

# The Burger Court Opinion Writing Database

*Estate of Thornton v. Caldor, Inc.*

472 U.S. 703 (1985)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Justice White  
 Justice Marshall  
 Justice Blackmun  
 Justice Powell  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

From: **The Chief Justice**

Circulated: **MAR 13 1985**

Recirculated: \_\_\_\_\_

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 83-1158

ESTATE OF DONALD E. THORNTON AND  
 CONNECTICUT, PETITIONERS *v.*  
 CALDOR, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT  
 OF CONNECTICUT

[March —, 1985]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether a State statute that provides employees with the absolute right not to work on their chosen Sabbath violates the Establishment Clause of the First Amendment.

### I

In early 1975, petitioner's decedent Donald E. Thornton<sup>1</sup> began working for respondent Caldor, Inc., a chain of New England retail stores; he managed the men's and boys' clothing department in respondent's Waterbury, Connecticut, store. At that time, respondent's Connecticut stores were closed on Sundays pursuant to state law. Conn. Gen. Stat. §§ 53-300 to 53-303 (1975 ed.).

In 1977, following the state legislature's revision of the Sunday-closing laws,<sup>2</sup> respondent opened its Connecticut

<sup>1</sup>Thornton died on February 4, 1982, while his appeal was pending before the Supreme Court of Connecticut. The administrator of Thornton's estate has continued the suit on behalf of the decedent's estate.

<sup>2</sup>The state legislature revised the Sunday-closing laws in 1976 after a state court held that the existing laws were unconstitutionally vague. *State v. Anonymous*, 33 Conn. Supp. 55, 364 A. 2d 244 (C. P. 1976). The legislature modified the laws to permit certain classes of businesses to remain open. Conn. Gen. Stat. § 53-302a (1976 ed.). At the same time, a

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

May 1, 1985

Re: No. 83-1158 - Estate of Thornton v. Caldor, Inc.

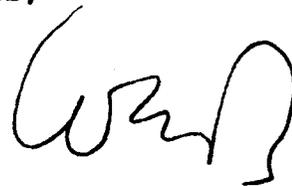
Dear Sandra,

I see no principled reason for remanding this case for reconsideration in light of the impending decision in Wallace v. Jaffrey, No. 83-812. We can hardly expect the Supreme Court of Connecticut to apply the "proper Establishment Clause test" when we now expand the confusion on that issue. Surely the court would be puzzled by a GVR given its "faithful" application of the Lemon test -- the very test applied by the Wallace plurality. The courts look to us for guidance, and we do not help them by sending obscure and puzzling signals to the Supreme Court of Connecticut.

As I recall, the Conference considered whether Section 53-303e(b) may correctly be read as giving Sabbath-observers an absolute right not to work on a designated day. The Draft Opinion p. 10 & n. 13, expresses what I consider to be a proper reading of the statute, in light of applicable State law, and one that followed the discussion at Conference.

I plan to circulate a new draft in due course. As always, I welcome comments and suggestions.

Regards,



Justice O'Connor  
Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

May 13, 1985

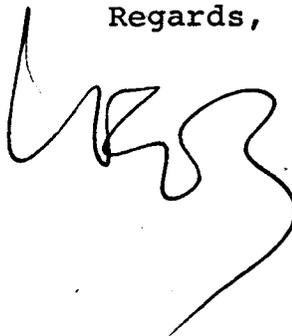
Re: No. 83-1158 - Estate of Donald E. Thornton and  
Connecticut v. Caldor, Inc.

MEMORANDUM TO THE CONFERENCE:

Enclosed is a new (second) draft in this case. It is a close-to-the-line case, as are most of the Establishment Clause cases.

Changed areas are marked.

Regards,

A handwritten signature in black ink, appearing to be 'L. R. S.', written in a cursive style.

To: Justice Brennan  
 Justice White  
 Justice Marshall  
 Justice Blackmun  
 Justice Powell  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

From: **The Chief Justice**

Circulated: \_\_\_\_\_

Recirculated: **MAY 13 1985**

CHANGES: 8, 11, 13-16

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 83-1158

ESTATE OF DONALD E. THORNTON AND  
 CONNECTICUT, PETITIONERS *v.*  
 CALDOR, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT  
 OF CONNECTICUT

[May —, 1985]

CHIEF JUSTICE BURGER delivered the opinion of the  
 Court.

We granted certiorari to decide whether a State statute that provides employees with the absolute right not to work on their chosen Sabbath violates the Establishment Clause of the First Amendment.

### I

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In 1977, following the state legislature's revision of the Sunday-closing laws,<sup>2</sup> respondent opened its Connecticut

<sup>1</sup>Thornton died on February 4, 1982, while his appeal was pending before the Supreme Court of Connecticut. The administrator of Thornton's estate has continued the suit on behalf of the decedent's estate.

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

PERSONAL

May 23, 1985

Re: No. 83-1158 - Estate of Donald E. Thornton &  
Connecticut v. Caldor

MEMORANDUM TO: Justice White  
Justice Powell  
Justice Rehnquist  
Justice O'Connor

Four are concurring in the judgment. Let me know what problems you have and I will try to deal with them.

Regards,

WRB

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

May 23, 1985

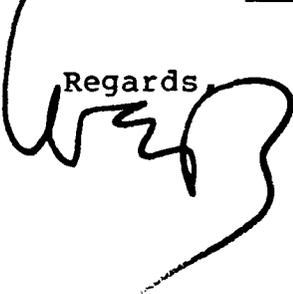
Re: No. 83-1158 - Thornton v. Caldor

Dear Lewis:

I do not agree fully with you on your memo of today on this case; but the duty of each of us is to execute an assignment as a majority vote. I will try to do that.

It is unimportant whether we agree fully when Lemon should be used. A Court majority more than once, you included, made the point that Lemon did not provide a "test" for all Religion Clause cases. That aside, I will try to meet your points with a new draft.

I suspect it is the time of the year that makes it very difficult for me to see how Bill Brennan's opinion and mine are at great odds except that he believes Lemon is "the test for all seasons."

Regards,  


Justice Powell

Copies to the Conference

99 JUN 24 1985

10. Justice Brennan  
 Justice White  
 Justice Marshall  
 Justice Blackmun  
 Justice Powell  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

CHANGES : 5,6,7,8,10-15

From: **The Chief Justice**

Circulated: \_\_\_\_\_

Recirculated: **MAY 23 1985**

3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 83-1158

ESTATE OF DONALD E. THORNTON AND CONNECTI-  
 CUT, PETITIONERS *v.* CALDOR, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF  
 CONNECTICUT

[May —, 1985]

CHIEF JUSTICE BURGER delivered the opinion of the  
 Court.

We granted certiorari to decide whether a state statute that provides employees with the absolute right not to work on their chosen Sabbath violates the Establishment Clause of the First Amendment.

### I

In early 1975, petitioner's decedent Donald E. Thornton<sup>1</sup> began working for respondent Caldor, Inc., a chain of New England retail stores; he managed the men's and boys' clothing department in respondent's Waterbury, Connecticut, store. At that time, respondent's Connecticut stores were closed on Sundays pursuant to state law. Conn. Gen. Stat. §§ 53-300 to 53-303 (1958).

In 1977, following the state legislature's revision of the Sunday-closing laws,<sup>2</sup> respondent opened its Connecticut

<sup>1</sup>Thornton died on February 4, 1982, while his appeal was pending before the Supreme Court of Connecticut. The administrator of Thornton's estate has continued the suit on behalf of the decedent's estate.

<sup>2</sup>The state legislature revised the Sunday-closing laws in 1976 after a state court held that the existing laws were unconstitutionally vague. *State v. Anonymous*, 33 Conn. Supp. 55, 364 A. 2d 244 (Com. Pl. 1976). The legislature modified the laws to permit certain classes of businesses to remain open. Conn. Gen. Stat. § 53-302a (Supp. 1962-1984). At the same time, a new provision was added, § 53-303e, which prohibited em-

Supreme Court of the United States  
Washington, D. C. 20543

June 7, 1985

Re: 83-1158 - Estate of Donald E. Thornton & Connecticut v. Caldor

MEMORANDUM TO THE CONFERENCE:

I will undertake another effort to resolve the "logjam"  
in this case.

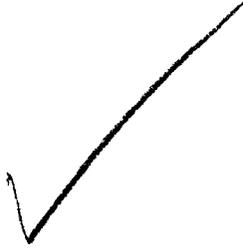
Regards,



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11-1 1985

Supreme Court of the United States  
Washington, D. C. 20543



June 7, 1985

Re: 83-1158 - Estate of Donald E. Thornton & Connecticut v. Caldor

MEMORANDUM TO THE CONFERENCE:

I will undertake another effort to resolve the "logjam"  
in this case.

Regards,

P.S. (LFP only) Can you "pinpoint" just what it would take to  
meet your problems?

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

PERSONAL

June 10, 1985

Re: No. 83-1158 - Estate of Donald E. Thornton and  
Connecticut v. Caldor, Inc.

Dear Lewis:

I have your two "personal" memos of June 7. My effort to try to accommodate all views has plainly been unproductive and I will now pare my opinion down to a tight and brief draft on the effect.

I am baffled by the Brennan opinion which paraphrases mine, but at greater length.

I fear it is the June Syndrome at work--at least in part!

Please stand by.

Regards,



Justice Powell

To: Justice Brennan  
 Justice White  
 Justice Marshall  
 Justice Blackmun  
 Justice Powell  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

From: **The Chief Justice**

Circulated: \_\_\_\_\_

Recirculated: **JUN 12 1985**

**SUBSTANTIAL CHANGES THROUGHOUT**

4th DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 83-1158

**ESTATE OF DONALD E. THORNTON AND CONNECTICUT, PETITIONERS v. CALDOR, INC.**

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT**

[June —, 1985]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether a state statute that provides employees with the absolute right not to work on their chosen Sabbath violates the Establishment Clause of the First Amendment.

I

In early 1975, petitioner's decedent Donald E. Thornton<sup>1</sup> began working for respondent Caldor, Inc., a chain of New England retail stores; he managed the men's and boys' clothing department in respondent's Waterbury, Connecticut, store. At that time, respondent's Connecticut stores were closed on Sundays pursuant to state law. Conn. Gen. Stat. §§ 53-300 to 53-303 (1958).

In 1977, following the state legislature's revision of the Sunday-closing laws,<sup>2</sup> respondent opened its Connecticut

<sup>1</sup>Thornton died on February 4, 1982, while his appeal was pending before the Supreme Court of Connecticut. The administrator of Thornton's estate has continued the suit on behalf of the decedent's estate.

<sup>2</sup>The state legislature revised the Sunday-closing laws in 1976 after a state court held that the existing laws were unconstitutionally vague. *State v. Anonymous*, 33 Conn. Supp. 55, 364 A. 2d 244 (Com. Pl. 1976). The legislature modified the laws to permit certain classes of businesses to remain open. Conn. Gen. Stat. § 53-302a (Supp. 1962-1984). At the same time, a new provision was added, § 53-303e, which prohibited em-

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

June 17, 1985

*Personal*

Re: No. 83-1158 - Estate of Thornton v. Caldor, Inc.

Dear Bill:

Re your note of June 12, I am puzzled on your objection of what is clearly a correct statement of historical fact on page 5.

If it would take care of your point, I am quite willing to add to the sentence on page 5 so it would read: "In setting the appropriate boundaries in Establishment Clause cases, the Court has frequently relied on our holding in Lemon, supra, for guidance, and we do so here."

Regards,

*WAB*

Justice Brennan

To: Justice Brennan  
 Justice White  
 Justice Marshall  
 Justice Blackmun  
 Justice Powell  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

From: **The Chief Justice**

Circulated: \_\_\_\_\_

Recirculated: **JUN 18 1985**

CHANGES: 5, 7

5th DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 83-1158

ESTATE OF DONALD E. THORNTON AND CONNECTICUT, PETITIONERS *v.* CALDOR, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

[June —, 1985]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether a state statute that provides employees with the absolute right not to work on their chosen Sabbath violates the Establishment Clause of the First Amendment.

### I

In early 1975, petitioner's decedent Donald E. Thornton<sup>1</sup> began working for respondent Caldor, Inc., a chain of New England retail stores; he managed the men's and boys' clothing department in respondent's Waterbury, Connecticut, store. At that time, respondent's Connecticut stores were closed on Sundays pursuant to state law. Conn. Gen. Stat. §§ 53-300 to 53-303 (1958).

In 1977, following the state legislature's revision of the Sunday-closing laws,<sup>2</sup> respondent opened its Connecticut

<sup>1</sup>Thornton died on February 4, 1982, while his appeal was pending before the Supreme Court of Connecticut. The administrator of Thornton's estate has continued the suit on behalf of the decedent's estate.

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

June 20, 1985

Re: No. 84-1256, Heckmann v. Cemeteries Association

MEMORANDUM TO THE CONFERENCE:

This case was held for Estate of Thornton v. Caldor, Inc.,  
No. 83-1158.

Petitioners are officials of a Chicago cemetery workers' union. The union has a collective bargaining agreement with respondent, the Cemeteries Association of Greater Chicago, a group of private cemeteries. The agreement provides that workers will be excused from work on specified holidays, and that no burials will be performed on such holidays except where required by health regulations. In addition, "by custom and mutual understanding between cemetery workers and owners, no work is performed on Sundays." App. A-4.

In 1983, the Illinois legislature passed "An Act to permit certain burials on Sundays and legal holidays." Ill. Rev. Stat. ch. 21, §101, et seq. The statute permits decedents to be buried in union cemeteries on Sundays and holidays, if required by the religious beliefs of the decedents, by voiding inconsistent provisions of collective bargaining agreements and by making it a crime for union members to interfere with a Sunday or holiday burial.

Petitioners filed a class action in Cook County Circuit Court against the cemetery owners seeking a declaratory judgment that the Illinois statute violated the National Labor Relations Act and the Illinois and United States Constitutions. The trial court granted respondents' motion for summary judgment. The Appellate Court affirmed in a split decision. Applying Lemon, the court rejected petitioners' Establishment Clause challenge. The court also disposed of petitioners' argument that the statute violated the Free Exercise Clause, noting that the statute did not compel gravediggers to work on Sundays or holidays. Finally, the court concluded that the National Labor Relations Act did not pre-empt the statute. Thereafter, the Illinois Supreme Court declined to review the case.

No union member has ever been prosecuted under the Illinois statute or forced to work on Sunday by this law. It seems doubtful that petitioners have standing to challenge the statute on Establishment Clause grounds because any injury remains

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hypothetical. On the merits, the Appellate Court's decision appears to be consistent with the Court's precedents. Our decision in Caldor does not call this ruling into question.

I WILL VOTE TO DENY.

Regards,

A handwritten signature in cursive script, appearing to be 'WFB', written in dark ink.

To: The Chief Justice  
 Justice White  
 Justice Marshall  
 Justice Blackmun  
 Justice Powell  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

From: **Justice Brennan**

Circulated: MAY 17 1985

Recirculated: \_\_\_\_\_

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 83-1158

ESTATE OF DONALD E. THORNTON AND CONNECTICUT, PETITIONERS *v.* CALDOR, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

[May —, 1985]

JUSTICE BRENNAN, concurring in the judgment.

I join in affirming the judgment of the Connecticut Supreme Court that Con. Gen. Stat. § 53-303e(b) violates the Establishment Clause of the First Amendment. I believe that this result is required by our consistent understanding of the Establishment Clause, as applied in this Court's precedents over at least the past 40 years. However, I do not agree with the Court's evident distaste for the Establishment Clause guidelines derived from our prior cases and set forth in *Lemon v. Kurtzman*, 403 U. S. 602 (1971). Because I believe that resolution of the sensitive issues in this case is best advanced by concentrating on the *Lemon* analysis, I therefore write separately to offer a less innovative explanation for today's result.

### I

The statute at issue in this case, as interpreted by the Connecticut Supreme Court, requires employers absolutely to accommodate the needs of employees who desire not to work on their Sabbath, regardless of the resulting impact on the employer or other employees. See *ante*, at 10-11, and n. 13. From petitioner's perspective, the statute is an example of a familiar kind of antidiscrimination ordinance; it declares that a citizen whose religious beliefs require observance of a Sabbath should not thereby be disabled from par-

To: The Chief Justice  
 Justice White  
 Justice Marshall ✓  
 Justice Blackmun  
 Justice Powell  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

From: Justice Brennan

Circulated: \_\_\_\_\_

Recirculated: \_\_\_\_\_ MAY 21 1985

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1158

ESTATE OF DONALD E. THORNTON AND CONNECTICUT, PETITIONERS *v.* CALDOR, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

[May —, 1985]

JUSTICE BRENNAN, with whom JUSTICE BLACKMUN joins, concurring in the judgment.

I join in affirming the judgment of the Connecticut Supreme Court that Con. Gen. Stat. §53-303e(b) violates the Establishment Clause of the First Amendment. I believe that this result is required by our consistent understanding of the Establishment Clause, as applied in this Court's precedents over at least the past 40 years. However, I do not agree with the Court's evident distaste for the Establishment Clause guidelines derived from our prior cases and set forth in *Lemon v. Kurtzman*, 403 U. S. 602 (1971). Because I believe that resolution of the sensitive issues in this case is best advanced by concentrating on the *Lemon* analysis, I therefore write separately to offer a less innovative explanation for today's result.

I

The statute at issue in this case, as interpreted by the Connecticut Supreme Court, requires employers absolutely to accommodate the needs of employees who desire not to work on their Sabbath, regardless of the resulting impact on the employer or other employees. See *ante*, at 10-11, and n. 13. From petitioner's perspective, the statute is an example of a familiar kind of antidiscrimination ordinance; it declares that a citizen whose religious beliefs require observ-

p. 1

To: The Chief Justice  
 Justice White  
 Justice Marshall ✓  
 Justice Blackmun  
 Justice Powell  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

From: **Justice Brennan**

Circulated: \_\_\_\_\_

Recirculated: MAY 22 1985

3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 83-1158

ESTATE OF DONALD E. THORNTON AND CONNECTICUT, PETITIONERS *v.* CALDOR, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

[May —, 1985]

*With*

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, concurring in the judgment.

I join in affirming the judgment of the Connecticut Supreme Court that Con. Gen. Stat. §53-303e(b) violates the Establishment Clause of the First Amendment. I believe that this result is required by our consistent understanding of the Establishment Clause, as applied in this Court's precedents over at least the past 40 years. However, I do not agree with the Court's evident distaste for the Establishment Clause guidelines derived from our prior cases and set forth in *Lemon v. Kurtzman*, 403 U. S. 602 (1971). Because I believe that resolution of the sensitive issues in this case is best advanced by concentrating on the *Lemon* analysis, I therefore write separately to offer a less innovative explanation for today's result.

I

The statute at issue in this case, as interpreted by the Connecticut Supreme Court, requires employers absolutely to accommodate the needs of employees who desire not to work on their Sabbath, regardless of the resulting impact on the employer or other employees. See *ante*, at 10-11, and n. 13. From petitioner's perspective, the statute is an example of a familiar kind of antidiscrimination ordinance; it

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

June 12, 1985

No. 83-1158 -- Estate of Thornton v. Caldor

Dear Chief:

The draft of your opinion that circulated today comes closer to accommodating my views. On page 6, however, the opinion states: "In setting the appropriate boundaries in Establishment Clause cases, the Court has frequently relied on our holding in Lemon, supra, for guidance." In light of the other decisions this Term, would not consistency be better served by changing the underlined portion of the sentence to read: "we apply the criteria set out in Lemon, supra." If you would make that change, I would join.

Sincerely,



The Chief Justice  
82 JUN 18 5 11  
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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

June 17, 1985

No. 83-1158

Estate of Thornton v. Caldor, Inc.

Dear Chief,

Thank you for your note of June 17.  
With that change, I'll be happy to join  
you.

Sincerely,



The Chief Justice

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

June 18, 1985

No. 83-1158

Thornton v. Caldor, Inc.

Dear Chief,

Please join me in your fifth draft  
in this case. I appreciate the changes  
you have made and I will withdraw my  
separate concurring opinion.

Sincerely,

*Sullivan*

The Chief Justice  
Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

May 28, 1985

83-1158 - Estate of Donald E. Thornton  
and Connecticut v. Caldor, Inc.

Dear Chief,

Although I would not be averse to modifying the Lemon test, I do not read your circulating draft as doing so. On page 13, citing Lemon, you say the issue is whether the statute has the primary effect of advancing religion. You conclude that it does, and I agree. I therefore join your opinion.

Sincerely yours,



.81 WLS:NB WLS:PO

The Chief Justice

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

May 22, 1985

Re: No. 83-1158-Thornton v. Caldor

Dear Bill:

Please join me in your concurring opinion.

Sincerely,



T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

June 19, 1985

Re: No. 83-1158-Estate of Donald E. Thornton and  
Connecticut v. Caldor

Dear Sandra:

Please join me in your concurring opinion.

Sincerely,

*Jm.*

T.M.

Justice O'Connor

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

May 20, 1985

Re: No. 83-1158, Estate of Thornton v. Caldor, Inc.

Dear Bill:

Please join me in your opinion concurring in the judgment.

Sincerely,

A handwritten signature in cursive script, appearing to read "Harry", with a horizontal line underneath it.

Justice Brennan

cc: The Conference

81 MAY 20 1985

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

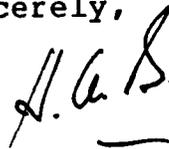
June 18, 1985

Re: No. 83-1158, Estate of Thornton v. Caldor, Inc.

Dear Chief:

Please join me in your 5th draft circulated today.

Sincerely,

Handwritten signature of H. A. B. in cursive script, with a horizontal line underneath.

The Chief Justice

cc: The Conference

April 22, 1985

83-1158 Estate of Thorton, et al. v. Caldor, Inc.

Dear Chief:

In checking the status of circulated opinions that I have not acted on, I find there has been no movement since your draft of March 13. As there have been no joins, I assume there will be another draft.

I agree with your decision that the Connecticut statute violates the Establishment Clause. I am concerned, however by what can be read as your rejection of the Lemon test, and the apparent adoption of a "coercion" test in-stead. Although we have never applied your Lemon test literally in all situations, it has been viewed by this Court and the lower courts as a test applicable in most cases.

I am afraid we will further fragment the Court, and confuse lower courts, if we are too critical of Lemon. Nor would I like to see us adopt a "coercion" test, the contours of which would be difficult to define and may be at odds with Lemon.

In sum, Chief, although I will join your judgment, I hope you will consider my concerns when you circulate a second draft.

Sincerely,

The Chief Justice

lfp/ss

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

May 23, 1985

83-1158 Thornton v. Caldor

Dear Bill:

I am circulating this afternoon a brief opinion concurring in the judgment. This is to indicate why I do not feel comfortable with your concurring opinion, even though I agree with your reliance on Lemon.

I admire the literary quality of your opinion, but I must say that a good deal of it seems to go well beyond what needs to be said in this case. For example, Part II discusses the "purpose" prong of the Lemon test but does not decide whether that prong has been satisfied. You then decide the case under the effects test. I see no reason for Part II at all.

As your views and mine do not always coincide in these religious cases (e.g., Marsh v. Chambers, and Lynch), I do not feel comfortable with some of the rather broad language in Parts I and III. In my view, this case could be disposed of quite briefly by deciding that the statute - at least as applied - clearly violates the effects test.

In view of my reference to your opinion in my little concurrence, the sum of our two opinions will be a strong reaffirmation of Lemon - consistent with what you have written so well in Grand Rapids and Aguilar.

Sincerely,

*Lewis*

Justice Brennan

lfp/ss

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

May 23, 1985

83-1158 Thornton v. Caldor

Dear Chief:

As I cannot join either your second draft or Bill Brennan's first draft of a concurring opinion, I will simply join the judgment as indicated in the draft I am circulating today.

I agree with Bill that the Lemon test that will be reaffirmed in Grand Rapids and Aguilar, applies to and disposes of this case. My difficulty with Bill's opinion is that it includes a substantial amount of dicta that is irrelevant.

As you know from my letter of April 22 commenting on your first draft, I was puzzled that you did not simply apply Lemon. Subsequent to that letter, I made a rather careful examination of all of our decisions since you enunciated the three-part test in Lemon. It was relied on in every Establishment Clause case except Marsh v. Chambers.

I was with you in Marsh and also in Lynch. These cases were based upon the acceptance over the entire history of this country of an opening prayer in a legislature and of the relationship of Christmas to religion. In neither of these cases was there any legislative enactment. These were simply accepted practices of the people. Yet even in Lynch you applied the Lemon test. This has been the only analytical framework a majority of the Court has ever approved for these cases.

In your present draft you properly conclude that the Connecticut statute violates the Establishment Clause, but you mention Lemon only twice and indeed reject it as the generally accepted test. As you put it:

"The Court has repeatedly rejected the concept that 'any single test or criterion' provides the touchstone for resolving Establishment Clause cases . . .", p. 8-9.

It is not clear to me exactly what standard your draft would apply. You rely a good deal on "accommodation" language that has been used primarily in "free exercise" cases, see pp. 6, 8, 9, 11, 12 of your draft, and you appear to adopt a "balancing" test (pp. 8-9, 12-15). This is a major departure from Lemon that would lead to great uncertainty because of the ad hoc weighing of interests that would be required in every Establishment Clause case.

In sum, Chief, I cannot join an opinion along the lines of your present circulation. Your opinion is at odds with the reasoning in Wallace, Grand Rapids and Aquilar and my concurring opinions in these cases.

Sincerely,

*Lewis*

The Chief Justice

lfp/ss

cc: The Conference

05/23

Justice Brennan  
 Justice White  
 Justice Marshall ✓  
 Justice Blackmun  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

From: **Justice Powell**

Circulated: May 28 1985

Recirculated: \_\_\_\_\_

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 83-1158

ESTATE OF DONALD E. THORNTON AND CONNECTI-  
 CUT, PETITIONERS *v.* CALDOR, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF  
 CONNECTICUT

[May —, 1985]

JUSTICE POWELL, concurring in the judgment.

I concur in the Court's judgment that Conn. Gen. Stat. § 53-303e(b) violates the Establishment Clause of the First Amendment. I agree with JUSTICE BRENNAN that the three-pronged test of *Lemon v. Kurtzman*, 403 U. S. 602, 612-613 (1971), and our Establishment Clause cases provide the proper framework for analysis of this case. I would hold simply and briefly that the Connecticut statute—at least as applied in this case—violates the “effects” prong of the *Lemon* test, and therefore, that the judgment of the Connecticut Supreme Court should be affirmed.

.84 100 S. 100 S.

June 7, 1985

83-1158 Thornton v. Caldor

Dear Chief:

Since our pleasant conversation in your Chambers on Wednesday, for the third time I have reviewed my file and the several opinions circulated in this miserable case.

My own record is as follows: At Conference, I voted to affirm on an "as applied basis", saying that the Connecticut statute "flunked the Lemon test". After there had been no response to your first draft of March 13, I wrote you on April 22 restating my view as to the applicability of Lemon. In that letter, I did say Lemon had not always been applied literally. I had in mind your decisions in Marsh and Lynch in which the primary reliance was on the history - though Lemon was applied in Lynch. As to history, see my n 5, on p. 3 in my concurring opinion in Wallace.

Again, after a careful reexamination, I wrote you on May 23, with copies to the Conference, stating that I "will simply join the judgment". I circulated a draft to that effect.

In your third draft, you do apply the Lemon test but I still have considerable difficulty with your opinion as a whole. A good deal of it seems unnecessary, and also some of the analysis is not consistent with my joins in Wallace, Grand Rapids and Aquilar.

As the situation now stands, there will be no Court for an opinion. Byron has joined you, Sandra disagrees with much of your opinion, and would join only Parts I and III. Bill Brennan has four votes for his opinion. Bill Rehnquist is the only Justice dissenting from the judgment. Thus, even if I were to join your present opinion or some revision of it, you would have only three votes for your opinion, and Bill would have four for his. There would be eight votes for the judgment.

I suppose this means that he would have a plurality but only for his opinion. As I have indicated, and is made clear from my opinions in Wallace, Grand Rapids and Aquilar, I am closer to Bill Brennan on Establishment Clause analysis than I am to you, and I could join him if he made

some changes. But, I feel more comfortable with my little opinion concurring in the judgment.

The decision and writing in this case will not be too important for the future. The Connecticut statute may well be unique. Moreover, the Court decisions in the other three religion cases mentioned above, in which you and I disagree, will be the controlling precedents. I therefore think the time has come simply to "let the chips fall". We both have other and more important cases to work on - cases in which I trust that you and I will be together - as we usually are.

Sincerely,

The Chief Justice

lfp/ss

June 7, 1985

83-1158 Thornton v. Caldor

Dear Chief:

Before I received your today's memo to the Conference (with your postscript to me), I had written you - and was about to send - the enclosed letter in which I suggested that we had spent more than enough time on this case (your first draft was circulated March 13), that it is a case of little importance, and that I am prepared to rest on my little concurring opinion and let the chips fall.

Your postscript on today's note asks if I can "pinpoint" changes in your third draft that would be acceptable. It is not easy for me to "pinpoint" because I think you and Bill Brennan both have written a great deal more than is necessary in a fairly simple case in which a straightforward application of the Lemon test - in a brief opinion would suffice.

I could not join Parts II and IV of your third draft as presently drafted. Much of both parts is unnecessary to the disposition of the case, and the analysis is not consistent with my joins in the other three Establishment Clause cases in which you and I disagree. An example of what troubles me is your continued deemphasis of the importance of Lemon (see p. 7). I do not understand your continued use of language related to your "coercion" theory - a theory so far as I know that has never been adopted in an Establishment Clause case. Nor do I understand your continued reliance on "accommodation".

As indicated in my other letter enclosed, there is no way you can get a Court for an opinion. Indeed, if you make major changes, you may lose Byron - the only Justice to join you. And, if he and I both were able to join you, you would have only three votes as against Bill Brennan's four.

Sincerely,

The Chief Justice

lfp/ss

06/10

To: The Chief Justice  
 Justice Brennan  
 Justice White  
 Justice Marshall  
 Justice Blackmun  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

changes  
 throughout

From: **Justice Powell**

Circulated: \_\_\_\_\_

Recirculated: JUN 10 1985

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 83-1158

ESTATE OF DONALD E. THORNTON AND CONNECTI-  
 CUT, PETITIONERS *v.* CALDOR, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF  
 CONNECTICUT

[June —, 1985]

JUSTICE POWELL, concurring in the judgment.

I concur in the Court's judgment that Conn. Gen. Stat. §53-303e(b) violates the Establishment Clause of the First Amendment. I agree that the three-pronged test of *Lemon v. Kurtzman*, 403 U. S. 602, 612-613 (1971), and our Establishment Clause cases provide the proper framework for analysis of this case. I would hold simply and briefly that the Connecticut statute—at least as applied in this case—violates the "effects" prong of the *Lemon* test, and therefore, that the judgment of the Connecticut Supreme Court should be affirmed.

82 1158 010

June 14, 1985

83-1158 Estate of Thornton v. Caldor, Inc.

Dear Chief:

I returned from Mayo late yesterday, and was happy to find your draft of June 12 on Caldor. I have sent you a join note.

The changes you made have accommodated by concerns. I appreciate your making them.

Sincerely,

The Chief Justice

LFP/vde

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 14, 1985

83-1158 Estate of Thornton v. Caldor, Inc.

Dear Bill:

I have noted your letter to the Chief about his draft of June 12.

Although you identified language that shouldn't be in the opinion, the Chief has come so far in response to our criticism of his prior opinions that I can join him. As we have agreed, your excellent opinions in Ball and Aquilar will be the law, and I also make clear in my concurring opinion that I am in agreement with you as to the applicability of Lemon analysis in Establishment Clause cases.

May I say also, Bill, that I think you are very gracious to give up your opinion in deference to the Chief. I would say that he has met our criticisms about 90% - which is quite a constructive change.

Sincerely,

*Lewis*

Justice Brennan

LFP/vde

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 14, 1985

83-1158 Estate of Thornton v. Caldor, Inc.

Dear Chief:

Please join me in your 4th Draft, circulated on June 12.

I will withdraw the little concurring opinion that I have heretofore circulated.

Sincerely,



The Chief Justice

Copies to the Conference

LFP/vde

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 3, 1985

Re: 83-1158 - Thornton v. Caldor

Dear Chief:

Please add at the end of your opinion, "JUSTICE REHNQUIST dissents."

Sincerely,



The Chief Justice

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

May 22, 1985

Re: 83-1158 - Thornton v. Caldor

Dear Bill:

Please join me in your opinion concurring in the judgment.

Respectfully,



Justice Brennan

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

June 18, 1985

Re: 83-1158 - Thornton v. Caldor

Dear Chief:

Please join me.

Respectfully,



The Chief Justice

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

April 30, 1985

No. 83-1158 Thornton v. Caldor, Inc.

Dear Chief,

I find myself in considerable doubt whether the Court should adopt the view of the circulating draft opinion and simply hold outright that the statute violates the Establishment Clause. One recurrent thought I have had is that we should vacate the judgment below and remand it in light of Wallace v. Jaffree, No. 83-812.

It seems to me that the Connecticut statute may have the valid secular purpose of preventing discrimination on the basis of a particular religious practice, i.e., observance of the Sabbath. Whether the statute has an illegitimate purpose, and whether it has an impermissible effect within the meaning of the Establishment Clause, turn in my view on whether it was intended to convey or would objectively be viewed as conveying a message of endorsement of the Sabbath observance. Before conclusively deciding that issue, I would prefer to let the state courts consider it in the context of the legislative history and the implementation of the statute.

The remand might also enable the Connecticut Supreme Court to clarify an issue on which there is some disagreement in the briefs. It is possible to read the Connecticut Supreme Court's opinion as agreeing with the Arbitration Board that §53-303e(b) confers an "absolute" right not to work on one's Sabbath. As I read the record, however, the situation is somewhat more complex. The Arbitration Board apparently assumed that the statute imposed an absolute accommodation requirement. J.A. at 12a. In part because it thought itself required to defer to the statutory interpretation of the Arbitration Board, and in part because the parties submitted to the

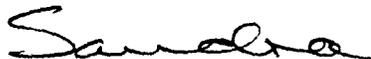
factual and legal determinations of the arbitrators without restriction, the Connecticut Supreme Court considered itself bound as a matter of state law by the Arbitration Board's interpretation of the statute. 484 A.2d 785, 790 (1983). The Connecticut Supreme Court then struck down the statute, not on the grounds that it imposed an "absolute" accommodation requirement, but because it apparently viewed any accommodation of Sabbath observances as violating all three prongs of the Lemon test.

As a result of this peculiar procedural posture, the Connecticut Supreme Court has never held that §53-303e(b) in fact imposes an absolute accommodation requirement, but has rather held only that these parties cannot challenge the Arbitration Board's legal conclusion to that effect. It remains possible, although perhaps unlikely, that the Connecticut Supreme Court, when faced with a restricted submission to the Arbitration Board in a case where reasonable accommodation is infeasible, would interpret the statute as requiring only reasonable accommodation.

In my view, whether the statute is "absolute" is relevant to whether an objective observer would perceive it as conveying a message of endorsement of the Sabbath. I would let the Connecticut Supreme Court address this issue in the first instance as it applies the proper Establishment Clause test on remand.

As presently disposed, I think my preference is to suggest that the judgment should be vacated and the case remanded for reconsideration in light of Wallace v. Jaffree, No. 83-812, in the hope that the statute might ultimately be upheld.

Sincerely,



The Chief Justice

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

May 29, 1985

No. 83-1158 Estate of Donald E. Thornton  
and Connecticut v. Caldor, Inc.

Dear Chief,

Please join me in Parts I and III of your  
opinion circulated May 23 and in the judgment.

Sincerely,

*Sandra*

The Chief Justice

SA 5/30/85

Copies to the Conference

FOR THE CHIEF JUSTICE

- Justice Brennan
- Justice White
- Justice Marshall
- Justice Blackmun
- Justice Powell
- Justice Rehnquist
- Justice Stevens

From: **Justice O'Connor**

Circulated: \_\_\_\_\_

Recirculated: \_\_\_\_\_

PP. 2

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 83-1158

ESTATE OF DONALD E. THORNTON AND CONNECTICUT, PETITIONERS *v.* CALDOR, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

*Jan*

[May —, 1985]

JUSTICE O'CONNOR, concurring in part and concurring in the judgment.

I join Parts I and III of the opinion of THE CHIEF JUSTICE and the Court's judgment that Connecticut General Statute § 53-303e(b) violates the Establishment Clause of the First Amendment. Both THE CHIEF JUSTICE and JUSTICE BRENNAN apply the test enunciated in *Lemon v. Kurtzman*, 403 U. S. 602, 612-613 (1971) and conclude that the Connecticut sabbath law has a primary effect that impermissibly advances religion. In my view, whether the statute has an impermissible effect turns on whether it conveys a message of endorsement of the Sabbath observance. Although I would prefer to let the Connecticut courts address this issue in the first instance,\* the Court chooses to reach and apply the "ef-

\*A remand on this issue might also clarify an issue on which there is some disagreement in the briefs. The Court reads the Connecticut Supreme Court's opinion as holding that § 53-303e(b) confers an "absolute" right not to work on one's Sabbath. As I read the record, however, the situation is somewhat more complex. The Arbitration Board apparently assumed that the statute imposed an absolute accommodation requirement. App. 12a. In part because it thought itself required to defer to the statutory interpretation of the Arbitration Board, and in part because the parties submitted to the factual and legal determinations of the arbitrators without restriction, the Connecticut Supreme Court considered itself bound as a matter of state law by the Arbitration Board's interpretation of the statute. 484 A. 2d 785, 790 (1983). The Connecticut Supreme Court

Justice White  
 Justice Marshall  
 Justice Blackmun  
 Justice Powell  
 Justice Rehnquist  
 Justice Stevens

From: Justice O'Connor

Circulated: \_\_\_\_\_

Recirculated: \_\_\_\_\_

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 83-1158

ESTATE OF DONALD E. THORNTON AND CONNEC-  
 TICUT, PETITIONERS *v.* CALDOR, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF  
 CONNECTICUT

[June —, 1985]

JUSTICE O'CONNOR, concurring in part and concurring in  
 the judgment.

I join Parts I and III of the opinion of THE CHIEF JUSTICE and the Court's judgment that Conn. Gen. Stat. § 53-303e(b) (1983) violates the Establishment Clause of the First Amendment. Both THE CHIEF JUSTICE and JUSTICE BRENNAN apply the test enunciated in *Lemon v. Kurtzman*, 403 U. S. 602, 612-613 (1971) and conclude that the Connecticut sabbath law has a primary effect that impermissibly advances religion. In my view, whether the statute has an impermissible effect turns on whether it conveys a message of endorsement of the Sabbath observance. Although I would prefer to let the Connecticut courts address this issue in the first instance,\* the Court chooses to reach and apply the "effects" prong of the *Lemon* test. I agree with its conclusion.

\*A remand on this issue might also clarify an issue on which there is some disagreement in the briefs. The Court reads the Connecticut Supreme Court's opinion as holding that § 53-303e(b) confers an "absolute" right not to work on one's Sabbath. As I read the record, however, the situation is somewhat more complex. The Arbitration Board apparently assumed that the statute imposed an absolute accommodation requirement. App. 12a. In part because it thought itself required to defer to the statutory interpretation of the Arbitration Board, and in part because the parties submitted to the factual and legal determinations of the arbitrators without restriction, the Connecticut Supreme Court considered itself bound as a matter of state law by the Arbitration Board's interpretation of

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

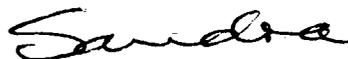
June 13, 1985

No. 83-1158 Estate of Thornton v. Caldor, Inc.

Dear Chief,

Please join me in your draft circulated June 12, 1985.  
I am circulating a revised concurring opinion.

Sincerely,



The Chief Justice

Copies to the Conference

Stylistic Changes Throughout

Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens

From: Justice O'Connor

Circulated: \_\_\_\_\_

Recirculated: \_\_\_\_\_

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 83-1158

ESTATE OF DONALD E. THORNTON AND CONNEC-  
TICUT, PETITIONERS *v.* CALDOR, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF  
CONNECTICUT

[June —, 1985]

JUSTICE O'CONNOR, concurring.

The Court applies the test enunciated in *Lemon v. Kurtzman*, 403 U. S. 602, 612-613 (1971) and concludes that Conn. Gen. Stat. § 53-303e(b) has a primary effect that impermissibly advances religion. I agree, and I join the Court's opinion and judgment. In my view, the Connecticut Sabbath law has an impermissible effect because it conveys a message of endorsement of the Sabbath observance.

All employees, regardless of their religious orientation, would value the benefit which the statute bestows on Sabbath observers—the right to select the day of the week in which to refrain from labor. Yet Connecticut requires private employers to confer this valued and desirable benefit only on those employees who adhere to a particular religious belief. The statute singles out Sabbath observers for special and, as the Court concludes, absolute protection without according similar accommodation to ethical and religious beliefs and practices of other private employees. There can be little doubt that an objective observer or the public at large would perceive this statutory scheme precisely as the Court does today. *Ante*, at — [slip opinion at 6-7]. The message conveyed is one of endorsement of a particular religious belief, to the detriment of those who do not share it. As such, the Connecticut statute has the effect of advancing religion, and cannot withstand Establishment Clause scrutiny.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

June 14, 1985

Re: 83-1158, Estate of Thornton v. Caldor, Inc.

MEMORANDUM TO THE CONFERENCE:

The second draft of my concurring opinion in this case, circulated yesterday, was erroneously marked "Stylistic Changes Throughout". It should have been marked "Substantial Changes Throughout." I apologize for any inconvenience.

Sincerely,

*Sandra*

SUBSTANTIAL CHANGES  
THROUGHOUT

Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens

From: Justice O'Connor

Circulated: 6/14/85

Recirculated: \_\_\_\_\_

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1158

ESTATE OF DONALD E. THORNTON AND CONNEC-  
TICUT, PETITIONERS *v.* CALDOR, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF  
CONNECTICUT

[June —, 1985]

JUSTICE O'CONNOR, concurring.

The Court applies the test enunciated in *Lemon v. Kurtzman*, 403 U. S. 602, 612-613 (1971) and concludes that Conn. Gen. Stat. § 53-303e(b) has a primary effect that impermissibly advances religion. I agree, and I join the Court's opinion and judgment. In my view, the Connecticut Sabbath law has an impermissible effect because it conveys a message of endorsement of the Sabbath observance.

All employees, regardless of their religious orientation, would value the benefit which the statute bestows on Sabbath observers—the right to select the day of the week in which to refrain from labor. Yet Connecticut requires private employers to confer this valued and desirable benefit only on those employees who adhere to a particular religious belief. The statute singles out Sabbath observers for special and, as the Court concludes, absolute protection without according similar accommodation to ethical and religious beliefs and practices of other private employees. There can be little doubt that an objective observer or the public at large would perceive this statutory scheme precisely as the Court does today. *Ante*, at — [slip opinion at 6-7]. The message conveyed is one of endorsement of a particular religious belief, to the detriment of those who do not share it. As such, the Connecticut statute has the effect of advancing religion, and cannot withstand Establishment Clause scrutiny.

To: The Chief Justice  
 Justice Brennan  
 Justice White  
 Justice Marshall  
 Justice Blackmun  
 Justice Powell  
 Justice Rehnquist  
 Justice Stevens

From: Justice O'Connor

Circulated: \_\_\_\_\_

Recirculated: \_\_\_\_\_

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1158

ESTATE OF DONALD E. THORNTON AND CONNEC-  
 TICUT, PETITIONERS *v.* CALDOR, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF  
 CONNECTICUT

[June —, 1985]

JUSTICE O'CONNOR, with whom JUSTICE MARSHALL joins,  
 concurring.

The Court applies the test enunciated in *Lemon v. Kurtzman*, 403 U. S. 602, 612-613 (1971) and concludes that Conn. Gen. Stat. § 53-303e(b) has a primary effect that impermissibly advances religion. I agree, and I join the Court's opinion and judgment. In my view, the Connecticut Sabbath law has an impermissible effect because it conveys a message of endorsement of the Sabbath observance.

All employees, regardless of their religious orientation, would value the benefit which the statute bestows on Sabbath observers—the right to select the day of the week in which to refrain from labor. Yet Connecticut requires private employers to confer this valued and desirable benefit only on those employees who adhere to a particular religious belief. The statute singles out Sabbath observers for special and, as the Court concludes, absolute protection without according similar accommodation to ethical and religious beliefs and practices of other private employees. There can be little doubt that an objective observer or the public at large would perceive this statutory scheme precisely as the Court does today. *Ante*, at — [slip opinion at 6-7]. The message conveyed is one of endorsement of a particular religious belief, to the detriment of those who do not share it. As such,