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Groff v. Dejoy and Title VII's "Undue Hardship" Standard

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ABSTRACT

In June 2023, the Supreme Court issued its decision in *Groff v. DeJoy*, where it clarified the standard governing an employer's obligation to make a religious accommodation under Title VII. For over 50 years, lower courts had been using the Court's language in *Trans World Airlines, Inc. v. Hardison*, that a religious accommodation constitutes an "undue hardship" under Title VII if it would cause the employer to incur "more than a de minimis cost." This Article explains the flawed *Hardison* standard and analyzes the Court's decision in *Groff*, including the Court's statement that an "undue hardship" under Title VII means "substantial increased costs in relation to the conduct of [the employer's] particular business." This Article also attempts to shed light on the relationship between the Court's Title VII jurisprudence and its Establishment Clause jurisprudence.

A few years before it issued its decision in *Hardison*, the Court quietly implied that there was a tension between Title VII's preference toward religion and the Establishment Clause. Though the Court has never overtly recognized a symbiosis between these two areas of the law—and though it has, at times, expressly disclaimed any meaningful connection between the two—I contend that the Court's posture toward Title VII in 1977 and in 2023 are reflective of the respective positions it has taken toward the Establishment Clause. This connection, particularly as it pertains to the idea of state neutrality toward religion, provides a fresh perspective to an otherwise unsurprising decision, and it invites consideration of how the Court might continue to reposition its jurisprudence toward religion.

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ABSTRACT

In June 2023, the Supreme Court issued its decision in Groff v. DeJoy*, where it clarified the standard governing an employer's obligation to make a religious accommodation under Title VII. For over 50 years, lower courts had been using the Court's language in* Trans World Airlines, Inc. v. Hardison*, that a religious accommodation constitutes an "undue hardship" under Title VII if it would cause the employer to incur "more than a de minimis cost." This Article explains the flawed* Hardison *standard and analyzes the Court's decision in* Groff*, including the Court's statement that an "undue hardship" under Title VII means "substantial increased costs in relation to the conduct of [the employer's] particular business." This Article also attempts to shed light on the relationship between the Court's Title VII jurisprudence and its Establishment Clause jurisprudence.*

A few years before it issued its decision in Hardison*, the Court quietly implied that there was a tension between Title VII's preference toward religion and the Establishment Clause. Though the Court has never overtly recognized a symbiosis between these two areas of the law—and though it has, at times, expressly disclaimed any meaningful connection between the two—I contend that the Court's posture toward Title VII in 1977 and in 2023 are reflective of the respective positions it has taken toward the Establishment Clause. This connection, particularly as it pertains to the idea of state neutrality toward religion, provides a fresh perspective to an otherwise unsurprising decision, and it invites consideration of how the Court might continue to reposition its jurisprudence toward religion.*

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CONTENTS

I. INTRODUCTION

In *Groff v. DeJoy*, the Court revised a longstanding Title VII standard that kept religious employees in a disfavored position.[1] It did so based on basic statutory construction and a careful interpretation of the 1977 decision responsible for the confusion.[2] The Court was unified in a 9–0 vote, with only a brief concurrence that made one point of clarification.[3]

The result in *Groff* was not surprising—both parties agreed that the prevailing rule was incorrect.[4] But it is my contention that the decision resounds from the tone that a majority of the Court has recently taken toward religion, and particularly toward the Establishment Clause. I make this argument despite the *Groff* Court's attempt to dissociate its Title VII jurisprudence from its Establishment Clause jurisprudence.[5] Such attempt is, frankly, unconvincing, given the development of Title VII caselaw in the Supreme Court and in the circuits since the Court's *Hardison* decision. It is further unconvincing given the way the Court's articulation of these standards so naturally intertwines them.

Part II of this Article begins with a brief overview of the development of Title VII's protection of employees' religious practices and beliefs. Part II then explains how we got to *Groff*, reviewing important decisions from the Supreme Court and from the courts of appeals that began to fill out the scaffolding of Title VII's "undue hardship" standard. Part III analyzes the Court's decision in *Groff*. In Part IV, I suggest that constitutional questions played a role, though unnamed, in the Court's Title VII decisions. In Part V, I predict where the Court might be headed now, having righted two wrongs in its religion jurisprudence.

II. THE DEVELOPMENT OF TITLE VII UP TO AND INCLUDING *HARDISON*

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to discriminate against an applicant or an employee "because of such

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1 Groff v. DeJoy, 600 U.S. 447, 453–54 (2023).

2 *See id.* at 468–70.

3 *See id.* at 452; *id.* at 473, 476 (Sotomayor, J., concurring).

4 *See id.* at 454 (majority opinion).

5 *See id.* at 461–62.

individual's . . . religion."[6] The statute originally left plenty undefined. Most significantly, Congress did not define what it meant to discriminate "because of" religion,[7] leaving it unclear whether and to what extent "employer[s] had an affirmative duty to accommodate [their] employee[s']" exercises of religion.[8] In an attempt to clarify the uncertainty, the Equal Employment Opportunity Commission (EEOC) issued a regulation in 1968 requiring "employers 'to make reasonable accommodations to the religious needs of employees'" unless the accommodation would create "an 'undue hardship on the conduct of the employer's business.'"[9]

Concerns about anti-establishment arose almost immediately. Soon after the EEOC promulgated its 1968 regulation, the Sixth Circuit rejected the EEOC's interpretation of Title VII. The Sixth Circuit held that forcing an employer to accommodate its employees' religious practices would violate the Establishment Clause, that employers were only required to *not discriminate* against their religious employees, and that, in the case before the Sixth Circuit, the employer had actually attempted to accommodate the employee.[10] The Supreme Court without comment affirmed the Sixth Circuit,[11] prompting Congress to amend Title VII in 1972[12] by defining religion to "include[] 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

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[6] 42 U.S.C. § 2000e-2(a)(1).

[7] *See Groff*, 600 U.S. at 457.

[8] Peter Zablotsky, *After the Fall: The Employer's Duty to Accommodate Employee Religious Practices Under Title VII After* Ansonia Board of Education v. Philbrook, 50 U. PITT. L. REV. 513, 513–14 (1989).

[9] *See Groff*, 600 U.S. at 456–57 (citing 29 C.F.R. § 1605.1 (1968)); Zablotsky, *supra* note 8, at 514 & n.5.

[10] Dewey v. Reynolds Metals Co., 429 F.2d 324, 334–36 (6th Cir. 1970), *aff'd*, 402 U.S. 689 (1971) (per curiam). The court stated that it found no evidence of "Congressional intent to coerce or compel one person to accede to or accommodate the religious beliefs of another." *Id.* at 334.

[11] *Dewey*, 402 U.S. 689.

[12] *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 73–74 (1977).

employer's business."[13] In other words, Congress effectively nullified the Court's affirmation of the Sixth Circuit's holding in *Dewey* and enshrined into Title VII the EEOC's 1968 framework for religious employment discrimination by making it into the very definition of religion.

The definition, however, did not solve all confusion. In interpreting the 1972 amendment, the Court noted that the legislative record was scant on the meaning of the new definition of religion—and particularly as to the *weight* of the employer's burden to provide an accommodation.[14] The Court later considered the impact of reprints of two decisions in the Congressional Record for the 1972 amendment, finding that "Congress intended to change [a] result" of a decision from the Middle District of Florida where the court did not require an "employer [to make] any effort whatsoever to [provide an] accommodat[ion]".[15] But to what extent Congress disapproved of the reasoning in *Dewey* (the other decision reprinted in the record), the Court found "more opaque," concluding only that Congress wanted employers to provide "some form of accommodation" for religious employees.[16] So, back to the circuits it went, with varying results. In a handful of cases analyzing employers' failure to accommodate employees' Sabbath practices, not only was there disagreement between circuits, but some circuits also struggled to maintain even internal consistency on cases with similar facts.[17]

It was in this muddled context that the Supreme Court issued its decision in *Trans World Airlines, Inc. v. Hardison*.[18] Larry Hardison worked for Trans World Airlines (TWA), and his work schedule was subject to a seniority system in a collective-bargaining agreement.[19] Hardison's religion required him to observe a Saturday Sabbath, which gave rise to a quandary when he secured a transfer to a different building and lost his seniority status.[20]

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[13] 42 U.S.C. § 2000e(j).

[14] *See Hardison*, 432 U.S. at 73–74, 74 n.9.

[15] *See id.* at 74 & n.9 (citing Riley v. Bendix Corp., 330 F. Supp. 583 (M.D. Fla. 1971), *rev'd*, 464 F.2d 1113 (5th Cir. 1972)).

[16] *See id.* (citing *Dewey*, 402 U.S. 689).

[17] *See id.* at 75 n.10.

[18] *See id.* at 75–76.

[19] *Id.* at 66–67.

[20] Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 67–69 (1977).

Because Hardison had low seniority status in the new building, if the union were to accommodate his Sabbath observance, it would have had to either violate other employees' contractually-guaranteed seniority rights, potentially leave critical work undone, or pay premium wages to an employee not scheduled to work Saturdays.[21] Hardison was eventually discharged after failing to report to work on Saturdays, and he filed suit against TWA and the International Association of Machinists and Aerospace Workers (IAM), which had a collective-bargaining agreement with TWA.[22] On appeal from the Eighth Circuit, which held that TWA had violated Title VII, the Court granted certiorari on the questions of whether TWA had done enough to accommodate Hardison's religion and whether requiring more under Title VII "would create an establishment of religion contrary to the First Amendment of the Constitution."[23]

After acknowledging that "the reach of [the employer's duty to reasonably accommodate] ha[d] never been spelled out by Congress or by EEOC guidelines,"[24] the Court proceeded to disagree with the Eighth Circuit on the first question, focusing on the contractual rights that more senior employees had under the collective-bargaining agreement, and concluding that Title VII did not require TWA to violate that agreement by granting Hardison's shift preference.[25] The Eighth Circuit had found that TWA had several viable options to accommodate Hardison: "permit[] Hardison to work a four-day week" and supplement his absence with a replacement from another department or another employee who would earn premium wages.[26] But the

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[21] *Id.* at 68–69.

[22] *Id.* at 67, 69.

[23] *Id.* at 70. The Court consolidated two petitions for appeal, one filed by TWA and the other by IAM. *See id.*; Trans World Airlines, Inc. v. Hardison, 429 U.S. 958 (1976) (granting certiorari). The Court also granted certiorari on TWA's contention that the court of appeals committed error by "ignor[ing] the [d]istrict [c]ourt's findings of fact." *Hardison*, 432 U.S. at 70.

[24] *Hardison*, 432 U.S. at 75.

[25] *See id.* at 70, 79. The Court noted that its holding was consistent with another provision within Title VII, which provides that employers are permitted to apply the terms of a "bona fide seniority . . . system" that grants senior employees special treatment. *Id.* at 81–82 (quoting 42 U.S.C. § 2000e-2(h)).

[26] *Id.* at 84.

question became whether such accommodation would constitute an "undue hardship" under Title VII.[27] In response to the four-day workweek option, the Court wrote a sentence that would set the trajectory of Title VII jurisprudence for the next 50 years: "To require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship."[28]

Analyzed contextually, the Court's cost analysis was arguably inseparable from its neutrality-toward-religion analysis, as I will discuss later.[29] But at this point, it is enough to say that the phrase "more than a de minimis cost"[30] became far and away the most important part of the *Hardison* decision. Because the Court resolved the case on the merits in favor of TWA and IAM, it did not answer the Establishment Clause question.[31]

Justice Marshall, dissenting in *Hardison*, believed that the TWA had feasible accommodation options available to it, but he nonetheless "seriously question[ed] whether simple English usage permits 'undue hardship' to be interpreted to mean 'more than de minimis cost.'"[32] Justice Marshall was not alone in his skepticism of the Court's language. *Hardison* was swiftly denounced as "an exceedingly parsimonious construction of what seems clearly to have been intended as a bold remedial scheme . . . run[ning] counter to the plain language and purpose of the statute."[33] The EEOC proceeded to adopt the Court's language, but with qualifiers, advising "that the infrequent payment of premium wages . . . [or] the payment of administrative costs [would] not [be] more than a de minimis cost."[34]

But some federal courts appeared to take the Court quite literally for its word in the years that followed, defining the phrase "undue hardship" as "more than a de minimis cost." Courts granted summary judgment in favor

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[27] *See id.*

[28] *Id.* I include the entire paragraph in which this sentence appears in Part IV. *See infra* note 79 and accompanying text.

[29] *See infra* Part IV; *Hardison*, 432 U.S. at 80–81, 84–85.

[30] *Hardison*, 432 U.S. at 84.

[31] *Id.* at 70.

[32] *See id.* at 85, 92 & n.6 (Marshall, J., dissenting).

[33] *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 70, 270–72 (1977) (published the same year that *Hardison* was argued).

[34] 29 C.F.R. § 1605.2(e)(1) (1980).

of the employer "if an accommodation would impose on the employer virtually any burden at all."[35] In fact, the posture some courts would take toward cost alternatives was later described as "a per se approach."[36] The Ninth Circuit even stated that "a standard less difficult to satisfy than the 'de minimis' standard . . . is difficult to imagine."[37] Employees' religious liberties were treated as of far secondary importance to employers' interests in conducting business. A particularly egregious example of this standard in practice was a case that the Court referenced in *Groff*,[38] where the Seventh Circuit held that it was an undue hardship for Walmart to simply facilitate a system of shift-trading because it "would require Walmart to bear more than a slight burden."[39] It was no surprise, then, that when the Supreme Court in *Groff* revisited this standard, all parties agreed that something needed to change.[40]

III. REVISITING AND CLARIFYING "UNDUE HARDSHIP" IN *GROFF*

A. The Court Revisits Title VII's "Undue Hardship" Standard

Gerald Groff had been a mail carrier associate for the United States Postal Service (USPS) for five years when the USPS entered an agreement with Amazon and started making deliveries on Sundays.[41] Groff, an Evangelical Christian, has a religious objection to working on Sundays.[42] USPS redistributed Groff's Sunday deliveries to branch staff and other regional carriers, but it did so while subjecting Groff to "progressive discipline."[43] Groff resigned about two years after USPS began disciplining him for

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[35] Dallan F. Flake, *Restoring Reasonableness to Workplace Religious Accommodations*, 95 WASH. L. REV. 1673, 1683 & n.47 (2020).

[36] Zablotsky, *supra* note 8, at 547 & n.108; *see id.* at 544–45, 545 nn.101–02 (cataloging cases in the circuits where either indirect or direct costs were held to be an undue hardship).

[37] Yott v. N. Am. Rockwell Corp., 602 F.2d 904, 909 (9th Cir. 1979).

[38] Groff v. DeJoy, 600 U.S. 447, 466 n.12 (2023) (citing Equal Emp. Opportunity Comm'n v. Walmart Stores E., L.P., 992 F.3d 656, 659–60 (7th Cir. 2021)).

[39] *See Equal Emp. Opportunity Comm'n*, 992 F.3d at 659–60.

[40] *Groff*, 600 U.S. at 454.

[41] *See id.* at 454–55.

[42] *Id.* at 454.

[43] *Id.* at 455.

refusing Sunday deliveries, and he sued, claiming a violation of Title VII.[44] The Third Circuit affirmed the district court's finding that the USPS could not accommodate Groff without incurring an undue hardship, because "[e]xempting Groff from Sunday work . . . had 'imposed on his coworkers, disrupted the workplace and workflow, and diminished employee morale.'"[45]

The Court granted certiorari to take its "first opportunity in nearly 50 years to explain" and offer "clarifications" to its *Hardison* decision.[46] The Court noted its more-than-a-de-minimis-cost sentence had been "oft-quoted" and would suggest, if read literally, "that even a pittance might be too much for an employer to be forced to endure."[47] The problem, of course, is that without contrary guidance from the Court, courts *did* take the sentence literally. But rather than overruling *Hardison*, or even simply acknowledging that the sentence was perhaps ill-stated,[48] the Court in *Groff* placed the blame on lower courts, who had, in the Court's eyes, interpreted the sentence incorrectly. The Court said that "it is doubtful that [the sentence] was meant to take on that large role,"[49] referring back to the *Hardison* majority's repeated statement that an accommodation that imposes "substantial" costs would not have been required.[50] More persuasively, the Court acknowledged a crucial point, which is that *Hardison* had focused on the "'principal issue' of seniority rights," and that each of the accommodations Hardison had requested would likely have violated those "off-limits" rights.[51]

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[44] *See id.* at 455–56.

[45] *Id.* at 456 (quoting Groff v. DeJoy, 35 F.4th 162, 175 (3d Cir. 2022)).

[46] Groff v. DeJoy, 600 U.S. 447, 456–57 (2023).

[47] *Id.* at 464.

[48] Justice Sotomayor acknowledged in her concurrence that *Hardison* used "loose language." *Id.* at 474 (Sotomayor, J., concurring).

[49] *Id.* at 464 (majority opinion).

[50] *Id.* at 464 (quoting Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 83 n.14 (1977)). The references to a "substantial" cost do not negate the references to "more than a de minimis" cost, though; if nothing greater than a "de minimis" cost could be imposed, then a "substantial" cost was, naturally, impermissible, too. Of course, the mixed language left a fair amount of clarity on the table, but it did not by necessity change the standard that the Court (at least to some) had seemed to articulate.

[51] *Id.* at 465.

The Court then began undoing the lower courts' interpretations of *Hardison* by explaining why using a *de minimis* standard was inconsistent with the text of Title VII. Drawing on dictionary definitions, the Court said that "a 'hardship is', at a minimum, 'something hard to bear.'"[52] And if a hardship is something "more severe than a mere burden," then an undue hardship is a "burden, privation, or adversity [that] must rise to an 'excessive' or 'unjustifiable' level."[53] Concluding that *Hardison* could not be "reduced" to its more-than-a-de-minimis-cost sentence, the Court articulated a clarification: "an employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business."[54] It instructed lower courts to consider "all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, 'size and operating cost of an employer.'"[55]

The Court then addressed three more issues that the parties had raised. First, it declined to adopt either party's suggested guidance—the Americans with Disabilities Act for Groff, and the EEOC's Title VII interpretations for the government—instead encouraging lower courts to apply the "undue hardship" standard in a "common-sense manner."[56] The Court did say, however, that the EEOC's guidance that "temporary costs, voluntary shift swapping, occasional shift swapping, or administrative costs" do not

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[52] Groff v. DeJoy, 600 U.S. 447, 468 (2023) (citing RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 646 (1966) (Random House)).

[53] *Id.* at 469 (citing RANDOM HOUSE, *supra* note 52, at 1547; *see, e.g.*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2492 (1971) ("inappropriate," "unsuited," or "exceeding or violating propriety or fitness"); AMERICAN HERITAGE DICTIONARY 1398 (1969) ("excessive")).

[54] *Id.* at 468, 470.

[55] *Id.* at 470–71 (alteration in original) (citing Brief for Respondent at 39, *Groff*, 600 U.S. 447 (No. 22-174)).

[56] *Id.* at 471. Because of similar verbiage between Title VII and the ADA, Groff and several amici had called upon the Court to use decades of ADA decisions when setting out the new standard for Title VII. *See, e.g.,* Reply Brief for Petitioner at 13, *Groff*, 600 U.S. 447 (No. 22-174); Brief for The Union of Orthodox Jewish Congregations of America as Amici Curiae Supporting Petitioner at 19–25, *Groff*, 600 U.S. 447 (No. 22-174); Brief for the Becket Fund for Religious Liberty Supporting Petitioner at 6-18, *Groff*, 600 U.S. 447 (No. 22-174). The Court dismissed the ADA option essentially without comment. *Groff*, 600 U.S. at 471.

constitute an undue hardship would likely remain undisturbed.[57] Second, the Court clarified that an accommodation's impact on coworkers (or customers) may only be considered to the extent that such impact actually affects the employer's business—but animosity or aversion toward religion is never part of the equation.[58] Finally, the Court reaffirmed that the employer has the affirmative duty to provide a reasonable accommodation, and an employer does not escape liability simply by concluding that an employee's proffered accommodation is unreasonable.[59] It remanded for application of the "clarified context-specific standard."[60]

Justices Sotomayor issued a brief concurrence, joined by Justice Jackson, for the discrete purpose of commenting on the second of the Court's three final points listed above.[61] Agreeing that animosity cannot constitute an undue hardship, Justice Sotomayor suggested that it would be unnecessary for an employer to prove that a hardship on employees (one not arising from animus) also worked a hardship on the conduct of the employer's business—such things were, in her estimation, inseparable.[62]

Again, the Court's decision was not a surprising result, given that the parties agreed *Hardison* needed at least clarification, and given that the Court essentially took a middle-of-the-road approach. What is intriguing, though, is the *Groff* Court's insistent detachment of *Hardison* from its Establishment Clause jurisprudence.

B. The Court Disclaims an Establishment Clause Connection

The Court noted in *Groff* that there had been "good reason to expect" that *Hardison* would have focused on any potential conflict between Title VII and

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[57] *Groff*, 600 U.S. at 471.

[58] *Id.* at 472–73. *See* Zablotsky, *supra* note 8, at 545 n.101 (listing cases where impact on other employees was an undue hardship); *see also* Wessling v. Kroger, 554 F. Supp. 548, 552 (E.D. Mich. 1982) (holding that because an accommodation made other coworkers "angry" and negatively affected those employer-employee relationships, the accommodation "resulted in more than a de minimis hardship").

[59] *Groff*, 600 U.S. at 473.

[60] *Id.*

[61] See id. at 475–76 (Sotomayor, J., concurring) (opinion joined by Jackson, J.).

[62] *Id.* at 475–76.

the Establishment Clause.[63] Indeed, the Court, by affirming the Sixth Circuit in *Dewey*, had previously tacitly acknowledged such a conflict,[64] and that decision was followed only weeks later by *Lemon v. Kurtzman*, which articulated the infamous three-part test[65] for constitutionality under the Establishment Clause.[66] To top this off, the Court had acknowledged four years after *Lemon* and two years before *Hardison* that "the Justices were evenly divided" on the issue of whether Title VII's definition of religion constituted an establishment of religion in violation of the First Amendment.[67]

But according to the Court in *Groff*, "constitutional concerns played no on-stage role in the Court's [*Hardison*] opinion."[68] While "[a] few courts" and "[s]ome constitutional scholars" had read hints of anti-establishment in *Hardison*, the Court found such a reading to be apparently unwarranted, if not even incorrect, because the Court had "clarified" in a 2015 decision that "'Title VII does not demand mere neutrality with regard to religious practices' but instead 'gives them favored treatment.'"[69] To the Court, apparently the 2015 decision had demonstrated that Title VII does not, in fact, permit employers to reject religious accommodations simply on the basis that they might impose more than a negligible cost. That clarification, though, came a bit late.

It should go without saying that a "clarification" issued nearly 40 years later can hardly retroactively interpret an opinion (and correct lower court decisions issued in the meantime). It is also worth noting that the clarification came from the pen of a member of the Court who was one of the most

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[63] *Id.* at 460 (majority opinion).

[64] *See* Dewey v. Reynolds Metals Co., 402 U.S. 689 (1971).

[65] The test required that the law have a "secular legislative purpose," that "its principal or primary effect . . . neither advance[] nor inhibit[] religion," and that it not "foster an 'excessive government entanglement with religion'." Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (citing Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968)); *id.* at 613 (citing Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

[66] *Groff*, 600 U.S. at 460.

[67] *Id.* (citing Parker Seal Co. v. Cummins, 429 U.S. 65 (1976) (per curiam)).

[68] *Id.* at 461.

[69] *Id.* at 461 n.9 (quoting EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 775 (2015)).

colorful critics of *Lemon* in his time.[70] This latter fact perhaps suggests that the posture of the Court in this later, clarifying decision had changed toward both Title VII and the Establishment Clause, welcoming a decision more friendly to religion in the workplace.

In addition, not everyone saw the line of demarcation between Title VII and the Establishment Clause as clearly as the *Groff* Court did. *Hardison* was described as demonstrating "an acute awareness of the [E]stablishment [C]lause problems inherent in Title VII."[71] Others cast the decision as one of constitutional avoidance, the narrow interpretation of Title VII serving to sidestep conflict with the Establishment Clause.[72] Tangentially, the Workplace Religious Freedom Act of 2007—which would have significantly altered the status quo set by *Hardison*'s restrictive view of "undue hardship"—was vilified on the primary grounds that it would have violated *Lemon*'s prohibition against excessive entanglement and "actual or apparent government endorsement."[73]

Some courts had expressly relied on the Establishment Clause in upholding or striking down Title VII's definition of religion.[74] These overt references to the Establishment Clause, depending on the result in a given case, may simply reflect the fact that litigants perceived a tension and tested it in court. But other courts considered anti-establishment in a more nuanced way, avoiding an accommodation if it might "assist religion."[75] Take, for

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[70] *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring) ("As to the Court's invocation of the *Lemon* test: Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District.").

[71] Lucy V. Katz, *Caesar, God and Mammon: Business and the Religion Clauses*, 22 GONZ. L. REV. 327, 337 (1987).

[72] Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 7 (1996).

[73] Gretchen S. Futrell, *Bring Your Dogma to Work Day: The Workplace Religious Freedom Act of 2007 and the Public Workplace*, 7 FIRST AMEND. L. REV. 373, 411 (2009).

[74] *See* Sara L. Silbiger, *Heaven Can Wait: Judicial Interpretation of Title VII's Religious Accommodation Requirement Since* Trans World Airlines v. Hardison, 53 FORDHAM L. REV. 839, 855 (1985).

[75] *Id.*

example, the Fifth Circuit's holding in *Brener v. Diagnostic Center Hospital* that an employer was not required to mandate shift swapping among staff to accommodate an employee's Sabbath request, because such a system would result in unequal treatment based on religion.[76] Unequal treatment is, of course, exactly what Title VII requires.[77] But the Fifth Circuit's illustrative conclusion was not wrested out of thin air. The Fifth Circuit cited from none other than *Hardison*, where the Court said that Congress did not intend to deny the preferences and rights of some employees "'in order to accommodate or prefer the religious needs of others, and' . . . concluded that employers were 'not required to discriminate against some employees in order to enable others to observe the Sabbath.'"[78] Such language from the Court invited results like the one in *Brener*.

Similarly, I suggest here that the principles that made their way into the *Lemon* test invited the language in *Hardison*. Suffice it to say that, while the Court in *Groff* may have disclaimed any meaningful connection between *Hardison* and the Establishment Clause, the legal community at large had not seen it that way. It is worth examining, albeit relatively briefly, some reasons why the *Lemon* test may have been an invisible character influencing the *Hardison* decision, and more significantly for the present, how the Court's recent interpretation of the Establishment Clause may have influenced its decision in *Groff*.

IV. NEUTRALITY, HOSTILITY, AND ACCOMMODATIONS

I begin here with another reference to the more-than-a-de-minimis-cost standard, but this time inviting consideration of the entire paragraph in which the sentence is found.

> To require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship. Like abandonment of the seniority system, to require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would

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[76] 671 F.2d 141, 146–47 (5th Cir. 1982).

[77] EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 775 (2015).

[78] *Brener*, 671 F.2d at 146 (quoting Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 81, 85 (1977)).

> involve unequal treatment of employees on the basis of their religion. By suggesting that TWA should incur certain costs in order to give Hardison Saturdays off the Court of Appeals would in effect require TWA to finance an additional Saturday off and then to choose the employee who will enjoy it on the basis of his religious beliefs. While incurring extra costs to secure a replacement for Hardison might remove the necessity of compelling another employee to work involuntarily in Hardison's place, it would not change the fact that the privilege of having Saturdays off would be allocated according to religious beliefs.[79]

Notice the language about inequality: it would be "unequal treatment . . . on the basis of their religion" to require TWA to bear additional costs to accommodate religious employees, such that TWA would have had to choose to allocate a "privilege" "on the basis of" or "according to religious beliefs."[80]

As the *Groff* Court stated, it does not seem that the *Hardison* Court was focused here so much on the particular dollar amount that constitutes an "undue hardship."[81] In fact, that issue does not appear to be the primary focus in the paragraph at all. The *Groff* Court explained this more-than-a-de-minimis-cost language with reference to the importance of seniority rights.[82] But though the concern about the inviolability of rights secured by a collective-bargaining agreement was certainly decisive in the opinion as a whole, that factor is far from center stage here.[83]

Rather, the *Hardison* Court's statements indicated that it was focused on something else. Why insulate TWA from incurring "additional" or "more than de minimis costs"? Because in the eyes of the Court, incurring those costs would have worked an inequality—not because they were *costs*, but because they were incurred *to accommodate Hardison's Sabbath*.[84] In other

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79 *Hardison*, 432 U.S at 84–85.

80 *Id.* at 84–85.

81 Groff v. DeJoy, 600 U.S. 447, 464 (2023).

82 *See id.* at 464–65.

83 *See id.* at 459–60, 464–65, 467.

84 *See Hardison*, 432 U.S. at 84–85.

words, it appears that the motivation for the accommodation, rather than the amount the accommodation would cost, mattered the most. The Court described Hardison's accommodation (Saturdays off) as a "privilege" to which all employees were equally entitled, and it concluded that to give that privilege to Hardison because of his religion would have created not just "unequal treatment" but "discrimination."[85] It was neither costs nor collective-bargaining rights that featured front-and-center here. This language reflects concern not about over-encumbering employers or disrupting seniority systems but about avoiding preferential treatment of religion.

Again, preferential treatment of religion under Title VII is the standard, which the Court has since recognized.[86] But other than simply acknowledging that these sentiments in *Hardison* were mistaken, how should we understand the reason for this indelicate depiction of religious accommodations as nothing more than unequal allocations of privileges?

Perhaps a familiar concept can bridge the gap. Neutrality has been described as "[t]he touchstone of the Religion Clauses," or "the principle from which both the Free Exercise and Establishment Clauses were interpreted."[87] The Court has called religious neutrality the "central Establishment Clause value . . . there being no neutrality when the government's ostensible object is to take sides."[88] The *Lemon* test, while not inventing the concept of government neutrality toward religion,[89] featured it quite prominently in its "purpose" analysis, as courts were tasked with "preventing the relevant governmental decisionmaker . . . from abandoning neutrality . . . ."[90]

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[85] *Id.*

[86] EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 775 (2015).

[87] F. Philip Manns, Jr., *Finding The "Free Play" Between the Free Exercise and Establishment Clauses*, 71 TENN. L. REV 657, 657, 693 (2005).

[88] McCreary Cnty. v. Am. C.L. Union of Ky., 545 U.S. 844, 860 (2005).

[89] *See* Lemon v. Kurtzman, 403 U.S. 602, 616 (1971) (citing Everson v. Bd. of Educ., 330 U.S. 1 (1947); Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968)) (concluding that states may provide parochial schools with "secular, neutral, or nonideological services, facilities, or materials").

[90] Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 335 (1987).

Lemon's neutrality principle also went by another name: endorsement. The Court proclaimed that the state must not *endorse* religion, because endorsement would send a message to "nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'"[91] Being careful to send a message of neither endorsement nor non-endorsement is another way of saying that the state must remain neutral.

"Neutrality" as a central feature of Establishment Clause jurisprudence was unwieldy[92] and deeply flawed.[93] But the persistent and pervasive role of *Lemon* and neutrality, though the principles produced varied and unpredictable results,[94] are acutely important here. In saying that TWA did not have to incur costs to offer a "privilege" to a religious employee, it is highly possible that the Court was indicating that the arrangement would have violated the principle of neutrality.[95]

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[91] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309–10 (2000) (quoting Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).

[92] *See* R. George Wright, *Can We Make Sense of "Neutrality" in the Religion Clause Cases?: Seven Rescue Attempts and a Viable Alternative*, 65 SMU L. REV. 877, 880 (2012) ("The frequency and importance of references to neutrality and related ideas in Free Exercise and Establishment Clause jurisprudence does not show . . . that 'neutrality' is typically used in any genuinely coherent, workable, and reasonably persuasive sense.").

[93] *See* Anita Y. Woudenberg, *Propogating a* Lemon*: How the Supreme Court Establishes Religion in the Name of Neutrality*, 7 FIRST AMEND. L. REV. 307, 336 (2009) ("[F]or conceptual, practical, and historical reasons, neutrality as a standard for Establishment Clause jurisprudence is not only meaningless and unattainable, but unnecessarily broad in scope.").

[94] *See* Van Orden v. Perry, 545 U.S. 677, 694 (2005) (Thomas, J., concurring) ("All told, this Court's jurisprudence [on the Establishment Clause] leaves courts, governments, and believers and nonbelievers alike confused . . . .").

[95] This is not to say that the Supreme Court was likely to find that Title VII violated the Establishment Clause. In *Estate of Thornton v. Caldor, Inc.*, the Court struck down a Connecticut law prohibiting employment discrimination against an employee who refused to work on his Sabbath, holding that the statute violated the *Lemon* test because, in giving religious employees an "absolute and unqualified right not to work" without any exceptions or consideration of accommodations, the law had a "primary effect that impermissibly advance[d] a particular religious practice." *Estate of Thornton*, 472 U.S. 703, 709–10. Notably, the decision indicated that the Title VII structure contained the type of safeguards that the

Again, the Court had affirmed the Sixth Circuit's conclusion that Title VII and the Establishment Clause are in conflict[96] and acknowledged that the "Justices were evenly divided" on the issue (though Congress then interjected with its own amendment to Title VII, in response to *Dewey*).[97] One month after *Dewey*, the Court issued its decision in *Lemon* and just a few years later its decision in *Hardison*. These two lines of reasoning, one on Title VII and the other on non-establishment, seem to have operated like stairsteps, incrementally addressing the same underlying concepts of religion and "neutrality." Indeed, it is unclear why the Court would deny this connection, especially since the timing seems so clear.

But other than simple observation, why does this connection matter as it pertains to *Groff*, which removed any doubt that Title VII permits employers to treat religion favorably? In 2022, the legal framework for the Establishment Clause also experienced a shift. High school football coach Joseph Kennedy's school district—motivated by Establishment Clause concerns—fired him after he refused to end his post-game practice of midfield prayer.[98] Addressing head-on the continued vitality of the *Lemon* test, the Court insisted that it had, in fact, already "abandoned *Lemon* and its endorsement test offshoot."[99] Of course, not everyone knew that *Lemon* was obsolete, and understandably so, since the Court had never formally overruled the test, though it had criticized it sharply or ignored it in various decisions.[100] But

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Thornton Court thought necessary to ensure neutrality—a fact that Justice O'Connor made explicit in her concurring opinion. *Id.* at 712 (O'Connor, J., concurring) ("Since Title VII calls for reasonable rather than absolute accommodation and extends that requirement to all religious beliefs and practices rather than protecting only the Sabbath observance, I believe an objective observer would perceive it as an anti-discrimination law rather than an endorsement of religion or a particular religious practice.").

[96] Dewey v. Reynolds Metals Co., 402 U.S. 689, 689 (1971) (affirming the Sixth Circuit's holding).

[97] Groff v. Dejoy, 600 U.S. 447, 460 (2023) (citing Parker Seal Co. v. Cummins, 429 U.S. 65 (1976) (per curiam)).

[98] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2415, 2427 (2022).

[99] *Id.* at 2414, 2427.

[100] *Id.* at 2428 n.4; *see id.* at 2434 (Sotomayor, J., dissenting) (criticizing and faulting the Court for overulling *Lemon*) ("The Court overrules *Lemon* . . . and calls into question decades of subsequent precedents."); *id.* at 2446 ("The Court . . . effect[s] fundamental changes in this

with *Lemon* officially and finally out of the way, the Court emphasized its previous instruction that "the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'"[101] Continuing, the Court repeated a familiar concept—that "coercion" in the sense of compulsory religious observance is clearly impermissible.[102] After clarifying the legal standard, the Court held that there was no evidence in the record that Kennedy's prayer practice was coercive toward students.[103]

More importantly for our purposes here, though, the Court also stated that there was "no conflict between the constitutional commands" in the Free Exercise, Free Speech, and Establishment Clauses.[104] The Court said that "[i]n the name of protecting religious liberty, the District would have us suppress it. Rather than respect the First Amendment's double protection for religious expression, it would have us *preference secular activity*."[105] Here, the Court recognized what it had before—that the Constitution undoubtedly does not require the "government to be hostile to religion" by eliminating religious expression.[106] The only time the majority opinion referred to neutrality was when it described the District's (incorrect) reason for terminating Kennedy's employment.[107]

Neutrality and *Lemon* did make an appearance, however, in Justice Sotomayor's dissent. She would have kept the *Lemon* test and the endorsement test,[108] maintaining that the endorsement test "is a measured, practical, and administrable one, designed to account for the competing

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Court's Religion Clauses jurisprudence, all the while proclaiming that nothing has changed at all.").

[101] *Id.* at 2428 (majority opinion) (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).

[102] *Id.* at 2429. Notably, and unfortunately, the Court did not define "coercion." *Id.* at 2429–30.

[103] *Id.* at 2430 (majority opinion). The dissenting Justices disagreed with the majority's conclusion on this matter, concluding that Kennedy's prayer was coercive because it "led students to feel compelled to join him." *Id.* at 2434, 2452 (Sotomayor, J., dissenting).

[104] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2432 (2022).

[105] *Id.* at 2431 (emphasis added).

[106] *Id.* (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952)).

[107] *See id.* at 2420, 2422–24.

[108] *Id.* at 2447–50 (Sotomayor, J., dissenting).

interests present within any given community."[109] The "particular tensions" she identified in *Kennedy* were between the conflicting speech interests of the parties and "between public institutions' religious neutrality and private individuals' religious exercise."[110] These competing interests—or the "particular tensions"—might result in a need for accommodation consistent with the Establishment Clause.[111]

With this last point, Justice Sotomayor analogized to Title VII, which she said served as another instance where "balancing [of] employer and employee interests" is required.[112] She surmised that "[s]urely, an employee's religious practice that forces a school district to engage in burdensome measures to stop spectators from rushing onto a field and knocking people down imposes much more than a *de minimis* burden."[113] Now, she did not appear to insinuate that there were Establishment Clause concerns with the Title VII framework, which, at the time *Kennedy* was issued, was still subject to the language in *Hardison*. Rather, to Justice Sotomayor, it appears that those two frameworks played quite well together. In defense of the neutrality standard, she invoked the Title VII more-than-a-de-minimis-cost standard in a way that implied it was perfectly reasonable.[114]

In other words, an interpretation of Title VII that applies a de minimis standard works hand-in-hand with an interpretation of the Establishment Clause that applies a neutrality or non-endorsement standard. And why wouldn't it? Both ensure that religious practices are not favored in either the private or public square.

I posit, then, that it should have come as doubly no surprise when, after eliminating the *Lemon*/neutrality/endorsement test in *Kennedy*, the Court eliminated the de minimis standard in *Groff*. If the Establishment Clause is not about the appearance of neutrality, after all—if it is about, rather, protecting against historical abuses of government authority to coerce religious practices—then the Court's framework in *Hardison*, which was

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109 *Id.* at 2448–49.

110 Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2448 (2022).

111 *Id.*

112 *Id.* at 2448 n.13.

113 *Id.*

114 *See id.*

laced with ideas like avoiding *preferring* religion, had no place in the Title VII canon.

Coming on the heels of the Court ensuring that the state does not suppress religion in the name of non-establishment, it was far past time to revisit *Groff* and ensure that employers do not discriminate against religion. Just like the government need not avoid acknowledging religion in the public square in a manner sensitive to an historical understanding of the Establishment Clause,[115] employers may not suppress religion to create a neutrality that is no less discriminatory than it is a sham.

V. CONCLUSION

The Court explained its *Hardison* language and offered its *Groff* standard while disclaiming any connection to the Establishment Clause. But while subliminal influences may go unmentioned, they are certainly worth crediting. The posture of the Court toward religion has come a long way since 1972, and as the Court in *Kennedy* made way for religion to play a bigger role in public life, it has now also made way for religion to play a bigger role in public and private employment.

Post-*Groff*, it remains to be seen how the circuits will strike the balance between the employer's ability to conduct its business and the employee's right to religious belief and practice. In some circuits, it is likely that little will shift. But *Groff* may indicate that something larger than the four corners of the opinion is at work. Since the Title VII (re)interpretation comes on the heels of and, as I argue, was influenced by the Establishment Clause revision in *Kennedy*, it also remains to be seen how the Court will perhaps rescript another main actor in the religious freedoms drama: the Free Exercise Clause.

The Court has recently denied a petition that asked it to reconsider whether *Employment Division v. Smith* was correctly decided.[116] As Justice Barrett said in her *Fulton v. City of Philadelphia* concurrence, "it is difficult to see why the Free Exercise Clause—lone among the First Amendment freedoms—offers nothing more than protection from discrimination."[117] It was possible that, even if the Court had granted certiorari in *Tingley*, it would

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115 *Id.* at 2428 (majority opinion).

116 Tingley v. Ferguson, 144 S. Ct. 33 (2023).

117 Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882–83 (2021) (Barrett, J., concurring).

have sidestepped the religion question and resolved the case on the speech grounds contained in the petition, like it did in *303 Creative* this summer.[118] In fact, this is precisely what it appears Justices Thomas and Alito would have done, as their dissents from the denial of certiorari focused on the speech issue.[119] But a majority of the current Court has nonetheless shown a willingness to revisit *Smith*, so though not in this case, a sea change is perhaps on the way.[120]

It is beyond the limited scope of this article to consider in any meaningful detail how the Court is likely to change its Free Exercise Clause jurisprudence. Perhaps it is enough to posit that the Court has an opportunity to round out the circle, bringing the Free Exercise Clause in concert with the more vigorous protections afforded by the Establishment Clause and now, by Title VII. This time, though, the Court won't be able to say that nothing has changed.

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[118] *See* 303 Creative LLC v. Elenis, 600 U.S. 570 (2023).

[119] *Tingley*, 144 S. Ct. at 34–35 (Thomas, J., dissenting); *id.* at 35–36 (Alito, J., dissenting).

[120] Justice Kavanaugh joined Justice Barrett in her statement quoted above. *Fulton*, 141 S. Ct. at 1882–83 (Barrett, J., concurring) (joined by Kavanaugh, J.). Justice Alito stated in his concurrence, joined by Justices Thomas and Gorsuch, that "[w]e should reconsider *Smith* without further delay." *Id.* at 1883, 1888 (Alito, J., concurring) (joined by Thomas & Gorsuch, JJ.).