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RECENT DEVELOPMENTS IN PUBLIC LAW

THORNTON V. CALDOR: WILL THE SUPREME COURT PUT THE SQUEEZE ON LEMON?

In 1983, the Connecticut Supreme Court ruled that a state "Sabbath statute" violated the establishment clause of the United States Constitution.¹ The statute provided that an employee's refusal to work on a day he designates as his Sabbath is not an appropriate ground for his dismissal.² The employee, Donald Thornton, petitioned the United States Supreme Court for a writ of certiorari, which was granted in March of 1984.³

This recent development comment discusses the Connecticut Supreme Court's holding and rationale. It also predicts how the United States Supreme Court will decide the case based on the language and holdings of previous religion clause cases. Finally, it explores the possible ramifications of the predicted Supreme Court holding.

THORNTON V. CALDOR

Facts

Caldor, Inc. required Donald Thornton, a department manager, to work one out of every four Sundays.⁴ After complying for two years, Thornton refused to continue working on Sundays, the day of his Sabbath.⁵ Caldor executives met with Thornton and offered him two choices: (1) to continue as a supervisor at a Massachusetts store that did not require Sunday employment; or (2) to remain at his current store as a nonsupervisor and join the employee union whose contract provided for Sabbath days off.⁶ Thornton rejected both proposals⁷ and resigned after the parties failed to reach a satisfactory agreement.⁸

Thornton protested Caldor's actions to the Connecticut state board of mediation and arbitration, alleging that Caldor violated state law by not allowing him to observe his Sabbath.⁹ The state law, Connecticut General Statute § 53-303(e), provided:

(a) No employer shall compel any employee engaged in any commercial

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1. Caldor, Inc. v. Thornton, 191 Conn. 336, 464 A.2d 785 (1983), *cert. granted sub nom.* Estate of Thornton v. Caldor, Inc., 104 S. Ct. 1438 (1984) (No. 83-1158, 1983 Term)
 2. CONN. GEN. STAT. ANN. § 53-303(e) (West Supp. 1984).
 3. The Court granted the requested writ of certiorari on March 5, 1984. See — U.S. —, 104 S. Ct. 1438 (1984).
 4. 191 Conn. at 338, 464 A.2d at 788. Caldor began opening for business on Sundays in 1977. All department managers were required to work one out of every four Sundays. *Id.*
 5. Thornton worked thirty-one Sundays between 1977 and 1979, but in November of 1979 he informed Caldor that he would no longer work on Sunday because it was his Sabbath day. *Id.*
 6. *Id.*
 7. *Id.* Thornton claimed that the change to Massachusetts would involve undue hardship by forcing him either to commute or change his residence. Moreover, becoming a union member included a decrease in pay from \$6.46 to \$3.50 per hour. *Id.*
 8. *Id.* Thornton's last day of work was March 8, 1980.
 9. *Id.*

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 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.

(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 to his former or a comparable position.

(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.

Caldor answered that Thornton had not been "discharged" within the meaning of the statute and that the statute was unconstitutional.¹⁰ Construing its authority as "quasi-judicial,"¹¹ the board assumed the constitutionality of the statute until a court ruled otherwise.¹² The board held that under the statute Thornton had been illegally discharged, and it issued an award in his favor.¹³

Caldor filed an application with a state trial court seeking to vacate the board's award,¹⁴ but the trial court affirmed the board's ruling. Caldor then appealed to the Connecticut Supreme Court. He asserted that the award was illegal¹⁵ and beyond the power of the arbitrators because the statute violated the establishment clause of the United States Constitution.¹⁶ Although the Connecticut Supreme Court found that the board had acted within its power in determining that Caldor had violated the statute,¹⁷ the court ruled that the statute violated the strictures of the establishment clause.¹⁸

10. 191 Conn. at 339, 464 A.2d at 789.

11. *Id.* at 339, 464 A.2d at 788.

12. *Id.* at 339, 464 A.2d at 788.

13. *Id.* at 339, 464 A.2d at 788.

14. CONN. GEN. STAT. § 52-418 (1978):

(a) Upon the application of any party to an arbitration, the superior court for the judicial district in which one of the parties resides or, in a controversy concerning land, for the judicial district in which the land is situated or, when the court is not in session, any judge thereof, shall make an order vacating the award if it finds any of the following defects: (1) If the award has been procured by corruption, fraud or undue means; (2) if there has been evident partiality or corruption on the part of any arbitrator; (3) if the arbitrators have been guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy or of any other action by which the rights of any party have been prejudiced; or (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made. (b) If an award is vacated and the time within which the award is required to be rendered has not expired, the court or judge may direct a rehearing by the arbitrators.

15. 191 Conn. at 339, 464 A.2d at 788.

16. *Id.* at 339, 464 A.2d at 788.

17. *Id.* at 340, 464 A.2d at 789.

18. *Id.* at 340, 464 A.2d at 789. The establishment clause provides that "Congress shall make no law respecting an establishment of religion . . ." U.S. CONST., amend. 1. The establishment clause is applicable to the states through the fourteenth amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

The Reasoning of the Connecticut Supreme Court

The Connecticut Supreme Court based its decision upon the three-pronged test set out by the United States Supreme Court in *Lemon v. Kurtzman*.¹⁹ Under that test, a statute violates the establishment clause unless it has a secular legislative purpose; its principal or primary effect is one that neither advances nor inhibits religion; and it does not foster an excessive entanglement of government with religion.²⁰ If a statute fails any prong of the *Lemon* test, it violates the establishment clause.²¹ Applying the *Lemon* test, the Connecticut Supreme Court found that the statute failed all three prongs and, therefore, violated the establishment clause.²²

The court reasoned that the statute did not have a secular legislative purpose.²³ It rejected Thornton's assertion that subsection (b)²⁴ of the statute merely allowed employees to designate their day of rest, thus reflecting the secular purpose of protecting persons from the "physical and moral debasement which comes from uninterrupted labor."²⁵ Subsection (a)²⁶ prohibited employment for more than six days in a calendar week, thus addressing the secular purpose that Caldor claimed subsection (b) provided.²⁷ The court reasoned that subsection (b) must have been meant for a different purpose; namely, to authorize each employee to designate his or her choice of day to observe a Sabbath. The court concluded that such a provision had the unmistakable purpose of promoting the freedom to practice religion.²⁸

Applying the second prong of the *Lemon* analysis, the court found that the statute had the primary effect of advancing religion.²⁹ Although the statute did not provide direct aid to religion "in the form of money or property,"³⁰ only employees who observe a Sabbath day could avail themselves of the benefit of choosing their day of rest from work. Thus, the "benefit" provided by subsection (b) was based solely on religion. The statute, therefore, violated the second prong of the *Lemon* test.³¹

Finally, the Connecticut Supreme Court found that the statute violated the third prong of the *Lemon* test.³² Subsection (c) of the statute empowered the state

19. 403 U.S. 602 (1971).

20. In *Lemon*, the Court stated:

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*, 392 U.S. 236 (1968); finally, the statute must not foster an "excessive government entanglement with religion." *Walz v. Tax Commission*, 397 U.S. 664, 688 (1970).

403 U.S. at 612.

21. "If a statute violates any of these three principles [of *Lemon*], it must be struck down under the Establishment Clause." *Stone v. Graham*, 449 U.S. 39, 40-41 (1980).

22. "We conclude that General Statute § 53-303(b) is clearly violative of the establishment clause, and the trial court therefore erred when it confirmed the arbitration award based on the statute and when it denied the motion to vacate the award." 191 Conn. at 351, 464 A.2d at 794.

23. *Id.* 191 Conn. at 349, 464 A.2d at 793.

24. CONN. GEN. STAT. ANN. § 53-303(e) (West Supp. 1984).

25. 464 A.2d at 792 (quoting from *McGowan v. Maryland*, 366 U.S. 420, 436 (1961)).

26. CONN. GEN. STAT. ANN. § 53-303(e) (West Supp. 1984).

27. 191 Conn. at 349, 464 A.2d at 792.

28. The word "Sabbath" itself was capitalized, thereby expressly connoting religious practices. *Id.* Moreover, the court considered various interpretations of the word "Sabbath" and concluded that it did not merely mean "day of rest" as asserted by Thornton; rather, it specifically represented the tenets of a particular religion. *Id.* at 347, 464 A.2d at 793.

29. *Id.* at 350, 464 A.2d at 794.

30. *Id.* at 350, 464 A.2d at 794.

31. *Id.* at 350, 464 A.2d at 794.

32. *Id.* at 351, 464 A.2d at 794.

board of mediators to rule on the "sincerity" of an employee's Sabbath observance.³³ The court held that because such an inquiry would necessarily involve an analysis of religious practices and activities, the government had created an unconstitutional entanglement with religion.³⁴

Although the court held that the statute violated the establishment clause, it implied that the state of Connecticut could enact a law allowing employees to designate their day off.³⁵ The state could not, however, use religious means to achieve the secular end of allowing each employee one day off from work per week.³⁶ In fact, subsequent to the Connecticut Supreme Court's decision, the Connecticut Legislature enacted a statute requiring employers only to make reasonable accommodations to their Sabbath observing employees when they choose their day off, rather than granting such employees an absolute right to designate their day off.³⁷

Appeal to the Supreme Court

Having lost in the Connecticut Supreme Court, Thornton petitioned the United States Supreme Court, and the Court granted his petition for certiorari.³⁸ In his brief supporting the petition, Thornton argues that the Connecticut statute is constitutional for three reasons.³⁹ First, the religion clauses of the first amendment do not prevent a state from protecting its citizens' exercise of religion against private discrimination.⁴⁰ Second, a rationality standard, rather than the three part test of *Lemon*, should be used in determining the constitutionality of the Connecticut statute.⁴¹ Third, the Connecticut statute satisfied constitutional standards under the *Lemon* test.⁴²

In response, Caldor argues that the statute violates the establishment clause because it absolutely requires private employers to defer to the Sabbath practices of their employees, without regard for the hardship that such a requirement imposes on the employer and other employees.⁴³ Caldor also contends that the Court need not reach the establishment clause issue.⁴⁴

If the Court affirms the Connecticut Supreme Court's decision on nonconstitu-

33. CONN. GEN. STAT. ANN. § 53-303(e) (West Supp. 1984).

34. The court stated: "This kind of state inspection and evaluation of the religious organization is fraught with the sort of entanglement that the Constitution forbids." 191 Conn. at 351, 464 A.2d at 794. (quoting from *Lemon*, 403 U.S. at 620).

35. *Id.* at 349, n.10; 464 A.2d at 793, n.10.

36. *Id.* at 349, n.10; 464 A.2d at 793, n.10.

37. CONN. GEN. STAT. § 46(a)-51(18) (1984) provides:

'Discrimination on the basis of religious creed' includes but is not limited to discrimination related to all aspects of religious observances 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.

38. The Court granted the requested writ of certiorari of March 5, 1984. *See* — U.S. —, 104 S. Ct. 1438 (1984).

39. *See* Brief for Petitioner at ii, Thornton v. Caldor, No.83-1158 (1984).

40. *Id.* at 10.

41. *Id.* at 19.

42. *Id.* at 27.

43. Brief for Respondent at 11, Thornton v. Caldor, No.83-1158 (1984).

44. *Id.* at 43-50. Caldor argues that the Court need not reach the establishment clause issue because a constitutional issue should be avoided if a case can be fairly decided on a statutory ground. *See* Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-48 (1936). Instead, Caldor contends, the Court should base its decision on Title VII of the 1964 Civil Rights Act which provides that "[i]t is an unlawful employment practice for an employer to discriminate against any individual because of such individual's . . . religion."

Because the statute allegedly discriminates between religious and non-religious employees, it violates Title VII. Moreover, the statute does not meet the Title VII exception of "religious accommoda-

tional grounds, states will be free to pass similar Sabbath laws subject only to the restraints of their own state court decisions.⁴⁵ The United States Supreme Court, however, will probably reach the establishment clause issue. Because last term's religion clause decisions have caused considerable confusion,⁴⁶ the relatively large number of religion clause cases docketed for this term⁴⁷ reveals the Court's desire to clarify its position on religious issues.

Thornton's first argument in favor of the Connecticut statute is that the "First Amendment was never intended to prohibit federal, state, or local government agencies from safeguarding the rights of people to worship—or refrain from labor—on the day of the week they deem sacred."⁴⁸ Thornton also argues that the establishment and free exercise clauses must be read together to complement one another.⁴⁹ Thornton urges the Court to follow the lead of *Sherbert v. Verner*⁵⁰ and allow the government to protect religious practices such as Sabbath observance.⁵¹

SHERBERT V. VERNER

In *Sherbert*, a Seventh-Day Adventist was discharged because she refused to work on Saturdays, the Sabbath day of her faith.⁵² Her claim for unemployment benefits was subsequently denied because she refused suitable work without good cause.⁵³ The United States Supreme Court held that the denial of an employee's

tion" because the proscribed unequal treatment of employees amounts to discrimination, not accommodation. See *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977).

Caldor also argues that the writ of certiorari should be dismissed as improvidently granted. After the Court granted the writ, Connecticut adopted a new statute that established a "flexible requirement that employers make reasonable accommodations to their employees" when they designate a Sabbath day. Because the statute substituted a reasonableness standard for the absolutist standard, the new statute avoids the absolute favoritism of traditional religions. Caldor argues that because the statute is no longer in effect, there remains "no substantial federal interest warranting review by the Court," and Thornton, the only litigant to reach the Connecticut courts under the Sabbath law, is now deceased.

45. Such a decision would leave open the questions of whether the statute violated the establishment clause and whether the Lemon test would be applied to future establishment clause issues.

46. In *Marsh v. Chambers*, — U.S. —, 103 S.Ct. 3330 (1983), the taxpayer, a state legislator, brought an action challenging the constitutionality of the Nebraska Legislature's policy of opening each legislative session with a prayer. The chaplain was paid with public funds, and the same chaplain, representing one religious denomination, opened each session for sixteen years. In finding no violation of the establishment clause, Chief Justice Burger's majority opinion focused on "two centuries of national practice" in opening state and federal legislative sessions with a prayer. Thus, the "unbroken practice for two centuries in the National Congress, for more than a century in Nebraska and in many other states, gives abundant assurance that there is no real threat (of establishing religion) 'while this Court sits.' "

In *Lynch v. Donnelly*, — U.S. —, 104 S.Ct. 1355 (1984), the city of Pawtucket, Rhode Island had annually erected a Christmas display in the center of town, on land owned by a nonprofit organization. The city-owned display included such traditional effects as a Santa Claus, a "Seasons Greetings" sign, and a creche. The majority opinion by Chief Justice Burger found that the city did not violate the establishment clause in displaying its creche. The Court concluded that the religion clauses of the first amendment were not meant to require absolute separation of the government and church; rather, they were meant to provide for accommodation. Examples of accommodation, cited by the Court, included the national celebration of Thanksgiving, which has a religious basis, and Christmas. The Federal Government pays its employees for such holidays, thus demonstrating a public tolerance for government "subsidized" holidays with religious significance.

47. Other religion cases docketed by the Court this term include *Wallace v. Jaffree*, 705 F.2d 1526, cert. granted, Nos. 83-812 and 83-929 (school prayer); *Board of Trustees of the Village of Scarsdale v. McCreary*, 575 F. Supp. 1112, No. 84-277 (display of creche in public park); *Grand Rapids v. Ball*, 546 F. Supp. 1071, No. 83-990 (government aid to parochial schools); and *Jensen v. Quaring*, 728 F. 2d 1121, No. 83-1944 (free exercise right not to have one's picture on a driver's license).

48. Brief for Petitioner at 10, *Thornton v. Caldor*, No.83-1158 (1984).

49. *Id.* at 12.

50. 374 U.S. 398 (1963).

51. Brief for Petitioner at 13, *Thornton v. Caldor*, No.83-1158 (1984).

52. 374 U.S. at 399.

53. *Id.* at 401.

unemployment benefits, solely because her faith would not allow her to work Saturdays, imposed an unconstitutional burden on the free exercise of her religion.⁵⁴ The Court stated that the decision did not "foster the 'establishment' of the Seventh-Day Adventist religion contrary to the first amendment."⁵⁵ Rather, the Government merely met its "obligation of neutrality in the face of religious differences."⁵⁶

Thornton contends that the *Sherbert* Court recognized the importance of saving the worshipper from having to make a choice which would infringe upon the Sabbatarian's right of free exercise.⁵⁷ Applying the *Sherbert* principles, Thornton contends that the Connecticut statute merely afforded him the right to freely exercise his faith by designating a work-free Sabbath.⁵⁸

III. STATUS OF THE LEMON TEST

The analogy to *Sherbert* sets up Thornton's central argument—that the Court should not apply the *Lemon* test to the facts of this case. Thornton relies on *Sherbert* and recent establishment clause cases in which the Court has not followed *Lemon*⁵⁹ in attempting to persuade the Supreme Court to adopt his proposed rationality test.⁶⁰

Whether the Court will carve out a third establishment clause test, however, and label it "rationality" is highly speculative. The Court has shown a willingness to carve out exceptions to the *Lemon* analysis,⁶¹ but that does not mean that the exceptions will be brought together and labeled as a new "test." The Court has noted the tension between the free exercise of religion and the establishment of religion.⁶² The Connecticut statute should be another example of the Court's willingness to accommodate the competing interests of the religion clauses. The Court has made such accommodations when the questioned law concerned historically or traditionally rooted activities such as nativity displays at Christmas⁶³ and prayers at the opening of legislative sessions.⁶⁴ Having a day off for worship would seem to be a traditional activity. Moreover, the Court has noted that Sunday closing laws undeniably allow citizens to attend religious services, but such an endorsement of religion was upheld nonetheless.⁶⁵

54. The Court found a clear burden on the appellant's free exercise of religion. The Court held that her declared ineligibility for benefits derived solely from the practice of her religion, and pressure was unmistakably put on her to forego that practice. *Id.* at 403.

55. The court stated: "[T]he extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall." *Id.* at 409.

56. *Id.*

57. *Id.* at 404.

58. See Brief for Petitioner at 10-19, Thornton v. Caldor, No.83-1158 (1984).

59. In *Marsh*, — U.S. — 103 S.Ct. 3330 (1983), the Court virtually ignored the *Lemon* test, upon which the Eighth Circuit Court of Appeals had based its opinion in finding that prayers opening legislative sessions were in violation of the establishment clause. In *Lynch*, — U.S. —, 104 S.Ct. 1355, 1362 (1984), the majority opinion notes that "[i]n two cases, the Court did not even apply the *Lemon* 'test.' We did not, for example, consider that analysis relevant in *Marsh*, *supra*. Nor did we find *Lemon* useful in *Larson v. Valente*, 456 U.S. 228 (1982)"

60. See Brief for Petitioner at 19, Thornton v. Caldor, No.83-1158.

61. See *supra*, note 59.

62. "[T]he range of permissible state accommodation to free exercise rights runs beyond that constitutionally compelled — out to limits ultimately imposed by the Establishment Clause." *Forest Hills Early Learning Center, Inc. v. Luckhard*, 728 F.2d 230, 241 (1984) (*citing* *Walz v. Tax Commission*, 397 U.S. 664, 673 (1969)).

63. See *Lynch*, — U.S. —, 104 S.Ct. 1355 (1984).

64. See *Marsh*, — U.S. —, 103 S.Ct. 3330 (1983).

65. See *Lynch*, — U.S. —, 104 S.Ct. 1355, 1363, n.11 (1984).

Thus, the Court can be expected to uphold the Connecticut statute as a proper accommodation of traditional and historical religious practice and limit *Lemon* to school funding cases.⁶⁶ Moreover, the Court has repeatedly said that it will not limit itself to one test in establishment clause cases.⁶⁷

THE REVISED CONNECTICUT STATUTE AS A MODEL

Even if the Supreme Court agrees with the Connecticut Supreme Court that the statute violates the establishment clause, and finds *Lemon* controlling, other states might use the new Connecticut statute as a model when enacting religious accommodation provisions for employers and employees.⁶⁸ The new statute eliminated the absolute requirement that employers accommodate religious employees. Instead, "reasonableness" in accommodation is the standard. The employer may balance the effect on his business of having too many employees choosing to take the same day of the week off for worship with the need for religious accommodation. Though the burden is on the employer to show undue hardship, the amended statute should be able to pass a *Lemon* three-prong analysis.

First, such a statute clearly states a secular purpose of preventing religious discrimination.⁶⁹ Second, although employees may still choose their day off for religious reasons or purposes, the employer may preempt the employee's choice by establishing that the exercise of this right places an undue burden on his business.⁷⁰ Thus, the "effect" is one of accommodation, not of religious promotion.

66. The *Lemon* case involved state aid to nonpublic schools. Five justices of the Court have indicated displeasure with the far-reaching application of the *Lemon* test to establishment clause issues. In *Lynch*, Justice O'Connor wrote a concurring opinion in which she outlined a "clarified version" of the application of various establishment clause tests, including *Lemon*: "It has never been entirely clear, however, how the three parts of the [*Lemon*] test relate to the principles enshrined in the Establishment Clause. Focusing on institutional entanglement and on endorsement or disapproval of religion clarifies the *Lemon* test as an analytical device." *Id.* at 366-67.

Justice White's displeasure with the *Lemon* test was made clear in his dissenting opinion in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1972): "I am quite unreconciled to the Court's decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). I thought then, and I think now, that the Court's conclusion there was not required by the First Amendment and is contrary to the long-range interests of the country." *Id.* at 820.

Justice Rehnquist has said that the third prong of the *Lemon* test regarding "divisive political potential" must be regarded as confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools.

Mueller v. Allen, — U.S. —, 103 S.Ct. 3062, 3071, n.11 (1983).

In *Lynch*, — U.S. —, 104 S.Ct. 1355 (1984), Chief Justice Burger's majority opinion contended that *Lemon* is not the sole test for establishment clause issues: "[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area."

Though not specifically addressing *Lemon*, Justice Powell had shown displeasure regarding past Court decisions regarding school prayer:

Unless and until the Court reconsiders the foregoing decisions [cites omitted], they appear to control this case. In my view, the District Court was obligated to follow them. Similarly, my own authority as Circuit Justice is limited by controlling decisions of the full court. Accordingly, I am compelled to grant the requested stay.

Jaffree v. Board of School Commissioners — U.S. —, 103 S.Ct. 842 (1983).

67. See *supra* note 59.

68. CONN. GEN. STAT. § 46(a)-51(18) (1984) provides:

"Discrimination on the basis of religious creed" includes but is not limited to discrimination related to all aspects of religious observances 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.

69. Thus, there is no longer "an absolutist requirement that Sabbath observance automatically trumps all secular factors. . . ." Brief for Petitioner *supra* note 39, at 22. Instead, religion is a factor and not a "veto."

70. Because the absolute yield to Sabbath observance has been removed, the primary effect of the new statute is that employers must accommodate the religious practices of its employees. Advancing religion is no longer the primary effect. See *id.* at 23.

Third, by focusing on the employer's showing of "undue hardship," the statute avoids an excessive entanglement of government and religion.⁷¹

Even if the Supreme Court does not uphold the Connecticut statute, Connecticut has provided an alternative and has left interested states with an approach to Sabbath statutes that would meet a *Lemon* analysis. Currently, many states have statutory provisions that prohibit discrimination based on religion. Most of these provisions either explicitly provide for,⁷² or have been interpreted by courts to require,⁷³ reasonable accommodation by the employer short of undue hardship to his business. The use of "reasonable accommodation" in a statute avoids the absolute language⁷⁴ of the contested Connecticut statute and should, therefore, pass constitutional muster if the Supreme Court affirms the ruling of the Connecticut Supreme Court.

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71. The focus has been shifted from the employee's sincerity of his Sabbath observance to the employer's showing of an undue hardship placed on his business by yielding to his Sabbath observing employees. *See id.* at 36-38, 40.

72. *See, eg.*, ARIZ. REV. STAT. ANN. § 41-1461(6) (1984):

[U]nlawful practices as prohibited by this article [Discrimination in Employment] shall include practices with respect to religion 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.

The following states have adopted statutory or administrative guidelines regarding religious accommodation: COLORADO [State Laws] FAIR EMPL. PRAC. (BNA), 453:1141 (Sept. 25, 1980); District of Columbia [State Laws] FAIR EMPL. PRAC. (BNA), 453:1708 (June 11, 1976), (§ 7-E adopts EEOC guidelines on Title VII which requires reasonable accommodation short of undue hardship, *see*, 29 C.F.R. § 1605.1); ILLINOIS [State Laws] FAIR EMPL. PRAC. (BNA), 453:2756 (Dec. 12, 1973) §§ 5.2, 5.3; KANSAS [State Laws] FAIR EMPL. PRAC. (BNA), 453:3312 (May 1, 1978); MARYLAND ANN. CODE art. 49B, § 15(f); MASSACHUSETTS ANN. LAWS, ch. 151B, § 4.1A (Law.Co-op.1976); MONTANA [State Laws] FAIR EMPL. PRAC. (BNA), 455:1901 (July 14, 1983) (which adopts 29 C.F.R. § 1605.1); NEVADA [State Laws] FAIR EMPL. PRAC. (BNA), 455:2351 (April 6, 1961) (which adopts 29 C.F.R. § 1605.1); OKLAHOMA [State Laws] FAIR EMPL. PRAC. (BNA), 457:555-6 (Feb. 25, 1977); SOUTH CAROLINA CODE ANN. § 1-13-30(K); SOUTH DAKOTA [State Laws] FAIR EMPL. PRAC. (BNA), 457:1754 (Dec. 16, 1979); TENNESSEE [State Laws] FAIR EMPL. PRAC. (BNA), 457:1887 (Jan. 19, 1979) (which adopts 29 C.F.R. § 1605.1); TEXAS ANN. CIV. ST. art.5221k, §§ 1.01, 2.01(B), 5.01 (Vernon Supp. 1984); VIRGINIA CODE, §§ 40.1-28.1 to 28.3 (1981); WISCONSIN STAT. ANN. § 111.337(1) (West Supp. 1983).

73. *See, eg.*, ALASKA STAT. §§ 18.80.200, 18.80.220(a)(1)(1965) as interpreted by *Wondzell v. Alaska Wood Products, Inc.*, 583 P.2d 860 (Alaska 1978), *rev'd* on other grounds, 601 P.2d 584 (1979); CALIFORNIA CONST. art I § 8 as interpreted in *Rankins v. Commission on Professional Competence*, 154 Cal. Rprt. 907, 593 P.2d 852 (1979); IOWA CODE ANN. § 601A.6(1)(a) (West 1975) as interpreted in *King v. Iowa Civil Rights Commission*, 334 N.W.2d 598 (Iowa 1983); MAINE REV. STAT. ANN. tit.5, § 4572 (1)(A) (1979) as interpreted in *Maine Human Rights Commission v. Local 1361, United Paperworkers Int. Union AFL-CIO*, 383 A.2d 369 (Me. 1978); NEW YORK EXEC. LAW § 296.10 (McKinney 1982) as interpreted in *State Division of Human Rights ex rel. Clarke v. Carnation Co.*, 86 A. D. 2d 977, 448 N.Y.S. 2d 330 (1982).

74. Some state statutes have absolute provisions similar to the contested Connecticut statute. *See, eg.*, MISSOURI ANN. STAT., § 578.115 (Vernon 1979); KENTUCKY REV. STAT. § 436.165(4)(a) (1975).

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