

## RECONSIDERING *THORNTON V. CALDOR*

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*[P]eople perceive a religious accommodation case like [Thornton v. Caldor] in many different ways: as a case about government intrusion on employer liberty; as a case about religious observance; as a case about government empowerment of religion; as a case about equalizing employment opportunities; as a case about unequal treatment of religious and non-religious workers. These multiple perspectives explain why people disagree about religious accommodation issues, and may also explain why people often feel some division within themselves.*

*Respondent's Brief in Thornton v. Caldor*<sup>1</sup>

Thirty-five years ago, the United States Supreme Court decided *Estate of Thornton v. Caldor*.<sup>2</sup> *Caldor* struck down, on Establishment Clause grounds, a Connecticut statute giving employees the right not to work on their chosen Sabbath. *Caldor* was the first Supreme Court case to impose constitutional limits on religious exemptions,<sup>3</sup> and is constantly invoked and debated in modern disputes over free exercise.<sup>4</sup> Yet *Caldor* also contains curiosities and mysteries. The Court's opinion is short, its holding unclear, and its reasoning somewhat incomplete.

This short symposium piece takes a look back at *Thornton v. Caldor*, seeking to offer a clearer discussion of this famously muddy case. Placing

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1. Brief for Caldor, Inc. at 24–25, *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (No. 83-1158), 1984 WL 566033, at \*24–25.

2. 472 U.S. 703 (1985).

3. To be sure, *Caldor* was not the first case to consider the Establishment Clause's application to religious exemptions. There were earlier ones, like *Gillette v. United States*, 401 U.S. 437 (1971), *Walz v. Tax Commission of New York*, 397 U.S. 664 (1970); *Welsh v. United States*, 398 U.S. 333 (1970), and *United States v. Seeger*, 380 U.S. 163 (1965). But none of those cases held a religious exemption unconstitutional. *Gillette* upheld a religious exemption against a claim of denominational discrimination; *Walz* upheld a tax exemption for religious property; and *Welsh* and *Seeger* both interpreted a religious exemption broadly to ameliorate Establishment Clause concerns.

4. For some good recent pieces discussing *Caldor* and its legacy, see Stephanie H. Barclay, *First Amendment "Harms,"* 95 IND. L.J. 331 (2020); Carl H. Esbeck, *Do Discretionary Religious Exemptions Violate the Establishment Clause?*, 106 KY. L.J. 603 (2017); Micah Schwartzman, Nelson Tebbe & Richard Schragger, *The Costs of Conscience*, 106 KY. L.J. 781 (2017).

the case in historical context, it takes a deeper dive into the Court's decision—scrutinizing what the Court said and reflecting on what it left out.

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*Thornton v. Caldor* arises out of changes in Connecticut's Sunday-closing laws.<sup>5</sup> *Caldor* itself mentions this backstory in a footnote, but it helps with understanding various facets of the case. The Supreme Court had upheld Sunday-closing laws from Establishment Clause challenges in a set of older cases, the most famous of which is probably *McGowan v. Maryland*.<sup>6</sup> Yet the arc of history was bent against Sunday-closing laws, and their story in both Connecticut and other places is one of slow but steady decline.

Connecticut's Sunday-closing laws dated all the way back to 1650,<sup>7</sup> and Connecticut would retain some form of Sunday-closing law until the state dropped its ban on Sunday alcohol sales in 2012.<sup>8</sup> As originally conceived, these laws were simply legal instantiations of religious requirements. The Commandments given to Moses had instructed the faithful to remember the Sabbath day and keep it holy: "Six days you shall labor, and do all your work, but the seventh day is a Sabbath to the Lord your God."<sup>9</sup> Even so, changes in American society had brought changes to Sunday-closing laws. Their rationales were being reconceived along more secular lines, and their scopes were becoming increasingly narrow, as consumers and businesses saw Sunday in terms more commercial and less religious.<sup>10</sup> Here one thinks naturally of another Burger opinion from the previous year, *Lynch v. Donnelly*, where another traditional aspect of religious observance (a

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5. *Caldor*, 472 U.S. at 705 n.2.

6. 366 U.S. 420 (1961); see also *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961); *Gallagher v. Crown Kasher Super Mkt. of Mass., Inc.*, 366 U.S. 617 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961).

7. The historical evolution of Connecticut's Sunday-closing laws is well covered in an earlier Connecticut case that partially invalidated those laws. See *Caldor's, Inc. v. Bedding Barn, Inc.*, 417 A.2d 343, 345–47 (Conn. 1979).

8. See, e.g., Lidia Ryan, *A Look at Some of Connecticut's Blue Laws*, CONN. POST (Oct. 29, 2015, 1:40 PM), <https://www.ctpost.com/living/article/A-look-at-some-of-Connecticut-s-Blue-Laws-6598583.php> [<https://perma.cc/KWY7-PSYX>].

9. *Exodus* 20:9–10. No one disputes this as a historical matter. See *McGowan*, 366 U.S. at 431 ("There is no dispute that the original laws which dealt with Sunday labor were motivated by religious forces."); *Two Guys from Harrison-Allentown, Inc.*, 366 U.S. at 592 (agreeing with the lower court that "the connection between religion and the original Pennsylvania Sunday closing statutes was obvious and indisputable").

10. *McGowan* discusses the evolution of Sunday-closing laws both generally and in Maryland in particular. See *McGowan*, 366 U.S. at 431–48. Another Supreme Court case discusses the evolution of Pennsylvania's closing laws. See *Two Guys from Harrison-Allentown, Inc.*, 366 U.S. at 592–97. Again, for the history of Connecticut's closing law, see *Caldor's, Inc.*, 417 A.2d at 345–47.

nativity scene in celebration of Christmas) was reconceived along more secular and commercial lines (and upheld on that basis).<sup>11</sup>

*Thornton v. Caldor* arose out of this background. By the late 1970s, Connecticut's Sunday-closing laws were in a state of flux. The Connecticut courts had repeatedly held the laws unconstitutionally vague, which had prompted repeated interventions by the Connecticut legislature to fix the problems.<sup>12</sup> This had softened the Sunday-closing laws in a variety of ways—most pertinent here, certain kinds of retail businesses were now free to open on Sundays when they had been required to close before. In turn, these changes prompted Connecticut's legislature to adopt the statute at issue in *Thornton v. Caldor*:

No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day. An employee's refusal to work on his Sabbath shall not constitute grounds for his dismissal.<sup>13</sup>

The connection between the decline of the Sunday-closing laws and this statute may be obvious, but it is worth saying explicitly. In the past, religious employees in retail businesses who would have wanted to take Sunday off for religious reasons were effectively shielded by Connecticut's Sunday-closing law. Those businesses could not operate on Sundays, so their employees automatically got Sunday off. But now that Connecticut was changing the rules to allow retail businesses to open on Sunday, Connecticut had to face the fact that some employees would be conscripted to work on Sundays, and that some of the conscripted would have religious objections to that.

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11. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668 (1984); see also *id.* at 727 (Blackmun, J., dissenting) ("The crèche has been relegated to the role of a neutral harbinger of the holiday season, useful for commercial purposes, but devoid of any inherent meaning and incapable of enhancing the religious tenor of a display of which it is an integral part. . . . Surely, this is a misuse of a sacred symbol."); Michael W. McConnell, *Religious Participation in Public Programs—Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 127 (1992) ("It would be better to forbid the government to have religious symbols at all than to require that they be festooned with the trappings of modern American materialism.").

One aside about the religious display in *Lynch*: The Supreme Court mentions that the crèche was accompanied by many other things—"a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, [and] a large banner that reads 'SEASONS GREETINGS.'" *Lynch*, 465 U.S. at 671. But the Supreme Court omits one critical fact—that the nativity scene also included a robot. See *Donnelly v. Lynch*, 525 F. Supp. 1150, 1155 (D.R.I. 1981) (noting the robot). For some reason, my students always find this amusing. Despite deep disagreements on what happened two thousand years ago, everyone seems to agree that no robots were involved.

12. See *Caldor's, Inc.*, 417 A.2d at 345–47 (discussing the history).

13. CONN. GEN. STAT. ANN. § 53-303e(b) (West 1985), *invalidated by* Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985).

The legislative history of the statute captures these points well enough. “Some people,” Representative Webber said, “have expressed concern about the employees who would staff the stores that choose to open on Sundays.”<sup>14</sup> To address that concern, Senator Hudson claimed that the Connecticut statute “gives people the right not to work on the Sabbath if they choose to and I think that that is a responsible action on the part of government to guarantee those who wish to observe their Sabbath, whatever day it is, not to have to work.”<sup>15</sup>

Note how Representative Webber spoke strictly in terms of Sundays, while Senator Hudson spoke more generally. One striking aspect of the statute has to do with denominational neutrality. The Connecticut statute protecting workers was denominationally neutral. Each person could take their chosen Sabbath off, whether it is Saturday, Sunday, or something else. (Although, you will note, each person could claim only *one* Sabbath day each week.) Yet, at the same time, obviously the Connecticut statute was passed with Christians in mind. After all, for hundreds of years, Connecticut had operated without any statute giving *other* workers the right to take *their* Sabbaths off. Connecticut only did so now because the repeal of the Sunday-closing laws threatened Sunday-observing Christians. The statute itself was denominationally neutral, but the concerns it was responding to were specific concerns about the situation of Christians given the decline of the Sunday-closing laws.

This leads to an interesting point about the interplay between free exercise and disestablishment values. Generally free exercise and disestablishment work hand-in-hand toward an attractive conception of religious freedom.<sup>16</sup> But sometimes, as here, weird things can happen. Forget *McGowan v. Maryland* for a second, and take Sunday-closing laws as part and parcel of a genuine religious establishment. (Certainly that is how they started.)<sup>17</sup> In this way, one can see how religious establishments can partially and backhandedly serve free exercise values. For all those years, Christians in Connecticut were vicariously protected from having to work on Sunday by Connecticut’s closing laws. This is not to defend closing

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14. 19 CONN. H.R. PROCEEDINGS (pt. 6), at 2415 (Apr. 21, 1976) (remarks of Rep. Webber). The legislative history of the bill is best covered in two briefs. See Brief for the United States as Amicus Curiae Supporting Petitioner at 13–14, *Caldor*, 472 U.S. 703 (No. 83-1158), 1984 WL 566038, at \*13–14; Brief of Intervenor State of Connecticut in Support of Reversal at app. C, *Caldor*, 472 U.S. 703 (No. 83-1158), 1984 WL 566031.

15. 19 CONN. S. PROCEEDINGS (pt. 5), at 2039–40 (Apr. 28, 1976) (remarks of Sen. Hudson).

16. I have put it this way: “The Free Exercise Clause gives people the right to practice their religion, while the Establishment Clause denies the government the right to practice religion. By requiring the government to stay out of religious affairs, the Constitution commits matters of religious belief and practice exclusively to the private sphere.” Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 12 (2011) (footnote omitted).

17. See *supra* note 8.

laws. Forcing everyone to observe the Christian Sabbath is a massively overbroad way of protecting the Christians who would, on their own, choose to observe it. It is like making everyone go to church as a way of ostensibly protecting the right of those who would choose to go on their own.

In this way, though, we can see how the demise of religious establishments naturally leads to questions about the propriety of targeted free exercise in their place. No longer is this merely about *Thornton v. Caldor*—we can see it, for example, in the most pressing issues of religious accommodation in our time. For a long time, Western society had an exclusively heterosexual conception of marriage, a conception of marriage that many Christians still hold. Maybe this is not a religious establishment exactly, but that view still dominated from time immemorial. Yet as this conception of marriage has lost its preeminence in American society, hard questions about free exercise necessarily follow. What rights should those who held the formerly hegemonic view—say Kim Davis or Jack Phillips—have now that the hegemony has collapsed?<sup>18</sup> What rights should they have as dissenters, the argument goes, when they tolerated so little dissent when they held the power? One persistent claim in *Thornton v. Caldor* is that the Connecticut statute at issue was merely a rear-guard action to maintain the Christian Sabbath despite the collapse of Connecticut’s Sunday-closing laws—just as one persistent claim in *Masterpiece Cakeshop* is that the suit was merely a rear-guard action to maintain the old heterosexual view of marriage despite *Obergefell*.<sup>19</sup>

This brings us to Donald Thornton, the plaintiff in *Thornton v. Caldor*.<sup>20</sup> Thornton was a department manager at the defendant Caldor, Incorporated, a chain of New England retail stores. Thornton managed the mens’ and boys’ clothing departments at a store in Waterbury. He had been hired in 1975, back when Connecticut’s Sunday-closing laws forced Caldor’s Connecticut stores to close on Sunday. But in 1976, because of changes in the closing laws, Caldor’s stores began opening on Sundays and requiring managers to work every third or fourth Sunday. Union employees did not have to work on Sundays if they had religious objections, and were given premium wages (time and a half) if they chose to work. But that was because

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18. For those who do not know, Jack Phillips was the baker who refused to provide a cake for a gay wedding in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), and Kim Davis was the county clerk who refused to issue marriage licenses for gay couples in *Miller v. Davis*, 123 F. Supp. 3d 924 (E.D. Ky. 2015).

19. See *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. 1719; *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

20. The facts in the next two paragraphs, which are uncontested, come from the parties’ briefs. See Brief for Petitioner at 2–7, *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (No. 83-1158), 1984 WL 566029, at \*2–7, and Brief for Caldor, Inc. at 1–7, *Caldor*, 472 U.S. 703 (No. 83-1158), 1984 WL 566033, at \*1–7.

of the collective bargaining agreement negotiated by the union. Being a manager, Thornton did not belong to the union—he had to work Sundays.

A devout Presbyterian, Thornton initially worked Sundays for Caldor in 1977 and 1978. But in 1979, after consulting an attorney and learning of the statute, Thornton asked Caldor to be excused from Sunday work. Caldor was willing to transfer Thornton to a Massachusetts store, which was closed on Sundays (because of, you guessed it, Massachusetts's more old-school Sunday-closing law). When Thornton refused, Caldor demoted him to a rank-and-file employee position at about half the salary. Thornton quit and brought suit in a state administrative forum—the State Board of Mediation and Arbitration. Relying on the above statute, the Board found for Thornton, and its judgment was confirmed by a Connecticut trial court.

But the Connecticut Supreme Court unanimously reversed, agreeing with Caldor that the statute violated the Establishment Clause.<sup>21</sup> Like the United States Supreme Court, the Connecticut Supreme Court handled the case with the three-part framework of *Lemon v. Kurtzman*.<sup>22</sup> But the Connecticut opinion was more ambitious. It concluded that Connecticut's statute violated all three prongs of *Lemon*, including *Lemon*'s first requirement of a secular purpose. Broad language in the opinion suggested that religious exemptions were inherently defective, that they categorically lacked secular purpose.<sup>23</sup> It would be hard to write this kind of opinion now—especially after *Amos*, where the Court began to explain how religious exemptions could be justified in non-religious terms.<sup>24</sup> No one thinks the state favors the Native American Church by allowing them to use peyote in their religious rituals.<sup>25</sup> When the state allows a Brazilian group to use hoasca in worship, no one takes that as a governmental endorsement of hoasca, worship, or the specific religious tenets of that Brazilian group

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21. *Caldor, Inc. v. Thornton*, 464 A.2d 785 (Conn. 1983), *aff'd*, 472 U.S. 703 (1985).

22. 403 U.S. 602 (1971). *Lemon*'s three-part framework included the requirements of (1) a secular legislative purpose, (2) a principal or primary effect that neither advances nor inhibits religion, and (3) no excessive entanglement with religion. *Id.* at 612–13.

23. Here is the heart of the Connecticut Supreme Court's secular-purpose analysis: "The unmistakable purpose of such a provision is to allow those persons who wish to worship on a particular day the freedom to do so. We conclude that § 53–303e(b) does not pass the 'clear secular purpose' test of establishment clause scrutiny." *Caldor*, 464 A.2d at 793.

24. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987) ("There is ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.'" (quoting *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 669 (1970))). It is true that *Amos* drew this language from *Walz v. Tax Commission of New York*, 397 U.S. 664. But the language meant something different in *Amos* than it had in *Walz*, because *Amos* involved a regulatory exemption while *Walz* had involved a tax exemption. Importing this language into the regulatory-exemption context was a conceptual evolution.

25. *See Emp't Div. v. Smith*, 494 U.S. 872 (1990).

(whatever they happen to be).<sup>26</sup> The state promotes religion when it promotes it. The state does not promote religion by allowing its exercise.

In any event, this brought *Thornton v. Caldor* to the United States Supreme Court. There Thornton was represented by the National Jewish Commission on Law and Public Affairs and the American Jewish Congress. Here too there is a story. Thornton had actually died, and his estate did not want to appeal. But the two groups received permission from Thornton's executor to petition the Supreme Court to try and get the Connecticut decision reversed.<sup>27</sup> In hindsight, of course, this turned out to be a mistake; it ended up making nationwide the precedent those groups were trying to undo in Connecticut. But that was impossible to see at the time.

The briefs filed in the Court were lopsidedly in Thornton's favor. Civil rights groups and religious organizations of all kinds saw themselves in Thornton. The ACLU, Americans United for Separation of Church and State, the American Jewish Committee, and the Anti-Defamation League all wrote in support of Thornton as amici.<sup>28</sup> Nowadays, of course, groups like the ACLU and Americans United argue for stringent Establishment Clause limitations on religious exemptions, supporting *Caldor* and a broad interpretation of it. But at the time, they opposed *Caldor*—Americans United said that striking down the statute, as the Court eventually did, would “make[] a mockery of one of the primary purposes of the religion clauses of the First Amendment.”<sup>29</sup>

Insiders will not be surprised by this. It is part of the larger change that has happened over the past few decades. As conservative religious belief has clashed with civil rights laws, the right has become more solicitous of free exercise while the left has become less.<sup>30</sup> The briefs in *Thornton v. Caldor* thus remind us of the old world—back when civil rights groups saw vividly, and in equality terms, the necessity of religious exemptions for believers.<sup>31</sup> And not only did Thornton have the civil rights groups on his

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26. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

27. These details are recounted in David Margolick, *High Court Gets Connecticut Sabbath-Work Case*, N.Y. TIMES, Apr. 11, 1984, at C24, <https://www.nytimes.com/1984/04/11/nyregion/high-court-gets-connecticut-sabbath-work-case.html> [https://perma.cc/38FA-A9B8].

28. See Brief of Americans United for Separation of Church and State as Amicus Curiae and Motion for Leave to File Amicus Curiae Brief at 12, *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (No. 83-1158), 1984 WL 566044, at \*12.

29. *Id.*; see also Michael A. Helfand, *Jews and the Culture Wars: Consensus and Dissensus in Jewish Religious Liberty Advocacy*, 56 SAN DIEGO L. REV. 305, 332–33 (2019) (discussing differences between the briefs submitted by different Jewish organizations).

30. For a sustained treatment of how folks on the right have changed their minds, see James M. Oleske, Jr., *A Regrettable Invitation to “Constitutional Resistance,” Renewed Confusion over Religious Exemptions, and the Future of Free Exercise*, 20 LEWIS & CLARK L. REV. 1317, 1346–55 (2017).

31. The notion of equality frequently appears throughout these briefs, in statements like this: “Sabbatarians can never achieve equality of employment opportunity so long as employers and unions are permitted to exclude from employment those who cannot, because of conscience, work on their

side, he had the Reagan Administration's Solicitor General on his side, as well as the state of Connecticut—Joseph Lieberman, who would soon become Connecticut's junior Senator, divided oral argument time with Thornton's counsel.

Another striking thing is that it is not clear why the Supreme Court took this case. The Connecticut Supreme Court's decision addressed one particular Connecticut statute that had no ramifications outside the state. There was no circuit split—and given the uniqueness of Connecticut's statute, there was little chance one would develop soon. And the Connecticut Supreme Court had struck down the statute unanimously.

Moreover, the Connecticut statute had almost no track record. The United States Supreme Court would eventually strike it down on its face (not as-applied), on the theory that it put too much of a burden on employers and other employees. But there was little evidence on what those burdens actually were. In its amicus brief, the ACLU argued that the case should be dismissed as improvidently granted for this reason.<sup>32</sup> Lower courts should consider whether Thornton could be easily accommodated by his employer, the ACLU said.<sup>33</sup> Maybe the constitutional problem would go away and the statute could be saved. Or maybe the Court would then have a basis for distinguishing between unconstitutional applications of the statute (where the burdens were too much) and constitutional ones (where they weren't). But those obviously were not paths the Supreme Court took.

Modern readers are struck when they read *Thornton v. Caldor* for the first time. Casebooks can easily include the whole decision. The main opinion is only three pages long. Its legal analysis is a single page. Justice Rehnquist dissents, but he does not write an opinion. It is not how the Court would decide a case today. *Thornton v. Caldor* is fascinating in part because the Court says so little.

Handling the case within *Lemon's* framework, the Court concludes that Connecticut's statute fails *Lemon's* second prong—the requirement that governmental action not have a primary effect of advancing religion.<sup>34</sup> But here the Court buries the lede. Thornton's principal argument was that *Lemon's* framework should not apply to religious exemptions.<sup>35</sup> Thornton

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Sabbath.” Brief of Americans United for Separation of Church and State as Amicus Curiae and Motion for Leave to File Amicus Curiae Brief at 7, *Caldor*, 472 U.S. 703 (No. 83-1158), 1984 WL 566044, at \*7.

32. See The American Civil Liberties Union and the American Jewish Committee for Leave to File and Brief Amici Curiae in Support of Petitioner at 20–27, *Caldor*, 472 U.S. 703 (No. 83-1158), 1984 WL 566040, at \*20–27.

33. *Id.*

34. *Caldor*, 472 U.S. at 710.

35. See Brief for Petitioner at 10–27, *Caldor*, 472 U.S. 703 (No. 83-1158), 1984 WL 566029, at \*10–27; see also Michael D. Woerner, Recent Development, *Thornton v. Caldor: Will the Supreme*

pointed out that it never had before, and Thornton insisted that a mechanistic application of *Lemon* (one that took any protections for free exercise as advancing religion) would lead only to “confusion and to absurd consequences.”<sup>36</sup> Also keep in mind that *Marsh v. Chambers*<sup>37</sup> had been decided only two years before *Thornton v. Caldor*. In *Marsh*, Chief Justice Burger ignored *Lemon*—which was, you must remember, yet another Burger opinion—in a context where it seemed obviously relevant, presumably because doing so would have led to a conclusion that Burger thought impossible.<sup>38</sup> In that way, *Caldor* is a 180-degree turnabout from *Marsh*. Now Chief Justice Burger finds *Lemon* suddenly relevant again, and so obviously controlling that he does not feel the need to say anything about it.

The Court’s analysis boils down to its almost-visceral sense that the Connecticut statute advances religion (in violation of *Lemon*’s second prong). The Court sees the statute as favoritism for religion. But it is hard to put one’s finger on exactly *why* the Court feels this way, because the Court throws around a bunch of concerns without systematizing them, let alone ranking them or choosing between them. The Court frequently returns to how the statute operates categorically and infeasibly: the statute “arms Sabbath observers with an *absolute* and *unqualified* right not to work,” and imposes “an *absolute* duty [on businesses] to conform their business practices to the particular religious practices of the employee.”<sup>39</sup> “Sabbath religious concerns *automatically* control over all secular interests at the workplace,” and “the statute takes *no account* of the convenience or interests of the employer or those of other employees.”<sup>40</sup>

In particular, it is hard to figure out whether the Court is concerned more about the burdens on *employers* (who have to accommodate people like Thornton) or *employees* (who may end up practically bearing the brunt of the accommodation). Modern folks often see *Thornton v. Caldor* as being fundamentally about the rights of other employees. But the opinion does not read that way. Instead, the Court persistently lumps together the concerns of employers and employees—referring to the “burden or inconvenience this imposes on the *employer or fellow workers*,” and the “interests of the *employer or those of other employees*.”<sup>41</sup> In an excellent piece, Charlotte

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*Court Put the Squeeze on Lemon?*, 12 J. LEGIS. 96, 101 (1985) (“Thornton’s central argument [is] that the Court should not apply the *Lemon* test to the facts of this case.”).

36. See Brief for Petitioner at 23, *Caldor*, 472 U.S. 703 (No. 83-1158), 1984 WL 566029, at \*23.

37. 463 U.S. 783 (1983).

38. See Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 MINN. L. REV. 972, 984 (2010) (noting that *Marsh* did not “mention the then-dominant three-part doctrinal test of *Lemon v. Kurtzman*”).

39. *Caldor*, 472 U.S. at 709 (emphasis added).

40. *Id.* (emphasis added).

41. *Id.* at 708–09 (emphasis added).

Garden sees *Thornton v. Caldor* as driven primarily by concerns for the employees.<sup>42</sup> She rightly points out that the Connecticut statute itself did not injure employees. Any injury employees might suffer would have come about as a result of the employer's choices about how to comply with the statute. And employers had ways of accommodating Sabbatarians that would not have burdened other employees. Garden notes that businesses like Caldor could have "adjusted their opening hours or hired more employees"—or perhaps most obviously—simply paid higher wages for Sunday work.<sup>43</sup> Remember this is exactly what Caldor had to do for its union employees—union employees had negotiated the right not to have to work on Sunday, and to be paid premium wages if they did so voluntarily. But the union had bargaining power, of course, and Thornton did not.

This puts *Thornton v. Caldor* in an unflattering light. Businesses here get themselves out of a legal mandate requiring them to accommodate their workers merely by pointing out they have discovered socially counterproductive ways to comply with it. This is hostage taking, pure and simple: "Don't make us accommodate our religious workers. Because if you do, we've found ways we can take it out on innocent third parties."<sup>44</sup> And this argument worked! To be fair, maybe it *should* work. It certainly matters if other employees would be significantly burdened. But the Court in *Thornton v. Caldor* takes the employer's claim at face value and does not interrogate it.

*Thornton v. Caldor* thus involves complicated relationships between employees, employers, and the government. This brings us to *Lochner v. New York*.<sup>45</sup> Analogies to *Lochner* are common these days, and sometimes they are overdone. Often when people compare a case to *Lochner*, they intend it simply as a slam—as a way of insulting an opinion or its author, as a way of saying that the Court was simply making it up. That is not what I mean.

What then does *Lochner* have to do with this? Like *Lochner*, *Caldor* strikes down a democratically-enacted statute protecting employees against their employers. But the analogy goes deeper than that. Like *Lochner*, *Caldor* seems to conceive of the market power that employers happen to possess as natural and not state-created, so state measures empowering

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42. See Charlotte Garden, *Religious Accommodation at Work: Lessons from Labor Law*, 50 CONN. L. REV. 855, 869–70 (2018) (noting that while "the Court mentions both employers and nonadherent employees, seemingly expressing concern about the statute's effect on both groups. . . . closer inspection reveals that the Court's primary concern was the statute's infringement on employers' managerial prerogatives").

43. *Id.*

44. See *id.* at 870 ("[This] brings to mind an autocratic employer that adjusts to life under the statute by forcing unwilling (but nonreligious) employees to work on their coworkers' Sabbaths instead of taking any of the other available paths.").

45. 198 U.S. 45 (1905).

employees become interventions in the natural order that deserve suspicion or at least strong justification. In *Lochner*, New York tries to protect the health needs of its employees, only to be told by the Court that it is just not the state's place to interfere with market relationships.<sup>46</sup> In *Caldor*, Connecticut tries to protect the religious needs of its employees, only to be told the same thing.

To be sure, *Caldor* itself does not say this. But one sees such ideas both in the briefs as well as in the doctrine and subsequent cases that *Caldor* generates. Free exercise, the argument goes, is a right only against the state. Other kinds of religious burdens, such as those imposed on employees by employers, are irrelevant. *Caldor*'s brief says this directly: "The principle of 'accommodation' . . . —a principle that seeks to avoid a state-created conflict between affirmative government action and an individual's religious liberty—is simply not present in the instant case . . . . [T]he Free Exercise Clause does not grant rights against private parties and is not involved in this case . . . ."<sup>47</sup> The government, in other words, simply has no role in trying to make employers respect the religious liberty of their employees.

If one doubts the idea that *Caldor* stands for such a striking proposition, consider the doctrine it has generated. Take this line from the Court's 2005 decision in *Cutter v. Wilkinson*: "Foremost, we find RLUIPA's institutionalized-persons provision compatible with the Establishment Clause because it alleviates exceptional government-created burdens on private religious exercise."<sup>48</sup> In some ways, this sentence is unremarkable. Justice Ginsburg was writing for a unanimous Court in an easy case. This sentence is not the heart of the legal analysis; earlier opinions had, in fact, said basically the same thing.<sup>49</sup> But note the sentence's implications. For

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46. *Lochner*, 198 U.S. at 64.

47. Brief for *Caldor, Inc.* at 27, *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (No. 83-1158), 1984 WL 566033, at \*27. Even more striking is an amicus brief:

[The] repeal [of Connecticut's Sunday-Closing Law] simply left the private sector free of a state-imposed limitation. That freedom is not the equivalent of an affirmative state law that itself has a negative impact on religion—the laws that have generated this Court's accommodation decisions. That being so, this is not a situation in which government action having an adverse effect on religion needs to be ameliorated by exempting religion from the government-imposed burden. The accommodation challenged here was not a second-level decision rendered necessary by a law enacted for secular purposes. Here, Connecticut reached out—into a field in which the State was not otherwise involved—for the sole purpose of placing the weight of the State behind facilitating religious exercise.

Brief of the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae in Support of Respondent at 7–8, *Caldor*, 472 U.S. 703 (No. 83-1158), 1984 WL 566042, at \*7–8 (emphasis omitted).

48. *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005).

49. Take *Texas Monthly*, where the Court said that a religious exemption was constitutionally suspect when it "either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a

religious exemptions to be constitutionally legitimate, not only must the religious burdens in question be *exceptional*, they must also be *government-created*. If one takes this seriously, it suggests the unconstitutionality of *any* governmental interference in market relationships in support of free exercise. Title VII's requirement that employers make reasonable accommodation for their employees' religious needs, for example, would be vulnerable.<sup>50</sup> This is not the case, of course. The Court is not about to invalidate the religious-accommodation provisions of Title VII.<sup>51</sup> But the errors in this line of thinking go back to *Caldor*.

This brings us to the biggest thing missing from the Court's opinion. The Court leaves out any discussion of the religious needs that prompted Connecticut's statute in the first place. If you ever talk to an observant Sabbatarian, it quickly becomes clear how profoundly their lives are shaped by that religious commitment—how they are cut off from many ordinary things that other people take for granted. When people work five days a week, everything else naturally gets shoved off to the weekends. Sabbatarians find themselves closed off from all those other things. A child that observes Saturday as her Sabbath, for example, is going to have an impossible time doing sports, theater, or countless other school activities. This is why all those Jewish groups offered to represent Thornton.<sup>52</sup> But about the religious needs of Sabbatarians, the Court says exactly nothing.

The Court also says nothing about the power of corporations. In our modern world, corporations wield real power—power over politics, power over consumers, and especially power over workers. Commercial businesses want to operate seven days a week. Lacking the economic power to force concessions, employees have to comply. This threatens religious liberty, but it also threatens religious equality. “Sabbatarians can never achieve equality of employment opportunity,” Americans United told the Court, “so long as employers and unions are permitted to exclude from employment those who cannot, because of conscience, work on their Sabbath.”<sup>53</sup>

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significant *state-imposed* deterrent to the free exercise of religion.” *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 15 (1989) (plurality opinion) (emphasis added).

50. *Caldor's* brief, in fact, openly cast doubt on it: “The truly important unanswered question in the law of religious accommodation concerns the constitutionality of ‘reasonable accommodation’ statutes like Title VII . . . .” Brief for *Caldor, Inc.* at 49, *Caldor*, 472 U.S. 703 (No. 83-1158), 1984 WL 566033, at \*49.

51. Indeed, four Justices recently issued calls to strengthen them, floating the idea that the Court might reconsider its decision in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), which read them narrowly. See *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 637 (2019) (Alito, J., joined by three other Justices, respecting the denial of certiorari).

52. See *supra* note 27 and accompanying text (explaining this point).

53. See Brief of Americans United for Separation of Church and State as Amicus Curiae and Motion for Leave to File Amicus Curiae Brief at 7, *Caldor*, 472 U.S. 703 (No. 83-1158), 1984 WL 566044, at \*7.

One striking thing is how this was *exactly* the way the United States Supreme Court conceived of the issue before *Caldor*. The leading Free Exercise case of the era, *Sherbert v. Verner*, involved someone else who lost their job because they refused to work on their Sabbath.<sup>54</sup> *Sherbert* held that such folks had a constitutional right to generally available unemployment benefits, and *Sherbert* saw the issue as a simple question of equality—it was, Justice Brennan said, “nothing more than the governmental obligation of neutrality in the face of religious differences.”<sup>55</sup>

This is how *Caldor* could so swiftly conclude that the Connecticut statute violated the Establishment Clause. Religious exemptions fit notions of religious neutrality, we think, because they advance religious liberty rather than merely advancing religion *simpliciter*. So by leaving out any discussion of how the Connecticut statute advances religious liberty, the only conclusion left is that the statute advances religion. The legal analysis becomes both formalistic and mechanistic—the kind of thing that could fit on a single page (which, of course, it does).

It is not clear why the Court gives such short shrift to the free exercise rationales in the case. The Court obviously thinks Connecticut’s statute goes too far; that is one thing most clearly visible from the face of the opinion.<sup>56</sup> The obvious contrast here is with Title VII’s reasonable-accommodation provision. Though it is not mentioned in the majority opinion, that provision shows up in the briefs, oral argument, and concurring opinion.<sup>57</sup> Title VII is the foil to Connecticut’s statute. Title VII requires religious accommodation, but the right is defeasible—accommodation is only required when *reasonable*.<sup>58</sup> Keeping Title VII constantly in mind is how to make sense of the Court’s complaints that the Connecticut statute is “absolute and unqualified,” or that “the statute takes no account of the [needs] of the employer or . . . other employees.”<sup>59</sup> Title VII is fine, but Connecticut’s statute goes too far.

But why does it go too far? The Court does not say, and the opinion comes off as intuitional and impressionistic. Here *Caldor* is reminiscent of the Court’s case in *Lynch v. Donnelly*<sup>60</sup>—another Burger opinion from just the year before.<sup>61</sup> *Lynch* had upheld a government-sponsored crèche,

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54. 374 U.S. 398 (1963).

55. *Id.* at 409.

56. See *supra* notes 39–40 and accompanying text (discussing this point).

57. See, e.g., Brief for Caldor, Inc. at 10, *Caldor*, 472 U.S. 703 (No. 83-1158), 1984 WL 566033, at \*10; Oral Argument at 3:59, *Caldor*, 472 U.S. 703 (No. 83-1158), <https://www.oyez.org/cases/1984/83-1158>; 472 U.S. at 711–12 (O’Connor, J., concurring).

58. 42 U.S.C. § 2000e(j) (2018).

59. *Caldor*, 472 U.S. at 709.

60. 465 U.S. 668 (1984).

61. The influence of Chief Justice Burger on the Religion Clauses in this era must be taken seriously. From the beginning of the 1980s to when he leaves the Court, Chief Justice Burger ends up

concluding that the crèche did not advance religion because it was secular (or least mostly secular). This conclusion was reached breezily, as if Chief Justice Burger could not see how anyone could disagree. *Caldor* has the same feel. Chief Justice Burger says this statute advances religion. The reasons are too obvious to explain.

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*Thornton v. Caldor* looks different thirty-five years later. The main opinion lacks the analytical detail and clarity modern readers expect in Supreme Court opinions. Much in *Thornton v. Caldor* is undoubtedly right, but there are also reasons to treat the case warily and with caution. *Thornton v. Caldor* takes a lot of things for granted. We should not take those things for granted; we should not take *Thornton v. Caldor* for granted either.

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writing many of the Supreme Court's most important opinions involving the Religion Clauses—he writes the majority opinion, for example, in *Thomas v. Review Board*, 450 U.S. 707 (1981), *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), *United States v. Lee*, 455 U.S. 252 (1982), *Bob Jones University v. United States*, 461 U.S. 574 (1983), *Marsh v. Chambers*, 463 U.S. 783 (1983), *Lynch*, 465 U.S. 668, *Caldor*, 472 U.S. 703, and *Bowen v. Roy*, 476 U.S. 693 (1986).