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Recent Cases

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RECENT CASES

Constitutional Law—The Establishment Clause—The Reasonable Accommodation Rule Mandates Unconstitutional Preferences for Religious Workers in Title VII Actions

I. Facts and Holding

Plaintiff,[1] discharged from his employment for failure to comply with the union security provisions[2] of a collective bargaining agreement signed by his employer and union,[3] brought suit to enjoin enforcement of the provisions and to obtain reinstatement to his former position. Plaintiff contended that because his religious beliefs forbade support of any labor union,[4] his employer's failure to accommodate these beliefs constituted religious discrimination in violation of Title VII of the Civil Rights Act of 1964[5] and the free exercise clause.[6] Defendants maintained that they were not required

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1. Plaintiff Kenneth Yott began his employment with North American Rockwell in 1947 and held the position of office equipment mechanic at the time of his dismissal.

2. The "union security" provision required either membership in the union or the payment of dues to the union by those who did not want to obtain active membership. Yott v. North American Rockwell, 428 F. Supp. 763, 764 (C.D. Cal. 1977). The Supreme Court has approved the use of union security clauses as a proper exercise of congressional power under the commerce clause. Union security clauses are viewed as a means of assuring stable labor relations on the job site. "Free riders" are discouraged under the compulsory provisions so that all who receive the benefits of the collective bargaining agreement pay their fair share. *See* Railway Employees' Dept. v. Hanson, 351 U.S. 225 (1956). *See generally* Morris, The Developing Labor Law 697-725 (1970).

3. On October 6, 1968, defendants North American Rockwell Corporation and Local 887, UAW, amended their collective bargaining agreement to require all employees to pay union dues. Plaintiff, after refusing to abide by the union security provision, was discharged on January 14, 1969. Yott v. North American Rockwell Corp., 501 F.2d 398, 399 (9th Cir. 1974).

4. At trial defendants conceded that Yott sincerely held religious beliefs prohibiting his compliance with the union security agreement. 428 F. Supp. at 765. The IRS had denied his church tax exempt status, but in Morey v. Riddell, 205 F. Supp. 918 (S.D. Cal. 1962), the court held that church members were entitled to deduct contributions.

5. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 253 (codified at 42 U.S.C. §§ 2000e to 2000e-15 (1970), *as amended by* 42 U.S.C. §§ 2000e to 2000e-17 (Supp. IV 1974)). In pertinent part, 42 U.S.C. § 2000e-2(c) (1970) provides:

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

6. "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . ." U.S. Const. amend. I.

to accommodate Plaintiff's religious precepts under the 1964 Civil Rights Act.[7] The United States District Court for the Central District of California dismissed the complaint for failure to state a claim. On appeal, the Court of Appeals for the Ninth Circuit held that the reasonable accommodation rule as incorporated into the 1972 Randolph Amendment to Title VII[8] required an accommodation unless either defendant employer or defendant union would suffer an undue hardship.[9] On remand, Defendants argued that the

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7. The gist of Defendants' argument was that the pertinent guidelines issued by the Equal Employment Opportunity Commission (EEOC), which Plaintiff contended required his employer to accommodate his religious beliefs to his employment, was an *ultra vires* exercise of the Commission's statutory authority and inconsistent with the thrust of the 1964 Civil Rights Act. The guidelines in question provided:

Part 1605—Guidelines On Discrimination Because Of Religion.

§ 1605.1 Observance of the Sabbath and other religious holidays

(a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and as a consequence, do not work on such days.

(b) The Commission believes that the duty not to discriminate on religious grounds required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such an accomodation can be made witbout undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath Observer.

(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodation to the religious needs of the employee unreasonable.

(d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied practices of the American people.

29 C.F.R. § 1605.1 (1974).

8. *See* notes 52-53 *infra* and accompanying text.

9. The Ninth Circuit reversed the district court decision and remanded the case to resolve the question whether North American Rockwell and the union could make a reasonable accommodation to Yott's religious beliefs without undue hardship. The court suggested that the district court apply a "business necessity" test to determine whether an accommodation was required. 501 F.2d 398, 402 n.6 (1974); *see* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (discussion of the "business necessity" test). Additionally, relying principally on Linscott v. Millers Falls Co., 440 F.2d 14 (1st Cir.), *cert. denied*, 404 U.S. 872 (1971), the Ninth Circuit panel adopted a balancing test in dismissing Yott's free exercise claim. Following language in *Linscott*, the Court found that Yott's alternative was "not destitution but merely employment in a non-union shop." The Court found ample authority for the proposition that union security clauses are constitutional when "minor infringements on First Amendment rights are concerned." 501 F.2d at 403-04 (1974). *See* International Ass'n of Machinists v. Street, 367 U.S. 740 (1961); Railway Employees' Dept. v. Hanson, 351 U.S. 225 (1957); Gray v. Gulf, M. & O.R.R., 429 F.2d 1064 (5th Cir. 1970). *See generally* Clark,

provision of the Randolph Amendment requiring an employer "to reasonably accommodate" an employee's religious beliefs violated the establishment clause of the first amendment.[10] The District Court for the Central District of California, *held*, judgment for the Defendants. By attempting to promote the free exercise of religion through the requirement that an employer reasonably accommodate the religious beliefs and practices of his employees, the Randolph Amendment fosters a governmental advancement of religion in violation of the establishment clause of the first amendment. *Yott v. North American Rockwell Corp.*, 428 F. Supp. 763 (C.D. Cal. 1977).

II. Legal Background

The inherent conflict[11] between the free exercise clause and the establishment clause has never been examined thoroughly by the Supreme Court.[12] Each clause has been interpreted separately,[13] giving rise to independent but paradoxical constitutional doctrines. Both provisions, however, have been conceived by the Court as constructing a strict "wall of separation"[14] between religion and government. In *Everson v. Board of Education,*[15] one of the first cases to

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Guidelines for the Free Exercise Clause, 83 Harv. L. Rev. 327 (1969); Gianella, *Religious Liberty, Non-establishment, and Doctrinal Development,* 80 Harv. L. Rev. 1381 (1967).

10. *See* note 6 *supra.*

11. Government can neither pass laws that provide benefits to religion nor pass laws that provide penalties to religion. Accordingly, an absolute prohibition of any benefits to religion would tend to penalize religion while an absolute prohibition of any penalties to religion would tend to benefit religion. Various theories have been advanced to reconcile this conflict. One theory views the two clauses as guaranteeing an individual's freedom to choose a particular religious belief and to practice the belief unfettered by governmental action. *See* D. Manzullo, Neither Sacred Nor Profane 5 (1973). Another theory views the clauses as creating a unifying principle of neutrality to religion, rendering the Constitution "religion-blind." *See* Kurland, *Of Church and State and the Supreme Court,* 29 U. Chi. L. Rev. 1 (1961). *But see* Pfeffer, Book Review, 15 Stan. L. Rev. 389 (1963), in which Leo Pfeffer illustrates the broad effect of Kurland's "religion-blind" thesis.

12. *But see* Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970); Sberbert v. Verner, 374 U.S. 398, 413-17 (1963) (Stewart, J., concurring); Abington School Dist. v. Schempp, 374 U.S. 203, 317 (1963) (Brennan, J., dissenting). *See generally* Pfeffer, *The Supremacy of Free Exercise,* 61 Geo. L.J. 1115 (1973); Schwarz, *No Imposition of Religion and Establishment Clause Values,* 77 Yale L.J. 692 (1968).

13. Although there is overlap and conflict between the two clauses, the Court traditionally has analyzed religion cases based on either the establishment clause or free exercise clause. *See* Kurland, *supra* note 11. *But see* Gillette v. United States, 401 U.S. 437 (1970), in which the Court recognized that both an "establishment clause" claim and a "free exercise" claim had independent validity.

14. The "wall of separation" metaphor came from tbe writings of Jefferson, who viewed the religion clauses of the first amendment to have built a wall of separation between church and state. Reynolds v. United States, 98 U.S. 145, 164 (1878).

15. 330 U.S. 1 (1947).

discuss the Supreme Court's view of the establishment clause,[16] the Court construed the clause to preclude any interaction between government and religion and to invalidate any laws that "aid one religion, aid all religion, or prefer one religion over another."[17] Although the *Everson* Court enunciated an absolute prohibition of government aid to religion, it nevertheless upheld a New Jersey statute providing a bus subsidy to all school children, including those attending parochial schools, concluding that the application of the legislation merely provided a general program for the transportation of pupils to and from accredited schools.[18] By approving such a scheme, the Court demonstrated that indirect benefits could accrue to religious organizations in the course of ordinary government functions, such as providing school transportation, so long as the government remained even-handed in its dealings with those organizations.[19] Thus the *Everson* Court appears to have relied on the princi-

16. *Everson* became the touchstone of future establishment clause cases. Prior cases raising establishment clause issues did not engender any substantive comment by the Court. *See* Church of the Holy Trinity v. United States, 143 U.S. 457 (1892) (rejecting an establishment clause argument because "this is a religious nation"); Bradfield v. Roberts, 175 U.S. 291 (1899) (Congressional grant to a religiously-affiliated hospital did not violate the establishment clause because the hospital was a "secular corporation"); Quick Bear v. Lepp, 210 U.S. 50 (1908) ("private transaction" outside the scope of the establishment clause); Arver v. United States, 245 U.S. 366 (1918) ("unsoundness" of an establishment clause argument precluded further evaluation); Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930) (decided before establishment clause incorporated into fourteenth amendment); Cantwell v. Connecticut, 310 U.S. 296 (1940) (establishment clause incorporated into fourteenth amendment but case decided on free exercise grounds). *See generally* Kurland, *supra* note 11 (survey of these early cases).

17. 330 U.S. at 15. Mr. Justice Black, writing for the majority, viewed the establishment clause as a reaction to the centuries of religious strife and persecution in England fostered by "established sects determined to maintain their absolute political and religious supremacy." *Id.* at 9-11. *But see* MURRAY, WE HOLD THESE TRUTHS 58 (1960), advocating that "Every historian who has catalogued the historical factors which made for religious liberty and separation of Church and State in America would doubtlessly agree that these institutions came into being under the pressure of their necessity for the public peace." Murray isolates four factors creating this necessity: (1) religious agnosticism in revolutionary America; (2) diversity of denominations among the believers; (3) economics—"persecution and discrimination were as bad for business affairs as they were for the affairs of the soul;" and (4) increasing religious freedom in England. *Id.* at 58-59. Kurland also has stated in this regard, "Like most commands of our Constitution, the religion clauses of the first amendment are not statements of absolute principles. History, not logic, explains their inclusion in the Bill of Rights; necessity, not merely morality, justifies their presence there." Kurland, *supra* note 11, at 2. *But see* Everson v. Board of Educ., 330 U.S. at 33-43 (Jackson, J., dissenting) (arguing that for Jefferson and Madison religious freedom was the crux of the struggle for freedom in general).

18. *See* 330 U.S. at 17.

19. *See id.* at 17-18. Justice Jackson's dissent, however, viewed the majority's reasoning as being "utterly discordant" with its conclusion, "unconsciously giving the clock's hand a

ple that the first amendment merely requires the state to be neutral in its relations with groups of religious believers, but it does not require the state to be their adversary.

The Court's adoption of the principle that some laws benefiting religion would not necessarily promote religion led the Court to search for a test to determine when the establishment clause prohibition would be triggered. In a series of cases dealing with religious programs in public schools,[20] Sunday closing laws,[21] and government financial aid to parochial schools,[22] the Court formulated a three-part test for measuring impingements upon the establishment clause guarantee.[23] In *Abington School District v. Schempp*[24] the Court articulated the first two prongs of the tripartite test and struck down a Pennsylvania statute requiring Bible reading at the opening of each school day. The Court gleaned from its prior formulations on the establishment clause the constitutional requirement that legislation have a "secular legislative purpose and a primary effect that neither advances nor inhibits religion."[25]

The Court rarely has invalidated legislation by employing the requirement that a particular government action have a secular legislative purpose. The primary case in which the Court found an

backward turn." *Id.* at 19 & 28. Justice Rutledge, witb wbom Justices Frankfurter, Jackson, and Burton agreed, concluded tbat history mandated tbe interpretation that tbe "[First] Amendment forbids any appropriation, large or small, from public funds to aid or support any and all religious exercises." *Id.* at 41.

20. Abington Scbool Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

21. McGowan v. Maryland, 366 U.S. 420 (1961); Two Guys, Inc. v. McGinley, 366 U.S. 582 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); Gallagher v. Crown Kosber Super Mkt., 366 U.S. 617 (1961).

22. Roemer v. Board of Pub. Works, 426 U.S. 736 (1976); Meek v. Pittinger, 421 U.S. 349 (1975); Hunt v. McNair, 413 U.S. 734 (1973); Sloan v. Lemon, 413 U.S. 825 (1973); Committee for Public Educ. v. Nyquist, 413 U.S. 756 (1973); Levitt v. Committee for Public Educ., 413 U.S. 472 (1973); Tilton v. Richardson, 403 U.S. 672 (1971); Lemon v. Kurtzman, 403 U.S. 602 (1971); Board of Educ. v. Allen, 392 U.S. 236 (1968). *See generally* Freund, *Public Aid to Parochial Schools,* 82 HARV. L. REV. 1680 (1969); Piekarski, *Nyquist and Public Aid to Private Schools,* 58 MARQ. L. REV. 247 (1975); Note, *Private Colleges, State Aid, and the Establishment Clause,* 1975 DUKE L.J. 976.

23. Prior to its development of the three-part establishment clause test, the Court sought to ensure government neutrality by focusing on tbe degree of permissible interaction between churcb and state. *See, e.g., Zorach v. Clauson,* in wbich tbe Court stated that "The constitutional standard is tbe separation of Cburcb and State. The problem, like many problems in constitutional law, is one of degree." 343 U.S. 306, 314. *See also id.* at 325 (Jackson, J., dissenting).

24. 374 U.S. 203 (1963).

25. *Id.* at 222. The *Schempp* Court also indicated that unlike the standard for free exercise violations, there need be no showing of coercion to violate tbe establisbment clause. *Id.* at 223.

impermissible sectarian purpose was *Epperson v. Arkansas*,[26] which struck down a statute prohibiting school teachers from teaching the theory of evolution. Noting that fundamentalist sectarian conviction was the sole force behind the law's enactment, the Court attributed to the law the purpose of proscribing a body of knowledge because it conflicted with established religious doctrines.[27] Typically, however, the Court has rejected challenges to state statutes that come before it for review by finding a nonsectarian purpose behind the legislation. In *McGowan v. Maryland*,[28] for example, the Court upheld the constitutionality of a Sunday closing law, reasoning that although such laws originally were motivated by religious ideals, they recently had assumed a secular function. Thus the Court has recognized certain secular purposes behind a law that otherwise appears to have religious motivations.

In contrast to the purpose prong of the Supreme Court's test for scrutinizing alleged establishment clause violations, the primary effect prong of the test frequently has been employed to strike down state legislation designed to provide financial aid to parochial schools and to inject religious observance and teaching into public schools. As in *Everson*, the Court's analysis of the primary effect of a law usually focuses upon whether the government has maintained the requisite degree of neutrality toward religion. In cases concerning state aid to parochial schools, neutrality most often is found when the secular and religious functions of an institution can be distinguished sufficiently.

In *Board of Education v. Allen*[29] the Court approved a plan for lending textbooks to private school children because the books were sufficiently related to the school's secular functions, thus ensuring that the loans would not advance an establishment of religion. The Court, however, has invalidated plans for tuition reimbursements for private school children and salary supplements for private school teachers because of a lack of neutrality. In *Committee for Public Education v. Nyquist*,[30] for example, a tuition reimbursement pro-

26. 393 U.S. 97 (1968).
27. *Id.* at 107.
28. 366 U.S. 420 (1961).
29. 392 U.S. 236 (1968). The *Allen* Court applied the *Schempp* rule to a statute that provided textbook loans without charge to both public and private schools. The Court drew parallels with the *Everson* bus subsidy, emphasized that the loan benefited all students, and acknowledged the valuable role private education has played in American life.
30. 413 U.S. 756 (1973); *accord*, Hunt v. McNair, 413 U.S. 734 (1973); Sloan v. Lemon, 413 U.S. 825 (1973).

gram failed the effect criterion because such financial aid, unlike busing, textbooks, and fire and police protection, was not a benefit bestowed "in common to all citizens."[31] Despite the program's secular purpose of providing a quality education for a greater number of its citizens, the Court prohibited the state from endorsing such a program because it effected an advancement of religion by operating as a reward for parents who sent their children to sectarian schools.[32] The *Nyquist* Court also invalidated direct grants to private schools for the maintenance and repair of facilities on the ground that the plan placed no restrictions on how the grants were to be applied and therefore did not distinguish sufficiently between religious and secular facilities.[33] In concentrating on the effect prong of the three-part test, the Court indicated that it had refined the "primary effect" criterion to invalidate laws having the "direct and immediate" effect of advancing religion.[34] Whether defined in terms of "primary" or "direct and immediate," the effect prong of the tripartite test mandates government neutrality, and the Court has adopted the position that neutrality does not mean only that government must not prefer one religion over another, but that it must stand apart from religion in general.

The Court's policy of benevolent neutrality toward religious exercise led it to consider an additional establishment clause criterion. Recognizing its own prior inconsistencies in establishment clause cases, the Court in *Walz v. Tax Commission*[35] indicated that the policy of benevolent neutrality requires an accommodation of the conflicting religion clauses of the first amendment. To achieve this accommodation, the Court added a third prong to its evolving tripartite test, evaluating both the administrative entanglements to which the supervision of a program dealing with religious organizations can give rise and the political divisiveness that often accompanies a program involving aid to, and thus regulation of, religious institutions. The question of excessive entanglement is directly related to the primary effect criterion[36] as demonstrated by *Walz*. Although the effect of granting tax exemptions to church property

31. 413 U.S. at 781-82.

32. *See id.* at 791.

33. *Id.* at 782.

34. *Id.* at 783-85 n.39; *see* note, *Establishment Clause Analysis of Legislative and Administrative Aid to Religion,* 74 COLUM. L. REV. 1175, 1181-82 (1974).

35. 397 U.S. 664 (1970).

36. For a discussion of the interplay between the effect and entanglement analyses, see Note, *supra* note 34.

was beneficial to religion, the Court recognized that the alternative of denying such exemptions would produce an excessive and continuing surveillance of religion leading to an impermissible degree of entanglement.[37]

The entanglement criterion was developed further in *Lemon v. Kurtzman*,[38] in which the Court struck down legislation providing salary supplements to parochial school teachers on the ground that the strict government scrutiny required by the law to ensure a secular primary effect could engender entanglements of a continuing and excessive nature. The Court once again focused on the concept of neutrality toward religion, recognizing that programs providing aid to religious institutions held a potential for political and social divisiveness that would accompany each yearly appropriation.[39] Because one of the purposes of the establishment clause is to remove religious controversy from political and governmental settings, a law calling for government scrutiny of religious organizations approaches the realm of unconstitutional establishment of religion.

Although the Supreme Court presently adheres to the three-pronged test enunciated in *Nyquist* and the lower federal courts consider it to be the proper test to apply in establishment clause cases,[40] it is questionable whether the criteria can be mechanically applied to all legislation and still provide a broad scrutiny of all potential promotions of religion.[41] Since most legislation will purport to have a clearly secular purpose in order to circumvent the purpose prong of the test, judicial scrutiny under this criterion will be limited. Similarly, use of the entanglement prong is limited because of the difficulty in determining when government contact with religion becomes an entanglement. Moreover, the Court has never explained satisfactorily its recasting in *Nyquist* of primary effect as "direct and immediate."

The application of the tripartite test is complicated further by claims arising under the free exercise clause. Government initiatives to promote the free exercise of religion often have been attacked as unconstitutional establishments of religion, and the tension between the two clauses suggests that there cannot be absolute separa-

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37. 397 U.S. at 674.

38. 403 U.S. 602 (1971).

39. *Id.* at 623.

40. *See, e.g.*, Kleid v. Board of Educ., 406 F. Supp. 902, 904 (W.D. Ky. 1976); Hardison v. Trans World Airlines, Inc., 527 F.2d 33, 43 (8th Cir. 1975), *rev'd on other grounds*, 97 S. Ct. 2264 (1977).

41. *See* Note, *supra* note 34. *See also* 62 VA. L. REV. 237, 251-52 (1976).

tion between church and state. In upholding New York's tax exemption for property used solely for religious purposes, the Court in *Walz* indicated that the policy of benevolent neutrality required some interplay between government and religion.[42] Also relying upon a justification of neutrality, the Court in *Sherbert v. Verner*[43] reversed a state's denial of unemployment benefits to a discharged employee who refused to work on Saturdays because of her religious beliefs. Although the Court recognized the attendant establishment clause problems in its decision, the majority explained that it was not fostering Sabbatarian religions but merely upholding the governmental obligation of neutrality in the face of religious differences.[44] The concurring and dissenting opinions, however, indicated that the majority's decision compelled the state to promote certain religious beliefs and thus to impinge upon the establishment clause guarantee.[45]

One area in which the Court has been forced to confront the conflict between the two clauses is the draft exemption given conscientious objectors. The exemption is not constitutionally compelled, and its constitutional validity has been challenged on the grounds that it has the effect of benefiting those religions whose tenets coincide with the exemption. In *Gillette v. United States,*[46] however, the Court rejected this challenge and upheld the constitutionality of the draft exemption. Although the Court conceded that the law had the effect of providing a draft exemption only to those who opposed war in any form by reason of religious training, it held that the exemption reflected a secular legislative purpose to provide for a workable draft law that accommodated individual free exercise.[47] In reaching this holding, the Court appeared equally persuaded by the overriding government interest in an effective conscription statute.[48]

The enactment of the Civil Rights Act of 1964 has required the lower federal courts to confront the conflict between the religion clauses that faced the Supreme Court in the draft exemption cases.

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42. 397 U.S. at 674-77.
43. 374 U.S. 398 (1963).
44. *Id.* at 409.
45. In his concurring opinion, Justice Douglas wrote, "For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." *Id.* at 412. Justice Harlan, in dissent, wrote, "I cannot subscribe to the conclusion that the State is constitutionally *compelled* to carve out an exception to its general rule of eligibility in the present case." *Id.* at 423.
46. 401 U.S. 437 (1971).
47. *Id.* at 455-57.
48. *Id.* at 462.

Title VII of the Act makes unlawful employment practices grounded upon consideration of religion and requires remedial action to halt such discrimination in the commercial employment sector.[49] The EEOC, created by the Act to enforce compliance with the statute and to promulgate administrative guidelines, has issued guidelines requiring an employer "to reasonably accommodate" the religious beliefs of his employees in scheduling workshifts.[50] Congress incorporated the reasonable accommodation guidelines promulgated by the EEOC into Title VII by enacting the Equal Employment Opportunity Act of 1972.[51] The Act included the Randolph Amendment[52] and added section 2000e(j) to Title VII, which defined religion as including all aspects of religious observance and practice and required that an employer demonstrate that he could not accommodate an employee's religious practices without undue hardship.[53]

49. 42 U.S.C. §§ 2000e to 2000e-15 (1970), *as amended by* The Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e to 2000e-17 (Supp. IV 1974). Congress enacted Title VII as an exercise of its commerce clause power. 110 CONG. REC. 1528 (1964) (remarks of Rep. Celler). *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964). The primary motivation for Title VII appears to have been to outlaw racially discriminatory employment practices—"the glaring . . . discrimination against Negroes which exists throughout our nation." H.R. REP. No. 914, 88th Cong., 1st Sess. 18 (1963). *See generally Symposium—1964 Civil Rights Act, Title VII, Equal Employment Opportunity,* 7 B.C. INDUS. & COM. L. REV. 413 (1964).

50. *See* Note, *Religious Discrimination in Employment: The 1972 Amendment—A Perspective,* 3 FORDHAM URB. L.J. 327 (1975). The EEOC issued initial guidelines in 1966 but the 1967 guidelines were the first to place an affirmative duty on the employer to accommodate the religious needs of his employees. *Compare* 31 Fed. Reg. 8370 (1966) *with* 29 C.F.R. § 1605.1 (1967).

51. The Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e(j) (Supp. IV 1974) (amending 42 U.S.C. § 2000e (1970)). *See* Note, *supra* note 50.

52. The amendment is named after its sponsor, Senator Randolph of West Virginia, who said:

> I say to the distinguished chairman of the Labor and Public Welfare Committee, who manages this bill, that there has been a partial refusal at times on the part of employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days. So there has been, because of understandable pressures, such as commitments of a family nature and otherwise, a dwindling of the membership of some of the religious organizations because of the situation to which I have just directed attention.
>
> My own pastor in this area, Rev. Delmer Van Horne, has expressed his concern and distress that there are certain faiths that are having a very difficult time, especially with the younger people, and understandably so, with reference to a possible inability of employers on some occasions to adjust work schedules to fit the requirements of the faith of some of their workers.

118 CONG. REC. 705 (1972).

53. 42 U.S.C. § 2000e(j) (Supp. IV 1974) provides: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrated that he is unable to reasonably accommodate to an employee's or prospective em-

Challengers of the Randolph Amendment have attacked section 2000e(j) as effecting an unconstitutional establishment of religion.[54] The first of the challenges to reach a federal appeals court on this issue was *Cummins v. Parker Seal Co.*,[55] in which the Sixth Circuit upheld the constitutionality of the reasonable accommodation rule under the *Nyquist* three-pronged test. Relying on *Gillette*, the court reasoned that the rule was designed to put teeth in the anti-discrimination laws and stated that it was constitutional for Congress to attempt to accommodate free exercise values through affirmative action.[56] Applying the effect prong of the test, the *Cummins* court found that the rule neither advanced nor inhibited religion but merely served to inhibit religious discrimination and to guarantee reasonable job security.[57] The court did not view as significant any incidental benefits flowing to particular religious organizations since the primary effect of the rule was not to advance religion.[58] Finally, the court found that the rule did not foster excessive government entanglement with religion, noting that its enforcement would require little contact between government and religion.[59]

In a strong dissent, Judge Celebrezze concluded that the reasonable accommodation rule had both a nonsecular purpose and a primary effect of advancing religion. The dissent found that the purpose of the rule was to benefit certain religions and that the rule's effect was neither even-handed in its operation nor neutral in its primary impact.[60] The dissent argued that elimination of the rule would lead to a proper "hands-off" policy consistent with the first amendment.[61] Moreover, the dissent noted that an employee wrongfully discharged by his employer because of his religion still would have a remedy under Title VII.[62] Although the elimination of the

ployee's religious observance or practice without undue hardship on the conduct of the employer's business."

54. *See, e.g.*, Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975), *aff'd by an equally divided Court*, 429 U.S. 65 (1976); Hardison v. Trans World Airlines, Inc., 375 F. Supp. 877 (W.D. Mo. 1974), *aff'd in part, rev'd in part*, 527 F.2d 33 (8th Cir. 1975), *rev'd on other grounds*, 97 S. Ct. 2264 (1977); Jordan v. North Carolina Nat'l Bank, 399 F. Supp. 172 (W.D.N.D. 1975).

55. 516 F.2d 544 (6th Cir. 1975), *aff'd by an equally divided Court*, 429 U.S. 65 (1976).

56. 516 F.2d at 552.

57. *Id.* at 553.

58. *Id.*

59. *Id.*

60. *Id.* at 556-59 (Celebrezze, J., dissenting).

61. *Id.* at 560.

62. *Id.* at 559-60.

rule might require sacrifices by those who stood to benefit by an accommodation, in the dissent's view, the rule could not survive the constitutional challenge.[63]

The *Cummins* panel struggled with the inherent conflict presented by the absolute language of the two religion clauses. If Congress passes legislation promoting the free exercise of religion, those laws will be subject to challenges based on the establishment clause. Although the *Walz* Court noted that no perfect or absolute separation is possible between the conflicting clauses, the question remains whether Congress can affirmatively seek to promote freedom of religion while respecting the principle of neutrality toward religion embedded in the first amendment.[64]

III. The Instant Opinion

Reaching the establishment clause issue after remand from the Ninth Circuit, the instant court found section 2000e(j) to be an unconstitutional enactment in view of the first amendment's absolute prohibition of any law respecting an establishment of religion. The affirmative accommodation mandate of section 2000e(j), according to the court, did not comport with the principle of government neutrality toward religion underlying the first amendment.[65] By adopting such a stance, the court reached what it termed a simplistic resolution: the reasonable accommodation rule abridges the establishment clause prohibition that Congress enact no law respecting an establishment of religion by compelling an employer

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63. *Id.* at 560. In conclusion, the dissent reasoned,

> Our beritage has not withered because of the constitutional requirement that Government keep 'hands off' religion. The heavy hand of Government may not be raised against or in favor of religion. As Judge Learned Hand wrote,
>
> > The First Amendment protects one against action by the government, though even then, not in all circumstances; but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities. . . . We must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life; and we can hope for no reward for the sacrifices this may require beyond our satisfaction from within, or our expectations of a better world.

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

64. On June 16, 1977, tbe Supreme Court decided the case of Trans World Airlines v. Hardison, 97 S. Ct. 2264 (1977), holding that TWA was not required to accommodate the religious beliefs of its employee, a Sabattarian, because it would involve more than a *de minimis* hardship, which the Court equated with an "undue hardship." Thus, by adopting a novel statutory interpretation, the Court avoided the more difficult constitutional issue. Writing in dissent, Justice Marshall apparently would have decided the case on the grounds he advanced in *Gillette*. *Id.* at 2277-83.

65. 428 F. Supp. at 765.

to provide preferences to his workers solely on the basis of their religious beliefs.[66] Although the court did not discuss the requirements of the three-part test, it rejected the rationale advanced by the Sixth Circuit in *Cummins* that the purpose of the reasonable accommodation rule was "to put teeth in the existing prohibition of religious discrimination"[67] and not to promote a sectarian end. The court characterized such analysis as clever sophistry since the 1964 Civil Rights Act already had provided adequate remedies for religious discrimination in employment,[68] and agreed with the *Cummins* dissent that the real purpose of the rule was to provide preferential treatment to those whose religious precepts must be accommodated to their employment.[69] Additionally, the court found that the *Cummins* court incorrectly relied on *Gillette* because in that case a compelling government interest in assuring a workable conscription law prevailed over any attendant promotions of religious interests.[70] The court also found the government interest in the instant case less compelling than the interest involved in the Sunday closing law cases.[71] Accordingly, the court held that the accommodation requirement, in the absence of any showing of discriminatory intent or practice, lacked a legitimate secular purpose in violation of the establishment clause prohibition.[72]

IV. COMMENT

The instant decision is illustrative of a lower court's struggle to reconcile the mandate of the establishment clause with Title VII's religious accommodation requirement. The *Everson* Court developed the broad principle that government cannot pass laws "which aid one religion, aid all religions, or prefer one religion over another."[73] The Court arrived at this principle through a consideration of the historical evils of government sponsorship of, financial support of, and active involvement with religion[74] that the clause was designed to eradicate. As the instant court correctly found, such an approach militates against the constitutionality of the reasonable

66. *Id.* at 766.
67. 516 F.2d at 552.
68. 428 F. Supp. at 766.
69. *See id.*
70. *Id.*
71. *Id.* at 767.
72. *See id.* at 766-67.
73. 330 U.S. at 15.
74. *See id.* at 8-15.

accommodation rule.[75] Congress satisfied its duty to protect the free exercise of religion by declaring religious discrimination unlawful in the pre-amended version of Title VII. The Randolph Amendment, however, actively promotes free exercise by favoring an identifiable class of beneficiaries whose accommodated religious precepts conflict with nondiscriminatory employment practices. Such government accommodation clearly falls outside the scope of benign neutrality, the major theme of establishment clause cases since *Everson*.

The constitutionality of the reasonable accommodation rule remains uncertain, however, until the Supreme Court provides a satisfactory framework for analyzing establishment clause challenges to the amendment's affirmative action requirement. As applied in the instant case, the tripartite test fails to provide the broad scrutiny of government contact with religion contemplated by the *Nyquist* Court to filter out unconstitutional promotions of religion.[76] The purpose prong of the test has been rendered illusory by legislation clothed with an express secular purpose and by the courts' willingness, as *Cummins* illustrates, to accept the articulated nonsecular purposes of legislation before them for review.[77] The entanglement criterion, which evolved primarily from a line of cases involving financial aid to religious institutions,[78] may pose difficulties when applied to the nonfinancial benefits accruing to religious practices as a result of the reasonable accommodation rule.[79] Consequently, the only prong of the three-part test that accurately assesses the encroachments upon the establishment clause guarantee presented by impermissible nonfinancial benefits to religion, and that cannot be circumvented by clever legislative drafting, is the effect criterion. Applying the *Nyquist* refinement[80] of that test to the

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75. *See* 428 F. Supp. at 766-67.

76. The *Nyquist* test has been described as "concentric circles forming a three-stage filter, each trapping progressively smaller particles of religious effect." Note, *A Workable Definition of the Establishment Clause: Allen v. Morton Raises New Questions*, 61 GEO. L.J. 1461, 1462 n.8 (1974).

77. *See* 516 F.2d at 552. The *Cummins* court found that the reasonable accommodation rule was designed "to put teeth in the existing prohibition against religious discrimination." *Id.; see* note 52 *supra*. *But see* Note, *supra* note 34, at 1180-81 (arguing that purpose scrutiny has re-emerged as an incident of the effect test).

78. *See* notes 29-33 *supra* and accompanying text.

79. In *Nyquist* the Court indicated that most establishment clause cases involve the relationship between religion and education. 413 U.S. at 772. It would appear, therefore, that the *Nyquist* test is best suited for analyzing financial subsidies to religion. *See also* Note, *supra* note 34, at 1186, in which the author concludes, "it is unlikely that the entanglement test reviews anything more than the extent of supervisory administrative contacts."

80. *See* 413 U.S. at 783-85 n.39. *But see Meek v. Pittinger*, in which the Court appears to adhere to the "primary" effect language. 421 U.S. at 358.

reasonable accomodation rule demonstrates that the rule's direct and immediate effect is to promote the religious interests of those who demand accommodation of employment practices to their religious beliefs.

The instant court's holding that the reasonable accommodation rule violates the first amendment perhaps can be attributed to its analysis of *Gillette*,[81] a pre-*Nyquist* case, in which the Supreme Court upheld a federal statute that provided nonfinancial benefits to certain religious interests. Although the *Gillette* Court focused on the secular purpose of the conscientious objector exemption,[82] it implicitly recognized that a slight effect of promoting or inhibiting religious interests, which argnably arose from the exemption provided by the conscription laws, must yield to a compelling government interest, such as conscription for national defense purposes.[83] Essentially, the Court adopted an analysis similar to that advanced in the Sunday closing law cases, in which a state's interest in providing a uniform day of rest for its citizens outweighed the small degree of religious promotion effected by the closing statutes.[84] Both *Gillette* and the Sunday closing law cases thus suggest an alternative to the mechanical tripartite test, a balancing test similar to that employed in free exercise challenges.[85] In the area of affirmative accommodation to religion, direct and immediate promotions of a religious interest should be justified only if the government demonstrates a compelling interest. Such an approach, coupled with a consideration of competing free exercise values, would enable the courts to reconcile the tension between the religion clauses and would appraise more adequately the impact of government action on the neutrality principle in light of increased societal demands for affirmative government action.[86]

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81. 428 F. Supp. at 766.

82. By employing a relatively narrow primary effect analysis, the *Gillette* Court focused on the secular purpose of the conscientious objector exemption. The "direct and immediate" effect of the exemption, however, would appear to promote certain religious beliefs. A better aproach would be to recognize the promotional effects in favor of certain religions and weigh these against compelling government interests.

83. The *Gillette* Court referred to the strong government interests in a workable conscription statute while discussing the free exercise claim. 401 U.S. at 461-62. If one accepts the neutrality principle as reconciling the conflicting religion clauses, however, then it follows that a strong government interest should prevail over an advancement, as well as an inhibition, of religion.

84. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420, 449-51 (1961).

85. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963). *See also* note 9 *supra*.

86. Of course, direct financial benefits to religious interests should be a violation of the establishment clause, but the value of the *Nyquist* standard within its particular setting is its ability to distinguish financial benefits earmarked for religious interests from those that

The principle that the government must not only refrain from providing special preference to a particular religion, but that it also must stand apart from religion in general is abridged once the government seeks to provide sustenance to religious interests. Government neutrality is preserved, however, when the government merely provides fertile ground on which religious interests can thrive independently. Because state-imposed employment accommodation of religious precepts creates proselytizing opportunities[87] upon which religious interests flourish and because there is no overriding government interest in requiring such accommodation, Title VII's Randolph Amendment transgresses establishment clause prohibitions.

JOHN P. KELLY

Torts—Occupational Safety and Health—Employee's Common Law Right to a Safe Workplace Compels Employer to Eliminate Unsafe Conditions

I. FACTS AND HOLDING

Plaintiff, an employee of defendant utility company,[1] brought suit to enjoin defendant from permitting cigarette smoking in plaintiff's work area. Plaintiff contended that the passive inhalation of smoke and gaseous by-products of burning tobacco was deleterious to her health[2] and that defendant had breached its duty to provide

serve secular interests (*e.g.*, religious training as opposed to arts and sciences).

Moreover, this approach requires first identifying what values are protected by the religion clauses. *See* Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680 (1969). The balancing process would not be triggered until there was a direct and immediate promotion or inhibition of a religious interest by state action that violates the neutrality principle.

87. It is apparent how the reasonable accommodation rule could aid the development of a particular religious belief. Presumably, religious persecution encourages conversion because of nonsecular rewards; religious accommodation encourages conversion because of secular rewards as well. As a practical matter, it would be impossible to distinguish "true" converts from those who are converting solely for the secular benefits. In any event, it is the religious body as a whole that would benefit to the detriment of competing religions. *See* Zorach v. Clauson, 343 U.S. 306, 314 (1952), in which the Court said, "The Government must be neutral when it comes to competition between sects."

1. Plaintiff was a secretary for New Jersey Bell Telephone Company.

2. Medical evidence indicated that Plaintiff was allergic to tobacco smoke. Plaintiff's symptoms, evoked by the presence of tobacco smoke, included severe throat irritation, nasal

her a safe working environment by allowing other employees to smoke in her work area.[3] On submission of affidavits and briefs, the Superior Court of New Jersey, Chancery Division, *held,* judgment for plaintiff. An employee's common law right to a safe workplace may be enforced by compelling the employer to eliminate all foreseeable and preventable hazards that are not necessary by-products of the employer's business operation. *Shimp v. New Jersey Bell Tel. Co.,* 145 N.J. Super. 516, 368 A.2d 408 (Ch. Div. 1976).

II. LEGAL BACKGROUND

The legal recognition of an employee's right to a safe workplace[4] has evolved as a result of changing economic and social values. Under common law principles an employee could recover damages for injuries that resulted from his employer's failure to exercise ordinary care[5] to provide a reasonably safe place to work.[6] The em-

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irritation which sometimes took the form of nosebleeds, irritation to the eyes which had caused corneal abrasion and corneal erosion, headaches, nausea, and vomiting.

3. Plaintiff had sought to correct the problem through the use of grievance mechanisms established by collective bargaining between defendant employer and Plaintiff's union. This action resulted in the installation of an exhaust fan in the vicinity of Plaintiff's work area. Because of complaints from other employees, however, the fan had not been in operation continuously and the attempted solution was unsuccessful.

4. The term "workplace" as used throughout this Comment refers to the entirety of the employee's working environment. The term embraces not only the physical attributes of the place of employment itself but also the mechanical instrumentalities used in the course of employment and the conduct of fellow employees. Although at one time legal distinctions were based upon these component parts of the "workplace," the modern trend appears to judge the employee's environment in its totality.

5. *See, e.g.,* Hall v. Burton, 201 Cal. App. 2d 72, 19 Cal. Rptr. 797 (1962); Swiercz v. Illinois Steel Co., 231 Ill. 456, 83 N.E. 168 (1907); McDonald v. Standard Oil Co., 69 N.J.L. 445, 55 A. 289 (1903); Dobbins v. Brown, 119 N.Y. 188, 23 N.E. 537 (1890). *See also* T. COOLEY, A TREATISE ON THE LAW OF TORTS § 267 (student ed. 1907); 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 18.6 n.20 (1956); 1 C. LABATT, COMMENTARIES ON THE LAW OF MASTER AND SERVANT § 14 (1904); W. PROSSER, THE LAW OF TORTS § 80 (4th ed. 1971).

Labatt describes the standard of care as that which the master would exercise for his own safety if the place or instrumentality in question were furnished for his personal use. 1 LABATT, *supra,* § 14.

6. *See, e.g.,* Thompson v. California Const. Co., 148 Cal. 35, 82 P. 367 (1905); Mueller v. Elm Park Hotel Co., 398 Ill. 60, 75 N.E. 2d 314 (1947); Estelle v. Board of Educ., 26 N.J. Super. 9, 97 A.2d 1 (Super. Ct. App. Div. 1953); McGuire v. Bell Tel. Co., 167 N.Y. 208, 60 N.E. 433, 127 N.Y.S. 315 (1901). *See also,* COOLEY, *supra* note 5, § 267; 2 HARPER & JAMES, *supra* note 5, § 18.6 n.20; 1 LABATT, *supra* note 5, §§ 6-7; PROSSER, *supra* note 5, § 80.

At common law an employer also was obligated to provide safe appliances, tools, and equipment for the work; to give warning of dangers of which the employee might reasonably be expected to remain in ignorance; to provide a sufficient number of suitable fellow servants; and to promulgate and enforce rules for the conduct of employees that would make the work safe. *See* PROSSER, *supra* note 5, § 80. *See also* COOLEY, *supra* note 5, § 266.

Recovery under the common law was limited to those cases in which the employer breached one of the specific duties outlined above. *See* PROSSER, *supra* note 5, § 80.

ployee's right to recover was based on the employer's negligence, which the courts determined by balancing the magnitude of the risk and the likelihood of harm against the burden of avoiding the risk.[7] Thus the common law did not require an employer to eliminate even very serious hazards if to do so would place an unreasonable economic burden upon his enterprise.[8] Furthermore, an employer's compliance with the established safety practices of his particular industry was important, if not conclusive, evidence of lack of negligence.[9] Even if employer negligence could be established, the common law defenses of assumption of risk,[10] contributory negligence,[11] and the fellow servant rule[12] often barred an employee's recovery. As

7. *See* Miller, *The Occupational Safety and Health Act of 1970 and the Law of Torts*, 38 LAW & CONTEMP. PROB. 612, 616 (1974). *See also* 1 LABATT, *supra* note 5, §§ 14-16.

8. *See* Miller, *supra* note 7, at 616.

9. *See, e.g.*, Caldwell-Watson Foundry & Mach. Co. v. Watson, 183 Ala. 326, 62 So. 859 (1913); Pauly v. King, 44 Cal. 2d 649, 284 P.2d 487 (1955); 1 LABATT, *supra* note 5, § 44; *cf.* PROSSER, *supra* note 5, § 33 (stating that even an entire industry, by adopting careless methods to save time, effort, or money was not permitted to set its own uncontrolled standard).

In Canonico v. Celanese Corp. of America, 11 N.J. Super. 445, 78 A.2d 411 (Super. Ct. App. Div.), *cert. denied*, 7 N.J. 77, 80 A.2d 494 (1951), cited in the instant decision, the New Jersey court stated that an employer was not negligent if he furnished a place of employment and appliances of a kind in general use and conducted his business in a manner conforming to the established standards of those engaged in the specific business. *Id.* at 445, 78 A.2d at 412.

10. *See, e.g.*, Donahue v. Washburn & Moen Mfg. Co., 169 Mass. 574, 48 N.E. 842 (1897); Soutar v. Minneapolis Int'l Elec. Co., 68 Minn. 18, 70 N.W. 796 (1897); Johnson v. Devoe Snuff Co., 62 N.J.L. 417, 41 A. 936 (1898); Knisley v. Pratt, 148 N.Y. 372, 42 N.E. 986 (1896); Davis v. Baltimore & O.R.R., 152 Pa. 314, 25 A. 498 (1893); COOLEY, *supra* note 5, § 275; 2 HARPER & JAMES, *supra* note 5, § 21.4; 1 LABATT, *supra* note 5, §§ 259-74; PROSSER, *supra* note 5, § 80.

Although Dean Prosser does not expressly define assumption of risk, he indicates that the defense is recognized in three broad types of situations: (1) when the plaintiff in advance has given his consent to relieve the defendant of an obligation of conduct toward him; (2) when the plaintiff voluntarily enters into some relation with the defendant, with knowledge that the defendant will not protect him against the risk; and (3) when the plaintiff, aware of a risk already created by the negligence of the defendant, proceeds voluntarily to encounter it. *See* PROSSER, *supra* note 5, § 68.

11. *See, e.g.*, Pollich v. Sellers, 42 La. Ann. 623, 7 So. 786 (1890); Tenanty v. Boston Mfg. Co., 170 Mass. 323, 49 N.E. 654 (1898); Wheeler v. Berry, 95 Mich. 250, 54 N.W. 876 (1893); Marean v. New York, S. & W.R.R., 167 Pa. 220, 31 A. 562 (1895); Reese v. Wheeling & E.G.R.R., 42 W. Va. 333, 26 S.E. 204 (1896); COOLEY, *supra* note 5, § 284; 1 LABATT, *supra* note 5, §§ 294-313; PROSSER, *supra* note 5, § 80.

"Contributory negligence is conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection." PROSSER, *supra* note 5, § 65.

12. *See, e.g.*, Quebec S.S. Co. v. Merchant, 133 U.S. 375 (1890); Farwell v. Boston & W.R.R., 45 Mass. (4 Met.) 49 (1842); Waddell v. Simoson, 112 Pa. 567, 4 A. 725 (1886); Norfolk & W.R.R. v. Nuckols, 91 Va. 193, 21 S.E. 342 (1895); COOLEY, *supra* note 5, § 277; 2 LABATT, *supra* note 5, §§ 470-73; PROSSER, *supra* note 5, § 80.

a consequence, if an employee commenced or continued employment in the face of known and apprehended hazards, he was denied recovery on the ground that he had assumed the risks of injury from such hazards and thereby had relieved his employer from any duty to eliminate them.[13] The employee of course could refuse to work under hazardous conditions, but the common law recognized no right in the employee to remain at work and insist that conditions be made safe;[14] thus an employee's right to a safe workplace at common law was actually nothing more than a right to refuse to work under unsafe conditions.[15]

The failure of common law rules to protect employees adequately from hazardous working conditions[16] provided the impetus for several federal and state statutes that promulgated safety standards for various industries.[17] Some courts held violation of these statutory duties to be evidence or actual proof of the employer's breach of duty.[18] More importantly, however, several courts refused

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The fellow servant rule holds that an employer is not liable for injuries caused solely by the negligence of a fellow employee. PROSSER, *supra* note 5, § 80.

13. *See* 1 LABATT, *supra* note 5, § 274. Professor Labatt explicates the doctrine of assumption of risk as it applies to the law of employer-employee as follows: (1) An employee assumes "ordinary" risks—those risks that the employer cannot with the exercise of reasonable care eliminate from the workplace. (2) An employee does not assume "extraordinary" risks—those that the employer could eliminate from the workplace with tbe exercise of reasonable care—*unless* such risks are known and apprehended by the employee. *See id.* §§ 2, 3, 274.

14. *See* Blumrosen, Ackerman, Kligerman, VanSchaick & Sheehy, *Injunctions Against Occupational Hazards: The Right to Work Under Safe Conditions*, 64 CAL. L. REV. 702, 711 (1976) [hereinafter cited as Blumrosen]. Apparently no prior case has directly ruled on the question of an employee's right to compel his employer to provide safe working conditions. The application by the courts of the common law defenses discussed previously justifies the implication that no such right existed at common law.

15. *See* Blumrosen, *supra* note 14, at 711. An employee could raise as a defense his employer's failure to provide a safe workplace if the employer sued for breach of the employment contract.

16. *See* E. CHEIT, INJURY AND RECOVERY IN THE COURSE OF EMPLOYMENT 10-11 (1961); J. PAGE & M. O'BRIEN, BITTER WAGES 47-55 (1973) (Ralph Nader's study group report on disease and injury on the job).

17. *See, e.g.*, Boiler Inspection Act, 45 U.S.C. §§ 22-29, 31-34 (1970) (amended 1976); Safety Appliance Act, 45 U.S.C. §§ 11-16 (1970) (amended 1976); Mining Regulation Act, 1897 Ala. Acts 1099 (current version at ALA. CODE tit. 26, §§ 166 (13)-166(23) (1958 & Interim Supp. 1975)); Structural Work Act, 1907 Ill. Laws 312 (current version at ILL. ANN. STAT. ch. 48, § 60 (Smith-Hurd 1969)); Act of March 11, 1903, 1903 Kan. Sess. Laws 540-43 (current version at KAN. STAT. §§ 44-101 to -108 (1973)); Act of April 15, 1903, 1903 Tenn. Pub. Acts 520-46 (current version at TENN. CODE ANN. §§ 58-301 to -307 (1968)); Employee Protection Act, 1905 Wash. Laws 164-70 (repealed 1973). These statutes were enacted primarily in the late nineteenth and early twentieth centuries.

18. *See* Blumrosen, *supra* note 14, at 711 n.46. For a general discussion of violation of statute as proof of negligence, see PROSSER, *supra* note 5, § 36.

to allow the defenses of assumption of risk[19] and contributory negligence[20] in employee actions based on violations of these safety statutes. The effect of the abrogation of these common law defenses was to place upon the employer an absolute duty to provide a safe workplace to the extent provided by the statutes. The common theme of these decisions, based on the premise that an employee should not be forced to choose between working under unsafe conditions and not working at all, suggests an implicit judicial recognition of an employee's right to a safe workplace.[21]

The passage of state employer liability acts,[22] which accomplished legislatively what had been accomplished judicially under the safety statutes, buttressed the right of an employee to a safe workplace. Employer's liability acts modified or entirely abrogated the defenses of assumption of risk,[23] contributory negligence,[24] and the fellow servant rule[25] in actions involving injuries caused by an employer's negligence.[26] These acts also were premised on the idea that the employee should not be forced to choose between unsafe employment and no employment at all, and thus evidence further

19. *See, e.g.*, Osborne v. Salvation Army, 107 F.2d 929 (2d Cir. 1939); Finnegan v. Royal Realty Co., 35 Cal. 2d 409, 218 P.2d 17 (1950); Waschow v. Kelly Coal Co., 245 Ill. 516, 92 N.E. 303 (1910); Suess v. Arrowhead Steel Prods. Co., 180 Minn. 21, 230 N.W. 125 (1930); Volpe v. Hammersley Mfg. Co., 96 N.J.L. 489, 115 A. 665 (1921); Welch v. Waterbury Co., 206 N.Y. 522, 100 N.E. 426 (1912); American Zinc Co. v. Graham, 132 Tenn. 586, 179 S.W. 138 (1915). *See also* RESTATEMENT (SECOND) OF TORTS § 496(F); Prosser, *Contributory Negligence as Defense to Violation of Statute*, 32 MINN. L. REV. 105, 118-23 (1948).

20. *See, e.g.*, Gowins v. Pennsylvania R.R., 299 F.2d 431 (6th Cir.), *cert. denied*, 371 U.S. 824 (1962); Thomas v. Chicago Embossing Co., 307 Ill. 134, 136 N.E. 285 (1923); Caspar v. Lewin, 82 Kan. 604, 109 P. 657, *rehearing denied*, 83 Kan. 799, 109 P. 669 (1910), *appeal dismissed*, 223 U.S. 736 (1911); Volpe v. Hammersley Mfg. Co., 96 N.J.L. 489, 115 A. 665 (1921); Koenig v. Patrick Const. Corp., 298 N.Y. 313, 83 N.E.2d 133 (1948). *See also* RESTATEMENT (SECOND) OF TORTS § 483; Prosser, *supra* note 19.

21. *See* Blumrosen, *supra* note 14, at 712.

22. *E.g.*, ARIZ. REV. STAT. §§ 23-801 to -808 (1971); CAL. LAB. CODE §§ 2800-2804 (West 1971); IDAHO CODE §§ 44-1401 to -1407 (1948); IND. CODE ANN. §§ 22-3-9-1 to -3-9-11 (Burns 1974); KAN. STAT. §§ 66-234 to -241 (1972); MASS. GEN. LAWS ANN. ch. 153, §§ 1-9 (West 1958); MINN. STAT. ANN. §§ 219.77 to .83 (West 1947); N.Y. EMPL'RS LIAB. LAW §§ 1-18 (Consol. 1955) (amended 1963). These statutes were enacted primarily in the early twentieth century.

23. *E.g.*, ARIZ. REV. STAT. § 23-806 (1971); CAL. LAB. CODE § 2801 (West 1971); IDAHO CODE § 44-1401 (1948); IND. CODE ANN. §§ 22-3-9-2, -3-9-3 (Burns 1974); KAN. STAT. § 66-239 (1972); MASS. GEN. LAWS ANN. ch. 153, § 3 (West 1958); MINN. STAT. ANN. § 219.80 (West 1947); N.Y. EMPL'RS LIAB. LAW § 4 (Consol. 1955).

24. *E.g.*, ARIZ. REV. STAT. § 23-806 (1971); CAL. LAB. CODE § 2801 (West 1971); IDAHO CODE § 44-1401 (1948); IND. CODE ANN. § 22-3-9-2 (Burns 1974); KAN. STAT. § 66-238 (1972); MINN. STAT. ANN. § 219.79 (West 1947).

25. *E.g.*, CAL. LAB. CODE § 2801 (West 1971); IDAHO CODE § 44-1403 (1948); MASS. GEN. LAWS ANN. ch. 153, § 1 (West 1958); MINN. STAT. ANN. § 219.77 (WEST 1947).

26. *See generally* CHEIT, *supra* note 16, at 11; PAGE & O'BRIEN, *supra* note 16, at 54.

implicit recognition of an employee's right to safe working conditions.

The modern trend of recognizing an employee's right to a safe workplace culminated with the enactment of the federal Occupational Safety and Health Act of 1970[27] (OSHA) and the passage of several state occupational safety and health acts shortly thereafter.[28] Section 5(a) of OSHA requires that each employer furnish his employees with "employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."[29] The duty OSHA imposes on employers is in some respects stricter and in some respects less stringent than the employer's common law duty to exercise ordinary care to provide a reasonably safe workplace.[30] Although OSHA does not grant employees a private right of action to enforce the statute,[31] the act establishes an extensive administrative enforcement apparatus that permits employee involvement in enforcement procedures.[32] Employees, for example, may complain of violations of the statute,[33] request inspections to determine if an

27. Occupational Safety & Health Act §§ 2-33, 29 U.S.C. §§ 651-678 (1970) [hereinafter cited as OSHA].

28. *E.g.*, ARIZ. REV. STAT. §§ 23-401 to -430 (Supp. 1976); CAL. LAB.CODE §§ 6300-6708 (West Supp. 1977); CONN. GEN. STAT. ANN. §§ 31-367 to -385 (West Supp. 1976); ILL. ANN. STAT. ch. 48, §§ 137.1 to .23 (Smith-Hurd 1976); IND. CODE ANN. §§ 22-8-1.1-1 to -8-1.1-50 (Burns 1974 & Supp. 1976); MINN. STAT. ANN. §§ 182.50 to .674 (West Supp. 1976); TENN. CODE ANN. §§ 50-501 to -579 (Supp. 1976); WASH. REV. CODE ANN. §§ 49.17.010 to .17.910 (Supp. 1976).

29. OSHA § 5(a), 29 U.S.C. § 654(a) (1970). This section also requires each employer to comply with all safety standards promulgated under OSHA. *Id.*

30. *See* Miller, *supra* note 7, at 616-17. The general duty clause (§ 5(a)(1)) seems to impose an absolute duty on the employer to eliminate recognized hazards that are causing or are likely to cause death or serious injury. In the absence of a specific standard, the employer is under no obligation to eliminate unrecognized hazards irrespective of the degree of risk they create. Nor is tbe employer obligated to eliminate recognized hazards if they are likely to cause only serious mental or emotional, rather than physical, harm; if they are less than "likely" to cause serious physical harm; or if they are likely to cause only nonserious harm. *Id.* at 617.

31. *See* Blumrosen, *supra* note 14, at 707-08. Several courts of appeal have held that no private right of action will be implied from the provisions of OSHA. *See* Byrd v. Fieldcrest Mills, Inc., 496 F.2d 1323 (4th Cir. 1974); Russell v. Bartley, 494 F.2d 334 (6th Cir. 1974); Skidmore v. Travelers Ins. Co., 356 F. Supp. 670 (E.D. La.), *aff'd per curiam*, 483 F.2d 67 (5th Cir. 1973).

32. The administration of OSHA is entrusted to the Secretary of Labor. Federal administrators have power to cite, conciliate, assess penalties, and ultimately to obtain court assistance in enforcing the provisions of the act. *See* OSHA §§ 6-9, 29 U.S.C. §§ 655-658 (1970). OSHA administrators also may develop safety standards, promulgate these standards through rules, regulations, and guidelines, and process complaints and ensure compliance by initiating verification systems. *See* OSHA §§ 6, 8, 10, 29 U.S.C. §§ 655, 657, 669 (1970).

33. *Id.* § 8(f), 29 U.S.C. § 657(f) (1970).

employer is complying with the provisions of the act,[34] and compel the administrative enforcement agency to seek injunctive relief if a hazard in the workplace creates an "imminent" danger of serious injury.[35] Most state occupational safety and health statutes provide for similar enforcement mechanisms and contain similar provisions regarding employee involvement.[36] These statutes expressly recognize an employee's right to a safe workplace, but they do not grant employees a direct judicial remedy to enforce that right.

The legislative and judicial developments outlined above grew out of the failure of common law rules regarding employer liability to protect adequately the safety of employees. Taken together, these developments indicate that the law now recognizes that an employee has a legally protectable interest in a safe workplace. The instant decision presents the important question of what common law duties should be imposed and what remedies should be available for breach of those duties in light of recent statutory developments.

III. The Instant Decision

The court initially stated that the common law of New Jersey guarantees to employees the right to work in a safe environment and places upon employers an affirmative duty to provide a work area that is free from unsafe conditions.[37] After noting that OSHA in no way pre-empted the field of occupational safety,[38] the court stated that when an employer is under a common law duty to act, a court of equity may enforce an employee's rights by granting injunctive relief.[39] Citing three New Jersey cases dealing with employee collective bargaining rights,[40] the court reasoned that equitable relief is

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34. *Id.*

35. *Id.* § 13(d), 29 U.S.C. § 662(d) (1970).

36. *See, e.g.*, Ariz. Rev. Stat. § 23-419 (Supp. 1976) (employee may seek writ of mandamus to compel commissioner to abate an imminent danger); Conn. Gen. Stat. Ann. § 31-374(f)(1) (West Supp. 1976) (employee may request inspections); Ill. Ann. Stat. ch. 48, § 137.17 (Smith-Hurd 1976) (employee may complain of violations).

37. 368 A.2d at 410. The court based this statement on several previous New Jersey cases that restated the common law rule that an employer was obligated to use reasonable care to provide a safe workplace. *See* Canonico v. Celanese Corp. of America, 11 N.J. Super. 445, 78 A.2d 411 (Super. Ct. App. Div.), *cert. denied*, 7 N.J. 77, 80 A.2d 494 (1951); Davis v. New Jersey Zinc Co., 116 N.J.L. 103, 182 A. 850 (1936); Clayton v. Ainsworth, 122 N.J.L. 160, 4 A.2d 274 (1939); Burns v. Delaware & Atl. Tel. & Tel. Co., 70 N.J.L. 745, 59 A. 220 (1904); McDonald v. Standard Oil Co., 69 N.J.L. 445, 55 A. 289 (1903).

38. 368 A.2d at 410-11.

39. *Id.* at 411.

40. Johnson v. Christ Hospital, 84 N.J. Super. 541, 202 A.2d 874 (Ch. 1964), *aff'd*, 45 N.J. 108, 211 A.2d 376 (1965); Cooper v. Nutley Son Printing Co., 36 N.J. 189, 175 A.2d 639

available in labor matters unless such relief is prohibited by statute.[41] The court also noted that the New Jersey workman's compensation act did not affect its power to grant injunctive relief since that act provides the exclusive remedy for the employee only when the hazard has ripened into an injury, and a suit for damages has been instituted.[42]

The court then considered whether the presence of tobacco smoke rendered plaintiff's workplace unsafe. After reviewing extensive medical and scientific evidence,[43] the court concluded that the passive inhalation of tobacco smoke and its gaseous by-products is deleterious to the health of a significant portion of the population[44] and that the danger therefore was reasonably foreseeable to the defendant. Noting that tobacco smoke is not a necessary by-product of defendant's business operations, the court reasoned that plaintiff could not be deemed to have assumed the risk of that hazard as one incident to employment.[45] The court therefore concluded that in failing to prohibit smoking in the working area, defendant had breached its duty to provide plaintiff with a safe workplace.[46] Accordingly, the court ordered defendant to prohibit smoking in the work area.[47]

IV. Comment

The instant opinion is the first express judicial recognition of an employee's common law right to compel his employer to eliminate unsafe conditions from the workplace. The decision illustrates a trial court's attempt to reconcile old principles of law with new social values, and the court's refusal to remain safely within the bounds of judicial precedent evidences the ability for growth and adaptation that lies at the heart of the common law process.[48] Furthermore, the decision is in accord with the generally accepted con-

(1961); Independent Dairy Workers v. Milk Drivers Local 680, 23 N.J. 85, 127 A.2d 869 (1956).

41. 368 A.2d at 412.

42. *Id.*

43. The court used the 1975 Surgeon General's report dealing with the health consequences of smoking, published medical papers, and several affidavits of physicians and scientists. *See id.* at 414-15.

44. *Id.* at 415.

45. *Cf.* Canonico v. Celanese Corp. of America, 11 N.J. Super. 445, 78 A.2d 411 (Super. Ct. App. Div.), *cert. denied,* 7 N.J. 77, 80 A.2d 494 (1951) (employee held to have assumed the risk of a disease as one incident to employment).

46. 368 A.2d at 415-16.

47. *Id.* at 416.

48. *See* Pound, *Common Law and Legislation,* 21 HARV. L. REV. 383 (1908); Stone, *The Common Law in the United States,* 50 HARV. L. REV. 4, 12-14 (1936).

cept that tort law should embody and reflect basic social values, which also may find expression in new statutory policies.[49]

Regrettably, however, the court fails to provide adequate guidelines for determining when an employer may be compelled to eliminate an unsafe condition in the workplace. The analysis required to ascertain whether injunctive relief is appropriate necessarily involves a determination of what duty an employer owes to his employees with respect to safe working conditions. Although the court does not expressly reject the traditional common law standard,[50] the opinion states that an employer may be compelled to eliminate all "preventable" hazards.[51] By distinguishing a previous case that involved an occupational disease,[52] the court may be equating "preventable" hazards with those that are not "necessary by-products" of the employer's business operation. This equation, however, leaves unanswered the question whether the term "necessary by-products" encompasses only hazardous conditions that are technically infeasible to eliminate or also includes hazardous conditions that are correctable but only at great economic expense.[53] The court perhaps considered it unnecessary to explicate fully the parameters of the employer's duty, since the instant case involved an activity that was not related directly to the employer's business operations and required no great expenditure to eliminate. The lack of a clear delineation of what duty an employer owes, however, renders the opinion of questionable usefulness in cases that involve more difficult factual situations.

The court also fails to analyze whether injunctive relief is appropriate in all cases in which an employer has breached his duty to provide a safe workplace. Normally, injunctive relief is available only when all remedies at law are inadequate either because the impending harm is not compensable in monetary damages or because the harm is a continuing one that would necessitate a multiplicity of legal actions.[54] Although the plaintiff in the instant case

49. *See* PROSSER, *supra* note 5, § 33; Green, *Tort Law: Public Law in Disguise*, 38 TEX. L. REV. 1, 257 (1959). *See also* Buhler v. Marriott Hotels, Inc., 390 F. Supp. 999 (E.D. La. 1974) (holding that OSHA standards and the fact that those standards had been violated may be used as evidence of negligence).

50. *See* notes 5-8 *supra* and accompanying text.

51. 368 A.2d at 411.

52. Canonico v. Celanese Corp. of America, 11 N.J. Super. 445, 78 A.2d 411 (Super. Ct. App. Div.), *cert. denied*, 7 N.J. 77, 80 A.2d 494 (1951).

53. For a discussion of the same problem in the context of OSHA's general duty clause, see Miller, *supra* note 7, at 615-27.

54. *See* D. DOBBS, HANDBOOK OF THE LAW OF REMEDIES § 2.5 (1973).

easily could have satisfied either of these conditions, the failure of the court to impose the traditional equity requirements, coupled with the court's broad statement as to its equity powers, may imply that injunctive relief is always available when an employer breaches his duty to provide a safe workplace. The propriety of such expansive injunctive relief, however, may be seriously questioned in states that have enacted occupational safety and health acts patterned after OSHA.[55] The traditional requirement that all remedies at law be inadequate before equitable relief is available embraces administrative avenues of relief as well as judicial relief,[56] and all of the state occupational safety and health acts provide extensive administrative remedies for occupational hazards.[57] Courts in those states therefore may require those remedies to be exhausted, or at least shown to be ineffective or inapplicable,[58] before they make injunctive relief available.

Although analytically incomplete in several respects, the opinion of the instant court appears to reach the correct result. The common law purported to impose upon employers a duty to provide a safe workplace for their employees, but it provided no adequate remedy to compel compliance with that duty. The instant decision corrects this anomaly in the law and may well promote an invigorating reconsideration of the role of the common law in the field of occupational health and safety.

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55. *See* notes 28-37 *supra* and accompanying text.
56. *See* Blumrosen, *supra* note 14, at 715.
57. *See* note 36 *supra* and accompanying text.
58. *See* Blumrosen, *supra* note 14, at 715.