

Reasonable Accommodations Under the ADA

THE SUPREME COURT IN BARNETT

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FOR MANY PEOPLE, the Supreme Court's October 2001 Term will be known simply as the Term *after Bush v. Gore*. But the Supreme Court year that just ended was noteworthy, if not momentous, in its own right. One area where significant law was made is the Americans with Disabilities Act of 1990 (ADA or Act),¹ the federal statute enacted over a decade ago to address problems faced by disabled persons on the job and in public places. In 2002, the Court, building on a trend established over the past few years, handed down four decisions² on the controversial and complicated legislation. Indeed, this large number prompted Justice O'Connor to

suggest in a speech that this Term would be remembered for "its emphasis on the ADA."³

US Airways, Inc. v. Barnett, the case on which we focus, is the most significant of these recent ADA rulings. As a practical matter, the holding of the case – that the ADA does not usually require an employer making job assignments to deviate from a legitimate seniority system even when the system is not part of a collective bargaining agreement (CBA) – is not a huge victory for employers over disabled employees, simply because so few employers have seniority systems that are *not* parts of CBAs (and everyone had already agreed that seniority in the context of CBAs is

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1 104 Stat. 328, 42 U.S.C. § 12101 *et seq.* (1994 ed. and Supp. v).

2 Four seems particularly high when one considers that the Court decided only 77 cases the whole Term. The four ADA-related cases are *US Airways, Inc. v. Barnett*, 122 S. Ct. 1516 (2002); *Toyota Motor Mfg. v. Williams*, 122 S. Ct. 681 (2002); *Chevron U.S.A. v. Echazabal*, 535 U.S. ____ (2002); and *Barnes v. Gorman*, 535 U.S. ____ (2002).

3 Tony Mauro, *Supremes Continue to Trim ADA's Parameters*, *The Recorder*, April 30, 2002, at p.1.

largely beyond the scope of the ADA.)⁴ Instead, *Barnett* is important because it is the first decision by the Court to construe the heart of the employment sections of the ADA – the requirement that an employer must make “reasonable accommodations” to the needs of a disabled employee.⁵ Other important employment decisions by the Court this Term have focused instead on what constitutes a disability,⁶ and on particular affirmative defenses an employer may have under the Act.⁷ But *Barnett* is the first high court word on what “reasonable accommodation” means. And in addressing that issue, the various *Barnett* opinions lay out quite different theoretical approaches that require consideration of two fundamental and related questions: what are we trying to accomplish with the ADA in the first place? and what is the essence of “accommodation” in this setting?

THE FACTS & THE MAJORITY’S APPROACH

Robert Barnett was a US Airways cargo handler who in 1990 injured his back while on the job to the point where he could no longer handle cargo. Invoking his seniority rights, he transferred to a less physically demanding position in the mailroom. Under the terms of US Airways’ seniority system, that position, like others, periodically came open to seniority-based bidding by other employees who

may have wanted the post. In 1992, Barnett learned that, during an open-bidding period, at least two other employees who had more seniority than he did intended to bid for his mailroom job. He pointed out to US Airways that his disability prevented him from performing any of the jobs that his own seniority level would entitle him to, and asked the company to keep him in the mailroom as a “reasonable accommodation” under the ADA. US Airways instead decided to follow its seniority system and allow the other employees to bid on the mailroom position. Barnett then sued under the ADA and prevailed in an en banc decision by the United States Court of Appeals for the Ninth Circuit, which grounded its holding in the “undue hardship” provision in the statute. According to the Ninth Circuit panel, an employee’s request that a deviation be made from a seniority system goes not to the “reasonableness” of the proposed accommodation, but rather to whether the employer can make out the affirmative defense of an “undue hardship.” On this question, the Ninth Circuit opined that the “presence of a seniority system is merely a factor in the undue hardship analysis,”⁸ and that “[a] case-by-case fact intensive analysis is required to determine whether any particular reassignment would constitute an undue hardship to the employer.”⁹

The Supreme Court reversed. A majority,

4 Indeed, to the extent *Barnett* suggests that seniority plans riddled with exceptions – perhaps even CBA-mandated seniority plans riddled with exceptions – might have to give way to the ADA, the case may represent a partial loss for employers, because before the decision came down nearly everyone assumed that all CBA seniority plans were immune from ADA attack.

5 In this essay, we focus only on the ADA’s employment provisions (Title I of the Act). The Supreme Court, in 2001, did address the “reasonable modifications” language of the public accommodations provisions (Title III) of the Act. *PGA Tour, Inc. v. Martin*, 121 S. Ct. 1879 (2001). What relationship, if any, there is between “reasonable modifications” and “reasonable accommodations” is a question we leave for another day.

6 See, e.g., *Toyota Motor Mfg. v. Williams*, 122 S. Ct. 681 (2002).

7 See, e.g., *Chevron U.S.A. v. Echazabal*, 535 U.S. ____ (2002).

8 *Barnett*, 122 S. Ct. at 1520, quoting the Ninth Circuit.

9 *Id.*, quoting the Ninth Circuit.

for whom Justice Breyer wrote, found the key question to be not whether an employer would suffer an undue hardship by deviating from a seniority plan, but rather whether such a deviation could ever be required as a “reasonable accommodation” under the statute. As the Court explained, the affirmative defense of undue hardship comes into play, if at all, only after a disabled person identifies, and the defendant employer fails to provide, a “reasonable accommodation.”¹⁰

Turning to the issue thus posed, the Court ruled:

The question in the present case focuses on the relationship between seniority systems and the plaintiffs’ need to show that an “accommodation” seems reasonable on its face, *i.e.*, ordinarily or in the run of cases. We must assume that the plaintiff, an employee, is an “individual with a disability.” He has requested assignment to a mailroom position as a “reasonable accommodation.” We also assume that normally such a request would be reasonable within the meaning of the statute, were it not for one circumstance, namely, that the assignment would violate the rules of the seniority system. ... Does that circumstance mean that the proposed accommodation is not a “reasonable” one? In our view, the answer to this question ordinarily is “yes.”¹¹

The reason why ordinarily deviations from seniority systems are not “reasonable” is that the burden of such deviations falls primarily not on the employer’s pocketbook, but rather on the other employees and their “expectations of consistent, uniform treatment –

expectations upon which the seniority system’s benefits depend.”¹² To rule otherwise, the Court said,

would substitute a complex case-specific “accommodation” decision made by management for the more uniform, impersonal operation of seniority rules. Such management decisionmaking, with its inevitable discretionary elements, would involve a matter of the greatest importance to employees, namely, layoffs; it would take place outside, as well as inside, the confines of a court case; and it might well take place fairly often. [Congress in enacting the ADA did not] intend[] to undermine seniority systems in this way.¹³

Justice Breyer’s majority opinion did leave open the possibility that an ADA plaintiff might show that a particular seniority system was so riddled with exceptions that employee expectations under it were unimportant, making disability-driven deviations from the system less problematic and thus “reasonable” within the Act. But the “plaintiff must bear the burden of showing special circumstances that make an exception from the seniority system reasonable in the particular case.”¹⁴

JUSTICE SCALIA’S ALTERNATIVE APPROACH TO “ACCOMMODATIONS” UNDER THE ADA

Justice Scalia, joined by Justice Thomas, dissented from the majority opinion,¹⁵ accusing the Court of answering a yes/no question

10 “The Act says that an employer who fails to make ‘reasonable accommodations to the known physical or mental limitations of an [employee] with a disability’ discriminates ‘unless’ the employer ‘can demonstrate that the accommodation would impose an *undue hardship* on the operation of [its] business.’” *Id.* at 1519, quoting language from the Act (emphasis provided by the Supreme Court).

11 *Id.* at 1523-24.

12 *Id.* at 1524.

13 *Id.* at 1524-25.

14 *Id.* at 1525.

15 Justice Souter, joined by Justice Ginsburg, also dissented from the majority’s approach. Because the Souter dissent largely tracks the Ninth Circuit’s reasoning, we do not explore it in any detail here.

with a “maybe.”¹⁶ According to Justice Scalia, the majority “eschew[ed] clear rules that might avoid litigation” and instead created a “standardless grab bag” of unfettered judicial discretion to determine “which workplace preferences ... can be deemed ‘reasonable.’”¹⁷

Justice Scalia’s criticism here may be a bit exaggerated. While the majority may have rejected a bright-line rule, its approach to interpreting “reasonableness” is not “standardless.” Indeed, in rejecting the Ninth Circuit’s “case-by-case” methodology of undue hardship¹⁸ in favor of a strong presumption of unreasonableness where seniority is involved, the Court made clear that certain factors, most specifically concern for the expectations of fellow employees, are in different categories than others, such as monetary cost to the employer. The majority did perhaps choose a “standards” approach over a “rules” approach,¹⁹ but it did not simply throw its hands up and leave everything to the trier-of-fact.

What would Justice Scalia’s rule look like in any event? He uses different formulations to try to get his point across, but his big idea is that the ADA requires an accommodation only where the accommodation is *linked to the disability itself and the way the disability affects performance in a particular job*. Workplace “obstacles that have nothing to do with [a person’s] disability,”²⁰ to use his phrase, are not the concern of the ADA. In Justice Scalia’s view, what keeps Robert Barnett out of the mailroom is not his disability so much as his lack of seniority, and the latter problem has

“nothing to do” with Barnett’s disability. Because the proffered accommodation – deviation from the seniority plan – is not “disability related,”²¹ it is not required by the ADA, irrespective of any cost-benefit balance.

What are we to make of Justice Scalia’s suggestion that there must be a relationship between the proffered accommodation and the disability itself? And precisely what kind of relationship between the disability and the accommodation does Justice Scalia’s approach require? One possible answer focuses on the statutory text on which he bases his reading of the law – the so-called “because of” phrase. As Justice Scalia points out, the statute’s main goal is to make “discrimination” against disabled persons illegal. And while “discrimination” is defined broadly to include a failure to make “reasonable accommodations,” not all “discrimination” – even broadly defined to include failure to accommodate – is actionable. Instead, reminds Justice Scalia: The ADA says that “an employer may not discriminate against a qualified individual with a disability *because of the disability* of such individual.”²²

It is not clear that the statute’s “because of” language gets Justice Scalia where he wants to go, however. It is true that the phrase “because of the disability” might be read to limit the Act. But the words “because of” usually mean one of two things. First, they could connote a requirement of purposeful discrimination. “Because of race” often means “specifically on account of a person’s race.” If that were the meaning given to the ADA, then a failure to

16 *Barnett*, 122 S. Ct. at 1528 (Scalia, J., dissenting).

17 *Id.* at 1528, 1529.

18 The majority did, after all, reverse the Ninth Circuit and disapprove of its truly case-by-case approach.

19 For a discussion of the “rules versus standards” debate, see e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989); Kathleen M. Sullivan, *The Supreme Court: 1991 Term – Foreword: The Justices of Rules and Standards*, 106 Harv. L. Rev. 24 (1992).

20 *Barnett*, 122 S. Ct. at 1529 (Scalia J., dissenting).

21 *Id.*

22 *Id.* (quoting the Act, 42 U.S.C. § 12112(a)) (emphasis is Justice Scalia’s).

accommodate (which the act defines as one form of discrimination) is actionable *only* if an employer's decision not to accommodate is motivated by the employee's being disabled. That is, an employee could sue an employer for failure to accommodate only when the employer would have accommodated a similarly-situated non-disabled person, but refuses to accommodate a disabled person simply because the employer doesn't like disabled persons. This invidious intent model is most certainly *not* what the ADA is about, and even Justice Scalia doesn't suggest otherwise.²³

Another meaning of "because of" is simply "caused by." We often say x happened "because of" y when we mean that y caused x. But causation here, as elsewhere, is itself a complicated concept. One kind of causation important in law is "but for" causation – y causes x if x would not have occurred "but for" y.²⁴ If "because of the disability" simply means that the disability was a "but for" cause of the need for an accommodation, then Justice Scalia is clearly wrong on the facts of the case (and would be on all the other cases he fears, as well). The short of it is that if we remove Barnett's disability from the picture, he would not need an exemption from the seniority policy, because he could fill and perform other, more physical, jobs to which his current seniority level would entitle him. But for his disability, he would have no quarrel with, and could live within the confines of, US Airways' seniority plan because his seniority (or lack thereof) would not preclude him from working in a position that he could perform. In that sense,

Barnett's disability is "related" to his proposed accommodation, and has "[some]thing to do with it."

Justice Scalia, therefore, must have a different kind of relationship between disability and accommodation in mind, apart from "but for" causation. What Justice Scalia seems to insist is that there must be a *logical or analytic*, and not simply a causal, relationship between the disability and the proposed accommodation. That is the implication of several statements he makes: At one point, for instance, he says that the requested accommodation must "*arise[] from*" – a term connoting legal relationship – the disability.²⁵ Elsewhere he says that the ADA accommodation requirement applies only to those workplace rules that "*pose [a] distinctive obstacle to the disabled*"²⁶ or rules "*that bear . . . more heavily on the disabled employee than upon others.*"²⁷

Justice Scalia's approach, while not crystal clear itself, can perhaps be illustrated by a hypothetical accommodation he distinguishes from Barnett's "unreasonable" request. Suppose the reason that US Airways denied Barnett the mailroom position was not its seniority policy (which Justice Scalia would uphold), but rather a "one-strike" policy under which someone who, for whatever reason, has already been deemed incompetent in one position is not eligible to move to another position within the company. Because Barnett's "incompetence" in the cargo room position is so tightly linked to his back disability, Justice Scalia suggests, the employer would have to make an exception to its one-

23 One reason for this is that virtually identical "because of" language appears in Title VII's religious accommodation provisions, and the Court has construed those provisions not to require plaintiffs to prove invidious intent. See, e.g., *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986).

24 Justice Scalia at one point does seem to speak in "but for" terms, see *Barnett*, 122 S. Ct. at 1529 (Scalia, J., dissenting), but as explained below, he cannot really mean to ask only the "but for" question.

25 *Id.* at 1531 (emphasis is Justice Scalia's).

26 *Id.* at 1528 (emphasis is Justice Scalia's).

27 *Id.* at 1529 (emphasis added.)

strike policy, just as it would have to make exceptions to furniture budget rules and frequency-of-bathroom-break rules for persons with mobility or urinary problems.²⁸ The need to be exempted from a “one-strike” policy is, according to Justice Scalia, sufficiently connected to the disability which led to the strike so as to be “reasonable.”

There is some support in the text of the statute for a requirement of a logical nexus between the proffered accommodation and the disability. Indeed, the support is much stronger than the opaque “because of” language on which Justice Scalia relies. The Act, after all, requires employers to make accommodations “to” disabilities, not accommodations “for” them. Moreover, and more important, the Act requires accommodations to the *disabilities themselves* – the “known physical or mental limitations” of an individual – not accommodations to (or for) the *persons* with the disabilities. Finally, the word “accommodation” itself connotes a logical fit. *x* accommodates *y* if it deals directly with *y*, not if it compensates for all the attenuated consequences of *y*.²⁹

But to say there is a nexus requirement is not, of course, to say how *much* of a nexus is required. Everything turns on what terms like “related” or “arise from” or “distinctive” or “bear more heavily” mean.³⁰ Take, for example, Justice Scalia’s willingness, described above, to invalidate a “one-strike” policy. If that one-strike policy poses “distinctive” obstacles to the disabled, and exceptions from that policy are “disability related” because the strike itself is a result of the disability, could not the same be said for the seniority system at

issue in *Barnett*? Don’t seniority rules “bear more heavily” on disabled workers because such workers have shorter work histories with particular employers, in part due to an historical (and economically rational) pre-ADA unwillingness by employers to modify workplace rules to accommodate the physical needs of the disabled? Don’t disabilities alter a person’s vocational path and make longevity at any one employer less likely? Robert Barnett may be the exception – he became disabled after he was employed and remained (or rather tried to remain) with his existing employer.³¹ But don’t seniority rules more generally hurt disabled persons more than others and thereby pose “distinctive” problems for the disabled?

Another not-so-hypothetical case also tests Justice Scalia’s approach. In *Lyons v. Legal Aid Society*,³² a staff attorney for a public interest employer who was injured in and disabled by an automobile accident sought, as a reasonable accommodation under the ADA, extra money (about \$300/month) to be used for a parking space near her office building, because her physical condition limited her ability to walk long distances. Plaintiffs’ doctors testified that parking near work was necessary for plaintiff to return to her job. Nonetheless, the employer, relying on the fact that it did not provide parking or money for it to *any* of its employees, denied plaintiff’s request. The United States Court of Appeals for the Second Circuit, reversing the district court, held there was a triable issue of fact on the question whether the proposed accommodation was “reasonable” under the ADA.

28 This is how Justice Scalia deals with the language in the statute that refers to “reassignment” to a vacant position as one possible reasonable accommodation. *Id.* at 1530.

29 The first definition of “accommodate” in the Oxford English Dictionary is, “to fit one person or thing to another.” The Oxford English Dictionary, 2d Ed. (1989) (emphasis in original).

30 For this reason, even Justice Scalia’s test is not as bright-line as he suggests.

31 Would Justice Scalia have ruled otherwise in *Barnett* had Mr. Barnett entered US Airways in the mailroom already with a back disability incurred at another place of employment? Clearly not.

32 68 F.3d 1512 (2d Cir. 1995).

We suspect Justice Scalia would say that the direct cause of the plaintiff's plight is not her disability, but rather her inability to save enough money to afford parking. In other words, Justice Scalia's bottom line in *Barnett* suggests that he views the terms "distinctive," "arise from," etc., to have real bite, and to limit accommodations largely to physical or temporal reconfigurations of the job requirements themselves to adjust to physical or mental limitations. An accommodation that goes beyond job reconfiguration, for Justice Scalia, is beyond the ADA.³³ Presumably, the majority in *Barnett* would have a wider focus, and would balance the parking needs of the employee and the costs of the employer. Unlike *Barnett*, where the plaintiff's fellow employees are bearing some of the brunt of the proposed accommodation, there may be no "weighted" factors in *Lyons*, such that the disabled plaintiff may have a strong case.

WHICH APPROACH MAKES MORE SENSE?

Whether Justice Scalia's approach is more attractive than the more contextual and more employee-generous tack taken by the majority depends, at the most basic level, on two questions: (1) what are we trying to accomplish by requiring "accommodation" in the first place?; and (2) what constraints on accommodation are there that are equally, if not more, important than our accommodation objectives themselves? While we have no clear answers to these questions, we do have a few concerns about Justice Scalia's approach and the inferences that can be drawn from it regarding the meaning of accommodation. The differences between our perspective and Justice Scalia's emerge most clearly when we compare the idea of "accommodation" in the

disability setting to our attitudes and instincts about accommodation in two other areas of federal antidiscrimination law, race and religion.³⁴

Consider, first, Title VII's prohibition against employment discrimination on the basis of "race, color or national origin." For the most part, Title VII doesn't require anything we would call "racial accommodation." Instead, it primarily prohibits irrational and invidious discrimination against persons based on race. That is, it tries to remove race from the decisionmaker's mind; it does not require the decisionmaker to be affirmatively sensitive to the needs of persons of a particular race. To the extent that Title VII could be thought to require racial accommodation of any kind – through its requirement that an employer eliminate any employment device that has a disparate racial effect unless the device is "job-related" – such an affirmative action requirement is supported by two possible justifications: the prophylactic objective of ensuring that employers cannot continue to discriminate reflexively and irrationally against persons based on race by hiding behind "race-neutral" devices, and the desire to remedy past invidious discrimination against certain groups who were common targets of such illicit unequal treatment in the not-so-distant past.

Indeed, if neither of these two justifications existed, Title VII's racial disparate impact doctrine might itself be constitutionally problematic under equal protection principles. Certainly, the Constitution imposes some serious limit on the provision of race-based accommodations. Legislative or administrative decisions mandating such accommodations bear a significant burden of explanation under some form of rigorous review. Accommodations that in real terms *privilege* certain workers

³³ See, e.g., *Barnett*, 122 S. Ct. at 1528-31 (Scalia, J. dissenting).

³⁴ Gender might also be a profitable analogy to consider, but we don't take it up here.

because of their race would violate the Constitution absent a prophylactic or remedial justification.

But neither of these two justifications for anti-discrimination laws directed at race explains disability accommodations very fully. As the Court suggested just last year in *Garrett*,³⁵ a great deal of employer treatment of disabled persons is not predicated on irrational reflexive stereotypes alone. To the extent that disabled persons haven't been allowed access to the workplace, it is in significant measure because employers have been acting with cold economic rationality – they haven't been willing to foot the bill for altering their policies to increase the number of disabled persons in the workforce. Therefore – and this is key – when Congress required “accommodation” for the disabled, it meant to do *more* than prohibit irrational invidious discrimination and rectify past irrational invidious discrimination. It must have intended to increase the number of disabled persons in the workplace, even if that means that employers have to do things that are not economically rational. And if that is the goal of the ADA – to increase opportunities for disabled individuals to live productive lives in our communities – then it is not unreasonable to suppose that employers may be required to do more than simply reconfigure job descriptions, workplace layouts, and scheduling demands – the kinds of things that Justice Scalia talks about.

Thus, the normative impulse behind the ADA may be quite different and broader than that behind Title VII's race provisions. The congressional purpose in the ADA is distinct from equality in the conventional sense of treating similarly situated individuals the same. And once we see that the ADA reflects a positive commitment to inclusion, then Justice Scalia's line-drawing looks more arbitrary and less adequately grounded than it initially

appears to be. Of course, the extent of our societal commitment to this inclusive principle and the extent to which Congress intended to pursue it in the ADA remain open to debate. The inferences we draw from the duty to accommodate raise questions rather than furnish conclusive answers. But we do not see how a court can determine the scope of the duty to accommodate in this statute without addressing these issues directly.

A similar comparison distinguishes constraints on any duty to accommodate in the race and disability areas. Unlike race, where current law clearly imposes constitutional limits on discrimination favoring or disfavoring any racial group, disability is not a suspect classification. The Constitution sets out few parameters restricting legislative discretion here. State and federal law may disadvantage individuals with disabilities to a considerable extent without violating equal protection requirements and, conversely, it may confer advantages on disabled individuals without violating equal protection. Thus, there is no constitutional impetus for limiting or rejecting statutory accommodations for the disabled under the ADA.

One possible response to our analysis might invoke the religious accommodation requirements of Title VII for comparison and support. Perhaps religion presents a more relevant analogy than race. It is likely that Title VII's duty on employers to accommodate the religious beliefs and practices of employees was inspired by more than a desire to prohibit discrimination *against* religious persons. Instead, it reflects the recognition by Congress that the autonomy to believe in and practice a religious faith deserves special respect and protection from interference, even if that means employers bear some of the cost of actualizing this respect – by making adjustments to work rules even where these

³⁵ *Bd. of Trustees of the Univ. of Alabama v. Garrett*, 121 S. Ct. 955 (2001).

adjustments do not rationally further the employers' economic goals. As with disability, something more than preventing or remedying invidious discrimination seems to be at work in the religion setting. And yet, someone might argue, because the religious accommodations provisions of Title VII have been construed somewhat narrowly, the accommodation provisions of the ADA should be construed narrowly as well.

We have a number of thoughts about this. First, while it is true that Title VII's religious accommodations provisions have not been read generously,³⁶ the caselaw adjudicating religious accommodations in other contexts supports the general understanding that accommodating religion transcends protection against discrimination. In that sense, religious accommodation – viewed generically – might track the majority's approach more than Justice Scalia's in *Barnett*. Indeed, Justice Scalia himself at times seems to display a much more generous attitude to religious accommodation than he does in *Barnett* towards disability accommodation.³⁷

In any event, we think religion is quite different than disability, and more like race in

at least this respect: Congress's desire to affirmatively accommodate religious believers, while it may extend beyond protection against discrimination, is directly limited to a significant extent by the Constitution, primarily the Establishment Clause. In *Hardison*, for example, the Court expressed concern that preferential accommodation of employees' religious beliefs and practices may compromise constitutionally required principles of religious equality and neutrality. As noted above, there is no similar requirement of equality or neutrality in the realm of disability. Congress can require accommodation of disability so long as such requirements are "rational."³⁸ That is but one reason why the legislative history of the ADA eschews the narrow understanding of "accommodation" that had been applied in Title VII's religion context.

At the end of the day, we are not saying Justice Scalia's approach is wrong. Instead, we are suggesting that he must provide more of an explanation as to why the lines he wants to draw are consistent with Congress's social welfare instinct that animates the ADA, when there are no constitutional impediments to reading that statute more broadly. *GB*

36 See, e.g., *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977); *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986).

37 See, e.g., *Texas Monthly v. Bullock*, 489 U.S. 1, 42 (1989) (Scalia, J., dissenting) (contending that a state law exempting religious periodicals published by a religious organization from a sales tax that secular periodicals published by secular associations must pay "comes so close to being a constitutionally required accommodation [that] there is no doubt that it is at least a permissible one"). Of course, just one year later, Justice Scalia – without explanation of his statements in *Texas Monthly* the previous Term – authored the majority opinion in *Employment Div. v. Smith*, 494 U.S. 872 (1990), which expressed skepticism about the ability of judges to craft a coherent doctrine of religious accommodations, at least under the Free Exercise Clause.

38 See *Garrett*.