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Establishment Clause Limits on Free Exercise Accommodations

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ESTABLISHMENT CLAUSE LIMITS ON FREE EXERCISE ACCOMMODATIONS[1]

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I. INTRODUCTION

Among the most vexing questions in the law of the religion clauses is when a legal measure that might otherwise be justified as an accommodation to free exercise is instead a forbidden establishment of religion. In a book about free exercise, I have provided some idea just how complex this question can be.[2] I now tackle it head on. Scholars have fairly observed that the Supreme Court has given us no theory, or no tenable theory, for drawing the line between permissible accommodation and impermissible establishment. We will look at what the Court has said and done, as well as the writings of some scholars, to see whether we can discern bases in the Court's decisions for distinguishing accommodation from establishment. (I also mention scholarly proposals that deviate more sharply from the Court's approach; those are analyzed elsewhere.)[3]

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[1] This essay is drawn from a chapter in KENT GREENAWALT, RELIGION AND THE CONSTITUTION, VOL. 2: NONESTABLISHMENT AND FAIRNESS (Princeton Univ. Press) (forthcoming Spring 2008) [hereinafter GREENAWALT, VOL. 2].

[2] *See* KENT GREENAWALT, RELIGION AND THE CONSTITUTION, VOL. 1: FREE EXERCISE AND FAIRNESS (Princeton Univ. Press 2006) [hereinafter GREENAWALT, VOL. 1].

[3] *See* GREENAWALT, VOL. 2, *supra* note 1, at Ch. 21; Kent Greenawalt, *How Does "Equal Liberty" Fare in Relation to Other Approaches to the Religion Clauses*, 85 TEX. L. REV. 1217 (2007).

It helps initially to set out some premises on which the remainder of this essay rests and to note discrete subquestions. The premises are these: 1) A great many accommodations to religion are exemptions from rules that are generally applicable, but accommodations may take the form of assistance that is not an exemption, as exemplified by chaplains in the military and in prisons; 2) Accommodations may be constitutionally required or within legislative (and administrative) discretion. This essay concentrates on accommodations legislators choose to grant; 3) Whatever one thinks about the implications of its precise language, the threefold *Lemon* test (a law is valid only if it has a secular purpose, does not have the primary effect of promoting or inhibiting religion, and does not unduly entangle the government with religion)[4] has never been regarded by most justices as barring all accommodations to religion. Either they have considered the purpose and effect of relieving burdens on religious exercise as one kind of secular purpose and effect (the majority position in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*)[5] or they have considered the purpose and effect as being a permissible religious purpose and effect (Justice Sandra Day O'Connor's position in *Amos*[6]). Concerns about whether an accommodation is unconstitutional may be lessened when it is formulated in general terms and not limited to religious claims;[7] but the Court has never indicated that all accommodations made explicitly to religious exercise are invalid. Indeed, in 2005, the court unanimously sustained federal legislation requiring accommodations to religious claims within prisons,[8] and in 2006 it upheld the application of the Religious Freedom Restoration Act to protect the importation of an hallucinogenic tea for religious worship.[9] Given that justices who reject the *Lemon* approach have joined these opinions, the cases clearly indicate that the permissibility of some accommodations in terms of religion does not depend on the continuing status of the *Lemon* test; 4) Accommodations may not involve favoritism of one religious group over another similarly situated religious group; 5) Accommodations may not consist of conferrals of direct political authority upon religious groups;[10] 6) Efforts to aid or promote religion that do not relieve any identifiable burden—sponsored oral prayer in public schools is an example—do not count as accommodations. A state may not single out religious groups for financial grants and call it accommodation; and 7) An "establishment" concern may be generated by flawed leg-

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4 Lemon v. Kurtzman, 403 U.S. 602 (1971).

5 Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 336-37 (1987).

6 *Id.* at 348-49 (O'Connor, J., concurring).

7 As Chapter 21 of *Free Exercise and Fairness* recounts, typical privileges not to participate in medical procedures are cast in this broader way.

8 Cutter v. Wilkinson, 544 U.S. 709 (2005).

9 Gonzales v. O Centro Espirita Beneficente União do Vegetal, 546 U.S. 418 (2006).

10 *See* GREENAWALT, VOL. 2, *supra* note 1, at Chs. 13, 14.

islative aspirations, by burdens imposed on those who bear the costs of accommodation, or by a failure to privilege non-religious claims analogous to the favored religious claims. If the only problem is the failure to treat analogous claims similarly, judicial correctives might take the form of extending the privileges.[11] In other instances, the "accommodation" is treated as invalid.

Some of the crucial questions are these: 1) Must the burdens that accommodation relieves be ones that the government itself has imposed; 2) Are all concerns about establishment removed if the classification for an exemption or other benefit is in nonreligious terms; 3) What determines whether a classification may permissibly be in terms of religion; 4) May the state accommodate by imposing burdens on private individuals and companies; and 5) Are the distinctions between permissible accommodations and impermissible promotions of religion ones of qualitative difference or of degree, or of both? To put this last question in terms of the *Lemon* test, will the main purpose or primary effect of a permissible accommodation be fundamentally different from the main purpose or primary effect of an impermissible establishment, or may the purposes or effects be of a similar nature but of a different magnitude?

A helpful way to illustrate some of the premises and to illuminate the questions is to focus on a Supreme Court case striking down an attempted accommodation.

II. THE PUZZLE OF *ESTATE OF THORNTON V. CALDOR, INC.*[12]

In response to a court decision declaring that its Sunday-closing laws were unconstitutionally vague, the Connecticut legislature allowed a greater number of businesses to stay open on Sunday, and it 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."[13] A Presbyterian who wanted Sunday off sued after Caldor, Inc. refused to keep him in his management position if he refused to work on Sunday. The Connecticut Supreme Court ruled that the law did not have a "clear secular purpose" and had a primary effect of advancing religion because it conferred its benefit on a religious basis.[14]

On review, the Supreme Court affirmed the decision, with an opinion by Chief Justice Warren E. Burger that relied on the law's impermissible effect. By affording workers an absolute right not to work on their Sabbath, the law took no account of the convenience of employers and of other workers. If a business, such as a school, operated only five days a week, it would have to grant an employee one of those days off if that was his Sabbath. And workers

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[11] Welsh v. United States, 398 U.S. 333, 357-58 (1970) (Harlan, J., concurring) (nonreligious conscientious objectors should be treated like the religious objectors Congress exempted from military service).

[12] Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985).

[13] *Id.* at 706 (quoting CONN. GEN. STAT. § 53-303e(b) (1985)).

[14] *Id.* at 707-08 (quoting Caldor, Inc. v. Thornton, 464 A.2d 785, 793 (Conn. 1983)).

with nonreligious reasons to have a day off would have to give way to those with religions reasons. "This unyielding weighting in favor of Sabbath observers," went beyond an "incidental or remote effect"; "[t]he statute has a primary effect that impermissibly advances a particular religious practice."[15]

Justice O'Connor's two page concurrence seemed to go further than the Court in various respects.[16] By singling out "Sabbath observers for special and . . . absolute protection without according similar accommodation to ethical and religious beliefs and practices of other private employees," the law conveyed a message of "endorsement of a particular religious belief."[17] According to O'Connor, the accommodations contemplated by the Free Exercise Clause are those that lift burdens imposed by the government, not by "*private* employers."[18] Nevertheless, she managed to approve the accommodation requirement in Title VII. Title VII[19] is the basic federal statute barring discrimination, requiring private employers to make reasonable accommodations to workers' religious needs (unless these would produce undue hardship for the employers). Justice O'Connor wrote that Title VII is justified because it is an anti-discrimination law and "calls for reasonable rather than absolute accommodation . . . ."[20]

Justice O'Connor's opinion intimated two sweeping limits to permissible accommodation that are neither supported by the Court's jurisprudence nor wise. The Connecticut law focused on Sabbath observance. *Any* specific legislative accommodation will be directed to some particular religious practice to the omission of others, for example, use of peyote in worship, or riding motorcycles without helmets. If every choice to protect one form of religious exercise is the endorsement or advancement of that form over others, every specific accommodation violates the Establishment Clause.[21] All that would be left for legislators to decide would be whether or not to grant a general accommodation, such as the Religious Freedom Restoration Act,[22] that does not distinguish among forms of religious exercise. Yet, it is highly desirable to leave some decisions up to legislatures, not courts, as to whether state interests will allow specific religious accommodations.[23]

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15 *Id.* at 710.

16 *Id.* at 711-12 (O'Connor, J., concurring).

17 *Id.* at 711 (O'Connor, J., concurring).

18 *Id.* at 712 (O'Connor, J., concurring) (citing Wallace v. Jaffree, 472 U.S. 38, 83-83 (1985)) (emphasis in original).

19 42 U.S.C. § 2000e (2007)

20 Estate of Thornton, 472 U.S. at 712 (O'Connor, J., concurring).

21 One might defend such an approach as appropriate in the context of privileges of workers vis-à-vis employers, but Justice O'Connor gives no such limited defense.

22 42 U.S.C. § 2000bb (2007).

23 *See* William K. Kelley, *The Primacy of Political Actors in Accommodation of Religion*, 22 U. HAW. L. REV. 403 (2000) (arguing that legislators are particularly to be trusted when they protect minority religions by accommodations).

If the choice to protect religious exercise over other nonreligious ethical beliefs and reasons inevitably advances religion in an impermissible manner, then *both* specific and general accommodations are invalid when they are formulated in terms of religion. As we have seen, the Court has consistently assumed, with Justice O'Connor's vote, that some accommodations in terms of religious exercise are all right.[24]

Chief Justice Burger's opinion for the *Thornton* Court was much more circumspect. It eschewed the purpose argument adopted by the Connecticut Supreme Court. One can see why. In any superficial sense—we shall later consider more complex arguments—it is hard to see that the legislative purpose to protect Sabbath observance differs depending on whether it gives absolute protection or a qualified protection to be balanced against the economic needs of employers and the claims of fellow workers. In treating *Sherbert v. Verner*[25] (which held that a Seventh Day Adventist could not be denied unemployment compensation because her religious convictions precluded work on Saturday) as continuing to be valid constitutional law, the recent Court has assumed that a legislature might enact an exemption from Saturday work in its unemployment laws to accommodate those who worship on Saturday and consider it a day of rest.[26] The legislative purpose to protect workers from suffering conflicts between religious obligations (or needs) and the demands of employment does not in any obvious way alter with the degree of protection.

Whether an effect is incidental or primary can reasonably be seen as related to the weight of the imposition on others. If religious exercise prevails over all countervailing considerations, the advancement of religion is much greater than if the law requires only modest efforts to accommodate. At least subject to further analysis, *Estate of Thornton* seems to be a case in which degree is crucial. Effects of the *same kind*, i.e., benefits to religious exercise at some inconvenience to employers and fellow workers,[27] are primary or incidental depending on their magnitude. The case, thus, raises a flag of caution about all efforts to distinguish permissible accommodations from impermissible establishments on the basis of qualitative (or categorical) differences.

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[24] I defend that approach in GREENAWALT, VOL. 2, *supra* note 1, and GREENAWALT, VOL. 1, *supra* note 2.

[25] 374 U.S. 398 (1963).

[26] *Sherbert*, of course, was a decision about a constitutionally required exemption. But if an exemption is required, it is obviously also one a legislature would be permitted to make. (And if one thinks *Sherbert* survived the more limited free exercise rights of *Employment Division v. Smith*, 494 U.S. 872 (1990), only because the Court had previously decided a number of unemployment compensation cases, *Smith* clearly would *allow* legislatures to carve out the privilege *Sherbert* requires.)

[27] One might distinguish unemployment cases as ones in which the government (and taxpayers in general) bear the burden, but in some states employer contributions to unemployment funds depend to a degree on how many of their employees draw unemployment compensation. *See* Kelley, *supra* note 23, at 414.

III. REQUISITES FOR PERMISSIBLE ACCOMMODATIONS

Drawing from the Supreme Court's jurisprudence, we can identify the following requirements for a permissible accommodation to religious practice. A valid exercise in accommodation relieves a relevant burden on religious practice; its remedy is not intrinsically unconstitutional, does not impose unacceptably on others, and is not much more expansive than is needed; and its classification of beneficiaries is appropriate. We shall examine each of these requisites in turn, asking how far decisions about whether they are satisfied can be based on relatively straightforward classifications, demand nuanced judgments about how to apply categories, or call for outright balancing of conflicting interests. This examination is followed by an introduction to three scholarly proposals that would significantly alter how courts address issues of accommodation. The first two suggest simpler criteria, the last a large degree of deference to legislative judgment.

A. *Relief of a Relevant Burden*

According to modern Supreme Court doctrine, an accommodation of free exercise must relieve a burden on religious practice, not promote or sponsor that practice. But saying that an accommodation must relieve a burden does not tell us what counts as a burden. Is any tax a burden or is a tax a burden only if it really interferes with religious practice or falls with particular weight on religious practice? In *Texas Monthly, Inc. v. Bullock*, Justice William J. Brennan wrote in his plurality opinion that an exemption for religious publications from a state sales tax was not justified when (absent the exemption) the tax would fall equally on all publications and apparently would not offend religious beliefs or inhibit religious activity.[28] For Justice Antonin G. Scalia in dissent, it seemed sufficient that the exemption relieved religious groups of a tax they would otherwise have to pay.[29]

Justice Brennan wrote that when a subsidy goes exclusively to religious organizations and is not compelled by the Free Exercise Clause, it is invalid if it "either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion . . . ."[30] The dissenters were much less demanding.

One might see this disagreement as over how great a burden on religion must be or as whether relief of a burden should even be a requirement of permissible accommodation. Perhaps it should be enough that the government enables religious practice without coercion or sponsorship. In *Zorach v. Clauson*,[31] a case in which New York allowed public school students to leave school

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28 489 U.S. 1, 18 (1989) (plurality opinion).

29 *Id.* at 38-39 (Scalia, J., dissenting).

30 *Id.* at 15 (plurality opinion).

31 343 U.S. 306 (1952).

specifically for religious instruction, Justice William O. Douglas's opinion for the Court is broadly positive about government accommodation to the religious needs of citizens. If one thinks the case was correctly decided,[32] one might justify the result on the ground that mandatory school attendance did interfere with possibilities for religious instruction (thus imposing a burden) or simply on the ground that government may aid citizens who want to engage in religious practice, whether or not it responds to a burden.

In my judgment, the Court has been right to insist that an accommodation must relieve some burden on the exercise of religion; that requirement is a needed corollary of a rule against promotion of religion. But this conclusion alone does not settle the question of baselines. What exactly is the state of affairs against which the inquiry about burden should be put? In *Zorach*, is it a burden that mandatory regular education occupies much of a student's day? In respect to military chaplains, does one take as given the basic conditions of military life—or does one start with conditions of ordinary civilian life—in which event military life restricts religious practice in a manner chaplains can relieve? These issues about baselines need to be addressed individually. Some are easy and some are hard, but none are resolved by a general formulation that requires relief of a burden.[33]

One crucial question about burden is whether the burden must be state-imposed. The crucial passage from Justice Brennan's opinion in *Texas Monthly* talks of a "state-imposed deterrent" to free exercise[34] and Justice O'Connor's opinion in *Estate of Thornton* emphasized that free exercise accommodations must lift burdens imposed by the government, not private employers.[35] If this limitation is conceived as applying to all government accommodations to the exercise of religion, I believe it is misconceived. To begin, it is a strain to construe the accommodation required by Title VII[36] as only about discrimination, as Justice O'Connor did.[37] The statutory language demands that employers make some accommodations to religious exercise that go beyond preventing discrimination. Justice O'Connor is on solid ground if all that she meant was that the terms of the Free Exercise Clause, which bar laws "prohibiting" religious exercise, seem to authorize only the lifting of burdens imposed by government.[38] (Although a state may "prohibit" the exercise of religion in a broad sense by

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32 Since I believe that New York's law significantly promoted religious practice through the use of the state's requirement that children attend school, I do not think the case was correctly decided.

33 Many chapters in GREENAWALT, VOL. 2, *supra* note 1, address the problems of baselines in specific contexts.

34 489 U.S. 1, 15 (plurality opinion).

35 472 U.S. 1, 11-12 (O'Connor, J., concurring).

36 42 U.S.C. § 2000e (2007).

37 *See* GREENAWALT, VOL. 1, *supra* note 2, at Ch. 18.

38 Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 712 (1992).

failing to correct a burden *it* has imposed, its failure to lift a privately imposed burden does not seem to involve it in prohibiting free exercise.) Still, burdens are often the consequence of an intermingling of government and private power. Private practices are affected by various laws, and many private enterprises rely heavily on government purchases and various forms of cooperation. And one should conceive the authority of governments to promote public welfare as including some lifting of burdens on religious exercise that goes beyond the specific terms of the Free Exercise Clause. That is a much more sensible approach to accommodation than treating every effort to lift privately imposed burdens as invalid under the Establishment Clause. No Supreme Court case has actually rejected an accommodation *because* it responds to a privately imposed burden, and it is fair to say that question has yet to be carefully considered.[39]

B. Unconstitutional Forms of Relief

An accommodation cannot remedy a burden by a measure that is intrinsically unconstitutional. Two illustrations will suffice here. In *Board of Education of Kiryas Joel Village School District v. Grumet*, the New York legislature created a school district drawn on religious lines.[40] That was regarded as impermissibly assigning political authority to a religious group on the basis of religion.[41] Another measure that would not be acceptable would be one that required courts to use criteria of judgment that the Court has ruled out as themselves unconstitutional.[42] A state legislature could not accommodate the religious practices of frustrated members of religious congregations by a law that assigned church property to the faction that "has remained faithful to traditional doctrines and practices." The Supreme Court has ruled that state courts cannot create and use such standards,[43] and they would be barred to state legislatures as well.

Some forms of relief may not be intrinsically unconstitutional but will have features that count negatively in an overall appraisal of their validity. The government is to remain neutral as to religion. If it attempts to accommodate a religious practice in a manner that encourages people to join religious groups and to adopt or feign religious belief, that leans toward a form of establishment.

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[39] When an attempted accommodation raises Establishment Clause problems, perhaps the countervailing free exercise interests should count more strongly if the lifted burden has been imposed by the government, but relief from private burdens should not be ruled out.

[40] 512 U.S. 687 (1994).

[41] *Id.* at 699 (Souter, J., concurring); *id.* at 722 (Kennedy, J., concurring). The two opinions offer slightly different rationales, but the difference is not significant for this point.

[42] The language of the Texas statute ruled unconstitutional in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 5 (1979), seemed to demand difficult judgments about exclusion and inclusion, but that feature did not figure in the decision.

[43] *See* GREENAWALT, VOL. 1, *supra* note 2, at Ch. 16.

Given the absolute privilege it provided, the Connecticut law held invalid in *Estate of Thornton* could well have encouraged people to join religious groups that worship on the day they would want off. They could assume that the state would not check their church attendance every week, and even if they attended services regularly, that could leave much of the day for recreation. Sometimes the need for accommodation is great enough, however, to warrant a degree of unintended encouragement to join a religious group. No matter how a draft exemption for conscientious objectors is formulated, i.e., whether or not it is limited to religious objectors and does or does not require group membership, it provides *some* encouragement to join pacifist religious groups, since those deciding if an applicant is really opposed to participation in any war are less likely to determine that members of pacifist religions are insincere.[44]

C. *Relation of Relief to Religious Need*

If a legislative accommodation grants a benefit that is far more extensive than the burden to which it responds, the "accommodation" will become an unconstitutional promotion of religion. This principle was invoked by the complaining fired workers in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*.[45] They claimed that the sensible privilege granted to religious organizations to discriminate on religious grounds when they employed persons in positions of religious leadership could not be extended to mundane forms of work unconnected to religious practice. The justices rejected their argument, on the ground that it would be burdensome for religious groups to have to explain why they should be able to use religious criteria in hiring and firing for various positions, but in doing so, the Court accepted the basic idea that the breadth of privilege should correlate reasonably with the breadth of the burden the privilege relieves.[46]

The Connecticut law reviewed in *Estate of Thornton* presented a problem of this kind, though not one on which the Court focused.[47] The law gave workers their Sabbath off from work whether or not they objected in principle to working on their Sabbath, and could or could not combine worship and work on the same day.[48] A large number of Christians have no objection based on their

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44 This problem is discussed at length in GREENAWALT, VOL. 1, *supra* note 2, at Ch. 4.

45 483 U.S. 327 (1987).

46 Such a correlation is also required if Congress acts to "enforce" the Free Exercise Clause and the claim is that it has exceeded its jurisdictional authority. In *City of Boerne v. Flores*, the Court held that Congress could not justify the breadth of the Religious Freedom Restoration Act as a measure to prevent actual violations of the Constitution. 521 U.S. 507 (1997).

47 472 U.S. 703.

48 *Id.*

religion to working Sunday afternoons and evenings.[49] Although the law's generosity in granting entire days off might be justified as a matter of administrative convenience, giving Sabbath observers so much more of a privilege than most of them needed could more reasonably be seen as excessive, amounting to promotion of Sabbath observance. We may generalize that the greater the law's privilege in relation to the religious need to which it responds, the more likely it will be that the legislature has gone beyond relieving a burden.

D. Permissible Classification

A legislative accommodation must classify beneficiaries in an acceptable way. Most obviously, the legislature cannot treat similarly situated religious groups differently.[50] A particular problem raised by the *Kiryas Joel* case is whether a legislature may respond with focused legislation to a particular problem faced by one religious group, given the absence of any assurance that it would treat another group similarly in the future.[51] Justice David H. Souter wrote for the Court that this potential for discrimination constituted an unacceptable failure to exercise authority in a religiously neutral way.[52] With Justice Anthony M. Kennedy,[53] I believe to the contrary that legislatures should be able to respond to pressing needs for accommodation; if unfair differentiation later occurs, judges can respond to it.

The more pervasive question about accommodation classification is whether religious groups and practices may be treated differently from analogous nonreligious ones. The most sensible position, I have claimed, is that for some subjects religion may be treated differently, for others not.

If a legislature's initial classification is impermissible for one reason or another, the legislature can choose to withdraw the benefit altogether or to extend the range of beneficiaries. Unless and until the legislature acts, a court declaring a classification invalid must make a similar choice, based, it is often said, on its best judgment of what the legislature would want.[54] Much may depend on the size of the pool the legislature intended to benefit in relation to the size of the pool needed to make a classification constitutional. If the intended religious beneficiaries numbered 100,000 and the nonreligious pool needed to make the classification acceptable numbered 3,000, one would assume the legis-

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[49] One *might* think this superfluous degree of privilege was partly designed to give Christians no less of a privilege than Jews, who, if observant, do not believe they should work on their Sabbath.

[50] I consider what features might make groups sufficiently dissimilar to make differential treatment acceptable in GREENAWALT, VOL. 2, *supra* note 1, and GREENAWALT, VOL. 1, *supra* note 2.

[51] Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687 (2004).

[52] *Id.* at 703.

[53] *Id.* at 726-27 (Kennedy, J., concurring).

[54] Welsh v. United States, 398 U.S. 333, 357-58 (Harlan, J., concurring).

lature would want an extension. Were the numbers reversed, one would think the legislature would prefer to withdraw the benefit.

If a legislature chooses to grant a benefit in a way that is not limited to religious claimants, the chances are significantly reduced that a court will find a violation of the Establishment Clause, even if the main body of intended beneficiaries have religious reasons to want the benefit. One option is to make the benefit available to anyone who wishes to take advantage of it. A prison concerned about religious objections of inmates to eating meat (or specific kinds of meat) may provide a vegetarian option, allowing any prisoner to choose the vegetarian meal. Concerned about religious scruples against oaths, the drafters of the Federal Constitution itself allowed federal officials to be bound to support the Constitution "by Oath or Affirmation."[55]

Rather than granting a benefit to all who wish it, a legislature may set criteria that do not refer to religion.[56] It may, for example, allow nurses not to participate in medical procedures if they have a moral objection or an objection in conscience to doing so. Or, parents may be excused from having their children vaccinated if vaccinations are contrary to their moral convictions. These criteria include religious convictions, but do not privilege them.

Although uses of these broader criteria sharply reduce concerns about violations of the Establishment Clause, they do not necessarily eliminate them. That is most evident with respect to constitutional objections that rest on the burdens that must be borne by others. Suppose the Connecticut law in *Estate of Thornton* had mandated a day off for all workers who had a reason of conscience not to work on that day. If an employer could show to the satisfaction of a court that the overarching aim and effect of the law was to protect Sabbath observance, it could presumably succeed on the argument that did succeed in the case—namely, that the legislature cannot protect the religious exercise of some citizens by imposing unduly on the interests of other citizens.[57] It is to this subject that we now turn.

E. Who Bears the Burden of a Privilege and How Great is the Burden's Weight?

An accommodation relieves a burden on the religious exercise of certain individuals; sometimes, but not always, others have to bear the cost of the privilege that the accommodation grants. That can make a crucial difference for whether the accommodation is constitutional. In any realistic sense, some accommodations carry no burden to be borne by others. If officials or witnesses at

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[55] U.S. CONST., art. VI.

[56] A variation on this option is to include religion explicitly as a basis, but also to include other bases that reach all analogous reasons for wanting to behave in a particular way.

[57] A similar analysis may be made of claims of hospitals and patients that a privilege for nurses not to participate may interfere too greatly with the provision of medical benefits. *See* the discussion in GREENAWALT, VOL. 1, *supra* note 2, at Ch. 21.

trial can "affirm" rather than swearing an oath, no one is poorer (unless those who affirm are more likely to lie as a consequence). If members of the Native American Church can ingest peyote in worship services, no one else suffers as a result.[58]

Other privileges from accommodations do impose disadvantages on others. The cost may be a financial one for the government and thus for individuals as taxpayers. In *Texas Monthly*, Justice Brennan wrote that the exemption from the sales tax for religious publications "burdens nonbeneficiaries by increasing their tax bills by whatever amount is needed to offset the benefit bestowed on subscribers to religious publications."[59] Although such a cost may be of some concern, an otherwise valid accommodation would not be ruled unconstitutional because taxpayers have to foot the bill.

The real problems arise if the cost is borne by private persons and enterprises in a way that reaches beyond a marginal increase in their tax liabilities. These costs can be financial or in opportunities foregone; they can be in terms of religious exercise itself. In *Estate of Thornton*, either employers had to carry the costs of workers taking their Sabbath off, or other workers had to work on days they would have preferred to be home (mainly Sunday and Saturday), or both.[60] For the Court, the demands that Connecticut's absolute Sabbath privilege placed on employers and other workers were too great.

As I have suggested in my original account of the case, it is hard to understand the question of whether the burdens to be borne by others are too great as anything other than a matter of degree. A slight cost borne by private individuals will not violate the Establishment Clause, a heavy cost will amount to an advancement of religion at the expense of other interests. Jonathan E. Nuechterlein has suggested, however, that the case may be analyzed in terms of an inquiry about purpose.[61] The legislature's extreme inattention to the interests of employers and other workers demonstrated that its purpose was to promote religion rather than lift a burden.[62] Although it is true that a failure to consider the

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58 That is, assuming that those who have ingested peyote do not go out and harm others, and putting aside feelings of possible discrimination among those who have nonreligious reasons to ingest peyote.

59 489 U.S. at 19 n.8 (plurality opinion).

60 In *Estate of Thornton*, 472 U.S. 703 (1985), the original burden on free exercise came from employers who wanted employees to work on Sunday (and other days that were the Sabbaths of workers) *and* the cost of the countervailing privilege not to work on one's Sabbath also fell on employers. These two features, source of burden and cost of its relief, typically combine but they are distinctive. *If* the government gives an absolute Sabbath privilege to its own workers, the burden may fall mainly on other individual government workers, not the government and taxpayers in general. If the government gives special compensation to those who lose jobs in the private sector because they refuse to work on their Sabbath, the burden would be privately created but the expense of accommodation would fall on the government and its taxpayers.

61 Jonathan E. Nuechterlein, *The Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause*, 99 YALE L. J. 1127, 1141-43 (1990).

62 *Id.*

interests of others can often be a signal of one's purpose, I am skeptical about this particular conclusion. Why should we not rather say that the legislators regarded an inability to worship on the Sabbath as a very heavy burden that needed to be lifted however high the cost on others?[63] In any event, if one standard for whether the legislative purpose was to promote religion is assessing the *magnitude* of hardship others must bear, we are still left to consider the *degree* of that hardship, to determine purpose.[64]

A special kind of burden that others might bear is an imposition on their own religious freedom. Michael McConnell has written, "An accommodation must not interfere with the religious liberty of others by forcing them to participate in religious observance."[65] McConnell is right to note the difference between an indirect economic injury and some form of forced participation in religious exercise. The latter will almost never be constitutionally allowable, but we cannot rule out completely the possibility that a law may pressure individuals to a degree to participate in a proceeding that has some religious significance but also gravely affects the value of civic rights of someone else. For example, the law may impose certain negative consequences on divorcing husbands of the Jewish faith who refuse to appear before a *beth din*, in proceedings leading to a religious divorce for their wives.[66]

A particular problem about bearing the burden of accommodation arises when a law accommodates by giving a private enterprise the right to treat someone (a worker) differently from how it could treat that person if ordinary prohibitions applied. In *Amos*,[67] the Mormon gymnasium was allowed to fire a worker on religious grounds. Justice Byron R. White's opinion for the majority suggested that if all the law does is to give a religious organization a privilege to engage in discrimination, if it chooses, the discrimination is not the responsibility of the government.[68] On that view, the burden on the workers' free exercise of religion, namely that a deviation from Mormon practice might lose them their jobs, was not attributable to the government. The better view, that taken by the concurring justices, was that the interference with workers' religious exercise,

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63 The fact that the law gave workers their Sabbath off from work whether or not they objected in principle to working on their Sabbath, and had religious reasons not to work on their Sabbath, was a stronger signal of a purpose to promote Sabbath worship than the burden placed on employers.

64 If the conclusion about purpose is, instead, simply a label one affixes once one has decided that a burden is disproportionate, then purpose itself plays no real part in the analysis at all.

I mean here to distinguish between assuming that legislators (or a reasonable legislator) actually had in mind one objective or another, with degree of burden providing some evidence of actual intent, from treating the "purpose" as depending directly on the degree of burden apart from any assumption about people's actual objectives.

65 Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 37.

66 *See* GREENAWALT, VOL. 2, *supra* note 1, at Ch. 14.

67 483 U.S. 327.

68 *Id.* at 338-39.

authorized by the law, did need to be taken into account, but that it was justified in terms of the free exercise interests supporting freedom for the religious organization.[69]

F. *A Brief Word about Major Alternatives*

Elsewhere,[70] I review two notable proposals, "substantive neutrality"[71] and "equal regard,"[72] that draw on aspects of what the Supreme Court has decided but would reform the law of the religion clauses to a considerable extent. Either of these proposals, if adopted, would affect how one would draw the line between permissible accommodation and impermissible establishment. Instead of working through separate inquiries about burdens, purposes, and effects, a court would ask how the law fares against an ideal of neutrality or equal regard. Under an ideal of neutrality, the government would aim to the greatest extent possible neither to encourage nor discourage religious affiliation and practice. Under an ideal of equal regard it would aim to respect religious claims equally with nonreligious claims. Because the Connecticut law in *Estate of Thornton* could easily have encouraged people to join churches and gave unequal regard to religious and nonreligious claims to be free of Sunday work, we can see how either of these approaches might have yielded the result of that case.

Two points about "neutrality" and "equal regard" approaches are important here. First, the apparent simplicity of each approach might lead one to think that they would permit straightforward categorical analysis, rather than balancing and assessing matters of degree, but I try to show how far that is from the truth. Second, even if one believes that neither approach captures all that is relevant under the religion clauses—and I argue that neither does—the considerations they pick out as crucial are relevant in an overall appraisal of what constitute relevant burdens and acceptable effects.

G. *Deference to Legislative Judgment*

As with most individual rights questions, the Supreme Court has approached the bulk of religion clause cases without affording great deference to legislative judgment. William Kelley has urged that this approach is misconceived as far as accommodations are concerned because these typically assist minority groups and legislatures can be trusted when they reach out to protect

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69 *See* the discussion at GREENAWALT, VOL. 1, *supra* note 2, at 383-84.

70 *See* GREENAWALT, VOL. 2, *supra* note 1, at Ch. 21.

71 Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990). This approach is criticized in Nelson Tebbe, *Free Exercise and the Problem of Symmetry*, 56 HASTINGS L.J. 699 (2005).

72 CHRISTOPHER L. EISGRUBER AND LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (Harvard Univ. Press 2007).

minorities.[73] Insofar as it is sound, this argument would apply when legislatures choose to protect minorities, not when they refuse to do so. Two problems with the argument concern its level of generality. Major pieces of accommodation legislation, such as the federal and state RFRAs, and RLUIPA[74] have been strongly supported by leading religious groups. Legislators may be disinclined to oppose that powerful set of lobbyists.[75] And legislators who may be trusted not to exaggerate the needs of minority religions over the welfare of the general populace may not care very much about the small number of nonreligious people with claims analogous to religious ones, such as nonreligious objectors to vaccinations. As to the choice whether to include nonreligious claimants in an exemption that will mainly benefit religious individuals, we have little reason to trust legislative majorities.

A quite different approach to accommodation from one of deference is skepticism about any legislative accommodation. According to the view that sees accommodations as benefits for religion that are a kind of trade-off for various disabilities required by the Establishment Clause, when disabilities shrink (as they have in recent years), permissible accommodations should also shrink to keep matters in balance. I do not think special protections for religious exercise are mainly a question of offsetting disadvantages required by the Establishment Clause.[76] Rather, the protection of religious liberty is independently valuable. Thus, I do not believe, and the Court has never suggested, that the range of permissible accommodation should expand or contract with expansions and contractions in Establishment Clause limits.

H. Summary

In drawing the line between permitted accommodation and forbidden establishment, courts must engage a number of inquiries. Sometimes their analysis can be categorical, whether a law is of one kind or another, but often they must assess subtle nuances and matters of degree to determine whether the border between the constitutional and the unconstitutional has been crossed.

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73 Kelley, *supra* note 23.

74 Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1 (2007).

75 This problem may be heightened when the benefiting groups are national and the opposing interests are local, as with zoning regulations that apply to churches.

76 *See* GREENAWALT, VOL. 1, *supra* note 2.