CONSTITUTIONAL LAW—ESTABLISHMENT CLAUSE—STATUTE PROHIBITING DISCHARGE OF EMPLOYEES REFUSING TO WORK ON THEIR SABBATH VIOLATIVE OF THE FIRST AMENDMENT—*Estate of Thornton v. Caldor, Inc.*, 105 S. Ct. 2914 (1985).

The establishment clause of the first amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion. . . ."[1] Thomas Jefferson characterized this clause as erecting a "wall of separation between church and State."[2] United States Supreme Court decisions, however, indicate that this barrier is more ambiguous than Jefferson's metaphor would imply.[3] In the recent case of

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[1] U.S. CONST. amend. I. The first amendment also provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]. . . ." *Id.* For a recent discussion of the free exercise clause, see Goldman v. Weinberger, 106 S. Ct. 1310 (1986) (United States Air Force regulation mandating uniform dress not violative of free exercise clause). *See also infra* note 63 (discussing interaction between free exercise clause and establishment clause).

[2] *See* Letter from Thomas Jefferson to Danbury Connecticut Baptist Association (Jan. 1, 1802) (discussing need for wall of separation between church and state), *reprinted in* S. PADOVER, THE COMPLETE JEFFERSON 518-19 (1943).

> GENTLEMEN: The affectionate sentiments of esteem and approbation which you are so good as to express towards me, on behalf of the Danbury Baptist Association, give me the highest satisfaction. My duties dictate a faithful and zealous pursuit of the interests of my constituents, and in proportion as they are persuaded of my fidelity to those duties, the discharge of them becomes more and more pleasing.
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> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction that progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.
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> I reciprocate your kind prayers for the protection and blessing of the common Father and Creator of man, and tender you for yourselves and your religious association, assurances of my high respect and esteem.

Id.; *see also* Everson v. Board of Educ., 330 U.S. 1, 16 (1946); Reynolds v. United States, 98 U.S. 145, 164 (1878).

[3] *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) ("Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.").

Estate of Thornton v. Caldor, Inc.,[4] the Court sought to define further the parameters of the church-state relationship under the establishment clause.[5]

When Donald Thornton, a Presbyterian, began work as a department manager in one of Caldor's Connecticut stores in 1975, his status as a Sunday Sabbatarian did not conflict with the store's hours of operation.[6] In 1976, however, the Connecticut Legislature revised the Sunday closing laws to permit certain businesses to remain open.[7] Thereafter, Caldor expanded its business hours to include Sundays.[8] As a result of the increased hours of operation, Caldor required department managers to work on several Sundays each month.[9] Thornton initially complied with the policy and began working on Sundays.[10] In November 1979, after working thirty-one Sundays, Thornton informed Caldor that he would no longer work on Sundays due to his observance of that day as his Sabbath.[11] Thornton justified his refusal to work on Sunday by relying on a Connecticut statute, § 53-303e(b),[12] which provides: "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

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4 105 S. Ct. 2914 (1985).

5 *See id.* at 2917-18.

6 *Id.* at 2915.

7 *Id.* at 2915 n.2.

8 *Id.* at 2915-16. The original statute precluding Sunday hours, CONN. GEN. STAT. ANN. §§ 53-300 to -305 (1958), was deemed unconstitutional in State v. Anonymous, 33 Conn. Supp. 55, 364 A.2d 244 (Conn. C.P. 1976). Several attempts at modifying the statutes to pass constitutional muster proved equally unsuccessful. *See Estate of Thornton*, 105 S. Ct. at 2915 n.2.

9 *Id.* at 2916. Thornton was required to work "every third or fourth Sunday." *Id.*

10 *Id.*

11 *Id.*

12 CONN. GEN. STAT. ANN. § 53-303e(b) (West 1985). Section 53-303(e) states, in its entirety, that

> (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 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

refusal to work on his Sabbath shall not constitute grounds for his dismissal."[13]

Thornton subsequently met with Caldor executives in an effort to resolve the conflict between the store's hours of operation and his religious beliefs.[14] Management offered him the option of transferring to a managerial position in a Massachusetts store which was closed on Sunday or remaining at the Connecticut store in a nonsupervisory position.[15] Unwilling to endure the hardships involved in relocating to Massachusetts or to suffer the substantial wage reduction associated with relinquishment of his managerial position, Thornton rejected both alternatives.[16] He was nevertheless transferred to a nonsupervisory position in the Connecticut store. Thereafter, Thornton resigned his position.[17]

In May of 1980, Thornton filed a grievance with the Connecticut State Board of Mediation and Arbitration (the Board) against Caldor claiming wrongful discharge under § 53-303e(b).[18] In response, Caldor contended that the statute was inapplicable since Thornton had voluntarily resigned from the company and was therefore not discharged.[19] Caldor also asserted that the statute violated the establishment clause[20] of the

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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.

Id.

13 *Estate of Thornton*, 105 S. Ct. at 2916 (quoting CONN. GEN. STAT. ANN. § 53-303e(b) (West 1985)).

14 Caldor, Inc. v. Thornton, 191 Conn. 336, 338, 464 A.2d 785, 788 (1983), *aff'd sub nom.* Estate of Thornton v. Caldor, Inc., 105 S. Ct. 2914 (1985). Under the collective bargaining agreement between Caldor and its employees, nonsupervisory employees did not have to work on Sundays if it was against their personal religious convictions. *Estate of Thornton*, 105 S. Ct. at 2916 n.4.

15 *Caldor*, 191 Conn. at 338, 464 A.2d at 788.

16 *Id.*

17 *Id.*

18 *Estate of Thornton*, 105 S. Ct. at 2916. Thornton relied on § 53-303e(c) which states that:

Any employee, who believes that his discharge was in violation of [§ 53-303e] may appeal such discharge to the state board of mediation and arbitration. If said board finds that the employee was discharged in violation of [§ 53-303e], it may order whatever remedy will make the employee whole, including but not limited to reinstatement to his former or a comparable position.

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

19 *Estate of Thornton*, 105 S. Ct. at 2916.

20 *See supra* note 1 and accompanying text.

first amendment to the United States Constitution and Article VII[21] of the Connecticut Constitution.[22]

Following an evidentiary hearing, the Board concluded that, as a quasi-judicial body, it was precluded from adjudicating the constitutionality of a legislative enactment.[23] The Board then focused its inquiry on the sincerity of Thornton's religious beliefs and whether he had been discharged within the meaning of the statute.[24] It concluded that Thornton's religious convictions were sincere and that he had in fact been unlawfully discharged.[25]

Caldor then appealed to the Superior Court of Connecticut alleging that the Board exceeded its power and that the statute was violative of the establishment clause.[26] The superior court rejected Caldor's assertions and affirmed the Board's decision.[27] Thereafter, Caldor appealed to the Supreme Court of Connecticut, again challenging the constitutionality of the statute under the establishment clause.[28] In the alternative, Caldor contended that both the Board and the superior court had erred in finding that Thornton had been discharged within the meaning of the statute.[29]

The Connecticut Supreme Court affirmed the Board's refusal to adjudicate the constitutionality of the statute reasoning

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[21] CONN. CONST. art. VII provides:

> It being the right of all men to worship the Supreme Being, the Great Creator and Preserver of the Universe, and to render that worship in a mode consistent with the dictates of their consciences, no person shall by law be compelled to join or support, nor be classed or associated with, any congregation, church or religious association. No preference shall be given by law to any religious society or denomination in the state. Each shall have and enjoy the same and equal powers, rights and privileges, and may support and maintain the ministers or teachers of its society or denomination, and may build and repair houses for public worship.

Id.

[22] *Estate of Thornton*, 105 S. Ct. at 2916.

[23] *Id.* at 2917 n.5. Unable to pass on the constitutionality of the statute, the Board concluded that the enactment was constitutional "until a court decided otherwise." Caldor, Inc. v. Thornton, 191 Conn. 336, 339, 464 A.2d 785, 788, *aff'd sub nom.* Estate of Thornton v. Caldor, Inc., 105 S. Ct. 2914 (1985).

[24] *See Estate of Thornton*, 105 S. Ct. at 2916.

[25] *Id.* at 2916-17.

[26] *Caldor*, 191 Conn. at 339-40, 464 A.2d at 788-89.

[27] *Id.* at 339, 464 A.2d at 789.

[28] *Id.* at 339-40, 464 A.2d at 789. Donald Thornton died before the Connecticut Supreme Court adjudicated the merits of his claim. *Estate of Thornton*, 105 S. Ct. at 2915 n.1. The administrator of his estate, nevertheless, continued the suit. *Id.*

[29] *Caldor*, 191 Conn. at 339-40, 464 A.2d at 789.

that such a determination would violate the separation of powers doctrine.[30] In analyzing the constitutionality of § 53-303e(b),[31] the Supreme Court of Connecticut applied the three-pronged test enunciated by the United States Supreme Court in *Lemon v. Kurtzman*.[32] Accordingly, the court concluded that the challenged Connecticut statute lacked a secular purpose,[33] had the primary effect of advancing religion,[34] and fostered excessive government entanglement with religion.[35] Consequently, the court held that the statute was clearly "the type of 'comprehensive, discriminating and continuing state surveillance' which creates excessive

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30 *Id.* at 340-42, 464 A.2d at 789-91. For a comprehensive discussion of the separation of powers doctrine, see W. BONDY, THE SEPARATION OF GOVERNMENTAL POWERS (1967).

31 *See Caldor*, 191 Conn. at 345-51, 464 A.2d at 792-94. The Connecticut Supreme Court chose not to analyze the constitutionality of the statute under article VII of the Connecticut Constitution. *Estate of Thornton*, 105 S. Ct. at 2917 n.6.

32 403 U.S. 602 (1971). In *Lemon*, the Court analyzed a Pennsylvania statute that permitted state subsidization of educational costs for specified secular courses in nonpublic elementary and secondary schools, and a Rhode Island statute authorizing the state to pay 15% of teachers' salaries in nonpublic elementary schools. *Id.* at 606-07. In deeming both statutes unconstitutional, the Court delineated a tripartite test for analysis under the establishment clause. *See id.* at 612-13. The Court stated "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.' " *Id.* (citations omitted).

33 *Caldor*, 191 Conn. at 347-49, 464 A.2d at 792-93. The court noted that a valid secular purpose would be the protection of " 'all persons from the physical and moral debasement which comes from uninterrupted labor.' " *Id.* at 347, 464 A.2d at 792 (quoting Soon Hing v. Crowley, 113 U.S. 703, 710 (1884)). The court reasoned, however, that the accomplishment of this goal by allowing the employee to designate any day as his Sabbath was not adequately devoid of religious overtones. *Id.* at 347, 464 A.2d at 792.

The court also distinguished McGowan v. Maryland, 366 U.S. 420 (1961). In *McGowan*, religious and nonreligious employees had been equally benefitted by Maryland's Sunday closing law, whereas in *Estate of Thornton* only those employees claiming observance of the Sabbath could invoke statutory protection. *Caldor*, 191 Conn. at 349, 464 A.2d at 793.

34 *Caldor*, 191 Conn. at 349-50, 464 A.2d at 793-94. The Court noted that § 53-303e confers a "benefit" exclusively on a religious basis. *Id.* at 350, 464 A.2d at 794. Moreover, the court reasoned that employees who do not observe a Sabbath may not take advantage of the statute's benefits. *Id.* Therefore, the "inescapable conclusion is that § 53-303e(b) possesses the primary effect of advancing religion." *Id.*

35 *Id.* at 350-51, 464 A.2d at 794. The court noted that the Board would be called upon to analyze particular religious practices and their scope, as well as which activities constituted observance of the Sabbath. Accordingly, the court concluded that such activities involved excessive governmental entanglement with religion. *Id.*

governmental entanglements between church and state."[36]

The Supreme Court of the United States granted certiorari in March 1984.[37] The Court affirmed the judgment of the Supreme Court of Connecticut and reasoned that the challenged statute was unconstitutional because its primary effect impermissibly advanced religious practices.[38]

The United States Supreme Court's analytical framework for reviewing cases involving establishment clause issues developed over a relatively short period of time. Indeed, it was not until 1940 that the Court held the clause applicable to the states through the fourteenth amendment.[39] Six years later, the Court decided *Everson v. Board of Education*,[40] a landmark case in contemporary establishment clause analysis.[41]

In *Everson*, a New Jersey statute authorized local school districts to promulgate rules and negotiate contracts regarding the transportation of children to and from parochial schools.[42] The statute also authorized state reimbursement of the transportation costs to parents of private school children.[43] Although noting that the "wall of separation" between church and state "must be

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[36] *Id.* at 351, 464 A.2d at 794 (quoting Lemon v. Kurtzman, 403 U.S. 602, 619 (1971)).

[37] Estate of Thornton v. Caldor, Inc., 465 U.S. 1078 (1984).

[38] *Estate of Thornton*, 105 S. Ct. at 2918.

[39] *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) ("The fundamental concept of liberty embodied in [the fourteenth amendment] embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.") (footnote omitted).

[40] 330 U.S. 1 (1946).

[41] *See id.* at 15-16. In attempting to define the boundaries of the clause, the Court stated:

> 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 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*.

Id.

[42] *Id.* at 3.

[43] *Id.* at 5.

kept high and impregnable,"[44] the Court upheld the reimbursement scheme.[45] According to the *Everson* Court, the first amendment required states to be neutral with regard to religion.[46] The Court reasoned, however, that the challenged legislation met the requirement of impartiality because it provided a general program aimed at aiding parents, irrespective of their religious beliefs, in safely transporting their children to school.[47]

The Court was guided by the general principles of *Everson* until 1963, when it reformulated the criteria applicable to establishment clause cases.[48] In *School District v. Shempp*,[49] the Court considered the constitutionality of a Pennsylvania statute that required the reading of the Holy Bible at the start of each school day.[50] The statute also provided that any child could be excused from the exercise upon the formal request of the child's parent or guardian.[51] In deeming the enactments unconstitutional, the *Shempp* Court articulated a two-prong test.[52] In their view, a challenged enactment must have "a secular legislative purpose and a primary effect that neither advances nor inhibits religion" in order to withstand the strictures of the establishment clause.[53] Reasoning that the challenged enactment lacked a secular purpose, the *Shempp* Court held that the statute was unconstitutional.[54]

Similarly, *Walz v. Tax Commission*,[55] involved a challenge to a New York statute that provided tax exemptions to properties

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44 *Id.* at 18.

45 *Id.*

46 *Id.*

47 *Id.* The *Everson* Court further analogized the state subsidized transportation scheme to other governmental services provided to churches. *Id.* at 17. The Court reasoned that parents might be reluctant to permit their children to attend schools that the state had terminated from general government services such as ordinary police and fire protection, connections for sewage disposal, public highways, and sidewalks. Of course, depriving church schools of these services, which are separate and indisputably marked off from the religious function, would make it far more difficult for the schools to operate. In the Court's view, however, this is not the purpose of the first amendment. *Id.* at 17-18.

48 *See* School Dist. v. Schempp, 374 U.S. 203 (1963) [hereinafter Abington School Dist. v. Schempp].

49 *See id.*

50 *Id.* at 205. The Court also examined the validity of a Maryland statute that required children in the Baltimore public school system to begin each school day with a biblical reading or religious prayer. *Id.* at 211.

51 *Id.* at 205.

52 *See id.* at 222.

53 *Id.* (citations omitted).

54 *Id.* at 223-25.

55 397 U.S. 664 (1970).

used entirely for religious worship.[56] Writing for the majority, Chief Justice Burger reasoned that "[t]he grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. There is no genuine nexus between tax exemption and establishment of religion."[57] Accordingly, the Court ruled that the challenged statute was not violative of the establishment clause because it did not promote excessive involvement between church and state.[58]

Thereafter, in *Lemon v. Kurtzman*,[59] the Court combined the criteria articulated in *Walz* and *Shempp* and enunciated a tripartite test to determine whether a statute is violative of the establishment clause.[60] In *Lemon*, the Court addressed the validity of a Pennsylvania statute authorizing the state to subsidize the cost of teaching secular courses in nonpublic schools and a Rhode Island statute authorizing the state to subsidize the salaries of teachers in nonpublic elementary schools.[61] In determining that the statutes were unconstitutional, the *Lemon* Court formulated a comprehensive method of analyzing constitutional issues under the establishment clause.[62] The Court opined that the establishment clause requires that a challenged statute "must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.' "[63]

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56 *Id.* at 666.

57 *Id.* at 675.

58 *Id.* at 675-76. The Court noted: "The exemption creates only a minimum and remote involvement between church and state and far less than taxation of churches. It restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other." *Id.* at 676.

59 403 U.S. 602 (1971).

60 *See id.* at 612-13.

61 *Id.* at 606-07.

62 *See id.* at 612-14; *see also supra* note 32 for a discussion of the tripartite *Lemon* test.

63 *Id.* (citations omitted). Subsequent cases reveal that a challenged statute or program will be held violative of the establishment clause if it fails to satisfy any one of the three-pronged *Lemon* criteria. *See, e.g.*, Stone v. Graham, 449 U.S. 39, 40-41 (1980) (per curiam) ("If a statute violates any of [the] three [*Lemon*] principles, it must be struck down under the Establishment Clause."). The Court, however, has not consistently applied the *Lemon* test. *Compare* Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) (strict interpretation of *Lemon* test) *with* Mueller v. Allen, 463 U.S. 388, 394 (1983) (*Lemon* test employed merely as an aid). Part of the inconsistency in establishment clause interpretations may be attributed to its interaction with the free exercise of religion clause of the first amendment. *See* Sherbert v. Verner, 374

In *Stone v. Graham*,[64] the Court evidenced its strong commitment to the tripartite *Lemon* test.[65] *Stone* involved a 1980 challenge to a Kentucky statute that required a copy of the Ten Commandments to be displayed in every public school classroom in the state.[66] The statute also provided that the copies were to be purchased with funds voluntarily contributed to the state.[67] Furthermore, each copy was to bear the following legislatively mandated statement of secular purpose: " 'The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.' "[68] In a per curiam opinion, the majority stated that "[t]his Court has announced a three-part test for determining whether a challenged state statute is permissible under the Establishment Clause of the United States Constitution."[69] Relying on the *Lemon* criteria, the *Stone* Court concluded that the statute lacked a secular purpose and was therefore unconstitutional.[70] Moreover, the Court summarily rejected the legislature's articulation of a secular purpose.[71]

U.S. 398 (1963). In *Sherbert*, a Seventh-day Adventist was discharged by her employer when she refused to work on Saturday. *Id.* at 399. She was subsequently denied unemployment compensation by the state of South Carolina. *Id.* at 400. The Court held that the state's denial of compensation benefits violated the free exercise clause of the first amendment. *Id.* at 409. The Court reasoned that the state's denial of compensation benefits "forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other." *Id.* at 404; *see also* Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970) ("The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.").

In addition, individual Justices' perceptions of the establishment clause differ from one another. *Compare* Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) ("Rather than continuing with the sisyphean task of trying to patch together the 'blurred, indistinct and variable barrier' described in *Lemon*, I would resurrect the 'high and impregnable' wall between church and state constructed by the Framers of the First Amendment.") (citation omitted) *with* Thomas v. Review Bd., 450 U.S. 707, 726 (1981) (Rehnquist, J., dissenting) ("the Establishment Clause is limited 'to government support of proselytizing activities of religious sects by throwing the weight of secular authorit[ies] behind the dissemination of religious tenets' ") (quoting Abington School Dist. v. Shempp, 374 U.S. 203, 314 (1963) (Stewart, J., dissenting)).

64 449 U.S. 39 (1980) (per curium).

65 *See id.* at 40-41.

66 *Id.* at 39.

67 *Id.* at 39 n.1 (citing KY. REV. STAT. § 158.178(3) (Bobbs-Merrill 1980)).

68 *Id.* (quoting KY. REV. STAT. § 158.178(2) (Bobbs-Merrill 1980)).

69 *Id.* at 40.

70 *Id.* at 40-42.

71 *Id.* at 41. The Court noted: "The pre-eminent purpose for posting the Ten

In 1982, the Court reiterated its commitment to the *Lemon* test.[72] In *Larkin v. Grendel's Den, Inc.*,[73] the Court considered the constitutionality of a Massachusetts statute that prohibited the issuance of a liquor license if a church or school within five hundred feet of the proposed licensed premises formally objected.[74] Writing for the majority, Chief Justice Burger recognized that the goal of the statute—protection of " 'spiritual, cultural, and educational centers from the 'hurly-burly' associated with liquor outlets' "—constituted a valid secular purpose.[75] The Court opined, however, that this objective could be adequately obtained through other means.[76] The Court further reasoned that the statute failed to satisfy the second and third prongs of the *Lemon* test.[77] In the Court's opinion, the statute endowed churches with substantial power, thereby enmeshing them in the exercise of legislative functions.[78] In addition, the majority accepted the characterization of the statute as a legislative delegation of a limited "veto power" to religious institutions.[79] According to the Court, the fact that the same "veto power" had been given to schools was insignificant for purposes of analysis under the establishment clause.[80] Finally, although the *Larkin* Court invoked the "wall of separation" metaphor and labeled it a "useful signpost" in adjudicating establishment clause challenges,[81] the Court also recognized that "limited and incidental entanglement between church and state" inevitably occurs in our society.[82]

Shortly thereafter, the Court's commitment to the *Lemon* test began to wane.[83] The 1983 case of *Mueller v. Allen*[84] involved a Minnesota statute that permitted parents of school age children

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Commandments on schoolroom walls is plainly religious in nature . . . and no legislative recitation of a supposed secular purpose can blind us to that fact." *Id.*

72 *See* Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982).

73 *See id.*

74 *Id.* at 117 (citing MASS. GEN. LAWS ANN. ch. 138, § 16c (West 1974)).

75 *Id.* at 123 (quoting Grendel's Den, Inc. v. Goodwin, 459 F. Supp. 761, 766 (D. Mass. 1980), *rev'd in part and aff'd in part*, 662 F.2d 88 (1st Cir.), *aff'd in part*, 662 F.2d 102 (1981) (en banc), *aff'd sub nom.* 459 U.S. 116 (1982)).

76 *Id.* at 123-24.

77 *See id.* at 125-26.

78 *Id.* at 127.

79 *Id.* at 120.

80 *Id.*

81 *Id.* at 123 (citing Reynolds v. United States, 98 U.S. 145, 164 (1879)).

82 *Id.*

83 *See* Mueller v. Allen, 463 U.S. 388 (1983); *see also* Note, *Tax Benefits to Parents Whose Children Attend Sectarian School Not Violative of the First Amendment*, 14 SETON HALL L. REV. 683, 689 (1984).

84 463 U.S. 388 (1983).

to deduct from their taxable income "certain expenses incurred in providing for the education of their children."[85] Although the *Mueller* Court applied the *Lemon* test, the majority emphasized that it provided " 'no more than [a] helpful signpost' in dealing with Establishment Clause challenges."[86]

Initially, the Court determined that the statute at issue in *Mueller* satisfied the first prong of the *Lemon* test.[87] According to the Court, the challenged enactment plainly served the secular purpose of insuring that the state maintain a well-educated populace.[88] Moreover, the *Mueller* Court also noted its "reluctance to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute."[89] The Court further noted that the enactment was neutral on its face and allowed the parents of both public and private school children to claim the deduction.[90] Writing for the majority, Justice Rehnquist also stressed that the statute conferred benefits directly upon the parents and not the religious schools.[91] Accordingly, Justice Rehnquist concluded that the second prong of the *Lemon* test was satisfied.[92] Finally, the Court ruled that state determinations of what constituted a permissible deduction did not foster an excessive entanglement between church and state.[93] Therefore, the third prong of the *Lemon* test was held to be satisfied.[94]

In dissent, Justice Marshall advocated a stricter interpretation of the establishment clause.[95] The Justice stated that "[t]he Establishment Clause of the First Amendment prohibits a state from subsidizing religious education whether it does so directly

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85 *Id.* at 390 (citing MINN. STAT. ANN. § 290.09 (West 1982)). Under the statute, parents of dependent children in grades kindergarten to six could deduct from their gross income up to $500 per child for the cost of providing tuition, textbooks, and transportation. Parents of children in grades seven through 12 could deduct up to $700 per child. The statute further provided that no deduction could be taken for the cost of "instructional books and materials used in the teaching of religious tenets, doctrines or worship." *Id.* at 390 n.1 (quoting MINN. STAT. ANN. § 290.09(22) (West 1982)).

86 *Id.* at 394 (quoting Hunt v. McNair, 413 U.S. 734, 741 (1973)).

87 *See id.* at 395.

88 *Id.*

89 *Id.* at 394-95.

90 *Id.* at 398.

91 *Id.* at 399.

92 *Id.* at 396-99.

93 *Id.* at 403.

94 *Id.*

95 *See id.* at 404-17 (Marshall, J., dissenting).

or indirectly."[96] Justice Marshall also asserted that the majority failed to analyze adequately the effect of the statute.[97] While agreeing that the tax deductions were technically available to all parents of school age children, Justice Marshall stated that parents of children attending sectarian schools were disproportionately benefited.[98] Consequently, the dissent concluded that the statute had failed to satisfy the "primary effect" prong of the *Lemon* test and was thus violative of the establishment clause.[99]

Within one week after the *Mueller* decision, the Court undertook an examination of the establishment clause without resorting to the *Lemon* criteria.[100] In *Marsh v. Chambers*,[101] the Court examined the constitutionality of the Nebraska Legislature's practice of beginning each of its sessions with a prayer offered by a publicly paid chaplain.[102] Writing for the majority, Chief Justice Burger upheld the constitutionality of the chaplaincy practice.[103] Initially, the majority relied on historical evidence which indicated that the drafters of the first amendment did not consider the chaplaincy practice violative of the establishment clause.[104] The Court noted, for example, that "the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since [the] early session[s] of Congress."[105] Although this historical evidence was admittedly not dispositive of the issue at hand, the Court stressed that the chaplaincy practice did not threaten the establishment of religion any more than did the statutes upheld in *Everson* and *Walz*.[106] The majority did not employ the *Lemon* criteria in upholding the

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96 *Id.* at 404 (Marshall, J., dissenting).

97 *Id.* at 405, 415 (Marshall, J., dissenting).

98 *Id.* at 409 (Marshall, J., dissenting). Fewer than 100 of the approximately 900,000 school age children in Minnesota attend public schools which have tuition. *Id.* Consequently, Justice Marshall reasoned that the vast majority of those families cannot take advantage of the statute "except in the unlikely event that they buy $700 worth of pencils, notebooks, and bus rides for their school-age children." *Id.*

99 *Id.* at 416-17 (Marshall, J., dissenting).

100 *See* Marsh v. Chambers, 463 U.S. 783 (1983).

101 *See id.*

102 *Id.* at 784-85. The chaplain was selected biennially by the Executive Board of the Legislative Council and was paid $319.75 per month. *Id.* at 785.

103 *See id.* at 792-95.

104 *Id.* at 786-92.

105 *Id.* at 788.

106 *Id.* at 791.

validity of Nebraska's chaplaincy practice.[107] Moreover, the *Marsh* Court asserted that "the practice of opening legislative sessions with prayer has become part of the fabric of our society."[108] Accordingly, the Court opined that legislative invocation of divine guidance amounted to nothing more than "a tolerable acknowledgment of beliefs widely held among the people of this country."[109]

In dissent, Justice Brennan opined that the *Marsh* Court's holding was a "narrow" one which "should pose little threat to the overall fate of the Establishment Clause."[110] Furthermore, the Justice stated that the majority's failure to apply the *Lemon* test "simply confirms that the Court is carving out an exception to the Establishment Clause rather than reshaping Establishment Clause doctrine to accommodate legislative prayer."[111] In Justice Brennan's opinion, the challenged chaplaincy practice would fail each of the three *Lemon* criteria, and thus should be deemed unconstitutional.[112]

Later, in *Lynch v. Donnelly*,[113] the Court applied the *Lemon* test, but stated that it was unwilling "to be confined to any single test or criterion in this sensitive area."[114] In *Lynch*, residents of the City of Pawtuckett, Rhode Island challenged that city's forty-year practice of including a crèche in its annual Christmas display as being violative of the establishment clause.[115] Writing for the majority, Chief Justice Burger reasoned that a celebration of the holiday season was secular in nature, thus satisfying the first prong of the *Lemon* test.[116] The *Lynch* Court next rejected the argument that the crèche impermissibly benefited religion and concluded that the second prong of the *Lemon* test was satis-

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107 *See id.* at 784-95.

108 *Id.* at 792.

109 *Id.*

110 *Id.* at 795 (Brennan, J., dissenting).

111 *Id.* at 796 (Brennan, J., dissenting).

112 *See id.* at 796-801 (Brennan, J., dissenting). Justice Brennan stated that the goal of invoking divine guidance is clearly religious and lacking secular value; the primary effect of the chaplaincy practice is to officially sponsor a form of religious worship; and the practice fosters government entanglement with religion because it necessitates state supervision in the selection of the chaplain and in ensuring that the chaplain limits himself to suitable prayers. *Id.* at 797-99 (Brennan, J., dissenting).

113 465 U.S. 668 (1984).

114 *Id.* at 679. Moreover, the Court stated that the wall of separation "is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state." *Id.* at 673.

115 *Id.* at 671.

116 *Id.* at 680-81.

fied.[117] Moreover, the Court found the entanglement prong to be satisfied since the erection and maintenance of the crèche fostered little, if any, interaction between church and state.[118] In its holding, the Court reiterated much of the same historical evidence presented in *Marsh*.[119] In permitting the city to erect the crèche, the Court indicated that the establishment clause could be interpreted as allowing a greater level of interaction between government and religion than prior decisions would indicate.[120]

Justice Brennan dissented and stated that the Court's return to the *Lemon* mode of analysis proved that *Marsh* had been an aberrant departure from the Court's settled method of analyzing establishment clause cases.[121] He asserted, however, that "the Court's less than vigorous application of the *Lemon* test suggests that its commitment to those standards may only be superficial."[122]

In the 1985 case of *Wallace v. Jaffree*,[123] the Court considered the constitutionality of an Alabama statute that authorized public schools to begin each day with a one minute period of silence "for meditation and voluntary prayer."[124] The Court held that the statute violated the establishment clause because it lacked a secular purpose.[125] Writing for the majority, Justice Stevens opined that "[n]o consideration of the second or third criteria [of *Lemon*] is necessary if a statute does not have a clearly secular

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117 *Id.* at 681-83.

118 *Id.* at 683-84. The Court further reasoned that:

> There is no evidence of contact with church authorities concerning the content or design of the exhibit prior to or since Pawtucket's purchase of the crèche. No expenditures for the maintenance of the crèche have been necessary; and since the city owns the crèche, now valued at $200, the tangible material it contributes is *de minimis*. In many respects the display requires far less ongoing, day-to-day interaction between church and state than religious paintings in public galleries.

Id. at 684.

119 *See id.* at 675-78.

120 *Id.* at 678. The *Lynch* Court noted:

> In each case, the inquiry calls for line-drawing; no fixed, *per se* rule can be framed. The Establishment Clause like the Due Process Clause is not a precise, detailed provision in a legal code capable of ready application. The line between permissible relationships and those barred by the Clause can no more be straight and unwavering than due process can be defined in a single stroke or phrase or test.

Id. at 678-79.

121 *Id.* at 695-96 (Brennan, J., dissenting).

122 *Id.* at 696 (Brennan, J., dissenting).

123 105 S. Ct. 2479 (1985)

124 *Id.* at 2481 (quoting ALA. CODE § 16-1-20.1 (Supp. 1984)).

125 *Id.* at 2490.

purpose."[126] Accordingly, the *Wallace* Court concluded that the legislature "was not motivated by any clear secular purpose—indeed, the statute has *no* secular purpose."[127]

As prior law reflects, the Court's position with regard to the establishment clause and the tripartite *Lemon* test has vacillated. *Estate of Thornton* marks the Supreme Court's most recent attempt to define the parameters of the establishment clause.

Chief Justice Burger, writing for the *Estate of Thornton* majority,[128] initially noted that the Connecticut State Board of Mediation and Arbitration's construction of § 53-303e(b) was binding on the federal courts.[129] The Board construed the statute as conferring an absolute right upon employees to designate any day of the week as their Sabbath.[130] The *Estate of Thornton* majority, however, found this absolute right of the Sabbatarian over secular concerns to be highly objectionable.[131] Equally objectionable, according to the Court, was the fact that the statute did not provide for "special circumstances" occurring in the ordinary course of employment.[132] The Chief Justice reasoned that an individual employed on a Monday through Friday basis may designate any of those days as his Sabbath and could not be terminated for refusing to work on that day.[133] Accordingly, the employer would have to adjust his affairs to accommodate fully the employee's desire regardless of the severity of the economic consequences.[134]

The Court also addressed the challenged statute's effect on non-religious employees required to replace the Sabbath observer.[135] According to the Court, the challenged statute resulted in non-religious employees who have earned the valuable right to have a weekend day off through seniority "be[ing] forced to surrender this privilege to the Sabbath observer: years of service and payment of 'dues' at the workplace simply cannot com-

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126 *Id.*

127 *Id.* (emphasis in original).

128 *See Estate of Thornton*, 105 S. Ct. at 2918. Justice O'Connor, joined by Justice Marshall, filed a concurring opinion. *Id.* Justice Rehnquist dissented, but did not write an opinion. *Id.*

129 *Id.* at 2917-18 n.8 (citations omitted).

130 *Id.* (citations omitted).

131 *Id.* at 2918.

132 *Id.*

133 *Id.*

134 *Id.* The Court also noted that the employer was without recourse if a high percentage of his workforce asserted their right to the same Sabbath. *Id.*

135 *Id.* at 2918 n.9.

pete with the sabbath observer's absolute right under the statute."[136] Similarly, employees seeking a weekend day off, in order to spend time with their spouses, are forced to take a "back seat" to the religious observer.[137] Consequently, the Court concluded that the challenged statute's "unyielding weighting" in favor of the religious employee's interest "impermissibly advance[d] a particular religious practice."[138] Therefore, the Court determined that the Connecticut statute was unconstitutional because it "provid[ed] Sabbath observers with an absolute and unqualified right not to work on their Sabbath."[139]

Justice O'Connor filed a concurring opinion in which she agreed with the majority that the effect of § 53-303e(b) impermissibly advanced religion.[140] In her view, the statute endorsed Sabbath observances to the detriment of other employees who do not share such beliefs.[141] According to Justice O'Connor, § 53-303e(b) confered "special" and "absolute" protection on its beneficiaries without accommodating the religious observances of other employees.[142] Consequently, Justice O'Connor concluded that § 53-303e(b) had the effect of advancing religion, and was therefore violative of the establishment clause.[143]

Directing her attention to Title VII of the Civil Rights Acts,[144] Justice O'Connor further reasoned that the Court's anal-

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136 *Id.*

137 *Id.*

138 *Id.*

139 *Id.*

140 *See id.* at 2918-19 (O'Connor, J., concurring).

141 *Id.* at 2919 (O'Connor, J., concurring).

142 *Id.*

143 *Id.*

144 *See* Civil Rights Act of 1964, Pub. L. 88-352, title VII, § 701, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e(j) & 2000e-2 (1982)). The term religion is defined in 42 U.S.C. § 2000e(j) as:

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

Id. In addition, 42 U.S.C. § 2000e-2(a) specifies unlawful employment practices to include:

> 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
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any in-

ysis would not invalidate those statutes.[145] Although Title VII also requires that private employers accommodate their employees' religious practices, Justice O'Connor noted that the employer may be excused from compliance when it "would cause undue hardship to the employer's business."[146] Consequently, unlike the Connecticut statute, Title VII's mandates are not absolute.[147] Justice O'Connor also posited that the provisions of Title VII manifest a secular purpose because they are directed toward antidiscrimination and "assuring employment opportunity to all groups in our pluralistic society" rather than endorsing particular religious practices.[148] Justice O'Connor thus concluded that Title VII would survive the majority's analysis since its requirements extend to *all* religious beliefs and not just the observance of the Sabbath.[149]

As stated earlier, the Court's position with regard to the establishment clause has fluctuated greatly. These vacillations have made attempts at predicting the future direction of the Court with respect to the establishment clause both difficult and highly speculative. A careful analysis of the Court's decision in *Estate of Thornton* in conjunction with its immediate predecessors, however, reduces the confusion produced by the seemingly contrary decisions and clarifies the Court's approach to establishment clause challenges.

Prior adjudications of the establishment clause can be divided into three categories: those in which the Court strictly interpreted the tripartite *Lemon* criteria, thereby yielding a restrictive view of the establishment clause; those in which the tripartite test was either not applied, or was applied in such a way as to advocate a substantially more permissive view of the establishment clause; and those in which the Court used the *Lemon* criteria primarily as an aid in the balancing of relevant factors, thus injecting flexibility into the process of interpreting the establishment clause.

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dividual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id.

145 *Estate of Thornton*, 105 S. Ct. at 2919 (O'Connor, J., concurring).

146 *Id.* (citing 42 U.S.C. §§ 2000e(j) and 2000e-2(a)(1)).

147 *Id.*; *see also* Wallace v. Jaffree, 105 S. Ct. 2479 (1985) (state statute authorizing period of meditation in public schools held violative of establishment clause).

148 *Estate of Thornton*, 105 S. Ct. at 2919 (O'Connor, J., concurring).

149 *Id.* (emphasis added).

Stone,[150] *Larkin*,[151] and *Wallace*[152] fall within the first category. Each of these cases involved a form of state action which has traditionally been subjected to a strict application of the establishment clause. For example, both *Stone* and *Wallace* centered around a legislative attempt to inject religion into the public school system.[153] Traditionally, the Court has been more willing to erect a high wall between church and state in such cases.[154] Similarly, *Larkin* involved a statute which the Court characterized as a delegation of legislative power to religious organizations.[155] Furthermore, the nature of these cases eliminated the need for the Court to justify its strict interpretation of the establishment clause with the strictures of the free exercise clause.[156] The Court's strict interpretation of the establishment clause in these cases can thus be viewed as aberrational because such an interpretation will only be employed in a very specific type of establishment clause challenge.

Marsh[157] and *Lynch*[158] fall within the second category. These cases reflect the Court's unwillingness to strike down what it considers to be harmless traditions and customs, although they may well be held unconstitutional if subjected to more rigorous scrutiny. As a result, these cases are examples of instances in which the Court's decision is based more upon the personal preferences of the justices than upon legal principles.[159] Therefore, the Court's interpretations of the establishment clause in these cases can also be viewed as aberrational.

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150 *See supra* notes 64-71 and accompanying text for a discussion of *Stone*.

151 *See supra* notes 72-82 and accompanying text for a discussion of *Larkin*.

152 *See supra* notes 123-27 and accompanying text for a discussion of *Wallace*.

153 *See* Wallace v. Jaffree, 105 S. Ct. 2479, 2481 (1985); Stone v. Graham, 449 U.S. 39, 39 (1980) (per curiam).

154 *See, e.g.*, Note, *Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause*, 81 COLUM. L. REV. 1463, 1464 (1981). The author noted that "[i]n recognizing establishment clause restrictions on religious activity in public schools, Supreme Court decisions have been remarkably harmonious. The majority opinions in these cases asserted the requirement of government neutrality toward religion in nearly absolute terms. . . ." *Id.*

155 *See* Larkin v. Grendel's Den, Inc., 459 U.S. 116, 127 (1982).

156 In *Larkin*, for example, it could not be asserted that the free exercise clause required the state to delegate legislative power to churches. Similarly, it could not be asserted in *Stone* or *Wallace* that the free exercise clause required the state to inject religion into public schools. *See generally supra* note 63 (discussing interaction between establishment clause and free exercise clause).

157 *See supra* notes 100-12 and accompanying text for a discussion of *Marsh*.

158 *See supra* notes 113-22 and accompanying text for a discussion of *Lynch*.

159 *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 796 (Brennan, J., dissenting) (implying Court had viewed Nebraska's chaplaincy practice through "sentimental eyes").

Everson,[160] *Mueller*,[161] and other cases involving aid to sectarian schools[162] fall within the third category and are representative of the bulk of establishment clause cases heard by the Court. Cases falling within this category have produced the most confusion.[163] Consequently, an understanding of the implications of the method of analysis employed in *Estate of Thornton* provides helpful guidance in understanding the vast majority of prior establishment clause cases and in predicting the Court's future position regarding the establishment clause.

In reviewing § 53-303e(b), the *Estate of Thornton* Court applied only the effects prong of the *Lemon* test, despite the Supreme Court of Connecticut's persuasive demonstration that the statute failed to satisfy all three prongs of the test.[164] By ignoring both the purpose and governmental entanglement prongs of the *Lemon* criteria, the Court suggests that the *effect* of a challenged statute will be of primary importance in the adjudication of establishment clause cases.

In finding the absolutism of the Connecticut statute objectionable, the Court implied that a narrowly tailored statute sensitive to the needs of both employees and employers would pass constitutional muster.[165] Thus, *Estate of Thornton* indicates that the Court is using the *Lemon* criteria as a basis for undertaking a balancing approach in establishment clause analysis rather than applying inflexible rules.

Under this approach, the Court does not erect a wall between church and state which would effectively prevent any benefit to flow from government toward religion. Rather, the strictures of the establishment clause are satisfied when benefits and burdens are equally proportioned between the sectarian and secular segments of society. The utilization of this balancing technique provides the Court with flexibility in interpreting the

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160 *See supra* notes 40-47 and accompanying text for a discussion of *Everson*.

161 *See supra* notes 83-99 and accompanying text for a discussion of *Mueller*.

162 *See, e.g.*, Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980); Walz v. Tax Comm'n, 397 U.S. 664 (1970); *see also* Note, *supra* note 83, at 689.

163 *See, e.g.*, Note, *supra* note 154, at 1464 ("In contrast to its firm stance against religious activity in public schools, the Supreme Court's approach to constitutional restrictions on government aid to sectarian schools had been ambiguous and untidy.").

164 *See Estate of Thornton*, 105 S. Ct. at 2917.

165 *See id.* at 2918. In addition, Justice O'Connor, in her concurrence, opined that the majority's analysis would not invalidate title VII of the Civil Rights Acts, which only requires employers to "reasonably accommodate" their employee's religious habits. *Id.* at 2919 (O'Connor, J., concurring).

establishment clause. One reason for the need for flexibility is the tension that exists between the two religion clauses. In short, the courts must contend with the fact that broad interpretations of both religion clauses will result in friction between the two.[166] It must be noted, however, that the utilization of flexibility has not led to a reduction of this tension.[167]

Estate of Thornton demonstrates that the Court is not willing to relinquish this flexibility. Accordingly, in the vast majority of establishment clause cases, the Court will undertake a balancing approach in which any state aid to religion will be weighed against secular considerations. The utilization of such a balancing approach is not per se objectionable. This analytical framework becomes suspect, however, when it is employed to advance the personal prejudices of the judges forced to confront establishment clause issues. It is, therefore, imperative that courts apply this balancing test objectively and carefully examine the relevant secular and sectarian considerations. Moreover, courts

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166 *See* Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970). In *Walz*, the Court discussed the relationship between the establishment and free exercise clauses of the first amendment:

> The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution. The sweep of the absolute prohibitions in the Religion Clauses may have been calculated; but the purpose was to state an objective, not to write a statute. In attempting to articulate the scope of the two Religion Clauses, the Court's opinions reflect the limitations inherent in formulating general principles on a case-by-case basis. The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles.
>
> The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.

Id.

167 *See supra* note 63 for a discussion of the interaction between religion clauses; *compare* Sherbert v. Verner, 374 U.S. 398 (1963) (denial of unemployment compensation based upon an individual's refusal to work on Sabbath held to be violative of the free exercise clause) *with Estate of Thornton*, 105 S. Ct. at 2914 (statute prohibiting an employer from discharging an employee based upon employee's refusal to work on Sabbath held violative of establishment clause). Arguably, a statute designed to implement the *Sherbert* decision could be held to be violative of the establishment clause under the *Estate of Thornton* rationale. For example, the statute might require that the state pay unemployment benefits to those who have been discharged because of their refusal to work on their Sabbath. Under *Estate of Thornton*, the statute would be deemed to be a violation of the establishment clause since it disadvantages those who have been discharged because they refused to work on a weekend day for legitimate, yet nonreligious reasons.

applying this test should set forth these considerations in detail, thereby reducing the possibility that these issues will be viewed through sentimental eyes.

Dominick Bratti