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The Holy and the Handicapped: An Examination of the Different Applications of the Reasonable-Accommodation Clauses in Title VII and the ADA

ALAN D. SCHUCHMAN*

INTRODUCTION

Employment litigation is the fastest-growing area in federal civil litigation today¹ in large part due to Title VII² and the Americans with Disabilities Act ("ADA").³ These two landmark pieces of civil rights legislation are similar in many ways. They share the same laudable goals: they provide protections comparable in scope,⁴ they are applicable to the same entities, and they have similar enforcement procedures.⁵ However, there is one anomaly between the two. Though both require that employers "reasonably accommodate" the needs of employees or applicants to avoid discriminating on the basis of religion or disability, the "reasonable accommodation" requirement is applied with markedly different results in each act.

In *TWA v. Hardison*,⁶ for example, a Title VII religious-discrimination action, the Supreme Court held that it would be an undue hardship for TWA to bear more than de minimis costs to give an employee the day of his Sabbath off. The Supreme Court rejected an accommodation allowing the employee to transfer to a position that would not involve a conflict with his religious beliefs, costing the airline only \$150 for three months.⁷ In contrast, in *Nelson v. Thornburgh*,⁸ a district court held that accommodations for three blind employees ranging in cost

* J.D. Candidate, 1998, Indiana University School of Law-Bloomington; B.S., 1993, Northwestern University. I would like to thank Professor Dan Conkle for providing me with the constitutional-law foundation, for sharing his expertise in the area of law and religion, for his open-door policy, and for his indefatigable willingness to answer questions without which this Note would not have been possible. This Note is dedicated to my family who stood by me the many years it took to get here and who taught me in many ways that prejudice and discrimination against anyone for any reason is deplorable.

1. See John J. Ross, *The Employment Law Year in Review*, 24 INST. ON EMPLOYMENT L., VOL. 1, at 7, 13-14 (1995).

2. 42 U.S.C. §§ 2000e to 2000e-17 (1994).

3. See Thomas D. Arn, *The Arizona Legislature Protecting Employment At-Will*, ARIZ. ATT'Y, Aug.-Sept. 1996, at 40, 40.

4. See Francis X. Dee, *Employment Litigation in the 90's: The Impact of the 1990 Americans With Disabilities Act and the Civil Rights Act of 1991*, 4 LITIG. MGMT. SUPERCOURSE 725, 727 (1993).

5. Compare 42 U.S.C. § 2000e-5, with *id.* § 12117 (providing that its powers, remedies, and procedures with regard to enforcement shall be the same as those of various other sections, among them *id.* § 2000e-5).

6. 432 U.S. 63 (1977).

7. See *id.* at 92 n.6 (Marshall, J., dissenting).

8. 567 F. Supp. 369 (E.D. Pa. 1983), *aff'd*, 732 F.2d 146 (3d Cir. 1984).

from \$18,000 to \$34,000 would not result in undue hardship and were thus required.⁹ These two cases vividly demonstrate the differing results of "reasonable accommodation" analysis under the two acts.¹⁰

How and why are these semantically identical requirements different? This Note attempts to answer that question. Part I looks at the statutes themselves. Part II delves into the development of the differing accommodation standards. Part III examines the potential reasons behind the differing applications of "reasonable accommodation." Ultimately, this Note concludes that the Supreme Court has misinterpreted the language and ignored the congressional intent behind the reasonable-accommodation clause of Title VII. This Note does not mean to suggest that "reasonable accommodation" under Title VII should be enforced with the same vigor as under the ADA. It does suggest that the current Supreme Court doctrine in Title VII religious-discrimination cases be rejected by Congress through legislation returning Title VII's reasonable-accommodation clause to its clear, originally intended meaning.

I. THE STATUTES

A. Title VII of the Civil Rights Act of 1964

Title VII prohibits discrimination against employees or job applicants on the basis of race, color, religion, sex, or national origin.¹¹ It makes it unlawful for an employer,¹² employment agency, or labor organization, "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment," or "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee," based on the delineated prohibited bases.¹³ The law allows, absent an intent to discriminate, the use of bona fide occupational qualifications and bona fide seniority or merit systems to permit appropriate deviations from the

9. *See id.* at 375-76. *Nelson* was decided under the Rehabilitation Act of 1973. 29 U.S.C. §§ 701-797 (1994). However, because the ADA is based in large part upon the Rehabilitation Act and its regulations, cases decided under the Rehabilitation Act are frequently used for guidance in "distinguishing a reasonable accommodation verses [sic] one that creates an undue hardship [under the ADA]." JAMES G. FRIERSON, EMPLOYER'S GUIDE TO THE AMERICANS WITH DISABILITIES ACT 93 (1992); *see also infra* note 83 and accompanying text.

10. Lest it appear I am intentionally skewing the case law, I acknowledge there are many cases under Title VII which resulted in accommodations being required, *see, e.g.*, *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988), and many cases under the ADA which resulted in accommodations being denied, *see, e.g.*, *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1318 (1997). However, the bulk of the decisions support the reasoning and analysis as posited in this Note.

11. *See* 42 U.S.C. § 2000e-2(a) (1994).

12. The law basically applies to all private employers with more than 15 employees, but excludes the federal government and tax-exempt private-membership clubs. *See id.* § 2000e(b).

13. *Id.* § 2000e-2.

restrictions discussed above.¹⁴ Of the five prohibited bases for discrimination, the statute gives definitions or parameters for only two: sex and religion. The law says, “[t]he 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 an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.”¹⁵ The law does not include, however, definitions of “reasonable accommodation” or “undue hardship.”

B. The ADA

Perhaps reflecting greater wisdom gained through experience, Congress, when drafting the ADA, utilized much greater specificity and detail than when it drafted Title VII. The ADA prohibits employers from discriminating against qualified individuals¹⁶ with a disability¹⁷ in regard to job-application procedures or any terms or conditions of a job already held.¹⁸ Discrimination under the ADA includes not making a reasonable accommodation to the known physical or mental limitations of such an employee or applicant, unless the employer can show that the accommodation would create an undue hardship.¹⁹

The ADA lists a variety of steps that might be reasonable accommodations, including: making existing facilities used by employees readily accessible to and usable by individuals with disabilities; job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modification of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; and the provision of qualified readers or interpreters.²⁰ An “undue hardship” is an action requiring significant difficulty or expense, when considered in light of the following factors:

the nature and cost of the accommodation needed under this chapter; the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; and the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or

14. *See id.* § 2000e-2(h).

15. *Id.* § 2000e(j).

16. The Act defines a “qualified individual” as one who with or without reasonable accommodation can perform the essential functions of the job. *See id.* § 12111(8).

17. In its sweeping coverage the Act defines “disability” as “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” *Id.* § 12102(2).

18. *See id.* § 12112(a).

19. *See id.* § 12112(b)(5)(A).

20. *See id.* § 12111(9).

fiscal relationship of the facility or facilities in question to the covered entity.²¹

It is in these definitions of "reasonable accommodation" and "undue hardship" that the ADA's greater specificity, relative to Title VII, is manifested.

II. THE DEVELOPMENT OF THE DIFFERENT ACCOMMODATION STANDARDS

A. Title VII of the Civil Rights Act of 1964

As originally enacted, Title VII included no accommodation requirement. It outlawed discrimination on the basis of religion but imposed no statutory duty on employers to accommodate employees' religious beliefs.²²

Two years after the law went into effect, the Equal Employment Opportunity Commission ("EEOC" or "Commission") addressed the issue of accommodation for the first time. The EEOC had received complaints raising 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 work week."²³ In response, in its religious-discrimination guidelines, the EEOC instituted the requirement that employers accommodate employees' and applicants' religious needs so long as doing so would not create a "serious inconvenience" to the employer's business.²⁴

The guidelines went on to create exceptions that all but swallowed the rule. For example, an employer was entitled to establish a normal work week and paid holidays generally applicable to all employees, "notwithstanding that this schedule might not operate with uniformity in its effect upon the religious observances of his employees."²⁵ An employer could permit time off with or without pay for religious holidays as long as he treated all religions with "substantial similarity," but closing on one holiday in no way mandated allowing time off for another.²⁶ When an employer found it necessary to alter an employee's schedule which previously did not cause a religious conflict, the employer was not compelled to accommodate the employee if doing so would cause "serious inconvenience to the conduct of his business or disproportionate allocation of unfavorable work assignments to other employees."²⁷ The Commission even went so far as to issue a caveat to employees and applicants: "a job applicant or employee who accepted the job knowing or having reason to believe that [normal work week and foreseeable overtime requirements] would

21. *Id.* § 12111(10).

22. *See* 42 U.S.C. § 2000e-2 (1964) (current version at 42 U.S.C. § 2000e-2 (1994)).

23. 29 C.F.R. § 1605.1(a)(1) (1967).

24. *Id.* § 1605.1(a)(2).

25. *Id.* § 1605.1(a)(3). The guidelines gave an example of this exception: "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." *Id.*

26. *Id.* § 1605.1(b)(1).

27. *Id.* § 1605.1(b)(4).

conflict with his religious obligations is not entitled to demand any alteration in such requirements to accommodate his religious needs."²⁸ Clearly, the EEOC's first foray into establishing an accommodation requirement did not result in much protection of religious liberties.

The following year, however, the EEOC released new guidelines taking a stronger pro-employee position. The new guidelines again stated that an employer had an obligation to accommodate the religious needs of current and prospective employees, but this time the employer was obligated to make "reasonable accommodations" where such were possible without creating an "undue hardship on the conduct of the employer's business."²⁹ The EEOC did not define "undue hardship," but instead gave only a single example of what might constitute such a burden.³⁰ The Commission went on to shift to the employer the burden of proving that an undue hardship rendered the accommodation unreasonable.³¹ Finally, the guidelines acknowledged that because of "the variety of situations which arise due to the varied religious practices of the American people," these cases would have to be reviewed individually to obtain an equitable application of the new guidelines.³² This kind of ad hoc, fact-determinative case review is still used today in religious-accommodation cases.

The EEOC's creation of an affirmative obligation to accommodate religious needs gave rise to court battles over whether the EEOC had the power to add such a duty to Title VII, which merely stated that it was illegal to discriminate on the basis of religion. In 1970, in denying rehearing in *Dewey v. Reynolds Metals Co.*,³³ the Sixth Circuit stated:

Nowhere in the legislative history of the Act do we find any Congressional intent to coerce or compel one person to accede to or accommodate the religious beliefs of another. The requirement of accommodation to religious beliefs is contained only in the EEOC Regulations, which in our judgment are not consistent with the Act.³⁴

28. *Id.* § 1605.1(b)(3).

29. 29 C.F.R. § 1605.1(b) (1968).

30. The guideline provided that an undue hardship "may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer." *Id.*

31. *See id.* § 1605.1(c).

32. *Id.* § 1605.1(d).

33. 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided Court*, 402 U.S. 689 (1971). In *Dewey*, the plaintiff, who refused to work on Sundays, was allowed under the employer's collective-bargaining agreement with the union to obtain his own substitute. He eventually refused on religious grounds to even do that because he sincerely believed it was a sin to ask someone else to work on Sunday. The district court ruled for the plaintiff. *See Dewey v. Reynolds Metals Co.*, 300 F. Supp. 709 (W.D. Mich. 1969). The court of appeals held that *Dewey* was not discharged because of discrimination but because of his violation of the collective-bargaining agreement and work rules. *See Dewey*, 429 F.2d at 330. The court felt that the defendant had made a sufficient accommodation in allowing the plaintiff to switch his own shifts. *See id.* at 331.

34. *Dewey*, 429 F.2d at 334. The court also believed that it would raise serious Establishment Clause issues for the Act to "compel an employer to accede to or accommodate the religious beliefs of all of his employees." *Id.* The court went on to say that "[t]he fundamental error of *Dewey* and the *Amici Curiae* is that they equate religious discrimination

The *Dewey* decision was affirmed per curiam by an equally divided United States Supreme Court.³⁵

One month later a district court in Florida handed down its decision in *Riley v. Bendix Corp.*,³⁶ also rejecting the authority of the EEOC to impose an accommodation requirement on employers. In ruling for the employer the court said:

We do not believe that the [EEOC] is vested with the authority of determining the procedural question of burden of proof. . . . Aside from that fact we feel it would be unreasonable and impractical to require the complex American business structure to prove why it cannot gear itself to the "varied religious practices of the American people."³⁷

These two decisions arguably led Senator Jennings Randolph to introduce the 1972 amendment to Title VII.³⁸ Senator Randolph's amendment tracked the language of the EEOC's regulations, thus giving the force of law to the parts of the guidelines the courts refused to recognize because the EEOC rather than Congress had promulgated them.³⁹ The amendment, which Congress passed and which is now codified as subsection (j) of § 2000e, reads: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."⁴⁰

Senator Randolph's speech on the floor of the Senate also gave the impression that he thought, or at least hoped, the amendment would lead to different results in cases like *Dewey* and *Bendix* in the future. He said:

[F]reedom from religious discrimination has been considered by most Americans from the days of the Founding Fathers as one of the fundamental rights of the people of the United States. Yet our courts have on occasion determined that this freedom is nebulous, at least in some ways. So in presenting this [amendment to Title VII], it is my desire . . . to assure that

with failure to accommodate." *Id.* at 335. For further discussion of the Establishment Clause issues see *infra* text accompanying notes 91-100.

35. See *Dewey*, 402 U.S. 689. The vote was four to four, with Justice Harlan not participating in the decision. See *id.*

36. 330 F. Supp. 583 (M.D. Fla. 1971), *rev'd*, 464 F.2d 1113 (5th Cir. 1972). The plaintiff was a Seventh Day Adventist who was terminated when he refused to work past sundown on Fridays even though his new shift required it. The court found that because the shift assignment applied equally to all foremen, "the plaintiff was discharged solely because of his refusal to work the hours assigned to him and not as a result of any religious discrimination." *Id.* at 591.

37. *Id.* at 588-89 (quoting 29 C.F.R. § 1605.1(d) (1967)).

38. In the *Congressional Record*, Senator Randolph mentioned the Supreme Court dividing equally on a Sabbath-and-job-discrimination question, mentioned court decisions "cloud[ing] the matter," and had the *Dewey* and *Bendix* cases printed in the record. 118 CONG. REC. 705-14 (1972) (statement of Sen. Randolph).

39. See *supra* text accompanying note 15.

40. 118 CONG. REC. 705 (emphasis added); see 42 U.S.C. § 2000e(j) (1994). Note that the italicized portions directly refute the *Dewey* and *Bendix* decisions concerning the EEOC regulations.

freedom from religious discrimination in the employment of workers is for all time guaranteed by law.⁴¹

The Senator went on to say that “there has been a partial refusal at times on the part of employers to hire or to continue in employment employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days.”⁴² He then posited his belief that the same concepts of freedom to believe and freedom to act that are found in the First Amendment were intended to be protected by the inclusion of religion in Title VII. However, Senator Randolph thought the courts “clouded the matter with some uncertainty” by coming down on both sides of the issue. He hoped his amendment would “resolve by legislation—and in a way . . . originally intended by the Civil Rights Act—that which the courts apparently have not resolved.”⁴³ He saw the amendment as a return “to what the Founding Fathers intended,” and a protection of people’s religious freedom and their “opportunity to earn a livelihood within the American system.”⁴⁴

The problem with Senator Randolph’s amendment was that it still did not provide much guidance to employers or courts for determining what a “reasonable accommodation” or an “undue hardship” was.⁴⁵ Arguably, Senator Randolph was not only aware of this but intended it. In a dialogue on the Senate floor, the Senator acknowledged utilizing language that would allow flexibility and discretion in the application of the amendment: “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.”⁴⁶ Senator Randolph believed that this discretionary approach would work because “the employer and employee, are of an understanding frame of mind and heart.”⁴⁷ They do not try to cause problems or conflicts but “are just building upon conviction, and, hopefully, understanding and a desire to achieve

41. 118 CONG. REC. 705 (statement of Sen. Randolph).

42. *Id.* The Senator also called attention to some of these “religious sects” and estimated their numbers in the work force to be over one million strong. *Id.*

43. *Id.* at 705-06.

44. *Id.* at 706.

45. *See, e.g.,* TWA v. Hardison, 432 U.S. 63, 75 n.9 (1977) (“It is clear from the language of § 701(j) that Congress intended to change [the result of the *Bendix* case] by requiring some form of accommodation; but this tells us nothing about how much an employer must do to satisfy its statutory obligation.”); *see also* BUREAU OF NAT’L AFFAIRS, RELIGIOUS ACCOMMODATION IN THE WORKPLACE 37 (1987) (“[701(j)] did not provide much guidance to employers in making attempts at accommodation.”).

46. 118 CONG. REC. 706 (statement of Sen. Randolph). The acknowledgment was in response to Senator Dominick’s question:

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?

Id. (statement of Sen. Dominick).

47. *Id.* (statement of Sen. Randolph).

an adjustment."⁴⁸ The Senator believed that only in a very, very small percentage of cases would this not be accomplished.⁴⁹ Unfortunately, for the Senator and his amendment, it was these very cases that went to the courts for interpretation of the Senator's vague, discretionary language. The result was the dramatic weakening of the amendment's accommodation obligation, a direction inconsistent with the Senator's intent.

The first, and by far the most influential, decision to undercut the reasonable-accommodation clause was rendered by the Supreme Court in *TWA v. Hardison*.⁵⁰ There the most damaging part of the Court's opinion held that to make TWA expend more than a de minimis cost to give the plaintiff his Sabbath off would be an undue hardship.⁵¹ Consequently, the Court rejected several accommodations the court of appeals found reasonable, saying they would have cost TWA "either in the form of lost efficiency in other jobs or higher wages."⁵² In setting this low de minimis threshold for establishing an undue hardship the Court set a standard "that arguably ma[de] almost any hardship an undue one."⁵³

After the *Hardison* decision the EEOC held public hearings to respond to the concerns and questions raised by the Court's ruling. The Commission considered both written and oral testimony from approximately 150 witnesses. The witnesses were members of many affected groups, including employers and employees, religious and labor organizations, and state and federal government representatives.⁵⁴ The Commission concluded after these hearings that there was still a great deal of confusion concerning the extent of accommodation required, that some religious practices were not being accommodated, and that employers were basing accommodation efforts on anticipated concerns rather than actual experiences or costs.⁵⁵ As a result, the EEOC revised the guidelines it issued in 1967 "to clarify the obligation imposed by section 701(j) to accommodate the religious practices of employees and prospective employees."⁵⁶

The new guidelines attempted to provide greater guidance concerning what constituted a reasonable accommodation and an undue hardship, and tried to replace some of the requirement's bite lost after *Hardison*. The Commission now considered a refusal to accommodate justified only when undue hardship would

48. *Id.*

49. *See id.*

50. 432 U.S. 63. In this case the plaintiff worked for TWA in a department that was crucial to the airline's operations, and that needed to be staffed 24 hours a day, seven days a week. The plaintiff was discharged for refusing to work on Saturdays, his Sabbath. See discussion *infra* part III.A for more comment and critique of this case.

51. *See id.* at 84.

52. *Id.* Among the rejected accommodations were allowing Hardison to work a four-day week, utilizing supervisory or other personnel to replace him on the fifth day, and filling Hardison's shift with other employees paid overtime wages for the shift. *See id.* at 76. The overtime would have cost \$150 for three months. *See id.* at 92 n.6 (Marshall, J., dissenting).

53. BUREAU OF NAT'L AFFAIRS, *supra* note 45, at 50.

54. *See* 29 C.F.R. §§ 1605.2-.3 app. A (1996) (summarizing reasoning behind and history of changes to EEOC religious-discrimination guidelines).

55. *See id.*

56. *Id.*

result from "each available alternative method of accommodation."⁵⁷ In cases where more than one possible accommodation exists the Commission recognized that certain alternatives might disadvantage one employee more than others. Therefore, "when there is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual."⁵⁸ The Commission went on to say that it would consider "what constitutes 'more than a *de-minimis* cost' with due regard given to the identifiable cost in relation to the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation."⁵⁹ Unlike past versions of the guidelines, this revision included many examples and suggestions concerning reasonable accommodations and undue hardships.⁶⁰ Thus, the EEOC was clearly trying to minimize the damage done by the *Hardison* decision to Senator Randolph's amendment and the EEOC's 1967 religious-discrimination guidelines.

Unfortunately, the vitality of the amendment and the EEOC's new guidelines suffered another major blow when the Supreme Court decided *Ansonia Board of Education v. Philbrook*.⁶¹ The Court held that neither the statute nor the legislative history require an employer to accept a particular accommodation.⁶² Thus, once an employer has reasonably accommodated an employee's needs,⁶³ the statutory inquiry is at an end and the employer does not have to show that the other desired accommodations would cause undue hardship.⁶⁴ The Court thus rejected the EEOC guideline requiring an employer to implement the accommodation that least disadvantages the employee.⁶⁵

That essentially brings us to the current state of the law regarding reasonable accommodation of religious beliefs under Title VII. The EEOC has given up battling the Supreme Court through its guidelines and has for the time being accepted the Court's doctrine as it stands. An accommodation is not reasonable and therefore not required if it will impose more than *de minimis* costs upon an employer; and, once the employer has offered a reasonable accommodation, it has fulfilled its obligation.

57. *Id.* § 1605.2(c).

58. *Id.* § 1605.2(c)(2)(ii).

59. *Id.* § 1605.2(e)(1) (emphasis in original) (quoting *TWA v. Hardison*, 432 U.S. 63, 84 (1977)).

60. *See id.* § 1605.2(d)-(e).

61. 479 U.S. 60 (1986). In this case, Philbrook claimed he had been discriminated against on account of his religion because his employer refused to allow more than three days of paid leave for religious purposes when his employer would allow it for secular reasons. Philbrook, relying on the EEOC guidelines, suggested an accommodation which was rejected by the employer and resulted in the litigation. *See id.* at 63-65.

62. *See id.* at 68.

63. In this case the Court found that the offer of additional unpaid days off was a reasonable accommodation. *See id.* at 70.

64. *See id.* at 68.

65. *See id.* at 69 n.6.

B. The ADA

Whereas Title VII's reasonable-accommodation standard developed over a period of years after its passage, that of the ADA was essentially already developed and in place when the Act was passed. What the courts did to shape and define Title VII, congressional hearings and drafting committees did to develop the ADA.

The ADA was passed in response to the perceived need for "omnibus rights legislation for individuals with disabilities."⁶⁶ What legislation there was, in particular the Rehabilitation Act of 1973,⁶⁷ was seen as inadequate, with serious gaps in its coverage.⁶⁸ Thus, after attempting legislation during a number of congressional sessions throughout the 1980s, Congress finally responded to the "compelling need to establish a clear and comprehensive Federal prohibition of discrimination on the basis of disability in the areas of *employment in the private sector*" with the passage of the ADA.⁶⁹

The ADA was drafted to overcome the Rehabilitation Act's limitations while preserving its fundamental approach to disability discrimination.⁷⁰ Thus, the definitions and prohibitions of the ADA closely parallel those of the Rehabilitation Act and its implementing regulations.⁷¹ Most importantly, the Rehabilitation Act's concept of reasonable accommodation was incorporated into the ADA.⁷² In so doing, Congress utilized the language of Title VII as it did throughout the ADA, with the resulting definition of discrimination including the failure to make a reasonable accommodation absent undue hardship.⁷³

However, the concern over what would constitute an undue hardship was one of the hottest topics of debate surrounding the ADA during its consideration in Congress.⁷⁴ Congress specifically rejected the *de minimis* standard of undue

66. H.R. REP. NO. 101-485, pt. 2, at 48 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 330.

67. 29 U.S.C. §§ 701-797 (1994).

68. *See* H.R. REP. NO. 101-485, pt. 2, at 32, *reprinted in* 1990 U.S.C.C.A.N. 303, 314. For instance, despite the enactment of the Rehabilitation Act, both the percentage of disabled men working full-time and the income of disabled workers dropped between 1980 and 1988. *See id.* at 28, *reprinted in* 1990 U.S.C.C.A.N. 303, 310.

69. *Id.* at 28, *reprinted in* U.S.C.C.A.N. 303, 310 (emphasis added). The fact that the Rehabilitation Act was applicable only to federal-government employment was probably seen as its greatest inadequacy and was thus a primary motivation for the ADA.

70. *See* Jeffrey O. Cooper, Comment, *Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans With Disabilities Act*, 139 U. PA. L. REV. 1423, 1425 (1991).

71. *See* ABIGAIL COOLEY MODJESKA, EMPLOYMENT DISCRIMINATION LAW § 4:01, at 2 (3d ed. 1993).

72. *See* 42 U.S.C. § 12111(9) (1994). The source of the reasonable-accommodation requirement in the Rehabilitation Act was the implementing regulation which defined a "qualified individual" as one who could perform the job with reasonable accommodation to their disability. *See* 29 C.F.R. § 1614.203(c) (1996).

73. *See* 42 U.S.C. § 12112(b)(5)(a); *supra* text accompanying note 19.

74. *See, e.g.*, 135 CONG. REC. 19,872-73 (1989) (dialogue between Sens. Harkin and Helms).

hardship as used in Title VII religion cases, and opted instead for a standard mandating an accommodation unless it rose to the level of "requiring significant difficulty or expense."⁷⁵ Congress felt this was necessary because of the "crucial role that reasonable accommodation plays in ensuring meaningful employment opportunities for people with disabilities."⁷⁶

Before settling on the "significant expense" threshold, Congress considered several other alternative undue-hardship standards. The Act initially required accommodation unless it would threaten the continued existence of the employer's business.⁷⁷ In response to great protest from the business community, that standard was discarded. Congress refused to enact as lenient a standard as the business community wanted in part because it believed the business community's fears regarding the costs of accommodation were misplaced.⁷⁸ The House Judiciary Committee even rejected an amendment that would have limited required accommodations to those costing no more than ten percent of the employee's salary. The Committee felt it was inappropriate to set a ceiling inasmuch as the desired intent was to establish a flexible approach like that employed under the Rehabilitation Act.⁷⁹

In addition to requiring significant expense rather than de minimis cost, Congress went on to enumerate and ultimately codify additional factors to be considered in the undue-hardship determination. These factors added to the force of the accommodation requirement.⁸⁰ What was not codified in the statute was included by the EEOC in its implementing regulations and its interpretive guidance on the ADA,⁸¹ issued one year before Title I of the ADA became effective. Included were the requirement that employers pay for the portion of an accommodation that does not cause an undue hardship; the suggestion of accommodating by reallocating "nonessential" job functions to other employees; and the allocation of primary consideration on choice of multiple possible accommodations to the disabled employee.⁸²

75. See 42 U.S.C. § 12111(10)(A); H.R. REP. NO. 101-485, pt. 2, at 68 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 350.

76. H.R. REP. NO. 101-485, pt. 2, at 68, *reprinted in* 1990 U.S.C.C.A.N. 303, 350.

77. See Bonnie P. Tucker, *The Americans With Disabilities Act: An Overview*, 1989 U. ILL. L. REV. 923, 927.

78. A 1982 study found that only 22% of disabled workers required special accommodation, and that of those, 51% imposed no cost and 30% cost less than \$500 per worker. See *id.* at 930.

79. See H.R. REP. NO. 101-485, pt. 3, at 41, *reprinted in* 1990 U.S.C.C.A.N. 445, 464.

80. See *supra* note 21 and accompanying text.

81. Compare H.R. REP. NO. 101-485, pt. 2, at 67-70, *reprinted in* 1990 U.S.C.C.A.N. 303, 330, with 29 C.F.R. § 1630.2(o)-(p), and *id.* § 1630 app. (1996) (Interpretive Guidance on Title I of the Americans With Disabilities Act, Section 1630.2(o), Reasonable Accommodation, and Section 1630.2(p), Undue Hardship).

82. See 29 C.F.R. § 1630.2(o)-(p); *id.* § 1630 app. (Interpretive Guidance on Title I of the Americans With Disabilities Act, Section 1630.2(o), Reasonable Accommodation, and Section 1630.2(p), Undue Hardship). As will become evident in Part III.A, similar requirements or suggestions have been either rejected or the cause of great debate under the reasonable-accommodation clause of Title VII.

The EEOC also made it clear that "the standards applied in the ADA are not intended to be lesser than the standards applied under the Rehabilitation Act of 1973."⁸³ The House and Senate committees in charge of examining and reporting on the ADA also noted that the undue-hardship determination was "derived from and should be applied consistently with interpretations by Federal agencies applying the terms set forth in . . . the Rehabilitation Act of 1973."⁸⁴ Thus, one year before the Act even became effective, the statutory language, legislative history and intent, EEOC regulations and guidance, and the adopted judicial and agency interpretations of the Rehabilitation Act, all combined to establish, with significant bite, the definition of reasonable accommodation in the ADA.

III. EXAMINATION OF POSSIBLE REASONS FOR DIFFERENT APPLICATIONS

A. Title VII of the Civil Rights Act of 1964

The possible reasons for the evisceration of Title VII's reasonable-accommodation clause stem from a variety of sources: the Constitution, concerns about reverse discrimination, societal notions of fairness, and even statistical data. Yet, all the reasoning is either unsound or easily rebutted.

The magnitude, or lack thereof, of the religious-discrimination problem is a possible reason for the continued weaker interpretation of Title VII's reasonable-accommodation clause. While charges of religious discrimination have increased more than 31% since 1990,⁸⁵ in 1995 they still made up only 2% of all EEOC complaints.⁸⁶ The ADA, on the other hand, accounted for over 20% of all EEOC complaints filed within two years of its passage!⁸⁷ Thus, it is quite possible that there simply is not enough public concern over the availability of reasonable accommodations for employees whose religious beliefs conflict with their employers' expectations or requirements to motivate congressional action to reverse the eviscerating case law through legislation.

Notwithstanding the statistical sparsity of religious-discrimination claims, it is the goal of civil rights statutes to protect minorities—a task that should be pursued whether that minority is a vocal one or not. Furthermore, the legislative history of § 2000e(j) clearly acknowledges that the amendment will protect "small denomination[s]" in their "opportunity to earn a livelihood within the

83. *Id.* § 1630 app. (Interpretive Guidance on Title I of the Americans With Disabilities Act, Section 1630.1(b) and (c), Applicability and Construction).

84. H.R. REP. NO. 101-485, pt. 2, at 67, reprinted in 1990 U.S.C.C.A.N. 303, 349; see S. REP. NO. 101-116, at 36 (1989).

85. See Margaret A. Jacobs, *Courts Wrestle With Religion in Workplace*, WALL ST. J., Oct. 10, 1995, at B1.

86. See L.M. Sixel, *Suits Claim Religious Job Bias/Federal Agency Acts in 3 Cases*, HOUSTON CHRON., July 25, 1996, at 1.

87. See Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 12 n.42 (1996).

American system.⁸⁸ Many commentators have opined that the purpose of Title VII's prohibition on religious discrimination is (or should be) to prevent individuals from having to choose between their religion and their job.⁸⁹ Thus, there is no reason why the size of the problem should obscure the laudable goals and detract from the enforcement of the reasonable-accommodation clause.

Another possible reason for the difference in force between the two reasonable-accommodation requirements deserves mention but is well beyond the scope of this Note. The actual and perceived differences between religion and disability as grounds for protection from discrimination affect peoples' views on this issue. By way of example, the ADA deals with discrimination based upon characteristics beyond an individual's control. Religion, on the other hand, is not perceived that way by many people. It can be argued that religion is the only basis of discrimination included in Title VII that is alterable (ignoring sex-change operations). On the other hand, it can be argued that its inclusion in that group of bases indicates a congressional belief that it is not alterable or that people either are or are not religious. These are among many important issues that dramatically affect judges', lawmakers', and everyday citizens' convictions about accommodation. But because they are obviously too rife with philosophical and theological implications, they are beyond the pale of this discussion.

By far the most important consideration affecting the reasonable-accommodation clause of Title VII is the Constitution. Anytime the government takes any affirmative action in the name of religion, it is treading a thin line between what is permissible and what is a violation of the First Amendment's Establishment Clause. The Establishment Clause prohibits Congress from passing a law respecting an establishment of religion, and from proscribing the free exercise thereof.⁹⁰ Establishment Clause challenges are reviewed by the courts under a test first enunciated by the Supreme Court in *Lemon v. Kurtzman*.⁹¹ Under the *Lemon* test, the Court requires that a law have a primary secular purpose; that it not have the primary effect of advancing or inhibiting religion; and that it not create an excessive entanglement between government and religion.⁹² If a statute fails any one of the three requirements, it is unconstitutional.

It is easy to see how a federal statute requiring private employers to accommodate the needs of religious employees is mired in the concerns of the Establishment Clause. Consequently, the Supreme Court and other courts have expressed concern over the potential conflict between the Establishment Clause and the enforcement of Title VII's reasonable-accommodation clause. Some

88. 118 CONG. REC. 706 (1972) (statement of Sen. Randolph).

89. See, e.g., *Rodriguez v. City of Chicago*, No. 95-C5371, 1996 WL 22964, at *3 (N.D. Ill. Jan. 12, 1996) ("It is nonsensical to suggest that an employee who, when forced by his employer to choose between his job and his faith, . . . has not been the victim of religious discrimination.").

90. See U.S. CONST. amend. I.

91. 403 U.S. 602 (1971).

92. See *id.* at 612-13.

commentators have opined that the Supreme Court, in *Hardison*,⁹³ chose to utilize a very low standard for establishing an undue hardship in order to avoid having to confront any Establishment Clause issues.⁹⁴ Too strict of an accommodation requirement could violate the Establishment Clause.

This was made clear by the Court in *Estate of Thornton v. Caldor, Inc.*,⁹⁵ decided after *Hardison*. There the Supreme Court ruled that a Connecticut statute mandating that employees be given time off work for their chosen Sabbath was in violation of the Establishment Clause. The Court found problematic the statute's "unyielding weighting" in favor of religion.⁹⁶ Quoting Judge Learned Hand, Chief Justice Burger wrote that "The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities."⁹⁷ Justice O'Connor, however, in a concurring opinion, distinguished Title VII's accommodation requirement from the Connecticut statute. O'Connor made specific mention of the fact that Title VII calls for "reasonable rather than absolute accommodation."⁹⁸

Thus, it can be inferred that the Court would find constitutionally suspect any application of Title VII's reasonable-accommodation clause which was too strict. By setting a lower standard, the Court was able to avoid the question entirely in *Hardison*. But did the Court have to go as low as it did? There certainly seems to be a broad range of possible thresholds between absolute accommodation and no accommodation upon showing de minimis costs, that would not violate the Establishment Clause.

Absent an absolute-accommodation requirement, Title VII's religious-discrimination provision appears to pass the *Lemon* test. Title VII has the secular purpose of eliminating discrimination in the workplace based on a variety of factors, not just religion. Although the courts and the EEOC may be involved, the level of their entanglement does not seem to be excessive. Finally, while the accommodation of religious beliefs could be considered as advancing religion, this is only an incidental effect of the statute. Title VII's primary effect is to prohibit workplace discrimination and "ensure that religiously motivated employees are given as much chance as possible to have the same employment opportunities as employees who do not have religious barriers to employment."⁹⁹

Thus, barring a requirement of absolute accommodation, or the provision of "benefits that are so excessive they encourage employees to join a religion,"¹⁰⁰

93. *TWA v. Hardison*, 432 U.S. 63 (1977) (articulating a de minimis standard for purposes of determining what constitutes an undue hardship).

94. See, e.g., BUREAU OF NAT'L AFFAIRS, *supra* note 45, at 50 ("Why did the Supreme Court decide that any accommodation that would have greater than a de minimis cost would constitute an undue hardship? It seems clear that the Court was trying to avoid the constitutional issue in *Hardison*.").

95. 472 U.S. 703 (1985).

96. *Id.* at 710.

97. *Id.* (omission in original) (quoting *Otten v. Baltimore & Ohio Ry. Co.*, 205 F.2d 58, 61 (2d Cir. 1953)).

98. *Id.* at 712 (O'Connor, J., concurring).

99. BUREAU OF NAT'L AFFAIRS, *supra* note 45, at 72.

100. *Id.*

a standard more protective of employees than the de minimis standard would not seem to violate the Establishment Clause. The Court could have measured undue hardship against a reasonable-costs standard or arguably even against a significant-expense standard, like that of the ADA, and still met the requirements of the *Lemon* test.

Closely related to (and possibly hopelessly intertwined with) the Establishment Clause issues is the concern that to accommodate one's religious beliefs is to discriminate against another's. This too was a driving force behind the Supreme Court's decision in *Hardison*.¹⁰¹ It appears as a concern in many other courts' opinions as well.¹⁰² It also is arguably the cause of the greatest workplace discord surrounding the accommodation issue.

In deciding *Hardison*, the majority placed great importance on what it perceived to be the discriminatory effect of religious accommodation. Justice White, writing for the Court, said "to require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve *unequal treatment of employees on the basis of their religion*."¹⁰³ Because Title VII prohibits discrimination against majorities as well as minorities, Justice White said "[i]t would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees . . . in order to accommodate or prefer the religious needs of others."¹⁰⁴ He concluded by stating, "In 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."¹⁰⁵

Justice White's concluding statement, although dicta, reveals that the Court seemingly would allow an employer to discriminate against an employee to enable a religious employee to observe his Sabbath if the statute or its history supported such a requirement. If this is the case then clearly such an action cannot be unconstitutional.

However, in the subsequent *Thornton* case, the Supreme Court, again in dicta, seemed to express a greater concern regarding the constitutionality of accommodating one employee's religious needs at the expense of another's secular needs. Chief Justice Burger, in a footnote, wrote:

101. *TWA v. Hardison*, 432 U.S. 63 (1977).

102. See BUREAU OF NAT'L AFFAIRS, *supra* note 45, at 70 ("The accommodation requirement does not refer to other employees as a source of undue hardship, but a judicial consensus appears to have emerged after *Hardison* that a proposed accommodation would be an undue hardship if it comes at the expense of other employees."); see also *EEOC v. Ithaca Indus., Inc.*, 829 F.2d 519 (4th Cir. 1987) (noting that Title VII does not require employer to discriminate against some employees so others can observe their Sabbath); *Ka Nam Kuan v. City of Chicago*, 563 F. Supp. 255 (N.D. Ill. 1983) (holding employee had cause of action for reverse discrimination due to accommodation of other religious employees); *EEOC Decision No. 86-1*, 40 Fair Empl. Prac. Cas. (BNA) 1873 (Nov. 18, 1985) (holding that employer need not alter work schedules if change would require other employees to work more Saturdays than under previous schedule).

103. *Hardison*, 432 U.S. at 84 (emphasis added).

104. *Id.* at 81.

105. *Id.* at 85.

[The statute in question] gives Sabbath observers the valuable right to designate a particular weekly day off—typically a weekend day, widely prized as a day off. Other employees who have strong and legitimate, but non-religious reasons for wanting a weekend day off have no rights under the statute. For example, those employees who have earned the privilege through seniority to have weekend days off may be forced to surrender this privilege to the Sabbath observer; years of service and payment of “dues” at the workplace simply cannot compete with the Sabbath observer’s absolute right under the statute. Similarly, those employees who would like a weekend day off, because that is the only day their spouses are also not working, must take a back seat to the Sabbath observer.¹⁰⁶

The Court objected to the absolute nature of the statute which allowed for no exceptions even when the “employer’s compliance would require the imposition of significant burdens on other employees required to work in place of the Sabbath observers.”¹⁰⁷ Thus, in part due to these concerns the Court held that this “unyielding weighting in favor of Sabbath observers over all other interests” established that the statute had the impermissible effect of advancing a particular religious practice.¹⁰⁸

Unfortunately, the Court’s reasoning in *Thornton* seems closer to grade-school notions of fairness than to scholarly constitutional analysis. Basically, the question asked is “whether the right to be free from work on Saturday so as to be able to wash the car or go on a picnic is entitled to the same constitutional protection as the right to practice the religious belief that one should not work on that day.”¹⁰⁹ The Bureau of National Affairs’s handbook on religious accommodation in the workplace poses a useful hypothetical to make its point:

Suppose, for example, that a religiously motivated employee is allowed to swap shifts while other employees cannot do so for non-religious reasons. Are the other employees placed in a position that is worse than the position they would be in if the religiously motivated employee were not allowed to swap shifts? No. *Instead, they are merely deprived of a benefit extended to him that allows him to continue to work for the employer.*¹¹⁰

It is true that if a nonreligious employee is forced to work on a Saturday to allow a religious employee his Sabbath off, the nonreligious employee is disadvantaged if she too wanted that day off. However, if the nonreligious employee has no legal right to a full weekend, and if she is being paid her usual wage, “it does not appear that the substituting employee has a complaint of the sort that the courts are required to uphold. In due process terms, she does not appear to have been deprived of a property right.”¹¹¹ Thus, for a court to base an accommodation decision on the impact the accommodation has on other employees seems to rely more on notions of fairness than on constitutional analysis.

Notwithstanding the *Thornton* dicta, at the time the Court rendered its *Hardison* decision the majority’s sentiment seemed to be that such an action was

106. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 n.9 (1985).

107. *Id.* at 710.

108. *Id.*

109. BUREAU OF NAT’L AFFAIRS, *supra* note 45, at 52.

110. *Id.* at 53 (emphasis added).

111. *Id.*

not unconstitutional. Therefore, the statutory language and legislative intent should have been controlling on the meaning and interpretation of the reasonable-accommodation requirement. Although Justice White found it lacking, there was statutory language and legislative history the *Hardison* Court could have relied on in setting its standard—that of the 1972 amendment, § 701(j).¹¹² Section 701(j), or 42 U.S.C. § 2000e(j) as codified, says that accommodation is required if it will not impose an *undue* hardship on the employer.¹¹³ In setting the de minimis standard, the Court essentially established that accommodation is not required if it will impose *minimum* hardship on the employer. In so doing the Court seems to have “read the adjective ‘undue’ out of the Act.”¹¹⁴ Likewise, the Court ignored the same language in the 1967 EEOC guidelines.¹¹⁵ Thus, a very colorable argument can be made that in *Hardison* and subsequent cases,¹¹⁶ the Court ignored congressional intent by establishing and maintaining a standard that excuses employers from their lawful duty to accommodate when the resulting hardship is less than undue.¹¹⁷

The legislative history of the 1972 amendment also suggests a stricter standard was desired than the Court created. In his dissent Justice Marshall criticized the majority’s decision and accused it of being “almost oblivious of the legislative history of the 1972 amendments of Title VII.”¹¹⁸ He went on to review the legislative history, focusing on Senator Randolph’s desire to overturn through legislation the *Bendix* and *Dewey* decisions which Marshall said “refused to equate ‘religious discrimination with failure to accommodate.’”¹¹⁹ The purpose of the amendment, Marshall said, was to “make clear that Title VII requires religious accommodation, even though unequal treatment would result.”¹²⁰

Although the legislative history contains only two pages of debate, there is further evidence of contemplation of a stricter standard contained therein. Senator Dominick asked Senator Randolph if the amendment would require an employer to change an employee’s schedule from fifteen days on and then fifteen off, to a customary five- or six-day work week so that the employee could

112. Although § 701(j), see 42 U.S.C. § 2000e(j) (1994), was not actually before the Court in *Hardison* (the case was based on the 1967 EEOC guidelines), the 1972 amendment was relied on to justify “accepting the [1967 guidelines] as a defensible construction of the pre-1972 statute.” *TWA v. Hardison*, 432 U.S. 63, 77 (1977). Thus, it could also have been used to provide the “clear statutory language and legislative history to the contrary” that the majority said was lacking. *Id.* at 85.

113. 42 U.S.C. § 2000e(j).

114. BUREAU OF NAT’L AFFAIRS, *supra* note 45, at 42.

115. Of course, EEOC guidelines are entitled to less deference than congressional statutes.

116. The Court could have addressed the language and legislative history of § 701(j) in subsequent cases, such as *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986), if it felt restrained from doing so in *Hardison*.

117. Justice Marshall, in his *Hardison* dissent, went so far as to say, “The Court today, in rejecting any accommodation that involves preferential treatment, [acts] in direct contravention of congressional intent.” *Hardison*, 432 U.S. at 89 (Marshall, J., dissenting).

118. *Id.* at 88 (Marshall, J., dissenting).

119. *Id.* at 89 (Marshall, J., dissenting) (quoting *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 335 (6th Cir. 1970), *aff’d by an equally divided Court*, 402 U.S. 689 (1971)).

120. *Id.* (Marshall, J., dissenting).

observe his Sabbath. Senator Randolph said that he did not "believe that an undue hardship would come to such an employer."¹²¹ Yet, under the Court's interpretation one could easily imagine such a request for accommodation being found to impose an undue hardship because "the privilege of having [certain days off] would be allocated according to religious beliefs."¹²²

Justice Marshall's dissent addresses this point very well in saying that "if an accommodation can be rejected simply because it involves preferential treatment, then the regulation and the statute, while brimming with 'sound and fury,' ultimately 'signif[y] nothing."¹²³ Marshall went on to explain that what all cases of accommodation have in common is that an employee could comply with a generally applicable, neutral rule only by violating his or her religious beliefs. The accommodation question is whether the employee will be exempted from the rule's demands; yet, doing so "will always result in a privilege being 'allocated according to religious beliefs."¹²⁴ However, Marshall concluded, this is what Title VII requires unless undue hardship would result.¹²⁵ Yet, the Court's opinion in *Hardison* has been interpreted by some lower courts to mean that any cost to an employer greater than *de minimis*, even if expended voluntarily, is discrimination against the other employees.¹²⁶

B. The ADA

Unlike Title VII, one need not delve into legislative history or analyze numerous court decisions to discover the reasons for the exacting reasonable-accommodation standard in the ADA.¹²⁷ The ADA begins with a section, entitled "Findings and purpose," that plainly spells out the motivations behind and the purpose of the Act.¹²⁸ Congress was concerned with the growing number of disabled people in this country who had long been subject to various forms of discrimination in critical areas and who did not have the benefit of any legal recourse.¹²⁹ This continuing discrimination relegated disabled individuals to an

121. 118 CONG. REC. 706 (1972) (statement of Sen. Randolph).

122. *Hardison*, 432 U.S. at 85.

123. *Id.* at 87 (Marshall, J., dissenting) (alteration in original).

124. *Id.* at 88 (Marshall, J., dissenting) (quoting *id.* at 84 (majority opinion)).

125. *See id.* (Marshall, J., dissenting).

126. *See, e.g.,* *Nottleson v. Smith Steel Workers D.A.L.U.* 19806, 643 F.2d 445, 451 (7th Cir. 1981) ("[A]nything more than a *de minimis* cost would result in discrimination against other employees."); *Ka Nam Kuan v. City of Chicago*, 563 F. Supp. 255, 258 (N.D. Ill. 1983) ("[W]hen an employer bears more than a *de minimis* cost to accommodate a religious belief, it in effect discriminates against its other employees."); *see also* *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 146 (5th Cir. 1982); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981); *Brown v. General Motors Corp.*, 601 F.2d 956, 961-62 (8th Cir. 1979); *Burns v. Southern Pac. Transp. Co.*, 589 F.2d 403, 406 (9th Cir. 1978).

127. Although if one did so, there are extensive reports, testimony of hundreds of witnesses, polls, and congressional findings, all supporting the need for this legislation. *See, e.g.,* H.R. REP. NO. 101-485, pt. 4, at 28-29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 512, 517-18; S. REP. NO. 101-116 (1989).

128. *See* 42 U.S.C. § 12101 (1994).

129. *See id.*; S. REP. NO. 101-116, at 6.

inferior position in society, and cost the nation billions of dollars in expenses due to dependency and nonproductivity.¹³⁰ Congress was also concerned that the discrimination was “based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals.”¹³¹

In the *Report of the Senate Committee on Labor and Human Resources on the Americans With Disabilities Act of 1989*, the Summary of the Legislation begins:

The purpose of the ADA is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American life; to provide enforceable standards addressing discrimination against individuals with disabilities, and to ensure that the Federal government plays a central role in enforcing these standards on behalf of individuals with disabilities.¹³²

Congress knew that it was passing legislation that was landmark in its scope and import. The ADA has been called “the most far-reaching discrimination measure enacted in the last 20 years,” and was predicted to “radically alter the employment picture” upon becoming effective.¹³³ To make any sort of impact upon the problem of discrimination against disabled people, the Act’s reasonable-accommodation requirement would have to be exacting.

CONCLUSION

Clearly there is a congressionally recognized and intended difference between the reasonable-accommodation clauses of Title VII and the ADA. Although Congress had less to do with the current interpretation of Title VII’s accommodation requirement than did the courts, it has not redefined the clause through legislation; thus it has impliedly accepted it. This is unfortunate because the Supreme Court has misinterpreted the clause, and ignored the original intent behind it.

Because the problem of discrimination against disabled people was, by congressional accounts, more severe both numerically and otherwise than that of discrimination against religion, it is arguably worthy of greater attention and enforcement support. Whereas the accommodation requirement of the ADA opens the workplace to millions of workers who otherwise would be unable to work, Title VII can be seen as simply conferring privileges on employees already in the workplace.

130. See 42 U.S.C. § 12101; S. REP. NO. 101-116, at 9.

According to [a] Lou Harris poll, the majority of those individuals with disabilities not working and out of the labor force, must depend on insurance payments or government benefits for support. Eighty-two percent of people with disabilities said they would give up their government benefits in favor of a full-time job.

Id.

131. 42 U.S.C. § 12101(7); see also S. REP. NO. 101-116, at 15.

132. S. REP. NO. 101-116, at 2.

133. ALAN M. KORAL & BRUCE McLANAHAN, *EMPLOYER COMPLIANCE WITH THE AMERICANS WITH DISABILITIES ACT 9-10* (1990).

Nonetheless, discrimination in any form is invidious, and thus to force sincere religious believers to choose between their beliefs and practices and a particular job seems to be creating choices and situations of the very nature that Title VII, and in particular subsection (j) of § 2000e, was enacted to prevent.¹³⁴ Of course there are competing interests, such as those of the business owners, to be considered. Surely a balance could be achieved between the business community's concerns over costs and control of their businesses and the Hobson's choice facing many religious believers.

I believe the answer lies somewhere between the de minimis and significant-expense thresholds, with a focus on many pertinent factors like that of the ADA.¹³⁵ Would it truly work an undue hardship on the United Parcel Service to allow an employee to wear a beard when his religious beliefs prohibit him from shaving?¹³⁶ Is it an undue hardship for a large company like TWA to pay \$150 to accommodate an employee for three months? And what of the employee who refuses to work on her Sabbath—is it an undue hardship to require another employee to forego a football Sunday or a picnic to make it possible for her to observe her beliefs and keep her job? The legal answer to these questions before the Supreme Court eviscerated the 1972 amendment to Title VII was “no.”

A new amendment to Title VII is needed: one that makes clear that employers may have to expend more than de minimis costs to ensure that Title VII's goal of eradicating workplace discrimination does not overlook religious discrimination; one that makes it clear that less import and consideration will be given to the effect an accommodation has on other employees whose only complaint is, “that's not fair.” A properly drafted amendment can avoid Establishment Clause problems by not requiring absolute accommodation and by not requiring so much of employers that the courts become too entangled in the management of businesses. Likewise, due process concerns can be avoided by not infringing upon the contractual rights of other employees when making a reasonable accommodation. A good starting point would be a repudiation of the current Supreme Court doctrine and a return to Senator Randolph's intended law.¹³⁷ Under his law, using an ad hoc, case-by-case determination, an employer would have to provide *reasonable* accommodations unless they would pose *undue* hardship upon the business.

134. When he introduced his amendment Senator Randolph stated, “This amendment is intended, in good purpose, to resolve by legislation—and in a way I think was originally intended by the Civil Rights Act—that which the courts apparently have not resolved.” 118 CONG. REC. 705-06 (1972) (statement of Sen. Randolph). Senator Randolph was concerned that the courts were not interpreting the term “religion,” as used in the Civil Rights Act, as Congress intended. He believed “[t]he 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.” *Id.* at 705.

135. See *supra* text accompanying note 21.

136. See *EEOC v. United Parcel Serv.*, 94 F.3d 314 (7th Cir. 1996).

137. See *supra* text accompanying notes 38-44.