# Compounding Errors in Favor of Religious Liberty

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- When is America's judicial system like the child's game of "telephone"?
- You've probably heard about the case Groff v. Dejoy, Postmaster General, but I doubt you've heard anything about just how bad the underlying jurisprudence is.
- When is a religious liberty win not as good as we've been told? When it's based on a house of cards.

Our judicial system today works like a bad case of the game "telephone". You probably remember that game from grammar school. The teacher would whisper something into one child's ear, who would then whisper it into the next child's ear, and on and on until the message got all the way around the room. Then the teacher would compare what they had whispered in to the first child's ear with what the last child heard, and it would be completely different. This child's game shows the dangers of what I call a "compounding replication error", the idea that small errors that occur when something like a message is replicated, compounded with each new replica, until the original message is lost. This is how our judicial system works today, often with disastrous effects. In the case of Groff v. Dejoy, Postmaster General most people see a win for religious liberty. I, however, see another generation of a compounding replication error in judicial opinion that, while granting the correct outcome today, lays the groundwork for

the destruction of our rights and the rule of law tomorrow.

On it's face, the case Groff v. Dejoy, Postmaster General seems quite simple. Can the United States Postal Service punish an employee for refusing to work on Sunday's for religious reasons?

*Petitioner Gerald Groff is an Evangelical Christian who believes for religious reasons that Sunday should be devoted to worship and rest. In 2012, Groff took a mail delivery job with the United States Postal Service. Groff's position generally did not involve Sunday work, but that changed after USPS agreed to begin facilitating Sunday deliveries for Amazon. … Groff received "progressive discipline" for failing to work on Sundays, and he eventually resigned.*

**Groff v. Dejoy, Postmaster General**

This seems simple enough. Mr. Groff took a mail delivery job with the United States Postal Service (USPS), which did not generally involve working on Sundays. When the USPS signed an agreement with Amazon which included Sunday deliveries, Mr. Groff moved to another station, a more rural one that did not offer Sunday deliveries. When that station began to offer Sunday deliveries, Mr. Groff refused to work those days, forcing the USPS to redistribute his work to other employees. This led to progressively increased discipline, which caused Mr. Groff to resign and file suit.

*Groff sued under Title VII of the Civil Rights Act of 1964, asserting that USPS could have accommodated his Sunday Sabbath practice "without undue hardship on the conduct of [USPS's] business." … The District Court granted summary judgment to USPS. The Third Circuit affirmed based on this Court's decision in Trans World Airlines, Inc. v. Hardison, …, which it construed to mean "that requiring an employer 'to bear more than a de minimis cost' to provide a religious accommodation is an undue hardship." … The Third Circuit found the de*

*minimis cost standard met here, concluding that exempting Groff from Sunday work had "imposed on his coworkers, disrupted the workplace and workflow, and diminished employee morale."*

**Groff v. Dejoy, Postmaster General**

Both the District and Circuit courts sided with the USPS, concluding that they only had to show a de minimus (Latin for "of minimum importance") cost to be able to deny a religious accommodation. These courts came to this decision based on a previous decision called *Trans World Airlines, Inc. v. Hardison*. This is where we pick up our game of Judicial Telephone.

**Undue Hardship**

Let's start where all legal cases should start: With the law. Title VII of the Civil Rights Act of 1964 prohibited discrimination in public places, provided for the integration of schools and other public facilities, and made employment discrimination illegal. Title VII, dealing with employment discrimination, was added to the U.S. Code until Title 42, Sections 2000e-2000e-17. Within that law we find:

*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;*

**42 USC §2000e–2**

Later the Equal Employment Opportunity Commission added regulations requiring that employers make a reasonable accommodation for religious practice.

*After an employee or prospective employee notifies the*

*employer or labor organization of his or her need for a religious accommodation, the employer or labor organization has an obligation to reasonably accommodate the individual's religious practices. A refusal to accommodate is justified only when an employer or labor organization can demonstrate that an undue hardship would in fact result from each available alternative method of accommodation.*

**29 CFR § 1605.2(c)(1)**

First we need to note that the regulation is 29 CFR §1605.2(c)(1) not §1605.1 as the court claims in the opinion's syllabus. This religious accommodation requirement was eventually codified in the U.S. Code under §2000e(j):

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

**42 USC §2000e(j)**

The law quite clearly states that employers cannot discriminate against an individual because of their religious observance and practice unless they can show doing so would be an undue hardship on their business. What is an undue hardship?

*exceeding or violating propriety or fitness : EXCESSIVE*

**Undue – Merriam-Webster's Online Dictionary**

*something that causes or entails suffering or privation*

**Hardship – Merriam-Webster's Online Dictionary**

In other words, employers must make accommodation for religious practices unless it would cause excessive suffering

or privation. However, in Mr. Groff's case, the Third Circuit did not base their decision on the law, but on their interpretation of a previous case, Trans World Airlines, Inc. v. Harrison. The Supreme Court noted the error in using this precedent in their decision.

*Instead, the Court's opinion stated that "the principal issue on which TWA and the union came to this Court" was whether Title VII "require[s] an employer and a union who have agreed on a seniority system to deprive senior employees of their seniority rights in order to accommodate a junior employee's religious practices." … The Court held that Title VII imposed no such requirement. …*

*But the Court's opinion in Hardison contained this oft quoted sentence: "To require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship." Although many lower courts later viewed this line as the authoritative interpretation of the statutory term "undue hardship," the context renders that reading doubtful. In responding to Justice Marshall's dissent, the Court described the governing standard quite differently, stating three times that an accommodation is not required when it entails "substantial" "costs" or "expenditures."*

**Groff v. Dejoy, Postmaster General**

Do you see how Judicial Telephone is so dangerous to our rights and the rule of law? How many lower court decision were made on the faulty reasoning found in Hardison? How would Mr. Groff's case have been decided if this court had not gone to the text of the law?

*To determine what an employer must prove to defend a denial of a religious accommodation under Title VII, the Court begins with Title VII's text. The statutory term, "hardship," refers to, at a minimum, "something hard to bear" and suggests something more severe than a mere burden. If Title VII said*

*only that an employer need not be made to suffer a "hardship," an employer could not escape liability simply by showing that an accommodation would impose some sort of additional costs. Adding the modifier "undue" means that the requisite burden or adversity must rise to an "excessive" or "unjustifiable" level. Understood in this way, "undue hardship" means something very different from a burden that is merely more than de minimis, i.e., "very small or trifling." The ordinary meaning of "undue hardship" thus points toward a standard closer to Hardison's references to "substantial additional costs" or "substantial expenditures."*

**Groff v. Dejoy, Postmaster General**

By now you may be thinking, "Great, Paul! The Circuit Court got it wrong, but at least the Supreme Court came to the right conclusion because they went back to the law." If that is what you're thinking, you're wrong.

**Equal Employment Opportunity**

You see the Hardison decision was based on a previous decision, Dewey v. Reynolds Metals Co..

*This is an action arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, which provides, among other things, for relief against religious discrimination in employment.*

**Dewey v. Reynolds Metals Co.**

OK, Paul, so what is wrong with Dewey? Dewey, which is the first case I found regarding Title VII of the Civil Rights Act of 1964, does not appear to have even considered whether or not Title VII was even constitutional.

*Because an application of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, will permit the court to decide the case, it is not necessary to reach the question of whether*

*plaintiff's constitutional rights have been violated.*

**Dewey v. Reynolds Metals Co.**

The Dewey court recognized that the Constitution, either directly or indirectly, had to be considered, but not because the Constitution said so, but because another court had.

*An agreement which violates a provision of the federal constitution or of a constitutional federal statute, or which cannot be performed without violating such a provision, is illegal and void. Ewert v. Bluejacket,*

**Dewey v. Reynolds Metals Co.**

Because of these views, the Dewey court never appears to question whether or not Title VII of the Civil Rights Act of 1964 violated the Constitution of the United States in the first place, which would have made the law void. This despite the fact that the court pointed out the unconstitutional nature of the law in their opinion.

*In relation to Sherbert, one might question its relevance, since in that case there was "state action," while in the instant case there is only private action. That distinction would be important if this opinion were dealing with whether defendant's overtime rule is unconstitutional. But the issue before the court is whether the defendant has violated a federal statute a statute which restricts the activities of private employers and does not require "state action." The importance of Sherbert to this analysis is not its holding on constitutionality, but its definition of discrimination a definition which is equally valid whether employed to measure private or state action.*

**Dewey v. Reynolds Metals Co.**

Title VII of the Civil Rights Act of 1964 restricted the activities of private employers, which is not a power

delegated to the United States by its Constitution.

*The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person,*

**42 USC §2000e(b)**

But Congress is not granted the power to regulate commerce, only:

*To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;*

**U.S. Constitution, Article I, Section 8, Clause 3**

Furthermore, Title VII does not regulate commerce, it regulates employment. While it's assumed that Congress can regulate employment within the federal government, they have not been delegated any power to regulate employment outside of that sphere. This means Title VII violates the Tenth Amendment.

*The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.*

**U.S. Constitution, Amendment X**

Since Title VII is a U.S. Law not made in pursuance of the Constitution, it is not the supreme law of the land.

*This Constitution, **and the Laws of the United States which shall be made in Pursuance thereof**; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.*

**U.S. Constitution, Article VI, Clause 2 (emphasis added)**

And, since the judges in every state are bound to the supreme law, including those of the Supreme Court who take an oath to support the Constitution, they should have found Title VII unconstitutional and therefore void.

The One Good Thing Found in This Mess

There is one good thing found in this mess, and that's the actual decision. You see, the USPS is part of the federal government (https://www.usa.gov/agency-index/p#P). Its very existence came from Congress, and therefore, it's subject to the First Amendment:

*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; …*

**U.S. Constitution, Amendment I**

The United States Postal Service, as an entity created by Congress, is barred from prohibiting the free exercise of religion, including observing the Sabbath.

*Held: Title VII requires an employer that denies a religious accommodation to show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business.*

**Groff v. Dejoy, Postmaster General**

So while the Supreme Court got it wrong, the outcome for Mr. Groff is correct.

*The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.*

**Groff v. Dejoy, Postmaster General**

**Conclusion**

When I was young my mother used to say, “Two wrongs don’t make a right.” That is true for this case. With everyone focusing on the court deciding in Mr. Groff’s favor, lost are the numerous wrongs that brought them to it. You may be asking, “Paul, how can you be upset with a win for religious liberty?” The answer is simple: Because it depends solely on the largess of nine black robed oligarchs, and what the oligarchs give, the oligarchs can take away. This decision is founded on nothing but a towering house of cards waiting for the slightest breeze to blow it down. What happens when the next judge or justice arbitrarily decides that an employee’s Sunday off is an undue hardship? Are you willing to bet your financial future, not to mention your rights, on how burdensome some judge might find your accommodation?

We used to have courts of justice, then we had courts of law, but now we are saddled with courts of opinions. How can we build a just and stable judicial system on such shifting sands?



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