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CONSTITUTIONAL LAW

I. *TOOLEY v. MARTIN-MARIETTA CORP.*: A POSITIVE STEP FOR RELIGIOUS FREEDOM IN EMPLOYMENT

A. INTRODUCTION

In *Tooley v. Martin-Marietta Corp.*,[1] the Ninth Circuit held (1) a substitute charity payment, in lieu of union dues, is a reasonable method of accommodating the plaintiffs' religious objections to the payment of union dues under section 701(j) of the Civil Rights Acts of 1964,[2] and (2) the accommodation requirement did not contravene the first amendment's prohibition against the establishment of religion.[3]

The plaintiffs were discharged for refusing to pay union dues in violation of a collective bargaining agreement executed in 1976.[4] The plaintiffs refused to join the union or pay union dues because such payment conflicted with their religious beliefs,[5] and offered instead to pay an amount equivalent to union dues to charity—an offer the union refused.[6] They sought relief against the company and the union under Title VII of the Civil

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1. 648 F.2d 1239 (9th Cir. 1981) (per Farris, J.; the other panel members were Hug and Tang, J.J.), *cert. denied*, 50 U.S.L.W. 3465 (U.S. Dec. 12, 1981).

2. *Id.* at 1243. Section 701(j) of the Civil Rights Act provides: "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 due hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j) (1976).

3. 648 F.2d at 1246. The first amendment provides in part: "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.

4. 648 F.2d at 1241. The parties executed the contract pursuant to 29 U.S.C. § 158 (a)(3)(1976), which provides in part:

> (3) . . . *Provided*, That nothing 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 . . . .

5. 648 F.2d at 1241.

6. *Id.*

Rights Act of 1964.[7]

The union's claim that the loss of revenue due to plaintiffs' non-payment imposed an undue hardship on the union[8] was rejected by the district court.[9] The district court issued an injunction prohibiting the plaintiffs' discharge.[10] The court also ordered the plaintiffs to pay to charity an amount equal to union dues.[11]

The union appealed on two grounds: (1) the decision was clearly erroneous because the court mistakenly found no undue hardship and (2) section 701(j) of the 1964 Civil Rights Act as applied was unconstitutional under the establishment clause of the first amendment. The Ninth Circuit unanimously rejected

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7. *Id.* Specifically, the plaintiffs alleged violations of § 703(a) and 703(c). Section 703(a) provides in relevant part:

> It shall be an unlawful employment practice for an employer—
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> (1) . . . to discharge any individual . . . because of such individual's . . . religion . . . or
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> (2) to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . religion . . . .

42 U.S.C. § 2000e-2(a) (1976).

Section 703(c) of the Act provides in relevant part:

> It shall be an unlawful employment practice for a labor organization—
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> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his . . . religion . . .
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> (2) to limit, segregate, or classify its membership . . . , or classify . . . any individual, in any way which would deprive or tend to deprive any individual of . . . employment opportunities or otherwise adversely affect his status as an employee . . . because of such individual's . . . religion . . . or
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> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

42 U.S.C. § 2000e-2(c) (1976).

8. 648 F.2d at 1243.

9. The district court found that: (1) the loss of dues attributable to plaintiff's nonpayment was approximately $600 per year, (2) there was a substantial likelihood that three other employees would request similar accommodation increasing the loss to $1,200 per year, (3) the union's 1978 income was $46,000—$4,300 more than expenses and (4) there were sizeable budget surpluses since 1976 even though the union donated to charity. 476 F. Supp. 1027, 1030 (D. Or. 1979).

10. 648 F.2d at 1241.

11. *Id.*

both contentions and affirmed the district court decision by holding the union did not demonstrate undue hardship and that the requirement of accommodation does not violate the establishment clause when the government maintains a position of neutrality and is not excessively involved in religious matters.[12]

B. Background

The Statutory Challenge

Title VII of the Civil Rights Act of 1964 (the Act)[13] was designed to prohibit employment discrimination.[14] In 1976, Congress amended the Act, focusing on discrimination based on religion.[15] Religious discrimination, unlike other types of invidious discrimination, is especially problematic because of two conflicting policies, both of which command national approval.[16] First, employment discrimination based on invidious criteria is prohibited.[17] Second, the harmonious relationships between business and labor, using the vehicle of the union shop, must be promoted.[18]

However, business and labor must not discriminate against

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12. *Id.* at 1243, 1246.

13. 42 U.S.C. §§ 1981 to 2000h-6 (1976).

14. 110 Cong. Rec. 1521, 1528-29 (1964).

15. Section 701(j), 42 U.S.C. § 2000e(j) (1976). *See* 118 Cong. Rec. 705, 706 (1972) (remarks of Mr. Randolph). For the text of § 701(j), see note 2 *supra*. The amendment to the Civil Rights Act that later became § 701(j) was approved unanimously. 118 Cong. Rec. 731 (1972).

16. 648 F.2d at 1242; Anderson v General Dynamics Convair Aerospace Div., 589 F.2d 397, 400 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979).

17. 42 U.S.C. §§ 2000e-2(a), 2000e-2(c) (1976). For the text of these sections, see note 7 *supra*. *See also* Nottelson v Smith Steel Workers D.A.L.U. 19806, 643 F.2d 445, 450 (7th Cir. 1981) (Title VII is an exception to NLRA union security clauses), *cert. denied*, 50 U.S.L.W. 3376 (U.S. Nov. 10, 1981); McDaniel v Essex Int'l, Inc., 571 F.2d 338, 343 (6th Cir. 1978) ("Since July 2, 1964 . . . , there has been no national policy of higher priority than the elmination of discrimination in employment practices.").

18. Courts that have stressed the importance of the union shop have been concerned about the possibility of free riders. *See* Nottelson v. Smith Steel Workers D.A.L.U. 19806, 643 F.2d 445, 456 (7th Cir. 1981) (Pell, J., dissenting) (notwithstanding the plaintiff's payment to charity, he is still a free rider vis-a-vis the union), *cert. denied*, 50 U.S.L.W. 3376 (U.S. Nov. 10, 1981); Gray v. Gulf, Mobile & Ohio R.R., 429 F.2d 1064, 1072 (5th Cir. 1970) (plaintiff was never asked to embrace the doctrine of unionism but merely to pay his fair share), *cert. denied*, 400 U.S. 1001 (1971); Linscott v. Miller Falls Co., 440 F.2d 14, 18 (1st Cir.) (industrial peace is objective of union shop), *cert. denied*, 400 U.S. 872 (1971); Linscott v. Miller Falls Co., 316 F. Supp. 1369, 1372 (D. Mass. 1970) (possibility of free riders will seriously disrupt commerce).

an employee and/or member on the basis of religion.[19] Thus, the conflict between the national policies of promoting the union shop and ameliorating employment discrimination intensifies when an individual fails to conform to a business practice or join or support a labor union because of his or her religious beliefs.[20]

Congress has attempted to reconcile this conflict through section 701(j) of the Act[21] which imposes a duty on the employer to accommodate an employee's religious beliefs unless it results in undue hardship. The Ninth Circuit applied the duty of accommodation to unions in *Yott v. North American Rockwell Corp. (Yott II)*.[22] Several other circuits have followed suit.[23]

Most of the problems concerning accommodation have arisen in two factual contexts: (1) a religious employee refuses to work on the Sabbath, or on religious holidays which do not conform to mainstream religious sabbaths and holidays,[24] or (2) a religious employee refuses to join or support a union or other business practice.[25] Although all courts recognize the employer's duty to accommodate the religious beliefs of his employee—aside from the constitutional objections that a few courts have raised[26]—the courts are divided as to what consti-

19. Sections 703(a) and (c), 42 U.S.C. §§ 2000e-2(a), 2000e-2(c) (1976). For the relevant text of these sections, see note 7 *supra*.

20. See cases cited notes 24-25 *infra* and accompanying text.

21. 42 U.S.C. § 2000e(j) (1976). For the text of § 2000e(j), see note 2 *supra*.

22. 602 F.2d 904, 909 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980). The plaintiff in *Yott II* argued that § 701(j) did not mandate consideration of hardship to the union. The court held that since neither the employer nor the union can discriminate against an employee, it is not unreasonable to consider the burden on the union. *Id.*

23. Nottelson v. Smith Steel Workers D.A.L.U. 19806, 643 F.2d 445, 451 (7th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3376 (U.S. Nov. 10, 1981); Cooper v. General Dynamics, Convair Aerospace Div., 533 F.2d 163, 170 (5th Cir.) (Brown, C.J., concurring) (both union and employer have a duty of accommodation and thus the union may show hardship as well), *cert. denied*, 433 U.S. 908 (1976).

24. *See, e.g.*, Nottelson v. Smith Steel Workers D.A.L.U. 19806 643 F.2d 445 (7th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3376 (U.S. Nov. 10, 1981); Yott II, 602 F.2d 904 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980); Anderson v. General Dynamics Convair Aerospace Div., 589 F.2d 397 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979); Burns v. Southern Pac. Transp. Co., 589 F.2d 403 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); Yott v. North Am. Rockwell Corp. (Yott I), 501 F.2d 398 (9th Cir. 1974).

25. *See, e.g.*, Wren v. T.I.M.E.-D.C., Inc., 595 F.2d 441 (8th Cir. 1979); Chrysler Corp. v. Mann, 561 F.2d 1282 (8th Cir.), *cert. denied*, 434 U.S. 1039 (1977); Huston v. Local 93, Int'l Union, 559 F.2d 477 (8th Cir. 1977); Draper v. United States Pipe & Foundry Co., 527 F.2d 515 (6th Cir. 1975).

26. See cases cited note 84 *infra* and accompanying text.

tutes reasonable accommodation.[27]

The trend in the circuit courts has been to construe broadly the employer's duty to accommodate[28] and one circuit has stated that Title VII is an exception to the national policy of union security clauses.[29] This trend is gaining momentum despite the Supreme Court's decision in *Trans World Airlines, Inc. v. Hardison,*[30] which narrowly construed the employer's duty to accommodate.[31] The *Hardison* Court held that the employer was not required to violate the seniority clause in a collective bargaining agreement in order to accommodate the religious needs of a Sabbatarian[32] and that any cost of the accommodation in excess of a de minimis amount constitutes undue hardship.[33]

Notwithstanding the *Hardison* decision, the Ninth Circuit has favored a broad interpretation of the employer's and union's duty to accommodate the religious needs of their respective employees and members.[34] The Ninth Circuit has considered four cases nearly identical factually to *Tooley.* In *Yott v. North American Rockwell Corp. (Yott I),*[35] the plaintiff was discharged for failing to pay union dues because of his religious beliefs.[36] The defendant offered to allow him to pay an equivalent amount

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27. *Compare* Wren v. T.I.M.E.-D.C., Inc., 595 F.2d 441, 445 (8th Cir. 1979) (defendant does not have to bend over backwards to accommodate the plaintiff but rather work within the seniority system) *and* Chrysler Corp. v. Mann, 561 F.2d 1282, 1285 (8th Cir.) (employee also has a burden of accommodation), *cert. denied,* 434 U.S. 1039 (1977) *with* Brown v. General Motors Corp., 601 F.2d 956, 959 (8th Cir. 1979) (defendant must point to some *actual* additional cost to establish undue hardship) *and* Draper v. United States Pipe & Foundry Co., 527 F.2d 515, 519 (6th Cir. 1975) (defendant must first attempt to accommodate the employee within his own classification and transfer him only as a last resort). *See generally* Note, *California's Controls on Employer Abuse of Employee Political Rights,* 22 STAN. L. REV. 1015, 1033 (1975).

28. See cases cited note 17 *supra.*

29. Nottelson v. Smith Steel Workers D.A.L.U. 19806, 643 F.2d 445, 450 (7th Cir. 1981), *cert. denied,* 50 U.S.L.W. 3376 (U.S. Nov. 10, 1981).

30. 432 U.S. 63 (1977).

31. *Id.* at 84.

32 A sabbatarian is an individual who reserves one day a week for exclusively religious activities.

33. 432 U.S. at 84.

34. *See* Yott II, 602 F.2d 904, 907 (9th Cir. 1979), *cert. denied,* 445 U.S. 928 (1980); Burns v. Southern Pac. Transp. Co., 589 F.2d 403, 406 (9th Cir. 1978), *cert. denied,* 439 U.S. 1072 (1979); Anderson v. General Dynamics Convair Aerospace Div., 589 F.2d 397, 402 (9th Cir. 1978), *cert. denied,* 442 U.S. 921 (1979); Yott I, 501 F.2d 398, 403 (9th Cir. 1974).

35. 501 F.2d 398 (9th Cir. 1974).

36. *Id.* at 400.

to a charity of his choice.[37] The plaintiff refused, claiming that one of his religious tenets prohibited forced contributions to anyone, even his own church.[38] The Ninth Circuit affirmed the judgment for the defendants, using a balancing test to weigh the societal interests in labor peace and free flow of interstate commerce against the individual's interest in first amendment rights.[39] The court concluded that the balance fell in defendant's favor because of a strong congressional policy against permitting free riders to share in the benefits of unionism without paying the cost, whereas the cost to the individual is merely finding non-union shop work which is generally less remunerative.[40]

In the next case involving non-payment of union dues for religious reasons, *Anderson v. General Dynamics Convair Aerospace Division,*[41] the Ninth Circuit first recognized the conflict between union security agreements and Title VII accommodation.[42] It then set out the burden to be borne by each party with respect to accommodation.[43] The plaintiff must show a bona fide belief that union membership and the payment of dues violate his religious faith, that he informed both the employer and the union of the conflict with the collective bargaining agreement, and that he was discharged for failure to join the union and tender dues.[44] The burden then shifts to the defendant to show a good faith effort to accommodate plaintiff's religious beliefs or demonstrate that it was unable to reasonably accommodate the plaintiff's beliefs without undue hardship.[45]

In *Burns v. Southern Pacific Transportation Co.,*[46] the Ninth Circuit rejected the union's claim of undue hardship which was based on the loss of dues attributable to plaintiff's

37. *Id.*
38. *Id*
39. *Id.* at 403.
40. *Id.* at 404.
41. 589 F.2d 397 (9th Cir. 1978), *cert. denied,* 442 U.S. 921 (1979).
42. *Id.* at 400. The district court in *Anderson* held that the burden of going forward with respect to accommodation was not borne by either party. The only relevant question was whether an accommodation could be reached. 430 F. Supp. 418, 421 (S.D. Cal. 1977). The district court found that the plaintiff refused to pay union dues because he distrusted the union, not because of his religious beliefs. *Id.* at 422.
43. 589 F.2d at 401.
44. *Id.*
45. *Id.* at 402.
46. 589 F.2d 403 (9th Cir. 1978), *cert. denied,* 439 U.S. 1072 (1979).

non-payment.[47] The court also reaffirmed its view in *Anderson* by stating that dissatisfaction among fellow employees did not by itself establish undue hardship. The court required actual disruption of the work routine.[48] The court also rejected the union's claim that granting this substitution would open the door to more requests for substitution, resulting in a greater than de minimis burden,[49] as hypothetical or speculative, hence inadequate to satisfy the requirement of undue hardship.[50]

Finally, in *Yott II*,[51] the Ninth Circuit decided on statutory grounds that the employer had made a reasonable attempt at accommodation and that all the plaintiff's proposals would have resulted in undue hardship.[52] The court, however, did not reach the constitutional issue.[53]

The other circuits and the Supreme Court vary widely in their views of what constitutes "reasonable accommodation" and "undue hardship."[54] One concern of the courts that narrowly

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47. *Id.* at 404-05.

48. *Id.* at 406-07. The union's hardship case was based on suppositions that free riders would cause serious dissension resulting in inefficiency of operation. *Id.*

49. *Id.* at 407.

50. *Id.*

51. 602 F.2d 904 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980).

52. *Id.* at 907.

53. The district court in *Yott II* held that § 701(j) unconstitutionally violated the first amendment's proscription of an establishment of religion. 428 F. Supp. 763, 767 (C.D. Cal. 1977). The court reasoned that religious objections are accorded a preference not given to political or moral objections, and stated that the government must be neutral in religious matters, even if it results in sacrifice to the individual. *Id.*

54. The circuits which have narrowly construed § 701(j) have taken several approaches. First, they seem to stress the severe, adverse impact of allowing exceptions to union shop clauses even if the clause burdens the plaintiff's right to the free exercise of religion. See cases cited note 18 *supra*. *See also* Linscott v. Miller Falls Co., 316 F. Supp. 1369, 1372 (D. Mass. 1970) (requirement to pay dues did burden plaintiff's right to free exercise of religion but the burden was justified by the *compelling* governmental interest of promoting labor peace). *But cf.* Note, *Accommodation of an Employee's Religious Practices Under Title VII*, 1976 U. ILL. L.F. 867, 885-86 (1976) (a seniority system is not a sufficiently compelling interest to overcome religious liberty). The courts fear that exceptions will swallow the rule and defeat the purposes of the National Labor Relations Act. *Cf.* Burns v. Southern Pac. Transp. Co., 589 F2d 403, 407 (9th Cir. 1978) (if excusing the plaintiff opens a floodgate of dues avoiders so that the union's fiscal integrity is at stake, there need be no accommodation), *cert. denied*, 439 U.S. 1072 (1979).

Specifically, these courts are concerned about the possibility of free riders—those who get the benefit of unionism without paying a fair share of the cost—resulting from bogus claims of religion. These are justifiable concerns, given the court's *extreme* reluctance to ever inquire into the validity of one's religion. "It is no business of courts to say . . . what is a religious practice or activity . . . ." Redmond v. GAF Corp., 574 F.2d 897,

construe the accommodation requirement is that social legislation which benefits all members of society should not be invalidated because of the religious preferences of a few.[55] The Eighth Circuit, in *Chrysler Corp. v. Mann*,[56] expressed concern that because the statute requires the employer, not the employee, to do the accommodating, the employee might be intransigent and force the employer to capitulate to his demands.[57] Consequently, that court held the employee must at least cooperate with attempts at reasonable accommodation, and the employee cannot shirk all responsibility to the employer.[58] Most courts hold that if a religious precept does not permit any accommodation on its face, the employee may be legally discharged.[59]

The circuits that have supported a broad reading of section 701(j) have also struggled with the concept of reasonable accommodation and undue hardship. These two concepts interrelate in that an employer must accommodate the employee's beliefs up to the point where undue hardship to the employer exists. Accommodations are unreasonable if the employer stops short of that point.[60] Thus the critical inquiry is: At what point does undue hardship exist? One court assumed that any accommodation

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900 (7th Cir. 1978) (quoting Fowler v. Rhode Island, 345 U.S. 67, 70 (1953)). Religion can be arbitrary, irrational, inconsistent, and eccentric and still merit protection under the first amendment. Thomas v. Review Bd. of Ind. Employment Sec. Div., 101 S. Ct. 1425, 1430 (1981). Furthermore, a believer need not be consistent in his behavior or may act on some tenet, in the name of religious freedom, that is not universally held by the church to which the individual belongs. *Id.*

55. See Gray v. Gulf, Mobile & Ohio R.R., 429 F.2d 1064, 1072 (5th Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971). Although general policy often contradicts specific religious belief, "it is not possible in an ordered society to allow every aspect of religious belief to stay the hand of government under the aegis of the First Amendment." *Id.*

56. 561 F.2d 1282 (8th Cir. 1977).

57. *Id.* at 1285.

58. *Id.*

59. The courts have generally recognized a narrow exception to the duty of accommodation when the religious tenet is so unconventional that there is no foreseeable method of accommodation. *E.g.*, Yott II, 602 F.2d 904, 906 (9th Cir. 1979) (employee's religious tenet which prevented any compulsory contribution to charity so that the substitute charity accommodation would not work, justified employee's discharge), *cert. denied*, 445 U.S. 928 (1980); Dewey v. Reynolds Metals Co., 429 F.2d 324, 329 (6th Cir. 1970) (employee who not only refused to work on his Sabbath but refused to have anyone substitute for him believing that he was encouraging others to sin, was properly discharged), *aff'd by an equally divided court*, 402 U.S. 689 (1971). *See* Draper v. United States Pipe & Foundry Co., 527 F.2d 515, 520 (6th Cir. 1975) (possible to prove undue hardship without actually attempting to accommodate).

60. See text accompanying notes 63-68 *infra*.

would entail some hardship, but concluded that not all hardship is undue.[61] According to the Ninth Circuit in *Anderson*, "[u]ndue hardship means something greater than hardship."[62]

Recognizing the lack of standards to judge the point at which hardship becomes undue, courts have attempted to give these words meaning through positive and negative examples. For example, no undue hardship exists when the union is deprived of an individual's dues,[63] when other employees grumble and complain about favoritism,[64] or when the union incurs a small administrative cost.[65] Undue hardship does exist when the union incurs a greater than de minimis cost,[66] the proposed accommodation compromises the safety of all employees,[67] or the proposed accommodation violates a bona fide collective bargaining agreement.[68] The Supreme Court, in *Hardison*, settled the question of undue hardship by defining the undue hardship standard as any cost in excess of a de minimis amount.[69]

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61. Draper v. United States Pipe & Foundry Co., 527 F.2d 515, 520 (6th Cir. 1975).

62. 589 F.2d at 402.

63. Nottelson v. Smith Steel Workers D.A.L.U. 19806, 643 F.2d 445, 451 (7th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3376 (U.S. Nov. 10, 1981).

64. Anderson v. General Dynamics Convair Aerospace Div., 589 F.2d 397, 402 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979); Burns v. Southern Pac. Transp. Co., 589 F.2d 403, 406-07 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979).

65. Tooley v. Martin-Marietta Corp., 648 F.2d at 1246.

66. Trans World Airlines v. Hardison, 432 U.S. 63, 84 (1977).

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

68. *Id.* Wren v. T.I.M.E.-D.C., Inc., 595 F.2d 441, 445 (8th Cir. 1979); Chrysler Corp. v. Mann, 561 F.2d 1282, 1285 (8th Cir.), *cert. denied*, 434 U. S. 1039 (1977); Huston v. Local 93, Int'l. Union, 559 F.2d 477, 480 (8th Cir. 1977).

69. 432 U.S. at 84. The Court accepted the district court's express findings that any of Hardison's proposed accommodations would have resulted in undue hardship. *Id.* at 83 n.14.

The *Hardison* dissent denounced the majority's reasoning and conclusion. First, the dissent attacked the majority's condemnation of unequal treatment, stating that accommodation, to any significant degree, involves inherently unequal treatment. Thus, to condemn unequal treatment is tantamount to emasculating the statute. *Id.* at 87. Second, the dissenters disagreed with the Court's formulation and application of the undue hardship standard. The dissent stated that to equate undue hardship to anything more than de minimis cost was to stretch the English language beyond recognition. *Id.* at 93 n.6. Furthermore, they argued, even if the majority correctly formulated the standard, it was incorrectly applied. *Id.* at 92. The district court found that $150 for three months constituted an undue hardship on the defendant's business. *Id.* at 92 n.6. This extra cost amounted to only a de minimis burden on the employer. *Id.* The dissent did not accord great weight to the district court's finding because there was nothing in the record to suggest that the district court properly interpreted and applied the term undue hardship. *Id.*

The Constitutional Challenge

One of the more controversial aspects of the duty of accommodation is whether it unconstitutionally establishes a religion. The first amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[70] This seemingly simple statement has generated volumes of litigation as to what Congress and the states can do with respect to regulating or accommodating religious beliefs.[71] The Supreme Court has often been called upon to resolve conflicts between the free exercise and establishment clauses.[72] The court has noted a general harmony between the two clauses, although the free exercise clause has a reach of its own.[73] However, the Court has also pointed out that either

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70. U.S. CONST. amend. I.

71. Valent v. New Jersey State Bd. of Educ., 114 N.J. Super. 63, 68, 274 A.2d 832, 837 (1971).

Because the courts have left many questions in this area unanswered, commentators have assumed widely varying positions in determining standards for the scope of both clauses. *See* Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 331 (1969) (importance of a law should be measured by incremental benefit of applying it to religious objectors); Shetreet, *Exemptions and Privileges on Grounds of Religion and Conscience*, 62 KY. L.J. 377, 392 (1974) (tendency of courts is to exalt free exercise clause over establishment clause); Note, *supra* note 54, at 875 (the privilege of inaction should be protected against state intrusion while religious action can be regulated). One commentator gave greater weight to the establishment clause and reasoned that the state may not prefer one person over another in any way on the basis of religion. Shetreet, *supra*. Another commentator gave greater weight to the free exercise clause by reasoning that the state may not interfere with religion absent a compelling state interest, and then only if it pursues the route least restrictive of religious liberty. Note, *supra* note 54.

72. *See* Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 788 (1973) (inevitable tension exists between the free exercise clause and the establishment clause and it may often not be possible to promote the former without violating the latter); *see, e.g.*, Abington v. Schempp, 374 U.S. 203 (1963); Braunfeld v. Brown, 366 U.S. 599 (1960); Cantwell v. Connecticut, 310 U.S. 296 (1939).

73. Gillette v. United States, 401 U.S. 437, 461 (1971). One example of the reach of the free exercise clause is Sherbert v. Verner, 374 U.S. 398 (1963). The majority there found no conflict with the establishment clause because: (1) paying benefits to sabbatarians was a neutral government act; (2) there was no excessive involvement; (3) the law did not abridge any other person's religious liberty. *Id.* at 409.

Justice Stewart's concurrence interpreted the free exercise clause most liberally stating that the Constitution commands positive protection of religious freedom by the government. *Id.* at 416. He described the Court's decisions interpreting the establishment clause as "positively wooden" and contrary to the intent of the clause. *Id.* at 414. Justice Stewart stated that he would not find an establishment clause violation unless the government tended to exalt one sect over another. A law that benefits all religions equally would be constitutional. *Id.* at 416.

In his dissent, Justice Harlan took precisely the opposite view. He acknowledged that "the Constitutional path of neutrality is not so narrow a channel that the slightest

clause taken to an extreme would clash with the other and thus has recognized that it must balance both clauses and attempt to strike a middle course that neither respects an establishment of religion nor prohibits its free exercise.[74] In *Wisconsin v. Yoder*,[75] the Supreme Court stated that because religious freedom is highly valued in the constitution, the strict scrutiny standard of review applies whenever a law burdens its free exercise.[76]

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deviation from an absolutely straight course leads to condemnation." *Id.* at 422. He stated, however, that the free exercise clause does not compel a state to provide exemptions for religious objectors but merely permits it. *Id.*

74. Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 788 (1973).

75. 406 U.S. 205 (1972).

76. *Id.* at 233. *See* 16 C.J.S. *Constitutional Law* § 206(1) (1956): "Under the constitutions, freedom of religion is in a preferred position, and in balancing the constitutional rights of property owners against those of the people to enjoy freedom of religion, the latter occupy a preferred position."

Although a free exercise claim was not raised in *Tooley*, the standards used to evaluate this claim are very instructive because both a free exercise claim and a request for accommodation are analytically similar, in that both are based on a claim of exemption from a generally applicable state law.

Some commentators have suggested an action/inaction dichotomy to divide protected from unprotected religious practices. Clark, *supra* note 71, at 346; Shetreet, *supra* note 71, at 413; Note, *supra* note 54, at 875. Religious action may not be protected if it runs counter to the public policy of a state or violates a health, safety, or criminal law. *See generally* Clark, *supra* note 71, at 340-50. The courts have condemned polygamy, Reynolds v. United States, 98 U.S. 145 (1878), and the use of illicit drugs in religious ceremonies, Leary v. United States, 383 F.2d 851 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969). This is consistent with the principle that religious believers have an absolute freedom to believe, but only a qualified freedom to act, subject to the state's interest in promoting the welfare of its citizens. Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1939); Cap Santa Vue v. NLRB, 424 F.2d 883, 886 (D.C. Cir. 1970).

Religious inaction exists when the religious individual seeks an exemption from a generally applicable state law. *See generally* Clark, *supra* note 71, at 345-47. One should not, however, interpret the dichotomy to mean that claims of exemption must always be honored. The dividing line in exemption claims is crossed if the exemption of a few individuals will defeat the purpose of the statute or endanger other individuals. Thus one court has stated that general innoculation schemes to prevent the spread of disease overcome a religious person's objections. Wright v. DeWitt School Dist., 238 Ark. 906, 385 S.W.2d 644 (1965). Although most courts have held that an individual employee may be exempt from a union security clause, an employer may not refuse to bargain with a union on the basis of a religious objection. Cap Santa Vue v. NLRB, 424 F.2d at 889-91.

The Supreme Court has interpreted the free exercise clause not only to permit (or require) exemptions, but also to prohibit the withholding of state granted benefits if the free exercise of religion is thereby burdened. In Sherbert v. Verner, 374 U.S. 398 (1963), the Supreme Court held that former employees could not be denied state employment benefits because the plaintiff refused to work on Saturday, her Sabbath. *Id.* at 404. The Court reasoned that to require the plaintiff to make herself available for Saturday work, the state was forcing her to choose between her religion and her benefits. *Id.* Imposing such a burden on the religious individual was tantamount to fining her for Saturday worship. *Id.*

The Supreme Court in Thomas v. Review Bd. of Ind. Employment Sec. Div., 101 S.

The trend in religion cases is toward a more generous treatment of religious freedom.[77] An early Supreme Court case stated that the separation of church and state must be complete and unequivocal and permit no exceptions.[78] Later, the Court retreated from this absolutist view of the first amendment, reasoning that it has never been thought desirable to enforce a regime of total separation[79] and that the correct position of government vis-a-vis religion is benevolent neutrality—neither sponsorship nor interference.[80] The Court has summed up its position thus: "The general principle deductible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion."[81]

In *Lemon v. Kurtzman*,[82] the Court established a test to de-

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Ct. 1425 (1981), recently affirmed the *Sherbert* holding. There, the plaintiff, a Jehovah's Witness, quit his job because he refused to work on any assembly line that directly produced articles of war. *Id.* at 1428. The defendant board denied the plaintiff unemployment benefits because the state law only allowed payment of such benefits if the plaintiff was terminated for good cause. *Id.* at 1429. The defendant also argued that other Jehovah's Witnesses had worked producing gun turrets and thus the plaintiff's refusal to produce them was not a religious objection but a personal one. *Id.* at 1428.

The Supreme Court held that putting substantial pressure on a religious adherent to modify his behavior created a burden upon religion. *Id.* at 1432. The Court dismissed the defendant's contention that the plaintiff's belief was a personal one. A belief need not be held by all members of a particular religion to qualify as religious. *Id.* at 1430. In any case, it was certainly not the business of the Court to judge the validity of religious beliefs.

77. *See* Shetreet, *supra* note 71, at 399.

78. Zorach v. Clauson, 343 U.S. 306, 312 (1952).

79. Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 760 (1973).

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

81. *Id.* It is critical to remember that the Supreme Court considers atheism and agnosticism to be religions within the purview of the first amendment. *See* Epperson v. Arkansas, 393 U.S. 97 (1968):

> [Government] may not be hostile to any religion or to the advocacy of no religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and non-religion.

Id. at 104 (footnote omitted). *See also* Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140 (5th Cir. 1975). Thus a law that benefits all religions—as the term is commonly understood—may still violate the establishment clause because the religious is preferred over the secular (atheist). Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 771 (1973) (a law need not establish a religion to be unconstitutional, it merely needs to respect an establishment of religion. A benefit to all religions may respect the establishment of them.).

82. 403 U.S. 602 (1971).

termine the constitutionality of a law challenged as an establishment of religion. According to *Lemon*, a law must (1) have a secular legislative purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) not involve excessive government entanglement with religion.[83]

Several courts have challenged the constitutionality of section 701(j).[84] Because there is no direct guidance from the Supreme Court[85] as to the constitutionality of section 701(j), one must look to the test articulated in both *Lemon* and *Committee for Public Education v. Nyquist*.[86] Most courts have applied these tests to section 701(j) and concluded that the statute is constitutional.[87] However, other courts, taking guidance from the Supreme Court's narrower decisions, have come to the opposite conclusion.[88]

First, some courts have attacked the statute on the basis that it lacks a secular legislative purpose.[89] They claim that although prohibiting religious discrimination is a secular purpose, the statute goes beyond that by requiring that employers not only avoid discriminating against a religious employee, but actually *accommodate* the employee's religious beliefs.[90] The courts have refused to equate the duty not to discriminate with the affirmative duty to accommodate.[91] By requiring the employer to accommodate an employee's religious beliefs, the statute has established a preference for the religious over the secular, and thus has departed from the constitutional path of neutrality.[92]

Second, a minority of courts have argued that the primary

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83. *Id.* at 612-13.

84. *See* Dewey v. Reynolds Metals Co., 429 F.2d 324, 329 (6th Cir. 1970) (accommodation requirement raised grave constitutional questions); Yott II, 428 F. Supp. 763 (C.D. Cal. 1977).

85. When the constitutional challenge was raised in *Hardison*, the Supreme Court avoided it by narrowing the scope of the statute. Trans World Airlines v. Hardison, 432 U.S. 63, 89 (1977) (Marshall, J., dissenting).

86. 413 U.S. 756, 773 (1973).

87. *See* text accompanying note 83 *supra*, and notes 96-104 *infra* and accompanying text, and cases cited therein.

88. Dewey v. Reynolds Metals Co., 429 F.2d 324, 335 (6th Cir. 1970); Yott II, 428 F. Supp. 763, 766 (C.D. Cal. 1977).

89. *See, e.g.*, Dewey v. Reynolds Metals Co., 429 F.2d 324, 335 (6th Cir. 1970).

90. *Id.*

91. *Id.*

92. Yott II, 428 F. Supp. 763, 767 (C.D. Cal. 1977).

effect of the statute is to advance religion.[93] One court reasoned that workers with strong political, social or moral objections to unions are still compelled to pay union dues and to work when assigned.[94] Thus, the strength of one's convictions is irrelevant. The exemption from certain obligations depends on that conviction being categorized as religious. Non-religious objectors are still forced to choose between their beliefs and their jobs. Consequently, religious objections are protected while others, equally strong, are not.

The majority of the courts which consider section 701(j) constitutional apply a different analysis to the three-prong *Lemon-Nyquist* test.[95] First, the majority of courts hold that prohibiting religious employment discrimination is a sufficiently secular legislative purpose.[96] The requirement of accommodation is one means of realizing the goal of non-discrimination.[97] This requirement also affords extra protection to religious freedom—a value of admittedly high social importance.[98] That this requirement results in unequal treatment of employees does not render the statute unconstitutional.[99] As one court pointed out, if no unequal treatment were allowed, the requirement of accommodation would be a nullity and might conflict with the free exercise clause.[100]

The second prong of the *Lemon-Nyquist* test—that the law's primary effect must not advance religion—is also fulfilled by section 701(j). The primary purpose of the statute is to obliterate the necessity of an employee choosing between his job and

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93. *See, e.g.*, Yott II, 428 F. Supp. 763, 767 (C.D. Cal. 1977).

94. *Id.* at 766.

95. The *Lemon-Nyquist* test is set out in text accompanying note 83 *supra*.

96. Trans World Airlines v. Hardison, 432 U.S. 63, 90-91 n.4 (1977) (Marshall, J., dissenting); Nottelson v. Smith Steel Workers D.A.L.U. 19806, 643 F.2d 445, 454-55, *cert. denied*, 50 U.S.L.W. 3376 (U.S. Nov. 10, 1981); Tooley v. Martin-Marietta Corp., 476 F. Supp. 1027, 1030 (D. Or. 1979); *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 70, 271 n.47 (1977).

97. See cases and material cited note 96 *supra*.

98. See note 76 *supra*.

99. Brown v. General Motors Corp., 601 F.2d 956, 962 (8th Cir. 1979). If no differential treatment were permitted, it "would preclude all forms of accommodation and defeat the very purpose behind [section 701(j)]." *Id.*

100. *Id.* Although the free exercise clause does not mandate accommodation in the statutory sense, the strict scrutiny standard still demands that the least restrictive means of fulfilling a compelling state interest be used. Thomas v. Review Bd. of Ind. Employment Sec. Div., 101 S. Ct. 1425, 1432 (1981).

his religion except when the nature of the job *mandates* certain activities contrary to the employee's religious scruples. The primary benefit of this statute inures to the individual employee and not to a particular religion. That the religion may receive incidental or tertiary benefits from an accommodation does not render the statute unconstitutional.[101]

Finally, the majority of the courts argue that the accommodation requirement does not require excessive governmental entanglement with religion.[102] There is nothing intrinsically complicated about the accommodation requirement that requires the courts' constant surveillance.[103] Once a court finds that accommodation is required, its task is over.[104]

C. Court's Analysis

In *Tooley v. Martin-Marietta Corp.*, the Ninth Circuit upheld an injunction preventing the defendants (employer and union) from discharging the plaintiffs for failure to pay union dues, provided they paid an equivalent amount to charity.[105] First, the court established that religious discrimination is prohibited by sections 703(a) and 703(c) of the Act.[106] Then, it quoted section 701(j) of the Act as requiring reasonable accommodation unless the employer can show undue hardship.[107] It also held that the union was subject to the duty of accommodation under section 701(j) even though the statute is framed in terms of the employer's duty.[108]

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101. Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 771 (1973).

102. See cases cited note 96 *supra*.

103. See cases cited note 96 *supra*.

104. See cases cited note 96 *supra*.

105. 648 F.2d at 1241.

106 *Id.* 42 U.S.C. §§ 2000e-2(a), 2000e-2(c) (1976). For text of these sections, see note 7 *supra*.

107. 648 F.2d at 1241. 42 U.S.C. § 2000e(j) (1976). For text of this section, see note 2 *supra*.

108. 648 F.2d at 1241. This application is not unreasonable considering that unions are also prohibited from engaging in employment discrimination. 42 U.S.C. § 2000e-2(c) (1976). The Ninth Circuit, in Yott II, 602 F.2d 904, 907 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980), applied the accommodation requirement and the hardship limitation to unions. The Sixth Circuit, in Cooper v. General Dynamics, Convair Aerospace Div., 533 F.2d 163, 169-70 (5th Cir.) (Brown, C.J., concurring), *cert. denied*, 433 U.S. 908 (1976), stated that both union and employer have a duty of accommodation but the statute is confined to hardship on the employer's business. *See also* notes 22-23 *supra* and cases cited therein.

Defendants first argued that plaintiff's request to pay an equivalent amount to charity in lieu of union dues was inherently unreasonable. The defendants urged that allowing this type of accommodation would clash with the congressional policy of promoting union shop agreements.[109] The court answered that preventing employment discrimination is an equally important congressional policy. Section 701(j) represents Congress' attempt to balance both interests through the medium of *reasonable* accommodation. The court also drew support for its finding that the accommodation was reasonable from the recent amendment to section 19 of the National Labor Relations Act which permits substitute payments if agreed to by the parties in their collective bargaining agreement.[110] The court then concluded that the requested accommodation was reasonable because the defendant enjoyed the benefits of a union shop agreement while the plaintiffs kept their jobs and practiced their religion.[111]

The union claimed that the accommodation was inherently unreasonable because it would result in unequal treatment.[112] The court found that unequal treatment is not by itself unreasonable.[113] Since no other employee's rights were compromised by the accommodation, the union had no substantial costs, and the plaintiffs suffered the same economic loss, the accommodation was reasonable.[114]

The union also asserted that allowing this accommodation would deprive the union of funds necessary to its operation, thereby resulting in undue hardship.[115] The Ninth Circuit accepted the district court findings that the union had ample money in its reserve to accommodate all the religious employees and still maintain a surplus.[116] Although the Ninth Circuit acknowledged that the de minimis standard announced in *Hardison* applied, it stated that a determination of hardship depended

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109. 648 F.2d at 1242. See note 4 *supra* for the text of the statute on employer agreements with labor organizations.

110. For the text of § 19 of the National Labor Relations Act, see note 131 *infra*.

111. 648 F.2d at 1242.

112. *Id.* at 1243.

113. *Id.*.

114. *Id.*

115. *Id.*

116. *Id.* (relying on Tooley v. Martin-Marietta Corp., 476 F. Supp. 1027, 1030-31 (D. Or. 1979)).

on the facts, and could not be extrapolated from a hypothetical situation.[117] As a result, unless a union can show that an accommodation will deprive it of funds necessary to its operation, district court findings of no undue hardship will not be rejected by the Ninth Circuit as clearly erroneous.[118]

The final issue was whether section 701(j) violated the first amendment as an establishment of religion. The Ninth Circuit stressed that the Supreme Court's definition of neutrality has enough flexibility to accommodate the religious practices of each religion.[119] As long as the government remains neutral between different religious sects and does not sponsor, support or involve itself in religious activities, there is no first amendment violation.[120] The Ninth Circuit held that the accommodation did not violate any of these requirements. First, this charity substitution provision put the plaintiffs on equal footing with the rest of the employees who had no religious objection to unions, thus maintaining the government's neutrality in the face of religious differences.[121] Second, there was no sponsorship, support or assistance involved since employees with religious objections are not granted an exemption but are merely allowed to substitute dues for charity, thereby suffering the same economic loss as non-religious employees.[122]

The court then applied the *Lemon-Nyquist* test[123] to determine section 701(j)'s constitutionality. First, the statute must reflect a clearly secular purpose. The union contended that this requirement was not met because Congress enacted section 701(j) to secure special privileges for some religions.[124] The court refuted this contention by concluding that section 701(j) was merely part of a statutory scheme designed to eradicate employment discrimination on the basis of certain invidious criteria.[125]

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117. 648 F.2d at 1243.
118. *Id.*
119. *Id.* at 1244.
120. *Id.*
121. *Id.* at 1245.
122. *Id.*
123. A law withstands constitutional challenge if it (1) has a secular legislative purpose; (2) has a primary effect that neither advances nor inhibits religion; and (3) does not involve excessive government entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).
124. 648 F.2d at 1245.
125. *Id.*

Since this purpose is wholly secular, the court concluded that the statute had a clearly secular purpose.[126]

Second, the statute's primary effect must neither advance nor inhibit the plaintiff's religion. The union argued that allowing the employee to substitute charity for dues gave him a freedom of choice unavailable to other employees.[127] The court classified this benefit as incidental and ancillary and rejected the union's argument that this choice conferred a primary benefit on the plaintiff's religion.[128] The union also argued that exempting the plaintiffs from union dues would result in curtailing union services or raising dues to make up for the loss, either of which imposes the burden of accommodation on unaccommodated private parties. The court answered this argument by stating that an inappreciable abstract burden is not enough to establish a first amendment violation.[129]

The third part of the *Lemon-Nyquist* test requires no excessive government entanglement. The Ninth Circuit summarily concluded that the administration of the accommodation involved little or no government supervision.[130]

D. SIGNIFICANCE

It must be noted at the outset that the precise issue decided in *Tooley*—accommodating a religious objection to the payment of union dues—has become moribund due to Congress' recent amendment of section 19 of the National Labor Relations Act.[131]

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126. *Id.*
127. *Id.* at 1246.
128. *Id.*
129. *Id.*
130. *Id.*
131. Act of Dec. 24, 1980, Pub. L. No. 96-593, 94 Stat. 3452 provides in part:

> Any employee 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 a contract between such employees [sic] employer and a labor organization in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organization charitable fund . . . .

This amendment has obviated the need to determine reasonable accommodation and undue hardship in the dues paying context. Section 19 plainly states that certain religious objectors shall not be required to financially support a union but may be required to pay an equivalent amount to charity if so provided in the collective bargaining agreement. The statute would be applicable even when hardship results since that limitation does not appear in the amendment.

This amendment has accomplished several worthy ends: (1) it has abolished any inconsistency among the circuits; (2) it frames the employee's right to be free from discrimination in this particular context as an absolute and not a conditional right subject to a finding of undue hardship; and (3) it establishes standards for defining religion. In order to qualify for an exemption the religious objector must show that the individual's belief stems from a religious tenet of the church, and that the church has historically held a conscientious objection to labor unions.[132]

The importance of defining religion can not be underestimated. Although the courts are very hesitant to define religion, many commentators have stated that the courts must make some kind of determination in this area.[133] For example, suppose a very conservative Presbyterian refuses to join a union for ostensibly religious reasons. Under the Supreme Court's decision in *Thomas v. Review Board of the Indiana Employment Security Division,*[134] the courts can inquire no further into the legiti-

132. *Id.* Section 19 may have raised some constitutional questions. Specifically, that one must be a member of a church to qualify for an exemption might run afoul of the establishment clause as the statute would benefit certain religions and churches and not protect other religious objectors who do not belong to a church. *See* United States v. Seeger, 380 U.S. 163, 172 (1965). However, a religious objector who does not qualify for the automatic exemption under § 19 may still pursue the more general remedy under § 701(j) of the Civil Rights Act.

133. *See* Clark, *supra* note 71, at 337-39 (courts must at least distinguish between conscientious and insouciant believers); Edwards & Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII,* 69 MICH. L. REV. 599, 618-19 (1971) (there is a need for a standard by which to measure religious practices).

134. 101 S. Ct. 1425 (1981). The Court stated that a religious claim of exemption is not limted to those persons who object to a state law on the basis of a religious tenet but also to persons who have a *personal* religious objection. Thus the first amendment protects not only group religious beliefs but individual religious beliefs as well. Since the Court has retreated from any analysis of the legitimacy of a religious claim, the result will likely be that many persons will claim an exemption on any ground and clothe it with religious language. The court will be helpless to expose the true nature of the claim.

macy or veracity of the Presbyterian's claims. This is true even though the Presbyterian Church does not have a tenet prohibiting union membership. It therefore becomes impossible to separate protected religious claims of exemption from unprotected moral, social or political claims of exemption. The statute was designed not to protect religious individuals who refuse to join a union but to protect religious individuals who refuse to join a union *on religious grounds*. Minimally, the individual should be required to show a nexus between his religious beliefs and his claim of exemption. A religious person may object to a union on political grounds. However, since there is no relationship between his objection and his religion, the claim to exemption should fail just as a non-religious individual's claim would fail.

Although the Ninth Circuit's opinion in *Tooley* is well reasoned, it suffers in one particular respect: It fails to conscientiously apply the standards announced in *Hardison,* specifically the de minimis test.[135] The court implicitly rejected the precedent established by *Hardison* by holding that the union had suffered no undue hardship. However, if one compares the facts of *Hardison* and *Tooley,* one is immediately impressed by the great disparity between the cost to the defendant TWA in accommodating Hardison and the cost to the defendant Local 8141 in accommodating Tooley. In *Hardison,* it was estimated that it would cost TWA $150 over a period of three months to pay overtime wages to replace Hardison for his sabbath absences.[136] At the end of that three month period Hardison could have transferred back to his original department where he had sufficient seniority to avoid Saturday work. Thus the conflict between Hardison's job and his beliefs was temporary and the cost of accommodation was only $150. By contrast, Tooley along with five other religious objectors, requested a permanent accommodation which would cost the union $1200 per year.[137] Thus, the cost borne by the union was eight times greater than that in *Hardison* which the Supreme Court found not de minimis.

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135. Trans World Airlines v. Hardison, 432 U.S. 63, 84 (1977). The Ninth Circuit, as well as other courts, has been hesitant to apply the de minimis text as strictly as the Supreme Court did in *Hardison.* One commentator criticized the opinion as parsimonious and contrary to the broad remedial provisions of the Act. Note, *The Supreme Court, 1976 Term,* 91 HARV. L. REV. 70, 271 (1977).

136. 432 U.S. at 92 n.6 (Marshall, J., dissenting).

137. Tooley v. Martin-Marietta Corp., 476 F. Supp. 1027, 1030 (D. Or. 1979).

The Ninth Circuit and the district court justified their decisions on the grounds that the requested accommodation would have merely reduced the union's surplus, resulting in practically no hardship at all. Despite the logic of this holding, it is contrary to the *Hardison* decision. Apparently, the *Hardison* Court considered the employer's ability to pay irrelevant. As the dissent in *Hardison* pointed out, TWA is one of the largest air carriers in the United States.[138] To suggest that a $150 cost would represent an undue hardship on the employer's business was simply ludicrous.[139] To put it simply, the *Tooley* decision does not comport with *Hardison* although it is better reasoned, fairer and more closely realizes Congress' intent in enacting section 701(j).

One of the enigmas surrounding religious discrimination cases is why it is treated differently than other types of invidious employment discrimination. As the Fifth Circuit stated: "Title VII provides a remedy against employment discrimination on the basis of an employee's race, color, religion, sex, or national origin . . . . The use of the word 'or' evidences Congress' intent to prohibit employment discrimination based on any or all of the listed characteristics."[140]

One possible reason for the different treatment of religious discrimination is that religion is a matter of choice while race and sex are immutable characteristics.[141] Notwithstanding this distinction, religious discrimination is no less arbitrary than race or sex discrimination.[142] Although race and sex discrimination are similar to religious discrimination in both content and effect, the courts have formulated a lesser standard by which to judge religious discrimination. For an employer to fulfill his burden in a religious discrimination case he need only show that an accom-

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138. 432 U.S. at 91.

139. *Id.*

140. Jeffries v. Harris County Community Action Assoc., 615 F.2d 1025, 1032 (5th Cir. 1980).

141. Edwards & Kaplan, *supra* note 133, at 637. This distinction has some support in the legislative history which demonstrates Congress' overriding concern with *racial* employment discrimination. *See* 110 CONG. REC. 1521, 1528-29 (1964).

142. *See* 110 CONG. REC. 1521, 1528-29 (1964). It is somewhat callous to suggest that persons could change their religious beliefs to suit the needs of their jobs. It is far more likely that religious employees will quit their jobs in order to adhere to their religious beliefs. The threat then exists that the adherents of a minority religion will become the marginally employed and unemployed members of our society, thus creating a permanent economic underclass.

modation would impose a greater that de minimis cost. However, an employer who discriminates on the basis of race must still satisfy the requirements of the business necessity doctrine.[143]

The courts often impose a greater than de minimis cost on business and labor to eradicate the effects of past racial employment discrimination.[144] The Ninth Circuit, in *United States v. Ironworkers Local 86*,[145] ordered the defendant union to create "special apprenticeship programs designed to meet the special needs of average blacks with no previous experience or special skills in the trade, or black applicants who have some previous experience . . . but do not meet journeymen standards."[146] Obviously, setting up a training program to train persons with substandard skills will be expensive. This requirement illustrates how far courts are willing to go to eliminate racial discrimination in employment. The courts should go just as far to eliminate religious discrimination. Undue hardship should be interpreted to comply with the business necessity doctrine.

There are essentially three reasons why the accommodation requirement should be set higher. First, a stricter standard would promote greater religious diversity and a richer cultural heritage.[147] One court has specifically stated that one of the

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143. One court has defined business necessity to be an irresistible demand: *"Necessity connotes an inesistible* [sic] *demand.* To be preserved, [a present employment practice] . . . must not only directly foster safety and efficiency of a plant, but also be essential to those goals." Watkins v. Scott Paper Co., 530 F.2d 1159, 1168 (5th Cir.) (quoting United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971) (bracketed material and emphasis from *Watkins*), *cert. denied*, 429 U.S. 861 (1976). The Ninth Circuit has recently departed from the absolute necessity requirement announced in *Watkins* in favor of a reasonable necessity requirement. Contrares v. City of Los Angeles, 656 F.2d 1267 (9th Cir. 1981). *See* Kirby v. Colony Furniture Co., 613 F.2d 696, 702-04 (8th Cir. 1980). The court described the burden as follows: (1) the plaintiff must show that the business practice results in disparate treatment or disparate impact on a protected class; (2) the defendant then must show that the practice is a business necessity; (3) the plaintiff must show it is a pretext for discrimination or that there are non-discriminating ways of achieving legitimate business goals. *Id. See generally* Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972).

144. *See, e.g.*, United States v. Local 212, IBEW, 472 F.2d 634, 635 (6th Cir. 1973) (union ordered to participate in a minority job training program); *accord*, Southern Ill. Builders Ass'n v. Ogilvie, 471 F.2d 680, 681 (7th Cir. 1972).

145. 443 F.2d 544 (9th Cir. 1971).

146. *Id.* at 548.

147. *See* 118 CONG. REC. 705, 706 (1972) (remarks of Mr. Randolph). The sponsor of

main purposes of Title VII was to preserve religious diversity.[148] The real issue, then, is not a religious versus secular confrontation but rather a majority versus minority religious confrontation. Most religions do not have religious objections to unions and most keep Sunday as their Sabbath. By refusing to allow accommodation to minority views, some courts have implicitly stated that only those views that accede to majoritarian doctrines merit first amendment protection. The Supreme Court has stated that any religion, no matter how unconventional, merits first amendment protection.[149]

A second reason for imposing a stricter standard of accommodation is to protect the individual's right to religious freedom. This was Congress' most pressing concern in amending section 19 of the National Labor Relations Act to include all religious objectors.[150] One commentator has suggested that too little value is given to the principle of religious freedom,[151] and has criticized the undue hardship test because "[f]airness further demands that protection of religious liberty be founded on social and moral values rather than on business expediency or incremental increases in social efficiency."[152] The author soundly pointed out that the application of the undue hardship test results in an enigma: If an employee is highly skilled and hard to replace, it is more likely that his religious exemption will be defeated on the grounds of undue hardship. On the other hand, an unskilled and easily replaceable employee will enjoy greater reli-

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§ 701(j) lamented that employer practices were decimating the ranks of many minority religions. *Id.*

148. Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140, 141 (5th Cir. 1975).

149. Thomas v. Review Bd. of Ind. Employment Sec. Div., 101 S. Ct. 1425, 1430 (1981). The free exercise clause was designed to protect the one percent who hold different religious views, Valent v. New Jersey State Bd. of Educ., 114 N.J. Super. 63, 70, 274 A.2d 832, 840 (1971), and ensure that the rights bestowed by the first ten amendments are not subject to a majority vote. Siff v. State Democratic Executive Comm., 500 F.2d 1307, 1308 (5th Cir. 1974).

150. Several congressmen voiced apprehension over imposing on the employee the grievous choice of either obeying one's religion or keeping one's job. *See* 126 CONG. REC. 760, 761 (daily ed. Feb. 11, 1980) (remarks of Messrs. Hinson, Clauson and Erlenborn).

151. Note, *supra* note 54, at 884.

152. *Id.* at 891. *Cf.* Tooley v. Martin-Marietta Corp., 648 F.2d at 1244 (the court implied that if many employees objected to dues on religious grounds they need not be accommodated); Clark, *supra* note 71, at 332. "Similarly, the number of persons who invoke the privilege of [conscientious objection to some law] has been considered by commentators to be a highly important fact in estimating whether a constitutional right to such objection should exist." *Id.*

gious freedom.[153] One's visceral reaction to this allocation of basic human rights by reference to an individual's economic value is that such allocation is contrary to the spirit of our constitutional freedoms which do not distinguish between rich and poor, urban and rural, black and white.[154]

Assuming that the standard for acommodation does not present cultural diversity or individual rights problems, the standard cannot be justified even by a close economic analysis. The rationale for the undue hardship test is that business should not bear excessive costs that are uneconomical and inefficient. From a purely economic perspective, this appears to be a wise policy (assuming efficiency is the highest goal in our economic system) but it is an extremely myopic view because it overlooks several hidden costs. First, the company may lose the services of a highly valued employee[155] and have to train a replacement. Second, there are several significant *social* costs which need to be calculated to arrive at an economic result. One of three events can happen to a terminated employee: (1) find a similar job in another company, (2) find a lower skilled job[156] or (3) remain unemployed.

The latter two choices are probably more realistic because the same factors which previously conflicted with the employee's religion will presumably appear again in similar companies. In the second scenario, the employee is transformed from a fully productive to a marginally productive worker. Some of his formerly utilized skills are wasted representing a significant social cost. Far more serious is the third scenario which imposes grievous cost on society. In this case, the employee contributes nothing to the productivity of the economy and in fact becomes an economic liability through unemployment insurance payments.

153. Note, *supra* note 54, at 884.

154. *See* Richards v. Townsend, 303 F. Supp. 793, 795 (N.D. Cal. 1969), *modified on other grounds*, 444 F.2d 528 (9th Cir. 1971).

155. *Cf.* Draper v. United States Pipe & Foundry Co., 527 F.2d 515, 518 (6th Cir. 1975) (plaintiff was a competent employee whose services were highly valued by the company); Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140, 142 (5th Cir. 1975) (Plaintiff was, by all accounts, an excellent employee and enjoyed a good relationship with peers and supervisors alike.).

156. Note, *supra* note 54, at 884.

Although these costs are less visible than the cost of accommodation, they are no less real and may in fact be greater. By imposing a higher standard of accommodation on the employer, it will force him to internalize many of these costs that previously were borne by society.

E. Conclusion

In *Tooley,* the Ninth Circuit took another step to insure religious liberty in the face of an apparently contrary Supreme Court decision in *Hardison.* Although the specific holding was narrow, the *Tooley* court has given a broad definition to the statute. The problem of non-payment of union dues was legislatively handled and will probably not arise often. However, in reference to other requested accommodations, the appropriate standard should be the business necessity doctrine, a higher standard which will better promote religious diversity, individual freedoms, and efficiency.

Jeff Kirk

II. CONSTITUTIONALITY OF STATEWIDE ANTI-BUSING LAW THAT DEFEATS A LOCAL DESEGREGATION PLAN

A. Introduction

In *Seattle School District No. 1 v. Washington,*[1] the Ninth Circuit held that a state law banning busing for purposes of school desegregation, but not for other school purposes, is an impermissible legislative classification based on racial criteria. The court's ruling, striking down on equal protection grounds a statewide anti-busing initiative, should be very encouraging to school districts which are trying voluntarily to desegregate.

Three local school districts sued to enjoin the enforcement of the anti-busing law, Initiative *350,* an amendment to the state education code adopted by a substantial majority of Washington

1. 633 F.2d 1338 (9th Cir. 1980) (per Ely, J.; the other panel members were Nelson, J. and Wright, J. dissenting), *cert. granted,* 50 U.S.L.W. 3278 (U.S. Oct. 13, 1981) (No. 81-9).

state's voters in November 1978.[2] The challenged statute, while not expressly racial in nature, created a "neighborhood schools policy," that permits local school districts to reassign and bus students out of their neighborhood for every significant educational purpose[3] except that of rectifying racial imbalances in the public schools. Court-ordered school busing for racial integration is unaffected by the statute.[4]

Prior to the enactment of Initiative *350,* the three plaintiff school districts had begun a variety of programs aimed at elimi-

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2. Seattle School Dist. No. 1 v. Washington, 473 F. Supp. 996, 1009 (W.D. Wash. 1979). The measure was approved by a 66% margin statewide. The margin by unofficial tally in Seattle was 61% citywide, but it failed in two legislative districts of the city with heavy minority voting. 473 F. Supp. at 1009. The plaintiff districts are Seattle, Tacoma, and Pasco, Washington.

3. Initiative *350* provides, in relevant part:

> Section 1. [N]o school board, school district . . . , nor the superintendent of public instruction . . . , shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence . . . , except in the following instances:
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> (1) If a student requires special education . . . he may be assigned and transported to the school offering courses and facilities for such special education . . . ;
>
> (2) If there are health or safety hazards . . . between the student's place of residence and the nearest or next nearest school; or
>
> (3) If the school nearest or next nearest . . . is unfit or inadequate because of overcrowding, unsafe conditions or lack of physical facilities.
>
> . . . .
>
> Section 3. For purposes of section 1 of this act, "[to] indirectly require any student to attend a school other than the school which is geographically nearest or next nearest . . ." includes, but is not limited to, implementing, continuing, pursuing, maintaining or operating any plan involving (1) the redefining of attendance zones; (2) feeder schools; (3) the reorganization of the grade structure of the schools; (4) the pairing of schools; (5) the merging of schools; (6) the clustering of schools; or (7) any other combination of grade restructuring, pairing, merging or clustering: PROVIDED, that nothing in this chapter shall limit the authority of any school district to close school facilities.
>
> . . . .
>
> Section 6. This chapter shall not prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools.

633 F.2d at 1343 n.3.

4. *Id.* Nowhere in the statute is there mention of desegregation.

nating the effects of segregated community housing patterns. These programs involved both voluntary and mandatory reassignment of students, thereby subjecting them to the new state law.[5] Seattle, the largest of the three plaintiff districts, was not under court order to desegregate its schools. Two years before Initiative *350* was adopted, however, the Seattle district had voluntarily agreed to desegregate.[6] To achieve racial balance, the district adopted the Seattle Plan, a program which included mandatory busing. Although the Plan met with vigorous local opposition,[7] the state court upheld it.[8] The board members adopting the Seattle Plan narrowly defeated a recall attempt by the organization that later sponsored Initiative *350*.[9] Had the state enforced the initiative, the Seattle Plan, and desegregation efforts in Pasco and Tacoma, would have ground to a halt.[10]

The trial court found Initiative *350* discriminatory, over-

5. 473 F. Supp. at 1002-07. Pasco adopted a busing plan in the Spring of 1965. Only minority students had been bused. Tacoma operated a variety of optional enrollment and voluntary busing programs since 1960 involving about 1,400 students. Seattle, faced with numerous complaints under Title VI of the 1964 Civil Rights Act, signed a memorandum of agreement to end segregation with the Office for Civil Rights on June 7, 1978. The Seattle school board mandated busing under the Seattle Plan, adopted in March 1978 and implemented the following September. The Seattle school district had been busing since 1972, and had desegregation programs as early as 1963. A "magnet" school program, implemented in 1977-78, was to encourage students to transfer voluntarily from their neighborhood schools to the "magnet school" which contained educationally-enhanced curricula. *Id.* at 1006.

6. *Id.* at 1007. The major feature of the Seattle Plan is the permanent assignment of entire neighborhoods of students to schools other than those geographically closest to their homes for a portion of their school careers. Additionally, there were other voluntary assignment options in some areas. *Id.*

7. *Id.* at 1006-08.

8. Roe v. Seattle School Dist. No. 1, No. 838291 (King County Superior Ct., 1978) (order denying injunction) and No. 838530 (King County Superior Ct., 1978) (order denying summary judgment).

9. 473 F. Supp. at 1006. The group sponsoring the recall and seeking to enjoin the busing plan called itself Citizens for Voluntary Integration Committee (CiVIC), a nonprofit corporation. *Id.* at 1007. That organization subsequently sponsored Initiative *350*. *Id.*

10. 473 F. Supp. at 1010-11. The state never enforced Initiative *350* because the district court issued a preliminary injunction. 633 F.2d at 1341-42. At the time of the injunction, the trial court granted the motion of eight Washington public interest groups to intervene in the litigation to test whether Seattle and Tacoma schools were, in fact, unconstitutionally segregated. The court bifurcated the litigation as follows: Phase I, from which this appeal stems, dealt only with the constitutionality of Initiative *350*. Phase II, which was never reached because of the invalidity of the initiative, derives from the intervenors' claim that the school districts operate unlawful dual school systems. *Id.* at 1341.

broad, and violative of the equal protection clause of the fourteenth amendment because it created an illegal racial classification.[11] The Ninth Circuit affirmed.[12]

This Note will explore the basis for the holding in *Seattle* and discuss its significance to statewide anti-desegregation measures, and its relevance to California's Proposition *1*, an anti-busing measure which the California Court of Appeal has upheld.[13]

B. Background

Equal Protection

Racially discriminatory laws have long been held invalid under the fourteenth amendment's equal protection clause,[14]

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11. 633 F.2d at 1342.

The Ninth Circuit reversed the trial court's denial of attorneys fees to the plaintiffs (both the school districts and the intervenors) as an abuse of discretion. *Id.* at 1347-50. Public entities (such as school districts) are not exempted from the protections of the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988 (1976), which authorizes the court "in its discretion" to award fees to prevailing parties, and 20 U.S.C. § 3205 (Supp. II 1978), part of the Emergency School Aid Act that provides for attorneys fees for civil rights litigation involving schools. School districts are eligible to receive attorneys fees as prevailing parties under §§ 1988 and 3205 "as long as [the] publicly-funded organization advances important constitutional values." 633 F.2d at 1348 (citations omitted). The court ruled that the "bad faith" exception to attorney fee awards applies only to named defendants in their individual, not their official, capacities. *Id.* at 1349 (citing Hutto v. Finney, 437 U.S. 678, 693-700 (1978) and Williams v. Alioto, 625 F.2d 845 (9th Cir. 1980)).

Intervenors were likewise entitled to attorneys fees despite their "de minimis" role in the litigation. They were prevailing parties under § 3205 because even though the Phase II issues were not reached, "an award is permissible for an issue . . . not fully litigated if constitutional rights are vindicated through the mechanism of a consent decree or other preliminary relief." 633 F.2d at 1349 (citing S. Rep. No. 1011, 94th Cong., 2d Sess. 5, *reprinted in* [1976] U.S. Code Cong. & Ad. News 5912-13).

12. 633 F.2d at 1350.

13. Crawford v. Board of Educ. (Crawford II), 113 Cal. App. 3d 633, 170 Cal. Rptr. 495 (1980), *cert. granted*, 50 U.S.L.W. 3278 (U.S. Oct. 13, 1981) (No. 81-38).

14. The clause provides: "No State shall make or enforce any law which . . . [denies] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

The Court has held that "all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the [fourteenth] amendment was primarily designed, that no discrimination shall be made against them by law because of their color . . . ." Strauder v. West Virginia, 100 U.S. 303, 307 (1880) (overturning statute that provided "only white male persons who are twenty-one years of age and who are citizens of this state" may serve on juries). *See also* Loving v. Virginia, 388 U.S. 1 (1967).

whether the racial classification in a challenged law is overtly or covertly discriminatory.[15]

In *Reitman v. Mulkey*,[16] the Supreme Court also proscribed, under the equal protection clause, state enactments which expressly sanction private discrimination.[17] The *Reitman* Court struck down a California initiative[18] that had effectively repealed fair housing laws and forbade the state from regulating private racial discrimination in housing. The Court found the California law's " 'immediate objective', its 'ultimate effect', its 'historical context and the conditions existing prior to its enactment' "[19] were to dispossess minorities of vested rights, and concluded the law violated the fourteenth amendment as discriminatory "state action."[20]

School officials have broad authority to desegregate, independent of any finding of a constitutional violation. In *Swann v. Board of Education*,[21] the Court decided: "If school authorities fail in their affirmative obligations under these holdings, [federal] judicial authority may be invoked."[22] In a companion case, *Board of Education v. Swann*,[23] the Court overturned a state anti-busing law which would have prevented a school board from carrying out a court-ordered desegregation plan in a district that

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15. Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979).

16. 387 U.S. 369 (1967).

17. *Id.* at 381.

18. In 1964, California voters adopted Proposition *14*, CAL. CONST. art. 1, § 26, which stated in relevant part:

> Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person as he, in his absolute discretion, chooses.

387 U.S. at 371. The Court said this law did not merely repeal an existing law forbidding racial discrimination. Rather, it established racial discrimination as "one of the basic policies of the State" in violation of the fourteenth amendment. *Id.* at 380-81.

19. 387 U.S. at 373.

20. *Id.* at 380-81.

21. 402 U.S. 1 (1971). The Court said school authorities have "broad discretionary powers" and in the exercise thereof "might well conclude" as a matter of educational policy "that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole." *Id.*

22. *Id.* at 15.

23. 402 U.S. 43 (1971).

was *de jure* segregated.[24]

In *Milliken v. Bradley*,[25] the Court held that suburban school districts around segregated Detroit schools were apparently innocent of any intentional segregative acts, hence, not under a constitutional duty to participate in Detroit's desegregation plans.

Although the Supreme Court has never held that local school board policies have constitutional pre-eminence over state law, in *San Antonio Independent School District v. Rodriguez*[26] and in *Milliken*, the Court emphasized some of the social values of local control and autonomy in public education.[27]

Racial Classifications

Government may not, through legislation, impose a special burden on minorities in its attempts to achieve equal rights, the Court held in *Hunter v. Erickson*.[28] In *Hunter*, the Court overturned a city charter amendment that required a special referendum to enact local fair housing laws.[29] The Court said that while the law was race-neutral on its face, it created a disproportionate burden on minorities seeking racial equality in housing and thus "constitutes a real, substantial, and invidious denial of the

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24. "[I]f a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees." *Id.* at 45.

25. 418 U.S. 717 (1974) (judicial desegregation remedies must not exceed the geographical scope of the constitutional violation).

26. 411 U.S. 1 (1973).

27. *Id.* at 50 (dictum); Milliken v. Bradley, 418 U.S. at 741-42. In *Milliken*, the Court said: "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process." *Id.*

28. 393 U.S. 385, 391 (1969).

29. Akron City Charter amend. § 137 provided in part:

> Any ordinance enacted by the Council of The City of Akron which regulates the use, sale, advertisement, transfer, listing assignment, lease, sublease or financing of real property of any kind . . . on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective.

393 U.S. at 387.

equal protection of the laws."[30] Because the law restricted adoption of only fair housing laws and not other forms of racial or housing laws, it was not "grounded in neutral principles of law"[31] and created an explicitly racial classification.[32]

In *Lee v. Nyquist*,[33] a New York district court applied the *Hunter* reasoning to school desegregation and busing. The *Lee* court overturned a state anti-busing law[34] because "the purpose is clearly an impermissible one . . . [,] it structures the internal governmental process in a manner not founded on neutral principles. . . . The New York legislature has acted to make it more difficult for racial minorities to achieve goals that are in their interest."[35] However, since *Hunter*, the Supreme Court in *Washington v. Davis*[36] has held disproportionate impact alone, absent a showing of discriminatory purpose, insufficient to prove a constitutional violation.[37]

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30. 393 U.S. at 393.

31. *Id.* at 395. Justice Harlan concurring, expounded at length on the distinction between discriminatory legislation, such as the Akron ordinance, and general laws which establish the various political structures of government. Statutes of the latter type do not violate the equal protection clause merely because they occasionally operate to disadvantage the Black political interests. *Id.* at 394. "If a governmental institution is to be fair, one group cannot always be expected to win." *Id.* (Harlan, J., concurring).

32. *Id.* at 392-93.

33. 318 F. Supp. 710 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971).

34. The statute that gave rise to *Lee* was a 1969 state anti-busing law, N.Y. EDUC. LAW § 3201 (McKinney 1969).

> The purpose of [section 3201(2)] is to control the practice initiated by the Commissioner of Education in this State of assigning youngsters to public schools on the basis of race or color in order to achieve a certain racial balance or quota, with all of the waste, disruption, community upheaval and expense which generally accompany such a move.
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> . . . .
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> . . . [D]espite the mounting evidence of the failures of these [racial balancing] schemes, they have continued to be foisted upon unwilling communities by the Commissioner of Education.

318 F. Supp. at 717 (quoting New York State Senate Debate on A. 214 (1969), at 2454, 2459).

The *Lee* court said that § 3201, which only affected busing programs by the state, "creates a single exception to the broad supervisory powers the state Commissioner of Education exercises over local public education." 318 F. Supp. at 718. That exception creates a racial classification because it places "burdens on the implementation of educational policies designed to deal with race on the local level." *Id.* at 719.

35. 318 F. Supp. at 720 (citations omitted).

36. 426 U.S. 229 (1976).

37. *Id.* at 240.

The Supreme Court has consistently applied the strictest scrutiny to racially discriminatory laws.[38] Under this high level of scrutiny, racial classifiers on their face violate the equal protection clause unless: (1) the classification serves an overriding or compelling governmental interest;[39] (2) the law is necessary to the accomplishment of a permissible state policy; and (3) the law is the least discriminatory means of achieving that governmental or state goal.[40]

School Desegregation

In *Brown v. Board of Education,*[41] the Court, holding that "[s]eparate educational facilities [for black children] are inherently unequal"[42] because such treatment generates feelings of "inferiority as to their status in the community,"[43] ordered the defendant school district to desegregate "with all deliberate speed."[44] Since *Brown,* the Court has imposed upon local school districts an affirmative constitutional duty "to eliminate from the public schools all vestiges of *state-imposed [de jure]* segregation,"[45] as distinguished from *de facto* segregation caused by demographic and economic factors.[46]

Lower courts have uniformly struck down anti-busing laws when such laws hampered efforts of *de jure* segregated districts to fulfill their constitutional duty.[47] The Supreme Court has yet

38. McLaughlin v. Florida, 379 U.S. 184, 192-96 (1964). *See also* Loving v. Virginia, 388 U.S. 1, 11 (1967).

39. McLaughlin v. Florida, 379 U.S. 184, 192 (1964).

40. *Id.* at 196.

41. 347 U.S. 483 (1954).

42. *Id.* at 495.

43. *Id.* at 494.

44. Brown v. Board of Educ. (Brown II), 349 U.S. 294, 301 (1955).

45. Swann v. Board of Educ., 402 U.S. 1, 15 (1971) (emphasis added). Note that the Seattle court found the distinction between *de jure* and *de facto* segregation to be "constitutionally irrelevant in this context."

46. Keyes v. School Dist. No. 1, 413 U.S. 189 (1973). There, the Court said: "[P]laintiffs must prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action . . . [consisting of] an unconstitutional policy of deliberate racial segregation . . . ." *Id.* at 198.

47. Albertson, *Equal Protection and the Neighborhood School Concept,* 55 WASH. L. REV. 735, 738 (1980). This article concerning *Seattle* at the trial court level cited Stell v. Board of Public Educ., 334 F. Supp. 909 (S.D. Ga. 1971); Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970), *aff'd,* 402 U.S. 935 (1971); Alabama v. United States, 314 F. Supp. 1319 (S.D. Ala.), *cert. dismissed,* 400 U.S. 954 (1970); School Comm. of Springfield v. Board of Educ., 366 Mass. 315, 319 N.E.2d 427 (1974), *cert. denied,* 421 U.S. 947 (1975).

to rule on the constitutionality of state legislation that blocks busing in *de facto* segregated districts. *Seattle* may become the test case on that question.

C. COURT'S REASONING: A RACIAL CLASSIFIER THAT RESTRUCTURES THE POLITICAL PROCESS

The trial court based its legal conclusions on findings that Initiative *350* (1) was motivated by discriminatory purpose;[48] (2) was overbroad;[49] and (3) created an invalid racial classifier. The appellate court refused to discuss the first two findings.[50] Rather, the Ninth Circuit focussed primarily on the principles enunciated in *Hunter*[51] and held that the challenged statute was "correctly struck down as an impermissible legislative classification based on racial criteria."[52] Regardless of the voters' motiva-

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Only one such case has reached the Supreme Court: Board of Educ. v. Swann, 402 U.S. 43 (1971). In *Swann*, the Court affirmed the lower courts' position and held that "[t]o forbid, at this stage, all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems." *Id.* at 46.

48. 473 F. Supp. at 1013. The court did not claim that the voters of Washington had a subjectively discriminatory intent in adopting Initiative *350*. In fact, it conceded that many voters may have been motivated by the conviction that it would be in the best interests of their children to attend neighborhood schools. However, the trial judge said subjective intent is not the constitutional test of illegal discriminatory intent or purpose that would render this law invalid. Rather the test, found in Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977), is based on five circumstantial factors: (a) the impact of the action, *i.e.*, whether it bore more heavily upon one race than upon another; (b) the historical background of the decision; (c) the specific sequence of events leading to the decision; (d) the procedural and substantive departures from the norm in connection with the decision or action; and, (e) the legislative or administrative history of the decision or action. 473 F. Supp. at 1014. The judge found that Initiative *350* would cause a disproportionate negative impact on the education of minority children, and said the enactment was "conceived, drafted, advocated and adopted for the specific purpose of overriding [school busing] to balance Seattle schools racially by means of student assignments." *Id.* at 1015.

49. 473 F. Supp. at 1016. The court found that "Initiative *350* is overly inclusive in that it prohibits school assignments to achieve racial balance even in a school district where there is *de jure* segregation, that is, segregation caused by prior governmental action." *Id.* The court held that districts are under an affirmative duty to take "whatever steps might be necessary to eliminate [*de jure*] segregation." *Id.* (citing Board of Educ. v. Swann, 402 U.S. 43 (1971) and Green v. County School Bd., 391 U.S. 430 (1968)). "[A] statute which would proscribe a principal, and in some cases essential and exclusive step to achieve that end must obviously violate constitutional requirements." San Francisco Unified School Dist. v. Johnson, 3 Cal. 3d 937, 955, 479 P.2d 669, 680, 92 Cal. Rptr. 309, 320, *cert. denied*, 401 U.S. 1012 (1971).

50. 633 F.2d at 1342.

51. See text accompanying notes 28-32 *supra*, for a discussion of *Hunter*.

52. 633 F.2d at 1342.

tion, the "operative legal and political effect" on Initiative *350* was discriminatory.[53] The court further found that the law was "conceived, drafted, advocated and adopted for the specific purpose of overriding the decision of the Seattle school board to balance Seattle schools racially by means of student assignments."[54]

Following the reasoning in *Hunter*[55] and *Lee*,[56] the *Seattle* court said that even though the statute contains no explicit racial classification, it contains one implicitly,[57] which is invalid because it places unconstitutional "special burdens on racial minorities within the governmental process."[58]

The court found Initiative *350* to cause the political process to become "skewed at the expense of local representative bodies and their constituencies,"[59] and held that the law "radically restructure[d] the political process of Washington by allowing a state-wide majority to usurp traditional local authority over lo-

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53. *Id.* at 1343.

54. *Id.*

55. *See* 393 U.S. at 389-90, 392-93. *See also id.* at 393-96 (Harlan, J., concurring).

56. *See* 318 F. Supp. at 718-20.

57. Although the initiative does not explicitly disallow student assignment for racial reasons, as did the New York statute considered in *Lee v. Nyquist*, it achieves the same purpose by enumerating those purposes for which there may be student assignment and omitting from that enumeration the assignment of students in order to achieve racial balance. This is as effective a racial classification as is a statute which expressly forbids the assignment of students for racial balancing purposes.

633 F.2d at 1343 (citing the trial court, 473 F. Supp. at 1013).

58. 633 F.2d at 1344.

59. *Id.* at 1346. "Had a successor school board to the one that adopted the Seattle Plan—instead of the state electorate as a whole—attempted to repeal or rescind the self-imposed student assignment plan, we would be faced with a quite different issue." *Id.* at 1345-46 n.8. Significantly, the court found:

> "The question of whether a rescission of previous Board action is in and of itself a violation of appellants' constitutional rights is inextricably bound up with the question of whether the Board was under a constitutional duty to take the action it initially took . . . . If the Board was not under such a duty, then the rescission of the initial action in and of itself cannot be a constitutional violation."

Id. (quoting Dayton Bd. of Educ. v. Brinkman (Dayton I), 433 U.S. 406, 413-14 (1977)).

The *Seattle* majority distinguished *Dayton I* on the grounds that in *Seattle* a different governmental body—the state-wide electorate—rescinded policies voluntarily enacted by local school boards already subject to local political control. *Id.* at 1346.

cal school board educational policies."[60]

Given the finding of a racially suspect classification in Initiative *350*, and an impermissible usurpation of local control over local educational policy, the court found the initiative invalid absent a compelling state interest.[61] In upholding the trial court, the Ninth Circuit found no compelling state interest in returning the Seattle schools to the traditional neighborhood schools policy.[62] While neighborhood schools policies are not *per se* constitutionally suspect,[63] on balance, "[t]he interest . . . in mandating a state-wide policy of neighborhood schools must, in these circumstances, fall to the paramount interest of locally elected school boards . . . in promulgating their own educational policy,"[64] the court reasoned.

The court discounted the fact that the Seattle schools had never been adjudged to be *de jure* segregated, citing *Lee*[65] for the principle that "a finding of *de jure* segregation is irrelevant when majoritarian political processes are used to frustrate minority participation . . . ."[66] Finding no compelling state interest in wresting control from local districts over educational policies, the court held the statute unconstitutional as a violation of the equal protection clause.[67] The court also flatly rejected other defense assertions in the opinion.[68]

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60. 633 F.2d at 1344.

61. *Id.* at 1344 (citing McLaughlin v. Florida, 379 U.S. 184, 192-96 (1964).

62. 633 F.2d at 1346. *Cf.* Association of Gen. Contr. v. San Francisco Unified School Dist., 616 F.2d 1381, 1388-90 (9th Cir.) (state interest in lowest-bid contracting policy in employment had priority over the school board's *non-educational* interest in voluntarily adopting a minority affirmative action program), *cert. denied*, 101 S. Ct. 783 (1980).

63. 633 F.2d at 1345. The court said: "While 'a neighborhood school policy is not constitutionally suspect', it is the locally-elected school authorities who 'are traditionally charged with broad power to formulate and implement educational policy'. . . ." *Id.* (citations omitted).

64. 633 F.2d at 1346.

65. 318 F. Supp. at 719-20. *See also* Flores v. Pierce, 617 F.2d 1386, 1391 (9th Cir.), *cert. denied*, 101 S. Ct. 218 (1980).

66. 633 F.2d at 1345-46.

67. *Id.* at 1346-47.

68. The defendants cited Brown v. Califano, 627 F.2d 1221 (D.C. Cir. 1980) (upholding congressional budgetary amendments that barred the Department of Health, Education, and Welfare (HEW) from withholding federal aid to school districts with neighborhood school assignment policies). The Ninth Circuit said the amendments in *Brown* did not " 'make [a] classification along impermissible [racial] lines,' " as did Initiative *350*, and *Brown* was therefore inapposite. 633 F.2d at 1347 (quoting Brown v. Califano, 627 F.2d at 1230).

The Dissent: No Discriminatory Intent

Judge Wright, dissenting, contended the Washington statute was valid: It interfered with no constitutional obligations of local school boards because the law exempted court-ordered desegregation from its provisions,[69] and no unlawful racial classification existed. Initiative *350* merely addressed a racial issue: desegregation. The majority has "confus[ed] the treatment of racial problems with treatment on the basis of race."[70]

Absent a racial classifier, the applicable cases[71] require proof of discriminatory intent or purpose in adopting the challenged law to show a violation of the equal protection clause.[72] But motive or purpose mixes questions of law and fact, and the plaintiff has the burden of proving that discriminatory intent was a motivating factor in its adoption.[73] The dissent found no evidence that racial bias motivated a desire to restore neighborhood schools.[74] The majority merely inferred such intent, the dissent said, based on the adverse impact the challenged statute had upon racial minorities. Impact alone, however, is constitutionally insufficient.[75]

The dissent further found the *Hunter* rule inapposite because the *Hunter* Court did not hold that the repeal of the *existing* fair housing ordinance violated the fourteenth amendment.[76] Rather, the *Hunter* Court found the city charter amendment defective because it subjected *future* fair housing ordinances to a more burdensome legislative process than other ordinances.[77] And, because Initiative *350* did not alter the legis-

69. 633 F.2d at 1350.

70. *Id.* at 1353.

71. *See* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, *reh. denied*, 444 U.S. 887 (1979); Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979); Dayton I, 433 U.S. 406 (1977); Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976).

72. 633 F.2d at 1353.

73. *Id.* at 1353-54 (citing Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265 (1977).

74. 633 F.2d at 1354.

75. *Id.* at 1354. The dissent cited the trial court's factual findings 7.30, 7.31 and 7.32, 473 F. Supp. at 1009-10, which acknowledged the many non-discriminatory rationales for supporting neighborhood schools.

76. Hunter v. Erickson, 393 U.S. at 390 n.5.

77. *Id.* at 393.

lative process or burden minorities procedurally,[78] the state lawfully exercised its power over educational matters.[79]

D. Analysis

Suspect Classifier

Initiative *350* is a classic example of a creatively worded and attractively promoted ballot measure whose purpose and intent is carefully hidden by neutral-sounding phrases and omissions of salient detail.[80] Initiative *350*'s express purpose was to stop the Seattle Plan and, in so doing, it trapped two other segregated school districts in its net.[81]

The Ninth Circuit, in affirming the trial court, correctly analyzed Initiative *350* as an implicitly racial law, one whose impact would be to permit white children the luxury of retaining their neighborhood schools while black children would either be left to fend for themselves in over-crowded ghetto schools,[82] or bite the bullet and assume the full burden of voluntary desegregation.[83] The holding is vulnerable, however, to an attack under the *Washington v. Davis* rationale: Adverse impact alone is a constitutionally insufficient basis to attack a law that is not explicitly discriminatory. To resolve that issue, the Supreme Court may remand the *Seattle* case to the trial court for further evidentiary proceedings on the question of intent.

To say that Initiative *350,* like the charter amendment in *Hunter* or the constitutional amendment in *Reitman,* is non-discriminatory because it permits voluntary desegregation or because it allows court-ordered busing begs the question.[84] By for-

78. 633 F.2d at 1353 n.3 (citing Wash. Const. art. II, § 3, which vests legislative authority in the legislature but reserves to the people the power to enact bills independently through the initiative process).

79. 633 F.2d at 1353 n.3.

80. See note 3 *supra* for the relevant text of Initiative *350.*

81. Seattle School Dist. No. 1 v. Washington, 473 F. Supp. at 1009-10 (discussing the CiVIC campaign to "stop forced busing"). The initiative explicitly barred the desegregation provisions of the Seattle Plan. The trial court found that those programs and provisions were the only feasible means to integrate the Seattle schools. *Id.* at 1015.

82. *Id.* at 1007, 1015.

83. *Id.* at 1003, 1007.

84. The trial court findings made it abundantly clear that only through some form of mandatory pupil reassignment, particularly in Seattle, would the districts be able to integrate. *Id.*

bidding every major, effective technique for achieving racial balance,[85] the initiative had the "clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest."[86] Procedural burden is the central question raised by the *Hunter* rule.

A Restructuring of the Political Process

The dissent's contention notwithstanding,[87] Initiative *350* exploited state-wide anti-integration sentiment to stop the desegregation of three of Washington's 300 school districts.[88] The law marked a departure from the procedural norm[89] in overriding the Seattle School Board's desegregation plan because voters who "could not conceivably be affected by any plan for the mandatory assignment of students for racial balancing purposes"[90] voted on and passed the initiative.

However, the Ninth Circuit majority appeared to misread the law when it found that the state's interest in a neighborhood schools policy "must, in these circumstances, fall to the paramount interest of the locally-elected school boards and the community they represent in promulgating their own educational policy."[91] Local school districts are creatures of state law;[92] hence, a local school board has no constitutional prerogative to set educational policy in contravention of state law.

Yet, *Swann* clearly dictates that local school boards not only have a constitutional duty to remedy racial imbalances, but they also have "broad discretionary powers" to set the racial mix in each school as a matter of educational policy.[93] Locally-elected school boards should and do have the authority to pass independent initiatives to racially balance their schools "quite

85. 633 F.2d at 1342. See, for example, note 3 *supra*.

86. Hunter v. Erickson, 393 U.S. at 395.

87. Namely, that "the record is devoid of evidence to contradict the state's contention that historical opposition to the Seattle Plan was motivated by race-neutral concerns." 633 F.2d at 1354-55.

88. 473 F. Supp. at 1008-09.

89. *See* Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 267 (1977).

90. 473 F. Supp. at 1016.

91. 633 F.2d at 1345. *See* note 21 *supra*.

92. Mandatory Busing v. Palmason, 80 Wash. 2d 445, 495 P.2d 657 (1972).

93. Swann v. Board of Educ., 402 U.S. at 16.

apart from any constitutional requirements . . . ."[94] But that does not preclude the state from setting educational policy in opposition to local initiatives.

Under *Hunter* and *Lee*, Initiative *350* places unconstitutional burdens on minorities within the political process[95] and effectively disenfranchises minority voters[96] in violation of the fourteenth amendment.

As mentioned by the dissent, local boards share control over educational policies with the state.[97] However, as a matter of practical public policy, states are ill-equipped either to dictate details of school administration or anticipate the local political and social nuances that are part of the calculus of sound educational policies.

E. *Seattle* vs. California's Proposition *1*

The California Court of Appeal in *Crawford v. Board of Education*[98] upheld the constitutionality of Proposition *1*, a state anti-busing amendment adopted by the voters in November 1979. The parallels between Initiative *350* and Proposition *1*, especially the reliance by the plaintiffs in both cases on *Hunter*, make it useful to consider the implications of *Seattle* in the Court's consideration of the challenge to Proposition *1*.[99]

Proposition 1 *Background*

Proposition *1* overrides state decisional law[100] dealing with

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94. *Id.* at 45.

95. 633 F.2d at 1344. *See also* Hunter v. Erickson, 393 U.S. 385 (1969); Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971).

96. 633 F.2d at 1346-47. The plurality for Initiative *350* in Seattle does not detract from this point, because Seattle residents voted to retain the school board members who adopted the plan.

97. *Id.* at 1353. *See* Wash. Const. art. 2.

98. 113 Cal. App. 3d 633, 170 Cal. Rptr. 495 (1980), *cert. granted*, 50 U.S.L.W. 3266 (U.S. Oct. 13, 1981) (No. 81-38).

99. The two cases are to be argued together before the Supreme Court.

100. Jackson v. Pasadena City School Dist., 59 Cal. 2d 876, 382 P.2d 878, 31 Cal. Rptr. 606 (1963). *Jackson* held that even in the absence of *de jure* or intentional segregation, school boards are under an affirmative duty to deal with racial imbalances. In fulfilling that duty "consideration must be given to the various factors in each case, including the practical necessities of governmental operation . . . [,] the degree of racial imbalance in the particular school . . . [,] the difficulty and effectiveness of revising school boundaries . . . and the availability of other facilities to which students can be transferred." *Id.*

school desegregation. The measure requires state courts to follow the narrower, more conservative federal rulings in applying the fourteenth amendment's equal protection clause to pupil school assignment and student busing.[101]

Federal courts, as noted, have authority to order desegregation only where they identify intentional or purposeful segregative state action.[102] But the California Supreme Court has gone further than the United States Supreme Court and has held that school districts have an affirmative duty to correct racial imbalances in schools *regardless of cause.*[103]

Proposition *1* does not relieve schools districts of their duty to desegregate under state law, but removes busing from "the arsenal of techniques available to state courts" to remedy *de facto* segregation.[104] Significantly, Proposition *1,* unlike Initiative *350,* does not prohibit *school boards* from initiating busing to integrate their schools.[105]

Like Initiative *350,* Proposition *1* was the product of a group seeking to stop, or at least stall, a massive cross-town busing and desegregation plan in Los Angeles, the state's largest school district.[106] Unlike Seattle, Los Angeles was under a ten-year-old state court order to desegregate a *de jure* system.[107]

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at 882, 382 P.2d at 882, 31 Cal. Rptr. at 610. In San Francisco Unified School Dist. v. Johnson, 3 Cal. 3d 937, 479 P.2d 669, 92 Cal. Rptr. 309, *cert. denied,* 401 U.S. 1012 (1971), the court reaffirmed the rule in *Jackson* that school boards have an affirmative duty to alleviate racial imbalance or racial isolation.

Crawford v. Board of Educ. (Crawford I), 17 Cal. 3d 280, 551 P.2d 28, 130 Cal. Rptr. 724 (1976) established the duty to undertake "reasonably feasible steps" to alleviate segregation in the schools regardless of its source. This case completely severed California law from the federal rules that distinguish *de facto* from *de jure* segregation for purposes of the equal protection clause. *Id.* at 302, 551 P.2d at 42, 130 Cal. Rptr. at 738. Because this holding was founded on CAL. CONST. art. I, § 7(a), it created independent state grounds on which to obliterate the *de facto-de jure* distinction.

101. CAL. CONST. art. I, § 7(a).

102. *See* note 45 *supra.*

103. *See* note 100 *supra. See also* Glenn, *State Court Desegregation Order,* 26 U.C.L.A.L. REV. 1183 (1979).

104. 113 Cal. App. 3d at 651, 170 Cal. Rptr. at 507.

105. *Id.* at 651, 170 Cal. Rptr. at 507.

106. The plan that took effect in September 1978 involved 86,600 students, of which 32,000 were in a mandatory program. Glenn, *supra* note 103, at 1216. This was 15% of the district's 567,260 students. *L.A. Busing Starts Today; Leaders Urge Compliance,* L.A. Times, Sept. 12, 1978, § 1, at 1, col. 2.

107. Crawford I, 17 Cal. 3d at 286, 551 P.2d at 30, 130 Cal. Rptr. at 727. The order

The trial court finding of *de jure* segregation, however, was overturned in *Crawford II*,[108] in light of United States Supreme Court rulings handed down since the original trial court desegregation order.[109] Desegregation efforts in Los Angeles have been stalled as a result of *Crawford II*. A voluntary desegregation plan has been in operation since September 1981,[110] pending a ruling by the Supreme Court.

Initiative 350 *Distinguished*

The *Crawford II* court, in dealing with the constitutionality of Proposition *1*, made several points that distinguish the California amendment from the Washington law: (1) Proposition *1* does not prohibit local voluntary desegregation; (2) Proposition *1* does not create a right to discriminate;[111] (3) unlike the charter amendment in *Hunter*,[112] Proposition *1* "embraces the protection of the fourteenth amendment and does not seek to violate it;"[113] (4) "rescission of the [Los Angeles desegregation plan] cannot be unconstitutional" if the district is under no federal constitutional obligation to correct racial imbalance;[114] (5) based

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in *Crawford I* is No. C 822854 (L.A. Superior Ct. 1976).

108. 113 Cal. App. 3d at 646, 170 Cal. Rptr. at 503. While the California Supreme Court in *Crawford I* rendered the *de facto-de jure* distinction moot, the appellate court held:

> [N]o federal violation of law was established by the 1970 findings, and the trial court's identification of the then existing racial segregation within the Los Angeles school system as *de jure* segregation was true only in a Pickwickian sense, and was not true at all in the sense of federal law. Because there was no evidence of acts done with specific segregative intent and discriminatory purpose, there was no federal constitutional violation—regardless of the terminology used by the court.

113 Cal. App. 3d at 646, 170 Cal. Rptr. at 503.

109. Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Dayton Bd. of Educ. v. Brinkman (Dayton I), 443 U.S. 406 (1977); Village of Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976); Washington v. Davis, 426 U.S. 229 (1976), *cited in* Crawford II, 113 Cal. App. 3d at 640-41, 170 Cal. Rptr. at 499-500.

110. *Los Angeles Schools Open Peacefully*, S.F. Chronicle, Sept. 16, 1981, at 5, col. 4.

111. "[I]t merely removes court-ordered pupil assignment and transportation as a remedy available to cure state-proscribed racial imbalance . . . ." 113 Cal. App. 3d at 653, 170 Cal. Rptr. at 508. *Cf.* Reitman v. Mulkey, 387 U.S. 369 (1967).

112. 393 U.S. at 387.

113. 113 Cal. App. 3d at 653, 170 Cal. Rptr. at 509.

114. *Id.* at 653, 170 Cal. Rptr. at 509. (citing *Dayton I* and *Dayton II*). This is a departure from the reasoning in *Seattle*, 633 F.2d at 1345-46, as to the power of the state to rescind a desegregation plan adopted by a locally-elected board.

on the espoused purposes of the California proposition,[115] the *Crawford II* court found no discriminatory or segregative intent in Proposition *1*;[116] and (6) Proposition *1* does not deprive minority groups of the vested right to an integrated education, it merely prevents the courts from chosing court-ordered busing from "among scores of remedies available for use by the court to end racial isolation."[117] In effect, *Crawford II* holds that no constitutional right to any particular remedy for illegal school segregation exists.[118]

Underlying the positions in both the holding in *Crawford II*[119] and the dissent in *Seattle*[120] is a question of the efficacy of busing to promote equality in education. Both the *Crawford II* majority and the *Seattle* dissent cite Justice Powell's dissent in *Estes v. Metropolitan Branches, Dallas NAACP*,[121] in which Justice Powell made some very disparaging remarks about the social costs of busing.[122]

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115. The amendment declares:

> [It is] necessary to serve compelling public interests, including those of making the most effective use of the limited financial resources now and prospectively available to support public education, maximizing the educational opportunities and protecting the health and safety of all public school pupils, enhancing the ability of parents to participate in the educational process, preserving harmony and tranquility in this state and its public schools, preventing the waste of scarce fuel resources, and protecting the environment.

CAL. CONST. art. I, § 7(a).

116. 113 Cal. App. 3d at 655, 170 Cal. Rptr. at 509.

117. *Id.* at 655-56, 170 Cal. Rptr. at 509.

118. *Id.*

119. *Id.* at 655, 170 Cal. Rptr. at 509.

120. 633 F.2d at 1351-52.

121. 444 U.S. 437 (1980).

122. The pursuit of racial balance at any cost—the unintended legacy of *Green*—is without constitutional or social justification. Out of zeal to remedy one evil, courts may encourage or set the stage for other evils. By acting against one-race schools, courts may produce one-race school systems. Parents with school age children are highly motivated to seek access to schools perceived to afford quality education. A desegregation plan without community support, typically with objectionable transportation requirements and continuing judicial oversight, accelerates the exodus to the suburbs of families able to move. The children of families remaining in the area affected by the court's decree are denied the opportunity to be part of an ethnically diverse student body.

444 U.S. at 450 (Powell, J., dissenting from a dismissal of a writ of certiorari).

Busing, of course, is not a constitutional end in itself.[123] However, it is a reasonably feasible means, and in many cases the only strategy available, to break down the racial barriers that have been erected through decades of discriminatory school transfer policies.[124] Thus, it is no wonder that busing has become a volatile code-word at the center of the maelstrom of the school integration controversy. To those who have accepted the inevitability and the political imperative of abolishing dual school systems, as has the Ninth Circuit majority, busing is a necessary fortress for the protection of inviolate rights.

The *Seattle* court faced a law nakedly promulgated to prevent local school boards from fulfilling their fourteenth amendment obligations without a court order.[125] The *Crawford II* court faced a different proposition: a law which merely eliminates independent state grounds as a basis for ordering school busing, limiting state courts to what the federal courts can do under the federal constitution.[126]

Where busing is the only feasible means to desegregate a school district, as is the case in both Los Angeles and Seattle, laws banning busing effectively foreclose the possibility of integration.

The United States Supreme Court will have to reconcile these two cases in some manner with the *Hunter, Reitman* and *Washington* holdings. Only Justice Rehnquist, denying a stay of a busing order in September 1980 to the Los Angeles school district,[127] has addressed himself to the issue in *Crawford II.* He said Proposition *1* cannot violate the fourteenth amendment because it specifically embraces it.[128]

F. Conclusion

Piercing the transparent veil of Washington's Initiative *350,*

123. 113 Cal. App. 3d at 649, 170 Cal. Rptr. at 505.

124. Seattle School Dist. No. 1 v. Washington, 473 F. Supp. at 1010-11.

125. *Id.* at 1016.

126. Board of Educ. v. Superior Court, 448 U.S. 1343 (1980).

127. " '[I]t is indeed difficult to accept the contention that by limiting a state court's jurisdiction to that of the federal courts, there is somehow a violation of [the] federal constitution.' " 113 Cal. App. 3d at 654, 170 Cal. Rptr. at 509 (quoting Board of Educ. v. Superior Ct., 448 U.S. 1343, 1345 (1980)).

128. 448 U.S. at 1345.

the Ninth Circuit in *Seattle* has correctly found an explicitly racial legislative classification which violates the equal protection clause. Initiative *350* puts local school districts in a double bind if they are constitutionally obliged to desegregate: They either violate the equal protection clause or violate the initiative.[129] The measure radically restructures the political process, making it more difficult for racial minorities to achieve their political rights, and usurps the power of local school boards to set local educational policies when those policies benefit minority groups.[130]

Seattle and *Crawford II* can be distinguished on both factual and legal grounds, and, therefore, are unlikely to influence one another in the United States Supreme Court.

Robert E. Kroll

III. THE BUSINESS NECESSITY DEFENSE IN THE NINTH CIRCUIT

A. Introduction

In the last survey period, the Ninth Circuit decided two cases focusing on defenses to Title VII[1] challenges to employment practices: *Harriss v. Pan American World Airways*[2] and

129. 473 F. Supp. at 1016.
130. 633 F.2d at 1346.

1. Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, § 702, 78 Stat. 255 (codified at 42 U.S.C. §§ 2000a to 2000h(6) (1976) (amended 1978)). Section 2000e-2(a) reads:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) 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, because of such individual's race, color, religion, sex, or national origin.

2. 649 F.2d 670 (9th Cir. 1981) (per Farris, J.; the other panel members were Schroeder, J., dissenting; and Anderson, J.).

Contreras v. City of Los Angeles.[3] These cases illustrate a conflict within this circuit regarding what an employer must prove to prevail against a plaintiff's showing that a facially neutral employment practice has had a disparate impact on a group protected under Title VII.

Purporting to adhere to long-standing Title VII case law, the two panels articulated conflicting definitions of the business necessity defense. In *Harriss,* a pregnancy discrimination case, the court expressed a standard which adheres closely to traditional interpretations of the defense, but misapplied it. The *Contreras* panel, on the other hand, although purporting to follow applicable precedent, in fact articulated and applied a weaker standard in a case involving an allegedly discriminatory testing procedure.

In *Harriss,* two Pan American World Airways (Pan Am) flight attendants challenged Pan Am's maternity leave policy, alleging that the policy had a disparate impact on women, thereby violating Title VII prohibitions against sex-based discrimination.[4] The *Harriss* case was tried and decided prior to the 1978 amendment to Title VII which specifically defines pregnancy-based employment policies as *per se* sex discrimination.[5] The appellate court, therefore, analyzed the pregnancy leave policies under two theories: as a practice which, although neutral on its face, had a disparate impact on women; and as a facial violation

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3. 656 F.2d 1267 (9th Cir. 1981) (per Wallace, J.; the other panel members were Tang, J., concurring and dissenting; and Hanson, D.J., sitting by designation).

4. 649 F.2d at 672.

5. The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical condition shall be treated the same for all employment-related purposes . . . as other persons not so affected by similar in their ability or inability to work . . . .

42 U.S.C. § 2000e(k) (Supp. II 1978), *as amended by* Act of Oct. 31, 1978, Pub. L. No. 95-555, 92 Stat. 2076. Congress amended the Act intending to expressly overrule the Supreme Court's holdings in General Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (pregnancy based classifications are not, on their face, sex discrimination under Title VII). By definition, pregnancy based classifications are *per se* violations of Title VII. H.R. Rep. No. 948, 95th Cong., 2d Sess. 3, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 4749, 4751. For a further discussion of *Gilbert,* and the pregnancy amendment see Rutherglen, *Sexual Equality in Fringe Benefit Plans,* 65 VA. L. REV. 199 (1979).

of the Act as amended in 1978.[6] The two analyses of the employment practice in *Harriss* are separate and distinct theories of discrimination, giving rise to separate and distinct defenses.

The plaintiffs challenged three aspects of Pan Am's maternity leave policy. First, Pan Am required every female flight attendant to notify her supervisor within twenty-four hours upon learning of her pregnancy.[7] After notification, the flight attendants began a mandatory, unpaid leave of absence (the stop-work policy).[8] Between sixty and ninety days after the birth of the child, the plaintiffs were required to return to work (the start-work policy).[9] Finally, the defendant denied flight attendants the right to accrue seniority after the first ninety days of maternity leave (the seniority policy).[10]

In its pre-amendment analysis, which is the primary concern of this Note, the *Harriss* panel found all three policies had a disparate impact on women, but that the employer had successfully justified the stop-work policy as a business necessity.[11] The court of appeals held that to prove a business necessity a defendant must show that the challenged practice "has a manifest relationship to the employment in question."[12] The panel then remanded the case to the district court for further findings on whether the stop-work and seniority policies satisfied the requirements of the business necessity defense.[13]

The *Contreras* plaintiffs, six former city accountants and auditors, alleged that two pre-employment screening tests unlawfully discriminated against Hispanics.[14] In 1976, the positions of city accountant and city auditor came within the city's civil service rules and regulations, which required incumbent employees, including the plaintiffs, to pass a written examination before assuming the positions of either senior accountant or senior au-

6. 649 F.2d at 673.
7. Harriss v. Pan Am. World Airways, Inc., 437 F. Supp. 413, 415 (N.D. Cal. 1977).
8. *Id.*
9. *Id.* at 415-16.
10. *Id.* at 415.
11. 649 F.2d at 676.
12. *Id.* at 674 n.3.
13. *Id.* at 676, 678.
14. 656 F.2d at 1271.

ditor.[15] Prior to 1976, when the plaintiffs were hired, employment decisions for these positions had been based on oral interviews.[16]

The Ninth Circuit in *Contreras* held: first, that plaintiffs failed to establish a prima facie case of discrimination as to the senior accountants examination;[17] second, that, while successfully establishing a prima facie case of disparate impact of the auditor examination, the plaintiffs failed to prove that less discriminatory alternatives were available to the defendant;[18] and finally, that the defendant's proof that the auditor examination was job-related satisfied the requirements of the business necessity defense and entitled it to judgment.[19]

It is not the purpose of this Note to delve into the intricacies of either the testing or pregnancy areas of Title VII jurisprudence, but rather to discuss the different theories of discrimination and focus on a comparison of the two panels' articulation and application of the business necessity defense as it stands in the Ninth Circuit.

B. Background

Title VII of the 1964 Civil Rights Act[20] prohibits most forms of employment discrimination on the basis of race, color, sex, religion, or national origin, by employers, labor organizations, and employment agencies.[21] The Act contains a statutory defense to all facially discriminatory practices (except those practices which discriminate on the basis of race): the bona fide occupational qualification (BFOQ).[22] The Act, however, is silent as

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15. *Id.*
16. *Id.*
17. *Id.* at 1274.
18. *Id.* at 1285-86.
19. *Id.*
20. 42 U.S.C. §§ 2000a to 2000h(6) (1976) (amended 1978).
21. *Id.* § 2000e-2. For relevent text of § 2000e-2, see note 1 *supra.*
22. *Id.* § 2000e-2(e) reads in part:

> Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .

to how other forms of discrimination may be proved and what defenses may be interposed by the defendant.

In *Griggs v. Duke Power Co.*,[23] the Supreme Court held that facially neutral policies which have a disparate impact on blacks violate Title VII regardless of the employers intent, and that such practices may only be defended on the grounds that they bear a manifest relationship to the employment in question. In *Griggs*, black employees alleged that the employer's use of standardized intelligence tests and a high school diploma requirement had an unlawfully discriminatory impact on Blacks and thereby violated Title VII.[24] The Court agreed, holding that the plaintiff need not prove the employer intended to discriminate, and that the congressional intent in enacting Title VII was to eliminate employment practices which "operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[25]

The defendant in *Griggs* argued that the express language of section 703(h) of the Act should be interpreted to require proof of an intent to discriminate in testing cases.[26] Rejecting this argument, the Court reasoned that Congress' intent was to prohibit "not only overt discrimination but also practices that are fair in form, but discriminatory in practice."[27] The Court held "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."[28]

Subsequently, in *Albemarle Paper Co. v. Moody*,[29] the

23. 401 U.S. 424 (1971).
24. *Id.* at 426.
25. *Id.* at 432.
26. *Id.* at 433. Section 703(h) of the Act reads in pertinent part:

> [N]or shall it be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin . . . .

42. U.S.C. § 2000e-2(h) (1976).
27. 401 U.S. at 431. The Court relied upon a memorandum circulated by Senators Case and Clark which dealt with the question of whether Title VII mandated the lowering of an employee's qualifications. *Id.* at 436.
28. *Id.* at 432 (Burger, C.J.).
29. 422 U.S. 405 (1975).

Court refined these theories of the plaintiff's and the defendant's burdens of proof in disparate impact cases. The *Albemarle* plaintiffs alleged that the defendant's employment testing program had a disparate impact on black employees.[30] In discussing the order and burden of proof, the Court stated that the plaintiffs had made a "prima facie case of discrimination, *i.e.*, had shown that the tests [or policies] in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants."[31] Once the plaintiff has established the *prima facie* case, the defendant may justify the practice as a business necessity by showing "that a given requirement has a manifest relationship to the employment in question."[32] For a defendant to satisfy the business necessity defense in a testing case, the exam must be "shown by professionally acceptable methods, to be predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job for which candidates are being evaluated."[33] If the employer successfully establishes the defense, the plaintiff has the burden of proving that "other tests or selection devices, without a similar undesirable . . . effect, would also serve the employer's legitimate interest in efficient and trustworthy workmanship."[34]

Because the Supreme Court has not addressed the issue of what must be proved to meet the manifest relationship standard, most courts have adopted the formulation for proof of the business necessity defense enunciated by the Fourth Circuit in *Robinson v. Lorillard*.[35] *Robinson* requires the defendant to prove that:

> [T]here exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve . . . .[36]

30. *Id.* at 409.
31. *Id.* at 425.
32. *Id.*
33. *Id.* at 434.
34. *Id.*
35. 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).
36. *Id.* at 798. Most of the circuit courts have adopted this formulation for proving

Both the proof of and the defense to allegations that Title VII protected groups have intentionally been treated differently have taken a wholly different route. The Supreme Court first announced the elements and allocation of the burden of proof in such cases in *McDonnell Douglas Corp. v. Green*,[37] clarifying it most recently in *Texas Department of Community Affairs v. Burdine*.[38] To prove that a defendant intentionally treated the plaintiff differently because of his or her status as a member of a group protected under Title VII, the plaintiff must prove that he or she: (1) belongs to a group protected by Title VII; (2) applied for and was qualified for a job, for which the employer was seeking applicants; (3) was rejected despite the plaintiff's qualifications; and, (4) after the rejection, the position remained open and the employer continued to solicit applications from persons of the plaintiff's qualifications.[39] Once the plaintiff has made this relatively simple showing, an inference of discrimination is raised which can be rebutted merely by the defendant "articulating some legitimate nondiscriminatory reason for plaintiff's rejection."[40] If the defendant succeeds in this endeavor, the plaintiff then has the heavy burden of proving that the defendant's proferred reason for plaintiff's rejection is a mere pretext for discrimination.[41] Thus, in contrast to the rigorous business

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the business necessity defense. *See* Williams v. Colorado Springs, Colo. School Dist., 641 F.2d 835, 841 (10th Cir. 1981); Kirby v. Colony Furniture Co., 613 F.2d 696, 705 n.6 (8th Cir. 1980); Palmer v. General Mills, Inc., 513 F.2d 1040, 1044 (6th Cir. 1975); Muller v. United States Steel Corp., 509 F.2d 923, 929 (10th Cir.), *cert. denied*, 423 U.S. 825 (1975); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 246 (5th Cir. 1974), *acq. in result* 576 F.2d 1157 (1978), *cert. denied*, 439 U.S. 1115 (1979); United States v. St. Louis-San Francisco Ry. Co., 464 F.2d 301, 308 (8th Cir., 1972), *cert. denied*, 409 U.S. 1116 (1973); United States v. International Longshoreman Ass'n, 460 F.2d 497, 504 (4th Cir.), *cert. denied*, 409 U.S. 1007 (1972); United States v. Jacksonville Terminal Co., 451 F.2d 418, 451 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971).

37. 411 U.S. 792 (1973).

38. 101 S. Ct. 1089 (1981).

39. 411 U.S. at 802. *See* Texas Dept. of Community Affairs v. Burdine, 101 S. Ct. at 1094 n.6. In *Burdine*, the Court said plaintiff's *prima facie* burden is "not onerous." *Id.* at 1094.

40. 411 U.S. at 802-03. The presumption of discrimination is rebutted if "the defendant's evidence raises a genuine issue of fact as to whether it discriminated against plaintiff . . . . The defendant must clearly set forth, through the introduction of admissible evidence, the reasons for plaintiff's rejection." 101 S. Ct. at 1094. "The defendant *need not* persuade the court that it was actually motivated by the proferred reasons." *Id.* (emphasis added).

41. 411 U.S. at 801, 804. The *Burdine* Court articulated two ways in which a plaintiff may show pretext: "either directly by persuading the court that a discriminatory

necessity defense to disparate impact cases, the defendant in disparate treatment cases has a minimal burden of proving some legitimate, nondiscriminatory reason for the plaintiff's rejection.

Both disparate impact and disparate treatment cases involve practices which, on their face, are not violations of Title VII. Facial discrimination under Title VII gives rise only to the aforesaid statutory BFOQ defense and is never permissible in cases involving racial discrimination.[41.1]

In *Dothard v. Robinson*,[42] the Court found that, although the state of Alabama expressly discriminated against women in its assignment of correctional counselors to maximum security prisons, this practice was justified as a BFOQ.[43] The *Dothard* Court, while citing lower court opinions on the burden of proof needed to satisfy the BFOQ test,[44] held that the BFOQ exception "provides only the narrowest of exceptions to the general rule requiring equality of employment opportunities . . . [and] that it is impermissible under Title VII to refuse to hire an individual . . . on the basis of stereotyped characterizations."[45]

The Ninth Circuit, in both *Harriss* and *Blake v. City of Los Angeles*,[46] adopted the long accepted formulation of the proof element of the business necessity defense in disparate impact cases as set out in *Robinson*. Yet, Ninth Circuit panels in *Con-*

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reason more likely motivated the employer or indirectly by showing that the employer's proferred explanation is unworthy of credence." 101 S. Ct. at 1095.

41.1 Miller v. Texas State Bd. of Barber Examiners, 615 F.2d 650, 652 (5th Cir.), *cert. denied*, 449 U.S. 891 (1980); *see* 42 U.S.C. § 2000e-2e (1976).

42. 433 U.S. 321 (1977). In addition to the *per se* discrimination analysis in *Dothard*, the Court found the state's height and weight requirements for prison guards had a discriminatory impact on women. *Id.* at 330. The Court then refined the "touchstone" language of *Griggs* to mean "a discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge." *Id.* at 332 n.14.

43. *Id.* at 333. For the text of § 2000e-2(e) which provides for the BFOQ defense, see note 22 *supra*.

44. The Court cited the BFOQ exception as formulated by the Fifth Circuit in Diaz v. Pan Am. World Airways, 442 F.2d 385, 388 (5th Cir. 1971) and Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969).

45. 433 U.S. at 333.

46. 595 F.2d 1367, 1376 (9th Cir. 1979), *cert. denied*, 446 U.S. 928 (1980) (plaintiff challenged defendant's height and weight requirements for employment in the city police department on the basis of sex discrimination).

treras, Craig v. County of Los Angeles,[47] and *deLaurier v. San Diego Unified School District*[48] have adopted a different formulation called the job-relatedness approach. Under this job-relatedness approach, the Ninth Circuit has held that the "manifest relationship" standard of *Griggs* is "met with less than proof of absolute necessity [by the employer]."[49] This may be one reason why the defense is being diluted in the Ninth Circuit.

C. THE *Harriss* OPINION

The Majority

The *Harriss* court began by deciding that the defendant's stop-work policy was justified as a business necessity.[50] The court initially found the policy constituted a prima facie violation of Title VII[51] because flight attendants were barred from employment after the notification of pregnancy and for at least sixty days after delivery.[52] Nevertheless, the court found that the airline's interest in safety overcame any discriminatory im-

47. 626 F.2d 659, 662 (9th Cir. 1980), *cert. denied*, 101 S. Ct. 1364 (1981). In *Craig*, plaintiff attacked defendant's use of two written examinations and minimum height requirements for employment by the county sheriff's department as discriminating against Mexican-Americans. *Id.* at 661. Holding that a single written examination and the height requirement violated Title VII, the Ninth Circuit found no evidence that either the written test or the height requirements were job related. *Id.* at 663.

48. 588 F.2d 674, 678 (9th Cir. 1978). In *deLaurier*, plaintiff challenged defendant's policy requiring that she go on leave at the beginning of her ninth month of pregnancy. *Id.* at 675. The Ninth Circuit held that the policy was sufficiently related to the goal of educational efficiency. *Id.* at 680. For an analysis of *deLaurier*, see 10 GOLDEN GATE U.L. REV. 39 (1980).

49. Contreras v. City of Los Angeles, 656 F.2d at 1276 (quoting deLaurier v. San Diego Unified School Dist., 588 F.2d at 678). For excellent discussions of the theoretical basis for the business necessity defense, see Comment, *The Business Necessity Defense to Disparate Impact Liability Under Title VII*, 46 U. CHI. L. REV. 911 926-30 (1976) and Note, *Business Necessity Under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98, 102, 106 (1974).

50. 649 F.2d at 676. The district court's opinion in *Harriss*, 437 F. Supp. 413 (1977), is analytically confused. The analysis used by the *Harriss* trial court mixes the three Title VII theories of discrimination, and their defenses. *See id.* at 430-36. The district court held that both the stop-work policy and the start-work policy constituted *prima facie* violations of Title VII, under the theory of disparate treatment. *Id.* at 425-30. However, the court held that these policies were justified as either a business necessity or a BFOQ. *Id.* at 432-35. The court further found that the seniority policy did not violate Title VII. *Id.* at 438. The court based its holdings on the possibility of incapacitation, due to pregnancy-related illness to flight attendants, the important goal of airline safety, and the possibility of a conflict of interest between passenger safety and the protection of the flight attendant's unborn child in the case of emergency. *Id.* at 420-25.

51. 649 F.2d at 674.

52. *Id.* at 672.

pact, that pregnancy would possibly affect the ability to perform emergency functions and that the risk, discounted by the gravity of the harm, justified the airline's policy.[53] In finding the stop-work policy justified, the Ninth Circuit applied the burden of proof test enunciated in *Blake*,[54] which in turn had adopted the approach announced in *Robinson*.

In considering the defendant's start-work policy under its pre-amendment analysis, the Ninth Circuit panel found that the policy restricted a pregnant woman's employment opportunities, thereby having a discriminatory impact on women in violation of Title VII.[55] The *Harriss* court noted that the district court had made no findings on either the risk to passengers in allowing flight attendants to return to work earlier than sixty days after birth[56] or the necessity of the start-work policy in light of that risk.[57] The Ninth Circuit remanded *Harriss* for further factual findings as to whether the policy could be justified as a business necessity.[58]

As for the seniority policy, however, the Ninth Circuit reversed.[59] The district court had determined that Pan Am's seniority policy did not violate Title VII. The Ninth Circuit panel reasoned that workers who received other medical leaves were not penalized by loss of seniority. The court held that the policy disproportionately burdened women and constituted a prima facie violation of Title VII.[60] The court then remanded the case for further findings as to the business necessity of the policy.[61]

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53. *Id.* at 675.

54. Blake v. City of Los Angeles, 595 F.2d 1367, 1376 (9th Cir. 1979), *cert. denied*, 446 U.S. 928 (1980).

55. 649 F.2d at 677.

56. *Id.*

57. *Id.*

58. *Id.* at 678.

59. *Id.* at 679.

60. *Id.*

61. *Id.* In the post-amendment analysis, the *Harriss* Court concluded that the stop-work policy was a *per se* violation of Title VII but was justified as a BFOQ. *Id.* at 676. The court adopted the formulation of the burden of proof used by the Fifth Circuit in Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976). The *Usery* Court laid down a two-part test in that the employer must show that the BFOQ involved is reasonably necessary to the essence of its business and the employer has a reasonable cause, a factual basis, for believing that all or substantially all of the class of people in question would be unable to perform safely and efficiently the duties of the job involved, or that it is impossible or impractical to deal with persons on an individual basis. *Id.* at 235-36.

The Dissent

The *Harriss* dissent attacked the majority for accepting the defendant's assertion that passenger safety adequately justified its stop-work policy.[62] Because "the airline makes no attempt to prevent flight attendants with other potentially disabling conditions from flying,"[63] the dissent argued, the stop-work policy advanced no valid goal of passenger safety and, therefore, was not a business necessity.[64] The dissent argued that after finding both the stop-work and seniority policies violative of Title VII, the court should not have remanded for further findings.[65]

Arguing that the start-work policy should be invalidated as discriminatory, the dissent stated that there was no "factual basis for finding that women are unable to perform their duties until 60 days after childbirth . . . . [N]or has the employer shown why it does not make individual determinations concerning a woman's ability to return to work before 60 days."[66]

Finally, the dissent argued that the defendant did not "attempt to justify the [seniority policy] as a business necessity."[67] In light of the 1978 pregnancy amendment to Title VII,[68] the remand to the district court is predestined to invalidate the policy.[69]

D. THE *Contreras* OPINION

The Majority

In *Contreras*,[70] the Ninth Circuit upheld the district court's

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The Ninth Circuit held that defendant's start-work policy and the seniority policy were *per se* violations of Title VII and remanded the issues to the district court to determine whether the policies could be justified as a BFOQ. 649 F.2d at 678-79.

62. 649 F.2d at 679 (Schroeder, J., dissenting).

63. *Id.* at 680. As examples of these physical conditions the dissent cited ulcers, high blood pressure, colitis, hernias, and heart disease. *Id.*

64. *Id.*

65. *Id.* at 681. At trial, two physicians testified as to when a post-partum examination should occur to determine when a woman could return to work after delivery. One doctor placed the time at 28 days (four weeks), the other at 42 days (six weeks). *Id.*

66. *Id.*

67. *Id.*

68. For pertinent text of the amendment, see note 5 *supra*.

69. 649 F.2d at 681.

70. 656 F.2d 1267 (9th Cir. 1981). The district court's opinion in *Contreras* may be found at 18 Fair Empl. Cas. (BNA) 80 (C.D. Cal. 1977). However, the trial court's opin-

ruling that the plaintiffs had failed to prove *prima facie* violations of Title VII with respect to the senior accountant's examination.[71] The district court held that statistical evidence of discriminatory impact, "although [showing] disparate [impact], [was] not statistically significant when tested at a .05 level of significance,"[72] and that, because the plaintiffs had failed to study seriously for the examination, they had not proved a prima facie case of discrimination. Upholding the lower court ruling, the Ninth Circuit said that because of the small sample size,[73] and evidence that the plaintiffs had not properly prepared for the examination, the district court's ruling against the plaintiff was not clearly erroneous under *United States v. Yellow Cab Co.*[74]

As for the auditor's examination, the appellate court found clear error and reversed the district court's determination that the plaintiffs had failed to establish a prima facie case of discriminatory impact.[75] The Ninth Circuit found the district court improperly combined the statistics of a separate senior auditor's examination with those of the auditor's examination to prove there was no disproportionate impact on Spanish surnamed applicants.[76]

Consequently, the burden shifted to the defendant to prove that the auditor's examination was sufficiently job-related to meet the business necessity defense requirements. The *Con-*

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ion is devoid of any reference to the business necessity defense and primarily discusses the validation of the two allegedly discriminatory tests for their job-relatedness.

71. 656 F.2d at 1274.

72. *Id.* at 1272.

73. Only 17 Spanish surnamed applicants took the senior accountant's examination. *Id.* at 1273.

74. *Id.* at 1274. "[W]here the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendant[,]. . . a choice between two permissible views of the weight of evidence is not 'clearly erroneous.'" United States v. Yellow Cab Co., 338 U.S. 338, 342 (1949).

75. 656 F.2d at 1275. For discussions of the problems of statistical proof in Title VII cases, see Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1973); Hallock, *The Numbers Game—The Use and Misuse of Statistics in Civil Rights Litigation*, 23 VILL. L. REV. 5 (1977); Note, *Beyond the Prima Facie Case in Employment Discrimination Law; Statistical Proof and Rebuttal*, 89 HARV. L. REV. 387 (1975); Note, *Statistics and Title VII Proof: Prima Facie Case and Rebuttal*, 15 HOUS. L. REV. 1030 (1978).

76. 656 F.2d at 1274-75.

treras court found that the defendant had met its burden[77] and that the plaintiffs failed to prove a less discriminatory alternative was available to the defendant.[78]

In constructing a test for the business necessity defense, the *Contreras* court sought to "harmonize the [Ninth Circuit] cases."[79] The court found that *deLaurier* and *Craig* applied a job relatedness standard which "mandate[d] employer color [or sex] blindness, but otherwise respects an employer's right to seek maximum employee productivity and efficiency."[80] In contrast, *Blake* allowed practices or tests only when it can be proved that not allowing these devices would seriously injure the defendant.[81] To resolve the dispute, the *Contreras* court analyzed the same legislative pronouncements analyzed by the Supreme Court in *Griggs*.[82]

The *Contreras* court found that "the legislative history of Title VII clearly reveals that Congress was concerned about preserving employer freedom, and that it acted to mandate employer color [or sex] blindness with as little intrusion into the free enterprise system as possible."[83] Therefore, the court concluded that the less restrictive burden of proof required by *Craig* and *deLaurier* is the appropriate test for business necessity.[84] For further support, the Ninth Circuit panel cited *New York Transit Authority v. Beazer*[85] and *Texas Department of Community Affairs v. Burdine*.[86] In *Beazer*, the Supreme Court held that the defendant's policy of denying employment to methadone[87] users was not racially discriminatory under Title VII.[88] After finding that the plaintiff had not produced sufficient evidence of disparate impact to establish a *prima facie* case of discrimination,[89] the Court reasoned that even if a *prima facie*

77. *Id.* at 1284.
78. *Id.* at 1285.
79. *Id.* at 1277.
80. *Id.*
81. *Id.*
82. *Id.* at 1277-78.
83. *Id.* at 1278.
84. *Id.*
85. 440 U.S. 568 (1979).
86. 101 S. Ct. 1089 (1981).
87. "Methadone" is used to treat heroin addiction. 440 U.S. at 573.
88. *Id.* at 587.
89. *Id.* at 584-87.

case was established, the policy could be justified as a business necessity on the basis that "the [policy] bears a manifest relationship to the employment in question."[90] The *Contreras* court then held that the defendant's process for validating its examination met the *Albemarle* standard[91] as to whether examinations are a business necessity and that the plaintiffs had not shown the existence of a less discriminatory alternative.[92]

The Dissent

The dissent, while concurring in the result in *Contreras*, disagreed with the panel's assertion that an intracircuit split for the burden of proof for the business necessity defense existed.[93] Attacking the majority, the dissent argued that the *Blake* court implicitly followed the Ninth Circuit decisions in *Craig* and *deLaurier* because it deleted the phrase "necessity connotes an irresistible demand . . . . [A practice] must not only directly foster safety and efficiency . . . but must also be essential to those goals."[94] Because the *Blake* court did not define necessity as being irresistible, as do other circuit courts, the dissent concluded that *Blake* was consistent with *Craig* and *deLaurier*.[95]

In addition, the dissent argued that if *Blake* had required proof that the employment practice was absolutely necessary to the business purpose, it would shift the plaintiff's burden of proving the availability of a less discriminatory alternative into the defendant's business necessity defense.[96] This shift in burden, the dissent maintained, would be contrary to the Supreme Court's decisions in *Dothard*[97] and *Albemarle Paper*.[98] The dissent contended that "(1) . . . the 'necessity' language in *Dothard* excludes consideration of less discriminatory alternatives as part of the employer's proof; and (2) any discussion of alternatives during judicial review of the employer's burden of proof centers on more efficient alternatives, and not, necessarily,

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90. *Id.* at 587 n.31.
91. 422 U.S. at 431.
92. 656 F.2d at 1284-85.
93. *Id.* at 1286 (Tang, J., dissenting).
94. *Id.* at 1289 (quoting United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971)).
95. 656 F.2d at 1290.
96. *Id.*
97. See notes 42-45 *supra* and accompanying text.
98. See note 29 *supra* and accompanying text.

on less discriminatory alternatives."[99] Finally, the dissent argued that because "the district court committed legal error by requiring [defendant to] supply 'competent and relevant evidence' on the issue of the job relatedness of their employment standard, . . . [he] would remand the case with instructions to reevaluate the evidence under the proper legal standard."[100] The dissent reasoned that because of the district court's erroneous concept of the law, the clearly erroneous standard should not be used.

E. Analysis

The conflict within the Ninth Circuit over the proper formulation of the burden of proof for the business necessity defense should be resolved in favor of the *Robinson* standard,[101] developed in the Fourth Circuit and adopted by the Ninth Circuit in *Harriss*[102] and *Blake*.[103] This burden of proof standard is consistent with congressional intent and the Supreme Court opinions in *Griggs, Albermarle,* and *Dothard.*

In the legislative debates accompanying the enactment of Title VII, the intent of Congress was to allow efficient business policies to continue, and to balance this policy with the goal of equal employment opportunity.[104] Cases which had adopted the *Robinson* approach have balanced these goals.[105] These cases strike down the employment practice only if (1) the practice is not related to job performance[106] or (2) an alternative policy exists, without the discriminatory impact, which serves the business policy better or equally as well.[107]

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99. 656 F.2d at 1291. This argument seems whimsical in light of the Supreme Court's decision in *McDonnell Douglas Corp. v. Green,* discussed at text accompanying notes 37-41 *supra.*

100. 656 F.2d at 1293-94.

101. For a discussion of the *Robinson* standard, see notes 35-36 *supra* and accompanying text.

102. 649 F.2d at 670.

103. 595 F.2d at 1376.

104. Congress expressly considered the court's decision in *Griggs,* and clearly approved the decision, indicating that the Court's focus on the predictiveness of a business policy to job performance was correct. H.R. Rep. No. 238, 92d Cong., 1st Sess. 8, 21 (1971); S. Rep. No. 415, 92d Cong., 1st Sess. 14 (1971); 177 Cong. Rec. (1971) (remarks of Rep. Perkins).

105. For a list of cases adopting the *Robinson* approach, see note 36 *supra.*

106. *E.g.,* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

107. See notes 112-117 *infra* and accompanying text.

The job-relatedness approach does not balance these legislative goals. In *Contreras,* the court held that "discriminatory tests are impermissible unless shown by professionally accepted method, to be predictive of, or significantly correlated with important elements of work behavior . . . to the job for which candidates are being evaluated."[108] This formulation of the burden of proof tolerates a disparate impact on protected individuals even though other job-related policies are at least as efficient as the challenged policy. The job-related policy does not carry out the balancing mandated by Congress.[109]

The *Contreras* court's reliance on dictum in *Beazer* is misplaced. *Beazer* involved drug use, the effects of which on an individual cannot readily be determined by tests which may be given by an employer. The plaintiff in *Beazer* failed to show that a feasible alternative was available to the defendant and is not a case which adopts the job-relatedness approach to the business necessity defense.

In trying to further support its interpretation of Title VII, the *Contreras* court unfortunately cited the Supreme Court's *Burdine* decision. *Burdine* involved allegations of discrimination through disparate treatment, while *Contreras* dealt with employment practices which allegedly have a disparate impact on groups protected by Title VII. As noted earlier, these two theories are not sufficiently analogous to lend support to each other.[110] Because of this incompatibility with the congressional intent of Title VII, the *Contreras* formulation of the burden of proof for the business necessity defense should be rejected.

The *Harriss* court adopted the correct formulation for the business necessity defense and then misapplied the standard. In *Harriss,* the court ignored the final portion of the *Robinson* standard.[111]

For example, in *Burwell v. Eastern Airlines, Inc.,*[112] the

108. 656 F.2d at 1332.

109. See text accompanying note 104 *supra.*

110. See notes 23-41 *supra* and accompanying text.

111. For a discussion of the *Robinson* standard, see notes 35-36 *supra* and accompanying text.

112. 633 F.2d 361 (4th Cir. 1980) (per curiam).

Fourth Circuit faced a situation analogous to that in *Harriss*. The *Burwell* court, in a per curiam opinion, found that Eastern's policy of requiring pregnant flight attendants to take maternity leave immediately upon learning of the pregnancy was not a business necessity during the first thirteen weeks of pregnancy. To reach this conclusion, the *Burwell* court relied on essentially the same medical evidence as did the *Harriss* panel.[113] The *Burwell* court concluded that the defendant had not met its burden of proof under *Robinson*. Consequently, *Burwell* holds that the mandatory leave policy is justified from the fourteenth week of pregnancy until the birth of the child.[114] The dissent[115] argued that the plaintiff had rebutted the existence of the business necessity defense when she showed that defendant had an alternative business practice available, which accomplished the business purpose equally as well.[116] The dissent urged that the lower court ruling, which stated that a business necessity did not exist until after the twenty-eighth week of pregnancy, was supported by the evidence and should not be reversed.[117]

Burwell presents two less onerous alternative policies to the harsh result in *Harriss*. Both the thirteenth week and the twenty-eighth week stopping point for flight attendants would serve the health and safety concerns of the businesses involved without the detrimental economic impact an immediate "stop-work" has on flight attendants and their families.

If there is a trend emerging from *Harriss* and *Contreras*, it may be that the Ninth Circuit is willing to defer to the policies

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113. The court noted that many of the experts who testified in *Burwell* have testified in similar cases. *Id.* at 367.

114. *Id.* at 372.

115. *Id.* at 373 (Butzner, J., concurring and dissenting).

116. *Id.* at 375.

117. Northwest Airlines permits flight attendants to work until the 28th week of pregnancy upon medical certification of their ability to work. *Id.* at 376. Subsequently, Eastern Airlines adopted the same policy after the district court's decision in *Burwell*. The partial dissent also noted that Eastern allows flight attendants, with the supervision of their medical department, to fly with controlled diabetes and epilepsy, even though medical experts at trial testified that the conditions were "more likely to be disabling than pregnancy." *Id.* Finally, the dissent said that defendant's "normal method of handling physical and mental disabilities, other than pregnancy, is to rely upon self-monitoring." *Id.*

of organizations which have a strong concern for safety.

F. Conclusion

The Ninth Circuit has not, after twelve years of litigation, settled on a standard for the business necessity defense. The *Harriss* and *Blake* courts have adopted the correct *Robinson* formulation for the business necessity defense. However, the Ninth Circuit's reasoning in *Harriss* and *Contreras* shows how easily Title VII is misinterpreted and misapplied. These mistakes make it easier for employers to discriminate freely without facing the consequences. Without stronger direction from the Supreme Court in the area of the business necessity defense, the intent of Title VII will never fully be achieved.

James D. Fisher

IV. ESCHEWING THE FAT: FLIGHT ATTENDANT WEIGHT REQUIREMENTS AND TITLE VII

A. Introduction

In *Gerdom v. Continental Airlines, Inc.*,[1] the Ninth Circuit held that (1) the airlines' weight requirements for flight attendants do not constitute unlawful sex discrimination under Title VII of the Civil Rights Act[2] on the theory of disparate impact on women; (2) remand was appropriate to allow plaintiffs an opportunity to establish a violation under the disparate treatment theory; and (3) the district court abused its discretion in refusing to certify the class action.

Until 1973, defendant Continental Airlines hired only female flight attendants and required them to maintain their weight below the maximum limits published in a height/weight chart. In 1973, the defendant began hiring a limited number of men as flight attendants.[3] Continental also modified its weight

1. 648 F.2d 1223 (9th Cir. 1981) (per Sneed, J.; the other panel members were Soloman, D.J., sitting by designation; and Schroeder, J., concurring in part, dissenting in part).

2. Subchapter VI of Title VII of the Civil Rights Act of 1964, §§ 701-718, 42 U.S.C. §§ 2000e to 2000e-17 (1976).

3. The airlines' change in hiring policy resulted from the Fifth Circuit decision in Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950

requirements so that flight attendants would maintain their weight in a reasonable relationship to their height, bone structure and age.[4]

Plaintiff Gerdom, a female flight attendant, was terminated in 1971 for exceeding her maximum weight.[5] She sued Continental and the Air Line Pilots' Association (the Association) in 1972 claiming unlawful sex discrimination. The court dismissed the suit against the Association in 1973. The Association then sued Continental on behalf of flight attendants suspended or terminated for exceeding the weight limits.[6] The two suits were consolidated and, in 1977, the Union of Flight Attendants became the bargaining representative for the affected employees and replaced the Association as a plaintiff.[7] The plaintiffs challenged both the pre-1973 and post-1973 weight requirements.

The trial court granted the defendant's summary judgment motion and the plaintiffs appealed.[8] The Ninth Circuit affirmed the lower court's finding that the airline's weight requirements had no adverse impact on women, but remanded the case to the trial court to determine the issue of disparate treatment which the lower court had failed to address. It also reversed the trial court's denial of plaintiff's motion to certify a class.

B. Background

Section 703(a) of the 1964 Civil Rights Act (the Act) proscribes employment discharges based on an individual's sex.[9] The

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(1971). *Diaz* held that a policy of hiring only women as flight attendants was not a bona fide occupational qualification and violated Title VII. *Id.* at 388-89. Men presently remain a small minority in this job category. As of 1974, only two percent of Continental's flight attendants were men. 648 F.2d at 1225.

4. 648 F.2d at 1225.

5. Gerdom was terminated March 22, 1971 because she exceeded her maximum weight for 90 days. She was 5' 5½" tall and weighed 146½ pounds—13 pounds above her allowed maximum. She had previously been suspended eight times without pay for exceeding her maximum weight requirement. *Id.*

6. *Id.*

7. *Id.*

8. Gerdom v. Continental Air Lines, Inc., 13 Empl. Prac. Dec. (CCH) 6051 (C.D. Cal. 1976).

9. Section 703(a) of the Act provides: "It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ." 42 U.S.C. § 2000e-2(a) (1976).

primary purpose of the Act is to insure equality of employment opportunities and to eliminate racial barriers.[10] The legislative history accompanying the amendment adding "sex" to Title VII is meager at best. The sex discrimination provisions were added to the Act only one day before the House approved Title VII[11] and was offered as a floor amendment without any prior legislative hearing or debate. The limited floor discussion lasted only an hour and added little substance to clarify the intended scope of the amendment.[12] Ironically, Representative Howard Smith of Virginia, an outspoken opponent of the Act, introduced the amendment and was later accused by one commentator of trying to sabotage the Act by his proposal.[13]

Because of the scant history, some courts have inferred that Congress did not intend the ban on sex discrimination to have "significant and sweeping implications."[14] However, attempts to modify Title VII by including age as an impermissible employment factor[15] and to weaken the sex amendment by prohibiting only discrimination based "solely" on sex have failed.[16] By the time of the Equal Employment Opportunity Act of 1972,[17] Congress made clear that it intended to fight sex discrimination as vigorously as other prohibited forms of discrimination.[18]

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10. "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." Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

11. Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084, 1090 (5th Cir. 1975); Binder, *Sex Discriminaton in the Airline Industry: Title VII Flying High*, 59 CALIF. L. REV. 1091, 1092-93 (1971); *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1167 (1971); Comment, *Flights Attendant Weight Requirements and Title VII of the Civil Rights Act of 1964*, 45 J. AIR L. & COM. 483, 485 (1980).

12. Comment, *supra* note 11, at 485.

13. *Id.*

14. *See, e.g.*, Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084, 1090 (5th Cir. 1975).

15. Comment, *supra* note 11, at 486 n.11.

16. *Id.* n.12.

17. Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. §§ 2000e to 2000e-17 (1976)) (amending the 1964 Civil Rights Act).

18. See Comment, *supra* note 11, at 486 n.15. The Report of the House General Sub-Committee on Labor stated:

> Women are subject to economic deprivation as a class. Their self-fulfillment and development is frustrated because of their sex. . . .
>
> Such blatantly disparate treatment is particularly objec-

Two legal theories may support a plaintiff's Title VII claim: disparate impact and disparate treatment.[19] Each theory dictates a different method of proof.

Disparate Impact Theory

Disparate impact, also known as adverse impact, focuses on the consequences of the alleged discriminatory employment practice. The leading case, *Griggs v. Duke Power Co.*,[20] involved the use of educational and intellectual employment requirements which excluded more blacks than whites from certain job categories. Because the requirements were neither job-related nor necessary for success in the positions being filled,[21] the *Griggs* Court found the employment criteria racially discriminatory. The Court held that job qualifications "must have a manifest relationship to the employment in question"[22] and "must measure the person for the job and not the person in the abstract."[23]

Whereas *Griggs* concerned racial discrimination under Title VII, *Dothard v. Rawlinson*[24] involved height and weight requirements for women employees in the Alabama prison system. The requirements excluded forty percent of the female population but only one percent of the male population from positions in the prison system. The Court found the requirements violated Title VII in those circumstances where they excluded women from certain jobs not involving direct contact with male prisoners.[25]

> tionable in view of the fact that Title VII has specifically prohibited sex discrimination since its enactment in 1964. . . .
> . . . [D]iscrimination against women continues to be widespread, and is regarded by many as either morally or physiologically justifiable.

H.R. REP. No. 92-238, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2140-41.

19. Golden v. Local 55, Int'l Ass'n of Firefighters, 633 F.2d 817, 820-21 (9th Cir. 1980); B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, 1153-54, 1158 (1976). A third theory, present effects of past discrimination, will not be discussed since only the first two theories were at issue in *Gerdom*.

20. 401 U.S. 424 (1971).

21. *Id.* at 429-33.

22. *Id.* at 432.

23. *Id.* at 436.

24. 433 U.S. 321 (1977).

25. *Id.* at 331-32.

Both decisions illustrate that, under the disparate impact theory, a plaintiff need only show that facially neutral standards actually result in a significantly discriminatory pattern of hiring to establish a prima facie case of discrimination. The burden then shifts to the employer to show that the requirement manifestly relates to the employment.[26] If the employer meets this burden, the plaintiff must then show that other selection criteria would serve the employer's legitimate business needs without the discriminatory impact.[27] Because courts focus on the consequences of the employment practice, they do not require proof of discriminatory intent, only discriminatory effect.[28]

Flight attendants have unsuccessfully challenged airline weight requirements under the disparate impact theory.[29] In *Dothard*, the plaintiffs established a prima facie case of sex discrimination because the Alabama prison system's combined height and weight restrictions excluded 41.13% of the female population but less than 1% of the male population.[30] Flight attendants have had a difficult time proving statistically any disparate impact of the weight requirements. In *Jarrell v. Eastern Airlines, Inc.*,[31] weight limits which differed for male and female flight attendants would admit only 33.3% of the general female population and 43.5% of the general male population. The court held these statistical differences insufficient to establish prima facie evidence of disparate impact.[32] Present airline weight requirements are close to these ratios.[33] Therefore, a statistical approach to proving the disparate impact of airline weight requirements would likely fail.

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26. Griggs v. Duke Power Co., 401 U.S. at 432.

27. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

28. "Title VII is not concerned with the employer's 'good intent or absence of discriminatory intent' for 'Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.' " Albemarle Paper Co. v. Moody, 422 U.S. 405, 422 (1975) (quoting Griggs v. Duke Power Co., 401 U.S. at 432).

29. Leonard v. National Airlines, Inc., 434 F. Supp. 269 (S.D. Fla. 1977); Jarrel v. Eastern Airlines, Inc., 430 F. Supp. 884 (E.D. Va. 1977), *aff'd*, 577 F.2d 869 (4th Cir. 1978); Cox v. Delta Air Lines, Inc., 14 Empl. Prac. Dec. (CCH) 4962 (S.D. Fla. 1976), *aff'd mem.*, 553 F.2d 99 (5th Cir. 1977).

30. 433 U.S. at 329-30.

31. 430 F. Supp. 884 (E.D. Va. 1977), *aff'd*, 577 F.2d 869 (4th Cir. 1978).

32. *Id.* at 889-90. This conclusion was reaffirmed in Leonard v. National Airlines, Inc., 434 F. Supp. 269, 275 (S.D. Fla. 1977) where only 22% of the female population would meet the weight standards as opposed to 30% of the male population.

33. *See* Comment, *supra* note 11, at 492-94.

Jarrell further supported the courts' reluctance to find disparate impact in flight attendant cases. Because the flight attendant is an overwhelmingly female-dominated job classification, the airlines' weight and other restrictions have not barred employment opportunities for women.[34] If anything, the recent past has been marked by sex discrimination against males,[35] and male flight attendants remain a minority. Therefore, some courts refuse to find that employment requirements discriminate against women in occupations where only women are employed. For example, in *Stroud v. Delta Airlines, Inc.*,[36] the Fifth Circuit held that where only women occupy positions as flight attendants, a no-marriage rule of the employer does not discriminate on the basis of sex.

Courts have also looked upon the airlines' weight requirements as a part of an overall grooming program or personal appearance policy,[37] allowing the employer to impose reasonable personal appearance requirements on its employees. The standards may also differ between male and female employees.[38] However, grooming standards which distinguish between men and women on the basis of "immutable characteristics" or "fundamental rights" do violate Title VII.[39]

The Ninth Circuit in *Baker v. California Land Title Co.*[40]

34. Jarrell v. Eastern Air Lines, Inc., 430 F. Supp. 884, 892-93 (E.D. Va. 1977), *aff'd*, 577 F.2d 869 (4th Cir. 1978).

35. Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir. 1971).

36. 544 F.2d 892 (5th Cir.), *cert. denied*, 434 U.S. 844 (1977).

37. Jarrell v. Eastern Air Lines, Inc., 430 F. Supp. 884, 891-92 (E.D. Va. 1977), *aff'd*, 577 F.2d 869 (4th Cir. 1978).

38. "There is virtual unanimity among the Circuit Courts of Appeals that an employer may impose reasonable personal appearance requirements upon its employees and such standards need not be identical for males and females. Such practices are said to be non-sexually discriminating." *Id.* at 891. *See also* Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084, 1091-92 (5th Cir. 1975).

39. Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084, 1091 (5th Cir. 1975). *See also* Earwood v. Continental Southeastern Lines, Inc., 539 F.2d 1349, 1351 (4th Cir. 1976):

> [D]iscrimination based on either immutable sex characteristics or constitutionally protected activities such as marriage or child rearing violate [Title VII] because they present obstacles to employment of one sex that cannot be overcome. On the other hand, discrimination based on factors of personal preference does not necessarily restrict employment opportunities and thus is not forbidden.

40. 507 F.2d 895 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046 (1975).

found hair length restrictions for male employees not discriminatory within the meaning of Title VII because hair length was not an immutable characteristic.[41] *Baker* was followed by the Fifth Circuit's decision in *Willingham v. Macon Telegraph Publishing Co.*,[42] which reflects the present state of the law on grooming standards. The employer in *Willingham* refused to hire an applicant because of his shoulder length hair. The Fifth Circuit concluded that Congress intended equal employment opportunity could best be secured by prohibiting employers from discriminating between men and women on the basis of immutable characteristics or fundamental rights.[43] The court found hair length neither immutable nor constitutionally protected[44] and that such grooming codes reflected the employer's right to control his or her business rather than a denial of equal opportunity.[45]

Except for *Laffey v. Northwest Airlines, Inc.*,[46] courts have upheld flight attendant weight requirements on the grounds that weight is neither an immutable characteristic nor a fundamental right.[47] In *Laffey*, decided prior to *Willingham*, the airlines hired male pursers whose jobs, for purposes of Title VII, were substantially equal and similarly situated to those of female flight attendants. The airlines, however, paid pursers higher salaries, allowed them more expensive layover accommodations, provided an allowance to maintain their uniforms, and did not

41. *Id.* at 897.

42. 507 F.2d 1084 (5th Cir. 1975).

43. *Id.* at 1091.

44. *Id.*

45. *Id.*

46. 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

47. In Cox v. Delta Air Lines, Inc., 14 Empl. Prac. Dec. (CCH) 4962 (S.D. Fla. 1976), *aff'd mem.*, 553 F.2d 99 (5th Cir. 1977), a female flight attendant claimed she was unable to reduce her weight to the employer's allowable maximum because of inherent female characteristics. The court analogized these weight restrictions to hair length restrictions and held that Title VII does not protect classifications which result from grooming standards. *Id.* at 4963. In *Jarrell*, the court held that the airlines' weight program did not violate Title VII by relying, in part, on the hair length cases. The court held that weight, like hair, is a characteristic subject to the reasonable control of most individuals. 430 F. Supp. at 892. In Leonard v. National Airlines, Inc., 434 F. Supp. 269 (S.D. Fla. 1977), the court upheld defendant's weight policy citing *Willingham*, *Jarrell* and *Cox*. *Id.* at 275. It noted that Title VII is not intended to interfere with an employer's right to determine how best to run his or her business. It held that weight is not an impermissible classification under Title VII because it is not immutable. *Id.*

subject them to weight restrictions.[48] The District of Columbia Circuit found that the weight program was only one aspect of a broad range of unequal treatment between the male pursers and female flight attendants and held that the weight requirement violated Title VII.

Disparate Treatment Theory

The disparate treatment theory of discrimination is what Congress contemplated when it passed Title VII.[49] It concerns treating similarly situated[50] individuals differently because of their race, sex, national origin or other prohibited criteria.

In *McDonnell Douglas Corp. v. Green*,[51] the Supreme Court set out an order of proof for disparate treatment allegations.[52] In *McDonnell Douglas*, the Court held that the complainant in a Title VII action carries the initial burden under the statute to establish a prima facie case of discrimination.[53] Complainant Green alleged racial discrimination as the reason the corporation refused to rehire him. He was able to establish prima facie discrimination by showing that: (1) he belonged to a racial minority; (2) he applied and was qualified for a job for which the corporation was seeking applicants; (3) despite his qualifications, he was rejected; and, (4) after his rejection, the position remained open and the corporation continued seeking applications from persons with similar qualifications.[54]

If the complainant establishes prima facie discrimination, the burden shifts to the employer corporation "to articulate some legitimate, non-discriminatory reason for the employer's rejection."[55] In *McDonnell Douglas*, the corporation pointed to complainant's past unlawful conduct against the corporation to justify its refusal to rehire him. Such a showing sufficiently rebuts the prima facie case and shifts the burden to the complain-

48. 567 F.2d at 454.

49. *See* B. SCHLEI & P. GROSSMAN, *supra* note 19, at 15.

50. *Id.* at 16-17.

51. 411 U.S. 792 (1973).

52. Although *McDonnell Douglas* addressed a private nonclass action brought under the disparate treatment theory, class actions would follow the same order and allocation of proof. *See* B. SCHLEI & P. GROSSMAN, *supra* note 19, at 1157.

53. 411 U.S. at 802.

54. *Id.*

55. *Id.*

ant to show that the employer's justification was pretextual. The Court listed ways the complainant could meet this burden: He could show that white employees engaged in the same activity were retained or rehired, or he could present evidence of the corporation's treatment of him during his prior employment, the corporation's reaction to his civil rights activities, or of the corporation's general policy and practice regarding minority employment.[56]

McDonnell Douglas articulated the three-step analysis that courts presently apply to Title VII cases brought under the disparate treatment theory. Later decisions have clarified and refined that analysis. In *McDonald v. Santa Fe Transportation Co.*,[57] the Supreme Court interpreted *McDonnell Douglas* as requiring a showing that "race was a 'but for' cause" but not a showing that race was the sole cause of the adverse action.[58] In *Furnco Construction Corp. v. Waters*,[59] the Supreme Court rejected the lower court's holding that in addition to showing a legitimate purpose behind its hiring methods, the employer must show those methods will allow consideration of the largest number of minority applicants.[60] The Court found that Title VII does not impose a duty on the employer to adopt a hiring procedure which maximizes hiring minority employees.[61] In *Board of Trustees of Keene State College v. Sweeney*,[62] the Supreme Court clarified the meaning of "articulating" a legitimate nondiscriminatory reason for an employment practice. The Court said this did not mean that the employer must "prove absence of discriminatory motive"[63] to meet its burden under Title VII.

Applying the *McDonnell Douglas* analysis to sex discrimination claims, the plaintiff must establish a prima facie case that persons of one sex are treated differently from similarly situated persons of the opposite sex and that no adequate explanation exists for the different treatment.[64] While the plaintiff retains

56. *Id.* at 804-05.
57. 427 U.S. 273 (1976).
58. *Id.* at 282 n.10.
59. 438 U.S. at 567 (1978).
60. *Id.* at 576-77.
61. *Id.* at 577-78.
62. 439 U.S. 24 (1978).
63. *Id.* at 25.
64. Golden v. Local 55, Int'l Ass'n of Firefighters, 633 F.2d 817, 821 (9th Cir. 1980).

the burden of persuasion, the burden of production shifts to the defendant employer to advance its reasons for treating male and female employees differently. The plaintiff must then show that the reasons were pretextual and that sex discrimination motivated the employment practice. Unlike disparate impact, the disparate treatment theory of Title VII requires proof of intent. The court will focus its inquiry on whether the employer premised the employment practices on sex. The motivation and intent of the employer will determine whether the articulated reasons for disparate treatment were pretextual.[65]

In *Laffey*, the District of Columbia Circuit defined the standard for intent.[66] The plaintiff in *Laffey* was a flight attendant who alleged sex discrimination under the disparate treatment theory. The employer admitted discriminatory treatment of female flight attendants vis-a-vis male pursers and that the disparate treatment was based on sex, but defended its conduct as unintentional. The court found that the Act requires only "a general intent to discriminate" and "prohibits any discriminatory practice which was not merely accidental."[67] If " 'the defendant meant to do what he did'—there is no burden to show additional discriminatory motivation in order to recover under Title VII."[68]

In *Sprogis v. United Air Lines, Inc.*,[69] a stewardess contested, under the disparate treatment theory, the airline's no-marriage rule because the rule did not apply to male stewards. The court held that the rule did not constitute a bona fide occupational qualification (BFOQ) under section 703(e)(1) of the Act and found for the plaintiff.[70] The court noted that even if only women occupied the position, the employer could not impose additional qualifications not imposed upon male employees unless "that requirement reflects an inherent quality reasonably neces-

65. *See* Teamsters v. United States, 431 U.S. 324, 335 n.15 (1976); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 (1973); B. SCHLEI & P. GROSSMAN, *supra* note 19, at 1153-54.

66. 567 F.2d at 454-55.

67. *Id.* (citing Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980, 995-97 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970)).

68. 567 F.2d at 455 (quoting Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980, 996 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970)).

69. 444 F.2d 1194 (7th Cir. 1971).

70. *Id.* at 1199.

sary to satisfactory performance of the duties of stewardesses . . . ."[71]

In summary, plaintiffs in flight attendant cases have argued sex discrimination under the disparate impact and disparate treatment theories. The disparate impact theory is less difficult for a plaintiff to prove upon showing a prima facie case. No evidence need be presented regarding the employer's intent. However, case history indicates that courts have largely disfavored this theory in challenges to flight attendant weight requirements. Courts are more receptive to arguments against weight requirements under the disparate treatment theory which requires the plaintiff to prove discriminatory intent.

C. The Court's Analysis

The Majority

The *Gerdom* plaintiffs alleged sex discrimination under both disparte impact and disparate treatment theories. The majority first considered the plaintiff's arguments that the airlines' weight policy adversely affected women under the *Griggs* and *Dothard* rationale and found the two cases inapplicable since defendant's weight requirements did not exclude women as a class from flight attendant positions. The majority referred to *Stroud v. Delta Air Lines, Inc.*[72] because, prior to 1972, the weight policy did not restrict employment opportunities for women inasmuch as only women were hired. The *Gerdom* court stated that some women were excluded, but only on the basis of weight.[73] Because the plaintiffs did not allege that the airlines enforced the requirements more strictly against female flight attendants than against male flight attendants, the majority affirmed the district court's dismissal of the adverse impact claim.[74]

The majority then turned to the disparate treatment allegation. The court noted that the airline could impose weight standards on its employees with different requirements for men and

71. *Id.*
72. 544 F.2d 892 (5th Cir.), *cert. denied*, 434 U.S. 844 (1977).
73. 648 F.2d at 1226.
74. *Id.* at 1227.

women, and relied on *Baker v. California Land Title Co.*,[75] a grooming standards case. The *Gerdom* court also referred to the decisions of other circuits which have reflected challenges to airline weight requirements to support its position.[76]

The plaintiffs alleged that the director of passenger services (DPS) and flight attendant positions were similarly situated. They pointed out that DPS was a predominantly male position subject to more lenient weight requirements which were more leniently enforced than were those for flight attendants. Plaintiffs argued that DPSs, like flight attendants, were inflight personnel, were exposed to a great amount of public contact, and often performed flight attendant duties.[77] The defendant argued that the positions differed in the amount of public contact involved and functions performed.[78] The majority concluded that plaintiffs had established a prima facie case that the DPS position was similar to that of the flight attendant, that one was predominantly male and the other predominantly female, and that the weight requirements for the jobs differed.[79] However, because the district court failed to consider the plaintiffs' disparate treatment argument, the majority remanded the case so that the lower court could resolve the remaining factual issues. The majority instructed the lower court to determine whether the duties between the two positions were so similar as to discredit any reason for disparate treatment in their weight requirements.[80]

The Dissent

Initially, the dissent agreed that the plaintiffs had shown a prima facie case of discrimination.[81] The dissent, however, disagreed with the majority's decision to remand the disparate

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75. 507 F.2d 895 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046 (1975).

76. 648 F.2d at 1227. The majority also reversed the district court on the issue of class certification. It found that the lower court abused its discretion in refusing to certify a class of flight attendants who had been terminated or suspended for violating defendant's weight requirement. *Id.* at 1228. This issue was not in controversy and will not be discussed further in this Note.

77. *Id.* at 1227.

78. *Id.* at 1227-28. The defendant also contended that DPS was a management position while flight attendant was not.

79. *Id.* at 1228.

80. *Id.*

81. *Id.* at 1229 (Schroeder, J., concurring in part, dissenting in part).

treatment issue because the defendant had had ample opportunity to justify its weight policy and the litigation was already too protracted.[82] Second, the dissent disagreed with the majority's approval of *Stroud*, a decision which the dissent found needlessly burdens the plaintiff who works in a segregated job.[83]

The dissent pointed out that the defendant imposed weight requirements on women but not on men, even though both served passengers during flights. As a result, women faced embarrassing weigh-ins, debilitating diets and reprisals for attempting to file suit. The dissent stated the weight requirements bore no relation to ability to perform as a flight attendant and that the airlines took no disciplinary action against male flight attendants who exceeded their weight limits.[84]

The dissent rejected the notion that the airlines imposed functionally similar grooming requirements on both men and women, as was the case in *Baker*.[85] The dissent criticized the defendant's justifications for its weight policy. The defendant asserted that the weight policy was a business judgment which furthered the corporate image. Men were exempted because they would advance to management rather than service positions. The dissent believed the defendant's explanation served only to highlight its discriminatory practices.[86]

According to the dissent, the airline industry has historically exploited female sex appeal and discriminated against women on the basis of sex. The dissent pointed to such past discriminatory practices against female flight attendants as mandatory retirement at age thirty-two or thirty-five and the no-marriage rule.[87] Such a history of discrimination made suspect any business necessity argument raised by the employer.[88]

The dissent also took issue with the majority's conclusion that the weight restrictions did not adversely affect women. In effect, the majority found the suspension or termination of em-

82. *Id.* at 1229-30.
83. *Id.* at 1229.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*

ployment was not adverse.[89] The dissent pointed out that the *Stroud* approach would only preclude plaintiffs in segregated job classifications from proving a prima facie case of discrimination. To prevent such a harsh result, the dissent proposed a new theory: Whenever an employment requirement is applied to a segregated job classification and not to other employees, a prima facie finding of discrimination should be found under either disparate treatment or disparate impact analysis.[90] The dissent then adopted the rationale of the *Sprogis*[91] court that if the employer imposed an additional qualification upon one sex, that requirement would be valid only if it was reasonably necessary to perform the duties of the position in question.[92] Under this proposed theory, the dissent believed the plaintiffs had proved their case.

D. CRITIQUE

Based on case law, the majority's decision to affirm the dismissal of plaintiffs' disparate impact claim was correct. While the dissent took issue with this point, there is little to support that position.

The majority mentioned the Fifth Circuit's *Stroud* decision in its opinion, although the disposition of the case shows less than a wholehearted approval of *Stroud*. By considering the disparate treatment claim, the Ninth Circuit has departed from *Stroud*. The *Stroud* court ignored that aspect of the case before it. Although there were no male flight attendants while Stroud was employed, men in other job classes were excluded from the marriage restriction. Yet, the court ignored this disparate treatment issue in its decision and held simply that because no men were in the flight attendant field, no barrier to women's employment existed. Therefore, the discrimination was based on marital status, not sex. On the other hand, the *Gerdom* court looked to the fact that men in other job classes, specifically the DPS, were excluded from the employer's weight requirements. There-

89. *Id.* at 1230.
90. *Id.*
91. 444 F.2d at 1194.
92. *Id.* at 1199.

fore, the *Gerdom* plaintiffs will be allowed the opportunity to prove their case under this theory, which the plaintiff in *Stroud* was not.

The dissent's criticism of *Stroud* is well taken in one other respect. The *Stroud* court ignored the fact that the right to marriage is a fundamental right. Under the grooming standards cases, such as the Fifth's Circuit's *Willingham* decision, the restriction against marriage presents a likely violation of Title VII which the *Gerdom* court failed to address.

The dissent raised a valid point which, fortunately, the Ninth Circuit was not forced to face in this case. Employees in segregated jobs where the employer imposes an unlawful employment restriction will find it almost impossible to present a prima facie case of discrimination under the present theoretical framework of Title VII. Their claims will not fit the disparate impact theory, in part because they will be unable to show a barrier to employment opportunities. Nor will their claims fit the disparate treatment theory because they will be unable to point to others similarly situated who are not similarly treated. As the dissent warned, the unfortunate effect could be to motivate the employer to segregate the work force. The dissent has suggested an inviting standard to resolve such a dilemma: Whenever an employer applies a rule only to employees in a sex-segregated job classification, a prima facie case of discrimination has been shown. To date, no court has adopted this standard. Although the dissent pointed to *Sprogis* to illustrate a case using this standard, the *Sprogis* court decided that dispute under the disparate treatment theory. In *Sprogis*, similarly situated men and women were treated differently because of their gender. Furthermore, the *Sprogis* court dealt with an issue affecting a fundamental right—the right of marriage.

In sum, the majority's decision agrees with the present state of the law on flight attendant weight restriction and may even be more liberal in terms of considering issues that other courts have ignored. The dissent may point the way for a new standard or theory under Title VII which would resolve the dilemma where segregated classes exist and suffer discriminatory practices, but are unable to establish prima facie cases within the

present theoretical framework of Title VII.

Jacqueline Martinez

V. OTHER DEVELOPMENTS IN CONSTITUTIONAL LAW

In other cases decided by the Ninth Circuit, the court refused to disturb a Naval regulation which provides for discharge solely on a person's sexual preference, required that verdicts from a bench trial be facially consistent, and allowed commercial pilots with a prior history of alcholism to qualify to fly.

A. Homosexual Discrimination Upheld

In *Beller v. Middendorf*,[1] the Ninth Circuit upheld Navy regulations which discharge persons solely on the basis of homosexual activity.[2] When confronted with evidence gathered by the military, plaintiffs[3] admitted their homosexuality.[4] Subsequently, the Navy convened administrative discharge boards and discharged plaintiffs.[5] Plaintiffs received honorable military discharges, although their military files state they are unfit for military service and ineligible for reenlistment.[6] Plaintiffs challenged the discharge in the district court and, on appeal, asserted a fifth amendment denial of due process claim.[7] The Ninth Circuit upheld the challenged regulations based on the special needs of the military.[8]

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1. 632 F.2d 788 (9th Cir. 1980) (per Kennedy, J; the other panel members were Browning, J. and Christensen, D.J., sitting by designation), *cert. denied*, 101 S. Ct. 3030, *rehearing, rehearing en banc denied*, 647 F.2d 80 (1981).

2. The Naval Personnel Manual provides in relevant part: "Members may be recommended for discharge by reason of unfitness for: . . . (e) Homosexual acts. Processing for discharge is mandatory. . . ." 632 F.2d at 803 n.11 (citing Bupersman 3420220).

3. *Beller* is the consolidation of three cases: Beller v. Middendorf, Miller v. Rumsfield and Saal v. Middendorf. Saal was stationed at Alameda Naval Air Station, and was discharged for having a homosexual affair with another enlisted person stationed at Alameda Naval Air Station. 632 F.2d at 792-93. Miller was stationed at Alameda Naval Air Station aboard the USS Oriskany. He was discharged for engaging in homosexual acts with two Taiwanese nationals while stationed in Taiwan. *Id.* at 793-94. Beller was discharged after his homosexuality was discovered during an investigation conducted for the purpose of raising Beller's security clearance. *Id.* at 794-95.

4. *Id.* at 793, 795.

5. *Id.* at 806.

6. *Id.* at 806-07. Two of the three plaintiffs have not tried to reenlist. The third, however, applied for and was denied reenlistment. *Id.*

7. *Id.* at 807.

8. *Id.* at 812.

The court first disposed of issues raised by the Navy concerning lack of subject matter jurisdiction,[9] mootness,[10] and failure to exhaust administrative remedies.[11] Having determined that plaintiffs claims were properly before the court, the *Beller* panel applied the procedural and substantive due process analyses to determine whether the Navy regulation violated plaintiffs fifth amendment rights.

Procedural due process requires the Navy not to deprive plaintiffs of a property or liberty interest without proper proceedings.[12] The court dismissed the plaintiffs' property interest claim[13] which was based on the Naval policy that homosexual activity is cause for discharge. Plaintiffs' admissions that they engaged in homosexual acts extinguished any reasonable expectations of continued employment they may have had.[14] The court found the question of plaintiffs' loss of a liberty interest more difficult.[15] In resolving the issue, it was determinative that the plaintiffs admitted their homosexual acts, and that plaintiffs had the opportunity to introduce evidence to support their arguments that the Secretary should exercise his discretion to retain

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9. The court found district court jurisdiction to hear the cases based on 28 U.S.C. § 1331 (1976). 632 F.2d at 795. The Ninth Circuit also decided that the amount in controversy was not essential to the district court's jurisdiction since the suit was brought against an officer of the United States acting within his official capacity. *Id.*

The Navy raised the issue of soveriegn immunity, but the court disposed of the issue under 5 U.S.C. § 702 (1976). Section 702 allows suits against the United States, provided that any resulting injunctive decree or order specifies the federal officer or officers personally responsible for compliance. 632 F.2d at 796-97.

10. The court dismissed the Navy's contention that the appeals were moot and pointed out that plaintiffs claims of stigmatization and potential employment difficulties are continuing damages, hence valid to litigate, despite the expiration of plaintiffs' enlistment terms. 632 F.2d at 800.

11. To support this contention, the Navy cited Champagne v. Schlesinger, 506 F.2d 979 (7th Cir. 1974), where the court required a person to appeal to the Board of Correction of Naval Records before contesting his denial of reenlistment in district court. *Id.* at 984. The *Beller* court avoided dealing with this squarely by reasoning that *Champagne* dealt with reenlistment, while the instant case concerned discharges. 632 F.2d at 801. The court stated that the Ninth Circuit has not required total exhaustion of administrative remedies before challenging regulations on constitutional grounds. *Id.* (citing Glines v. Wade, 586 F.2d 675 (9th Cir. 1978), *rev'd on other grounds sub nom.* Brown v. Glines, 440 U.S. 957 (1980); Downen v. Warner, 418 F.2d 642 (9th Cir. 1973)).

12. 632 F.2d at 805. *See* Board of Regents v. Roth, 408 U.S. 564 (1972).

13. The property interest in question was wages.

14. 632 F.2d at 805.

15. *Id.* at 805-06. Apparently, a deprivation of liberty could be presumed if the Navy's charges were false, made public, and followed by discharge. *Id.* at 806.

them.[16] The court concluded the plaintiffs' liberty interests were protected by the hearings they received.[17]

Addressing the substantive due process issue, the court declined to consider the plaintiffs' claim that homosexual conduct is protected as an aspect of the fundamental right of privacy.[18] Since plaintiffs' claim was based on a deprivation of substantive due process, not on denial of equal protection,[19] the Ninth Circuit scrutinized the regulation by employing a balancing test.[20] The court relied on recent Supreme Court decisions involving substantive due process to support this approach.[21]

The *Beller* court's due process scrutiny of the regulation involved a "balancing of the nature of the individual interests allegedly infringed, the importance of the government interests furthered, the degree of infringement, and the sensitivity of the government entity responsibile for the regulation to more carefully tailored alternative means of achieving its goals."[22] The court compared the substantive due process analysis to the lowest tier of equal protection scrutiny in cases where conduct not protected as a fundamental right is subject to government regulations.[23] In such cases, the court explained, "[a] rational relation to a legitimate government interest will normally suffice to uphold the regulation."[24] However, where the government regu-

16. *Id.* The court relied on the reasoning of Codd v. Velger, 429 U.S. 624 (1977).

17. Plaintiffs argued that they received the stigma of "unfitness" for retention without a hearing on the issue. However, the court rejected this contention because

> [t]he mere fact of discharge from a government position does not deprive a person of a liberty interest. The real stigma imposed by the Navy's action, moreover, is the charge of homosexuality, not the fact of discharge or some implied statement that the individual is not sufficiently needed to be retained.

632 F.2d at 806 (citations omitted).

18. The court conceded that if the right to engage in homosexual conduct is a fundamental right, such conduct would be "subject to prohibition only to further compelling state interests and . . . the . . . burden imposed by the regulation must be a necessary, or the least restrictive way to promote those interests." *Id.* at 807.

19. *Id.*

20. *Id.*

21. Zablocki v. Redhail, 434 U.S. 374, 396 (1978) (Stewart, J., concurring in the judgment) (citing Williams v. Illinois, 399 U.S. 235 (1970) (Harlan, J., concurring in the result)); Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977) (plurality opinion), *cited in Beller*, 632 F.2d at 807.

22. 632 F.2d at 807.

23. *Id.* at 807-08.

24. *Id.* at 808.

lation "seriously intrudes into matters which lie at the core of interests which deserve due process protection, then the compelling state interest test employed in equal protection cases may be used by the Court to describe the appropriate due process analysis."[25] The court concluded that this case lay somewhere between the two standards.[26]

The panel acknowledged the substantial academic support for the argument that the choice to engage in homosexual action is a personal decision entitled to recognition as an aspect of an individual's fundamental right of privacy,[27] but cited substantial authority to the contrary.[28] Although the court conceded that some kinds of government regulation of private consensual homosexual behavior may face substantial constitutional challenge,[29] it distinguished *Beller* on the ground that it involved military regulations prohibiting personnel from engaging in homosexual conduct while in the service.[30]

An assessment of the military regulations was required because the military is " 'by necessity, a specialized society separate from civilian society.' "[31] The court concluded that the importance of the government interests furthered by the regulations outweigh "whatever heightened solicitude is appropriate for consensual private homosexual conduct."[32] The nature of the employer was "crucial" to its decision.[33] The court explained that although one does not surrender constitutional rights upon entering the military, such rights must be viewed in light of the special circumstances and needs of the armed

25. *Id.*

26. *Id.* at 809.

27. *Id. See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-13 (1978); Comment, *Out of the Closet, Out of a Job: Due Process in Teacher Disqualification*, 6 HASTINGS CONST. L.Q. 663 (1979); Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct*, 72 MICH. L. REV. 1613 (1974).

28. 632 F.2d at 809-10. *See, e.g.*, Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976).

29. 632 F.2d at 810.

30. *Id.* The court contrasted cases involving military regulations with cases where the state, through its criminal process, coerces persons to comply with moral precepts even when they involve private acts of consenting adults. *Id.*

31. *Id.* (quoting Parker v. Levy, 417 U.S. 733, 743 (1974)).

32. 632 F.2d at 810.

33. *Id.*

forces.[34] Therefore, regulations which might infringe upon constitutional rights in other contexts may survive scrutiny because of military necessities.[35]

Among the grounds cited by the court as support for the Navy regulation are: protecting the fabric of military life, preserving the integrity of the recruiting process, maintaining discipline of personnel in active service, and insuring the acceptance of military personnel abroad.[36] In addition, the Navy "could conclude rationally that toleration of homosexual conduct . . . might be understood as tacit approval."[37] Finally, the court concluded that although the rule might be broader than necessary to accomplish some of its goals, in view of the importance of the military's role, and the special need for discipline and order in the service, the regulation represented a reasonable effort to accommodate the needs of the government as well as the interests of the individual.

The opinion reflects unwarranted deference to the military. The panel's acceptance of the Navy's alleged interests in preserving the integrity of the recruiting process, maintaining discipline among active duty personnel, and insuring the acceptance of military personnel abroad, are particularly suspect. The business of the Navy is to fight or be prepared to fight wars. The accomplishment of this mission does not entail the foisting of the Navy's views of morality on its members or the protection of the sensibilities of foreign nationals. Nor was the panel persuasive in arguing, not that *public* conduct might impinge on recruitment, discipline, and public image, but that *private*, consensual acts were so destructive as to warrant arbitrary and automatic discharge.

The opinion is an inflexible acceptance of intolerance of the sort that could not withstand judicial scrutiny were it based on race or sex. Even if the Navy's interests were legitimate, it is difficult to see how they can survive either the strict scrutiny applicable to a fundamental right or the heightened scrutiny

34. *Id.*
35. *Id.* at 810-11.
36. *Id.* at 811.
37. *Id.*

used by the *Beller* panel.[38]

B. The Fourteenth Amendment Proscribes Facially Inconsistent Verdicts From a Bench Trial

In *United States v. Duz-Mor Diagnostic Laboratory, Inc.*,[39] the Ninth Circuit held that the due process clause of the fourteenth amendment proscribes facially inconsistent verdicts from a bench trial in a criminal prosecution unless the trial court demonstrates by appropriate findings that the conviction validly rests on a rational basis. The trial judge convicted the defendant corporation of Medicare and Medi-Cal fraud. However, it dismissed the indictment of Irigene Morehead, president of the defendant corporation, who, with her husband, owned all the shares of the corporation. On appeal, defendant challenged the constitutionality of the inconsistent verdicts when the only evidence of culpability applied equally to both it and its president.[40]

In resolving this issue, the Ninth Circuit first noted that the Second Circuit, in *Rivera v. Harris*,[41] confronted a similar question. In *Rivera*, three defendants faced criminal charges.[42] At trial, the prosecution presented evidence that all three defendants took part in the criminal acts. The defense called as its

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38. *See* order denying rehearing, 647 F.2d 80 (1981) (Norris and Boochever, J.J., dissenting).

Judge Norris dissented from the court's rejection of the suggestion for rehearing en banc. He argued that (1) the *Beller* panel seriously misconstrued the proper methodology of substantive due process analysis; (2) the question of whether private consensual homosexual activity is protected as an aspect of the fundamental right of privacy, though "avoided" by the *Beller* panel, is "crucial" to the proper due process analysis; and (3) the Navy's justification for the regulation are so "wholly inadequate" that the regulation is unconstitutional. *Id.* at 80-88.

Judge Boochever concurred in part with the Norris dissent. He stated: "Assuming that the Navy's professed interests are legitimate they cannot survive either the strict scrutiny test applicable to fundamental rights or the "heightened solicitude" test used by the *Beller* panel. *Id.* at 80.

39. 650 F.2d 233 (9th Cir. 1981) (per Goodwin, J.; the other panel members were Schroeder, J. and East, D.J., sitting by designation).

40. Evidence implicating defendant and Morehead included a tape-recorded conversation between an undercover agent and Morehead concerning an allegedly illegal kickback agreement. The trial judge heard the tapes before granting Morehead's motion to dismiss and denying an identical motion by defendant corporation. *Id.* at 225.

41. 643 F.2d 86 (2d Cir. 1981).

42. The three defendants faced five charges each. The trial judge acquitted all three defendants on two of those charges. *Id.* at 89. The remaining three led to the constitutional challenge.

only witness one defendant who testified that all three defendants were innocent.[43] The trial judge, hearing the case without a jury, convicted two of the three defendants and acquitted the third. The Second Circuit reversed and remanded the decision based on the fact that the facially inconsistent verdicts constituted a prima facie case of denial of due process.[44]

The Ninth Circuit noted that other circuits are split over the issue of inconsistent verdicts from bench trials.[45] The court, however, found the question open within this circuit and adopted the *Rivera* approach.[46]

C. Prior Alcoholism: No Automatic Bar to FAA Flight Qualification

In *Jensen v. Administrator of Federal Aviation Administration*,[47] the Ninth Circuit invalidated Federal Aviation Administration (FAA) regulations[48] which disqualified all persons with a history of alcoholism from obtaining medical certificates required for a commercial pilot's license.[49]

Jensen, who holds a lifetime commercial pilot certificate,

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43. *Id.* at 88-89.

44. *Id.* at 98.

45. 650 F.2d at 225-26. The court distinguished *Duz-Mor* from two earlier Ninth Circuit cases which affirmed inconsistent verdicts. McElheny v. United States, 146 F.2d 932 (9th Cir. 1944), involved inconsistencies between multiple counts of an indictment as opposed to that between verdicts of multiple defendants. In United States v. Zamora-Corona, 465 F.2d 427 (9th Cir. 1972), the court never reached the issue of inconsistent verdicts because it concluded that the verdicts were not necessarily inconsistent.

The *Duz-Mor* court also noted that in United States v. West, 549 F.2d 545, 553 (8th Cir.), *cert. denied*, 430 U.S. 956 (1977), the Eighth Circuit sustained inconsistent verdicts on multiple counts of an indictment.

46. 650 F.2d at 226-27. The court permits inconsistent verdicts in jury trials because individual jurors may disagree in assessing evidence and courts dislike invading the jurors decision-making province. *Id.* at 226. In bench trials, however, neither factor comes into play and the judge must rule consistently. *Id.*

The *Duz-Mor* court also noted that this case involved a dismissal whereas in *Rivera* there was an acquittal. However, to distinguish the two cases on that basis would "make this case turn upon the formal point that inconsistent substance can be overlooked when erroneous form was employed." *Id.* at 227 n.4. Consequently, the court extended the *Rivera* approach to dismissals.

47. 641 F.2d 797 (9th Cir. 1981) (per Solomon, D.J., sitting by designation; the other panel members were Fletcher, J. and Trask, J., dissenting).

48. 14 C.F.R. §§ 67.15, 67.17 (1980).

49. FAA regulations require commercial pilots to have both an FAA commercial pilot certificate and a second-class medical certificate. 641 F.2d at 798.

applied to the FAA for recertification of his second-class medical certificate. He disclosed his history of alcoholism, but asserted he was fully cured. The FAA denied his application without a hearing under FAA regulations which automatically disqualify all prior alcoholics from obtaining medical certificates. The denial was affirmed by the National Transportation Safety Board (NTSB).[50]

The majority applied provisions of the Comprehensive Alcohol Abuse and Alcohol Prevention, Treatment, and Rehabilitation Act of 1970 (the Alcoholism Act),[51] which prohibits the denial of jobs and privileges to reformed alcoholics solely because of their history of alcoholism.[52] The FAA argued that certificates were not denied solely on the grounds of prior alcoholism since the FAA administration had discretion to grant an exemption from the rule if it would be "in the public interest" and "would not adversely affect safety."[53] The majority rejected this contention, finding that exemption from the rule, at the Administrator's discretion, could not cure the direct conflict between the disqualifying regulations and the Alcoholism Act.[54] In addition, the exemption procedures did not comport with due process.[55] The *Jensen* court concluded that, although the challenged disqualifying regulations were held valid, the FAA may still consider alcoholism a problem in its certification process, albeit on a case-by-case basis.[56]

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50. *Id.*

51. 42 U.S.C. § 4561(c)(1) (1976). This section provides in part: "No person may be denied or deprived of Federal civilian or other employment or a Federal professional or other license or right solely on the grounds of prior alcohol abuse or prior alcoholism."

52. 641 F.2d at 798.

53. *Id.* at 799. The FAA based its argument on 14 C.F.R. § 11.27(e) (1980) which provides that "[i]f the Administrator determines, after consideration of any comments received in response to a summary of a petition for exemption, that the petition is in the public interest, the Administrator [may grant] the exemption."

54. 641 F.2d at 799.

55. In reaching this conclusion, the majority found it determinative that the FAA need not grant an applicant a hearing before passing on the application, and that the decisions were reviewable under the "arbitrary and capricious standard." *Id. See* Keating v. FAA, 610 F.2d 611 (9th Cir. 1979). In addition, the court explained that due process requires, for a meaningful review of an agency decision, that the agency must have articulated standards governing its determinations. In the instant case, the FAA standard did not give the court sufficient basis for review. 641 F.2d at 799.

56. 641 F.2d at 799. Inquiries into the effect of prior alcoholism under 14 C.F.R. § 67.15(d)(ii) (1980) would comply with the Alcoholism Act, according to the court, because jobs and privileges will not be denied to reformed alcoholics solely because of their history of Alcoholism. 14 C.F.R. § 67.15(d)(ii) (1980) provides that an applicant must

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establish that he has:

> [n]o other personality disorder, neurosis, or mental condition that the Federal Air Surgeon finds—
>
> (a) Makes the applicant unable to safely perform the duties or exercise the privileges of the airman certificate that he holds or for which he is applying . . . and the findings are based on the case history and appropriate, qualified, medical judgment relating to the condition involved.