COMMENTS

Estate of Thornton v. Caldor, Inc.: Defining Sabbath Rights in the Workplace

Introduction

In June 1985, the United States Supreme Court held, in *Estate of Thornton v. Caldor, Inc.*,[1] that an employee is not constitutionally entitled to a day of rest on his or her designated day of worship. As a case involving significant issues of free religious exercise and employment rights, the opinion is remarkable for its brevity. Chief Justice Burger's majority opinion is barely seven pages in length; Justice Rehnquist dissented without a written opinion. Justice O'Connor, joined by Justice Marshall, concurred in a separate opinion which offers useful advice to future litigants in this area of first amendment rights.[2]

In *Thornton*, an employee's claimed right to worship freely by staying home from work on his chosen Sabbath—a right initially established by state statute[3]—was categorically rejected by the nation's highest court in a few terse pages. How is such a result achieved in a country whose founders arrived seeking the freedom to worship without government intrusion? This Comment seeks to answer that question.

Part I sets forth the facts and holding of *Thornton*. Part II examines the development of federal constitutional law in this area. Part III explores Justice O'Connor's suggestion, in her concurrence, that federal statutory law—specifically Title VII's employment discrimination statute[4]—may provide relief where the constitution is unavailing.

This Comment concludes that federal constitutional law, hampered by an absence of Supreme Court guidance concerning the interplay between the Establishment and the Free Exercise Clauses, does not offer a viable solution at this time to the free exercise problem posed in *Thornton*.[5] However, the federal employment discrimination statute, Title VII

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1. 472 U.S. 703 (1985).

2. *See infra* notes 24-28 and accompanying text.

3. CONN. GEN. STAT. ANN. § 53-303e (West 1983). *See infra* note 11 and accompanying text.

4. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. § 2000e (1982)).

5. *See infra* notes 148-153 and accompanying text.

of the Civil Rights Act of 1964,[6] provides a workable means for protecting an employee's free exercise rights without running the risk of unconstitutionally establishing religion.[7] This Comment suggests that the Supreme Court might employ the "reasonable accommodation" test currently used in the federal antidiscrimination law to resolve establishment/free exercise conflicts in the area of employee rights.[8]

I. The Facts and the Holding

A. Facts

In *Estate of Thornton v. Caldor, Inc.*,[9] petitioner's decedent, Thornton, began working for Caldor (a large department store) in early 1975. In 1976, the Connecticut legislature revised its Sunday closing statutes.[10] In 1977, Caldor opened its Connecticut stores for Sunday business. Thornton, then a department manager, complied with his employer's request that he work a total of thirty-one Sundays during 1977 and 1978. In 1979, he informed his employer that he would no longer work on Sundays because he observed that day as his Sabbath. He invoked the protection of section 53-303e(b) of the General Statutes of Connecticut which provided that: "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."[11] Complying with the letter of the statute, Caldor proposed that Thornton either move to Massachusetts (to manage a department in a store which was closed on Sundays), or accept a demotion to a lower paying, nonsupervisory position. Thornton re-

6. 42 U.S.C. § 2000e (1982).

7. *See infra* notes 24-28 and accompanying text.

8. *See infra* notes 144-153 and accompanying text.

9. 472 U.S. 703 (1985).

10. *Id.* at 705 n.2.

11. CONN. GEN. STAT. ANN. § 53-303e(b) (West 1985). The statute additionally provided:

> (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.
>
> . . . .
>
> (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.

CONN. GEN. STAT. ANN. § 53-303e (West 1985).

jected both options and the store demoted him to a clerical position. Thornton resigned two days later and filed a grievance with the Connecticut State Board of Mediation and Arbitration.[12] After an evidentiary hearing, the Board found that Thornton's claim was sincere, that his demotion constituted constructive discharge, and that Caldor had thereby violated the statute. The superior court affirmed, holding that the Connecticut statute did not offend the Establishment Clause.[13]

B. Majority Holdings

The Connecticut Supreme Court reversed,[14] concluding that the statute violated the federal Establishment Clause under the test enunciated by the United States Supreme Court in *Lemon v. Kurtzman*.[15] The United States Supreme Court affirmed.[16]

The Connecticut Supreme Court held that the statute violated all three prongs of the *Lemon* test in that it lacked a clear secular purpose, improperly advanced religion, and encouraged excessive entanglement between church and state.[17] Chief Justice Burger's opinion, however, focused only on the second prong of the *Lemon* standard, and held that the statute exceeded the limitation proscribing a more than incidental or remote effect of advancing religion. The Chief Justice wrote: "The statute has a primary effect that impermissibly advances a particular religious practice."[18] The Burger majority concluded that "the Connecticut statute impose[d] on employers and employees an absolute duty to conform their business practices to the particular religious practices of the employee by enforcing observance of the Sabbath the employee unilaterally designates."[19] This rigid scheme of rights, the Court decided, improperly favored Sabbath observers.[20] Quoting Judge Learned Hand, the Court observed: "The 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."[21] In an accompanying footnote, the majority implied that the religious rights of employees must be balanced against

12. 472 U.S. at 706-07.

13. *Id.* at 707.

14. Caldor, Inc. v. Thornton, 191 Conn. 336, 351, 464 A.2d 785, 794 (1983).

15. 403 U.S. 602 (1971). *Lemon v. Kurtzman* provides that three tests must be met for a statute to avoid violating the Establishment Clause: (1) the statute must have a secular purpose; (2) the statute must not have a primary effect which advances or inhibits religion; and (3) the statute must not foster excessive entanglement between government and religion. *Id.* at 612-13.

16. 472 U.S. at 708.

17. 191 Conn. at 345-51, 464 A.2d at 792-94.

18. 472 U.S. at 710.

19. *Id.* at 709.

20. *Id.* at 709-10.

21. *Id.* at 710 (quoting Otten v. Baltimore & O.R.R., 205 F.2d 58, 61 (2d Cir. 1953)).

the nonreligious rights of their coworkers.[22]

The majority also noted that the statute contained no provisions for special circumstances, such as Friday Sabbath observance, nor did the law provide special consideration for the possibility that a high percentage of the work force might choose the same day of worship. The statute also failed to consider possible hardships to an employer who had to make the required accommodations.[23] In short, the state had given too much weight to the concerns and interests of Sabbath observers.

C. The O'Connor-Marshall Concurrence

The concurrence of Justice O'Connor, joined by Justice Marshall, accepted the majority's conclusion that the statute "impermissibly advance[d] religion."[24] Justice O'Connor added, however, that the religious accommodation provisions of Title VII of the Civil Rights Act of 1964[25] do not appear vulnerable to the same establishment clause analysis.[26] Justice O'Connor noted that Title VII, like the Connecticut statute, "attempts to lift a burden on religious practice that is imposed by *private* employers, and hence it is not the sort of accommodation statute specifically contemplated by the Free Exercise Clause."[27] Title VII's goal of preventing discrimination represents a valid secular purpose, and its call for reasonable rather than absolute accommodation of all religious beliefs and practices suggests that the law would pass the requirements of the *Lemon* test.[28]

II. Constitutional Analysis

The facts of *Thornton* suggest a clear free exercise issue: the right to worship freely on one's Sabbath represents, to many people, a fundamental right of religious freedom. But the Free Exercise Clause is not men-

22. Section 53-303e(b) gives Sabbath observers the valuable right to designate a particular weekly day off—typically a weekend day, widely prized as a day off. Other employees who have strong and legitimate, but nonreligious, reasons for wanting a weekend day off have no rights under the statute. For example, those employees who have earned the privilege through seniority to have weekend days off may be forced to surrender this privilege to the Sabbath observer; years of service and payment of "dues" at the workplace simply cannot compete with the Sabbath observer's absolute right under the statute. Similarly, those employees who would like a weekend day off, because that is the only day their spouses are also not working, must take a back seat to the Sabbath observer.

Id. at 710 n.9.

23. *Id.* at 709-10. This language appears to refer to the "reasonable accommodation" requirements of 29 C.F.R. § 1605 (1967), which implements 42 U.S.C. § 2000e. *See infra* notes 83-85 and accompanying text.

24. 472 U.S. at 711 (O'Connor, J., concurring).

25. 42 U.S.C. § 2000e (1982).

26. 472 U.S. at 711-12 (O'Connor, J., concurring).

27. *Id.* at 712 (O'Connor, J., concurring) (emphasis in original).

28. *Id. See also infra* note 153.

tioned explicitly in the majority opinion.[29] To explore the reasons behind this absence, a brief historical review is in order.

A. Historical Development

The United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."[30] These guarantees, known respectively as the "Establishment" and "Free Exercise" Clauses, were drafted at a time when the concepts of state and religion were generally well defined and narrowly limited.[31] As evidenced by the debate in Congress over the proposed Bill of Rights, the legislators were primarily concerned with preventing the establishment of a single, national religion.[32] Addressing themselves primarily to this goal, the Framers of the First Amendment felt that individual religious issues were to be resolved by the separate states.[33]

The Supreme Court initially adopted the founders' interpretation of the First Amendment, allowing the states great latitude in regulating religious matters within their borders. In the first case to raise the free exercise issue, *Permoli v. First Municipality of New Orleans*,[34] a Catholic

29. Quoting Judge Learned Hand, the majority alluded to the Free Exercise Clause and subordinated it to the Establishment Clause. *See supra* note 21 and accompanying text.

The Court argued, in effect, that the free exercise right is limited when one's religious practice intrudes upon the rights of others. A statute absolutely guaranteeing a right to free exercise under such circumstances would serve to establish religion because it would have a "primary effect that impermissibly advances a particular religious practice." 472 U.S. at 710.

30. U.S. CONST. amend. I.

31. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1154 (1988). Although Professor Tribe does not explain what he means by "well defined and quite narrowly limited," he refers the reader to an informative book on the subject. *Id.* at 1154 n.4. *See* A.P. STOKES AND L. PFEFFER, CHURCH AND STATE IN THE UNITED STATES (1964). Stokes and Pfeffer chronicle the "Official Acts and Utterances" of the founding fathers before, during, and after the ratification of the Constitution. Two themes emerge from Stokes' and Pfeffer's work which suggest a basic consensus among the Framers as to the perception of church and state. First, the majority of the founding fathers endorsed, and joined in, various public religious practices. Prayers, thanksgivings, and fasts were not infrequent in that day. Prominent persons supporting these national calls to worship included John Adams, Benjamin Franklin, George Washington, and the Constitution's principal architect, James Madison. Second, the founders, while generally opposed to the establishment of a single national church, *see infra* note 32 and accompanying text, were less hostile to the establishment of various state churches within the separate states. A.P. STOKES & L. PFEFFER, *supra*, 64-103.

32. One excerpt from these debates reads:

> Mr. Madison thought, if the word national was inserted before religion, it would satisfy the minds of honorable gentlemen. He believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform. He thought if the word national was introduced, it would point the amendment directly to the object it was intended to prevent.

A.P. STOKES & L. PFEFFER, *supra* note 31, at 95.

33. *Id.* at 91-92.

34. 44 U.S. (3 How.) 589 (1845).

priest appealed a fine imposed on him for officiating at a funeral in violation of a New Orleans ordinance granting a monopoly to a certain chapel. The Supreme Court dismissed the appeal, stating that the First Amendment did not protect citizens from laws passed in their respective states.[35]

The first signal that the federal government could indeed reach the lives of individuals worshipping in their own states came in the so-called "Mormon cases."[36] In *Reynolds v. United States*,[37] the Court held that although the First Amendment prevented Congress from exercising power over individual beliefs and opinions, religious practices were inferior to the established laws of the land.[38] In *Davis v. Beason*,[39] the Court wrote: "However free the exercise of religion may be, it must be subordinate to the criminal laws of the country . . . ."[40]

B. The Modern Standard: *Everson v. Board of Education*

A number of cases which have interpreted the first amendment religion clauses arose from the field of education and parochial schools.[41] In *Everson v. Board of Education*,[42] the Court went far beyond the definition of "establishment of religion" which had been employed by the drafters of the Bill of Rights.[43] The *Everson* court stressed that the Establishment

35. *Id.* at 609-10. It should be noted that this case was decided prior to the adoption, in 1868, of the Fourteenth Amendment, which specifically prohibits state interference with citizens' enjoyment of federal statutory and constitutional guarantees. It is well settled today that all first amendment guarantees are equally binding on state and federal governments. *See* L. TRIBE, *supra* note 31, at 1156; *see also infra* notes 42, 43 & 68.

36. The three "Mormon cases" are Reynolds v. United States, 98 U.S. 145 (1878) (religious polygamy in United States Territory held subject to congressional control); Davis v. Beason, 133 U.S. 333 (1890) (Idaho Territory statute prohibiting polygamy and enacted pursuant to legislative power given by United States Congress was upheld); and Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890) (Congress had power to repeal act of incorporation of a church after church continued to advocate polygamy).

37. 98 U.S. 145 (1878).

38. *Id.* at 166-67. In *Reynolds*, § 5352 of the Revised Statutes made bigamy a crime in United States Territories.

39. 133 U.S. 333 (1890).

40. *Id.* at 342-43. Although the actual law was passed by the Idaho Territorial Legislature, the legislature derived its power from congressional grant. *Id.* at 345-47.

41. *See generally* A.P. STOKES & L. PFEFFER, *supra* note 31, at 351-446; L. TRIBE, *supra* note 31, at 1154-79.

42. 330 U.S. 1 (1947). In *Everson*, a state statute authorized a school board to establish a program which reimbursed parents for the cost of school bus transportation to public and nonprofit private schools. The only nonprofit private school in the district was a Catholic school. The Supreme Court upheld the program by a five to four vote.

43. The *Everson* Court's famous gloss on the Establishment Clause described in forceful language the constitutionally required "wall of separation between church and State":

> 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 pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church

Clause required a "wall of separation" between church and state with specific, rigid features.[44] A year later, in *McCollum v. Board of Education*,[45] the Court reaffirmed the principle of strict separation between church and state, which barred any form of direct aid to religion.[46] The Court concluded that the "wall of separation"[47] must be "kept high and impregnable."[48]

Maintaining a "wall of separation" between church and state demands continuous surveillance of the relations between secular and nonsecular groups.[49] In contrast, the concept of religious neutrality presumes that the state has religious citizens whose practices will be permitted as long as any resulting entanglements with the state are de minimus.[50] Religious neutrality was reflected in the words of Justice Douglas when he said: "We are a religious people whose institutions presuppose a Supreme Being."[51] Religious neutrality can also be seen in the four cases that upheld Sunday closing laws during the 1960 Supreme Court Term.[52] Opponents of neutrality who advocate a "wall of separation" eschew any form of government ties to religion for fear that one group may obtain a more favorable status than others. Because the Establishment Clause more directly addresses this issue of possible governmental favoritism, it is implicitly favored by those who believe in a "wall of separation."

> against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. 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 religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

330 U.S. at 15-16 (emphasis in original) (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).

44. *See supra* note 43.

45. 333 U.S. 203 (1948).

46. *Id.* at 209-12.

47. This phrase was reportedly offered first by Thomas Jefferson in reply to an address to him by the Dansbury Baptist Association. *Reynolds*, 98 U.S. at 164 (quoting 8 JEFF. WORKS 113).

48. *McCollum*, 333 U.S. at 212.

49. For a general discussion of the logical tension inherent in the language and jurisprudence of the religion clauses, see L. TRIBE, *supra* note 31, at 1154-1301.

50. W. KATZ, RELIGION AND AMERICAN CONSTITUTIONS 22-24 (1964).

51. Zorach v. Clauson, 343 U.S. 306, 313 (1952).

52. Gallagher v. Crown Kosher Market, 366 U.S. 617 (1961) (Massachusetts Sunday closing law not violative of First and Fourteenth Amendments); Braunfeld v. Brown, 366 U.S. 599 (1961) (Pennsylvania Sunday closing law did not violate First and Fourteenth Amendments); Two Guys from Harrison-Allentown v. McGinley, 366 U.S. 582 (1961) (Pennsylvania closing law did not violate First and Fourteenth Amendments); McGowan v. Maryland, 366 U.S. 420 (1961) (Maryland Sunday closing law did not violate Equal Protection and Due Process Clauses of the Fourteenth Amendment, or the Establishment Clause of the First Amendment).

C. The Tension Between the Clauses

In *Zorach v. Clauson*,[53] the Supreme Court noted that the Constitution does not require government hostility toward religion.[54] Nonetheless, the *Everson* interpretation of the Establishment Clause has remained firmly entrenched.[55] This interpretation has exacerbated tension between the religion clauses. As Justice Frankfurter has noted: "[I]n view of the competition among religious creeds, whatever 'establishes' one sect disadvantages another, and vice versa."[56] Justice Douglas added: "The reverse side of an 'establishment' is a burden on the 'free exercise' of religion."[57]

This tension has been increased by America's high degree of religious diversity. As Justice Brennan has pointed out:

> Today the Nation is far more heterogeneous religiously, including as it does substantial minorities not only of Catholics and Jews but as well as of those who worship according to no version of the Bible and those who worship no God at all. In the face of such profound changes, practices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive to many persons, the deeply devout and the nonbelievers alike.[58]

The Establishment and Free Exercise Clauses, originally drafted as complementary devices for protecting religious minorities and restraining religious majorities, are now at odds with each other.[59] The Establishment Clause, as currently interpreted, provides that when a statute or other government act supports the religious practices of any one group, whether a minority or majority, the threat of establishment is raised.[60]

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53. 343 U.S. 306 (1952).

54. The Court observed: "We are a religious people whose institutions presuppose a Supreme Being . . . [W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence." *Id.* at 313-14.

55. In Abington School Dist. v. Schempp, 374 U.S. 203 (1963), the Court adopted an even more limited view of permissible interaction between church and state than had been asserted in the *Everson* majority opinion. The *Schempp* Court adopted the following portion of Justice Rutledge's dissent in *Everson*:

> The [First] Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies . . . . The object was broader than separating church and state. . . . It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.

Id. at 217 (quoting Everson v. Board of Educ., 330 U.S. 1, 31-32 (Rutledge, J., dissenting)).

56. McGowan v Maryland, 366 U.S. 420, 463 (1961) (Frankfurter, J., concurring).

57. *Id.* at 578 (Douglas, J., dissenting).

58. Abington School Dist. v. Schempp, 374 U.S. 203, 240-41 (footnote and citation omitted) (Brennan, J., concurring).

59. *See supra* notes 49-58 and accompanying text.

60. *Everson*, 330 U.S. at 15-16. *See supra* notes 55-57 and accompanying text.

Government action designed to assure persons an opportunity to worship according to the dictates of their consciences, in support of free religious exercise, arguably violates the Establishment Clause. Thus, if religious persons obtain government assistance to secure their religious rights against an uncooperative employer, they run the risk that the Court will minimize their rights to avoid establishing religion.[61]

D. The Problem of State Action

Faced with this tension, the Supreme Court appears to have abandoned any attempt to harmonize the religion clauses.[62] Instead, the Court decides cases on the basis of one clause or the other, depending on which clause is triggered by the challenged state action. The need for state action to raise the constitutional issue makes it highly unlikely that both clauses will be construed together.

Because the religion clauses are enforceable only against the state or federal governments,[63] some specific governmental action must be challenged to invoke the constitutional guarantee.[64] That specific action cannot simultaneously harm an employer's interest in preventing an establishment of religion and infringe on the employee's free exercise right.[65] Without such a coinciding of legal issues, it is highly unlikely that the two clauses will be construed together.[66] The Court then will limit its analysis to the single clause that is offended by the state action. For example, in *Thornton*, the Court found proreligious state action in

61. This was precisely the result in *Thornton*. *See supra* notes 9-24 and accompanying text.

62. *See* Moore, *The Supreme Court and the Relationship between the "Establishment" and "Free Exercise" Clauses*, 42 TEX. L. REV. 142, 149 (1963).

63. *See* L. TRIBE, *supra* note 31, at 1688-1720; *see also* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 421-50 (1986) [hereinafter J. NOWAK].

64. *See* L. TRIBE, *supra* note 31, at 1688-1720; *see also* J. NOWAK, *supra* note 63, at 421-50.

65. The Free Exercise Clause, while protective of religious freedom, is only a restraint on governmental action. The wording of the clause forbids governmental intrusion on free exercise of religion; it does not impose an affirmative duty on government to promote or protect free exercise in the face of intrusions into that freedom by *private* parties. A case involving first amendment issues cannot be brought unless there is state action. For a complete analysis of the concept of state action, see L. TRIBE, *supra* note 31, at 1688-1720. *See also* J. NOWAK, *supra* note 63, at 421-50. Thus, if the government action arguably offended a *defendant's* interest under the Establishment Clause (as did the statute in *Thornton*), it is highly unlikely the *same* action would offend the *plaintiff's* interest under the Free Exercise Clause.

66. The Supreme Court, if it wanted to take up the challenge, could construe the two clauses together in dual appeals. For example, while Caldor was the party to raise the Establishment Clause issue in *Thornton*, Thornton arguably could have appealed the state high court's ruling on the establishment clause issue by claiming *that ruling* constituted state action in violation of his free exercise rights. The United States Supreme Court then could analyze the case as raising both religion clauses in the context of *two* instances of state action: the enactment of the Connecticut statute and the ruling of the Connecticut Supreme Court.

the Connecticut statute, and therefore relied exclusively on establishment clause analysis.[67] The Court could not, however, address Thornton's free exercise concerns because his employer was a private party who stood outside the reach of the First and Fourteenth Amendments.[68]

The case of *Sherbert v. Verner* provides an example of the Supreme Court's focus on the Free Exercise Clause.[69] In 1957, Sherbert converted to the Seventh Day Adventist faith which preserves Saturday as a day of rest. In 1959, Sherbert's employer switched from a five-day to a seven-day work week. When Sherbert refused to work on Saturdays she was fired. Unable to find a new job, she applied to the state of South Carolina for unemployment compensation benefits. She was denied these benefits for failing to accept suitable work without "good cause."[70] The only "suitable work" offered would have required that she work on Saturdays. Reversing the South Carolina Supreme Court, the Court found that this denial of benefits constituted state action, and held that the denial was an unconstitutional burden on the free exercise rights of the appellant.[71]

The Supreme Court's different approaches to the religion issues raised in *Thornton* and *Sherbert* illustrate the apparent reluctance of the Court to provide guidance that might interrelate in some principled manner the different policies behind the two religion clauses. In *Thornton*, the Court also might have analyzed the question of whether the Connecticut Supreme Court, in reversing the decision of the Board and the superior court, impermissibly infringed on Thornton's free exercise rights. In *Sherbert*, the Court might also have analyzed the issue of whether payments of unemployment compensation would impermissibly advance Sherbert's religion in violation of the Establishment Clause. In both cases, the Court engaged in a narrow and apparently selective discussion of the particular religion clause triggered by the challenged state action. This narrow approach leaves open fundamental—and perhaps unanswerable—constitutional questions concerning the boundary between government's proper accommodation of individual religious needs and its improper support of specific religions.

In view of the "wall of separation" rule,[72] with its greater sensitivity to the Establishment Clause than to the Free Exercise Clause,[73] and given the tension between the clauses[74] and the tendency of state action

67. 472 U.S. 703, 708-10 (1985). *See supra* notes 14-23 and accompanying text.

68. The first amendment religion clauses were made applicable to the states through the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

69. 374 U.S. 398 (1963).

70. *Id.* at 399-401.

71. *Id.* at 409-10.

72. *See supra* notes 42-55 and accompanying text.

73. *See supra* text following note 52.

74. *See supra* notes 53-61 and accompanying text.

to trigger an analysis under one clause only,[75] it is clear that the free exercise dilemma faced by employees like Thornton[76] is unlikely to find favorable resolution under federal constitutional analysis.[77] As Justice O'Connor suggests in *Thornton*, however, relief is available under the federal antidiscrimination laws found in Title VII of the Civil Rights Act of 1964.[78]

III. Title VII Antidiscrimination

A. The Statute and its Early Interpretation

As part of Title VII of the Civil Rights Act of 1964, 42 U.S.C. section 2000e prohibits discrimination based on race, color, religion, sex, or national origin.[79] This law is the only federal statute affecting Sabbath rights in the workplace.[80] Subsection (2)(a) of section 2000e defines those employment practices which are unlawful and discriminatory.[81]

During the three years immediately following its enactment, section 2000e was litigated infrequently.[82] The Equal Employmment Opportunity Commission (EEOC), charged with enforcing the new statute, developed guidelines to aid in its application.[83] These guidelines noted that several complaints had been filed with the EEOC which raised the question of whether or not it was considered discrimination to discharge or refuse to hire employees who regularly observed a particular Sabbath. The EEOC determined that the employer's duty not to discriminate in-

75. *See supra* notes 62-71 and accompanying text.

76. *See supra* notes 9-23 and accompanying text.

77. State constitutional analysis in this area is also of no avail since state high courts consistently interpret their state constitutions' religion clauses, which are similar or identical to the First Amendment, in accordance with federal first amendment law. *See, e.g.*, Lane v. McFadyen, 259 Ala. 205, 66 So. 2d 83 (1953).

78. *See supra* notes 24-28 and accompanying text.

79. 42 U.S.C. § 2000e (1982).

80. *See*, U.S.C. Index (1982).

81. 42 U.S.C. § 2000e-2 (1985) provides in part:

> (a) It shall be unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (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.

82. For the period between 1964 and 1966, the only reported cases which deal with the statute are the following: Sarfaty v. Nowak, 369 F.2d 256 (7th Cir. 1966); Local 12, United Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966); United States v. Building and Constr. Trades Council, 271 F. Supp. 447 (E.D. Mo. 1966); and Ward v. Firestone Tire & Rubber Co., 260 F. Supp. 579 (W.D. Tenn. 1966).

83. The first set of guidelines was adopted in 1966 as EEOC Regulation 1605. 29 C.F.R. § 1605 (1966). The guidelines were amended a year later. 29 C.F.R. § 1605 (1967).

cluded an obligation to make reasonable accommodations for the religious needs of employees.[84] Such accommodation, however, should not involve undue hardship for the employer. The EEOC further required the employer to carry the burden of showing when the accommodation resulted in undue hardship.[85]

The first case to interpret section 2000e and the EEOC religious discrimination guidelines with regard to Sunday worship was *Dewey v. Reynolds Metals Company*.[86] Having refused to work on Sundays because of his religious beliefs, Dewey agreed to obtain replacements for the Sundays he was scheduled to work. After eight months, Dewey decided it was a sin to ask others to work in his place. On September 4, 1966, Dewey refused to work or to find a replacement. He was given a warning and a disciplinary layoff lasting three days. After a similar refusal on September 11, 1966, Dewey was fired.[87]

After several unsuccessful efforts to obtain relief through his union and two government agencies, Dewey filed a complaint with the EEOC. The EEOC authorized filing of suit in district court despite the regional director's belief that there was no probable cause to support the discrimination claim.[88] In a memorandum opinion, the district court ruled in favor of Dewey, ordering reinstatement with back pay, and issuing an injunction which prevented Reynolds from requiring Dewey to work Sundays.[89]

The Sixth Circuit Court of Appeals reversed,[90] holding that Dewey had not been discharged because of his religion, but because he had violated his union's collective bargaining agreement.[91] The Supreme Court granted certiorari, and a four-to-four split upheld the lower court's decision.[92]

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84. 29 C.F.R. § 1605, 1605.2(b)(1) (1967).

85. 29 C.F.R. § 1605.2(c)(1) (1967).

86. 429 F.2d 324 (6th Cir. 1970), *aff'd*, 402 U.S. 689 (1971).

87. *Id.* at 327-29.

88. *Id.* at 327.

89. *Id.* at 328

90. *Id.* at 332.

91. *Id.* at 330. The court of appeals held that the older EEOC guidelines controlled Dewey's case. These guidelines assisted employers who operated on Saturdays and Sundays. Former § 1605.1(b) stated in part:

> (3) The employer may prescribe the normal work week and foreseeable overtime requirements, and, absent an intent on the part of the employer to discriminate on religious grounds, a job applicant or employee who accepted the job knowing or having reason to believe that such requirements would conflict with his religious obligations is not entitled to demand any alterations in such requirements to accommodate his religious needs.

29 C.F.R. § 1605.1(b)(3) (1966). This subsection was deleted from the 1967 EEOC guidelines, leaving the matter to the ad hoc discretion of the Commission. *See* 29 C.F.R. § 1605 (1967).

92. Dewey v. Reynolds Metals Co., 402 U.S. 689 (1971). The split decision was due to Justice Harlan's absence from the vote. The decision is reported without an opinion.

Two principal issues arose from the *Dewey* case. First, Judge Combs, dissenting from the Sixth Circuit majority, minimized the significance of the collective bargaining agreement, and emphasized the first amendment right to freedom of religion as one of the Bill of Rights' strongest mandates.[93] Judge Combs argued that the "cornerstone" of both the 1966 and 1967 guidelines[94] was that employers were to accommodate the religious needs of employees "where such accommodations can be made without undue hardship on the conduct of the employer's business."[95] As future cases soon demonstrated, the question of what constitutes undue hardship to an employer became a principal issue in this area of section 2000e litigation.[96]

A second issue raised by *Dewey* relates to the weight to be given to EEOC regulations. The *Dewey* majority remarked in a footnote: "The authority of the EEOC to adopt a regulation interfering with the internal affairs of an employer, absent discrimination, may well be doubted."[97] One year later, an Arkansas federal district court further explored the authority of the EEOC regulations in *Kettell v. Johnson & Johnson*.[98] The *Kettell* court observed: "The failure to affirmatively accommodate an employee to the extent suggested by EEOC regulation cannot be equated with 'discrimination'."[99] The court concluded that Congress had not intended to impose on employers such a broad duty to accommodate employees under section 2000e.[100]

B. The 1972 Amendment to 42 U.S.C. section 2000e

Less than a year after the *Kettell* decision, Congress explicitly expanded the duties of an employer by amending the statute to include a new provision. New subsection (j) provides: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."[101]

The first case to apply the revised statute was *Riley v. Bendix*

93. 429 F.2d at 334 (Combs, J., dissenting).

94. *See supra* note 91.

95. 429 F.2d at 333 (Combs, J., dissenting).

96. *See, e.g.*, Hardison v. Trans World Airlines, 527 F.2d 33 (8th Cir. 1975), *rev'd*, 432 U.S. 63 (1977) (*see infra* notes 113-126 and accompanying text); Riley v. Bendix Corp., 464 F.2d 1113 (5th Cir. 1972) (*see infra* notes 102-104 and accompanying text); Shaffield v. Northrop Worldwide Aircraft Servs., 373 F. Supp. 937 (M.D. Ala. 1974) (*see infra* notes 105-108 and accompanying text).

97. 429 F.2d at 331 n.1.

98. 337 F. Supp. 892 (E.D. Ark. 1972).

99. *Id.* at 895.

100. *Id.*

101. 42 U.S.C. § 2000e(j) (1982).

Corp.[102] Riley had refused to work between sundown Friday and sundown Saturday for religious reasons. His employer decided that maintaining uniform treatment of its employees was a valid reason to refuse any special accommodations for Riley.[103] Noting the recent amendment of section 2000e, the court held that the employer had failed to demonstrate that it was unable to accommodate Riley's religious observances without undue hardship to its business.[104]

In *Shaffield v. Northrop Worldwide Aircraft Services, Inc.*,[105] Shaffield had been discharged for refusing to work between sundown Friday and sundown Saturday. The employer argued that Shaffield's refusal to work created undue hardship by disrupting the company's seniority system. Rejecting this argument, the court observed that management had not contacted Shaffield to attempt a reasonable accommodation.[106] The court held that the employer was guilty of religious discrimination and ordered reinstatement with back pay.[107] The court concluded that under the statute an employer has an affirmative duty to prove either that a reasonable accommodation was made, or that the burden of such accommodation was not reasonable under the circumstances.[108]

In 1975, the Sixth Circuit Court of Appeals ruled in favor of another religious employee. In *Cummins v. Parker Seal Co.*,[109] the employer argued that the reasonable accommodation rule violated the Establishment Clause. The Sixth Circuit rejected this view and reversed the lower court, holding that the employer had failed to demonstrate undue hardship.[110] The employer appealed to the Supreme Court, arguing that section 2000e violates the three prongs of the *Lemon v. Kurtzman*[111] test, and thus advances the religion of Sabbath observers. The Supreme Court granted certiorari but one Supreme Court justice was absent from the vote and a four-to-four split upheld the lower court's ruling.[112]

C. *Trans World Airlines v. Hardison*

In 1977, the Supreme Court fully considered revised section 2000e in *Trans World Airlines v. Hardison*.[113] *Hardison* abruptly ended the

102. 464 F.2d 1113 (5th Cir. 1972).
103. *Id.* at 1115.
104. *Id.* at 1118.
105. 373 F. Supp. 937 (M.D. Ala. 1974).
106. *Id.* at 943-44.
107. *Id.* at 944-45.
108. *Id.* at 944.
109. 516 F.2d 544 (6th Cir. 1975), *aff'd by an equally divided court*, 429 U.S. 65 (1976).
110. *Id.* at 551. After reversing the lower court's judgment, the appellate court remanded, suggesting that the district court consider reinstatement with back pay and attorney's fees. *Id.* at 554.
111. 403 U.S. 602 (1971). *See supra* note 15.
112. 429 U.S. 65 (1976). The absent justice was Justice Stevens.
113. 432 U.S. 63 (1977).

trend of decisions favoring employees. In 1968, Hardison converted to the Worldwide Church of God which espoused Saturday as its day of rest. Hardison requested that TWA relieve him of Saturday shift assignments, and the company complied. Hardison later agreed to work in a different location which maintained a separate seniority list. His superior at the new location asked Hardison to work on Saturdays. He refused and was fired.[114]

Hardison sued for injunctive relief under 42 U.S.C. section 2000e-2 and the 1967 EEOC guidelines. The district court held that TWA had satisfied its "reasonable accommodation" obligation, and that further concessions would constitute undue hardship to the company.[115] The Eighth Circuit reversed, holding that TWA had not satisfied its duty to accommodate Hardison.[116]

The Supreme Court reversed the Eighth Circuit's decision.[117] The Court noted that the 1967 EEOC guidelines did not specify what constitutes "reasonable accommodation" or "undue hardship" to an employer.[118] Because neither the EEOC nor Congress had clarified these standards, the Court developed its own definition of these terms stating that a duty to accommodate was secondary to a previously established seniority system and anything more than a de minimus cost was undue hardship to the employer.[119]

Applying these newly developed standards, the Court concluded that TWA's efforts to accommodate Hardison's religious beliefs were reasonable under the 1967 EEOC guidelines.[120] Of special importance to the Court was the TWA seniority system, which raised the problem that a particularly deferential accommodation of Hardison's religious needs would constitute discrimination against Hardison's fellow employees.[121] Reasoning that a trade-off of employee rights was at issue, the Court insisted on "clear statutory language" to establish Congressional intent to defer to the religious employee.[122] The Court concluded that "to re-

114. *Id.* at 66-70.

115. Hardison v. Trans World Airlines, 527 F.2d 33, 40, 42 (8th Cir. 1975).

116. *Id.* at 39.

117. 432 U.S. at 85.

118. *Id.* at 72.

119. *Id.* at 75-85.

120. *Id.* at 77.

121. The seniority system created rights and priorities among the employees which included rights to time off and shift preferences for more senior workers. This system would be undermined, and senior workers would suffer discrimination, the Court decided, if junior workers could claim for religious reasons time-off privileges otherwise due only senior employees. *Id.* at 80-81.

122. The Court wrote:

> TWA was not required by Title VII to carve out a special exception to the seniority system in order to help Hardison meet his religious obligations . . . . In the absence of clear statutory language or legislative history to the contrary, we will not

quire TWA to bear more than a *de minimus* cost in order to give Hardison Saturdays off is an undue hardship."[123]

Justices Marshall and Brennan dissented, claiming that the *Hardison* decision constituted a "fatal blow to all efforts under Title VII to accommodate work requirements to religious practices."[124] The dissenters seemed to argue that the majority had reduced the statute to meaningless rhetoric and prevented religious employees from receiving even minor privileges required by their religious faith.[125] The dissenters concluded that the statute could require employers to grant privileges to religious persons as part of the accommodation process without violating the Establishment Clause.[126]

D. The EEOC Response to *Hardison*

The Court's charge that Congress and the EEOC had failed to define "reasonable accommodation" and "undue hardship" brought a prompt response. In 1978, the EEOC conducted public hearings concerning questions raised by the *Hardison* decision.[127] The EEOC concluded from the hearings that confusion was widespread concerning the extent of accommodation required under the *Hardison* decision, and that certain employee religious practices were not being accommodated properly.[128] Such practices included the observance of a Sabbath and religious holidays, prayer breaks, special dietary requirements, and time off to mourn a deceased relative. Also neglected were beliefs concerning medical examinations, union membership, and dress and grooming habits.[129] The EEOC found, in addition, that many employers had independently developed viable methods of accommodating religious practices and that such accommodation generally did not result in unfavorable business consequences.[130] Based on these findings, the EEOC revised its

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readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath.

Id. at 85.

123. *Id.* at 84.

124. *Id.* at 86 (Marshall, J., dissenting).

125. *Id.* at 87.

126. *Id.* at 91. Justice Marshall wrote:

> [T]his Court has repeatedly found no Establishment Clause problems in exempting religious observers from state-imposed duties . . . . If the State does not establish religion over nonreligion by excusing religious practitioners from obligations owed the state, I do not see how the State can be said to establish religion by requiring employers to do the same with respect to obligations owed the employer. Thus, I think it beyond dispute that the Act does—and, consistently with the First Amendment, can—require employers to grant privileges to religious observers as part of the accommodation process.

Id. at 90-91 (citations omitted).

127. 29 C.F.R. § 1605, app. A at 161 (1987).

128. *Id.*

129. *Id.*

130. *Id.*

guidelines to clarify the accommodation obligation.[131]

Section 1605.2 of the new guidelines directly refers to and expands on the *Hardison* decision. Subsection (e)(1) explains the "undue hardship" requirement under the category of "Cost": "An employer may assert undue hardship to justify a refusal to accommodate an employee's need to be absent from his or her scheduled duty hours if the employer can demonstrate that the accommodation would require 'more than a *de minimus* cost.' "[132] While the regular payment of premium wages to a substitute employee would represent more than a de minimus cost, the employer should bear the burden of an occasional payment of premimum wages and of general administrative costs.[133] Violating a bona fide seniority system to protect one employee's religious practice constitutes undue hardship if such accommodation denies another employee a preferred shift guaranteed under the system.[134] However, voluntary substitutions and shift swaps are arrangements that an employer actively should pursue.[135] The EEOC also suggested that an employer could provide reasonable accommodation through flexible scheduling[136] or lateral transfers and changes of job assignments.[137]

Although determining whether an accommodation is reasonable or unreasonable under section 2000e has remained difficult under the new federal guidelines, the courts have begun to develop useful formulas. In an early case decided under the new EEOC guidelines, the Fifth Circuit held that an employee should explore scheduling or voluntary shift assignments before demanding that the employer make accommodations.[138] In 1983, a federal district court in Texas declined to require that an employer guarantee a worker every Sabbath off, as the regular payment of substitute employees during the worker's occasional assignments to peak work periods would constitute undue hardship.[139]

Courts are more receptive to claims by employees who express a willingness to give up work-related benefits in exchange for work-free Sabbaths. In *Philbrook v. Ansonia Board of Education*,[140] an employee suggested that he be allowed to use his personal business leaves for religious observances. The employer insisted on an alternative solution which involved a loss of pay to the employee. The Second Circuit Court

131. *Id.* Completed in 1980, these revisions replaced the previous guidelines found at 29 C.F.R. §§ 1605-1605.1.

132. 29 C.F.R. § 1605.2(e)(1) (1987).

133. *Id.*

134. 29 C.F.R. § 1605.2(e)(2) (1987).

135. 29 C.F.R. § 1605.2(d)(1)(i) (1987).

136. 29 C.F.R. § 1605.2(d)(1)(ii) (1987).

137. 29 C.F.R. § 1605.2(d)(1)(iii) (1987).

138. Brener v. Diagnostic Center Hosp., 671 F.2d 141, 146 (5th Cir. 1982).

139. Turpen v. Missouri-Kansas-Texas R.R., 573 F. Supp. 820, 826 (N.D. Tex. 1983).

140. 757 F.2d 476 (2d Cir. 1985), *aff'd*, 479 U.S. 60 (1986).

of Appeals held that when both employee and employer propose reasonable accommodation plans, section 2000e requires that the employer accept the employee's proposal unless the accommodation would impose undue hardship on the employer's business.[141]

The Supreme Court has yet to decide a case under the new EEOC regulations. However, Justice O'Connor, in her concurring opinion in *Thornton*,[142] stressed that the majority's invalidation of the Connecticut statute under the Establishment Clause did not threaten the religious accommodation provisions of section 2000e: "Since Title VII calls for reasonable rather than absolute accommodation and extends that requirement to all religious beliefs and practices rather than protecting only the Sabbath observance, I believe an objective observer would perceive it as an antidiscrimination law rather than [as] an endorsement of . . . a particular religious practice."[143]

E. Religious Employees' Rights Under 42 U.S.C. section 2000e

In balancing the competing interests of employer and employee by means of formulas defining "reasonable accommodation" and "undue hardship", 42 U.S.C. section 2000e has achieved its own "reasonable accommodation" between the Establishment and Free Exercise Clauses—a result which thus far has eluded the Supreme Court under strict interpretation of the First Amendment.[144] Under section 2000e, employers may reasonably accommodate the religious observances of employees, short of imposing undue hardship on the employer or on fellow employees.[145] This opportunity for free religious exercise—the secondary result of a congressional policy directly aimed at preventing discrimination[146]—is broader than any free exercise right that could be granted directly by Congress or a state. *Thornton* clearly illustrates the shortcomings of legislative efforts to guarantee free religious exercise directly.[147]

Conclusion

In *Estate of Thornton v. Caldor, Inc.*, the Supreme Court focused on the Establishment Clause in relation to denying a religious employee the right to be free from work on his Sabbath. This Comment has suggested that this result occurred because current first amendment jurisprudence, which emphasizes the need for a "wall of separation" between Church and State, implicitly subordinates the Free Exercise Clause to the Estab-

141. *Id.* at 484.
142. *See supra* notes 24-28 and accompanyng text.
143. 472 U.S. 703, 712 (1985) (O'Connor, J., concurring).
144. *See supra* notes 9-23, 30-77 and accompanying text.
145. *See supra* notes 79-141 and accompanying text.
146. *See supra* note 81 and text accompanying note 101.
147. *See supra* notes 9-23 and accompanying text.

lishment Clause.[148] For this and other reasons inherent in the tension between the clauses[149] and the need for state action,[150] the Supreme Court is unlikely to interpret the clauses together, or to supply principled reasons for invoking one clause rather than the other in situations in which both clauses are implicated and suggest conflicting results. At present, there is no constututional right enabling a religious employee to insist on enjoying his or her Sabbath as a day of rest.

Justice O'Connor's *Thornton* concurrence suggests that Title VII of the Civil Rights Act of 1964 (specifically, 42 U.S.C. section 2000e) may provide a statutory resolution of this dilemma when constitutional analysis fails.[151] An exploration of Justice O'Connor's suggestion and the case law and EEOC regulations in this area[152] indicates that section 2000e presents a valuable source of rights for employees seeking reasonable accommodation of their religious practices from their public or private employers. As *Thornton* illustrates, the Establishment Clause may pit the judiciary against the legislature when the legislature's goal is to protect the free exercise of religion. The key to the success of section 2000e is the use of the word and concept of "discrimination." Both the legislature and the courts are strongly committed to eliminating this social evil. The tension between these two branches of government is largely avoided when a denial of free exercise is framed as a form of discrimination. Thus, the religious antidiscrimination goal of Title VII closely parallels the original object of the Free Exercise Clause, while it avoids establishment clause complication.[153]

If the Free Exercise and Establishment Clauses are ever construed together, the "reasonable accommodation" and "undue hardship" standards developed under section 2000e could provide a useful analytical model. In determining employee rights, religious practices should be accommodated to a point short of creating undue hardship to the other parties involved. As the freedom of religion is a fundamental right, the burden of showing hardship should rest upon those who oppose the free exercise of religion.

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148. *See supra* notes 42-55 and accompanying text.

149. *See supra* notes 49-61 and accompanying text.

150. *See supra* notes 62-71 and accompanying text.

151. *See supra* notes 24-28 and accompanying text, and *infra* note 153.

152. *See supra* notes 83-147 and accompanying text.

153. Justice O'Connor, in her *Thornton* concurrence, suggested that § 2000e would survive establishment clause analysis because of the strong secular policy condemning discrimination:

> [A] statute outlawing employment discrimination based on race, color, religion, sex, or national origin has the valid secular purpose of assuring employment opportunity to all groups in our pluralistic society . . . . I believe an objective observer would perceive it as an anti-discrimination law rather than an endorsement of religion or a particular religious practice.

472 U.S. 703, 712 (1985) (O'Connor, J., concurring).

In the meantime, those who find themselves in a position similar to Thornton's would be well advised to avoid seeking redress though the First Amendment, and instead concentrate on the relief afforded by the provisions of section 2000e.

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