VII's "ban on religious discrimination simply extends the first amendment's protection of religious beliefs to private employment," and consequently, that union shop agreements enforceable under the first amendment are equally enforceable under Title VII. This argument has a basis in the legislative history of section 701(j). In describing his bill, Senator Randolph declared:

The term "religion" as used in the Civil Rights Act of 1964 encompasses, as I understand it, the same concepts as are included in the first amendment—not merely belief but also conduct; the freedom to believe, and also the freedom to act.

I think in the Civil Rights Act we thus intended to protect the same rights in private employment the Constitution protects in Federal, State or local governments.

155. See note 108 supra.
156. See text accompanying notes 23-48 supra.
It is thus asserted that as first amendment religious freedoms will not prevent normal application of a union security provision, similarly the majority's right to have an agency shop need not fall before the right of the individual to freely exercise religion under Title VII.\textsuperscript{159}

The answer to this argument is that while section 701(j) seeks to promote religious liberty, it also seeks to achieve the same ends as does Title VII as a whole, that is, the further promotion of equal employment opportunities for American workers. Congress in passing Title VII was concerned that race, nationality, religion or sex should not affect an individual's employment status or opportunities, except in rare instances. As Senator Randolph acknowledged, "[t]he complexity of our industrial life, the transition of our whole arena of employment, of course are matters that were not always understood by those who led our nation in earlier days."\textsuperscript{160} In attempting to achieve the secular interest of equal employment opportunity, Congress expressly created a new and separate standard and test for determining compliance with Title VII: the requirement of reasonable accommodation short of undue hardship. Even if for first amendment purposes the interests of the majority predominate over the interests of the individual, Congress has concluded that, for Title VII purposes, unless an accommodation creates undue hardship on the majority, the accommodation must be made. While the first amendment speaks to absolute protection of religious beliefs, Title VII provides for a limited protection which would be available in situations where first amendment protection might not be. Thus, the test under the first amendment differs from that under Title VII, and a determination of the perimeters of reasonable accommodation is an appropriate undertaking for the courts, despite earlier constitutional challenges to union security based on religious guarantees of the first amendment.

Until recently, although the circuit courts had uniformly found Title VII applicable to the union security controversy,\textsuperscript{161} they had never addressed the issue of what constitutes a reasonable accommodation because, in each instance, the district courts below had rejected the employee's Title VII claim without reaching the merits. In fact, one circuit court originally expressed serious doubt as to the possibility of formulating any reasonable accommodation in the union security

\textsuperscript{159} Hammond v. United Papermakers Union, 462 F.2d 174 (6th Cir. 1972), cert. denied, 409 U.S. 1028 (1972).

\textsuperscript{160} 118 CONG. REC. 706 (1972).

Unfortunately, most of the accommodations developed by the courts to meet the needs of sabbatarians are not applicable to the union security conflict.\textsuperscript{163} There is, however, one method of accommodation originally developed for use in sabbatarian cases which might ease some union security conflicts. That accommodation involves the transfer of the religious employee from the bargaining unit to another position in the employer's organization where his religious belief would not be in conflict with a work requirement — in this case a position which is not yet unionized or subject to the provisions of an agency shop.\textsuperscript{164} This transfer could be made to a vacancy in a nonunionized rank–and–file job or to a supervisory position, as long as neither transfer would require excessive training costs for the employer. This accommodation, however, would be available in only a small percentage of cases, since such a transfer requires that the employer have a business which employs a large number of workers in a wide variety of jobs. Moreover, transfer often results in hardship to the religious employee, as it may require physical relocation, loss of seniority, a forfeiture of specialized job skills, or a reduction in pay.\textsuperscript{165}

\textsuperscript{162} In \textit{Yott v. North American Rockwell Corp.}, 501 F.2d 398, 403 (9th Cir. 1974), the court of appeals declared:

We note, however, that this is not a "refusal to work" case in which a reasonable accommodation is easily provided. We are not certain that any accommodation is available. If appellees are able to demonstrate that any suggested accommodation would impose undue hardship on the union or on the employer's business then Yott's discrimination claim should fail.

\textsuperscript{163} The accommodations most commonly offered to meet the needs of sabbatarians include:

\begin{itemize}
  \item[(1)] allowing the employee to work different shifts or hours (United States v. City of Albuquerque, 423 F. Supp. 591 (D.N.M. 1975), aff'd, 545 F.2d 110 (10th Cir. 1976), cert. denied, 433 U.S. 909 (1977); EEOC Dec. No. 70-716, 2 Fair Empl. Prac. Cas. 684 (1970));
  \item[(2)] allowing leave without pay, or including time off as part of vacation pay (United States v. City of Albuquerque, 423 F. Supp. (D.N.M. 1975), aff'd, 545 F.2d 110 (10th Cir. 1976), cert. denied, 433 U.S. 909 (1977); Draper v. U.S. Pipe & Foundry Co., 527 F.2d 515 (6th Cir. 1975)), even though the training of substitutes to work in the employee's absence is required (EEOC Dec. No. 71-463, 3 Fair Empl. Prac. Cas. 385 (1970));
  \item[(3)] permitting substitution or shift-swapping among employees (Claybaugh v. Pacific Northwest Bell Tel Co., 355 F. Supp. 1 (D. Ore. 1973); EEOC Dec. No. 72-2066, 4 Fair Empl. Prac. Cas. 1063 (1972)).
\end{itemize}

\textsuperscript{164} Claybaugh v. Pacific Northwest Bell Tel. Co., 355 F. Supp. 1 (D. Ore. 1973), provided a strong statement which supports this alternative. The court stated: "It is the employer's duty to seek out an open position within its organization before it can discharge an employee based on religious needs." \textit{Id.} at 5 (emphasis added). Such language may require that an employer avoid the conflict with union security by removing transferring religious objectors to nonunion positions within its operation.

\textsuperscript{165} Such a consequence was acknowledged in \textit{Linscott v. Miller Falls Co.}, 440 F.2d 14, 18
consequently held that an employer must first attempt to accommodate the employee within his own job classification,\textsuperscript{166} and that transfer to a less desirable position cannot be required if there is a less onerous alternative available.\textsuperscript{167} It is therefore necessary to consider possible accommodations within the bargaining unit.

One intra-unit accommodation initially suggested by some religious organizations was that of direct payment of dues to the union welfare fund rather than to the union's general fund. It was believed that religious employees could in this manner avoid support of union activities which they found objectionable. This accommodation proved unworkable, however, since some unions co-mingle their funds to support the activities seen as objectionable.\textsuperscript{168}

A second intra-unit accommodation which better meets and balances the conflicting interests of the parties has been referred to as the accommodation of "charity substitution." This accommodation would permit the employee with sincere religious beliefs against supporting a union to pay an amount equal to union dues and fees to a nonreligious nonunion charity. Charity substitution has several variations. In addition to the straight dues and fees plan described above, the substitution payment can be coupled with payment of a reasonable cost for any requested representation. Procedurally, charity substitution can involve a check drawn to the charity but passed on to the charity by the union. It can also be administered by the employer through a checkoff provision or administered by a joint trust committee. The charity chosen under this accommodation is usually selected jointly by the religious employee and the union.

Charity substitution would not only accommodate the religious employee's desires not to support certain concerted activities of the union but would also lessen the free rider argument of unions—that employees should not receive the benefits of union activity without incurring some of its costs. This accommodation does not allow the objecting employee to avoid contribution; rather, it allows the employee to pay his fair share in a manner compatible with his conscience.

\textsuperscript{166} Draper v. U.S. Pipe & Foundry Co., 527 F.2d 515, 519-20 (6th Cir. 1975).


\textsuperscript{168} During the 1940's the Seventh-day Adventist religious-liberty leader Carlyle B. Haynes contacted more than one hundred international unions proposing the welfare-fund accommodation. Fifteen international unions, representing more than 2000 locals, agreed to the accommodation. In the early 1960's, however, church leaders discovered that funds contributed by their members were being diverted for strike purposes, and the accommodation program was abandoned. Dybdahl, You're Fired!, LIBERTY, July/Aug. 1978, at 16 (A publication of the Seventh-day Adventist Church).
Where unions also pay funds to charities, the religious employee's funds could be subtracted from this amount. The union is thus in some cases affirmatively benefitted by the employee's charity contribution. In this manner, a charity substitution plan provides a reasonable accommodation; it treats no right as absolute but rather balances the needs of all parties. It accepts the union's need to prevent free riders and at the same time recognizes the religious desires of the employee.

This method of accommodation has long had the support of organized labor, religious organizations, and Congress. In 1965 the Executive Committee of the AFL-CIO issued the following statement on union membership and religious objectors:

The Senate Labor Committee has incorporated in the bill repealing Section 14(b) provisions giving to religious objectors the option of contributing to a non-religious charity designated by the union, sums equal to union dues and initiation fees—provisions which the AFL-CIO supports. These provisions become operative where there are no voluntary agreements covering these matters. It is the conviction of the AFL-CIO that such voluntary union agreements are the best method for handling such matters. Therefore this Executive Council declares it to be the policy of the AFL-CIO that unions should accommodate themselves to individual religious scruples. We strongly urge all national and international unions affiliated with the AFL-CIO, that have not already done so, to:

1) Immediately adopt procedures for respecting sincere personal religious convictions as to union membership or activities; and
2) undertake to insure that the policy is fully and sympathetically implemented by all unions.


170. Brief for Appellants at 36, Nottelson v. A.O. Smith Corp., 397 F. Supp. 928 (E.D. Wis. 1975). This policy statement grew out of a letter in the same year by George Meany of the AFL-CIO to Representative Frank Thompson Jr. That letter stated in part, Nevertheless, I am strongly of the view that unions and employers should undertake to accommodate religious objections with regard to union security arrangements, just as I think persons who object to working on Sunday, or Saturday, are entitled to consideration.

Various unions have in the past worked out a variety of arrangements with particular religious groups. In some instances, special membership cards have been issued to religious objectors, and they have participated fully in union activities except for not taking the union oath or obligations, or serving as pickets. In other cases religious objectors have not participated at all in union enterprises, but have paid the equivalent of dues to a union charitable fund or to an agreed upon charity. One union issues special cards attesting that the holder is "entitled to the same rights of employment as good standing members of the union."

I am told that there have in the past been some difficulties in the implementation of these agreements by particular local unions. Some local union officials are reluctant to give special treatment to a handful of people, and employers, I am told, don't like the extra accounting and recordkeeping involved. It may be that where the numbers of people involved are very small the best course would be for the union and the employer to exclude them entirely from the union security arrangement.

In any event, I believe that unions, and employers, too, should accommodate themselves to genuine individual religious scruples, and I am sure that all our unions will take...
Charity substitution is also acceptable to most employees whose religious beliefs prevent payment of dues to a union. Indeed, it is the accommodation normally suggested by the Seventh-Day Adventist Church. Finally, Congress has also seen the merits of this accommodation. In 1974, when it passed the health care amendments to the National Labor Relations Act, Congress included a charity substitution plan for religious objectors in the health care field. The amendment states that the religious employee:

may be required, in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious charitable fund . . . chosen by such employee from a list of at least three such funds, designated in a contract between such [health care] institution and a labor organization, or if the contract fails to designate such funds, then to any fund chosen by the employee.

More recently, the House of Representatives sought to make charity substitution available to all employees covered by the NLRA. Because of its equitable features and widespread support, charity substitution is the most feasible means of reasonably accommodating the religious objector.

B. Undue Hardship

I. General Principles

In order for any accommodation, including charity substitution, to provide an effective answer under Title VII, the proposed accommodation must not only create a workable solution to the needs of the religious employee but it must also avoid any resultant undue hardship. In that view, too, I intend, accordingly, to propose to the AFL-CIO Executive Council that it adopt a strong policy statement to that effect; and that the international unions affiliated with the AFL-CIO undertake to insure that their local unions scrupulously respect individual religious reservations in the administration of union security agreements.

Letter published in part in Hearings on H.R. 77, H.R. 4350 and Similar Bills Before the House Special Subcommittee on Labor of the Committee on Education and Labor, 89th Cong., 1st Sess. 266-67 (1965). George Meany reaffirmed his position recently while testifying on H.R. 8410, the recent Labor Law Reform Bill, before the House Subcommittee on Labor Management Relations. Mr. Meany stated:

Our position on that I think has been clear for years, and I think it is a fair position on the people who have conscientious objections to joining unions. We think they should participate, that they are the beneficiaries of good contracts where we get good contracts. At the same time we want to recognize their obligations to their particular religion. So we say in effect that they should make a contribution not to us but to some charitable (organization) . . .

---

171. Dybdahl, supra note 168, at 16.
174. 123 Cong. Rec. H11,901-07, 11967-68 (daily ed. Nov. 1, 1977). A bill passed the House, but was incorporated into the Labor Law Reform Bill in the Senate which, after a filibuster, was returned to committee. See text accompanying notes 312-319 infra.
examining this requirement of the statute, the courts have considered
the possibility that an accommodation might cause undue hardship to
the employer and/or to the union.\textsuperscript{175} The validity of considering un-
due hardship to the union as well as undue hardship to the employer
was discussed in \textit{Cooper v. General Dynamics}.\textsuperscript{176} While the language of
the statute speaks only to “undue hardship on the conduct of the em-
ployer’s business,”\textsuperscript{177} the court in \textit{Cooper}, in a split decision, found that
“reason argues overwhelmingly that in the structure of this statute Con-
gress could not have thought that for two parties under the same string-
gent substantive prohibition one has an escape hatch of undue hardship
denied to the other growing out of the common industrial setting.”\textsuperscript{178}
Undeniably, the union is a party in interest where union security provi-
sion are concerned, as such provisions are enacted primarily with the
interests of the union in mind. If a union is required to accept a revi-
sion in its contract with the employer in order to effectuate a reasonable
accommodation, as some courts have correctly suggested that it
must,\textsuperscript{179} then equity suggests that undue hardship to the union be al-
lowed to balance that requirement.

As reflected in the \textit{Cooper} decision, it is also possible for the courts
to include hardship to the union under the language “conduct of the
employer’s business” because relations between unions and employees
frequently affect the employer’s business.\textsuperscript{180} Should hardship to the
union be so severe as to weaken the effectiveness of the union in ful-
filling its statutory role as collective bargaining representative, the possi-
bility of harmful economic clashes with the employer becomes more
likely.

In deciding whether undue hardship should include hardship to
the union, it is necessary to keep in mind that Title VII deals with the
entire employment relationship. One side of that relationship is the
individual employee, whose interests are in following his religious be-
liefs while at the same time maintaining his employment opportunities.
In most instances, the employee’s interests will conflict with the inter-
est of the employer—the party to whom the section of the statute is
addressed. Yet the union also pays an inseparable role in the employ-
ment relationship, and at times its interests may conflict with those of

\textsuperscript{175} Cooper v. General Dynamics, 533 F.2d 163, 172 (5th Cir. 1976); Yott v. North American
Rockwell Corp., 501 F.2d 398, 403 (9th Cir. 1974); McDaniel v. Essex Int’l, Inc., 571 F.2d 338, 343
(6th Cir. 1978); Nottelson v. A.O. Smith Corp., 423 F. Supp. 1345, 1347 (E.D. Wis. 1976); Ande-
rson v. General Dynamics, 589 F.2d 397, 400 (9th Cir. 1978); Burns v. Southern Pac. Transp. Co.,
589 F.2d 403, 405-06 (9th Cir. 1978), cert. denied, 99 S. Ct. 843 (1979).
\textsuperscript{176} 533 F.2d 163 (5th Cir. 1976).
\textsuperscript{178} 533 F.2d at 172.
\textsuperscript{179} See notes 144-45 \textit{supra} and accompanying text.
\textsuperscript{180} 533 F.2d at 172-73.
the religious employee. To ignore the interests of the union in making the balance required by this section of the Act would be to ignore industrial realities and to inadequately consider and balance all of the interests involved. This is something Congress certainly would not have intended and is a result which should be avoided.

In determining the meaning of undue hardship, it is initially clear that “something greater than hardship” must be involved.\(^181\) Congress adopted the “undue hardship” wording of the 1967 guidelines, as opposed to the “serious inconvenience” standard of the 1966 rules, and must have seen the burden required to avoid the accommodation requirement as something out of the ordinary. As Senator Randolph suggested in proposing his amendment, reasonable adjustments would be possible in all but “a very, very small percentage of cases.”\(^182\) The courts in applying section 701(j) have generally followed this suggestion and found undue hardship difficult to prove.\(^183\)

2. Undue Hardship and Charity Substitution

Despite the difficulty in proving undue hardship and the support given to charity substitution by the parties and Congress, it was not until recently that the courts have come to accept charity substitution as a reasonable accommodation that would not create undue hardship.\(^184\) In *Burns v. Southern Pacific Transportation Co.*,\(^185\) the Ninth Circuit Court of Appeals reversed the finding of the United States district court for Arizona which had held that charity substitution would cause undue hardship to the employer and to the union.\(^186\) The district court had found that the proposed charity substitution plan would cause undue hardship in three ways. First, it would lead to financial hardship for the union;\(^187\) second, it would create serious administrative difficul-

---


182. 118 CONG. REC. 706 (1972).


187. *Id.* at 1444.
ties for the employer, and third, it would create employee dissension which would reduce the operational efficiency and safety of the employer's business. The Ninth Circuit disagreed with the district court and rejected each of these conclusions.

The first rationale given by the district court for finding that charity substitution would create undue hardship was that such an accommodation would cause severe financial hardship for the union. The district court based this conclusion on the belief that:

- it is very likely that additional Seventh-day Adventists and other employees in the railroad industry with similar beliefs would on the basis of the decision herein, refuse to pay dues and assessments to the Union.
- Further it is very likely that many other persons holding such beliefs would seek and obtain employment in the railroad industry because of the relatively high wages and other benefits enjoyed by railroad employees.

This argument suggests that while charity substitution does not allow the religious employee a free ride, the union nonetheless suffers from a serious loss of needed income just as if the religious employee had paid nothing at all.

Financial hardship is certainly a legitimate ground on which to base a finding of undue hardship. Yet as the district court in Burns implicitly acknowledged, the term "undue hardship" usually requires more than the existence of some additional financial cost; rather, substantial financial costs and expenses must result. The valid needs of a union for dues and assessments to cover negotiating costs, salaries for office and staff, and other union programs are beyond challenge, but the burden of proof is on the union to show that undue financial hardship will indeed result from the loss of the religious employee's dues. The Ninth Circuit held that the Union in Burns failed to meet its burden of proof. The court noted that the loss of dues, in the words of a union official, "wouldn't affect [the union] at all" and would not amount to even a de minimis cost under the Supreme Court's new standard as set forth in Trans World Airlines v. Hardison.

The Ninth Circuit's conclusion seems correct and would be the result in most cases, as the dues of religious objectors are usually a mini-
moral percentage of total union dues, the loss of which would normally not cause substantial hardship to the union. Moreover, many unions normally make donations of money to charities,196 where such donations are made, the dues of the religious objector could be used in full as part of the donation with no effective loss to the union at all. Thus, if a union normally donates $5,000 per year to various charities, and if dues are $100 per year, then fifty religious objectors could be accommodated before the union would experience any financial loss.

Undue financial hardship might, however, result from a loss of the religious objector's dues in certain instances, such as where a union is very small or where the employees are represented by the local rather than by the international union, with union programs administered through separate local funds. The Ninth Circuit also noted that undue hardship to the union might result if there were a large number of religious objectors within a particular industry.197 The health care field might be such an industry, as there are a substantial number of health care facilities operated by religious groups.198 That industry, however, is an exception, and the Ninth Circuit rejected as speculative the district court's observation that "it is very likely . . . other employees . . . with similar beliefs would . . . refuse to pay dues."199

Empirical support exists for the circuit court's conclusion that only a very small number of employees will take advantage of a charity substitution clause. When the Communication Workers of America set up a program for its religious objectors, only fifteen members out of 500,000 requested the accommodation.200 Equally unsupported is the district court's observation that many more employees with religious objections to union security will enter an industry whose unions enact a charity substitution plan. There are no reported instances where such a steamroller effect has occurred. As one circuit court noted, "hypothetical hardships that an employer thinks might be caused by an accommodation that has never been put into effect" should be viewed with skepticism.201

The Ninth Circuit also rejected the district court's second basis for a finding of undue hardship in Burns, the assertion that charity substitution would create substantial administrative difficulties. The circuit court summarily noted that "the modest amount of paper work" required by a substitution plan would not even amount to de minimis

196. See note 169 supra.
197. 589 F.2d at 407.
199. 11 Fair Empl. Prac. Cas. at 1444.
The conclusion reflects the view of most courts that administrative inconvenience will only rarely be sufficient for a finding of undue hardship and the fact that an accommodation may be troublesome to administer or disruptive of certain routines will not usually relieve the employer of his duty to accommodate. Charity substitution in particular can be administered several different ways, including through the check-off systems generally found in a union or agency shop situation. A check-off would merely require the company to transmit the religious employee withdrawals periodically to a charity mutually agreed upon by the union and the religious objector, and clearly would not be difficult to administer.

Finally, the Ninth Circuit also struck down the district court's conclusion that "the 'no bill' or 'free riders' . . . would cause significant employee hostility [and dissention, causing] reduced operation efficiency and safety." Harm to the safety of other employees or of customers has been held to constitute undue hardship, but the district court's claim more appropriately concerns the question of whether employee discontent is a valid ground for a finding of undue hardship.

The Courts have disagreed on whether employee grumbling is to be taken into consideration in determining whether undue hardship exists. Some courts have considered employee discontent, but others, in accord with the Ninth Circuit in Burns, have specifically rejected considering such discontent, concluding that "if employees are disgruntled because an employer accommodates its work rules to the religious needs of one employee . . . such grumbling must yield to the single employee's right to practice his religion." An appropriate balance was struck by the Sixth Circuit in Draper v. United States Pipe & Foundry, where the court held that grumbling will not ordinarily constitute undue hardship, unless such employee discontent will produce "chaotic personnel problems."

---

202. 589 F.2d at 407.
204. See text following note 168 supra.
205. 11 Fair Empl. Prac. Cas. at 1445.
209. 527 F.2d 515 (6th Cir. 1975).
The Ninth Court seems to have set forth a similar standard in *Burns* when it declared that “[a]n employer or union would have to show . . . actual imposition on co-workers or disruption of the work routine” for there to be undue hardship. The courts have been less likely to find hardship where complaints of coworkers are based on perceived favoritism for the religious employee as opposed to when complaints are about additional physical, or in this area financial, burdens. Applying this approach, in most instances it would seem highly unlikely that the accommodation of a small number of religious objectors would place enough additional financial burden on the remaining employees to justify discontent great enough to constitute “chaotic personnel problems.” Moreover, as acknowledged by the circuit court in *Burns*, the employer and the union must prove such undue hardship. The mere foreseeability of such a hardship should not suffice.

Analysis thus supports the Ninth Circuit’s conclusion in *Burns* that charity accommodation, in most instances, will not lead to undue hardship for either the employer or the union. Under certain circumstances even this accommodation may cause undue hardship, and, in such cases the needs of the religious objector should be subordinated to the interests of other workers unless an alternative accommodation is found. Yet the charity substitution plan is advanced as the primary solution to the union security conflict, for it provides, in the vast majority of cases, a satisfactory balance of the interests involved.

**C. The Statutory Framework Reevaluated**

In applying the statutory framework of reasonable accommodation without undue hardship, the courts must engage in a balancing process between accommodation and hardship. As one federal district court declared in *Claybaugh v. Pacific Northwest Bell Telephone Co.*, as the degree of business hardship increases, the quantity of conduct which will satisfy the reasonable accommodation requirement decreases. The balancing of reasonableness and hardship is what [the Supreme Court] was referring to as the ‘business necessity’ which would qualify as a legitimate reason for discharging an employee. It is because accommodations must be balanced against hardships that an accommodation must be made before a hardship can be found to be undue.

---

211. For examples of situations where courts have found undue hardship in small operations, see *Johnson v. U.S. Postal Service*, 364 F. Supp. 37 (N.D. Fla. 1973), aff’d, 497 F.2d 128 (5th cir. 1974); *Drum v. Ware*, 7 Fair Empl. Prac. Cas. 269 (W.D.N.C. 1974).

212. Additional support for this conclusion may perhaps be drawn from the Supreme Court’s subsequent denial of certiorari, 99 S. Ct. 843 (1979).


214. *Id.* at 6.

215. For general discussions of the interaction between reasonable accommodation and un-
Balancing is a subjective method for determining the existence of religious discrimination. One major benefit of the balancing technique is inherent flexibility. This is useful, as each instance of alleged discrimination presents a unique factual situation. The religious beliefs of the American people are diverse, as are the possible conflicts in employment and the possible forms which reasonable accommodation or undue hardship can take. Any absolute approach could provide too great or too little protection for either the religious employee or his employer and/or union. Since religious liberty and various secular programs are each interests which society seeks to advance, the courts need flexibility to protect these competing interests against absolute exclusion of one by the other.

Under Congress’ statutory framework, the results of each case depend largely on a balance of the facts present in each case, and thus have limited precedential effect. As one commentator described the process:

Each employer receives an individualized hearing in which the practical considerations of reasonable accommodation and undue hardship determine the degree of religious freedom he must afford to any employee. Thus in effect, the accommodation process results only in a protection or elimination of specific individualized problems within specific business settings. As this language suggests, balancing by its very nature precludes development of specific criteria for determining reasonableness or undue hardship which would apply in every case. Thus, balancing provides needed flexibility, but it also fails to provide the employer or union with any reasonable degree of predictability concerning their obligations under the law. While one goal of any legal system should be the establishment of clear rules that the parties to a controversy can look to in order to properly conform their actions, such a result is never absolutely possible under a balancing approach. Balancing, however, does not leave the parties totally without guidelines. A well-developed body of case law applying a balancing approach can establish broad general principles of law which the parties can use to conform their action, even though that case law cannot provide exact assurances of legality. In this manner, Title VII’s approach to religious discrimination in employment sacrifices only some pre-existing certainty in outcome to achieve an equitable result based on the facts of each case. Such a


balancing system is viable when the case law has been clearly developed. Unfortunately, up to this point the lower court case law on reasonable accommodation has been in a constant state of flux and confusion. Various federal district courts have used different factors to balance the competing interests, resulting more often than not in reversal of the district courts’ legal conclusions by the federal appeals courts.\textsuperscript{217}

\section*{VI}

\textit{Trans World Airlines v. Hardison}

Much of the confusion and inconsistency found in lower court decisions has resulted not only from the use of the balancing approach called for by the reasonable accommodation standard, but also from an inability of the Supreme Court to agree on a general interpretation of that standard. Twice the Supreme Court found itself equally divided in the area of religious discrimination in employment.\textsuperscript{218} Finally, in 1977, the court in \textit{Trans World Airlines v. Hardison}\textsuperscript{219} squarely addressed the scope of the Title VII reasonable accommodation standard. The Supreme Court found that scope to be very limited.\textsuperscript{220}

Complainant Larry Hardison was a member of the Worldwide Church of God, a religious organization whose doctrine requires Saturday sabbath observance. Hardison was employed by Trans World Airlines (TWA) as a stores clerk at the company’s maintenance and repair facility. Due to the stores department’s essential role in airline maintenance, the operation was required to be kept open twenty-four hours a day throughout the year.\textsuperscript{221} Hardison’s work shift assignment was governed by a seniority system incorporated into the collective bargaining agreement in effect between TWA and the International Association of Machinists and Aerospace Workers (IAM).\textsuperscript{222}

\textsuperscript{217} For a perceptive discussion, see generally Note, \textit{Title VII: An Employer’s View of Religious Discrimination Since the 1972 Amendment}, 7 \textit{Loy.-Chi. L.J.} 97 (1976).


\textsuperscript{219} 432 U.S. 63 (1977).


\textsuperscript{221} 432 U.S. at 66.

\textsuperscript{222} The collective bargaining agreement provided in pertinent part:

\begin{quote}
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.
\end{quote}
Initially Hardison's sabbath observances presented no conflict with his employment activities as he had sufficient seniority to obtain a preferential shift which allowed him to avoid Saturday work. However, in December of 1968 Hardison bid for and received a transfer to the day shift at another building governed by a separate seniority list. Hardison was placed near the bottom of that list. When an employee went on vacation, Hardison was asked to work on Saturdays. While TWA was willing to allow Hardison to seek a change in shifts, the IAM was not willing to allow such a violation of its seniority system. Hardison's request to work a four-day week was rejected by TWA on the grounds that his job was essential and he was the only employee available on his shift to perform it. TWA claimed that no accommodation without undue hardship was possible. The company argued that the employment position could not be left open due to its essential nature; to transfer a supervisory employee from another area would have left the other area understaffed, while to employ someone not regularly assigned to Saturday work would require the payment of premium (overtime) wages. When no accommodation was reached, Hardison repeatedly refused to report for his Saturday shift and was subsequently discharged.

After filing an unlawful employment practice charge with the EEOC and exhausting his administrative remedies, Hardison brought suit against both TWA and the IAM for violation of Title VII. The district court found that neither TWA nor the union had violated the Act. First considering the duty of the union, the court held that the union as well as the employer had a duty to accommodate, but that waiver of the seniority clause would be an undue hardship. As for TWA, the district court held that TWA's efforts to allow Hardison to seek a voluntary substitute met the reasonable accommodation requirement and that any other accommodation would cause undue hard-

---

* * *

Except as hereinafter provided in this paragraph, seniority shall apply in selection of shifts and days off within a classification within a department . . . .

Id. at 67 n.1.
223. Id. at 68.
224. Id.
225. Id. at 68-69.
226. Id. at 69. Technically, Hardison was discharged for insubordination in refusing to work his designated shift.
227. Hardison brought suit under both the 1967 guidelines and the 1972 amendment. He was discharged in 1969 before section 701(j) was added to the Act; however, the Supreme Court held that the 1967 guidelines should be followed in light of their subsequent codification by Congress and that it was not necessary to consider retroactivity of the 1972 amendment. Id. at 76 n.11.
229. Id. at 882. The district court specifically held that the IAM was not required to breach the provisions of its collective bargaining agreement. Id. at 883.
230. Id. at 882.
ship. The court also considered challenges to the constitutionality of the reasonable accommodation requirement but found that the requirement did not violate the establishment clause of the first amendment.

On review, the Eighth Circuit Court of Appeals reversed the district court as to TWA and found the company in violation of the Act. The appellate court found that, consistent with the collective bargaining agreement, TWA could have accommodated Hardison's request to work a four-day week either by filling the job with a supervisor or with other employees already on duty, or by hiring a substitute for Hardison. The appellate court also suggested that TWA could have allowed Hardison to switch entire shifts or days off with another employee, even though this would have violated the seniority provision of the union contract. While the circuit court noted that it was unclear whether statutory accommodation required violation of a bona fide seniority system, it did not decide the issue.

The Supreme Court, in a 7-2 decision authored by Justice White, reversed the findings of the court of appeals, holding that TWA had satisfied its Title VII obligations. The Court set forth at the outset its fundamental premise—that Title VII seeks to eliminate all discrimination in employment, whether directed against minorities or majorities. “[S]imilarly situated employees,” the Court declared, “are not to be treated differently solely because they differ with respect to . . . religion.” In reviewing the legislative history of Title VII, the Court concluded that there was a clear statutory duty on the part of the employer to make a reasonable accommodation short of undue hardship, but the Court also noted that neither Congress nor the Commission had

231. Id. at 889.
232. Id. at 887-88.
234. The district court judgment as to the IAM was not challenged on appeal, therefore the favorable judgment was upheld. Id. at 43. The circuit court did note that, in a proper case, the union would have a duty to accommodate. Id. at 42.
235. The circuit court rejected TWA’s argument that undue hardship would result from either course of action. Id. at 39-40. The court noted that the EEOC had rejected the same arguments. See EEOC Dec No. 70-580, 1973 CCH EEOC Dec. ¶ 6120 (1970).
236. 527 F.2d at 40. The court also rejected the argument that additional expense constituted undue hardship. The circuit court specifically declared, “[t]he regulation does not preclude some cost to the employer any more than it precludes some degree of inconvenience to effect a reasonable accommodation.” Id.
237. Id. at 41. The court did suggest if a seniority provision of a collective bargaining agreement were too inflexible to allow such accommodation, it would, of itself, constitute an unlawful employment practice. Id. at 41-42.
239. Id. at 71.
spelled out the reach of that obligation.\textsuperscript{240}

In proceeding to the merits, the Court determined that TWA had made a reasonable effort to accommodate Hardison's religious beliefs and that the alternatives suggested by the court of appeals would have caused undue hardship.\textsuperscript{241}

Considering first the alternative of permitting Hardison to swap shifts with another employee, the Court pointed out that this would amount to a breach of the seniority provision in the collective bargaining agreement.\textsuperscript{242} The Court held that absent an express indication from Congress, the duty to accommodate does not require an employer to act inconsistently with seniority provisions found in a collective bargaining agreement.\textsuperscript{243} The bases for this finding were that collective bargaining "lies at the core of the national labor policy" and that a requirement of such an accommodation would force the employer to deprive other employees with strong but nonreligious preferences of their shift choice because they do "not adhere to a religion that observed the Saturday Sabbath."\textsuperscript{244} The Court found that the seniority system itself was a significant accommodation to both the religious and secular needs of all employees, as it represented a "neutral way of minimizing the number of occasions when an employee must work on a day that he would prefer to have off."\textsuperscript{245} Relying for support on the special treatment afforded to seniority provisions in section 703(h) of the Act\textsuperscript{246} and on the Court's earlier decision in \textit{International Brotherhood of Teamsters v. United States},\textsuperscript{247} Justice White concluded that absent a discriminatory intent, the operation of a seniority system would not be an unlawful employment practice despite its potentially adverse effects on religious interests.\textsuperscript{248}

As for permitting Hardison to work a four-day week, by replacing him either with employees already scheduled to work that day or with "premium wage" employees, the Court concluded that each of these alternatives would constitute undue hardship because each one would require TWA to "bear more than a \textit{de minimis} cost" in order to give

\begin{flushright}
\textsuperscript{240} \textit{Id.} at 72-75. The Court found most of the limited Congressional history opaque. \textit{Id.} at 74 n.9. It also dismissed most of the lower court decisions as failing to suggest a theory to justify the differing results that had been reached. \textit{Id.} at 75 n.10.
\textsuperscript{241} \textit{Id.} at 77.
\textsuperscript{242} \textit{Id.} at 79.
\textsuperscript{243} \textit{Id.}
\textsuperscript{244} \textit{Id.} at 79-81.
\textsuperscript{245} \textit{Id.} at 78.
\textsuperscript{247} 431 U.S. 324, 352 (1977). In that case the Supreme Court held that "the unmistakeable purpose of § 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII."
\textsuperscript{248} 432 U.S. at 82.
\end{flushright}
Hardison Saturday off.\textsuperscript{249} Such additional costs, when no costs were incurred for nonreligious employees, were also held to involve unequal treatment of employees because of their religion.\textsuperscript{250} The majority opinion closed with the declaration that "[i]n the absence of clear statutory language or legislative history to the contrary, we will not readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath."\textsuperscript{251}

The majority's opinion is a clear departure from the balancing process previously used under section 701(j). While the Court did analyze the particular fact situation presented in the case, it also developed and applied rules on reasonable accommodation and undue hardship which would be applicable in every case. The majority opinion, by defining the scope of section 701(j) in precise terms, reduced that scope so as to seriously limit the effectiveness of the reasonable accommodation standard.\textsuperscript{252} In setting out its new principles of law under section 701(j), the Court disregarded statutory language, legislative history, administrative rulings, and lower court decisions and rationales. Instead the majority opinion established four primary propositions: (1) that Title VII's ban on religious discrimination will not be construed to require an employer to discriminate against some employees in order to enable others to observe their religious beliefs;\textsuperscript{253} (2) that an employer's duty to accommodate the religious needs of employees does not require him to take steps inconsistent with an otherwise valid collective bargaining agreement;\textsuperscript{254} (3) that seniority itself is a significant accommodation to the needs of all employees;\textsuperscript{255} and (4) that to require an employer to bear more than \textit{de minimis} cost will constitute undue hardship.\textsuperscript{256} Each of these propositions requires close analysis, for although \textit{Hardison} dealt with the accommodation of a sabbatarian by addressing the proper statutory construction of section 701(j) in broad terms, the decision has tremendous implications for the accommodation of religious objections to union security.

In \textit{Hardison}, the Supreme Court's principal ruling was that it is unacceptable for an employer to treat employees differently solely on the basis of religious beliefs. While it was acknowledged that the statute places an affirmative duty on the employer to make accommoda-

\textsuperscript{249} \textit{Id.} at 84.
\textsuperscript{250} \textit{Id.}
\textsuperscript{251} \textit{Id.} at 85.
\textsuperscript{252} In a vigorous dissent, Justice Marshall, joined by Justice Brennan, chastized the majority for, in his words, "[d]ealing] a fatal blow to all effort under Title VII to accommodate work requirements to religious practices." \textit{Id.} at 86.
\textsuperscript{253} \textit{Id.} at 85.
\textsuperscript{254} \textit{Id.} at 79.
\textsuperscript{255} \textit{Id.} at 78.
\textsuperscript{256} \textit{Id.} at 84.
tions. The Court declared that only equality of treatment and neutrality between employees can constitute *reasonable* accommodation, since Title VII was meant to insure full equality for all, both the majority and the minority.

This requirement of neutrality, however, misinterprets the intent of Congress. As Justice Marshall noted in his dissent, "the EEOC originally upheld an employer's right to establish a normal workweek . . . generally applicable to all employees," but the EEOC rejected this position in formulating the 1967 standard requiring affirmative action—reasonable accommodation so long as an undue hardship would not result. Congress by adopting the 1967 language for its statutory amendment clearly intended more than mere neutrality on the part of the employer or union. The 1967 guidelines prohibited discrimination by effect as well as discrimination by intent, and as Justice Marshall noted, "[t]he accommodation issue by definition arises only when a neutral rule of general applicability conflicts with the religious practices of a particular employee." Where such a conflict occurs, Congress intended that the competing interests of the religious employee be balanced against the interests of the employer or the union, and where that balance weighed in favor of the employee (when accommodation would not cause undue hardship to the other parties), then special protection was to be given to the religious employee's interests. The term "accommodation" itself suggests that Congress intended that the religious employee would be given special treatment that would not be received by the majority.

The Supreme Court also ignored the fact that this was the same argument advanced by the court of appeals in *Dewey v. Reynolds Metals Co.* and later rejected by Congress. The circuit court in *Dewey* declared that to excuse religious observers from neutral work rules would "discriminate against . . . other employees [and] would consti-

---

257. *Id.* at 74.
258. *Id.* at 81.
260. The majority in *Hardison* declared that in making the 1967 guidelines, "the EEOC . . . did not purport to change the view expressed in its 1966 guidelines that work schedules generally applicable to all employees may not be unreasonable." *Id.* at 72 n.7. While it is true there is no explicit rejection of the 1966 guidelines in the 1967 version, the latter regulations do state that they "amend" the earlier guidelines. Moreover, as Justice Marshall noted, "the example of 'undue hardship' given in the new guidelines [that "such undue hardship may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications. . ."] makes clear that the Commission believed, contrary to its earlier view, that in certain instances employers would be required to excuse employees from work for religious observances." *Id.* at 86 n.1.
261. *Id.* at 87.
262. 429 F.2d 324 (6th Cir. 1970), aff'd per curiam by an equally divided Court, 402 U.S. 689 (1971).
tute unequal administration of the collective bargaining agreement.\textsuperscript{263} Congress by enacting section 701(j) expressly rejected the reasoning of the \textit{Dewey} case. Thus, the Supreme Court's principal ruling in \textit{Hardison} not only fails to reflect the desires of Congress, it also contradicts express congressional intent. Although the Supreme Court in \textit{Hardison} acknowledged the existence of a duty of accommodation short of undue hardship, at the same time the Court's ruling in effect allows an employer to refuse to grant the large majority of potential accommodations.\textsuperscript{264} The Supreme Court's decision thus overly restricts the nature of the accommodation duty by limiting the affirmative actions that can be taken on behalf of religious employees.

In applying the Court's restrictive approach, it is, nevertheless, still possible to find ways to effectuate reasonable accommodation between religious objections and union security. The charity substitution accommodation does not require inequality of treatment between employees as it does not relieve the religious objector of any obligations. "Membership for employment purposes" is defined solely in terms of financial support, and charity substitution merely changes the party to whom payment is made—from the union to a mutually agreed-upon charity. Each employee thus makes identical payments and suffers the same loss of income. Additionally, if charity substitution of dues and fees is accompanied by payment to the union of a reasonable cost of any requested representation, then other employees are not forced to bear the burden of any grievance activities undertaken on behalf of the religious employee by the union as mandated by the union's duty of fair representation. While it is true that the religious employee is given special treatment to the extent that he is allowed the opportunity to pay dues to a charity rather than to the union, the Supreme Court under the rubric of the \textit{Hardison} decision still envisions some accommodation, and charity substitution does treat all employees equally in terms of the amount of their financial obligation, which is the only prerequisite for continued employment.

The Supreme Court's second proposition in \textit{Hardison} that the duty of accommodation does not require an employer to take steps inconsistent with an otherwise valid collective bargaining agreement also lacks proper legislative foundation. This proposition is based on the rationale that "collective bargaining, aimed at effectuating workable and enforceable agreements between management and labor lies at the core of our national labor policy."\textsuperscript{265} Violation of a collective bargaining

\textsuperscript{263} 429 F.2d at 330.
\textsuperscript{264} Justice Marshall in dissent in \textit{Hardison} opined that under the majority decision an employer "need not grant even the most minor special privilege to religious observers to enable them to follow their faith." 430 U.S. 63, 87 (1977).
\textsuperscript{265} 432 U.S. at 79.
agreement was viewed as tearing at the heart of this policy. This rationale, however, fails to take into account the purpose of Title VII, the prevention of discrimination in employment, which is an equally important national concern. At times these two concerns will come into conflict, but when that happens Congress has intended to maximize collective bargaining only to the extent that the individual employee's Title VII rights are not diminished in any way.266

Moreover, the Supreme Court's position on the inviolability of collective bargaining positions seems grounded on the assumption that inconsistent accommodations will harm industrial stability by requiring unilateral changes in the collective bargaining agreement.267 This premise is incorrect, since accommodation is not unilateral; the other party to the agreement, in this case the union, also has a duty to reasonably accommodate the religious employee by accepting or affirmatively implementing accommodations which affect contract provisions. Finally, as noted above, the Supreme Court's position is inconsistent with the position of the EEOC, the administrative body created by Congress to administer the Act.268

The Supreme Court also based its second proposition on section 703(h) of the Act, which provides in the relevant part:

Notwithstanding any other provision of this subchapter, it 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 or merit system... provided that such differences are not the result of an intention to discriminate.269

The accommodation requested in Hardison would have required the violation of a seniority clause, and the language of section 703(h) creates a specific legislative exemption for bona fide seniority provisions by providing that absent an intent to discriminate, the operation of a seniority system will not be an unlawful employment practice even if the system has discriminatory consequences or effects.270 Religious dis-

266. See text accompanying notes 117-126 supra.
267. The Court's concern should not be based on the mere fact that accommodation prevents the parties from effectuating certain mutually desirous provisions which will harm individuals. The Court has long upheld the right of the government to prevent agreement by the parties to collective bargaining on certain provisions which are deemed contrary to the interests of the public or of the employees. Such provisions, for example, would include exclusive hiring halls which refer only union members, or closed shop agreements. See generally R. Gorman, Basic Text on Labor Law 529-31 (1976).
268. See text accompanying note 144 supra.
270. It was initially feared by opponents of the Civil Rights Act that the Act would interfere with previously established seniority rights of workers. Largely in response, two interpretive memoranda which asserted that already established seniority rights would not be affected by the Act were included in the Congressional Record by proponents of the bill. 110 Cong. Rec. 7212 (1964). See Franks v. Bowman Transp. Co., 424 U.S. 747, 759-60 nn.15 & 16 (1976). Subse-
RELIGIOUS DISCRIMINATION

Discrimination in employment is rarely the result of an intent to discriminate but is rather the result of conflicts between neutral work requirements and the employee's religious beliefs. Section 703(h) thus acts to nullify the reasonable accommodation requirement of section 701(j) as it applies to seniority provisions.\footnote{271}

Due to the special protected status of seniority provisions under the Act, even had the issue of the liability of the union in \textit{Hardison} been before the Supreme Court, the Court would have been required to find that the IAM had not violated the Act. The union's normal duty to accommodate the employee by accepting changes in a bargaining provision is not applicable to seniority provisions. It was because the seniority clause is specially protected that the employee in \textit{Hardison} was necessarily forced to seek the other forms of accommodation from the employer which the Court labeled as causing undue hardship by requiring more than a \textit{de minimis} cost.

To the extent that the Supreme Court's statement in \textit{Hardison} concerning the inviolability of collective bargaining provisions is limited to seniority clauses, the holding has a legislative basis. Yet the language of the court is broad. The Court declared: "\textit{[W]e do not believe that the duty to accommodate requires [an employer] to take steps inconsistent with the otherwise valid agreement.}"\footnote{272} If this language is read to apply to \textit{all} provisions found in a collective bargaining agreement, then the Supreme Court's argument cannot be substantiated as there are no special statutory clauses exempting other provisions from the reach of section 701(j). This is especially true in the case of union security provisions, which have no special protection in either Title VII, the NLRA or RLA.\footnote{273}

In addition, there is an important distinction between seniority systems and union security provisions in regard to religious discrimination. As the Supreme Court noted in \textit{Hardison}, the seniority system did not "lock members of any religion into a pattern wherein their freedom to exercise their religion was limited," and that "\textit{[i]t was coincidental that in plaintiff's case the seniority system acted to compound...}"

\footnote{271. Several courts and commentators have suggested that seniority provisions do not or should not have special protection from the provisions of section 701(j) and if the employer has any leeway in assigning shifts he must accommodate the religious needs of his employee, seniority provisions notwithstanding. \textit{See} Draper v. U.S. Pipe & Foundry Co., 527 F.2d 515, 522 (6th Cir. 1976); Shaffield v. Northrop Worldwide Aircraft Serv. Inc., 373 F. Supp. 937, 942 (M.D. Ala. 1974); and for commentary, Note, \textit{Accommodation of an Employee's Religious Practices under \textit{Title VII}}, 1976 U. Ill. L. F. 867, 885-888.

272. 432 U.S. at 77.

273. See text accompanying notes 113-116 supra.}
his problems in exercising his religion."\textsuperscript{274} The primary effect of seniority systems in the area of religious discrimination is to reduce the number of available means of accommodation. It is because a seniority system does not act as a source of discrimination, but only as a limitation on types of accommodation, that courts are reluctant to require accommodations which violate the seniority provisions. Union security provisions, on the other hand, are a source of religious discrimination. It is the application of the agency shop requirements which forces the religious employee to choose between his religious beliefs and his employment opportunities. Thus union security provisions, as opposed to seniority systems, are not merely coincidental to religious discrimination. They cause rather than simply compound the problem that requires accommodation. For this reason it is far less acceptable under the Congressional scheme to say that a valid union security provision is always inviolate than it is to say that a valid seniority system need not be violated to achieve a reasonable accommodation. In the first situation, accommodation could never be achieved; in the second, accommodation is merely on occasion made more difficult to achieve.

As a third holding, the Supreme Court in \textit{Hardison} stated that the seniority system in that case "itself represented a significant accommodation to the needs, both religious and secular of all . . . employees."\textsuperscript{275} The significance of this "accommodation" is questionable as it was unable to prevent Hardison's discharge for refusal to compromise his religious beliefs. More important, however, is the fact that this language by the Court allows in response the argument that "Congress effected the reasonable accommodation required by Title VII when it balanced the competing interest in enacting the union shop provisions of the Taft Hartley Act of 1947."\textsuperscript{276} The reasoning underlying the argument is that Congress, by requiring only financial support of unions rather than mandatory membership under section 8(a)(3) of the NLRA, has decided that this is the proper accommodation to religious needs required upon a balancing of the interests. This was the conclusion arrived at by the district court in \textit{McDaniel v. Essex International Inc.}\textsuperscript{277} The district court held that the required accommodation had already been made by Congress when it pared the membership requirement to its financial core.

Upon reviewing the legislative history, however, the Sixth Circuit in \textit{McDaniel} reversed the district court's holding.\textsuperscript{278} The court of appeals concluded that "there is no indication . . . Congress intended ei-

\textsuperscript{274} 432 U.S. at 82 (quoting from the district court decision, 375 F. Supp. at 883).
\textsuperscript{275} 432 U.S. at 78.
\textsuperscript{277} \textit{Id}.
\textsuperscript{278} 571 F.2d 338 (6th Cir. 1978).
other subsection 8(a)(3) or 8(b)(2) to strike a balance between the religious needs of individual employees and the security requirements of unions."

Rather, the court declared that "the compromise was between the abuses of compulsory unionism and the problem of 'free riders.'" The House Report on the Taft-Hartley bill described the purpose of section 8(a)(3) as follows:

In the language of the present Act, this section forbids employer's to discriminate in regard to hire and tenure of employees or any terms and condition of employment to encourage or discourage membership in any labor organization. Consistently with court decisions, the bill expressly makes this clause applicable to persons seeking employment, thereby barring 'black lists.'

Thus, Congress was concerned about union blacklisting rather than about the accommodation of a worker whose religious beliefs prevent him from seeking union membership. The only legislative accommodation of religious objections to union security is found in section 701(j) of Title VII.

Moreover, even assuming arguendo that section 8(a)(3) of the NLRA was meant in 1947 to be an accommodation to religious practices, there was nothing to prevent Congress from creating a different standard for accommodation twenty-five years later under the Civil Rights Act. Section 701(j) clearly requires an accommodation provided that no undue hardship results. The Supreme Court in Hardison found this requirement to be "unequivocal." Therefore, even if the agency shop is itself a limited accommodation, if a more complete accommodation, such as charity substitution, can be implemented without undue

---

279. Id. at 342.
280. Id.
282. The circuit court found illuminating two comments made by Senator Taft regarding section 8(a)(3).

The record describes two examples of union abuse sought to be remedied:

1. prohibiting the union from firing an employee because he testified truthfully that he saw a union shop steward knock another employee down;
2. prohibiting unions from making rules that exclude from membership anyone not the son of a man already working in that plant and already a member of that union.

93 Cong. Rec. 4886 (1947).

Referring to these examples Senator Taft explained . . .

There are also many abuses in connection with the firing of men. We further provide in the bill that if a man is fired by the union for some reason other than non-payment of dues, the employer does not have to discharge him. The abuse at which that provision is aimed is the usual type of abuse, and is the only type of abuse testified to. We have taken care of that in the committee bill.

[Senator Taft also declared] in answer to a question by Senator Donnell.

In this bill we are trying to be strictly practical and to meet the actual problems which have arisen, and not to go into the broader fields of rights of particular persons.

93 Cong. Rec. at 4886 (1947).

571 F.2d at 343 (emphasis in original).
hardship, then it should be implemented under the requirements of Title VII.

Finally, the Supreme Court's definition of undue hardship as anything more than a *de minimis* cost must be challenged. As noted above, while cost is certainly a legitimate factor in determining the existence of undue hardship, the Court's more than *de minimis* cost standard is clearly insufficient to constitute undue hardship under the EEOC or Congressional scheme.

Under the original EEOC guidelines the duty of an employer was to accommodate the reasonable religious needs of his employees where such accommodation could be made without serious inconvenience to the conduct of his business. The EEOC subsequently increased the burden to undue hardship, citing as an example of such hardship a situation where an employee's needed work cannot be performed by another employee of substantially similar qualifications. Congress in enacting the 1967 standard did not seek to define undue hardship, but it did make it clear that a fairly substantial burden was expected to be borne before the duty of accommodation could be avoided. The Supreme Court's more than *de minimis* cost standard is inconsistent with this view, for as one commentator has declared, this standard would make "all but the most trivial accommodations, even if easily accomplished and inexpensive, impermissible..." As Justice Marshall, in dissent, also noted, "as a matter of law it must be seriously questioned as to whether simple English usage permits 'undue hardship' to be interpreted to mean 'more than *de minimis* cost.'" Indeed, to equate *de minimis* cost with undue hardship does seem to be like an "Alice in Wonderland World, where words have no meaning."

Yet even applying the Supreme Court's standard of undue hardship, it is still possible for charity substitution to be seen as a reasonable accommodation. This was in fact the conclusion reached by the Ninth

---

283. See text accompanying note 191 supra.
285. 29 C.F.R. § 1605.1(b) (1967).
286. Senator Randolph, in proposing his amendment, noted that it was anticipated that in only "a very, very small percentage of cases" would adjustments be impossible." 118 CONG. REC. 705 (1972).
288. 432 U.S. at 92 n.6. Websters International defines hardship as "something that causes or entails suffering or privation" and undue as "excessive, immoderate, unwarranted." *De minimus* on the other hand is defined as "trifling or very small." Webster's Third New International Dictionary.
Circuit in *Burns v. Southern Pacific Transportation Co.*,\(^2\) where the court declared, “[i]n our view, the loss of dues to the union is *de minimus*, even if so necessary to its fiscal well-being that its equivalent would be collected from the Local’s 300 members at a rate of 2 cents each per month.”\(^2\) The circuit court also found the administrative burdens *de minimis*.\(^2\) Certainly the Court’s more than *de minimis* standard makes undue hardship easier to prove, but it does not make it an absolute certainty. Charity substitution should not create undue hardship under the *Hardison* standard, for it places almost no burdens on the parties forced to make the accommodation.

VII

THE FUTURE OF RELIGIOUS ACCOMMODATION AND UNION SECURITY

Rather than acknowledging the need to balance the highly individualized facts present in each case as intended by the congressional scheme, the Supreme Court in *Hardison* attempted to establish precise standards which would be uniformly applicable to all situations. This attempt necessitated the establishment of very strict and inflexible rules. Thus, in holding that reasonable accommodation will never justify the unequal treatment of employees or that undue hardship will always exist where more than a *de minimis* cost results, the Supreme Court advanced a position so narrow as to raise doubts about the decision’s propriety. As one commentator has noted, “by substituting its view of the proper balance among interests for that of Congress, the *Hardison* Court appears to have approached and perhaps exceeded the limits of proper statutory construction and application.”\(^2\)

The Supreme Court in *Hardison*, nonetheless, squarely addressed for the first time the scope of the reasonable accommodation standard, and its decision cannot and will not be ignored. The *Hardison* decision creates substantial new barriers that must be hurdled before Congress’ reasonable accommodation standard can become an effective remedial scheme. The Court’s decision in fact casts doubt upon the future ability of section 701(j) to protect the needs of religious employees.\(^2\)

With this in mind, it is necessary to examine avenues for minimizing the future impact of the *Hardison* decision and thus effectuating Congressional desires to prevent religious discrimination in employ-

\(^2\) Id. at 407.

\(^2\) Id.


\(^2\) Justice Marshall in dissent declared that under the Court’s ruling “the regulation and the statute, while brimming with ‘sound and fury’ ultimately signify[ ] nothing.” 432 U.S. at 87.
ment. The analysis will be made in terms of possible judicial, administrative, and legislative alternatives and will specifically examine the role of such alternatives in the accommodation of employees with religious objections to union security.

A. A Judicial Approach

The Supreme Court's decision in Hardison, while seriously undermining the reasonable accommodation standard, did not dismiss it altogether, and the Court did hold that a duty of accommodation would exist in certain, albeit limited, instances. It thus becomes the task of the lower federal courts to apply the Supreme Court's doctrine while attempting to further clarify the scope of the accommodation duty.

Although the Hardison Court sought to create rules of general applicability, the peculiar facts present in each case should give the lower courts some flexibility in arriving at different outcomes by distinguishing factual variations. Where a sabbatarian is faced with an inability to obtain his desired day off because of a contractual seniority clause, the lower courts have felt compelled to follow the Supreme Court's decision.295 The Hardison Court, however, did not directly address the union security problem. In the first circuit court decision to confront that problem after Hardison, the Eighth Circuit in McDaniel v. Essex International, Inc.,296 was still able to find a violation of section 701(j) in the discharge of a religious employee for failure to pay union fees and dues. In that case the circuit court was able to effectively avoid the Hardison construction of the statute by finding that no accommodation was ever attempted by the defendant company or the union.297 That circuit court, however, did not feel constrained to examine the Supreme Court's position on disparate treatment, nor did it analyze the more than de minimis cost standard.298 Yet subsequently, the Ninth Circuit in Burns v. Southern Pacific Transportation Co.299 did analyze the de minimis cost standard and on the facts found that an accommodation to the plaintiff's objections to union security could be made without

295. Huston v. UAW Local 93, 559 F.2d 477 (8th Cir. 1977) (a union is not required to modify the seniority provisions of a collective bargaining agreement); Rohr v. Western Elec. Co., 567 F.2d 829 (8th Cir. 1977) ("we have no alternative but to affirm [the district court's finding the employer and the union made reasonable attempts at accommodation] as the Supreme Court held the employer was not required by Title VII to create a "special exception to its seniority system. . . .") See also Chrysler Corp. v. Mann, 561 F.2d 1282 (8th Cir. 1977), cert. denied, 434 U.S. 1039 (1978).
296. 571 F.2d 338 (6th Cir. 1978).
297. Id. at 343.
299. 589 F.2d 403 (9th Cir. 1978), cert. denied, 99 S. Ct. 843 (1979); accord, Anderson v. General Dynamics, 589 F.2d 397 (9th Cir. 1978).
undue hardship. The Ninth Circuit, unfortunately, noted only indi-
crectly the potential problem of inequality of treatment. 300 Another
lower court, outside the union security context, felt obliged to analyze
this problem and was unable to find a violation of the Act under the
Hardison standards. 301

Thus, while the lower courts are in a position to limit the reach of
the Hardison decision based on factual variation between cases, they
cannot effectively prevent any application of that decision. Despite the
Supreme Court’s denial of certiorari in the Burns case, 302 the Court
cannot be expected to ignore lower court opinions which arguably may
be in direct contradiction with its ruling. Nor can such judicial opin-
ions uniformly be expected of the lower courts. While the courts
should still be able to find that a reasonable accommodation to an em-
ployee’s religious objections to union financial support is possible, the
Hardison decision will undoubtedly make such a ruling more difficult
than anticipated by Congress. Thus lower court interpretation and ap-
plication of the Supreme Court’s ruling alone will not fully effectuate
the true intent of Congress.

B. An Administrative Approach

A second legal authority with the power to clarify the reasonable
accommodation doctrine in light of the Court’s ruling in Hardison is
the EEOC, the administrative body that first developed the guidelines
which became the current statutory formula. There is no reason to sup-
pose that the EEOC will or should remain inactive in the face of the
Supreme Court’s decision, for the EEOC is still charged with the task
of implementing the Act. The EEOC has in fact held public hearings
on whether to formulate new guidelines concerning religious discrimi-
nation or to propose new comprehensive legislation in response to the
Supreme Court’s ruling. 303

The importance of EEOC action through its power to formulate
guidelines under the Act cannot be understated, particularly in the area
of religious discrimination. Any new guidelines must seek to provide

300. 589 F.2d at 403 n.3.
301. Chrysler Corp. v. Mann, 561 F.2d 1282, (8th Cir. 1977), cert. denied, 434 U.S. 1039
(1978): “Nor do we think that an employer should have to adjust its entire work schedule to
accommodate individual religious preferences and practices, particularly where procedures and
scheduling already provide a measure of elasticity in switching work shifts and in allowing ex-
cused absences.”
303. 98 LAB. REL. REP. (BNA) (News & Background Info.) 141. EEOC Chair Eleanor
Holmes Norton said the hearings were prompted by a “troubling Supreme Court decision” (Har-
dison), which she said had “been misinterpreted by some employers.” Chair Norton declared that
the ruling “has left confusion in its wake” and confusion in the area of religious discrimination
“cannot be tolerated.”
more precise information to employers about their obligations under the Act. One of the principal criticisms of the current formula is that it fails to give employers a reasonable degree of predictability concerning what Title VII requires of them. The reasonableness of an accommodation, however, need not be determined in a vacuum, and while the new guidelines cannot provide a definite answer to whether a particular accommodation is reasonable under a given circumstance, guidelines should at least provide a nonexhaustive list of factors which the employer should consider in evaluating the nature and degree of hardship. Such a list would include the size of the employer's business, cost of the proposed accommodation, administrative difficulties, employee discontent, and numbers to be accommodated. While the EEOC cannot define undue hardship, it can emphasize that undue hardship should not be easily found. This may be inconsistent with the tenor of the Hardison decision but it is consistent with legislative history of section 701(j).

Such action by the EEOC, however, is sure to face opposition by some courts, despite the Supreme Court's statement in Griggs v. Duke Power Co. that "the administrative interpretation of the Act by the enforcing agency is entitled to great deference." Several courts including the Supreme Court have been willing to strike down or ignore regulations which they feel do not correctly reflect the intent of Congress. As the Supreme Court declared in Manhattan General Equipment Co. v. Commissioner of Internal Revenue:

The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed in the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute is a mere nullity.

Since the Supreme Court commented in the Hardison decision on the intent of Congress, EEOC regulations inconsistent with that decision could be held inconsistent with the judicially defined congressional "intent." Judicial reaction to new guidelines would, therefore, be mixed at best, and new guidelines could lead to more rather than less confusion. Moreover, while the EEOC hearings held in the summer of 1978 dealt with possible reformulation of the guidelines in general, the hearings were devoted exclusively to the problems of sabbatarians. The effect of


306. 297 U.S. at 134 (1936).
Hardison on union security issues was not discussed. These factors suggest that a more effective solution to the union security conflict after Hardison would be the passage of new comprehensive legislation on religious discrimination.

C. A Legislative Approach

Limitations on the ability of the courts and the EEOC to adjust the Hardison ruling suggest that any meaningful solution to the plight of sabbatarians and religious objectors must come from the legislature. If, as suggested, the Supreme Court's decision in Hardison is truly at odds with congressional intent, it is not unreasonable to expect some legislative response, just as the current statutory framework in section 701(j) was specifically enacted in response to earlier judicial decisions.

Any reformulation of the religious discrimination standard must make explicit in the legislative history or, preferably, within the text of the reformulation itself, that Congress envisions a "balancing of the interests" approach, in which no express, universally applicable rules of reasonableness or hardship can be created. Congress must squarely address the holding of the Hardison case and make clear that in requiring employers and/or unions to accommodate themselves to the needs of religious employees, some special dispensation for those employees is mandated. Furthermore, in its balancing formula, Congress must be more explicit in stating that a fairly substantial burden must be borne by the employer and/or the union before the employee's religious beliefs will be found subordinate. Finally, Congress should explicitly declare that its policies against religious discrimination in employment are applicable to all religious beliefs, not merely to observance of the Sabbath or other religious holidays.

These suggestions obviously envision the formulation of a flexible standard, similar to the current rule of reasonable accommodation short of undue hardship, which could be adapted to a variety of factual situations. There seem to be two primary criticisms of such a standard. First, as noted above, no clear guidelines are provided for employer or union action. This is necessarily true of any balancing formula, which

307. The emphasis on sabbatarian needs was due primarily to the fact that Hardison dealt with a sabbatarian and the most adverse effects of the Supreme Court's decision have come in that area. The Seventh-day Adventists provided the following figures on the Hardison ruling's impact on sabbatarians.

From June 1, 1976 until the decision (12½ months), we had 35 cases (2.7 per month) of which we resolved 29 successfully and 6 lost their employment, thus only a 17 percent loss of employment. Since the verdict until April 1, 1978 (9½ months) we had 49 cases (5.2 per month). Of those, we resolved 22 successfully, 19 were discharged, and 8 are still pending. The loss of 46 percent of the Sabbath-observance-related jobs is nearly three times as high as before.

98 LAB. REL. REP. (BNA) (News & Background Info.) 142.
by definition includes an element of subjectivity. Yet a balancing approach is particularly essential in the area of religious discrimination because of the special place of religion in our society. Without a balancing approach, religious beliefs would have to be given either absolute protection or an absolute denial of protection. Either approach would be inconsistent with our socio-legal traditions. A clear congressional reformulation of the balancing formula, incorporating the suggestions above, should provide enough initial guidance for employers and unions until a body of relevant case law can be developed.

A second criticism of the balancing approach currently in use, and one which would equally apply to any reformulation along the same basic lines, is that such an approach "imposes a priority of the religious over the secular." Freedom of religion is felt to necessarily include "the freedom not to believe as well as the freedom to believe." This argument is in effect the argument advanced by the Supreme Court in Hardison when it declared, "it is unacceptable to treat employees differently solely on the basis of religious beliefs." The Hardison Court should have followed the existing statutory framework which clearly incorporates such a result, but here the argument questions the validity of such a statutory approach on reformulation. Much of the argument concerns the constitutional establishment clause issues which have not yet been fully adjudicated by the courts. Most commentators, however, in discussing these issues have found no constitutional infirmity. The limited special protections given religious beliefs by the current statutory requirement of reasonable accommodation properly reflect the historic and psychological importance of religious toleration in our heritage. The balancing approach currently in use recognizes the special role of religious liberty by creating a rule under which economic and collective interests will not always predominate over society's interests in religious freedom.

While an accommodation of religious objections to union security can still be made under the Hardison decision, the Court's inflexible and over-restrictive ruling nonetheless provides the impetus for new comprehensive legislation on religious discrimination under Title VII. There is, moreover, a strong possibility that additional protection for religious objections to union security will come from Congress in the form of amendments to the NLRA and to the RLA creating absolute protection for such religious beliefs.

308. Edwards & Kaplan, supra note 50, at 628.
309. Id. Edwards & Kaplan suggest as an example: "Who is to say that the desire to stay home Sunday and do nothing is any less worthy of protection than is the need to attend church that same day? But the EEOC's standard clearly chooses the one over the other." Id.
310. 432 U.S. at 71-72.
311. See note 83 supra.
There is already an absolute charity substitution exemption from union security requirements for religious employees in the health care industries covered by the NLRA. Major lobbying efforts by religious groups whose members oppose union security seek to extend that absolute accommodation to all workers covered by that Act and by the RLA. Such attempts were nearly successful in late 1977 with the passage by the House of Representatives of an amendment expanding the NLRA's current exemption to all covered workers. The legislative history of the bill reflects an intent to reconcile the requirements of the NLRA with the principles of Title VII. As Representative Thompson, the bill's principal sponsor declared:

The bill would accommodate the religious beliefs of these persons and thereby reconcile the National Labor Relations Act with section 701(j) of the Equal Employment Opportunity Act as recently construed in Cooper v. General Dynamics, 533 F.2d 163, Fifth Circuit decided June 9, 1976. Thus, the bill reflects the legislative determination that the alternative to the payment of union dues provided in the bill—

Reasonably accommodate[s] . . . an employee . . . religious observance or practice without undue hardship.

Title VII, section 701(j), 43 United States Code, section 2000e(j). The option of allowing a qualifying individual the ability to pay the equivalent of dues to a nonreligious charity clearly constitutes a "reasonable accommodation" to the individual's religious beliefs.

After notation that the bill had no opposition either from management or organized labor and that no conflict with the first amend-

313. 123 CONG. REC. H11,967-68 (daily ed. Nov. 1, 1977). The text of H.R. 3384 read as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 19 of the National Labor Relations Act is amended as follows: (a) by striking out the words "of a health care institution" after the words "Any employee"; and (b) by adding a new sentence at the end thereof: "Proof of such payments must be made on a monthly basis as a condition of continued exemption from the requirement of financial support to the labor organization, subject to such rules and regulations as the Board may prescribe."

Id. at H11,901.
314. 123 CONG. REC. H11,901 (daily ed. Nov. 1, 1977). Representative Erlenborn another principle supporter of the bill further declared:

Some feel that the religious accommodation represented by this bill does not rise to the status of a first amendment issue. By recognizing that this bill accommodates the religious beliefs of those small sects I have mentioned, and thereby reconciling the National Labor Relations Act with the Equal Employment Opportunity Act, I believe that the first amendment constitutional rights are fully protected, for that is what the EEOA sought to accomplish. Certainly this bill accepts the principle of religious liberty as guaranteed by our Constitution, and implemented by the Equal Employment Opportunity Act; and it is clear the bill prefers that principle over any conflict with it raised by our national labor policy.

Id. at H11,904. See also Id. at H11,905 (remarks of Representative Clausen).
315. Id. at H11,902 (remarks of Representative Erlenborn).
ment would result,\textsuperscript{316} the bill passed the House easily by a vote of 400-7.\textsuperscript{317} The bill then went to committees in the Senate where it was included as part of S.B. 1883 known as "The Labor Reform Act of 1977." The reform bill was later reported out of the Senate Human Resources Committee as a new bill, S.B. 2467, by an affirmative vote of 13-2.\textsuperscript{318} While the religious amendment exemption apparently had little opposition either in committee or on the floor of the Senate,\textsuperscript{319} the reform bill as a whole faced serious and well-organized opposition due to several other controversial provisions. After a lengthy filibuster and a number of unsuccessful attempts at cloture, the bill was returned to committee. While chances of passage of the entire reform bill are extremely slim, it still seems likely that given the almost unanimous support in Congress for the charity substitution provision, such an amendment might be enacted independently in the future. Such a provision would clearly solve the union security conflict for the great majority of religious employees, as the charity substitution plan provided for in the legislative proposal is flexible enough to accommodate almost all religious objectors.

Enacting charity substitution as part of the NLRA and the RLA rather than as part of Title VII would, however, create some difficulties. First there is the problem of the interface between the limited coverage of employees under the NLRA and the RLA and the coverage of Title VII which applies to all workers. Workers not covered by either the NLRA or the RLA would still require the protection of Title VII. The NLRA amendment also lacks Title VII's flexibility, as it creates an absolute exemption providing for charity substitution where undue hardship would arguably result under the Title VII standard. In such a situation, while the absolute provision in the NLRA would seem to control, there is no logical reason for a different standard to be applied to different workers, with greater protection for religious objectors covered by the NLRA than for religious objectors covered by Title VII. Additionally, in some instances charity substitution under the NLRA might not be acceptable to certain religious employees covered by that Act, and under such circumstances Title VII would still seem to allow some other accommodation absent undue hardship. There is nothing in the legislative history of the proposed NLRA amendments which declares otherwise.

\textsuperscript{316} Id. at H11,905 (remarks of Representative Clausen).
\textsuperscript{317} Id. at H11,967-68.
\textsuperscript{318} S. REP. No. 628, 95th Cong., 2d Sess. 36-37 (1978). The Senate subcommittee added an additional accommodation that the employee may elect to pay the equivalence of dues and fees directly to a fund maintained to pay the costs of arbitration. Id. at 34-35.
\textsuperscript{319} This amendment was not mentioned in a lengthy dissent from the subcommittee recommendations by Senators Hatch and Hayakawa. Senator Hatch became a leading opponent of the reform act on the Senate floor.
Despite these conflicts, enactment of protection for religious objectors under the NLRA should be encouraged, absent an early opportunity to revise the language of Title VII. The legislative history of the House's 1977 bill suggests that the bill and Title VII are meant to be complementary, and that the provisions of each Act could and should be reconciled in most situations. With this legislative history, passage of the NLRA amendment would provide added support for the ruling in Burns that charity substitution should be considered a reasonable accommodation under Title VII. Thus the amendment would clear up many of the existing questions under Title VII which were addressed in this article. Finally, the amendment avoids the unacceptable results which may follow from the current balance required by Title VII under the Hardison holding.

VIII
CONCLUSION

Attempts under Title VII to balance the interests of religious employees who object to the requirements of union security against the interests of the employer and the union have been vigorously litigated in the courts, but have not yet been fully reconciled. This balance, however, can be effectively struck by the courts if they apply the congressional intent as manifest by enactment of section 701(j) of the Act. The reasonable accommodation standard was chosen because of its flexibility. It does not attempt to create definitive rules nor to provide an absolute means of predicting obligations under the Act. Rather, the standard attempts to ensure some protection for all religious beliefs while at the same time acknowledging the secular interests of the employer and other employees.

Given these considerations, it seems clear that religious objections to union security are protected by Title VII. The statute should not be read narrowly to exclude this protection merely because union security is not explicitly mentioned in the legislative history of section 701(j). Congress has shown a legislative concern over protecting individual interests, both secular and religious, where those interests are in conflict with the application of union security. Furthermore, there is no valid reason under Title VII or any other statute to distinguish between objections to union security and other protected religious beliefs.

In applying the provisions of section 701(j) to the union security conflict, it must be remembered that no rights are absolute and that all parties—the employer, the union, and the religious employee—are expected to attempt to accommodate themselves to the needs and inter-

320. See text and accompanying note 314 supra.
ests of the other parties. One reasonable accommodation to the union security conflict is charity substitution. Charity substitution not only accommodates the desire of religious employees to avoid the financial support requirements of the agency shop, but it also acts to ensure that religious employees do not avoid their fair share of the cost. In most instances charity substitution will not cause undue hardship. Economic costs to the union are usually small, administrative inconvenience to the employer is virtually nonexistent, and employee discontent should be minimized by the fact all employees are required to bear the same financial burden.

The Supreme Court's recent decision in *Trans World Airlines v. Hardison*, however, ignores Congress' flexible balancing approach by attempting to create specific rules applicable in every case. In that decision the Court adopted overly restrictive standards concerning the "special treatment" required by accommodation, and the meaning of undue hardship. This statutory construction raises serious questions about the continued viability of section 701(j) in fulfilling its statutory function to prevent religious discrimination in employment. Although charity substitution is probably still available under the *Hardison* ruling, that accommodation is most effective when the courts apply the flexible system mandated by Congress.

Unless the court's, the EEOC, or Congress is willing and able to reestablish the flexible approach originally embodied in the reasonable accommodation formula, religious objectors may be forced to turn away from Title VII as a source of protection. In that event, religious objectors will probably invoke statutes such as the National Labor Relations Act and the Railway Labor Act, where an absolute requirement of charity substitution can be expected in the near future. Application of charity substitution, either as a reasonable accommodation under Title VII or as an absolute accommodation under the NLRA and the RLA, will finally create a situation under which the religious employee can satisfactorily meet both the demands of Caesar and the demands of God.