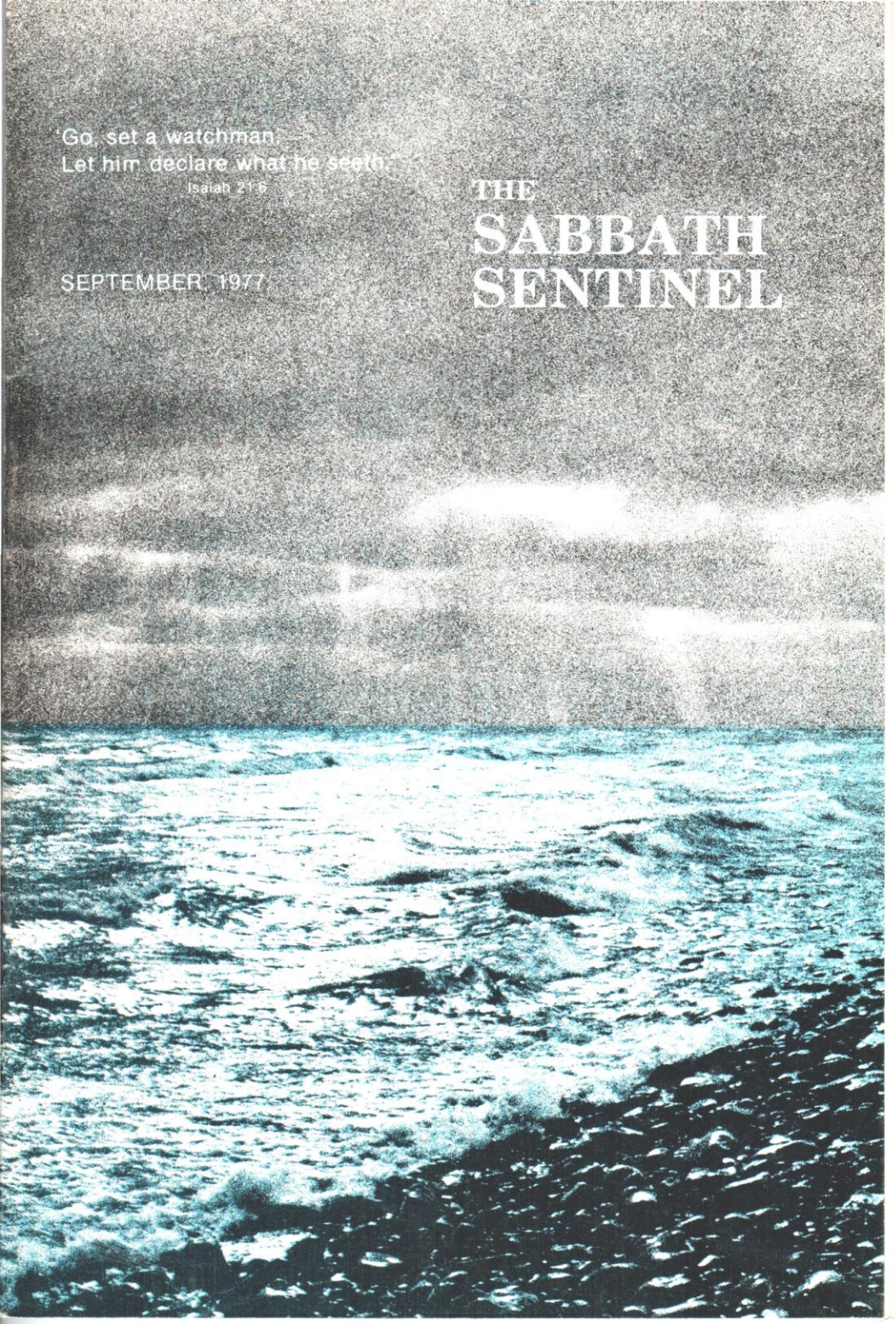
'Go, set a watchman,
Let him declare what he sees.'
Isaiah 21:6

# THE SABBATH SENTINEL

SEPTEMBER, 1977



*A Note From the Editor*

# IF YOU TURN THE LIGHTS OUT?

EUGENE LINCOLN

IN A statement which may rank as rock bottom among sayings by government officials, the incredible Ambassador Andrew Young said about the looting in New York City following the recent blackout: "If you turn the lights out, folks will steal." He thereby excused the behavior of those who broke into stores and took what they wanted.

Thus Young neatly repeals all of the Ten Commandments, as well as men's laws, by making it all right for people to violate them—"if they're hungry."

We submit that such a philosophy—partly the result of preaching that God's Law has been done away with—is one of the most dangerous hazards making their rounds in today's world. We'd take our chances with neutron bombs rather than with ideas such as Young's. A society without obedience to God's and man's laws is suicidal.

## IN THIS ISSUE . . .




## THE SABBATH SENTINEL

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The object of this non-sectarian, nondenominational association is to bring together into one strong organization all believers in the Biblical seventh-day Sabbath (Saturday) regardless of sect, creed, or denomination, for the sole purpose of spreading knowledge of, belief in, and observance of the Creator's Holy Day. The only qualification is belief in the seventh-day Sabbath.

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# Are we blind ?

## Supreme Court Decision and Dissent In Recent TWA, Inc., *v.* Hardison *et al*

EDITOR'S NOTE: *In a case decided by the U.S. Supreme Court last June 16, a majority of the justices decided that union seniority rules must take precedence over rights of employees as provided by the Equal Employment Opportunities Act. The case involved Larry Hardison, who was fired from his job with Trans World Airlines because of his refusal to work on the Sabbath. It has been reported in the past two issues of* THE SABBATH SENTINEL.

*Because of the importance of this case to Sabbatarians, we are devoting a large portion of this issue to excerpts from the official report of the decision, which has just become available. Recognizing the importance of dissenting opinions in past Supreme Court decisions, we are presenting almost in its entirety the dissent of Justice Marshall, in which Justice Brennan joined. We feel it is a classic in the history of dissenting opinions and hope that at a future time it may become majority opinion.*

# SUPREME COURT OF THE UNITED STATES

Nos. 75—1126 and 75—1385

Trans World Airlines, Inc.
Petitioner,
75—1126 *v.*
Larry G. Hardison et al.

International Association of Machinists and Aerospace Workers, AFL—CIO, et al., Petitioners,
75—1385 *v.*
Larry G. Hardison et al.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[June 16, 1977]

MR. JUSTICE WHITE delivered the opinion of the Court.

Section 703(a)(1) of the Civil Rights Act of 1964, Title VII, 42 U. S. C. Section 2000e-2(a)(1), makes it an unlawful employment practice for an employer to discriminate against an employee or a prospective employee on the basis of his or her religion. At the time of the events involved here, a guideline of the Equal Employment Opportunity Commission (EEOC), 29 CFR Section 1605.1(b), required, as the Act itself now does, 42 U. S. C. Section 2000e(j), that an employer, short of "undue hardship," make "reasonable accommodations" to the religious needs of its employees. The issue in this case is the extent of the employer's obligation under Title VII to accommodate an employee whose religious beliefs prohibit him from working on Saturdays.

I

We summarize briefly the facts found by the District Court 375 F. Supp. 877 (WD Mo. 1974).



Petitioner Trans World Airlines (TWA) operates a large maintenance and overhaul base in Kansas City, Mo. On June 5, 1967, respondent Larry G. Hardison was hired by TWA to work as a clerk in the Stores Department at its Kansas City base. Because of its essential role in the Kansas City operation, the Stores Department must operate 24 hours per day, 365 days per year, and whenever an employee's job in that department is not filled, an employee must be shifted from another department, or a supervisor must cover the job, even if the work in other areas may suffer.

Hardison, like other employees at the Kansas City base, was subject to a seniority system contained in a collective-bargaining agreement that TWA maintains with petitioner International Association of Machinists and Aerospace Workers (IAM). The seniority system is implemented by the union steward through a system of bidding by employees for particular shift assignments as they become

available. The most senior employees have first choice for job and shift assignments, and the most junior employees are required to work when the union steward is unable to find enough people willing to work at a particular time or in a particular job to fill TWA's needs.

In the spring of 1968 Hardison began to study the religion known as the Worldwide Church of God. One of the tenets of that religion is that one must observe the Sabbath by refraining from performing any work from sunset on Friday until sunset on Saturday. The religion also proscribes work on certain specified religious holidays.

When Hardison informed Everett Kussman, the manager of the Stores Department, of his religious conviction regarding observance of the Sabbath, Kussman agreed that the union steward should seek a job swap for Hardison or a change of days off; that Hardison would have his religious holidays off whenever possible if Hardison agreed to work the traditional holidays when asked; and that Kussman would try to find Hardison another job that would be more compatible with his religious beliefs. The problem was temporarily solved when Hardison transferred to the 11 p. m. - 7 a. m. shift. Working this shift permitted Hardison to observe his Sabbath.

The problem soon reappeared when Hardison bid for and received a transfer from Building 1, where he had been employed, to Building 2, where he would work the day shift. The two buildings had entirely separate seniority lists; and while in Building 1 Hardison had sufficient seniority to observe the Sabbath regularly, he was second from the bottom on the Building 2 seniority list.

In Building 2 Hardison was asked to work Saturdays when a fellow employee went on vacation. TWA agreed to permit the union to seek a change of work assignments for Hardison, but the union was not willing to violate the seniority provisions set out in the collective-bargaining contract, and Hardison had insufficient seniority to bid for a shift having Saturdays off.

A proposal that Hardison work only four days a week was rejected by the company. Hardison's job was essential, and on weekends he was the only available person on his shift to perform it. To leave the position empty would have impaired Supply Shop functions, which were critical to airline operations; to fill Hardison's position with a supervisor or an employee from another area would simply have undermanned another operation; and to employ someone not regularly assigned to work Saturdays would have required TWA to pay premium wages.

When an accommodation was not reached, Hardison refused to report for work on Saturdays. A transfer to the twilight shift proved unavailing since that schedule still required Hardison to work past sundown on Fridays. After a hearing, Hardison was discharged on grounds of insubordination for refusing to work during his designated shift.

Hardison, having first invoked the administrative remedy provided by Title VII, brought this action for injunctive relief in the United States District Court against TWA and IAM, claiming that his discharge by TWA constituted religious discrimination in violation of Title VII, 42 U. S. C. Section 2000e-2 (a)(1). He also charged that the union had discriminated against him by failing to represent him adequately in his dispute with TWA and by depriving him of his right to exercise his religious beliefs. Hardison's claim of religious discrimination rested on 1967

EEOC guidelines requiring employers "to make reasonable accommodations to the religious needs of employees" whenever such accommodation would not work an "undue hardship," 29 CFR Section 1605.1, 32 Fed. Reg. 10298 (1967), and on similar language adopted by Congress in the 1972 amendments to Title VII, 42 U. S. C. Section 2000e (j).

After a bench trial, the District Court ruled in favor of the defendants. Turning first to the claim against the union, the District Court ruled that although the 1967 EEOC guidelines were applicable to unions, the union's duty to accommodate Hardison's belief did not require it to ignore its seniority system as Hardison appeared to claim. As for Hardison's claim against TWA, the District Court rejected at the outset TWA's contention that requiring it in any way to accommodate the religious needs of its employees would constitute an unconstitutional establishment of religion. As the District Court construed the Act, however, TWA had satisfied its "reasonable accommodation" obligations, and any further accommodation would have worked an undue hardship on the company.

The Eighth Circuit Court of Appeals reversed the judgment for TWA. It agreed with the District Court's constitutional ruling, but held that TWA had not satisfied its duty to accommodate. Because it did not appear that Hardison had attacked directly the judgment in favor of the union, the Court of Appeals affirmed that judgment without ruling on its substantive merits.

In separate petitions for certiorari TWA and IAM contended that adequate steps had been taken to accommodate Hardison's religious observances and that to construe the statute to require further efforts at accommodation would create an establishment of religion contrary to the First Amendment of the Constitution. TWA also contended that the Court of Appeals improperly ignored the District Court's findings of fact.

We granted both petitions for certiorari.—U.S.—(1976). Because we agree with petitioners that their conduct was not a violation of Title VII, we need not reach the other questions presented.

II

The Court of Appeals found that TWA had committed an unlawful employment practice under Section 703(a)(1) of the Act, 42 U. S. C. Section 2000e—2 (a)(1), which provides:

> "(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."

The emphasis of both the language and the legislative history of the statute is on eliminating discrimination in employment; similarly situated employees are not to be treated differently solely because they differ with respect to race, color, religion, sex, or national origin. This is true regardless of whether the discrimination is directed against majorities or minorities. . . .

The prohibition against religious discrimination soon raised the question of whether it was impermissible under Section 703 (a)(1) to discharge or refuse to hire a

person who for religious reasons refused to work during the employer's normal workweek. In 1966 an EEOC guideline dealing with this problem declared that an employer had an obligation under the statute "to accommodate to the reasonable religious needs of employees . . . where such accommodation can be made without serious inconvenience to the conduct of the business." 29 CFR Section 1605.1, 31 Fed. Reg. 8370 (1966).

In 1967 the EEOC amended its guidelines to require employers "to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodation can be made without undue hardship on the conduct of the employer's business." 29 CFR Section 1605.1, 32 Fed. Reg. 10298 (1967). The Commission did not suggest what sort of accommodations are "reasonable" or when hardship to an employer becomes "undue."

This question—the extent of the required accommodation—remained unsettled when this Court affirmed by an equally divided Court the Sixth Circuit's decision in *Dewey* v. *Reynolds Metals Co*, 429 F. 2d 324 (CA6 1970), affirmed by an equally divided Court, 402 U. S. 689 (1971). The discharge of an employee who for religious reasons had refused to work on Sundays was there held by the Court of Appeals not to be an unlawful employment practice because the manner in which the employer allocated Sunday work assignments was discriminatory in neither its purpose not effect; and consistent with the 1967 EEOC guidelines, the employer had made a reasonable accommodation of the employee's beliefs by giving him the opportunity to secure a replacement for his Sunday work.

In part "to resolve by legislation" some of the issues raised in *Dewey*, 118 Cong. Rec. 706 (1972) (remarks of Sen. Randolph), Congress included the following definition of religion in its 1972 amendments to Title VII:

> "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.

Title VII Section 701 (j), 42 U. S. C. Section 2000e (j). The intent and effect of this definition was to make it an unlawful employment practice under Section 703(a)(1) for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees. But like the EEOC guidelines, the statute provides no guidance for determining the degree of accommodation that is required of an employer. The brief legislative history of Section 701 (j) is likewise of little assistance in this regard. The proponent of the measure, Senator Jennings Randolph, expressed his general desire "to assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law," 18 Cong. Rec. 705 (1972), but he made no attempt to define the precise circumstances under which the "reasonable accommodation" requirement would be applied.

In brief, the employer's statutory obligation to make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship, is clear, but the reach of that obligation has never

been spelled out by Congress or by Commission guidelines. With this in mind, we turn to a consideration of whether TWA has met its obligation under Title VII to accommodate the religious observances of its employees.

III

The Court of Appeals held that TWA had not made reasonable efforts to accommodate Hardison's religious needs under the 1967 EEOC guidelines in effect at the time the relevant events occurred. In its view, TWA had rejected three reasonable alternatives, any one of which would have satisfied its obligation without undue hardship. First, within the framework of the seniority system, TWA could have permitted Hardison to work a four-day week, utilizing in his place a supervisor or another worker on duty elsewhere. That this would have caused other shop functions to suffer was insufficient to amount to undue hardship in the opinion of the Court of Appeals. Second—according to the Court of Appeals, also within the bounds of the collective-bargaining contract—the company could have filled Hardison's Saturday shift from other available personnel competent to do the job, of which the court said there were at least 200. That this would have involved premium overtime pay was not deemed an undue hardship. Third, TWA could have arranged a swap between Hardison and another employee either for another shift or for the "Sabbath days." In response to the assertion that this would have involved a breach of the seniority provisions of the contract, the court noted that it had not been settled in the courts whether the required statutory accommodation to religious needs stopped short of transgressing seniority rules, but found it unnecessary to decide the issue because, as the Court of Appeals saw the record, TWA had not sought, and the union had therefore not declined to entertain, a possible variance from the seniority provisions of the collective-bargaining agreement. The company had simply left the entire matter to the union steward who the Court of Appeals said "likewise did nothing."

We disagree with the Court of Appeals in all relevant respects. It is our view that TWA made reasonable efforts to accommodate and that each of the Court of Appeals' suggested alternatives would have been an undue hardship within the meaning of the statute as construed by the EEOC guidelines.

A

It might be inferred from the Court of Appeals' opinion and from the brief of the EEOC in this Court that TWA's efforts to accommodate were no more than negligible. The findings of the District Court, supported by the record, are to the contrary. In summarizing its more detailed findings, the District Court observed:

> "TWA established as a matter of fact that it did take appropriate action to accommodate as required by Title VII. It held several meetings with plaintiff at which it attempted to find a solution to plaintiff's problems. It did accommodate plaintiff's observance of his special religious holidays. It authorized the union steward to search for someone who would swap shifts, which apparently was normal procedure." 375 F. Supp., at 890-891.

It is also true that TWA itself attempted without success to find Hardison another job. The District

Court's view was that TWA had done all that could reasonably be expected within the bounds of the seniority system.

The Court of Appeals observed, however, that the possibility of a variance from the seniority system was never really posed to the union. This is contrary to the District Court's findings and to the record. The District Court found that when TWA first learned of Hardison's religious observances in April, 1968, it agreed to permit the union's steward to seek a swap of shifts or days off but that "the steward reported that he was unable to work out scheduling changes and that he understood no one was willing to swap days with plaintiff. . . ." Later, in March 1969, at a meeting held just two days before Hardison first failed to report for his Saturday shift, TWA again, "offered to accommodate plaintiff's religious observance by agreeing to any trade of shifts that plaintiff and the union could work out. Any shift or change was impossible within the seniority framework and the union was not willing to violate the seniority provisions set out in the contract to make a shift or change. . . ." As the record shows, Hardison himself testified that Kussman was willing, but the union was not, to work out a shift or job trade with another employee. . . .

We shall say more about the seniority system, but at this juncture it appears to us that the system itself represented a significant accommodation to the needs, both religious and secular, of all of TWA's employees. As will become apparent, the seniority system represents a neutral way of minimizing the number of occasions when an employee must work on a day that he would prefer to have off. Additionally, recognizing that weekend work schedules are the least popular, the company made further accommodation by reducing its work force to a bare minimum on those days.

B

We are also convinced, contrary to the Court of Appeals, that TWA cannot be faulted for having failed itself to work out a shift or job swap for Hardison. Both the union and TWA had agreed to the seniority system; the union was unwilling to entertain a variance over the objections of men senior to Hardison; and for TWA to have arranged unilaterally for a swap would have amounted to a breach of the collective-bargaining agreement.

(1)

Hardison and the EEOC insist that the statutory obligation to accommodate religious needs takes precedence over both the collective-bargaining contract and the seniority rights of TWA's other employees. We agree that neither a collective-bargaining contract nor a seniority system may be employed to violate the statute, but we do not believe that the duty to accommodate requires TWA to take steps inconsistent with the otherwise valid agreement. Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts. Without a clear and express indication from Congress, *we cannot agree with Hardison and the EEOC that an agreed-upon seniority system must give way when necessary to accommodate religious observances. . . .* (Italics added)

Any employer who, like TWA, conducts an around-the-clock operation is presented with the choice of allocating work schedules either in accordance with the

preferences of its employees or by involuntary assignment. Insofar as the varying shift preferences of its employees complement each other, TWA could meet its manpower needs through voluntary work scheduling. In the present case, for example, Hardison's supervisor foresaw little difficulty in giving Hardison his religious holidays off since they fell on days that most other employees preferred to work, while Hardison was willing to work on the traditional holidays that most other employees preferred to have off.

Whenever there are not enough employees who choose to work a particular shift, however, some employees must be assigned to that shift even though it is not their first choice. Such was evidently the case with regard to Saturday work; even though TWA cut back its weekend work force to a skeleton crew, not enough employees chose those days off to staff the Stores Department through voluntary scheduling. In these circumstances, TWA and IAM agreed to give first preference to employees who had worked in a particular department the longest.

Had TWA nevertheless circumvented the seniority system by relieving Hardison of Saturday work and ordering a senior employee to replace him, it would have denied the latter his shift preference so that Hardison could be given his. The senior employee would also have been deprived of his contractural rights under the collective-bargaining agreement.

It was essential to TWA's business to require Saturday and Sunday work from at least a few employees even though most employees preferred those days off. Allocating the burdens of weekend work was a matter for collective-bargaining. In considering criteria to govern this allocation, TWA and the union had two alternatives: adopt a neutral system, such as seniority, a lottery, or rotating shifts: or allocate days off in accordance with the religious needfs of its employees. TWA would have had to adopt the latter in order to assure Hardison and others like him of getting the days off necessary for strict observance of their religion, but it could have done so only at the expense of others who had strong, but perhaps nonreligious reasons for not working on weekends. There were no volunteers to relieve Hardison on Saturdays, and to give Hardison Saturdays off. TWA would have had to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath.

Title VII does not contemplate such unequal treatment. The repeated, unequivocal emphasis of both the language and the legislative history of Title VII is on eliminating discrimination in employment, and such discrimination is proscribed when it is directed against majorities as well as minorities . . . Indeed, the foundation of Hardison's claim is that TWA and IAM engaged in religious *discrimination* in violation of Section 103(a)(1) when they failed to arrange for him to have Saturdays off. It would be anomalous to conclude that by "reasonable accommodation" Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far.

(2)

Our conclusion is supported by the fact that seniority systems are afforded special treatment under

Title VII itself. Section 703 (h) provides in pertinent part:

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . ."

There has been no suggestion of discriminatory intent in this case. "The seniority system was not designed with the intention to discriminate against religion nor did it act to lock members of any religion into a pattern wherein their freedom to exercise their religion was limited. It was coincidental that in plaintiff's case the seniority system acted to compound his problems in exercising his religion . . . ." The Court of Appeals' conclusion that TWA was not limited by the terms of its seniority system was in substance nothing more than a ruling that operation of the seniority system was itself an unlawful employment practice even though no discriminatory purpose had been shown. That ruling is plainly inconsistent with the dictates of Section 703(h), both on its face and as interpreted in the recent decisions of this Court.

As we have said, TWA was not required by Title VII to carve out a special exception to its seniority system in order to help Hardison to meet his religious obligations.

C

The Court of Appeals also suggested that TWA could have permitted Hardison to work a four-day week if necessary in order to avoid working on his Sabbath. Recognizing that this might have left TWA short-handed on the one shift each week that Hardison did not work, the court still concluded that TWA would suffer no undue hardship if it were required to replace Hardison either with supervisory personnel or with qualified personnel from other departments. Alternatively, the Court of Appeals suggested that TWA could have replaced Hardison on his Saturday shift with other available employees through the payment of premium wages. Both of these alternatives would involve costs to TWA, either in the form of lost efficiency in other jobs or as higher wages.

To require TWA to bear more than a *de minimus* 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 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.

As we have seen, the paramount concern of Congress in enacting Title VII was the elimination of discrimination in employment. In the absence of clear statutory

language or legislative history to the contrary, we will not readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath.

*Reversed.*

## DISSENT

Mr. Justice Marshall, with whom Mr. Justice Brennan joins, dissenting.

One of the most intractable problems arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, has been whether an employer is guilty of religious discrimination when he discharges an employee (or refuses to hire a job applicant) because of the employee's religious practices. Particularly troublesome has been the plight of adherents to minority faiths who do not observe the holy days on which most businesses are closed—Sundays, Christmas, and Easter—but who need time off for their own days of religious observance. The Equal Employment Opportunity Commission has grappled with this problem in two sets of regulations, and in a long line of decisions. Initially the Commission concluded that an employer was "free under Title VII to establish a normal workweek . . . generally applicable to all employees," and that an employee could not "demand any alteration in [his work schedule] to accomodate his religious needs." 29 CFR § § 1605.1 (a)(3), (b)(3) (1967). Eventually, however, the Commission changed its view and decided that employers must reasonably accommodate such requested schedule changes except where "undue hardship" would result—for example, "where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence." 29 CFR § 1605.1 (b) (1976).[1] In amending Title VII in 1972 Congress confronted the same problem, and adopted the second position of the EEOC. Pub. L. 92-261, § 2(7), 86 Stat. 103, codified at 42 U.S.C. § 2000e (j). Both before and after the 1972 amendment the lower courts have considered at length the circumstances in which employers must accommodate the religious practices of employees, reaching what the Court correctly describes as conflicting results. . . .And on two occasions this Court has attempted to provide guidance to the lower courts, only to find ourselves evenly divided. *Parker Seal Co.* v. *Cummins* 429 U.S. 65 (1976); *Dewey* v. *Reynolds Metals Co.*, 402 U.S. 689 (1971).

Today's decision deals a fatal blow to all efforts under Title VII to accommodate work requirements to religious practices. The Court holds, in essence, that although the EEOC regulations and the Act state that an employer must make reasonable adjustments in his work demands to take account of religious observances, the regulation and Act don't really mean what they say. An employer, the Court concludes need not grant even the most minor special privilege to religious observers to enable them to follow their faith. As a question of social policy, this result is deeply troubling, for a society that truly values religious pluralism cannot compel adherents of minority religions to make the cruel choice of surrendering their religion or their job. And as a matter of law today's result is intolerable, for the Court adopts the very position that Congress expressly rejected in 1972, as if we were free to disregard congressional choices that a majority of this Court think unwise. I therefore dissent.

I

With respect to each of the proposed accommodations to respondent's religious observance that the Court discusses, it ultimately notes that the accommodation would have required "unequal treatment," in favor of the religious observer. That is quite true. But if an accommodation can be rejected simply because it involves preferential treatment, then the regulation and the statute, while brimming with "sound and fury," ultimately "signif[y] nothing."

The accommodation issue by definition arises only when a neutral rule of general applicability, conflicts with the religious practices of a particular employee. In some of the reported cases, the rule in question has governed work attire; in other cases it has required attendance at some religious function; in still other instances, it has compelled membership in a union; and in the largest class of cases, it has concerned work schedules. What all these cases have in common is an employee who could comply with the rule only by violating what the employee views as a religious commandment. In each instance, the question is whether the employee is to be exempt from the rule's demands. To do so will always result in a privilege being "allocated according to religious beliefs," unless the employer gratuitously decides to repeal the rule in toto. What the statute says, in plain words, is that such allocations are required unless "undue hardship" would result.

The point is perhaps best made by considering a not-altogether-hypothetical example. . . .Assume that an employer requires all employees to wear a particular type of hat at work in order to make the employees readily identifiable to customers. Such a rule obviously does not, on its face, violate Title VII, and an employee who altered the uniform for reasons of taste could be discharged. But a very different question would be posed by the discharge of an employee who, for religious reasons, insisted on wearing, over her hair a tightly fitted scarf which was visible through the hat. In such a case the employer could accommodate this religious practice without undue hardship—or any hardship at all. Yet as I understand the Court's analysis—and nothing in the Court's response . . . is to the contrary—the accommodation would not be required because it would afford the privilege of wearing scarfs to a select few based on their religious beliefs. The employee thus would have to give up either the religious practice or the job. This, I submit, makes a mockery of the statute.

In reaching this result, the Court seems almost oblivious to the legislative history of the 1972 amendment to Title VII which is briefly recounted in the Court's opinion. That history is far more instructive than the Court allows. After the EEOC promulgated its second set of guidelines requiring reasonable accommodations unless undue hardship would result, at least two courts issued decisions questionsing, whether the guidelines were consistent with Title VII. *Dewey* v. *Reynolds Metals Co.*, 429 F. 2d 324 (CA 6 1970), affirmed by an equally divided Court, 402 U. S. 689 (1971); *Riley* v. *Bendix Corp.*, 330 F. Supp. 583 (MD Fla. 1971); reversed, 464 F. 2d 1113 (CA5 1972). These courts reasoned, in language strikingly similar to today's decision, that to excuse religious observers from neutral work rules would "discriminate against . . . other employees" and "constitute unequal administration of the collective-bargaining

agreement. . . ." They therefore refused to equate "religious discrimination with failure to accommodate. . . ." When Congress was reviewing Title VII in 1972, Senator Jennings Randolph informed the Congress of these decisions which, he said, had "clouded" the meaning of religious discrimination. . . .He introduced an amendment, tracking the language of the EEOC regulation, to make clear that Title VII requires religious accommodation, even though unequal treatment would result. The primary purpose of the amendment, he explained, was to protect Saturday Sabbatarians like himself from employers who refuse "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 . . . ." His amendment was unanimously approved by the Senate on a roll call vote. . . .and was accepted by the Conference Committee, . . . whose report was approved by both Houses. . . .Yet the Court today, in rejecting any accommodation that involves preferential treatment, follows the *Dewey* decision in direct contravention of congressional intent.

The Court's interpretation of the statute, by effectively nullifying it, has the singular advantage of making consideration of petitioner's constitutional challenge unnecessary. The Court does not even rationalize its construction on this ground, however, nor could it, since "resort to an alternative construction to avoid deciding a constitutional question is appropriate only when such a course is 'fairly possible' or when the statute provides a 'fair alternative' construction. . . ." Moreover, while important constitutional questions would be posed by interpreting the law to compel employers (or fellow employees) to incur substantial costs to aid the religious observer,[2] not all accommodations are costly, and the constitutionality of the statute is not placed in serious doubt simply because it sometimes requires an exemption from a work rule. Indeed, this Court has repeatedly found no Establishment Clause problems in exempting religious observers from state-imposed duties, *e. g., Wisconsin* v. *Yoder,* 406 U. S. 205, 234-235, n. 22 (1972); *Sherbert* v. *Verner,* 374 U. S. 398, 409 (1963); *Zorach* v. *Clauson,* 343 U. S. 306 (1952), even when the exemption was in no way compelled by the Free Exercise Clause, *e. g., Gillette* v. *United States,* 401 U. S. 437 (1971); *Welsh* v. *United States,* 398 U. S. 333, 371-372 (1970) (White, J., dissenting); *Sherbert* v. *Verner, supra,* at 422 (Harlan, J., dissenting); *Braunfeld* v. *Brown,* 366 U. S. 599, 608 (1961) (dictum); *McGowan* v. *Maryland,* 366 U. S. 420, 520 (1961) (Frankfurter, J., concurring).[3] If the State does not establish religion over nonreligion by excusing religious practitioners from obligations owed the State, I do not see how the State can be said to establish religion by requiring employers to do the same with respect to obligations owed the employer. Thus, I think it beyond dispute that the Act does—and, consistently with the First Amendment, can—require employers to grant privileges to religious observers as part of the accommodation process.

## II

Once it is determined that the duty to accommodate sometimes requires that an employee be exempted from an otherwise valid work requirement, the only remaining question is whether this is such a case: did TWA prove that it

exhausted all reasonable accomodations, and that the only remaining alternatives would have caused undue hardship on TWA's business. To pose the question is to answer it, for all that the District Court found TWA had done to accommodate respondent's Sabbath observance was that it "held several meetings with [respondent] . . . [and] authorized the union steward to search for someone who would swap shifts. . ." To conclude that TWA, one of the largest air carriers in the nation, would have suffered undue hardship had it done anything more defies both reason and common sense.

The Court implicitly assumes that the only means of accomodation open to TWA were to compel an unwilling employee to replace respondent; to pay premium wages to a voluntary substitute; or to employ one less person during respondent's Sabbath shift.[4] Based on this assumption, the Court seemingly finds that each alternative would have involved undue hardship not only because respondent would have given a special privilege, but also because either another employee would have been deprived of rights under the collective-bargaining agreement . . . or because "more than a *de minimus* cost. . ." would have been imposed on TWA. But the Court's myopic view of the available options is not supported by either the District Court's findings or the evidence adduced at trial. Thus, the Court's conclusion cannot withstand analysis, even assuming that its rejection of the alternatives it does discuss is justifiable.[5]

To begin with, the record simply does not support the Court's assertion, made without accompanying citations, that "[t]here were no volunteers to relieve Hardison on Saturdays," *ante*, at 16. Everett Kussman, the manager of the department in which respondent worked, testified that he had made no effort to find volunteers, App., at 136, and the Union stipulated that its steward had not done so either. . . . Thus, contrary to the Court's assumption, there may have been one or more employees who, for reasons of either sympathy or personal convenience, willingly would have substituted for respondent on Saturdays until respondent could either regain the non-Saturday shift he had held the three preceding months[6] or transfer back to his old department where he had sufficient seniority to avoid Saturday work. Alternatively, there may have been an employee who preferred respondent's Thursday-Monday daytime shift to his own; in fact, respondent testified that he had informed Kussman and the union steward that the clerk on the Sunday-Thursday night shift (the "graveyard" shift) was dissatisfied with his hours. App. 70. Thus, respondent's religious observance might have been accommodated by a simple trade of days or shifts without necessarily depriving any employee of his or her contractual rights and without imposing significant costs on TWA. Of course it is also possible that no trade—or none consistent with the seniority system—could have been arranged. But the burden under the EEOC regulation is on TWA to establish that a reasonable accommodation was not possible . . . . Because it failed either to explore the possibility of a voluntary trade or to assure that its delegate, the union steward, did so, TWA was unable to meet its burden.

Nor was a voluntary trade the only option open to TWA that the Court ignores; to the contrary, at least two other options are apparent from the record. First, TWA could

have paid overtime to a voluntary replacement for respondent—assuming that someone would have been willing to work Saturdays for premium pay—and passed on the cost to respondent. In fact, one accommodation Hardison suggested would have done just that by requiring Hardison to work overtime when needed at regular pay. Under this plan, the total overtime cost to the employer—and the total number of overtime hours available for other employees—would not have reflected Hardison's Sabbath absences. Alternatively, TWA could have transferred respondent back to his previous department where he had accumulated substantial seniority, as respondent also suggested. Admittedly, both options would have violated the collective-bargaining agreement; the former because the agreement required that employees working over forty hours per week receive premium pay, and the latter because the agreement prohibited employees from transferring departments more than once every six months. But neither accommodation would have deprived any other employee of rights under the contract or violated the seniority system in any way. Plainly an employer cannot avoid his duty to accommodate by signing a contract that precludes all reasonable accommodations; even the Court appears to concede as much. . . .Thus I do not believe it can be even seriously argued that TWA would have suffered "undue hardship" to its business had it required respondent to pay the extra costs of his replacement, or had it transferred respondent to his former department.

What makes this case most tragic, however, is not that respondent Hardison has been needlessly deprived of his livelihood simply because he chose to follow the dictates of his conscience. Nor is the tragedy of the case exhausted by the impact it will have on thousands of Americans like Hardison who could be forced to live on welfare as the price they must pay for worshipping their God.[8] The ultimate tragedy is that despite Congress' best efforts, one of this Nation's pillars of strength—our hospitality to religious diversity—has been seriously eroded. All Americans will be a little poorer until today's decision is erased.

I respectfully dissent.

---

[1]The Court's statement that in promulgating the second guidelines "[t]he Commission . . . did not purport to change the view expressed in its 1966 guidelines that work schedules generally applicable to all employees may not be unreasonable," *ante at* 8 n. 7, is incomprehensible. The preface to the later guidelines, 32 Fed. Reg. 10298 (1907), state that the "Commission hereby amends § 1605.1, Guidelines on Discrimination Because of Religion . . . Section 1605.1 as amended shall read as follows. . . ." Thus the later guidelines expressly repeated the earlier guidelines. Moreover, the example of "undue hardship" given in the new guidelines and quoted in text makes clear that the Commission believed, contrary to its earlier view, that in certain instances employers would be required to excuse employees from work for religious observances.

In its decisions subsequent to the formulation of the guidelines, the Commission has consistently held that employers must accommodate Sabbath observances where substitute employees are available. . . .

[2]Because of the view I take of the facts, . . . I find it unnecessary to decide how much cost an employer must bear before he incurs "undue hardships." I also leave for another day the merits of any constitutional objections that could be raised if the law were construed to require employers (or employees) to assume significant costs in accommodating.

[3]The exemption here, like those we have upheld, can be claimed by any religious practitioner, a term that the EEOC has sensibly defined to include atheists . . . and persons not belonging to any organized sect but who hold " '[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption. . . .' The purpose and primary effect of requiring such exemptions is the wholly secular one of securing equal economic opportunity to members of minority religions . . . . And the mere fact that the law sometimes requires special treatment of religious practitioners does not present the dangers of "sponsorship, financial support, and active involvement of the sovereign in religious activity," against which the Establishment Clause is principally aimed. . . .

[4]It is true that these are the only options the Court of Appeals discussed. But that court found that TWA could have adopted these options without undue hardship; once that conclusion is rejected it is incumbent on this Court to decide whether any other alternatives were available that would not have involved such hardship.

[5]I entertain grave doubts on both factual and legal grounds about the validity of the Court's rejection of the options it considers. As a matter of fact, I do not believe the record supports the Court's suggestion that the costs to TWA of either paying overtime or not replacing respondent would have been more than *de minimus*. While the District Court did state, as the Court notes, . . . that both alternatives "would have created an undue burden on the conduct of TWA's business, . . ." the court did not explain its understanding of the phrase "undue burden," and may have believed that such a burden exists whenever any cost is incurred by the employer, no matter how slight. Thus the District Court's assertion falls far short of a factual "finding" that the costs of these accommodations would be more than *de minimus*. Moreover, the record is devoid of any evidence documenting the extent of the "efficiency loss" TWA would have incurred had it used a supervisor or an already scheduled employee to do respondent's work, and while the stipulations make clear what overtime would have cost, the price is far from staggering: $150 for three months, at which time respondent would have been eligible to transfer back to his previous department. The Court's suggestion that the cost of accomodation must be evaluated in light of the "likelihood that . . . TWA may have many employees whose religious observances . . . prohibit them from working on Saturdays or Sundays" is not only contrary to the record, which indicates that only one other case involving a conflict between work schedules and Sabbath observance had arisen at TWA since 1945, . . . but also irrelevant, since the real question is not whether such employees exist but whether they could be accommodated without significant expense. Indeed, to the extent that TWA employed Sunday as well as Saturday Sabbatarians, the likelihood of accommodation being costly would diminish, since trades would be more feasible.

As a matter of law, I seriously question whether simple English usage permits "undue hardship" to be interpreted to mean "more than *de minimus* cost," especially when the examples the guidelines give of possible undue hardship is the absence of a qualified substitute . . . . I therefore believe that in the appropriate case we would be compelled to confront the constitutionality of requiring employers to bear more than *de minimus* costs. The issue need not be faced here, however, since an almost cost-free accommodation was possible.

[6]Respondent lost the non-Sabbath shift when an employee junior to him went on vacation. The vacation was to last only two weeks, however, and the record does not explain why respondent did not regain his shift at the end of that time.

[7]The Court states . . . that because of TWA's departmental seniority system, such a transfer "would not have solved Hardison's problems." But respondent testified without contradiction that had

he returned to his previous department he would have regained his seniority in that department, and thereby could have avoided work on his Sabbath. . . .

[8]Ironically, the fiscal costs to society of today's decision may exceed the costs that would accrue if employers were required to make all accommodations without regard to hardship, since it is clear that persons on welfare cannot be denied benefits because they refuse to take jobs that would prevent them from observing religious holy days, see *Sherbert* v. *Verner, supra.*



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# The Divine Commemorative

EUGENE LINCOLN

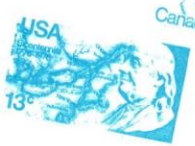














*An amazing and beautiful truth is often overlooked by so many.*

WHAT DOES a postage stamp mean to you? Chances are that if you're a typical adult, you think of it simply as a small piece of gummed paper with perforations on the sides and its value printed on the front, usually along with a picture, map, or design. Perhaps, added to these obvious details, comes the disturbing thought that the price for postage is getting higher all the time.

But if your concept of a postage stamp ends with these points, you're missing much of the beauty, romance, and adventure that are represented by those little canceled adhesives that adorn your mail.

To begin with, a stamp serves the humble purpose of a receipt, indicating that the sender has prepaid the postage. Does this fact seem too evident even to mention? Then remember that until Sir Rowland Hill, a British government official and teacher, thought up the idea of stamps during the first half of the nineteenth century, the one receiving the letter had to pay the

postage. Think of paying the letter carrier for the privilege of receiving a bill from a creditor!

The first postage stamps, issued by Great Britain in 1840, bore the image of Queen Victoria, reigning monarch at the time. Because of their color they were soon dubbed "the Penny Blacks." At first the innovations were called labels, and the cancellation mark was termed the stamp. But before long the public was calling the bits of paper "stamps." And the name has stuck.

Other countries soon followed the example of Great Britain. Brazilians began using stamps in 1843, and the first two United States stamps were issued in 1847. The brown five-cent stamp bore a picture of Benjamin Franklin, first postmaster general. George Washington's likeness appeared on the black ten-cent variety, which had the value in Roman numerals. Canada's first stamps were issued in 1851.

Early stamps were not perforated, so postmasters kept scissors handy to cut out the required number from the sheets.

Before long a new hobby—philately, or stamp collecting—was born. Some of the first collections were stored in boxes, pasted in scrapbooks, or even attached to walls of houses. Philatelists soon realized that such practices made it impossible to remove a stamp to another location without damaging it. Nowadays stamp hinges take care of this problem, as they peel off easily without any danger of tearing the stamp.

If you think that stamp collecting is just for kids, think again. Millionaires, kings, and presidents have indulged in this fascinating hobby. President Franklin D. Roosevelt was an avid collector. Stamp selling for hundreds of dollars are not uncommon, and some sell for thousands—one for $280,000 in 1970. Many people buy sheets or "blocks of four" stamps, unused, as an investment—a practice which will often bring bigger returns than stocks or bonds.

You don't have to be a collector, however, to enjoy stamps. Many of them are masterpieces of miniart. After all, where else can one secure an engraving by one of the world's best artists for a few cents? Some of these stamps, issued to commerate famous persons or important events and called commemoratives, offer an interesting way to learn the history of a country.

All governments—from tiny Vatican City and Liechtenstein (area 108.7 acres and 62 square miles, respectively) to the USSR (area over 8 1/2 million square miles)—issue stamps, and practically all of them recall important events with commemoratives. So perhaps it would not be unusual to find that the kingdom of heaven has a "commemorative stamp" in honor of a great happening. The kingdom of heaven has issued a commemorative for the completion of the grandest construction project ever undertaken in the history of the universe. Compared to it, the construction of the Panama Canal (for which the United States issued a commemorative stamp in 1939) fades into nothing. It took the U.S. Army Corps of Engineers seven years of actual construction work to build the canal, but it took the Ruler of the heavenly kingdom only seven days to complete His task—and one of these days was spent in looking over the completed work and giving it His approval.

And the commemorative issued in honor of the event? It wasn't a colorful bit of paper that would not endure through eternity that He wanted it remembered; it wasn't

even a mammoth granite monument with bronze plaque attached to it, for even these do not pass the test of withstanding the ravages of aeons.

But we're getting ahead of the story. Let's start at the beginning and study the Word of God to find what the project was and how it is to be commemorated for all time to come. In fact, we shall touch upon another part of the story—how an enemy government has made a counterfeit commemorative, just as the British government made counterfeit German stamps during World War I. In each case the counterfeit was so cleverly done that many people have been completely fooled by it.

The first words of the Bible contain this profound statement: "In the beginning God created the heaven and the earth" (Genesis 1:1). The rest of chapter 1 relates how the Lord, simply by saying the word, created light; the sky; the earth and sea, with plants; sun, moon, and stars; fish and birds; and animal life. On the sixth day He climaxed creation by creating man in His image out of the dust (Genesis 1:26; 2:7).

But then God did an unusual thing. He rested on the seventh day and spent it just looking at His work, and He pronounced it "very good." Because He had rested on the seventh day, He endowed this special day with two special qualities: blessing and sanctification (Genesis 2:1-3). These set it apart from any other day of the week, for when something is sanctified, it is made holy; and blessing includes the idea of invoking divine favor on something.

How long does God's blessing on something last? David said, "What thou, O Lord, hast blessed is blessed for ever" (1 Chronicles 17:27, RSV).

The Lord wanted man to rest from his labors every week and to remember who had created him and all things around him. From the summit of Mount Sinai in a voice that shook the earth the Lord proclaimed ten timeless laws for mankind, and the fourth of these was, "Remember the sabbath day, to keep it holy. Six days shalt thou labour, and do all thy work: but the seventh day is the sabbath of the Lord thy God: in it thou shalt not do any work, thou, nor thy son, nor thy daughter, thy manservant, nor thy maidservant, nor thy cattle, nor thy stranger that is within thy gates: for in six days the Lord made heaven and earth, the sea, and all that in them is, and rested the seventh day: wherefore the Lord blessed the sabbath day, and hallowed it" (Exodus 20:8-11).

The Lord intended the Sabbath commemorative, included in these ten laws, to last through eternity (Psalm 111:7, 8; Exodus 31:13). Sabbath keeping was to be a sign between Him and His followers that He who could create a universe and sanctify a day could also re-create individuals and sanctify their lives (Ezekiel 20:12, 20).

"That's all right," you may be saying as you read this, "but what's so important about it? Doesn't the whole Christian world honor the Lord every seventh day?"

But stop a moment to consider. First, think of the exact wording of the fourth commandment—"the *seventh* day is the sabbath of the Lord." Now look at your calendar. What is the seventh day? Is it Sunday?

No, Sunday is the *first* day of the week, and Saturday is the seventh day, a fact attested by the Jews, who have remembered it for thousands of years. Something has happened to the Sabbath, for most of Christendom observes the first day rather than the seventh.

Has the calendar been changed? Yes, it has, but this did not affect the days of the week. In 1582 the Julian calendar, which had been in use since a few years before Christ was born on earth, was ten days ahead of where it should be. So to remedy this, Friday, October 15, followed Thursday, October 4. In some countries the change was made in 1752, when eleven days had to be skipped; Thursday, September 14, followed Wednesday, September 2. Never in recorded history has there been a break in the orderly progression of the weekly cycle.

A calendar gaining favor in some countries makes an arbitrary division of the week so that Sunday appears to be the seventh day, but calling a "one" a "seven" doesn't make it so.

Did Jesus or His disciples, then, make the change from the seventh day of the week to the first day? Search as we will in the New Testament, we can find no record of a change in the day of rest. Jesus kept the Sabbath (Luke 4:16), and the apostle Paul kept it long after Jesus' resurrection (Acts 17:2). Even Gentiles who were inquiring into the new message that Paul proclaimed met on the Sabbath—not on Sunday (called "the first day" in the Bible) (see Acts 13:14, 42, 44). The first day of the week is mentioned only eight times in the New Testament, and not one of these contains a command or even a suggestion that it was to be the Christian day of worship.

So the question comes to us: When and how did Sunday observance come into the church, since it was not originated by Christ or His apostles?

Religious historians are almost unanimous in saying that Sunday observance was the result of early pagan influence in the Christian church.

One author, Joseph McSorley, writes:

"As time went on, and the separation between Judaism and Christianity became more deliberate and conscious, the Christians abandoned the observance of the Sabbath altogether" (*An Outline History of the Church by Centuries,* p. 20).

Gordon J. Laing adds some more background to the mystery:

"Our observance of Sunday as the Lord's Day is apparently derived from Mithraism. The argument that has sometimes been used against this claim, namely that Sunday was chosen because the resurrection occurred on that day, is not well supported. As a matter of fact the first Christians adhered to the Jewish practice of keeping Saturday" (*Survivals of Roman Religion,* pp. 148, 149).

So we are faced with a choice that will determine our eternal destinies: Shall we accept the divine commemorative of His power instituted by God Himself or settle for a counterfeit tainted with a background of sun worship?

Jesus said, "If ye love me, keep my commandments" (John 14:15). The inspired John wrote the last beatitude of the Scriptures: "Blessed are they that do his commandments, that they may have right to the tree of life, and may enter in through the gates into the city" (Revelation 22:14).

The choice is not simply which day one will observe each week as his day of rest; it is whether we recognize God's sovereignty over our lives or reject it, saying in effect, "Thank You, Lord, but we prefer the counterfeit to the genuine stamp of Your creatorship."

Think it over; consider the eternal consequences of your choice. Then why not talk the matter over with the Lord, telling Him that you want to become a citizen of the kingdom of heaven? And if you

remain in Him and He remains in you, you will be among those in the new earth that "from one sabbath to another" will "come to worship" the Lord (Isaiah 66:23).

Eugene Lincoln

# Our Readers Respond

I have been receiving THE SABBATH SENTINEL for about a year now, but it has not been until the past few weeks that I really began to think in terms of joining the association. The recent Supreme Court decision on the Sabbath is what did it. Before I really didn't see the real need for the B.S.A. in relationship to religious liberty. But now, because of the events taking place, I see a strong need in supporting and joining the fight for Sabbatarian rights. Enclosed is a check for my membership.

—E.B., New York

I believe that the Bible Sabbath Association is doing right by being actively involved in political affairs. President Littrell is on his toes and ready to respond at any moment. We can be thankful that the Lord has given us such a "live wire" as our B.S.A. president.

—A.M., Arizona

* * *

Your personal letters, literature, and Bible lessons are most precious to me. I am an isolated Sabbath keeper and just don't know what I would do without the Bible Sabbath Association. I value my membership.

—M.A., Wisconsin

* * *

Please don't send me your insane magazine any more. Legalism is a curse to God's people. I don't want anything to do with your law keeping.

—M.F., Texas

* * *

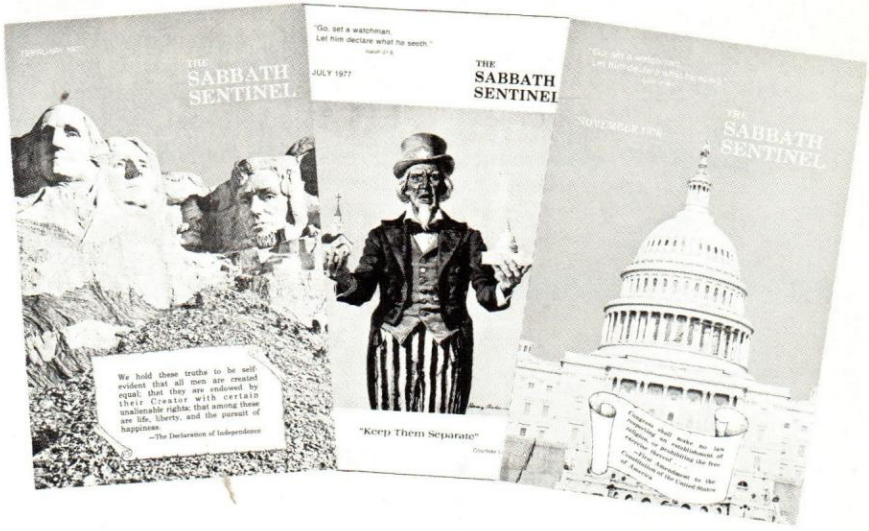
Wow! Your July issue of the Sabbath Sentinel was fantastic—the best ever that I have received.

—B.R., California

* * *

I would like to commend you for publishing the recent article in THE SABBATH SENTINEL entitled "Sunday Is the Lord's Day" from the Catholic point of view. So many Sabbatarians feel that they are experts on Catholic doctrine, yet they don't read Catholic literature or visit a Catholic Mass. We Catholics will attend Seventh-day Adventist services, but why don't you attend ours?

—B.H., Indiana

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