COMMENT

A TEST OF FAITH: ACCOMMODATING RELIGIOUS EMPLOYEES' "WORK-RELATED MISCONDUCT" IN THE UNITED STATES AND CANADA

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What is the relationship between freedom of religion and unemployment compensation? On five separate occasions over the past thirty-five years, most recently in the 1990 decision, Employment Division v. Smith, n1 the United States Supreme Court has confronted cases involving the intersection of these two issues. The matter emerges when an employee, terminated for engaging in religious conduct, is denied unemployment compensation. What free exercise rights do religious observers retain in the workplace? How much accommodation is required of the government?

In this Comment, I examine and evaluate many facets of this problem: the approaches courts in the United States have taken in freedom of religion cases generally and unemployment compensation cases specifically; the approach Canadian courts have taken in freedom of religion cases and the approach they would likely take in the context of unemployment compensation cases; the unemployment compensation systems in the two countries; and statutory and constitutional responses to judicial action undertaken to accommodate religious freedom in both countries. The potential application of the [*251] Canadian approach to accommodating employees' freedom of religion in the United States is considered in the final section.

I. The United States' Approach

A. Freedom of Religion in Historical Perspective

The First Amendment to the United States Constitution provides, in part, that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. n2 In interpreting the meaning of the First Amendment, the United States Supreme Court traditionally has referred to the views and writings of its Framers. n3 While no record was preserved of the deliberations which produced the final wording of the First Amendment, n4 the goal of the amendment was to promote religious freedom in the United States. n5 An early principle underlying First Amendment jurisprudence is the notion that a wall-of-separation should divide Church and State. n6 This wall has been erected for the protection and sanctity of both institutions. n7

Constitutional analysis of the Amendment has consisted of an examination of its two animating clauses: the Establishment Clause and the Free Exercise Clause. Although the goal of both clauses of the First Amendment is to provide religious liberty, the two clauses occasionally conflict. The Free Exercise Clause, for example, would seem to compel the government to accommodate the practices of religious observers. When the government is too accommodating to religious observers, however, an Establishment Clause challenge may be raised. Much First Amendment litigation revolves around this tension.

1. The Early Case History: A Narrow Interpretation of the First Amendment n8

The earliest freedom of religion cases to reach the Supreme Court interpreted the Free Exercise Clause narrowly and did little to [*252] promote religious diversity. n9 The 1878 Reynolds v. United States n10 case involved George Reynolds, a Mormon who was charged with violating Utah's criminal law against bigamy. At trial, Reynolds proved that he had been a Mormon for many years and that male members of the Mormon faith were compelled by their religion to practice polygamy. Although the Court conceded that Congress could not pass a law prohibiting the free exercise of religion, the Court also found it impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to [polygamy]. n11 The Court, faced with the question of whether the First

Amendment mandated exempting religious observers from the application of the Utah law, held that no such exemption was required. The Court wrote:

Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose ... a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice? n12

Thus, in order to avoid permitting every citizen to become a law unto himself, n13 the Court upheld Utah's law.

In taking this position, the Court attempted to distinguish between beliefs, which are protected by the Constitution, and actions, which may be limited. Applying this analysis in the context of bigamy, the Court found it significant that the practice has always been odious among the northern and western nations of Europe n14 and that bigamy always had been considered an offense against society in the United States as well. The Court held that although the First Amendment prohibits the regulation of opinions, Congress is free to regulate actions such as polygamy, which violate social duties or [are] subversive of good order. n15

2. The Court's Interpretation Widens

The Court expanded the rights of religious claimants in a series of cases beginning in 1925. The first case, Pierce v. Society of Sisters, n16 [*253] involved an Oregon law compelling children to attend public school. The Society of Sisters, a Roman Catholic organization dedicated to the care and secular education of children, challenged the law. The Society claimed that the law violated parents' rights to choose which school their children attend. The Court agreed with the Society, holding that the law unreasonably interfered with the rights of parents in raising their children. n17

In 1938, in Lovell v. Griffin, n18 the Court considered the claim of Alma Lovell, a Jehovah's Witness, who challenged a local ordinance prohibiting the distribution of literature without the prior consent of the city manager. The Court held that, on its face, the statute violated the freedom of the press. Schneider v. State, n19 decided one year after Lovell, was a consolidation of four cases challenging local ordinances prohibiting canvassing and soliciting without a permit. The ordinances were likewise struck down by the Court on free speech grounds.

The next significant free exercise cases to reach the Supreme Court were Cantwell v. Connecticut n20 and Minersville School District v. Gobitis, n21 two 1940 cases involving Jehovah's Witnesses. In Cantwell, a religious observer and his two sons each went door-to-door on the streets of New Haven, Connecticut, asking residents for permission to play them a record on a portable phonograph. The records described religious books which the Cantwells were selling; one of them contained an attack on the Catholic religion. The three were arrested and charged with violating Connecticut laws prohibiting solicitation for religious purposes and with inciting a breach of the peace.

In stark contrast to its analysis in Reynolds, the Cantwell Court held that the First Amendment, made applicable to the states through the Due Process Clause of the Fourteenth Amendment, n22 embraces two concepts, - freedom to believe and freedom to act. n23 Although the Court emphasized that the freedom to act is not absolute, it also made clear that any regulation cannot unduly ... infringe the protected freedom. n24 The Court applied a clear and present danger test and reversed the Cantwells' convictions on both free speech and [*254] free exercise grounds. Justice Roberts wrote for the majority: The fundamental law declares the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged. n25

The Cantwell Court took a balancing approach, weighing the state's interest in keeping the peace against the Cantwells' interest in free expression. Had there been evidence that the Cantwells' solicitation presented a clear and present danger of riot or disorder, the Court likely would have upheld Connecticut's power to punish the offense. However, the case involved a statute which swept within its language all acts and words likely to produce violence in others. n26 The Court found the law constitutionally overbroad:

[A] State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions. Here we have a situation analogous to a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application. n27

Gobitis, decided two weeks after Cantwell, involved two students who were expelled from school for refusing to salute the American flag. The students, who were Jehovah's Witnesses, believed that the flag salute was forbidden by the Bible. n28 Justice Frankfurter, writing for the Court, upheld the school district's expulsions. Although the Court acknowledged that the government cannot interfere with individual expression of belief, it held that possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities. n29 The Court also noted that general laws not aimed against a particular faith have never been held unconstitutional. n30 Justice Stone wrote a scathing dissent, charging the Court with abdicating its responsibility to protect unpopular minorities. n31

Two years after Gobitis was decided, the Court confronted a case involving the sale of religious literature without a license. In Jones v. Opelika, n32 a Jehovah's Witness was convicted of unlicensed distribution under a city ordinance. After examining the ordinance, the Court found no problem with imposing a reasonable license fee, writing: It [*255] is prohibition and unjustifiable abridgement which are interdicted, not taxation. n33 The Court made it clear that the fee fell within the state's power to regulate commercial activity; it would have held otherwise had the Court viewed the sale of books as a religious ritual. n34 Four dissenting justices would have invalidated the ordinance on free speech and free exercise grounds, n35 and, in a separate dissent, three justices noted the grave responsibility the government has in protecting the views of religious minorities. n36

Although Gobitis and Jones temporarily set back the rights of religious claimants, both cases were subsequently overturned by the Supreme Court. In Murdock v. Pennsylvania, n37 the case overruling Jones, the Court faced facts similar to those in the earlier case. Writing for the Court, Justice Douglas held that a tax laid on the exercise of freedoms guaranteed by the First Amendment is unconstitutional. In contrast to the conclusion reached in Jones, the Murdock Court viewed the sale of books as religious activity, and found the practice to be no more commercial than the passing of the collection plate in church. n38 As the Court stated, Spreading one's religious beliefs or preaching the Gospel through distribution of religious literature and through personal visitations is an age-old type of evangelism with as high a claim to constitutional protection as the more orthodox types. n39

In West Virginia State Board of Education v. Barnette, n40 decided in 1943, the Court returned to the same issue decided in Gobitis - whether, consistent with the First Amendment, student religious observers can be forced to salute the flag. As in Gobitis, Barnette involved children of Jehovah's Witnesses who believed that the Bible prohibited saluting the flag. After refusing to participate in the flag salute, the children were expelled from school. The District Court enjoined the school district's policy, and the Board of Education appealed to the Supreme Court. The Court explicitly reversed its Gobitis decision. By so doing, the Court rejected Justice Frankfurter's conclusion in Gobitis that the judiciary lacks competence in the arena [*256] of education and instead emphasized the importance of the Bill of Rights. n41 As the Court noted:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. n42

The Court made it clear that the freedoms guaranteed by the First Amendment in particular can only be abridged to prevent grave and immediate danger to interests which the State may lawfully protect. n43 Justice Jackson eloquently summed up the extent of the protection provided by the First Amendment: If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. n44

The United States Supreme Court continued to protect religious observers in three cases decided in 1943 and 1944. In Martin v. Struthers, n45 decided on the same day as Murdock, the Court, on free speech grounds, struck down a municipal ordinance forbidding door-to-door solicitation, under which a Jehovah's Witness was convicted. In Prince v. Massachusetts n46 and Follett v. McCormick, n47 both decided in 1944, the Court again considered challenges to the prohibition of canvassing, but reached differing results. In Prince, a religious observer was convicted of violating the Commonwealth's child labor laws by furnishing a minor with literature to distribute. Against a free exercise challenge buttressed ... with a claim of parental right as secured by the due process clause of the [Fourteenth Amendment], n48 the Court upheld the statute. Although the conviction was upheld, the Court strictly limited its holding to the regulation of child labor, indicating that a prohibition against similar activity by an adult would be unconstitutional. n49 In Follett, a Jehovah's Witness was convicted of violating a town ordinance for failing to obtain a license before selling

[*257] religious literature. Citing Murdock and Opelika, the Court reversed the conviction and stated that freedom of religion is not merely reserved for those with a long purse. n50

From the time the Court decided Pierce in 1925 until the Follett decision in 1944, the Supreme Court - with few exceptions - showed a great deal of sensitivity to minorities' rights in the religious context. In protecting religious freedoms, the Court explicitly recognized that the rights of religious minorities find little protection in the democratic process. n51 Because of their political powerlessness, minorities require protection by the courts from oppressive operation of majority will. n52 In affording this protection, the Court removed the issue of religious freedom from the political arena.

Expressed in Barnette, Justice Jackson's philosophy that the politically underrepresented require judicial protection was not a new concept in 1943. Justice Stone had stated this principle in his 1940 Gobitis dissent. n53 In fact, as early as 1938, Justice Stone had discussed - without deciding - the prospect of the Court's use of a more exacting judicial scrutiny n54 when reviewing laws which restrict the political process or which are directed at particular religions. Nor need we enquire ... whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. n55

Although the Court had provided religious claimants a great deal of protection during this period, it did so mostly through the memorable language of its decisions. Unfortunately, the Court did not create any formal test to determine which religious claims should prevail. Such a test would have been useful for its precedential value, for the Court then would have been able to apply a structured analysis in future cases to create a legacy of religious protection. n56
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3. The Compelling State Interest Test and the Free Exercise Clause

In Braunfeld v. Brown, n57 decided in 1961, the Supreme Court finally articulated such a test. Braunfeld involved a challenge by Orthodox Jewish merchants to a Pennsylvania Sunday closing law n58 on the basis of the Establishment Clause, the Equal Protection Clause of the Fourteenth Amendment, and the Free Exercise Clause. n59 Because the merchants' religious beliefs required them to close their stores for a twenty-four hour period beginning on sundown each Friday night, they claimed that the Pennsylvania statute placed them at a competitive disadvantage to merchants of other faiths, thereby impairing their ability to conduct business.

The Court, after a careful review of past free exercise cases, determined that the law was constitutional. Although acknowledging the financial sacrifice the religious observers were forced to endure in order to continue to observe their faith, the Court noted that they had an option - they could retain their present occupation and make the financial sacrifice, or they could find other employment. n60 While the Court noted that this choice might impose a cruel test of faith, it upheld the statute because the law alone did not operate to prevent their religious observance. As the Court noted, The option is wholly different than when the legislation attempts to make a religious practice itself unlawful. n61 In drawing this narrow distinction, the Court finally created a test which could be applied to other cases:

If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden. n62

[*259] Because the Court believed the state had a strong interest in a providing a weekly respite from all labor, n63 and because the law was narrowly tailored to serve the state's legitimate interest, the statute was upheld. n64 Although the Court ruled against the religious claimants, the test used by the Court was both a sensible and durable solution that could be applied in future free exercise cases.

In the 1972 case Wisconsin v. Yoder, n65 Amish religious observers challenged a Wisconsin law which required them to send their children to school until the students reached the age of sixteen. The respondents removed their children from school after they had completed the eighth grade because they believed that attending school beyond that level n66 was contrary to the basic tenets of the Amish religion and way of life. The Court recognized that their objec-

tion to formal higher education was firmly grounded in [their] central religious concepts, n67 and applied the compelling state interest test in evaluating the respondents' free exercise claims:

In order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause. n68

Applying this test, the Court concluded that the respondents' claim was a matter of deep religious conviction and that further secondary education would interfere with their free exercise. Unlike the Orthodox Jews in Braunfeld, the law permitted the Amish no options, except to migrate to some other and more tolerant region. n69 The Court squarely rejected the belief-action distinction first enunciated in Reynolds and found it irrelevant that the Wisconsin law was generally applicable, rather than intended to discriminate against any religion. Finally, the Court found that the respondents' fundamental claims of religious freedom outweighed Wisconsin's interest in compulsory education.

Yoder was the high watermark of the Supreme Court's protection of religious claimants. In reversing Yoder's conviction, the Court [*260] thoroughly examined the Amish interests at stake, including tenets of the Amish religion, its history and values, and the devastating effect that mandatory high school attendance could have on the sect. n70

B. The Employment-Religion Cases

Braunfeld was one of the first reported cases involving a free exercise claim in the workplace. Subsequent cases in the employment arena raised both statutory and free exercise claims.

1. Statutory Protection of Free Exercise

In addition to the Free Exercise Clause of the First Amendment, federal legislation has been enacted to safeguard religious freedom in the United States. In the employment context, Title VII of the 1964 Civil Rights Act declares it to be an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment on the basis of religion. n71 Published guidelines of the Equal Employment Opportunity Commission (EEOC) address the employer's obligation to accommodate religious employees and religious applicants for employment. n72

Two Supreme Court cases decided in the past twenty years demonstrate the legal standard an employer must meet before terminating a religious employee. The 1977 case Trans World Airlines, Inc. v. Hardison, n73 involved a Trans World Airlines (TWA) employee and member of the Worldwide Church of God, who worked as a store clerk at a maintenance and overhaul base. Because the base was critical to TWA operations, it remained open twenty-four hours a day, year-round. TWA and the machinists' union had entered into a collective bargaining agreement which gave the most senior employees preference in job and shift assignments. Although Hardison's religious practices forbade him from working on Saturdays, he was able to avoid Saturday work because of his seniority. Subsequently, Hardison sought and received a transfer to a different building. In his new location, Hardison had insufficient seniority to choose a shift assignment which did not conflict with his religious practices, and was asked to work on Saturday. He explained his difficulty to a TWA manager, who authorized the union to change his work assignment. When the [*261] union was unwilling to do so, n74 alternative proposals were suggested. TWA rejected one proposal in which Hardison would have only worked four days, because this would have impaired critical functions in airline operations. Another possibility involved using another employee, who was not regularly assigned for Saturday work, at an overtime rate. Neither of these alternatives was adopted by TWA. No accommodation could be reached and Hardison was eventually discharged for failing to report to work. Hardison brought an action against both TWA and the union, n75 claiming his discharge constituted religious discrimination in violation of Title VII of the Civil Rights Act.

The Supreme Court held that the airline did not violate the federal civil rights prohibition against religious discrimination. The Court found that, by authorizing a change in shifts, the airline had made a reasonable effort to accommodate the religious employee. n76 The Court indicated that the seniority system itself, from which the union refused to deviate, already represented significant accommodation by TWA to all of its employees. n77 For TWA to arrange a job swap without the union's consent would have been beyond its authority; TWA was under no obligation to circumvent the seniority provision of the collective bargaining agreement. Finally, the Court held that TWA was under no ob-

ligation to adopt any of the other proposed alternatives because each of them would have imposed an undue hardship. n78

In the second case, Ansonia Board of Education v. Philbrook, n79 the Court examined the case of Ronald Philbrook, who became a member of the Worldwide Church of God six years after starting work as a high school teacher for the Ansonia Board of Education in Connecticut. His faith required him to miss approximately six days of work each year to observe religious holidays. The collective bargaining agreement into which his union had entered with the school board allowed him to miss only three days per year for religious reasons, however, and prohibited him from using personal leave or sick leave for religious purposes. n80 For several years, after using up his religious [*262] leave, Philbrook took unauthorized unpaid leave, scheduled hospital visits, or worked on religious holidays. Subsequently, Philbrook asked the Board of Education for permission to use his personal leave for religious holidays or to allow him to pay for a substitute on religious holidays. After his request was denied, he filed a complaint with the Equal Employment Opportunities Commission against the school board and his union.

On appeal, the Supreme Court held that the school board was not required to accept Philbrook's proposal. According to the Court, once an employer has provided an employee with reasonable accommodation, the employer's statutory obligation ends. n81 The employer is not required to accept the employee's proposal for reasonable accommodation, even if doing so would not present an undue hardship. The Court remanded the case to determine whether the school board's policy, which allowed Philbrook to take unauthorized unpaid leave for religious leave in excess of three days, constituted reasonable accommodation.

Hardison and Philbrook illustrate that under Title VII of the Civil Rights Act, an employer has a duty to provide religious employees with only reasonable accommodation. Once the employer has met that burden, however, it need not accept an alternative arrangement that the religious employee deems preferable, even if doing so would impose no undue burden on the employer.

C. The Unemployment Compensation System in the United States

Employees who are discharged as a result of their religious practices may wish to contest the discharge; alternatively, they may concede the discharge and instead apply for unemployment benefits. Unemployment insurance programs are funded by state and federal taxes and vary from state to state. n82 Benefits are generally available for up to twenty-six weeks and usually amount to about half of the claimants' former wages, up to a maximum amount. n83 The main objective of the unemployment compensation system in the United States is to serve as an insurance policy to protect against a loss of salary from unemployment. n84 Unemployment insurance also assists in providing employers with an incentive to stabilize their employment [*263] and in maintaining consumer purchasing power in economic downturns. n85

Rules vary among states, but all states require claimants to have earned a minimum amount of wages to be eligible for compensation. Some states also require claimants to have worked a minimum number of weeks. n86 Additionally, eligibility for unemployment compensation depends on how long an employee has worked for the employer and the reason for the unemployment. One cannot simply quit work without good cause and be eligible to receive full benefits. Nor can an individual create his own unemployment by work-related misconduct and remain entitled to receive unemployment benefits. As Roche indicates, no one should expect compensation for a wage loss that he himself has caused. n87 A reasonable corollary, however, is that the state should not deny benefits when the reasonable acts of a prudent man result in his unemployment. n88

In light of these principles, states condition the right to receive benefits on the claimants' willingness to search for work, their availability for full-time work, and their willingness to take suitable full-time work. n89 State provisions uniformly disqualify potential claimants from receiving full benefits if they: (1) voluntarily leave work, (2) are discharged for misconduct, (3) refuse suitable work, or (4) become unemployed as a result of a labor dispute. n90 The disqualification provisions, because of their vagueness, are frequently the subject of conflicting interpretations. No area of the unemployment insurance program has generated so many appeals as the provisions about voluntary quits and discharges for misconduct. n91

How courts interpret the disqualification provisions can have significant implications for discharged religious employees. In some states, a worker who terminates his employment voluntarily must have good cause to avoid disqualification; in many States ... good cause is specifically restricted to good cause connected with the work or attributable to the employer. n92 The disqualification for refusing suitable work depends on such criteria as length of unemployment,

prospects for re-employment, commuting distance, health risk, [*264] and prior employment and work experience. n93 Some states include within the good cause allowance claimants who are unemployed due to their own reasonable actions; others limit good cause to actions attributable to the employer or growing out of the work situation. n94 South Carolina, unlike most states, specifies that whether work is suitable must be based on a standard of reasonableness as it relates to the particular claimant involved. n95

Because the terms of the disqualification provisions are largely undefined, unemployment compensation boards may seek to disqualify religious claimants on various grounds: for voluntarily leaving employment, for work-related misconduct, or for refusing suitable work. These are central issues in religious observers' unemployment compensation cases.

D. Early Unemployment Compensation Cases Involving Religious Observers

Sherbert v. Verner, n96 decided in 1963, was the first case involving the denial of unemployment compensation to a person terminated due to her religious practices to reach the United States Supreme Court. In Sherbert, a Seventh-Day Adventist was discharged for refusing to work on Saturday, her Sabbath, and was subsequently denied unemployment compensation. The South Carolina Employment Security Commission denied benefits to the appellant on the basis that, by refusing to work on Saturday, she had refused to accept available suitable work without good cause. n97 Justice Brennan, writing for the Court applied the compelling state interest test and held that the denial was unconstitutional. n98 The Court found that the State had declared the appellant ineligible for benefits solely because she was practicing her religion. This interpretation of the statute, according to the Court, violated her free exercise rights. n99

Prior to 1990, the Court uniformly applied the Sherbert n100 compelling state interest test in all unemployment compensation cases, reaching the same result each time: accommodation of the religious [*265] employee by providing benefits. In a 1981 case, Thomas v. Review Board, n101 an employee of a military supplier quit after being transferred to a department that manufactured military equipment. The employee, a Jehovah's Witness, believed that he could not assist in weapons production without violating the tenets of his religion. The Indiana Employment Review Board denied him unemployment compensation, finding that his refusal to work was not based on good cause. n102 The Supreme Court disagreed and reversed, finding that the appellant's good faith religious belief prevented him from continuing his present work. Once again, the Court applied the compelling state interest test n103 and found that the state's purported interest in denying benefits - to prevent a large number of people from leaving their jobs for personal reasons and to prevent employers from inquiring into their employees' religious beliefs - were not sufficiently compelling to justify the free exercise intrusion. n104

In Hobbie v. Unemployment Appeals Commission, n105 decided in 1987, the Court again faced this issue. There, a convert to the Seventh-Day Adventist Church told her employer she could not continue to work on Saturdays. Her employer fired her, and the Florida Department of Labor and Employment Security denied her benefits after concluding that Ms. Hobbie's refusal to work constituted work-related misconduct. n106 The Supreme Court found no distinction between Ms. Hobbie's claim and the claims in Sherbert and Thomas, and reversed the denial of benefits. n107

Finally, Frazee v. Illinois Department of Employment Security, n108 decided in 1989, involved a Christian who refused to accept a job requiring work on Sundays because of his personal religious beliefs. Illinois denied Frazee benefits after concluding that his refusal was based on his own personal professed religious belief rather than the dogma of an established religious sect. n109 The Supreme Court again reversed the denial of benefits, finding it irrelevant that Frazee did not claim to be a member of a particular sect. The fact that the appellant's refusal was based on a sincerely held religious belief was sufficient to defeat whatever interest Illinois may have had in denying benefits. n110 [*266]

Several lower court cases had reached similar results in addressing the state's duty to provide unemployment compensation to displaced religious employees. n111 As early as 1954, the Michigan Supreme Court held that Seventh-Day Adventists were entitled to unemployment benefits despite being unavailable for work from sundown on Friday to sundown on Saturday. n112 Faced with similar facts, the North Carolina Supreme Court reached the same conclusion two years later. n113 One year before Sherbert was decided, the Michigan Supreme Court, in Detroit Gravure Corp. v. Michigan Employment Security Commission, n114 held that a church-going porter who refused Sunday employment was entitled to benefits. In Lincoln v. True, n115 decided in 1975, a Kentucky federal court followed the holding in Sherbert, and awarded unemployment compensation to a Jehovah's Witness who quit her job with a tobacco manufacturer on religious grounds. In Southeastern Pennsylvania Transportation Authority v. Commonwealth, Unemployment Compensation Board of Review, n116 a 1980 Pennsylvania Commonwealth Court decision granted a bus driver com-

pensation after he was dismissed for refusing to work on a religious holiday. Finally, when an employee was discharged after refusing to pay union dues for religious reasons, n117 the Wisconsin Supreme Court granted compensation.

E. The Demise of the Compelling State Interest Test and the Smith Decision

Outside the employment context, several freedom of religion cases decided in the last ten years have either deviated from the compelling state interest test or abandoned it entirely. In a 1982 case, United States v. Lee, n118 a member of the Old Order Amish community sought to avoid social security tax payments on religious grounds. n119 Although the Court acknowledged that the tax payments would inter [*267] fere with the appellant's free exercise rights, a unanimous Court held that there was an overriding governmental interest n120 in maintaining the integrity of the social security system, and thus denied the religious claim.

In a 5-4 decision, the Court in 1986 declined to apply the compelling state interest test in a case involving a free exercise claim by a United States serviceman. n121 That case, Goldman v. Weinberger, involved an Orthodox Jew who wished to wear a religious skullcap. The Court showed great deference to military regulations and denied the religious observer's claim.

In Bowen v. Roy, n122 decided less than three months later, the Court rejected the religious claim of a Native American that the Free Exercise Clause prohibits the government from using a social security number in administering social welfare programs. n123 The Court convincingly distinguished Sherbert and its progeny; unlike unemployment compensation statutes, where good cause exemptions are statutorily carved out, no such exemptions exist in the social security system. Additionally, the Court seemed to be concerned about disrupting a traditional government practice - the assignment of social security numbers. The Court held that the appellant's request that the Free Exercise Clause be interpreted so as to compel the government to affirmatively act, or refrain from acting, was without precedent. The Court stated, Just as the Government may not insist that appellees engage in any set form of religious observance, so appellees may not demand that the Government join in their chosen religious practices by refraining from using a number to identify their daughter. n124

The Court in Lyng v. Northwest Indian Cemetery Protection Ass'n, n125 a 1988 case, rejected an attempt by Native Americans to prevent the government from building a road on land they believed to be sacred. The Court again declined to apply the compelling state interest test, holding that the government could not exist if it were required to satisfy every citizen's religious needs and desires. n126 The Court likened this case to Bowen, and indicated that in neither case did the government action coerce the individual to violate his religious [*268] beliefs. n127 Recognizing that a broad range of government activities will be deemed as essential to some religions and offensive to others, Justice O'Connor wrote for the Court that the First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion. n128

In light of the mixed results in free exercise jurisprudence, the compelling state interest test stood on shaky ground by the time of the Court's 1990 decision in Employment Division, Department of Human Resources v. Smith. n129 In Smith, two members of the Native American Church were dismissed by their employer, a private drug and alcohol rehabilitation center, after they ingested peyote n130 during an off-duty religious ceremony. Although the drug use for which they were terminated was an isolated event, both men had a history of substance abuse. The rehabilitation center had a strict rule prohibiting drug use; the rule was designed both to discourage relapses by current employees and to create a positive example for patients. Neither employee challenged his dismissal. Instead, both applied to the state of Oregon for unemployment compensation.

The Oregon Employment Appeals Board denied the unemployment compensation, finding the dismissed employees ineligible as a result of their work-related misconduct. n131 Under an administrative state rule, Oregon denies benefits for wilful violations of the standards of behavior which an employer has the right to expect of an [*269] employee. n132 This regulation is based on state law, which provides that an individual shall be disqualified from the receipt of benefits ... if the ... individual: (a) has been discharged for misconduct connected with work. n133 The Oregon Court of Appeals reversed the Employment Appeals Board decision and the Oregon Supreme Court affirmed, holding that the denial of benefits violated the Free Exercise Clause of the First Amendment. The United States Supreme Court granted the state's petition for certiorari, and remanded the case to determine if the state criminal laws prohibited sacramental peyote use. The Oregon Supreme Court determined that peyote use was illegal under state law, but held that a criminal prosecution would violate the Free Exercise Clause. The United States Supreme Court again granted certiorari. n134

In a 6-3 decision, the Supreme Court refused to exempt the claimants from the Oregon law. n135 The Court did not explicitly overrule Sherbert and its progeny, but distinguished Smith and provided several independent rationales for its holding. Unlike previous cases, the plaintiffs' only claim in Smith was that the state's denial of compensation infringed on their free exercise rights. According to the Court, the Free Exercise Clause alone had never been sufficient to exempt persons from generally applicable laws. The Court characterized previous successful free exercise claims as hybrid cases which involved at least one additional constitutional claim. n136 Additionally, Justice Scalia distinguished Smith from Sherbert by holding that the compelling state interest test had never been applied to exempt plaintiffs from criminal laws. Justice Scalia stated that, although the Court had sometimes purported to apply the Sherbert test in contexts other than unemployment compensation, it had never invalidated any legislation based on the Sherbert test outside the area of unemployment compensation. n137

The Court also distinguished between impermissible laws that directly discriminate against religious observers and permissible laws [*270] that merely produce an incidental impact on religious practices. The Court characterized the statute in Sherbert as belonging to the former group. n138 In contrast, the Court found that Oregon's law did not discriminate directly, producing only an incidental impact on the Smith claimants.

In addition to distinguishing Smith from the previous free exercise cases, the Court advanced several other rationales for not granting a religious exemption. The Court explicitly exercised judicial restraint, choosing to leave the issue of exemptions to the political process. In the words of Justice Scalia:

It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws ... n139

This preference for the legislative process was motivated, at least in part, by a concern that judicially-granted exemptions would open the door to potential claimants who would flood judicial dockets and impair the State's ability to prevent such harms as manslaughter, child neglect, drug proliferation, illegal child labor, and cruelty to animals. n140 In short, the Court ruled that as long as a criminal law is generally applicable and does not directly target a religious practice, ... the free exercise clause of the United States Constitution [does not serve] as a basis for requiring an exemption to the law. n141

F. Criticism of the Smith Decision

Smith has been criticized on a variety of fronts. Perhaps most troubling is Smith's failure to protect minorities, a protection that is at the heart of the Bill of Rights. As Justice Jackson wrote in Barnette,

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship [*271] and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. n142

The decision itself was poorly drafted and relied largely on authorities long considered extinct. To support his holding, Justice Scalia relied on Gobitis (without mentioning that the case was overruled by Barnette), Pierce v. Society of Sisters (which did not involve a free exercise claim), and cases burdening free speech, not free exercise. n143 Justice Scalia's opinion also fails to mention Frazee, which presented similar issues and was decided only one year earlier. n144 In addition, by asserting that the Supreme Court has never evaluated the centrality of a religious practice to the religion, the opinion ignored the Court's approach in Yoder. n145 Writing in defense of the Smith decision, one commentator even conceded that Justice Scalia's analysis exhibits only a shallow understanding of free exercise jurisprudence and its use of precedent borders on fiction. n146

Smith instituted an unannounced doctrinal reversal. The compelling state interest test had been recently reaffirmed in the unemployment compensation context, and the Court's refusal to apply it in Smith represented a dramatic departure from precedent. Additionally, the Smith Court attempted to distinguish previous free exercise cases on the grounds that they involved hybrid claims, but failed to explain why a free exercise claim by itself is insufficient. n147

The Smith Court's refusal to find that the Oregon law discriminated against Native Americans, because it did not explicitly exempt specific groups from the denial of unemployment compensation, distorts the true meaning of the statute and is inconsistent with precedent. The Oregon law, like the South Carolina law under consideration in Sherbert, declared potential beneficiaries ineligible if they were dismissed for misconduct connected with work. Like the South Carolina Employment Security Commission's decision in the former case, the Oregon Employment Division's interpretation of the statutory language disqualifying potential beneficiaries in Smith was overly broad. In Sherbert, the Court found that refusing to work for [*272] religious reasons could not be considered declining employment without good cause; n148 likewise, in Smith, the Court should have found that practicing religion could not be considered misconduct connected with work.

Justice Scalia's fears that the continued application of the compelling state interest test will result in judicial chaos and increased litigation appear to be unsubstantiated. The use of peyote is relatively minor and poses no threat to public safety. n149 Therefore, his opinion seems motivated by an overreaction to the drug crisis. Additionally, the Court underestimated the judiciary's ability to exercise discretion and to recognize feigned claims of religious faith. The Court's fear of judicial tyranny is unwarranted; unlike some areas, the issue of religious freedom is a particular area of judicial competence. As Justice O'Connor wrote, the Court's parade of horribles not only fails as a reason for discarding the compelling interest test, it instead demonstrates just the opposite: that courts have been quite capable of applying our free exercise jurisprudence to strike sensible balances between religious liberty and competing state interests. n150 Even if Justice Scalia's concerns about judicial tyranny are legitimate, they do not justify withholding constitutional protection from free exercise claimants.

Though in recent history the state had been successful in defending against claims of free exercise violations, the compelling state interest test should not be abandoned merely because the government usually prevails. That [the Court] rejected the free exercise claims in [recent] cases hardly calls into question the applicability of First Amendment doctrine in the first place. Indeed, it is surely unusual to judge the vitality of a constitutional doctrine by looking [at its] win-loss record. n151

Clearly, the Court's treatment of free exercise cases has changed substantially in the last decade. Prior to Smith, two rationales provided plausible reasons for the different results. First, as some commentators have suggested, the Court may be deliberately distinguishing between positive and negative free exercise rights. n152 The Court consistently has refused to provide claimants with positive free exercise rights which would require the government to take af [*273] firmative steps to restructure its practices in conformity with claimants' religious beliefs. In contrast, the Court has been more willing to recognize negative rights which free the claimant from practices that coerce or prohibit religious activity. n153 As Justice Douglas indicated in Sherbert:

The fact that government cannot exact from me a surrender of one iota of my religious scruples does not, of course, mean that I can demand of government a sum of money, the better to exercise them. 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. n154

Alternatively, the Court may have been distinguishing these cases on their facts. The Court preferred to avoid interfering in internal government procedures in Bowen, Lyng and Lee. Goldman also presented a special situation because of concerns about military interference. Other cases, in contrast, involved plaintiffs whose claims had little effect on government functions.

Although these explanations may have been plausible prior to Smith, they ring hollow in its aftermath. Smith involved a negative right - the right to be free from government regulations which conflict with religious practices. In addition, the religious claims made by the appellants in Smith, while admittedly different from previous cases, are sufficiently similar to those made in Yoder and Sherbert to expect a similar result. n155 No case spells the demise of the compelling state interest test more clearly than Smith.

II. The Canadian Approach

A. Religious Freedom in Canadian Law

The Canadian Constitution, known as the Canadian Charter of Rights and Freedoms, or simply the Charter, was introduced in 1982 and represented a limitation upon the principle of parliamentary sovereignty previously unknown to Canadian constitutional law. n156 Although the Charter, unlike the United States Constitution, does not protect free exercise explicitly, sections 2(a) and 15(1) provide for religious freedom. Section 2(a) makes freedom of conscience and religion a fundamental right. Section 15(1) states that every individual [*274] is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination ... based on ... religion. n157 In contrast to the United States' Constitution, however, the Charter contains no prohibition against the establishment of religion. As one commentator stated:

In Canada, quite clearly, the separation of Church and State has never constituted articulate governmental or legislative policy. On the contrary, section 93 of the Constitution Act, 1867, evinces an institutionalized accommodation of majority religions, whereas the preamble to the Charter refers explicitly to the Supreme Deity. Moreover, the very fact that [the Supreme Court] upheld the Lord's Day Act, enacted for the purpose of safeguarding the sanctity of Sunday in furtherance of Christian tenets, suggests the prevalence only of a guarantee of free exercise, without one against establishment. n158

Despite the absence of an express establishment clause, however, the Canadian Supreme Court has interpreted freedom of religion to include the freedom to manifest religious non-belief, as well as the freedom to refuse to participate in religious practice. n159

In drafting the Charter, Canada compromised between the Canadian tradition of provincial autonomy and the United States' tradition of constitutionally and judicially secured individual liberties. n160 In section 33, the Charter vests in both Parliament and the provincial legislatures the power to supersede rights secured in the Charter. n161 This override provision essentially states that national rights are national [only] to the extent the provinces permit. n162 An additional limit on the Charter is contained in section 1, which guarantees the rights and freedoms set out in [the Charter] subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. n163

Before the Charter was enacted in 1982, section 1(c) of the Canadian Bill of Rights expressly protected freedom of religion. This protection was temporarily limited by a 1963 decision which restricted the freedom to existing rights and freedoms as of 1960. n164 This frozen [*275] concepts perspective was rejected by the Ontario Court of Appeals in a post-Charter decision, Regina v. Videoflicks Ltd. n165 In that case, the court introduced a broader definition of religious freedom:

Freedom of religion [under the Charter] goes beyond the ability to hold certain beliefs without coercion and restraint and entails more than the ability to profess those beliefs openly. [It] also includes the right to observe the essential practices demanded by the tenets of one's religion and, in determining what those essential practices are in any given case, the analysis must proceed not from the majority's perspective of the concept of religion but in terms of the role that the practices and beliefs assume in the religion of the individual or group concerned. n166

In The Queen v. Big M Drug Mart Ltd., n167 the Canadian Supreme Court agreed, interpreting section 2(a) of the Charter to include the notion of the centrality of individual conscience and the inappropriateness of governmental intervention to compel or to constrain its manifestation. n168

B. Freedom of Religion Cases

The wide variety of circumstances in which freedom of religion claims have been asserted in the employment context in Canada has been well documented. n169 Conflicts have arisen when religious employees request days off to observe their Sabbaths, when they wear religious headgear or other apparel, or when they request permission to attend religious assemblies. Additional cases concern employment rules governing facial hair and leaves of absence. n170 Freedom of religion cases in the employment context have reached the Canadian Supreme Court three times in the past decade: Ontario Human Rights Commission and Simpsons-Sears Ltd. n171 (O'Malley); Bhinder and Canadian National Railway Co. n172 (Bhinder); and most recently, Alberta Human Rights Commission v. Central Alberta Dairy Pool n173 (Dairy Pool).

O'Malley, decided in 1985, involved a plaintiff who became a member of the Seventh-Day Adventist Church during her employ [*276] ment with Simpsons-Sears. Her religion required her to miss work on Friday evenings and Sat-

urdays in order to observe her Sabbath. O'Malley alleged discrimination when her employer refused to accommodate these needs. The Canadian Supreme Court found the employer guilty of violating the Ontario Human Rights Code, which prohibits discrimination against employees with regard to any term or condition of employment, because of ... creed. n174 In reviewing the Ontario Human Rights Code, the Court noted that legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary - and it is for the courts to seek out its purpose and give it effect. n175 Writing for a unanimous Court, Justice McIntyre held that intent is not a necessary prerequisite to establish a violation of the Ontario Human Rights Code; absent undue hardship, the employer has a duty to accommodate observant employees and bears the burden of showing that undue hardship will result by accommodating the employee. n176

Bhinder, handed down on the same day as O'Malley, involved a Sikh maintenance electrician employed by Canadian National Railways (CN). During Bhinder's employment, CN initiated a policy requiring employees to wear hard hats, a rule directly contrary to the Sikh religious policy mandating the wearing of turbans. Bhinder's employment ended when he refused to wear the hard hat, and he subsequently filed a complaint against CN alleging a violation of the Canadian Human Rights Act. n177 The Federal Court of Appeal reversed a ruling in favor of Bhinder by a human rights tribunal on the basis that CN's policy constituted a bona fide occupational requirement (BFOR) and thus complied with the Canadian Human Rights Act.

In a 5-2 decision - and over a strong dissent by Chief Justice Dickson - the Supreme Court affirmed. The Court recognized that the risk borne by Bhinder by wearing a turban instead of a hard hat was only increased by a small amount and that excepting Bhinder would be unlikely to impose a hardship on CN. n178 Again writing for [*277] the majority, Justice McIntyre held that the Canadian Human Rights Act, unlike the Ontario Human Rights Code, does not require an employer to accommodate a religious employee when the employee's religious practice conflicts with a BFOR. n179 The majority held that, in considering the validity of a BFOR, courts are required to examine the employer's reasons for adopting the work rule. If the employer did so for genuine business reasons, with no malicious intent, the employer is not guilty of discrimination. According to the majority, the BFOR could not be considered on an individual basis. The words of the statute speak of an "occupational requirement'. This must refer to a requirement for the occupation, not a requirement limited to an individual ... It is, by its nature, not susceptible to individual application. n180 As one commentator has noted, the effect of the Bhinder decision was that a law with a BFOR allowance would permit employers to prevail over the religious requirements of an individual employee. n181

Dairy Pool, the most recent religion-and-employment case to reach the Canadian Supreme Court, involved Jim Christie, an observer of the Worldwide Church of God. Christie's religion required him to refrain from working from Friday evening until Saturday evening and on ten religious holidays. His employer, the Central Alberta Dairy Pool, denied Christie's request to be excused from work on a religious holiday which fell on a Monday, since that day of the week was particularly busy. The Dairy Pool subsequently fired Christie. Pursuant to Alberta's Individual's Rights Protection Act, Christie brought a discrimination complaint. His claim was initially upheld by an Alberta Board of Inquiry, but was later denied on appeal by both the Alberta Court of Queen's Bench and the Alberta Court of Appeal on the basis of the Supreme Court's decision in Bhinder. On appeal, however, the Canadian Supreme Court reversed its decision in Bhinder, concluding that the Court should have considered whether the employer could have accommodated the individual religious employee without experiencing undue hardship. The Court held that, even under jurisdictions permitting a bona fide occupational qualification (BFOQ) n182 exception, an employer has a duty to accommodate individual religious employees unless such accommodation would impose an undue hardship on the employer. [*278]

C. The Canadian Unemployment Compensation System

To date, in cases reaching the Canadian Supreme Court in which observant employees were terminated, the complainants have all sought redress against their employer. As in the United States, however, employees terminated after practicing their religion have the option of applying for unemployment insurance instead of contesting dismissal. With that in mind, a basic overview of the Canadian unemployment insurance system is appropriate.

The policies underlying the Canadian unemployment insurance system parallel the policies underlying the United States' system. The objectives include providing income to workers who have become unemployed, providing money and time to assist the unemployed in finding other jobs, facilitating labor market adjustments, and redistributing income. n183 Like its counterpart in the United States, the scope of the Canadian unemployment insurance program is broad. The present Canadian program has opted to cover almost all involuntary interruptions of earnings where claimants have

satisfied minimum employment periods. n184 Like the unemployment compensation system in the United States, eligibility also depends on the basis of the claimant's unemployment.

D. Accommodating Canadian Religious Employees by Providing Unemployment Compensation

Canadian courts have not yet decided whether accommodation requires the government to grant unemployment compensation to employees who have quit, refused work, or been terminated for exercising their religious views. Nevertheless, it appears that Canadian courts would be more likely than their American counterparts to provide unemployment compensation to religious dissenters. The absence of an establishment clause enables Canada to take a more accommodating approach to religious freedom generally. n185 Additionally, the recent willingness of the Canadian Supreme Court in Dairy Pool to provide broad free exercise rights to a terminated employee living in a BFOR jurisdiction suggests that Canada has conferred a preferred status on religious freedom. However, one should not conclude definitively that Canada would compensate religious employees who have been terminated because of their religions. Juxta [*279] position of the United States Supreme Court's decisions in Hardison and Smith demonstrates that courts will not necessarily equate an employer's duty to reasonably accommodate religious employees with the state's duty to provide compensation to those who have been terminated as a result of religious exercise.

III. Evaluating the Two Approaches

A. The United States' Approach: Compelling State Interest v. Incidental Impact

From the 1940s until the early 1980s, the United States Supreme Court consistently applied the compelling state interest test in the area of unemployment compensation, as well as in the context of other negative free exercise rights. This approach recognized that the First Amendment confers a preferred status on those seeking to freely exercise their religions.

Criticism of the incidental impact approach has been harsh, swift, and largely justified. It is unclear whether Smith's abandonment of the compelling state interest test was a permanent shift. Although Smith was the first unemployment compensation case to abandon the compelling state interest test, it was hardly the first free exercise case to do so. It is also unclear what impact, if any, the recent ascension of Justice Ginsburg or any additional appointments to the United States Supreme Court will have on this evolving jurisprudence. Nonetheless, the judicial approach in free exercise cases in the United States appears to have settled, at least temporarily, with the incidental impact analysis. n186 As Justice Scalia stated, If prohibiting the exercise of religion ... is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended. n187

The compelling state interest test deserves greater vitality. As Yoder demonstrated, the test is appropriate in cases of deep religious conviction and is most consistent with the primary goals the Framers of the First Amendment sought to achieve: prevention of religious coercion and promotion of religious pluralism. n188 Chief Justice Burger's [*280] comprehensive explanation of the test in Thomas n189 amply demonstrates its merit in the free exercise arena. The judiciary is competent to evaluate the merits of sincere, good-faith religious beliefs. A sincerity test, such as the one the Court used in Sherbert, n190 can sufficiently filter out unwarranted exemptions. As the Court ruled in Thomas, the fact-finder must merely determine whether the plaintiff's claim is sufficiently religious to enjoy the preferred status of the First Amendment. n191

B. The Canadian Approach and the Duty to Accommodate

As the O'Malley Court indicated in reference to the adverse effects of discrimination, an employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply. n192 This observation summarizes the accommodating approach the Canadian Supreme Court has taken so far with respect to claims made by religious employees. On this subject, one commentator noted, it can now be simply stated that whenever an employee's religious beliefs or practices conflict with job related requirements discrimination will be presumed regardless of whether the employer intended it. n193 The Canadian Supreme Court's position in O'Malley reflected its willingness to ban indirect or effects discrimination in the name of the Charter. n194 Although Canada has not enacted specific provisions analogous to the United States' civil rights legislation requiring an employer to reasonably accom-

modate religious employees, any lingering doubts about the existence or extent of a duty to accommodate, absent specific legislative authority, were laid to rest by the Supreme Court's decision in O'Malley. n195

The Bhinder court temporarily recognized the supremacy of provincial authority by allowing an employer to impose rules which may have a discriminatory effect on religious employees if such rules are grounded in bona fide occupational requirements. BFORs must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate perform [*281] ance of the work involved. n196 Bhinder effectively allowed BFOR defenses in jurisdictions whose legislatures had enacted them.

In Dairy Pool, however, the court restored the supremacy of religious claims. Even in jurisdictions where BFORs have been enacted, an employer must accommodate religious employees unless doing so would pose an undue hardship. Since Dairy Pool, several conclusions can be drawn regarding the Canadian approach when religion conflicts with employment. First, it is apparent that the Canadian courts will weigh the effects of unlawful discrimination at least as heavily as the employer's intent. Second, once the complainant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate undue hardship. Third, religious claims will prevail even over bona fide occupational requirements.

IV. Conclusions

Despite different constitutional and legislative schemes, both Canada and the United States recognize the conceptual distinction between the positive right of free exercise and the negative right to be free from an establishment of religion. n197 However, differences in the two countries' statutory and constitutional schemes reveal contrasting approaches.

Additionally, comparing the United States' issue of a state's duty to accommodate religious employees by providing unemployment compensation and the closest Canadian analog, the issue of an employer's duty to accommodate religious employees, is problematic. Notwithstanding these differences, however, Canada has taken an admirable approach in attempting to resolve disputes between employers and religious employees. Courts in the United States, while employing a legal standard with respect to disputes between employers and religious employees similar to Canada's, have departed dramatically from that standard in the area of unemployment compensation. This approach has been much less accommodating and should be troubling to all who are concerned about free expression.

Corrective legislation, however, may be sufficient to rescue religious claimants. In 1988, in response to the Goldman decision, Congress passed a law to loosen the strict requirements of the military [*282] dress code. n198 Native Americans' sacramental use of peyote is also protected by federal law. n199 In addition, President Clinton recently signed into law the Religious Freedom Restoration Act of 1993, n200 a direct response to Smith, which reinstates the compelling state interest test.

States have likewise taken action to protect religious employees. Twenty-three states, for example, exempt sacramental peyote use from criminal sanction. n201 Additionally, in a number of states, statutes have been enacted to bar employers from discriminating on the basis of race, color, national origin, or religious creed, with respect to personnel decisions or the terms and conditions of employment. n202

Ironically, by refusing to grant the Smith claimants their free exercise rights, the United States Supreme Court's prophecy became self-fulfilling: the Court left accommodation to the political process, and democracy restored free exercise. Such an approach, however, is extremely troublesome. It took Congress and the President three years to restore the compelling state interest test. Unfortunately, legislatures may not always be willing or able to take on a role that the judiciary should assume in the first place: protection of religious minorities.

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of ReligionEstablishment of ReligionConstitutional LawBill of RightsFundamental FreedomsFreedom of ReligionFree Exercise of ReligionLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationEligibilityGeneral Overview

FOOTNOTES:

n1. 494 U.S. 872 (1990).

n2. U.S. Const. amend. I.

n3. Arlin M. Adams & Charles J. Emmerich, A Heritage of Religious Liberty, 137 U. Pa. L. Rev. 1559, 158283 (1984).

n4. See id. at 1581.

n5. Id. at 1599.

n6. Id. at 1584-85 & nn.110-11 (explaining the origins and history of the wall metaphor).

n7. Id. at 1587.

n8. The historical overview which follows is not meant to be exhaustive. Although the cases presented largely involve free exercise claims, many also involve free speech and related claims. Because of the interrelatedness of these claims, several cases involving both claims are summarized in this section and the next section.

n9. Danielle A. Hess, The Undoing of Mandatory Free Exercise Accommodation, 66 Wash. L. Rev. 587, 588 (1991).

n10. 98 U.S. 145 (1878).

n11. Id. at 165 (noting that Virginia had outlawed bigamy shortly after passing a law establishing religious freedom).

n12. Id. at 166.

n13. Id. at 167.

n14. Id. at 164.

n15. Id.

n16. 268 U.S. 510 (1925).

n17. Id. at 534-35.

n18. 303 U.S. 444 (1938).

n19. 308 U.S. 147 (1939).

n20. 310 U.S. 296 (1940).

n21. 310 U.S. 586 (1940), overruled by W. Va. State Bd. of Ed. v. Barnette, 319 U.S. 624 (1943).

n22. This clause provides that no state shall deprive any person of life, liberty, or property, without due process of law. U.S. Const. amend. XIV.

n23. 310 U.S. at 303.

n24. Id. at 304.

n25. Id. at 307.

n26. Id. at 308.

n27. Id.

n28. See Exodus 20:3-5.

n29. 310 U.S. at 594-95.

n30. Id. at 594.

n31. Id. at 604-05.

n32. 316 U.S. 584 (1942), vacated, 319 U.S. 103 (1943).

n33. 316 U.S. at 597.

n34. Id. at 598.

n35. Id. at 620.

n36. Id. at 624.

n37. 319 U.S. 105 (1943).

n38. Id. at 111.

n39. Id. at 110.

n40. 319 U.S. 624 (1943).

n41. The first ten amendments to the United States Constitution are commonly referred to as the Bill of Rights.

n42. 319 U.S. at 638.

n43. Id. at 639.

n44. Id. at 642.

n45. 319 U.S. 141 (1943).

n46. 321 U.S. 158 (1944).

n47. 321 U.S. 573 (1944).

n48. 321 U.S. at 164.

n49. Id. at 167.

n50. 321 U.S. at 576.

n51. Clyde W. Summers, The Sources and Limits of Religious Freedom, 41 Ill. L. Rev. 53, 64 (1946).

n52. Id. (arguing that legislation which oppresses a minority must be presumed unconstitutional and subjected to careful scrutiny by the Court).

n53. 310 U.S. at 604-06 (Stone, J., dissenting).

n54. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

n55. Id. Justice Stone wrote these now famous words in the course of reviewing a law regulating the interstate shipment of milk.

n56. The Court did use a more structured analysis in Cantwell and Barnette, balancing the religious observers' First Amendment rights against the state's interest in regulating the religious activity. This analysis, however, was used only sporadically in subsequent free exercise cases decided during this period.

n57. 366 U.S. 599 (1961).

n58. The Sunday closing law was a criminal law which required most retailers to keep their stores closed on Sunday under penalty of fine or imprisonment. Id. at 600 n.1.

n59. The challenges under the Establishment Clause and the Equal Protection Clause were summarily disposed of on the authority of a previous decision by the Court. Id. at 601.

n60. Id. at 606.

n61. Id.

n62. Id. at 607 (citing Cantwell, 310 U.S. at 304-05). The test - frequently called the compelling state interest test or the strict scrutiny test - actually had been created in Cantwell, but Braunfeld marked the first time it had been formally adopted.

n63. Id.

n64. Id. at 606-09.

n65. 406 U.S. 205 (1972).

n66. The Amish do not object to formal schooling through the eighth grade because they believe that a basic education is necessary in the course of daily affairs. Id. at 212.

n67. Id. at 210.

n68. Id. at 214.

n69. Id. at 218.

n70. Hess, supra note 9, at 590.

n71. Title VII, Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a) (1988).

n72. 29 C.F.R. 1605.1-1605.3 (1992).

n73. 432 U.S. 63 (1977).

n74. The union claimed it was unwilling to violate the terms of the seniority provisions in the collective bargaining agreement. Id. at 68.

n75. Although Hardison's initial action was against both TWA and the union, he did not appeal the trial court's verdict in favor of the union. Id. at 70.

n76. Id. at 78.

n77. Id.

n78. Id. at 84.

n79. 479 U.S. 60 (1986).

n80. The collective bargaining agreement restricted the use of personal leave for only those purposes not already specified in the contract. Because the agreement specifically provided for three days of religious leave, employees were not permitted to use personal leave for religious purposes.

n81. 479 U.S. at 68.

n82. Michael W. Finkin et al., Legal Protection for the Individual Employee 702 (1989).

n83. Id. at 706.

n84. See George S. Roche, Entitlement to Unemployment Insurance Benefits 1 (1973).

n85. Id. at 1-2.

n86. Finkin et al., supra note 82, at 706.

n87. Roche, supra note 84, at 49.

n88. Id.

n89. Unemployment Insurance Service, U.S. Department of Labor, Comparison of State Unemployment Insurance Laws 400-415 (Comparison Revision No. 2, Jan. 5, 1992)[hereinafter Comparison of State Unemployment].

n90. Id. 425.

n91. Roche, supra note 84, at 50.

n92. Comparison of State Unemployment, supra note 89, 430.

n93. See id. 440.01.

n94. Roche, supra note 84, at 51.

n95. Id.

n96. 374 U.S. 398 (1963).

n97. Id. at 401.

n98. Id. at 403.

n99. Id. at 406.

n100. The compelling state interest test was borrowed from NAACP v. Button, 371 U.S. 415 (1963), a case involving racial, rather than religious, discrimination. See Tom C. Rawlings, Employment Division, Department of Human Resources v. Smith: The Supreme Court Deserts the Free Exercise Clause, 25 Ga. L. Rev. 567, 580 n.89 (1991).

n101. 450 U.S. 707 (1981).

n102. Id. at 712.

n103. See id. at 718.

n104. Id. at 718-19.

n105. 480 U.S. 136 (1987).

n106. Id. at 139.

n107. Id. at 141.

n108. 489 U.S. 829 (1989).

n109. Id. at 831.

n110. Id. at 834-35.

n111. Not all courts have reached the same conclusion, however. For a collection of cases reaching different conclusions, see Sonja A. Soehnel, Annotation, Leaving or Refusing Employment for Religious Reasons as Barring Unemployment Compensation, 12 A.L.R. 4th 611 (1980).

n112. Swenson v. Mich. Employment Sec. Comm'n, 65 N.W.2d 709 (Mich. 1954).

n113. In re Miller, 91 S.E.2d 241 (N.C. 1956).

n114. 115 N.W.2d 368 (Mich. 1962).

n115. 408 F. Supp. 22 (W.D. Ky. 1975).

n116. 420 A.2d 47 (Pa. Commw. Ct. 1980).

n117. The employee was a member of the Seventh-Day Adventist Church which bars its members from joining or financially supporting labor unions and similar organizations. Nottelson v. Wisconsin Dep't of Indus., Labor & Human Relations, 287 N.W.2d 763, 765 (Wis. 1980).

n118. 455 U.S. 252 (1982).

n119. The appellant indicated the Amish believe it is sinful not to support needy members of their own community, and are therefore opposed to the national social security system. Id. at 255.

n120. Id. at 257-58.

n121. Goldman v. Weinberger, 475 U.S. 503 (1986).

n122. 476 U.S. 693 (1986).

n123. The claimant believed that assigning people a number robs them of their unique spirit and prevents them from obtaining great spiritual power. See Kenneth Marin, Employment Division v. Smith: The Supreme Court Alters the State of Free Exercise Doctrine, 40 Am. U. L. Rev. 1431, 1446 (1991); see Bowen, 476 U.S. at 696.

n124. 476 U.S. at 699-700.

n125. 485 U.S. 439 (1988).

n126. Id. at 452.

n127. Id. at 449.

n128. Id. at 452.

n129. 494 U.S. 872 (1990).

n130. Peyote is a hallucinogen derived from a cactus plant. The plant produces buttons of mescaline-containing peyote. See Rawlings, supra note 100, at 567 & n.1. Peyote is central to the teachings and practices of the Native American Church. In describing the role of peyote to the Church, one commentator noted:

The Native American Church is an Indian religious organization whose membership has been estimated at more than 200,000. The sacramental use of peyote, which dates back to the sixteenth century, is a central tenet of the Church. Members believe peyote embodies the Holy Spirit and that those who partake of peyote enter into direct contact with God. Use of the drug is limited to a few highly controlled ritual ceremonies during which participants chew several buttons of the bitter cactus to achieve a hallucinogenic state of worship; women and children are prohibited from using the drug, and its use by anyone outside the ceremony is considered sacrilegious.

Id. at 568-69 (citing People v. Woody, 394 P.2d 813, 816-17 (Cal. 1964); J.S. Slotkin, The Peyote Way, in Teachings from the American Earth 96, 100 (Dennis Tedlock & Barbara Tedlock eds., 1975); Edward F. Anderson, Peyote: The Divine Cactus (1980)).

n131. The claimants were not declared ineligible because they violated Oregon's general criminal prohibition against drug use. Indeed, Oregon has never sought to prosecute respondents, and does not claim that it has

made significant enforcement efforts against other religious users of peyote. 494 U.S. at 910 (Blackmun, J., dissenting).

n132. Black v. Employment Div., 721 P.2d 451, 452 (Or. 1986), consolidated and vacated sub nom. Employment Div. v. Smith, 485 U.S. 660 (1988), reaff'd en banc, 763 P.2d 146 (1988), rev'd, 494 U.S. 872 (1990).

n133. See Rawlings, supra note 100, at 568 n.4 (citing Or. Rev. Stat. 657.176(2) (1989)).

n134. Black v. Employment Div., 707 P.2d 1274 (Or. App. 1985), aff'd, 721 P.2d 451, 452 (Or. 1986), consolidated and vacated sub nom. Employment Div. v. Smith, 485 U.S. 660 (1988), reaff'd en banc, 763 P.2d 146 (1988), rev'd, 494 U.S. 872 (1990).

n135. Justice Scalia's opinion was joined by Chief Justice Rehnquist and Associate Justices White, Stevens, and Kennedy. Justice O'Connor concurred in the judgment.

n136. As examples of hybrid claims, the Court cited Cantwell (decided on free exercise, free speech and free press grounds), Murdock (same), Follett (same), Pierce (decision based on free exercise and parents' rights to educate children), and Yoder (same). 494 U.S. at 881.

n137. Id. at 883.

n138. The South Carolina law disqualified claimants from compensation if they quit or refused available work without good cause. According to Justice Scalia, the without good cause language created a mechanism for individualized exemptions; where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of "religious hardship without compelling reason.' Id. at 884.

n139. Id. at 890.

n140. Id. at 888-89. See Roald Mykkeltvedt, Employment Division v. Smith: Creating Anxiety by Relieving Tension, 58 Tenn. L. Rev. 603, 616 (1991); Rawlings, supra note 100, at 572 n.32.

n141. Hess, supra note 9, at 587.

n142. Barnette, 319 U.S. at 638.

n143. Robert N. Anderton, Just Say No to Judicial Review: The Impact of Oregon v. Smith on the Free Exercise Clause, 76 Iowa L. Rev. 805, 825-26 (1991).

n144. Mykkeltvedt, supra note 140, at 613 n.59.

n145. See Marin, supra note 123, at 1470; Mykkeltvedt, supra note 140, at 615 n.67 (arguing that Yoder refutes Justice Scalia's assertion that the Court had never examined the place of a particular practice in religious belief).

n146. William P. Marshall, In Defense of Smith and Free Exercise Revisionism, 58 U. Chi. L. Rev. 308, 309 (1991).

n147. See Mykkeltvedt, supra note 140, at 617; Marin, supra note 123, at 1458, 1469-70 (arguing, inter alia, that Smith turns Yoder on its head by requiring a parental right to accompany a constitutional right).

n148. Sherbert, 374 U.S. at 400-02.

n149. 494 U.S. at 916 (Blackmun, J., dissenting)(There is, however, practically no illegal traffic in peyote.). The total amount of peyote seized by federal authorities from 1980 to 1987 was 19.4 pounds; over 15 million pounds of marijuana were seized during the same period. Id.

n150. Id. at 902 (O'Connor, J., concurring)(citation omitted).

n151. Id. at 896-97 (O'Connor, J., concurring).

n152. Marin, supra note 123, at 1447 & n.94 (citing L. Tribe, American Constitutional Law 14-13, at 1262-64 (2d ed. 1988)).

n153. Id. at 1447 & n.96.

n154. Sherbert, 374 U.S. at 412 (Douglas, J., concurring).

n155. At a very general level, Smith, like Yoder, involved plaintiffs who sought an exemption from a generally applicable criminal law which incidentally burdened free exercise rights. Marin, supra note 123, at 1470.

n156. Patrick Macklem, Freedom of Conscience and Religion in Canada, 42 U. Toronto Fac. L. Rev. 50, 71 (1984).

n157. Canada Act 1982, ch. 11, sched. B 2(a), 15(1) (Can.), reprinted in 1 Public General Acts and General Synod Measures of 1982 79, 82, 86 (1983).

n158. Irwin Cotler, Freedom of Conscience and Religion (Section 2(a)), in Canadian Charter of Rights and Freedoms 163, 184 (Gerald A. Beaudoin & Ed Ratushny eds., 1989).

n159. Id. at 174.

n160. Calvin R. Massey, The Locus of Sovereignty: Judicial Review, Legislative Supremacy, and Federalism in the Constitutional Traditions of Canada and the United States, 1990 Duke L.J. 1229, 1266.

n161. See id.

n162. Id. at 1268.

n163. Canada Act 1982, 1.

n164. Robertson v. The Queen, 1963 S.C.R. 651, 654-55 (Can.).

n165. 14 D.L.R.4th 10, 34 (C.A. 1984)(Can.), aff'd sub nom. Edwards Books and Art Ltd. v. The Queen, [1986] 2 S.C.R. 713 (Can.).

n166. 14 D.L.R.4th at 35.

n167. [1985] 1 S.C.R. 295 (Can.).

n168. Id. at 346.

n169. See, e.g., Ivan F. Ivankovich, The Religious Employee and Reasonable Accommodation Requirements, 13 Can. Bus. L.J. 313, 314 & nn.1-5 (1987-88).

n170. Id. at 321 & nn.29-30.

n171. [1985] 2 S.C.R. 536 (Can.).

n172. [1985] 2 S.C.R. 561 (Can.).

n173. [1990] 2 S.C.R. 489 (Can.).

n174. [1985] 2 S.C.R. at 546.

n175. Id. at 547.

n176. See Ivankovich, supra note 169, at 317-18.

n177. The Canadian Human Rights Act is aimed at the elimination of discriminatory practices. [1985] 2 S.C.R. at 582. Although sections 7 and 10 of the Act make it illegal for an employer to discriminate on religious grounds or to adopt a policy which has a discriminatory effect, section 14(a) indicates that an employer does not illegally discriminate if his action is based on a bona fide occupational requirement (BFOR). This BFOR defense distinguishes the Canadian Human Rights Act from the Ontario statute relevant in O'Malley. See Canadian Human Rights Act, R.S.C. ch. H-6 15 (1985)(Can.).

n178. [1985] 2 S.C.R. at 575-76 (Dickson, C.J., dissenting).

n179. Id. at 590.

n180. Id. at 588.

n181. Ivankovich, supra note 169, at 330.

n182. There is no apparent distinction between BFORs and BFOQs. [1985] 2 S.C.R. at 502.

n183. Jonathan R. Kesselman, Canadian Tax Paper No. 73: Financing Canadian Unemployment Insurance 5 (1983).

n184. Id. at 6.

n185. When the government is too accommodating to religious observers in the United States, allegations of Establishment Clause violations may be raised.

n186. The Court's most recent foray into free exercise was Church of the Lukumi Babaluaye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993). That case struck down a local ordinance banning ritual animal sacrifice under the guise of prohibiting cruelty to animals. The Court distinguished the ordinance on the grounds that it was not neutral or of general applicability; thus, the Court analyzed the ordinance under the compelling state interest test. The Court reaffirmed the incidental effect test, however, in cases involving neutral laws of general applicability. Id. at 2226.

n187. Smith, 494 U.S. at 878.

n188. See Hess, supra note 9, at 588.

n189. 450 U.S. at 716-19.

n190. Sherbert, 374 U.S. at 407. See also Smith, 494 U.S. at 907 (O'Connor, J., concurring)(The distinction between questions of centrality and questions of sincerity and burden is admittedly fine, but it is one that is an established part of our free exercise doctrine.).

n191. 450 U.S. at 715.

n192. O'Malley, [1985] 2 S.C.R. at 551; see Ivankovich, supra note 169, at 321.

n193. Ivankovich, supra note 169, at 321.

n194. Cotler, supra note 158, at 182.

n195. Ivankovich, supra note 169, at 326 (footnote omitted).

n196. Bhinder, [1985] 2 S.C.R. at 572 (Dickson, C.J., dissenting) (quoting Ontario Human Rights Comm'n v. Borough of Etebicoke, [1982] 1 S.C.R. 202, 208 (Can.)).

n197. See Cotler, supra note 158, at 174; U.S. Const. amend. I.

n198. The law now allows religious observers in the military to wear religious apparel unless the Secretary of the branch of the armed forces concerned decides that the apparel would interfere with the performance of the member's military duties. 10 U.S.C. 774 (1988).

n199. See 42 U.S.C. 1996 (1988).

n200. The law prohibits the government from burdening a person's free exercise unless the burden furthers a compelling state interest and is the least restrictive means of doing so. Religious Freedom Restoration Act, Pub. L. No. 103-141 (Nov. 23, 1993).

n201. Anderton, supra note 143, at 828.

n202. Wayne F. Foster, Annotation, Judicial Construction and Application of State Legislation Prohibiting Religious Discrimination in Employment, 91 A.L.R. 3d 155, 157 (1978).