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Is Title VII's Reasonable Accommodations Requirement a Law Respecting an Establishment of Religion

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IS TITLE VII'S REASONABLE ACCOMMODATIONS REQUIREMENT A LAW "RESPECTING AN ESTABLISHMENT OF RELIGION"?

I. Introduction

In July 1967, the Equal Employment Opportunity Commission (EEOC) issued revised guidelines on religious discrimination.[1] Like the previous guidelines, the new ones, contained in § 1605.1, expressed the Commission's view that the duty not to discriminate on religious grounds encompassed an obligation on the part of the employer to make an effort to accommodate the religious needs of his employees. The EEOC was specifically concerned about employees who refused to work certain days for religious reasons. The 1966 guidelines had maintained that an employer had the right to establish a normal work schedule, even though it did not uniformly affect the religious practices of all employees. This meant, for example, that an employer who closed his business on Sunday was not discriminating merely because he required all his employees to be available for work on Saturday.[2] The 1967 revision omitted this language, and placed upon the employer the burden of showing that a reasonable accommodation had been made.

Judicial opinions questioned the validity of the EEOC's new interpretation of the Civil Rights Act of 1964. It was argued that the guidelines were inconsistent with the purpose of the Act, since Congress had intended to regulate only discriminatory practices, and failure to make accommodations was not a discriminatory practice.[3] Congress clarified its intention in 1972 when it added the following definition to the 1964 Act:

> (j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.[4]

The potential impact of this section is substantial. It may mean that an employer must attempt to negotiate a new arrangement with a union where the present employment contract requires scheduling a worker for the days objected to on religious grounds.[5] It may mean that an employer must violate a labor contract by assigning more senior employees to Saturday work.[6] The language "all aspects of religious observance and practice, as well as belief" is broad enough to protect employees who object to making particular products, or to

1 29 C.F.R. § 1605.1 (1973).
2 31 Fed. Reg. 8370 (1966).
3 Dewey v. Reynolds Metals Co., 429 F.2d 324, 334 (6th Cir. 1970) (dictum), *aff'd mem. by an equally divided Court*, 402 U.S. 689 (1971); *see* Riley v. Bendix Corp., 330 F. Supp. 583 (M.D. Fla. 1971), *rev'd*, 464 F.2d 1113 (5th Cir. 1972).
4 42 U.S.C. § 2000e-(j) (Supp. II, 1972), *amending* 42 U.S.C. § 2000e (1970).
5 *See* Claybaugh v. Pacific Northwest Bell Tel. Co., 355 F. Supp. 1 (D. Ore. 1973).
6 *See* Scott v. Southern Cal. Gas Co., 7 Fair Emp. Prac. Cas. 1030 (C.D. Cal. 1973).

shaving, or to joining a union in a closed shop.[7] The validity and effect of this requirement is therefore of interest to private employers.

The section was constitutionally challenged in *Cummins v. Parker Seal Co.*[8] After the Parker Seal Company discharged Paul Cummins for failure to work scheduled Saturdays, he filed a complaint alleging religious discrimination. Cummins claimed the protection of the reasonable accommodations requirement, since he had religious reasons for refusing Saturday work. The Sixth Circuit reversed the lower court decision against Cummins, holding that the reasonable accommodations requirement did not violate the establishment clause, and that the company had failed to show that it had met its obligation. The majority argued that the section merely "put teeth in the existing prohibition against religious discrimination."[9]

While the Supreme Court has not addressed this specific question, there is a substantial body of decisions dealing with other establishment clause challenges. The Court has developed well-recognized guidelines for evaluating such questions. To survive this objection a statute must: (a) avoid excessive entanglement between government and religion; (b) have a secular legislative purpose; and (c) have a principal or primary effect which is neutral regarding religion.[10] Applying these standards to the reasonable accommodations requirement, the following conclusions appear justified. First, the requirement does not threaten excessive entanglement since it causes only minimal church-state contact. Second, the purpose behind the requirement is constitutionally questionable since its sponsor was primarily concerned with the plight of certain religious organizations. Third, whatever its purpose, it results in government-enforced preferential treatment of certain groups on religious grounds which is not necessary to preserve the right to free exercise. This effect is impermissible under the decided cases, and therefore the constitutionality of the accommodations requirement is doubtful.

II. Excessive Entanglement

A law which fosters excessive entanglement between government and religion violates the establishment clause regardless of its purpose and effect.[11] The Court has found this objectionable entanglement in two contexts. Administrative entanglement, the first, occurs when a state program produces continuing, comprehensive, and discriminating contact between government and religious organizations. The second form of entanglement, potential political disruption, results when legislation threatens to divide the voters in states or local communities along religious lines, especially if the disruption arises annually due to the need for continued legislative appropriations. Analysis of the judicial opinions in this area indicates that the reasonable accommodations requirement does not have these effects.

7 Cummins v. Parker Seal Co., 516 F.2d 544, 559 (6th Cir. 1975) (dissenting opinion).
8 *Id.*
9 *Id.* at 552.
10 Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).
11 *Id.* at 613.

A. *Administrative Entanglement*

The Court first discussed administrative entanglement when it upheld state property tax exemptions for religious organizations in *Walz v. Tax Commission*.[12] The majority emphasized that state taxation and the confrontation which would result from tax valuation of church property, tax liens, and tax foreclosures would involve greater church-state entanglement than a general property tax exemption.[13]

The first programs struck down because of excessive entanglement were two state plans to aid nonpublic schools, which the Court invalidated in *Lemon v. Kurtzman*.[14] The constitutional objection to the plans was based in part upon the provision for state examination of the accounting records of religious organizations designed to distinguish religious from secular expenditures. Chief Justice Burger warned that such surveillance and control measures were inherent in government subsidy programs and resulted in "an intimate and continuing relationship between church and state."[15] Other state schemes to aid nonpublic schools have been declared fatally flawed for similar reasons.[16]

Not all government involvement in financing results is excessive entanglement. The Court upheld federal construction grants to church-related colleges and universities in *Tilton v. Richardson*.[17] The plurality opinion there argued that since these grants were given but once for a single purpose, entanglement was reduced. There was no need for continuing government separation of religious from secular expenditures, no annual audits were required, and no continuing financial relationship was established.[18]

The reasonable accommodation requirement, codified as 42 U.S.C. § 2000e-(j), does not involve government in the financial affairs of religion. Government makes no payment to any religious institutions; thus no government financial surveillance is necessary. In fact, government and religious organizations would come into contact, if at all, only in the courtroom. This might become necessary if a plaintiff claimed the protection of § 2000e-(j), and the question was raised whether the alleged belief was "religious" within the meaning of the law. Testimony would then be necessary to establish the religious nature of the belief.

The dissent in *Cummins* suggested that government inquiry into the religious nature of an employee's belief might result in excessive entanglement.[19] This objection is not well-based in either the decided cases or logic. The Court has decided numerous cases which necessitate determining whether a belief is

12 397 U.S. 664 (1970).
13 *Id.* at 674.
14 403 U.S. 602 (1971).
15 *Id.* at 622.
16 Meek v. Pittinger, 421 U.S. 349 (1975); Public Funds for Pub. Schools Inc. v. Marburger, 358 F. Supp. 29 (D.N.J. 1973) (alternative holding), *aff'd mem.*, 417 U.S. 961 (1974).
17 403 U.S. 672 (1971).
18 *Id.* at 688.
19 516 F.2d 544, 559 (6th Cir. 1975).

religious. In *Sherbert v. Verner*,[20] South Carolina was barred from denying unemployment compensation benefits to a worker who refused available employment because it involved working on the Sabbath, which her religion prohibited. There is, however, nothing in that decision to prevent the state from withholding benefits from workers who refuse suitable employment for secular reasons. The Court implicitly recognized the possible necessity of a judicial determination of the character of the worker's belief, since only a religious motivation would justify refusing employment. A similar determination is implicit in *Wisconsin v. Yoder*.[21] There, the state's interest in compulsory education was compelled on free exercise grounds to accommodate the religious tenets of the Amish. Since no accommodation is necessary if the conflicting belief is not religious, these cases argue against the contention that a judicial characterization of the nature of a belief involves excessive government entanglement.

Furthermore, the logical result of the dissent's contention would preclude enforcement of any congressional legislation prohibiting religious discrimination. Unless a court was required to accept the aggrieved party's characterization of his own belief, all litigation on the issue would involve excessive entanglement. If courts attempted to determine the nature of a belief, then the establishment clause would be violated; but if the evaluation were precluded, then any belief which a party chose to term "religious" would be entitled to protection. Thus the argument that courts cannot constitutionally determine if a belief is religious proves too much.

B. *Potential Political Divisiveness*

The Court has repeatedly cautioned that state and local political activity engendered by legislation such as aid programs for nonpublic schools is a potential hazard to the normal political process.[22] It tends to divide the electorate along religious lines and therefore to "confuse and obscure other issues of great urgency."[23] And the divisions which result from initially securing the passage of the initial legislation are deepened when annual appropriations are necessary. The first amendment was intended to guard against this danger.[24]

Section 2000e-(j) does not foster this political divisiveness. It does not require additional annual appropriations, since enforcement is vested primarily with the EEOC, a pre-existing, funded body with considerable responsibilities beyond § 2000e-(j).[25] Furthermore, the Court has never sustained this objection to federal legislation, since the danger apparently is greater at the state and local levels. Therefore, the reasonable accommodations requirement has little potential for causing political divisions along religious lines.

Entanglement, however, is only one of three obstacles which the reason-

20 374 U.S. 398 (1963).
21 406 U.S. 205 (1972).
22 Meek v. Pittinger, 421 U.S. 349 (1975); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971).
23 Lemon v. Kurtzman, 403 U.S. 602, 622-23 (1971).
24 *Id.*
25 42 U.S.C. § 2000e-5 (1970), *as amended*, 42 U.S.C. § 2000e-5(a)-(g) (Supp. II, 1972).

able accommodations requirement must overcome to withstand a constitutional challenge. Since it does not involve administrative and political entanglement, discussion must turn to its legislative history to determine if it is supported by the necessary secular legislative purpose.[26]

III. Legislative Purpose

The legislative history of § 2000e-(j), when viewed in light of the decided cases, supports two conclusions: (1) the sponsor of the amendment was principally concerned with easing the problems of members of Sabbatarian religious sects who were forced to choose between employment and observation of the Sabbath according to the tenets of their faith; (2) his religious concern alone is probably insufficient to require the invalidation of the law.

Section 2000e-(j) did not evoke extended legislative comment. It was added on the floor of the Senate by West Virginia Senator Jennings Randolph.[27] *The Congressional Record* gives a clear indication of his intention, but is silent as to the purpose of other legislators.

Senator Randolph clearly intended to require at least that employers show that they made or attempted to make a reasonable accommodation of the employee's religious practice in order to justify the discharge of or failure to hire an employee or potential employee who, for religious reasons, could not work times scheduled by the employer.[28] The Senator's remarks show special concern for the diminishing membership in some religious organizations.

> [T]here has been a partial refusal at times on the part of employers to hire or to continue in employment employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days. So there has been, because of understandable pressures, such as commitments of a family nature and otherwise, a dwindling of the membership of some of the religious organizations because of the situation to which I have just directed attention.[29]

Any remaining doubt as to Senator Randolph's intention is dispelled by examining the cases included in the extention of his remarks in light of his belief that judicial implementation of first amendment freedoms had been inadequate. He prefaced his speech to the Senate with the assertion that although freedom from religious discrimination has been considered a fundamental right, "our courts have on occasion determined that this freedom is nebulous."[30] Following his address, the Senator included the text of two federal court decisions.[31] Each decision rejected the plaintiff's claim that the employer was in violation of the Civil Rights Act of 1964 because he had failed to accommodate the religious

26 Meek v. Pittinger, 421 U.S. 349, 359 (1975); Epperson v. Arkansas, 393 U.S. 97, 107 (1968).
27 118 CONG. REC. 705-31 (1972) (remarks of Senator Randolph).
28 *Id.* at 706.
29 *Id.* at 705.
30 *Id.*
31 *Id.* at 706-13.

practice of the plaintiff. Both courts argued that Congress did not intend that reasonable accommodations be required, and therefore failure to do so was not contrary to the Act.[32] It is clear that Senator Randolph added this section precisely to show that Congress did intend to place this burden on employers.

Senator Randolph's purpose in adding the section may not by itself cause invalidation of the amendment.[33] While it is true that lack of a secular legislative purpose is theoretically fatal, the Court has seldom relied on the legislative purpose to strike down a challenged law. Indeed, the Court seemingly indulges every presumption that the legislative purpose was proper. In the Sunday closing law cases,[34] the Court held that the legislative purpose was valid in providing for a uniform day of rest. It reached this conclusion in spite of the historical connection between Sunday closing laws and religious observances, and the fact that one section of one law was cloaked in terms of "profain[ing] the Lord's day."[35] In upholding state property tax exemptions granted religious organizations, the Court approved the broad legislative objective of avoiding inhibiting "certain entities that exist in a harmonious relationship with the community at large."[36] Even several programs to aid nonpublic schools, although held unconstitutional on other grounds, were recognized as having valid secular purposes, i.e., advancement of secular education, promotion of pluralism and diversity, concern about overcrowding in public schools should nonpublic schools fail, and preservation of a safe and healthy educational environment for all schoolchildren.[37] Only the prohibition against teaching the theory of evolution in *Epperson v. Arkansas*[38] and the prayer in public school case of *Abington School District v. Schempp*[39] were invalidated because of an impermissible legislative purpose. Add to this general legislative deference the fact that the intention of the 434 other legislators is unknown, and it is doubtful that Senator Randolph's intention alone would necessitate the invalidation of the law.

The reasonable accommodation requirement, then, is likely to avoid censure on either excessive entanglement or legislative purpose grounds. The final question is whether its principal or primary effect can withstand the challenge of the first amendment.

IV. Principal Effect

Even a law supported by a secular legislative purpose violates the establishment clause if its primary or principal effect is the advancement of religion.[40]

32 Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970); Riley v. Bendix Corp., 330 F. Supp. 583 (M.D. Fla. 1971).
33 Cummins v. Parker Seal Co., 516 F.2d 544, 553 (6th Cir. 1975).
34 McGowan v. Maryland, 366 U.S. 420 (1961); Two Guys v. McGinley, 366 U.S. 582 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); Gallagher v. Crown Kosher Super Market, 366 U.S. 617 (1961).
35 McGowan v. Maryland, 366 U.S. 420, 448 (1961), *citing* MD. ANN. CODE art. 27, § 492 (1971).
36 Walz v. Tax Comm'n, 397 U.S. 664, 672 (1970).
37 Meek v. Pittinger, 421 U.S. 349 (1975); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971).
38 393 U.S. 97, 107 (1968).
39 374 U.S. 203 (1963).
40 Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 774 (1973).

The reasonable accommodations requirement advances religion to the extent that, by forcing employers to make a special effort to resolve the work-related conflicts of religious employees, it makes the practice of religion more convenient. To be constitutionally permissible this aid must fall into either of two categories. First, assistance is not objectionable if it is incidental to the uniform application of public welfare legislation. Second, assistance in the form of an exemption from the operation of a restrictive law is not objectionable where failure to grant the exemption results in an abridgement of the right of free exercise of religion. After outlining these two principles, the effect of § 2000e-(j) will be analyzed to determine whether it is supported by either of them.

A. *Public Welfare Legislation*

If government chooses to confer a benefit to all persons meeting nonreligious criteria, that benefit cannot be denied by reason of religious belief, even though religion is indirectly assisted thereby. The Supreme Court applied this rule in *Everson v. Board of Education*.[41] Discussing the meaning of the free exercise and establishment clauses, Justice Black wrote:

> Consequently [New Jersey] cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation.[42]

He concluded that the first amendment did not proscribe the use of state tax dollars to reimburse parents of children attending parochial schools for bus fares to and from school as part of a general program which similarly benefited children in public and other schools. Although the Court recognized that this program might encourage attendance at church-related schools by making it less expensive, it held that this impetus was no more direct, and therefore no more impermissible, than that which results from providing these schools with police and fire protection.[43]

The majority opinion in *Board of Education v. Allen*[44] relied on this principle to uphold a New York statute which extended to nonpublic schoolchildren an existing public school student textbook loan program. Unlike *Everson,* the program in *Allen* did not involve a health and safety measure analogous to police and fire protection, yet the Court applied the same reasoning. Since this was merely the extension of public welfare legislation to all schoolchildren, and the benefit to religion was no more direct than in *Everson,* the measure was upheld.[45]

Similar reasoning supported the decision in *Sherbert v. Verner*.[46] The majority held that absent a compelling state interest, South Carolina could not deny a worker unemployment compensation benefits because she refused to accept avail-

41 330 U.S. 1 (1947).
42 *Id.* at 16 (emphasis supplied).
43 *Id.* at 17-18.
44 392 U.S. 236 (1968).
45 *Id.* at 243-44.
46 374 U.S. 398 (1963).

able employment which required work on the Sabbath contrary to her religious beliefs. Unlike the decisions in *Everson* and *Allen,* the *Sherbert* decision necessitated recognizing an exemption to the law, inasmuch as persons who turned down otherwise suitable employment because they had insufficient secular objections to working on Saturdays were disqualified from these benefits.[47] The majority ruled that withholding the benefits violated the free exercise clause since it had the same effect as a state-imposed fine on the appellant for practicing her faith. The Court argued that this exemption did not violate the establishment clause because it merely made the benefits of public welfare legislation available to all, instead of withholding them from some people for religious reasons.[48] Although religion might be incidentally advanced, this indirect assistance was not found impermissible.

B. *Exemption from Restrictive Laws*

If government creates a general burden or restriction affecting all who meet nonreligious criteria, the free exercise clause may require that some persons be exempted because of the law's detrimental effect on the practice of their religion. Free exercise does not constitutionally require an exemption if the restriction only makes religious practice more burdensome. *Gallagher v. Crown Kosher Super Market*[49] and *Braunfeld v. Brown*[50] involved laws which forced the closing of the appellants' places of business on Sunday, even though the stores were already closed on Saturday for religious reasons. The Court reasoned that since the laws did not prohibit the practice of the appellants' faith, but only made it more expensive, exemption from the law was not necessary.[51] However, if the law prohibits a religious practice, a different rule applies.

Where the restrictive state action either prohibits a religious practice or requires conduct offensive to religious tenets, the Court has applied a balancing test. In order to justify the detriment to the religious practitioner, the state must show that it has an overriding interest. In *Reynolds v. United States,*[52] the Court held that society's long-standing interest in monogamy vindicated state laws against polygamy, even though they were oppressive to the practice of the Mormon faith. On the other hand, in *Wisconsin v. Yoder*[53] the Court ruled that the state's interest in compulsory education to age 16 did not justify requiring Amish parents to violate their faith by sending their children to school beyond the eighth grade. Because the contrary conclusion "would gravely endanger if not destroy the free exercise of respondent's religious beliefs,"[54] the religious interest outweighed Wisconsin's concern with two additional years of formal education.

Interpretation of the draft-exemption for conscientious objectors also in-

47 *Id.* at 401.
48 *Id.* at 410.
49 366 U.S. 617 (1961).
50 366 U.S. 599 (1961).
51 *Id.* at 605; 366 U.S. 617, 631 (1961).
52 98 U.S. 145 (1878).
53 406 U.S. 205 (1972).
54 *Id.* at 219.

volved application of a balancing test. Whether the Government could justify requiring participation in war contrary to religious beliefs against involvement in all war has never been decided, since Congress has provided for such an exemption. But in *Gillette v. United States*,[55] the Court decided the question of whether the Government could draft those who, for religious reasons, objected only to participation in unjust wars. The majority argued that granting such an exemption would involve new administrative difficulties which might cause the conscription laws to appear unfair. The burden placed on the appellant's religion was justified by the substantial government interest in promoting public confidence in the administration of the draft laws.[56]

C. *The Effect of § 2000e-(j)*

The assistance given religion by the reasonable accommodation requirement is qualitatively different from either that which is incidental to uniform distribution of public welfare benefits or that which is necessary to avoid abridgement of the right of free exercise. Unlike the former, it creates a class of beneficiaries which excludes all nonreligious workers. Unlike the latter, the burden which would otherwise complicate the practice of religion is only inconvenience.

The cases which involved public welfare legislation have one common element: the same benefits were given to all who met the secular criteria. All parents who met the nonreligious criteria of having children attending school were reimbursed for the transportation expenses of those children.[57] All schoolchildren were loaned textbooks.[58] All unemployed workers received compensation benefits unless they failed to meet secular criteria.[59] The reasonable accommodations requirement, however, does not distribute benefits based on secular criteria.

Use of religious criteria to distribute benefits has not been found objectionable where both religious and nonreligious persons can be assisted. The Civil Rights Act of 1964's prohibition against religious discrimination is one example. Certainly it protects a religious worker denied employment because of his faith, but it also protects the nonreligious worker denied employment because of his lack of faith.[60] The reasonable accommodations requirement does not provide this equal advantage.[61] Section 2000e-(j) requires that an employer show that

55 401 U.S. 437 (1971).
56 *Id.* at 460.
57 Everson v. Board of Educ., 330 U.S. 1 (1947).
58 Board of Educ. v. Allen, 392 U.S. 236 (1968).
59 Sherbert v. Verner, 374 U.S. 398 (1963).
60 4 Fair Emp. Prac. Cas. 434 (EEOC Dec. No. 72-0528, 1971); 4 Fair Emp. Prac. Cas. 842 (EEOC Dec. No. 72-1114, 1972).
61 The reasonable accommodations test has been applied in a case involving an atheist worker, but that interpretation seems clearly in error. The court implied that a discriminatory practice, forcing an unwilling employee to attend an entire business meeting begun with a religious observance, might be justified by showing an undue burden on the conduct of the business. Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140, 144 (5th Cir. 1975). The effect is to read § 2000e-(j) as a limitation on the general prohibition against religious discrimination. This does not seem justified in light of the legislative history as outlined in Part III of this note. Earlier decisions indicate that the practice is discriminatory without regard to the effect on business. *See* 4 Fair Emp. Prac. Cas. 434 (EEOC Dec. No. 72-0528, 1971); *cf.* 4 Fair Emp. Prac. Cas. 842 (EEOC Dec. No. 72-1114, 1972).

he attempted to accommodate an employee who refused to work on Saturday for religious reasons in order to justify the discharge of that worker for not working scheduled days.[62] If the nonreligious worker refuses Saturday work, the employer has no corresponding statutory obligation to attempt any concessions. The nonreligious workers cannot benefit because they have no protectible religious practices or observances.

Laws which conferred benefits only to religious groups because of their religion have consistently been either struck down or interpreted so as to avoid a discriminatory effect. In *Welsh v. United States,*[63] the Court interpreted "religious training and belief" in § 6 of the Universal Military Training and Service Act to include moral and ethical as well as religious beliefs if held with the strength of traditional religious beliefs.[64] This tortured reading was apparently necessary to save the conscientious objector exemption from invalidation on grounds of the establishment clause.[65] In *Committee for Public Education v. Nyquist,*[66] the Court struck down a state plan which provided partial tuition grants to parents of children attending church-related schools. The majority argued *inter alia* that because the grants were given in addition to the right of parents to send their children to public schools at state expense, the law had the effect of granting special benefits to nonpublic sectarian institutions.[67] In a companion case, *Sloan v. Lemon,*[68] a state tuition reimbursement plan which authorized payments to parents of children attending nonpublic schools was held violative of the establishment clause. Justice Powell wrote for six members of the Court:

> We think it plain that this is quite unlike the sort of "indirect" and "incidental" benefits that flowed to sectarian schools from programs aiding *all* parents by supplying bus transportation and secular textbooks for their children. Such benefits were carefully restricted to the secular side of church-affiliated institutions and provided no special aid for those who had chosen to support religious schools.[69]

Because it creates a class of beneficiaries limited to religious workers, the reason-

62 Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975).
63 398 U.S. 333 (1970).
64 *Id.* at 339-40.
65 Justice Harlan, concurring in the result, gave this explanation of Justice Black's controlling opinion. *Id.* at 344-67.
66 413 U.S. 756 (1973).
67 *Id.* at 783. Justice Powell, writing for the majority, argued that because the grants were given in addition to the right to attend public schools at state expense, they did more than merely equalize the benefits to all parents. This does not convincingly distinguish *Everson* and *Allen* from the present case. The parents involved in the earlier cases also had the right to send their children to public schools and thereby benefit from the transportation reimbursements and textbook loans. Perhaps Justice Powell recognized this weakness because he was compelled to further defend the majority's position. "And in any event, the argument [that the tuition grants were analogous to the transportation reimbursements and textbook loans and therefore valid] proves too much, for it would also provide a basis for approving through tuition grants the *complete subsidization* of all religious schools on the ground that such action is necessary if the State is fully to equalize the position of parents who elect such schools—a result wholly at variance with the Establishment Clause." *Id.* at 782 n.38 (emphasis supplied).
68 413 U.S. 825 (1973).
69 *Id.* at 832 (emphasis supplied).

able accommodations requirement cannot be justified by claiming that it confers only an incidental benefit to religion pursuant to the uniform application of public welfare legislation.

However, the exemption which the Court required in *Wisconsin v. Yoder* did involve a special benefit granted for religious reasons only to religious persons. The exemption was required because application of the particular restrictive law involved would have abridged the free exercise of religion.[70] Section 2000e-(j) is not an exemption from a restrictive law. If the practice of religion is more difficult in the absence of government-enforced reasonable accommodations, it is because of contractual rules devised by private employers, not because the Government has taken some affirmative action which interfered with free exercise. Furthermore, the interference here is different from that in the free exercise case, where an exemption was required. The Amish parent in *Yoder v. Wisconsin*[71] faced government sanctions against the practice of his faith while a religious worker, in the absence of the reasonable accommodations requirement, is only inconvenienced. Either he makes a private arrangement with a willing employer or he finds other work which is better suited to his religious needs. Like the businessman in *Braunfeld v. Brown*,[72] religious practice is perhaps made more expensive, but is not prohibited. For these reasons, the government-enforced preference which results from the reasonable accommodations requirement is not justified by the free exercise clause.

V. Conclusion

The reasonable accommodations requirement passes the first two tests required to survive an establishement clause challenge, but it fails the third. Even though it avoids excessive entanglement between government and religion, and probably would not be invalidated for having an impermissible purpose, its effect is not neutral with respect to religion. Because it confers special benefits only to religious workers, which are not necessary to preserve the right to free exercise, a decision upholding the reasonable accommodations requirement would be in conflict with the decided cases.

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70 Yoder v. Wisconsin, 406 U.S. 205 (1972).
71 *Id.*
72 366 U.S. 599 (1961).