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LOYALTY OATHS: THE RELIGIOUS FREEDOM RESTORATION ACT AND THE *BESSARD* CASE

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ABSTRACT

This article examines the ramifications of *Bessard v. California Community Colleges*, the first case in the employment setting decided under the Religious Freedom Restoration Act (RFRA). To set the stage for an analysis of the *Bessard* case, the thirty year history of the "compelling interest" test in public sector employment is traced from its development in the 1963 case of *Sherbert v. Verner* through its being struck down by the Supreme Court in *Employment Division, Department of Human Resources v. Smith* (1990) to its reinstatement in the Religious Freedom Restoration Act of 1993. After this examination of the judicial and legislative heritage of the RFRA and its relationship to the free-exercise clause of the First Amendment, the facts and decisions in the *Bessard* case are analyzed. A concluding discussion is then presented, examining the implications of the RFRA and *Bessard*, with an eye toward areas of possible future First Amendment litigation over employment issues in the public sector.

The Puritans were never a tolerant bunch. Soon after the execution of King Charles I, on January 2, 1650, the so-called Rump Parliament of England passed what became known as the Engagement Act. This act specified that all men over the age of eighteen would have to take an oath, which they called "The Engagement." The Engagement read as follows: "I, _____, do declare and promise, that I will be true and faithful to the Commonwealth of England, as it is now established, without a King or House of Lords" [1, p. 391]. The Puritan-mandated oath was not long-lived however, mostly due to the fact that many adult men refused to swear allegiance to the new form of government [2, p. 515]. In the end, neither

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was the Puritan Revolution, as Oliver Cromwell's "replacement" government was not long-lived either.

Observers have stated that throughout American history, this country has established both a great tradition of religious freedom *and* a countertradition of religious prejudice and persecution [3]. As such, the guarantee of religious liberty contained in the First Amendment has proven to be the subject of much judicial and academic debate for over two hundred years [4]. Within the First Amendment to the Constitution are actually two, separate, religious freedom protections. The first, known as the establishment clause, means that government cannot establish official religions or pass laws favoring one religion over another. The second, the free-exercise clause, provides protection to individuals in their religious beliefs and the practice thereof [5, p. 63]. Writing in 1970, Chief Justice Warren Burger noted these two freedoms are inherently in conflict, due to the fact that if either right were "expanded to a logical extreme, [they] would tend to clash with one another" [6]. The chief justice noted that as courts attempt to protect an individual's free-exercise rights while avoiding any semblance of establishing a state-supported or protected religion, judges face a task tantamount to walking a legal tightrope [6].

In the United States some fifty years ago, the parents of a Jehovah's Witness child claimed their child should not be forced to recite the Pledge of Allegiance, due to the fact that recitation of this "oath" violated a tenet of their religion that proscribes the swearing of allegiance to anyone and anything other than God. In the case of *West Virginia State Board of Education v. Barnette* [7], the Supreme Court found that compelling schoolchildren to recite the Pledge indeed violated their First Amendment right to freely exercise their religious beliefs. The *Barnette* court wrote that individuals had, due to the free-exercise clause, a "freedom to differ" [7, at 624].

Fast forward to the nineties. All applicants for positions with constituent institutions of the State Center Community College District, like all other prospective state employees in California, are required to indicate they would be willing to recite the following oath:

> I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter [8, at 508].

During 1992, both Lanell Bessard and her daughter, Tanella Bridges, independently sought employment with Fresno City College. Both failed to make it past the initial screening phase in the college's hiring process due to the fact that

they answered "no" to what was a routine question on the employment application. Both Ms. Bessard and Ms. Bridges responded negatively to the question on the college's standard job application form which stated: "Prior to employment are you willing to swear or affirm allegiance to the United States and to the State of California?" [8, p. 509].

What caused these two women to respond in this manner? It was squarely due to their being Jehovah's Witnesses. A central tenet of that faith is that one must "bear faith and allegiance to God alone" [8, at 513]. Thus, the issue before the *Bessard* court was similar to the one faced by the Supreme Court some fifty years earlier in the *West Virginia State Board of Education v. Barnette* case [7]. This was whether or not the state's interest in compelling the women to recite the loyalty oath was compelling enough to override the Jehovah's Witnesses' "freedom to differ" in the United States.

In this article, we overview the decision in the *Bessard* case. This is the first reported case in an employment setting decided under the Religious Freedom Restoration Act (RFRA). We briefly overview the legal developments that brought about the RFRA and then outline the scope and coverage of the act. Then, we review the *Bessard* court's application of the RFRA.

THE COMPELLING INTEREST TEST

What standard should be employed to determine whether an individual's freedom to differ in his or her religious beliefs outweighs the right of a state to enforce a law? In the 1963 case of *Sherbert v. Verner* [9], the Supreme Court first established the legal criterion known as the "compelling interest test."

The *Sherbert* case involved a devout Seventh-Day Adventist who was fired from his job in a South Carolina textile mill due to his unwillingness to work on Saturdays. Sherbert subsequently applied for unemployment compensation, but was denied benefits due to the fact that the South Carolina Unemployment Compensation Act provided that all beneficiaries had to be available for work at any time [9, at 400]. The *Sherbert* court determined that even though the South Carolina law was not crafted to intentionally penalize those who observed Saturday as their Sabbath, the law nonetheless had the effect of making Sherbert choose between exercising his religious beliefs or receiving unemployment compensation. As such, the Supreme Court found that the South Carolina law burdened Sherbert's First Amendment rights without furthering a "compelling state interest" [9, at 407].

The *Sherbert* court thus established what was to become known as the two-pronged "compelling interest test." In practice, this test meant that in cases involving the nexus of free-exercise rights and state interests, the government would be required to first prove a compelling state interest to justify any restriction of free-exercise rights. If that point were indeed proven by the state, the

government would have the further obligation to prove that the law or regulation in question was the least restrictive means of achieving that interest [9, at 407].

From 1963 to 1990, the "compelling interest test" was employed by courts to determine the limits of free-exercise rights and state interests [10, p. 830]. For example, the Supreme Court found twice more that states could not deny unemployment benefits to those who could not work on their respective Sabbaths [11, 12]. Likewise, the Supreme Court supported a free-exercise claimant denied unemployment compensation because she refused to work in armaments production due to her religious beliefs [13]. Outside of the employment setting, the Supreme Court also applied the compelling interest test in determining that a Wisconsin compulsory school attendance law unduly burdened the religious beliefs of the Amish [14].

Yet, these cases were, in truth, exceptional. In point of fact, thirteen of the seventeen free-exercise cases that reached the Supreme Court and over 80 percent of the free-exercise cases decided in federal courts of appeals utilizing the compelling interest test all reached similar outcomes. In these cases, the courts either found that the government indeed had a compelling interest or that the plaintiffs free-exercise rights were not unduly burdened by the law or regulation in question. This led one legal commentator to note a trend was developing in these decisions, over nearly three decades since the *Sherbert* ruling in 1963 [9], whereby the federal judiciary "simultaneously expanded what it considered to be a "compelling" governmental interest and narrowed what it considered to be a free exercise "burden" under the compelling interest test [4, p. 1414]. Thus, the stage was set in 1990 for the Supreme Court to revisit the compelling interest test it had established in 1963.

EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES V. SMITH AND ITS AFTERMATH

Alfred Smith and Galen Black were employed as counselors at a private substance abuse rehabilitation center. Both were Native Americans, and as part of a religious rite of their church, they ingested peyote [15]. Peyote, a cactus that contains mescaline—a hallucinogenic substance—has been used by Native Americans for centuries as part of religious ceremonies. Twenty-three states and the federal government exempt sacramental use of peyote from drug laws. However, Oregon was not one of these states [16]. Hence, when their employer learned Smith and Black had ingested peyote, they were fired from their positions as drug counselors at the clinic. Subsequently, they were denied unemployment benefits from the state of Oregon due to the illegality of the act that precipitated their terminations [15, at 872].

The cases of Smith and Beck actually went before the Supreme Court twice. In 1988, in a case which became known as *Smith I* [17], the Supreme Court

overturned the finding of the Oregon Supreme Court and found the criminality of the use of peyote was instrumental to the defendants' free-exercise claims. At that point, the Supreme Court remanded the case back to the Oregon courts for further hearing on the question of whether or not the Oregon laws pertaining to controlled substances, without an exemption for the sacramental use of peyote, were indeed constitutional [17]. This set the stage for the Supreme Court's decision in the spring of 1990, which became known as *Smith II* [15, at 875-876].

Justice Antonin Scalia, writing the majority opinion in *Smith II*, relied not on the precedents established in *Sherbert* and *Yoder*, but one decided much earlier. In the 1879 case of *Reynolds v. United States*, the court observed:

> Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself [18, at 166-167].

The Court thus focused on the nature of the conduct involved in the *Smith* case as opposed to many other free-exercise cases decided under the compelling interest test. Scalia noted that Smith and Black's conduct (ingesting peyote) was illegal, while Sherbert's conduct (refusing to work on Saturdays) was not illegal. Because the drug counselors' actions were illegal, the Court held that a free-exercise question was not raised [15, at 884-885]. Thus, the Court again reversed the decision of the Oregon Supreme Court and upheld the state's denial of unemployment benefits to the two men [15, at 890].

In deciding *Smith II* however, the Supreme Court went beyond the issue at hand and effectively set aside the compelling interest test. Rather than holding to the *Sherbert* precedent that government must demonstrate it had a compelling interest to burden an individual's free-exercise rights, the *Smith II* Court held that as long as a law was facially neutral (as with the case of controlled substance laws), the government need not demonstrate a compelling interest in applying the law to religiously motivated conduct [15, at 878-880]. According to one legal commentator, the effect of the *Smith II*'s Court setting aside of the compelling interest test was "broad" in that it virtually eliminated the constitutional protection of religious practice under the First Amendment, as "much religious activity is hard to fit into any category but pure 'conduct' " [19, p. 7].

The *Smith II* decision shocked the legal community due to the Supreme Court's willingness both to set aside the rather recently established precedent of the compelling interest test and to "abandon its traditional protection of religious liberty" [4, p. 1411]. In the scholarly legal community, sixteen of seventeen law review articles written analyzing *Smith II* were extremely critical of the Supreme

Court's decision [4, p. 1409]. In legal practice, however, the effect of *Smith II*'s setting aside of the compelling interest test was "deleterious" and "not merely hypothetical" [3, p. 214]. Just one week after the Supreme Court's *Smith II* decision, the case was cited as the reason for the Court's vacating the decision of a Minnesota state court, which had held that an Amish farmer need not display a bright orange triangle on his horse drawn carriage. The Supreme Court held that the Amish farmer's objection to the display of this "worldly symbol" on his vehicle did not exempt him from following the neutral traffic laws of the state of Minnesota, even though the law had the effect of burdening the farmer's free-exercise rights [20].

In sum, *Smith II* had the effect, in legal practice, of effectively tilting the scales of justice against individuals who claimed that governmental laws or actions impinged on their free-exercise rights [10, p. 868]. In fact, federal and state courts directly cited *Smith II* in over fifty cases between 1990 and 1993 as the reason that free-exercise claimants did not prevail in their cases [10, p. 857]. In a wide variety of cases, governmental interests in enforcing neutral laws ranging from zoning ordinances [21, 22], immigration [23], and mandatory autopsies [24, 25] were seen as superseding any free-exercise rights of individuals.

Dissatisfaction with the Supreme Court's decision in *Smith II* swiftly turned into political action. The religious community saw the wider implications of the *Smith II* decision in limiting the free exercise of even mainstream religious practices. Civil liberties groups saw the *Smith II* decision as a serious encroachment on First Amendment rights [19, p. 2]. Thus, what emerged was one of the broadest and most diverse coalitions in American political history. From the American Civil Liberties Union and People for the American Way to religious denominations (spanning the gamut, and including mainline Protestantism, the Catholic Church, major Jewish groups, Islamic groups, and the Church of Scientology), this fragile and diverse coalition fought against the decision of the Supreme Court in *Smith II* [3, pp. 210-211].

In the conclusion of the majority opinion in *Smith II*, the Supreme Court urged Congress to lessen the impact of the *Smith II* decision by providing exemptions to religious practices on a case-by-case basis. The *Smith II* court stated this might well place religions that are not in large numbers at relative disadvantage and their practices at risk due to the failings of the democratic process [15, at 890]. However, such a legislative remedy would be preferable to the compelling interest test, which, in Justice Scalia's opinion, had created "a system in which each conscience is a law unto itself . . . (where) judges weigh the social importance of all laws against the centrality of all religious beliefs" [15, at 890]. Yet, the diverse coalition that formed in response to the *Smith II* decision sought not a piecemeal legislative response, but in effect, a complete reversal of the Supreme Court's holding in the *Smith II* case. This came in the form of the Religious Freedom Restoration Act (RFRA).

THE RELIGIOUS FREEDOM RESTORATION ACT (RFRA)

Based upon the Fourteenth Amendment and the Necessary and Proper Clause of the Constitution, Congress has the ability to "create a statutory right where the Supreme Court declined to create a constitutional right" [26, p. 246]. Within months of the Supreme Court's finding in *Smith II* in 1990, Representative Stephen Solarz introduced the Religious Freedom Restoration Act to effectively create such a statutory right [4, p. 1437]. The RFRA stalled in Congress for more than two years—largely due to the abortion issue [19, p. 15]. What emerged from the legislative process was not the piecemeal approach suggested by the Supreme Court in *Smith II* (whereby protected practices would be specifically enumerated). This was largely due to fears that such a bill would have become, in effect, "a religious licensing act" and that the broad coalition supporting the RFRA would crack if the bill were too detailed [3, p. 219]. Rather, what emerged in the RFRA was the statutory guarantee that a standard review—the compelling interest test—be applied to cases brought under the free-exercise clause of the First Amendment [3, p. 218].

In what was categorized by one legal scholar as "the most important step in protecting the constitutional right of free exercise of religion" in American history [19, p. 2], the Religious Freedom Restoration Act was passed unanimously in the House of Representatives and by a margin of 97 to 3 in the Senate and was signed into law on November 11, 1993 by President Bill Clinton [3, p. 210]. The key provision of the RFRA is Section 3(b), which states:

> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person: (1) is in the furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest [27].

The RFRA cited the compelling interests test as a "workable test" for judging the balance between religious liberty and legitimate governmental interests [27, §2(a)(5)]. Congress specifically stated that the purpose of the RFRA was to restore the compelling interest test set forth in the *Sherbert* and *Werner* cases [27, §2(b)(1)].

Legal commentators have speculated on the ramifications of Congress' substitution of the compelling interest test to federal and state judicial proceedings over the Supreme Court's ruling in *Smith II*. One observer called the RFRA a virtual "trump card" for religious groups and individuals to play when their practices conflict with a governmental law or regulation [19, p. 3]. However, as was shown earlier, free-exercise plaintiffs did not fare well under the compelling interest test between *Sherbert* and *Smith II*. Thus, the true meaning of Congress' rejuvenation of the compelling interest test will not mean absolute protection for

free-exercise claimants [4, p. 1413]. As one legal commentator stated, in effect, what Congress did was "problematic," in that the RFRA "seeks to establish a protective legal framework that may never have truly existed" [28, p. 254]. While the compelling interest test will be the subject of judicial scrutiny for years to come, the RFRA, according to one legal scholar, sent a "symbolic message" to the courts and government at all levels that the public, as represented through the Congress, "will not tolerate the withdrawal of a constitutional right as fundamental as the right to freely exercise one's religion" [10, p. 872].

BESSARD v. CALIFORNIA COMMUNITY COLLEGES

Ms. Bessard and Ms. Bridges brought multiple claims against the State Center Community College District, alleging that their rights under both the First Amendment and Title VII of the Civil Rights Act of 1964 had been abridged by Fresno City College's refusal to consider their respective applications. While the court could have considered whether or not actions could have been taken by the college to reasonably accommodate the women's religious beliefs under Title VII, the *Bessard* court chose to address their claims under the Religious Freedom Restoration Act. This was due to the court's finding that the decision would "obviate" the need to subsequently address the plaintiff's statutory claims (under Title VII) and constitutional claims (under the First Amendment) [8, at 508].

A procedural issue arose in terms of whether or not the women's claims under the RFRA were valid due to the timing of their case. The reader will recall that Ms. Bessard and Ms. Bridges sought and were denied employment during 1992. However, the RFRA was not signed into law until November 16, 1993. The language of the RFRA specifically stated that it applied to the analysis of all federal and state laws and actions pursuant to them taken "before or after the enactment of this Act" [27, §6(a)]. While the RFRA's indication of congressional intent for it to apply retroactively was unambiguous, the question of the validity of the women's charges remained due to the college district's contention that the women had not filed their charges in a timely enough manner, due to the fact that the women's denial of employment had occurred more than a year prior to the RFRA's enactment. However, the *Bessard* court chose to apply California's "three-year catchall statute of limitations" as urged by the plaintiffs (rather than the one-year statute of limitations for personal injury cases, which the defendant argued was applicable), thus allowing Bessard and Bridges to pursue their case against the college district under the RFRA [8, at 507].

Without the statute of limitations question resolved, the *Bessard* court saw three central issues to be decided in applying the Religious Freedom Restoration Act to the simple facts involved in this case. The first matter was whether the requirement that these applicants take the loyalty oath substantially burdened their free-exercise rights. If the oath were indeed found to be burdensome, the defendant, California Community Colleges, would be required under the restored

compelling interest standard to demonstrate both that the college had "a compelling interest in requiring the loyalty oath" and that the required oath was "the least restrictive means available to further the compelling interest" [8, at 513].

In regard to whether the district's loyalty oath substantially burdened Ms. Bessard's and Ms. Bridges' free exercise rights, the college did not dispute that the oath would contradict a central conviction of the Jehovah's Witness faith. Thus, the college district conceded their requirement, on its face, constituted a substantial burden on the women's right to freely exercise their religious beliefs [8, at 513]. However, the defendant argued it had still not burdened the women's free-exercise rights due to two factors.

First, the district argued the women did not have "a vested right to be employed" by the college [8, at 513]. However, the *Bessard* court found the district's argument "irrelevant" [8, at 513]. This was because, in the *Barnette* case some fifty years earlier, the Supreme Court had established the precedent that a federal or state requirement which limited a person's First Amendment rights could not be used to bar a plaintiff from seeking a public benefit, whether or not that individual had any constitutional entitlement to the benefit s/he was seeking [7, at 624]. While the *Bessard* court found no case which stated, in effect, that an individual has a "vested right" to public employment [8, at 513], the court did find that the Supreme Court had established that the "denial of a state job is a serious privation" [29, at 2729, 2738]. Further, the Supreme Court had specifically ruled in the 1972 case of *Cole v. Richardson* that government at any level could not condition public employment on a requirement to take an oath, if such an oath would "impinge on rights guaranteed by the First and Fourteenth Amendments" [30, at 676, 680]. Thus, the *Bessard* court found the district's oath had substantially burdened Ms. Bessard's and Ms. Bridges' free-exercise rights because it had the effect of forcing the women to choose between their religious beliefs and their employment prospects with Fresno City College [8, at 514].

The second ground on which the college district claimed the plaintiff's free-exercise rights had not been substantially burdened was that the women were never "coerced" into taking the oath. The *Bessard* court found "no merit" in the district's argument that the women were not physically coerced into taking the oath, finding that the conditioning of employment on the recitation of the oath was indeed an application of force on the women [8, at 514].

Under the RFRA then, with the *Bessard* court having firmly found that Ms. Bessard's and Ms. Bridges' free exercise rights had indeed been violated, the burden then shifted to the college to prove it had both a compelling governmental interest in enforcing the policy and the oath was the least restrictive means available to it to pursue this interest. The college district suggested two possible compelling interests. First, it advocated it was merely following state law in enforcing the oath requirement [8, at 514]. Second, the college contended it had "a compelling interest in ensuring employee loyalty and trustworthiness" [8, at 514].

The *Bessard* court strongly renounced the district's first argument, finding this rationale would lead to every state law being "immune" from attack on constitutional grounds, leaving individuals with hollow constitutional protections [8, at 514].

In regard to the second argument, the court found the oath was "not the least restrictive means of furthering the goal of having a loyal workforce" [8, at 515]. This was based on the fact that the district failed to present any evidence that employees who take a loyalty oath were any more loyal than those who did not [8, at 514]. Further, the *Bessard* court stated the district had many other options at its disposal to promote a loyal workforce besides the oath—mainly through proper and prudent administration [8, at 575]. The *Bessard* court found the oath to be of little value in promoting worker loyalty among those who would object on religious grounds. In finding so, it called on the *Barnette* case once again, where Justice Hugo Black had observed that "words uttered under coercion are proof of loyalty to nothing but self-interest" [7, at 630].

In the end, then, the *Bessard* court found the college district had not satisfied the restored compelling interest test under the Religious Freedom Restoration Act. Hence, it found in favor of the two female plaintiffs and enjoined the college from requiring Ms. Bessard and Ms. Bridges to take an oath as a precondition of employment with the college district [8, at 515].

CONCLUSION

What will *Bessard* and the Religious Freedom Restoration Act mean for those engaged in administrative capacities? While the RFRA and the restored compelling interest test will be the subject of much judicial scrutiny in the years to come, certainly only a fraction of these cases will arise out of the employment setting. However, unlike all the other employment laws passed in the Nineties (the Americans with Disabilities Act, the Civil Rights Act of 1991, and the Family and Medical Leave Act), the RFRA, by its very definition, will apply *only* to public employers.

Public sector managers must thus face the possibility that their employment actions and decisions may in fact be subject to potential challenge under the RFRA. Certainly, all public sector organizations should examine their employment policies, both pre- and post-hire, which could cause the public sector organization to violate the RFRA. Most apparent would be the same type of loyalty oath that got the State Center Community College District in trouble. While many states and localities have such oaths routinely included in their hiring process, *Bessard*, although only precedential in part of California, serves as a clarion call for public administrators across the nation to examine the necessity and legality of such oaths.

Going beyond the immediate matter of loyalty oaths, *Bessard* and the RFRA make it clear that proactive public administrators should examine their

employment policies to ensure they will not run the risk of violating the RFRA as did Fresno City College. Where could potential RFRA challenges come from? The possibilities are literally endless, as anywhere there is a potential intersection of personal religious practices and personnel practices, policies, and procedures. Work schedules, holiday schedules, health benefits, and workplace display policies are likely to be the first nexuses between religious practices of employees and/or applicants and public sector employers.

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