Duquesne Law Review

Volume 24 | Number 3 Article 9

1986

Constitutional Law - First Amendment - Establishment Clause

Michael J. Hudock III

Recent Decisions

CONSTITUTIONAL LAW—FIRST AMENDMENT—ESTABLISHMENT CLAUSE —The United States Supreme Court has held that State statutes which mandate that an employer not force an employee to work on his chosen Sabbath are violative of the Establishment Clause of the first amendment.

Estate of Thornton v. Caldor, Inc., 105 S. Ct. 2914 (1985).*

In 1975, Donald E. Thornton began working in a managerial position with Caldor, Incorporated, a chain of retail stores in the New England area.[1] The particular store in which Thornton was employed was in the state of Connecticut.[2] Initially, Caldor's Connecticut stores were closed on Sundays pursuant to state law.[3] The Connecticut Legislature, however, revised the state's Sunday closing laws in 1979, after which Caldor opened its stores for Sunday business.[4] Due to the expanded store hours, Caldor required its

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* Due to the unavailability of the *Estate of Thornton* opinion in the United States Reports at the time of publication, citations to this reporter have been omitted.

1. Estate of Thornton v. Caldor, 105 S. Ct. 2914 (1985). Thornton died on February 4, 1982, while his appeal was pending before the Supreme Court of Connecticut. The administrator of Thornton's estate has continued the suit on behalf of the estate. *Id.* at 2915 n.1. Thornton was employed by Caldor as a manager of a men's and boys' clothing department. *Id.* at 2915.

2. Caldor, Inc. v. Thornton, 191 Conn. 336, 339, 464 A.2d 785, 788 (1983). Thornton began working in Caldor's Waterbury, Connecticut store during 1975. *Id.*

3. *Estate of Thornton*, 105 S. Ct. at 2915. *See* CONN. GEN. STAT. §§ 53-300 - 53-303 (1958).

4. 105 S. Ct. at 2915 n.2. The state legislature revised the Sunday closing laws in 1976 after a state court had held that the existing laws were unconstitutionally vague. *See* State v. Anonymous, 33 Conn. Supp. 55, 364 A.2d 244 (Conn. C.P. 1976). The legislature modified the statute to allow certain types of businesses to remain open. CONN. GEN. STAT. § 53-302a (Supp. 1962-1984).

The legislators simultaneously added a new provision, § 53-303e, which prohibited employment for more than six days in any calendar week and guaranteed employees the right not to work on the Sabbath of their religious faith. *Id.* Soon after the revised Sunday closing law was enacted, a common pleas court declared it unconstitutional. *See* State v. Anonymous, 33 Conn. Supp. 141, 366 A.2d 200 (Conn. C.P. 1976). This decision was limited to the section governing Sunday closing, § 53-302a; the court refrained from assessing the validity of other sections such as § 53-303e. *Id.*

managers to work one out of every four Sundays on a rotational basis.[5]

Thornton, a Presbyterian observing Sunday as his Sabbath, initially complied with Caldor's demands and worked thirty-one Sundays between 1977 and 1978.[6] In October 1978, Thornton was transferred to a managerial position at another Caldor store within Connecticut where he continued to work his Sunday schedule through November of 1979.[7] It was around this time that Thornton informed Caldor that he would no longer work on Sunday as that was his Sabbath.[8] Thornton claimed this option as a matter of right protected by Connecticut statute.[9]

Subsequently, Thornton had several meetings with Caldor executives in an attempt to resolve the problem. As a result, Thornton was offered two alternatives: first, to continue in a supervisory capacity at a Massachusetts store, which did not require Sunday employment; or second, to remain at his current location in a non-

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In 1978, the Connecticut legislature tried once again to enact another Sunday closing law, Pub. Act No. 78-329, 1978 Conn. Pub. Acts 700-702; The Supreme Court of Connecticut declared the statute unconstitutional. *See* Caldor's Inc. v. Bedding Barn, Inc., 177 Conn. 304, 417 A.2d 343 (1979). As had the common pleas court, the Supreme Court of Connecticut did not assess the constitutionality of § 53-303e and that provision remained in effect until challenged in this action before the United States Supreme Court. *Id.*

5. *Estate of Thornton*, 105 S. Ct. at 2916. The managerial employees were expected to work every third or fourth Sunday on a rotation basis. *Id.*

6. *Id.* at 2916.

7. *Id.*

8. *Id.*

9. Specifically, Thornton invoked the protection of CONN. GEN. STAT. § 53-303e (Supp. 1962-1984) which provides in its entirety:

> More than six days employment in calendar week prohibited. Employee observance of Sabbath. Employee remedies.
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> (a) No employer shall compel any employee engaged in any commercial occupation or in the work of any industrial process to work more than six days in any calendar week. An employee's refusal to work more than six days in any calendar week shall not constitute grounds for his dismissal.
>
> (b) No person that states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day. An employee's refusal to work on his Sabbath shall not constitute grounds for his dismissal.
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> (c) Any employee, who believes that his discharge was in violation of subsection (a) or (b) of this section may appeal such discharge to the state board of mediation and arbitration. If said board finds that the employee was discharged in violation of said subsection (a) or (b), it may order whatever remedy will make the employee whole, including but not limited to reinstatement in his former or comparable position.
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> (d) No employer may, as a prerequisite to employment, inquire whether the applicant observes any Sabbath.
>
> (e) Any person who violates any provision of this section shall be fined not more than two hundred dollars.

CONN. GEN. STAT. § 53-303e (Supp. 1962-1984).

supervisory capacity as a member of the employee union.[10] Thornton found both alternatives equally unsavory and rejected both offers.[11]

In March 1980, Thornton was transferred to a clerical position within the same store at a lower salary.[12] He resigned two days later and filed a grievance with the State Board of Mediation and Arbitration alleging that he was discharged from his managerial position in violation of Connecticut General Statutes section 53-303e(b).[13] Caldor defended its action before the Board on the ground that Thornton had not been "discharged" within the meaning of the statute.[14] Caldor further urged the Board to find that section 53-303e(b) violated Article 7 of the Connecticut Constitution[15] as well as the Establishment Clause of the first amendment of the United States Constitution.[16] The Board rejected both of Caldor's proposed defenses and thereupon ordered Thornton reinstated to his managerial position with backpay and compensation for lost benefits.[17] On appeal, the superior court affirmed the Board's decision, holding that section 53-303e(b) did not violate the Establishment Clause.[18]

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10. 105 S. Ct. at 2916. The collective bargaining agreement in effect for Caldor's non-supervisory employees provided that they were not required to work on Sundays if it were "contrary [to the employee's] personal religious convictions." *Id.* at n.4.

11. *Id.* at 2916. The reasons for Thornton's refusal are more fully set forth in the Connecticut Supreme Court decision. *See Caldor*, 191 Conn. at 339, 464 A.2d at 788 (Thornton rejected both alternatives because of the distance and hardship involved in commuting or moving to Massachusetts, and because remaining in Connecticut as a union member would have involved a decrease in pay from $6.46 to $3.50 per hour).

12. 105 S. Ct. at 2916. *See also Caldor*, 191 Conn. at 339, 464 A.2d at 788 ("Caldor informed him [Thornton], on Thursday, March 6, 1980, that there was 'no alternative other than to revert you back to rank and file at $3.50 an hour beginning this Monday,'. . . .").

13. 105 S. Ct. at 2916. *See supra* note 9 for text of § 53-303e(b).

14. 105 S. Ct. at 2916.

15. *Id.* As a quasi-judicial body, the Board concluded that it lacked the authority to pass on the constitutionality of state law and refused to consider Caldor's constitutional challenge. *Id.* at 2917 n.5.

16. *Id.* at 2916. *See also Caldor*, 191 Conn. at 339-40, 464 A.2d at 789 & n.2. The Establishment Clause of the first amendment of the United States Constitution provides: "Congress shall make no laws respecting an establishment of religion . . . ." U.S. CONST. amend. I, cl. 1. The Establishment Clause was made applicable to the states in Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

17. *Estate of Thornton*, 105 S. Ct. at 2916-17. Assuming the constitutionality of § 53-303e(b) until a court declared otherwise, the Board decided that Thornton's dismissal by Caldor had violated the statute's provisions. Caldor, Inc. v. Thornton, Conn. Bd. Med. & Arb. No. 7980-A-727 (Oct. 20, 1980). Thornton's remedy, fashioned by the Board, included reinstatement to his former or comparable position with backpay and compensation for lost fringe benefits. *Id.*

18. 105 S. Ct. at 2917. On November 18, 1980, Caldor filed an application to vacate the

Caldor then appealed the superior court's decision to the Connecticut Supreme Court, pursuing the same defenses it had presented before the superior court and the Board below.[19] Although the court rejected Caldor's first contention that Thornton was not discharged within the meaning of the statute,[20] it agreed with Caldor that section 53-303e(b) violated the Establishment Clause of the first amendment.[21] In deciding whether section 53-303e(b) passed constitutional muster under the Establishment Clause, the Connecticut Supreme Court held that the statute did not have a "clear secular purpose,"[22] the statute had a primary effect which impermissibly advanced religion,[23] and that the statute

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arbitration award with the trial court pursuant to CONN. GEN. STAT. § 52-418, alleging the award to be illegal and beyond the power of the arbitrators in that (1) Thornton was not "discharged" within the meaning of § 53-303e; and (2) § 53-303e was unconstitutional as a violation of the Establishment Clause of the first amendment. *Caldor*, 191 Conn. at 339, 464 A.2d at 788-89.

In response, Thornton filed a cross-application, seeking confirmation of the arbitration award pursuant to CONN. GEN. STAT. § 52-417. In a memorandum opinion, the trial court concluded that § 53-303e did not violate the Establishment Clause and ruled that the Board was correct in its determination that Thornton had been discharged within the meaning of the statute. Accordingly, the court granted Thornton's cross-application for confirmation of the arbitration award, while denying Caldor's petition to have the award vacated. *Caldor*, 191 Conn. at 340, 464 A.2d at 789.

19. 191 Conn. at 340, 464 A.2d at 789. *See also supra* text accompanying notes 14 & 16.

20. 191 Conn. at 340, 464 A.2d at 789. In considering the first contention, the court was unwilling to accept Caldor's suggestion that because Thornton resigned from his job he had not been "discharged." The court noted that the arbitration board found that Thornton had been discharged within the meaning of the statute, therefore, it was a settled fact which they could not review. *Id.*

21. *Id.* at 343, 464 A.2d at 792. Justice Grillo, writing for the majority, set forth the test which the statute must pass in order not to impinge upon the Establishment Clause of the first amendment. Justice Grillo noted that "[i]t is settled law that in order to pass muster under the establishment clause, the statute 'in question, first, must reflect a clearly secular legislative purpose, second, must have a primary effect that neither advances nor inhibits religion, and third, must avoid excessive governmental entanglement with religion.' " *Id.* The court also noted that if the statute fails to pass any one part of the test, it must fall. *Id.*

22. *Id.* at 343, 464 A.2d at 793. Noting that the Supreme Court held in McGowan v. Maryland, 366 U.S. 420, 445-52 (1961), that a statute may have a valid secular purpose of providing a common day of rest for both religious and non-religious citizens, the Connecticut Supreme Court declared that § 53-303e(b) stretched this rationale too far since it authorized each employee to designate his or her own observance of Sabbath. 191 Conn. at 343, 464 A.2d at 793. The unmistakable purpose of such a provision, the court reasoned, was to allow those persons who worship on a particular day the freedom to do so, and this did not pass constitutional muster under the "clear secular purpose" test. *Id.*

23. *Id.* at 344, 464 A.2d at 794. The court reasoned that the "benefit" of choosing to take a particular day of the week off was conferred on a strictly religious basis because under the statute only those employees who designate a Sabbath are entitled, with impunity, to not work on a particular day, while those who do not observe a Sabbath may not avail themselves of the same unbridled benefit. According to the court, the primary effect of

promoted excessive entanglement between government and religion.[24] For all of these reasons, the court concluded that section 53-303e(b) violated the Establishment Clause of the first amendment.

Thornton subsequently filed and was granted a writ of certiorari to the Supreme Court of the United States.[25] Chief Justice Burger, writing for the majority, noted that in Establishment Clause cases, the Court must strike down any government activity which either impinges on religious freedom or potentially creates a state religion.[26] The Chief Justice then relied on *Lemon v. Kurtzman*[27] as stating the correct test to be used in Establishment Clause cases.[28] *Lemon* dictates that in order for a statute to pass constitutional muster, it must not only have a clear secular purpose and not foster excessive entanglement of government and religion, but also, its primary effect must not advance or inhibit religion.[29] Focusing on section 53-303e(b), the Court observed that:

> The Connecticut statute . . . guarantees every employee, who "states that a particular day of the week is observed as his Sabbath," the right not to work on his chosen day. . . . The State has thus decreed that those who observe a Sabbath any day of the week as a matter of religious conviction must be relieved of the duty to work on that day, no matter what burden or inconvenience this imposes on the employer or fellow workers.[30]

Thus, the Court concluded that section 53-303e(b) granted an absolute and unqualified right not to work on whatever day the religious employee happened to unilaterally designate.[31] This right,

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this incongruent grant of benefit was to advance religion. *Id.*

24. *Id.* It was the third criterion as set forth by the court (*See supra* note 21 and accompanying text) which presented the "most troublesome consideration." *Id.* According to the court, in looking at the effect of § 53-303e(b) it is necessary to also consider § 53-303e(c), which provides the arbitration board with the right to resolve disputes arising under subsection (b). *Id. See supra* note 9 for the exact text of the statute.

25. Estate of Thornton v. Caldor, Inc., 104 S. Ct. 1438 (1984). The Supreme Court also granted the motion of the State of Connecticut to intervene as of right to defend the constitutionality of § 53-303e(b). *Id.*

26. Estate of Thornton v. Caldor, Inc., 105 S. Ct. 2914, 2917 (1985). In *Estate of Thornton*, five justices joined Chief Justice Burger in the majority, Justice O'Connor filed a concurring opinion in which Justice Marshall joined, and Justice Rehnquist dissented without a written opinion. *Id.*

27. 403 U.S. 602 (1971).

28. 105 S. Ct. at 2917.

29. *Lemon*, 403 U.S. at 613.

30. *Estate of Thornton*, 105 S. Ct. at 2917.

31. *Id.* The Court noted that the State Board of Mediation and Arbitration came to the same conclusion with regard to the statute, that the statute provided Thornton with the absolute right not to work on the Sabbath. *Id.* at 2917 n.8. *See also* Caldor, Inc. v. Thorn-

the Court noted, correspondingly placed an absolute duty on employers and employees to conform their business practices to the particular religious practices of the religious employee.[32] According to the Court, the inevitable result of section 53-303e(b) is that religious concerns of Sabbath observers are raised above all secular interests in the workplace and given a weight unyielding to the expense of all other interests.[33] Therefore, the Court concluded, section 53-303e(b) went far beyond the point of only having an incidental and remote effect of advancing religion, and thus failed the primary effect test of *Lemon*.[34] Accordingly, the Court held that the Connecticut statute violated the Establishment Clause of the first amendment.[35]

Justice O'Connor, in her concurring opinion, agreed with the majority that the appropriate test to be used in Establishment Clause cases was that enunciated by the Court in *Lemon*, and also agreed with the majority's analysis under the *Lemon* test.[36] Justice O'Connor, however, pointed out that while section 53-303e(b) must fall under the Court's analysis, she did not interpret the Court's opinion as suggesting that the religious accommodation provisions of Title VII of the Civil Rights Act of 1964 were similarly unconstitutional.[37] The crucial differences between Title VII and the Con-

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ton, Conn. Bd. Med. & Arb. No. 7980-A-727 (Oct. 20, 1980).

The Supreme Court also noted that this was the construction given and accepted by the State Superior Court and the Connecticut Supreme Court in the proceedings of the case below. *Estate of Thornton*, 105 S. Ct. at 2917 n.8. *See, e.g., Caldor*, 191 Conn. at 340-43, 350, 464 A.2d 785, 789-90, 794 (1983). The federal courts are bound to apply the construction of state law as construed by the state courts. *See, e.g.*, Brown v. Ohio, 432 U.S. 161, 167 (1975); Garner v. Louisiana, 368 U.S. 157, 169 (1961).

32. 105 S. Ct. at 2918.

33. *Id.* The Court noted, for example, that under the statute, there is no allowance made for the special circumstances as the Friday Sabbath observer employed in an occupation with a Monday through Friday work schedule, such as a school teacher; nor does the statute provide for special consideration if a high percentage of the employer's work force asserts rights to the same Sabbath. *Id.* Moreover, the Court noted, there is no exception allowed when honoring the choice of the Sabbath observer would impose substantial economic burdens on the employer or when such compliance would require the employer to impose significant burdens on other employees required to work in place of the Sabbath observers. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 2918-19 (O'Connor, J. concurring).

37. *Id.* at 2919. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(j) (1982) defines the affirmative duty to reasonably accommodate by providing the following:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer is able to demonstrate 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.

necticut statute were, according to Justice O'Connor, twofold: one, while section 53-303e(b) calls for absolute accommodation for the religious employee in the workplace, Title VII only requires reasonable accommodation; and, two, section 53-303e(b), ostensibly an equal employment opportunity statute, confers its benefit solely upon Sabbath observers, while Title VII extends its protection to all religious groups, as well as to all groupings by race, national origin and sex.[38]

The Establishment Clause of the first amendment provides that "Congress shall make no law respecting an establishment of religion."[39] Over the years, the Supreme Court of the United States has held this prohibition not only to proscribe the establishment of a national religion but also to forbid governmental assistance in sectarian programs.[40] The Establishment Clause has been traditionally viewed as mandating government neutrality in religious matters[41] and guaranteeing the separation of church and state.[42]

Id.

Prior to 1972, Title VII simply prohibited employers from using religion, or other enumerated criteria, as a factor in employment decisions. Section 2000e-2 of Title VII states:

> It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2 (1982).

38. 105 S. Ct. at 2919 (O'Connor, J., concurring). Justice O'Connor obviously felt the need to defend Title VII against the constitutional scrutiny to which § 53-303e(b) was subjected. Her defense of Title VII is, however, inarticulate and superficial. *See infra* note 130 and accompanying text.

39. U.S. CONST. amend. I, cl. 1.

40. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971); Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947).

41. *See, e.g.*, Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 793 (1973); Abington School Dist. v. Schempp, 374 U.S. 203, 222, 226, 306 (1963); Engel v. Vitale, 370 U.S. 421 (1962); Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 211 (1948); *Everson*, 330 U.S. at 18.

42. Comment, *Meuller v. Allen: Do Tuition Tax Deductions Violate the Establishment Clause?*, 68 IOWA L. REV. 539, 542 (1983); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-4, at 818-19 (1978) (hereinafter referred to as TRIBE). Tribe suggests that two fundamental principles underlie the Establishment and Free Exercise clauses: voluntarism and separatism or "neutrality." Designed to prevent any direct or indirect compulsion in matters of belief, the Free Exercise Clause is a mandate of religious voluntarism. The Establishment Clause involves the principle of voluntarism in terms of ensuring that the church sustains itself only through voluntary support of its followers, not from political support of the state.

The juridical controversy over the Establishment Clause has centered around the degree of government neutrality and separation that the mandate requires. Although the Supreme Court has frequently noted Thomas Jefferson's concept of a high and impregnable "wall of separation between church and state,"[43] the Court has been loath to apply such a theory of strict government neutrality toward religion.[44] Having rejected an absolute construction and mechanical application of the Establishment Clause, the Court has been in a continuing debate over the appropriate degree of government neutrality required.[45]

The scope of the Establishment Clause mandate evolved into its present form in the 1970's, primarily through a case by case analysis.[46] The majority of these cases involved public aid to parochial

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The separation principle requires that the state refrain from involvement in religious affairs and prohibits fragmentation of the electorate by reason of sectarian differences. *Id.* at 818-19.

43. Letter from Thomas Jefferson to Danbury Baptist Association (Jan. 1, 1802), *reprinted in* 8 THE WRITINGS OF THOMAS JEFFERSON 113 (Washington ed. 1861). The "high and impregnable" characterization was given by the Supreme Court in *Everson*, 330 U.S. at 18. *See also* TRIBE, *supra* note 42, at 817 n.58, where the author notes that Thomas Jefferson supported the separation primarily as a means to protect the state from the church. Jefferson believed that only the strictest "wall of separation between church and state," would eliminate the formal influence of religious institutions from politics and preserve free choice among political views. *Id.*

44. *See* Larken v. Grendel's Den, Inc., 459 U.S. 116, 122-23 (1982); Laycock, *Towards a General Theory of Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1416 (1981). The solidity of the wall as an absolute barrier to government involvement with religion has never been certain. In *Everson*, Justice Black wrote for the Supreme Court majority: "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach." 330 U.S. at 18. But having set the strict standard, the *Everson* Court turned around and upheld a state program to pay expenses for students of parochial as well as public schools. Noting the apparent irony of the majority decision, Justice Jackson dissented: "[T]he undertones of the opinion . . . seem utterly discordant with its conclusion . . . . [T]he most fitting precedent is that of Julia, according to Byron's Reports, 'whispering, "I will ne'er consent," consented.' " *Id.* at 19 (Jackson, J.,dissenting).

45. *See Nyquist*, 413 U.S. at 788; Tilton v. Richardson, 403 U.S. 672, 677 (1971); Walz v. Tax Comm'n, 397 U.S. 664, 668-70 (1970); Board of Educ. v. Allen, 392 U.S. 236, 249 (1968) (Harlan, J., concurring); *Abington*, 374 U.S. at 222; *Everson*, 330 U.S. at 18.

46. For a discussion of the criticisms of a case-by-case approach, see Wolman v. Walter, 433 U.S. 229, 265-66 (1977) (Stevens, J., concurring and dissenting); Buchanan, *Accommodation of Religion in Public Schools: A Plea for Careful Balancing of Competing Constitutional Values*, 28 UCLA L. REV. 1000, 1021 (1980); Marty, *Of Darters and Schools and Clergymen: The Religion Clauses Worse Confounded*, 1978 SUP. CT. REV. 171, 182. *See also* McDonald, *Establishment Clause Challenge to Mandatory Religious Accommodation in the Workplace*, 36 HASTINGS L. REV. 121, 121-22 (1984) (for a survey of the incongruent and confusing decisions rendered under a case-by-case approach).

schools[47] or religious practices in public schools.[48] For example, in *Everson v. Board of Education*,[49] the first major decision in this area, the Supreme Court applied the Establishment Clause to state legislation. In *Everson*, the Court adopted the first prong of modern Establishment Clause analysis—the secular purpose test.[50]

In *Everson*, a New Jersey statute authorizing local school districts to provide transportation to nonpublic as well as public school pupils was challenged.[51] In the majority opinion, Justice Black noted initially that only a strict policy of no-aid to parochial schools could preserve the original meaning of the Establishment Clause.[52] However, realizing the undesirable consequences of such an absolute policy, Justice Black reasoned that incidental benefits to religious institutions were permissible so long as these benefits were derived from legislation that had a valid secular purpose.[53]

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47. *See, e.g., Lemon*, 403 U.S. 602 (1971) (teacher salaries, textbooks and other materials); *Tilton*, 403 U.S. 672 (1971) (construction grants to colleges); *Allen*, 392 U.S. 236 (1968) (textbook loans); *Everson*, 330 U.S. 1 (1947) (bus transportation).

48. *See, e.g., Engel*, 370 U.S. 421 (1962) (prayer reading in public schools); Zorach v. Clauson, 343 U.S. 306 (1952) (release time from public schools for religious training).

49. 330 U.S. 1 (1947). In *Everson*, the Establishment Clause of the first amendment was held applicable to the states through the fourteenth amendment. The Free Exercise Clause was similarly applied to the states in Cantwell v. Connecticut, 310 U.S. 296 (1940).

50. 330 U.S. at 5-8.

51. *Id.*

52. *Id.* at 16. Justice Black was referring to Thomas Jefferson's concept of a "wall of separation between church and state." Justice Black stated in *Everson*,

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can they pass laws that aid one religion, aid all religions, or prefer one religion over another . . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice a religion . . . .

Id. at 15-16.

Despite this pronouncement, the Court has been loath to follow such a strict policy. *See, e.g.*, Comment, *Statute Granting Tax Deductions for Tuition Paid by Parents of Sectarian and Non-Sectarian School Children Does Not Violate the Establishment Clause: Meuller v. Allen*, 61 WASH. U.L.Q. 269, 272-73 (1983).

53. 330 U.S. at 16-18. Justice Black noted that while under the Establishment Clause of the first amendment, New Jersey could not use tax raised funds to support any religious institution, the language of the first amendment also commanded that New Jersey could not hamper its citizens in the exercise of their own religions. *Id.* As Justice Black concluded:

> Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, . . . Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation. While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state established churches, to be sure that we do not inadvertantly prohibit New Jersey from extending its general state law benefits to all its citizens without regard to religious belief.

Id. See also Lynch v. Donnelly, 104 S. Ct. 1355, 1358-59 (1984) (Court's reiteration that the notion that tensions exist between the goal of preventing governmental intrusion into reli-

Applying this test, the *Everson* Court held that legislation ensuring the safe delivery of children to and from school had a public welfare rather than religious goal, and consequently was permissible.[54]

The "valid secular purpose" test, in the years which followed the *Everson* decision, proved to be an inadequate means of gauging permissible government activity in religious contexts. As the Court struggled with first amendment challenges to Sunday-closing laws,[55] released-time arrangements on and off public school premises,[56] and prayer in public schools,[57] it soon became apparent to the Court that the states were attempting to circumvent constitutional challenges by masquerading clearly religious legislation in statements of legitimate secular purposes.[58] To deal with this subterfuge, the Court reformulated the test to include two prongs—the "valid secular purpose" inquiry of *Everson*, and the "primary effect" inquiry.[59]

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gious areas and the reality that total separation is impossible).

54. *Everson*, 330 U.S. at 18.

55. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420 (1961) (upholding Sunday closing laws because of the legitimate secular purpose of giving everyone a day of rest).

56. A released-time arrangement allows public school students to have time away from their secular studies for religious instruction when they do not have access to sectarian schools. *See* Comment, *supra* note 52, at 274 n.38. *See also* Illinois *ex. rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948) (holding that a released-time program with religious instruction on public school property was invalid as violating the Establishment Clause); *and Zorach*, 343 U.S. 306 (1952) (relying on the Free Exercise Clause to approve the release of students for religious instruction off public school premises).

57. *See Engel*, 370 U.S. 421 (1962) (prohibiting the use of state-written prayer in the public schools).

58. *See Abington*, 374 U.S. at 223. In *Abington*, the rule called into question under the Establishment Clause provided for the opening exercises of the public schools to include readings from the Bible and or the Lord's Prayer. *Id.* Trying to ground the legislation in a secular purpose, the state contended that the program was an effort to extend its benefits to all public school children without regard to their religious belief, and, among its secular purposes, the legislation was designed to promote moral values, contradict the materialistic trend of the time, perpetuate American institutions, and teach literature. *Id.*

In response, the Court observed:

> But even if [the legislative] purpose is not strictly religious, it is sought to be accomplished through readings, without comment, from the Bible. Surely the place of the Bible as an instrument of religion cannot be gainsaid, and the State's recognition of the pervading religious character of the ceremony is evident from the rule's specific permission of the alternative use of the Catholic Douay version as well as the recent amendment permitting non-attendance at the exercises. None of these factors is consistent with the contention that the Bible here is used as an instrument for nonreligious moral inspiration or as a reference for the teaching of secular subjects.

Id. at 224.

59. *Abington*, 374 U.S. at 222. *See Everson*, 330 U.S. at 14-15 (valid secular purpose test).

The "primary effect" prong of the test demands that the principal consequence of the legislation neither positively nor negatively bear upon religion.[60] Under this inquiry, although a state may have a purported secular purpose in its legislation or program, the courts may nevertheless invalidate the law or state program if it has the primary effect of either advancing or inhibiting religion.[61] This prong of Establishment Clause analysis was first unveiled and applied in *Abington School District v. Schempp*,[62] where the Court invalidated statutes requiring Bible readings and prayer in public schools. The next application of the two prong "purpose-effect" test came five years later in *Board of Education v. Allen*[63] where the Court upheld a New York textbook loan program which provided for the loan of textbooks to both private and public school pupils alike.

Finally, in 1970, the Court developed the third and final prong of the Establishment Clause analysis in *Walz v. Tax Commission*,[64] where the Court denied a challenge to the tax exempt status conferred to church property by the New York Constitution. In the final step of its analysis, the *Walz* Court considered the degree of entanglement between church and state created by the tax exemption, stating that the Establishment Clause forbids excessive and continuing administrative entanglement between government and

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60. *Abington*, 374 U.S. at 222.

61. Application by the Court of the primary effect test involves two criteria to determine whether a statute will pass constitutional muster. *See generally* Comment, *Tax Deduction for Parents and Children Attending Public and Non-Public Schools: Mueller v. Allen*, 71 KY. L.J. 685, 687-90 (1982-83) (discussing application of the primary effect test). The first criterion requires that the activity being aided have clearly distinguishable secular aspects from its religious aspects so that a court can be certain that only the secular activities are aided. *See* Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472, 480 (1973). The second criterion looks to the breadth of the benefitted class: if the class is too narrow, the statute is suspect. *See Nyquist*, 413 U.S. at 794.

62. 374 U.S. 203 (1963). For a general discussion of the *Abington* decision, see *supra* note 58 and accompanying text.

63. 392 U.S. 236, 243-44 (1968). The *Allen* Court, however, concentrated on the primary effect prong of the test, reasoning that since the financial benefit of the state aid flowed to the parents and their children and not directly to religious schools, the statute did not have the primary effect of advancing religion. *Id.*

64. 397 U.S. 664 (1970). First, the Court noted that the tax exempt status of the church had a long standing history. *Id.* at 666-67. Second, the Court examined the breadth of the benefited class, emphasizing that religious institutions represented merely one of several non-profit, quasi-public corporations and institutions granted tax exempt status under the New York Constitution. *Id.* Furthermore, according to the *Walz* Court, the federal government and every state had granted churches a property tax exemption, modeled after a Virginia statutory scheme adopted in 1800. *Id.*

religious institutions.[65] The Court then observed that the state involvement caused by the exemption was "minimal and remote" and far less than that contact that would result if religious institutions were subject to taxation.[66] Accordingly, the *Walz* Court upheld the tax exemption for religious institutions in New York.[67] Concern with this last element, excessive entanglement between church and state, represented the third and final prong in subsequent Establishment Clause analysis.

These three prongs finally merged into one cohesive test formally adopted by the Supreme Court in *Lemon v. Kurtzman*.[68] There, the Court invalidated state subsidy of parochial school teacher salaries.[69] Noting that the state law passed the secular purpose and primary effect tests, the Court nevertheless invalidated the program because it did not pass the excessive entanglement portion of the test.[70] The Court stated that the state subsidy of parochial school teacher salaries not only promised to entangle church and state in complicated administrative procedures, but also promised to generate "heated" church related debates in the legislature during annual appropriation sessions.[71]

Additionally, the Court's opinion in *Lemon* indicated that the entanglement prong of the test is itself a two-tiered inquiry. First, the Court inquires into whether a statute impermissibly fosters excessive administrative entanglement between government and religion[72] and, secondly, the Court asks whether the challenged statute

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65. *Id.* at 676.

66. *Id.* at 674. The Court reasoned that taxation would ultimately result in greater entanglement in the form of "tax valuations of church property, tax liens, tax foreclosures, and the direct confrontation and conflicts that follow in the train of those legal processes." *Id.*

67. *Id.* at 675.

68. 403 U.S. 602 (1971). Therein, the Court stated:

> [e]very analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests must be gleaned from our cases. First, the statute must have a secular purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . . finally, the statute must not foster "an excessive, governmental entanglement with religion."

Id. at 612-13 (citations omitted). Additionally, the Court more clearly articulated the entanglement prong of the test. *Id.* at 614-25.

69. *Id.* at 620.

70. *Id.*

71. *Id.*

72. *Id.* at 615. The *Lemon* Court, outlining the basic line of inquiry in the area of administrative entanglement, said: "[The Court] must examine the character and purposes of the institutions that are benefited, the nature of aid that the State provides, and the resulting relationship between the government and the religious authority." *Id.* The *Lemon* Court invalidated a state program because it created excessive administrative entanglement,

has the potential for dividing an electorate or legislature along religious lines.[73]

A statute which fails either the secular purpose test, the primary effect test, or the administrative entanglement test will be held unconstitutional.[74] Although the Court considers political division as dangerous because it will divert legislative attention away from other important issues, it has never invalidated a statute solely because it failed the political entanglement test.[75] Instead, a statute's propensity for political divisiveness triggers a warning signal, provoking the Court to review the analysis under the other areas with stricter scrutiny.[76]

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reasoning that the program would require "comprehensive, discriminating, and continuing state surveillance" to operate. *Id.* at 619. *Cf.* Wolman v. Walter, 433 U.S. 229 (1977) (Ohio state program which sought to provide non-public schools with textbooks and auxiliary services created excessive administrative entanglement since participation in the program was contingent upon compliance with state restrictions and the state would have to continuously monitor compliance). *See also* Meek v. Pettinger, 421 U.S. 349 (1975).

The Supreme Court has recognized that the test for administrative entanglement cannot be relentlessly applied, reasoning that some administrative entanglement is inevitable when otherwise valid laws or government activities affect religion. *See Larken*, 459 U.S. at 123; *Lemon*, 403 U.S. at 614; *Tilton*, 403 U.S. 672 (upholding lump sum federal construction grants to non-public colleges); Marsh v. Chambers, 103 S. Ct. 3330 (1983). *See also* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 1031 (2d ed. 1983) (hereinafter cited as NOWAK).

73. *Lemon*, 403 U.S. at 622-24; *accord*, *Wolman*, 433 U.S. 229, 258 (Marshall, J., concurring in part and dissenting in part); *see also* TRIBE, *supra* note 42, § 14-12, at 866; Goffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U.L.J. 205, 206 & n.7 (1980); Schotten, *The Establishment Clause and Excessive Governmental Entanglement: The Constitutional Status of Aid to Non-Public Elementary and Secondary Schools*, 15 WAKE FOREST L. REV. 207, 222 (1979).

74. Larson v. Valente, 456 U.S. 228, 251-52 (1982); Widmar v. Vincent, 454 U.S. 263, 271 (1981); Stone v. Graham, 449 U.S. 39, 40-41 (1980) (*per curiam*); Wolman v. Walter, 433 U.S. 229, 236 (1977); Roemer v. Board of Pub. Works, 426 U.S. 736, 748 (1976) (quoting *Lemon*); *Nyquist*, 413 U.S. 756, 773 (1973); *Lemon*, 403 U.S. at 612-13. *See also* R. MILLER & R. FLOWERS, TOWARD BENEVOLENT NEUTRALITY: CHURCH, STATE, AND THE SUPREME COURT 302 (rev. ed. 1982); Serritella, *Tangling with Entanglement: Toward a Constitutional Evaluation of Church-State Contacts*, 44 LAW & CONTEMP. PROBS. 143, 145 (Spring 1981).

75. *See, e.g.*, Lynch v. Donnelly, 104 S. Ct. 1355 (1984) (O'Connor, J., concurring); *Wolman*, 433 U.S. at 258; *Meek*, 421 U.S. 349, 372 (1975); *Nyquist*, 413 U.S. at 795-96 (1973) (competing efforts by various religious groups to gain support of government strains political system "to the breaking point") (quoting Walz v. Tax Commission, 397 U.S. 664, 694 (1970) (Harlan, J., concurring)); *see also* TRIBE, *supra* note 42, § 14-12 at 867 (The Court has stressed danger of political division along religious lines).

76. *Nyquist*, 413 U.S. at 797-98 ("While the prospect of [political] divisiveness may not alone warrant the invalidation of state laws . . . it is certainly a 'warning signal' not to be ignored") (citing Lemon v. Kurtzman, 403 U.S. 602, 625 (1971)); *accord*, *Lynch*, 104 S. Ct. at 1358-59; *Meek*, 421 U.S. at 365 n.15; NOWAK, *supra* note 72, at 1035; Ripple, *The Entanglement Test of the Religion Clauses—A Ten Year Assessment*, 27 UCLA L. REV. 1195, 1203 (1980); TRIBE, *supra* note 42, § 14-12, at 866.

Since *Lemon*, the three-prong test has been used by the Supreme Court as the guiding standard for resolving Establishment Clause cases.[77] Although two recent cases, *Marsh v. Chambers*[78] and *Larson v. Valente*,[79] seem, superficially, to indicate a change of direction by the Court in this area, a closer examination of these cases proves otherwise.

In *Marsh*, the Court focused on historical evidence to uphold the constitutionality of a state legislature's practice of opening their sessions with a prayer.[80] The Court concluded that this practice had become meshed in the fabric of society and its unique history posed no threat to the Establishment Clause.[81] *Marsh*, however, is clearly distinguishable from those cases in which the Court has uniformly applied the *Lemon* test. The most salient difference is that the challenged activity involved government action and did not compel the action of private individuals. Moreover, unlike the majority of state actions challenged under the Establishment Clause,[82] legislative prayer existed at the time that the Establishment Clause was drafted and, therefore, its retention raised the presumption that the Framers did not consider the practice inconsistent with the purpose of the Establishment Clause.[83]

In *Larson*, the Court used a strict scrutiny analysis to invalidate a state statute that overtly favored specific religious denominations over others through registration and disclosure requirements for contributions to religious organizations.[84] The Court held that statutes which intentionally discriminate among religions are invalid

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77. *See, e.g., Larken*, 459 U.S. 116; *Nyquist*, 413 U.S. 756; *Tilton*, 403 U.S. 672; *and Stone*, 449 U.S. at 40-41.

78. 103 S. Ct. 3330 (1983).

79. 456 U.S. 228 (1982).

80. 103 S. Ct. at 3330-36.

81. *Id.* at 3335-36 (the statute was merely a tolerable acknowledgement of widely held beliefs).

82. Traditionally the Establishment Clause cases have centered around state legislation and programs designed to aid sectarian schools. *See, e.g., Lemon*, 403 U.S. at 602 (teacher salaries, books, and other materials); *Tilton*, 403 U.S. at 672 (construction grants to colleges); *Allen*, 392 U.S. at 236 (textbook loans); *Everson*, 330 U.S. at 1 (bus transportation); *Engel*, 370 U.S. 421 (prayer reading in public schools); *Zorach*, 343 U.S. 306 (release time from public schools for religious training).

83. *Marsh*, 103 S. Ct. at 3333-34.

84. *Larson*, 456 U.S. at 246-51. The state statute provided that only those religious organizations which solicited more than 50% of their total contributions from non-members were subject to the registration and reporting requirements of the charitable solicitations statute, while religious organizations which received less than half of their contributions from non-members were exempt from the requirements. *Id.* at 231-32.

unless justified by a compelling state interest.[85] The *Larson* Court's application of a compelling state interest test, however, does not represent an abandonment of the *Lemon* test. Rather, the statute in *Larson* was discriminatory on its face, since the target of the discrimination under the statute was religion, a fundamental right, and the Court has long held that when a state activity, regulation or program implicates a fundamental right, the state activity is subject to a strict scrutiny (compelling state interest) standard of review.[86] Furthermore, while the strict scrutiny standard was applied in *Larson*, the Court indicated that the *Lemon* test, if applied, would have rendered substantially the same result.[87] Thus, the Court apparently set forth two propositions in *Larson*: one, strict scrutiny will be required if a statute contains explicit denominational preferences among religions,[88] but two, the *Lemon* test is the appropriate analysis for statutes, although facially neutral, that either confer their benefits on some religions or confer their benefits on religion generally.[89]

Whatever doubts were raised by *Marsh* and *Larson* as to the viability of the *Lemon* test were alleviated by the Court in *Lynch v. Donnelly*.[90] In *Lynch*, the Court held that a city's display of a nativity scene during the Christmas season did not violate the Establishment Clause.[91] Although the *Lynch* majority expressed its unwillingness to confine itself to a single method of analysis, the meat of the Court's decision was based on the inquiry laid down in *Lemon*.[92]

Although Establishment Clause cases have traditionally centered around state aid to and state programs for sectarian schools, important and controversial Establishment Clause cases have most recently arisen in the employment arena.[93] A number of federal

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85. *Id.* at 246.

86. *Id. See, e.g,* Bates v. Little Rock, 361 U.S. 516, 524 (1960) ("Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling"); *accord* Roe v. Wade, 410 U.S. 113, 155 (1973) ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest.' ").

87. 456 U.S. at 251-55.

88. *Id.* at 246.

89. *Id.* at 251-55.

90. 104 S. Ct. 1355 (1984).

91. *Id.* at 1366.

92. *Id.* at 1362-65. In a concurring opinion, Justice O'Connor went to great lengths to demonstrate that the analysis of the *Marsh* and *Larson* decisions could be assimilated into the traditional *Lemon* test. *Id.* at 1366-70 (O'Connor, J., concurring).

93. *See infra* note 98 and accompanying text.

and state laws now require employers to accommodate the religious observances and practices of their employees.[94] For example, Title VII of the Civil Rights Act of 1964[95] was amended by the 1972 Congress to include an affirmative duty of the employer to accommodate his employees on religious grounds.[96] Many states have followed suit by adopting statutes or regulations that prohibit religious discrimination in the workplace and require the employer to modify facially neutral work practices when these practices conflict with an employee's religious beliefs or observances.[97] Several of these "accommodation" statutes have been challenged in state courts on constitutional grounds,[98] however, these courts have virtually all skirted the constitutional issue and focused their inquiry on statutory interpretation.[99]

The principal case represents the first time that the Supreme Court has determined whether such religious accommodation statutes violate the Establishment Clause of the first amendment.[100]

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94. These "accommodation" statutes allow the employees to invoke "reasonable accommodation" rules to avoid working on their observed Sabbath, and thereby alter their normal work schedule. *See supra* note 37; *see also infra* note 99 and accompanying text.

95. Pub. L. No. 88-352, 78 Stat. 253 (1964) (codified as amended by the Equal Employment Opportunity Act of 1972 at 42 U.S.C. §§ 2000e - 2000e-17 (1982)) (hereinafter referred to as Title VII).

96. *See supra* note 37 for the complete text of Title VII § 701(j), 42 U.S.C. § 2000e-2, which codified the affirmative duty to accommodate.

97. *See, e.g.*, ARIZ. REV. STAT. ANN. §§41-1461(6), 41-1463 (1956); CONN. GEN. STAT. § 53-303e (1982); GA. CODE ANN. §§ 10-1-570, 45-19-22 (1982); KY. REV. STAT. §§ 344.030(5), 344.040(1), 436.165(4)(a) and (b) (1975); MD. ANN. CODE art. 27, § 492 (Cum. Supp. 1983); *id.* at art. 49B, 14-16 (1979); MASS. GEN. LAWS ANN. ch. 151B, § 4.1A (West 1976); MO. ANN. STAT. § 578.115 (Vernon 1979); N.H. REV. STAT. ANN. § 354-A:3(4) (1955); N.Y. EXEC. LAW § 296.10 (McKinney 1982) (explicitly accommodating Sabbath observers); PA. STAT. ANN. tit. 43 § 955.1 (Purdon 1964) (explicitly accommodating Sabbath observers who are public employees); S.C. CODE ANN. §§ 1-13-30(k), 1-13-80 (Law Co-op. 1976); VA. CODE §§ 40.1-28.2, 40.1-28.3 (1981) (explicitly accommodating Sabbath observers); W. VA. CODE § 61-10-27 (1977). In other states, accommodation is required by regulation. *See, e.g,* [State Laws] Fair Empl. Prac. (BNA) ¶ 453:1141 (Colo. Sept. 25, 1980); ¶ 45:1708 (D.C. June 11, 1976); *Id.* at ¶ 45:2756 (Ill. Dec. 12, 1973).

98. *See, e.g.*, Anderson v. General Dynamics, 648 F.2d 1247 (9th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1983); Nottelson v. A.O. Smith Corp., 643 F.2d 445 (7th Cir.), *reh'g denied*, 454 U.S. 1046 (1981).

99. *See, e.g.*, Gavin v. Peoples Natural Gas Co., 613 F.2d 482 (3d Cir. 1980); Yott v. North American Rockwell Corp., 602 F.2d 904 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980). In Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977), construing the religious accommodation provisions of Title VII and its scope, the Supreme Court ruled that requiring an employer to bear more than a *de minimus* cost would constitute an "undue hardship" on the employer. *Id.* at 84. The *Hardison* Court, however, left open the issue of whether a statute can, consistently with the first amendment, require employers to grant privileges to religious observers as part of the accommodation process. *Id.* at 70.

100. *See, e.g.*, Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975) (holding that

At the outset of its analysis, the Court announced that the *Lemon* test would be applied in *Estate of Thornton* to determine the constitutionality of the Connecticut religious accommodation statute, which provides, in part:

> No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day. An employee's refusal to work on his Sabbath shall not constitute grounds for his dismissal.[101]

After briefly reiterating the three areas of inquiry under *Lemon*, the Court confined its analysis of section 53-303e(b) to the primary effect prong of the test.[102] Without elaborating on the requirements under the primary effect analysis for a statute to pass constitutional muster, the Court delved into the statutory text and hastily struck the statute down.[103] Concentrating on the express language of the statute, the Court observed that section 53-303e(b) effectively conferred upon the Sabbath observer an absolute and unqualified right not to work on whatever day he might happen to designate as his Sabbath.[104] Moreover, the Court noted, the statute mandated a corresponding absolute duty on both employers and employees to conform their business practices to the particular practices of the employee by enforcing, under penalty, the observance of the Sabbath unilaterally designated by the employee.[105]

Although not expressly stated, the absolute nature of the rights and duties under the statute is what the Court seemingly found most repugnant. According to the Court, the benefits of the statute were inequitably distributed to the Sabbath observer with little or no regard for the competing interests of the employer and nonreligious, fellow employees.[106] For example, the Court pointed out

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provisions of Title VII which makes it an unlawful employment practice for an employer to discharge any individual because of his religion does not violate the Establishment Clause of the first amendment), *aff'd per curiam mem. by evenly divided court*, 429 U.S. 65 (1976), *vacated on non-constitutional grounds*, 433 U.S. 903 (1977); Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970); *aff'd per curiam by an evenly divided court*, 402 U.S. 689 (1971). Note, a judgment which is entered by an equally divided court is not entitled to precedential weight. Neil v. Biggers, 409 U.S. 188, 192 (1972).

101. 105 S. Ct. at 2917. *See supra* note 9 for complete text of the statute.

102. 105 S. Ct. at 2917.

103. *Id.* at 2917-18.

104. *Id.* at 2918. *See supra* notes 31-33 and accompanying text.

105. 105 S. Ct. at 2918.

106. *Id.* at 2918. The Court declared that the absolute favoring of the Sabbath observer under the statute contravened a fundamental principle of the Religion Clauses: "[t]he First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities." *Id.* at 2918 (quoting

that the statute failed to give any special consideration to the employer if a high percentage of his work force asserted the same Sabbath.[107] Similarly, the Court noted that the statute provided no exception to the mandatory accommodation requirement when honoring the dictates of the Sabbath observer would cause the employer substantial economic burdens, or place significant burdens on fellow employees required to work in his place.[108] Hinting that reasonable rather than absolute accommodation might be more desirable and constitutionally acceptable, the Court criticized the statute as failing to account for the competing interests of the employer and fellow employees.[109]

The Court concluded that the Connecticut statute was blatantly askewed in the Sabbath observer's favor and thus went far beyond merely having an incidental and remote effect upon religion.[110] Instead, the Court concluded, it had a primary effect of impermissibly promoting a particular religious practice.[111]

Even though the Supreme Court's decision to invalidate section 53-303e(b) as violative of the Establishment Clause of the first amendment was correct, the Court's analysis in reaching that decision was woefully inadequate. Religious accommodation statutes regulating employment practices are a fairly recent development.[112] However, the majority of states, either through statute or administrative regulation, have now developed such accommodation programs.[113] *Estate of Thornton* represents the first time that the Court has decided the constitutionality of a religious accommodation statute regulating employment practices.[114] Both the novelty of the constitutional issue and the widespread use of the statutes should have signaled the Court that a more careful analysis was needed. Properly handled, the Court's decision in *Estate of Thornton* could have provided legislatures with distinct guidelines in drafting their religious accommodation statutes, and could have also clarified the Court's position with respect to those guidelines. Unfortunately, we do not receive such guidance from *Estate of*

Judge Learned Hand in Otten v. Baltimore & Ohio R. Co., 205 F.2d 58, 61 (2d Cir. 1953)).

107. 105 S. Ct. at 2918.

108. *Id.* at 2918 & n.9.

109. *Id.* at 2918.

110. *Id.*

111. *Id.*

112. *See supra* note 97 and accompanying text. With a few exceptions, the bulk of the state religious accommodation statutes have been enacted since the 1970's.

113. *See supra* note 97 and accompanying text.

114. *See supra* note 100 and accompanying text.

Thornton.

The Court properly chose to apply the *Lemon* test to section 53-303e(b) but then proceeded in a summary fashion to strike the statute down under the primary effect prong of the test.[115] In so doing, the Court failed to address several factors that have been considered pertinent to the evaluation of primary effect by past Supreme Court decisions: first, a determination must be made as to whether the statute advances the interests of religious persons and, in so doing, favors them over the interests of non-religious persons;[116] second, it must be determined whether the law favors the interests of certain sects over other sects;[117] and third, it must be ascertained whether the government has singled out, on the basis of religion, a narrow class of citizens as beneficiaries of compulsory treatment.[118] In the principal case, the Court only deals with the first factor listed above, while failing to even mention the remaining two.[119] Does this mean that only one of the three inquiries need be answered in the affirmative for the statute to fail the primary effect test? The Court does not say, but this may be reasonably inferred.

The Court appropriately discusses how section 53-303e(b) favors and advances the interests of Sabbath observers at the expense of the employers and non-religious fellow employees. Nevertheless, the Court's analysis stops short of resolving several crucial points. For example, the Court fails to note that in the area of religious accommodation, it has recognized "permissible burdens" which may be placed on the non-religious in order to accommodate the

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115. 105 S. Ct. at 2917-18.

116. *See* Board of Education v. Allen, 392 U.S. 236 (1968).

117. *See, e.g., Zorach*, 343 U.S. at 314 (the government has a duty to act neutrally toward different religious sects). The Establishment Clause, however, not only proscribes aid to traditional religions as against non-believers, but also precludes aid favoring "those religions based on a belief in the existence of God as against those religions founded on different beliefs." *Torcaso*, 367 U.S. at 495.

118. The Court has often recognized the narrowness of the benefited class as a key factor in the primary effect analysis. *See, e.g.*, Mueller v. Allen, 103 S. Ct. 3062, 3068 (1983); Sloan v. Lemon, 413 U.S. 825, 831 (1973); *Walz*, 397 U.S. at 696.

In *Walz*, Justice Harlan offered the following analysis of statutory "underinclusion":

> Neutrality in its application requires an equal protection mode of analysis. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders. In any particular case the critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that [all groups that] could be thought to fall within the natural perimeter [are included].

397 U.S. at 696.

119. 105 S. Ct. at 2917-18.

interests of the religious.[120] Is there a similar "permissible burden" which the employer and fellow employees must bear in order to accommodate the interests of the religious employee? Again, the the Court is silent.[121]

Only one helpful guideline is discernible from the Court's scant discussion: if a statute places an *absolute* duty to accommodate on the employer without providing an exception for the employer whose business would be unduly burdened by the duty to accommodate, then the statute violates the primary effect test of Establishment Clause analysis.[122] This standard, however, merely chips away at the tip of a very large iceberg. Many questions remain unanswered. For example, if reasonable accommodation is permissible, as opposed to absolute accommodation, then what is reasonable? Likewise, what constitutes an undue burden on the employer such that he may be excused from the duty to accommodate, or conversely, what constitutes a permissible burden of which the employer will not be heard to complain? Furthermore, why should the other employees who must work in place of the religious employee not be granted rights under such a statute also?

The court has been applying the primary effect analysis to Establishment Clause cases for twenty-five years.[123] While this perhaps explains the Court's cursory application of the primary effect analysis in the principle case, it certainly does not excuse it.

Admittedly, the *Lemon* test requires that only one of the three prongs be violated before the statute can be declared unconstitutional, so that the Court cannot be criticized for invalidating the statute once it determined the primary effect portion of the test was not met.[124] Nevertheless, while judicial restraint and conservatism are generally desirable judicial policies, they do not demand the sacrifice of thorough analysis of a crucial and novel issue. One might expect the Court to invalidate a state program providing direct financial aid to a parochial school in a summary decision since the underlying analysis and rationale has been heard many times before.[125] However, in *Estate of Thornton*, the Court was not deal-

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120. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (allowing an Amish student's exemption from a state compulsory school attendance statute); Gillette v. United States, 401 U.S. 437 (1971) (exemption from military obligations on religious grounds).

121. Will the Court not recognize "permissible burdens" at all? *See Trans World Airlines, supra* note 99 and accompanying text.

122. 105 S. Ct. at 2918.

123. *See Abington*, 374 U.S. 203 (1963).

124. *See supra* note 74 and accompanying text.

125. *See, e.g., Nyquist*, 413 U.S. 756 (1973); *Lemon*, 403 U.S. 602 (1971); *Allen*, 392

ing with a settled issue, but instead a disputed one.[126] The principal case afforded the Court an excellent vehicle to scrutinize religious accommodation statutes under all three prongs of the *Lemon* test and thereby settle the constitutional controversy surrounding such statutes.

In this regard, the Court's decision in *Estate of Thornton* is a disappointment, especially in light of the Court's failure to justify any ability of the state to accommodate religion in the workplace under the Establishment Clause. For example, even in the area of "reasonable accommodation" the Court does not explain why it is permissible for a court to involve itself in religious inquiries necessary to implement the accommodation rule.[127] Whether reasonable or absolute, religious accommodation necessarily requires inquiry into the nature and sincerity of individual beliefs in order to determine whether the individual is entitled to accommodation.[128] Perhaps the Court is willing to allow some government involvement in religion in this area, as it has in other areas, but it does not say. Furthermore, assuming that some level of government involvement is permissible, guidelines for degrees of "permissible entanglement" are surely needed.

Finally, the Court does not discuss the "secular purpose" prong of the test.[129] Perhaps the Court agreed with the Connecticut Supreme Court's evaluation of this issue, but, once again, the Court did not say.[130] The failure to engage in secular purpose analysis

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U.S. 236 (1968); *Everson*, 330 U.S. 1 (1947).

126. 105 S. Ct. at 2914. *See also supra* note 100 and accompanying text.

127. The entanglement principle is not limited to the prohibition of government interference with religious institutions, but rather it also limits the scope of judicial inquiry into a claimed religious belief. *See Engel*, 370 U.S. at 421; United States v. Ballard, 322 U.S. 78 (1944). Because the Establishment Clause prohibits the government from becoming involved in purely religious matters, *a fortiori* the government cannot become embroiled in the business of examining religious affirmations. Thus, the entanglement problem arises whenever an individual claims that his conduct or belief is "religious" under a statute that grants a privilege or benefit based on religious beliefs. *See, e.g., Abington*, 473 U.S. 203 (1963); *Torcaso*, 367 U.S. 488 (1961).

128. In order for the plaintiff-employee to establish a *prima facie* case against his employer under § 53-303e(b), as a threshold matter he must plead and prove that he has a sincere bona fide religious belief which requires the employer to excuse him from work on the particular day he claims as his "Sabbath." If the availability of a benefit hinges on the existence of a religious ground, then an inquiry into the bona fides of such a claim cannot be avoided. *See, e.g., Cummins*, 516 F.2d 544, 559 (6th Cir. 1975), *aff'd*, 429 U.S. 65 (1975), *vacated*, 433 U.S. 903 (1977); *Gavin*, 464 F. Supp. at 631. Two essential items must be determined: one, whether the asserted belief is religious, and two, whether the asserted belief is sincerely held. *Cummins*, 516 F.2d at 559 (Celebrezze, J., dissenting).

129. 105 S. Ct. at 2914. *See also supra* notes 25-34 and accompanying text.

130. 105 S. Ct. at 2914.

leaves unresolved the inevitable dilemma of deciding if and when a statute must meet the *Lemon* test under Establishment Clause scrutiny, or when it may be labelled an anti-discrimination statute and held to a different standard of review. Thus, serious doubts are raised about the validity and viability of Title VII of the Civil Rights Act of 1964, which also requires accommodation.[131] The *Estate of Thornton* majority never addresses the inherent problem of distinguishing anti-discrimination statutes like Title VII from statutes like section 53-303e(b). The only help comes from a short concurrence by Justice O'Connor, which strains to declare that Title VII remains unscathed by the majority's decision, but offers little more than conclusory statements in support of this contention.[132]

The upshot of the Supreme Court's decision in *Estate of Thornton* is that the Court "missed the mark." *Estate of Thornton* presented the Court with an appropriate vehicle through which to settle the controversy surrounding religious accommodation statutes in the employment arena, the Court equivocated and the result was a decision which is both hopelessly ambiguous and superficial, offering very little guidance for the resolution of the complex problems underlying religious accommodation legislation.

Michael J. Hudock, III

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131. *See supra* note 37 and accompanying text. Clearly, this was the fear that Justice O'Connor was trying to alleviate. 105 S. Ct. at 2918-19 (O'Connor, J., concurring).

132. 105 S. Ct. at 2918-19. It seems that Justice O'Connor is willing, unlike the majority, to expressly state that reasonable accommodation as embodied in Title VII would be an acceptable alternative to the absolute accommodation of the Connecticut statute. She does not, however, tell us why. For example, she does not explain how reasonable accommodation is any less offensive to the Establishment Clause than absolute accommodation in light of the inquiries the Court must make into religious beliefs and sincerity to enforce the accommodation statute. *See supra* note 128 and accompanying text. Justice O'Connor also fails to explain why merely including religion as one of several categories receiving protection allows Title VII to be properly understood as an anti-discrimination statute. If this is all that is necessary to save the statute from Establishment Clause analysis, then can the states just sandwich religion in between other categories such as race and national origin and thereby avoid constitutional scrutiny? In the final analysis, Justice O'Connor's concurrence answers the easy question of whether the Court will entertain similar challenges to Title VII, however, it fails, as does the majority opinion, to answer the more difficult underlying questions.