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CONSTITUTIONAL LAW—UNEMPLOYMENT COMPENSATION BENEFITS AND THE FIRST AMENDMENT: PERPETUATING THE TENSION? Thomas v. Review Board, 450 U.S. 707 (1981)

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CONSTITUTIONAL LAW—UNEMPLOYMENT COMPENSATION BENEFITS AND THE FIRST AMENDMENT—PERPETUATING THE TENSION? *Thomas v. Review Board*, 450 U.S. 707 (1981).

I. INTRODUCTION

The first amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."[1] To the framers of the Constitution, these two religious clauses "were at least compatible and at best mutually supportive."[2] With the application of the religious clauses to the states[3] and an expanding definition of religion,[4] a serious tension developed in this once harmonious relationship.[5] As a consequence, the Court attempted to alleviate the tension by following a neutral course between the two clauses.[6] The perpetual tension between the free exercise clause and the establishment clause was illustrated again in the recent Supreme Court decision of *Thomas v. Review Board*.[7]

In *Thomas*, the Court decided the issue of whether Indiana's denial of unemployment compensation benefits to a Jehovah's Wit-

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1. U.S. CONST. art. I.

2. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 814 (1978) [hereinafter cited as TRIBE].

3. Everson v. Board of Education, 330 U.S. 1 (1947) (Court first applied the establishment clause to the states); Cantwell v. Connecticut, 310 U.S. 296 (1940) (Court first applied the free exercise clause to the states).

4. The Supreme Court appears to have moved toward a twofold definition of religion. The Court's definition of "religion" under the establishment clause seems narrower than the definition applied to the free exercise clause. TRIBE, *supra* note 1, at 829. *See also* Torcaso v. Watkins, 367 U.S. 488, 495 (1961) (holding that religion could not be limited to religions based on the belief in God); United States v. Ballard, 322 U.S. 78, 86 (1944) (holding that truth or veracity of one's religious beliefs could not be considered by judge or jury without violating the free exercise clause); Fowler v. Rhode Island, 345 U.S. 67, 69-70 (1953) ("it is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment").

5. *See* Gianella, *Religious Liberty, Nonestablishment, And Doctrinal Development: Part I. The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1388-90 (1967). *See also* TRIBE *supra* note 1, at 815.

6. *See* Walz v. Tax Commissioner, 397 U.S. 664, 668-69 (1970). The Court stated that it has struggled "to find a neutral course between the two Religious Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." *See also* TRIBE, *supra* note 2, at 816-19; Gianella, *Religious Liberty, Nonestablishment, And Doctrinal Development: Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 516-18 (1968).

7. 450 U.S. 707 (1981).

ness, who had terminated his employment because his religious belief forbade his participation in the production of armaments, was a violation of his first amendment rights to the free exercise of religion.[8] The Court held that the denial of unemployment compensation benefits violated Thomas' right to the free exercise of religion.[9] In a persuasive dissenting opinion, Justice Rehnquist asserted that the Court's decision only added "mud to the already muddied waters of the First Amendment."[10] Both opinions, however, failed to resolve the continuing dilemma of the tension between the free exercise clause and the establishment clause. This note will examine the question the *Thomas* Court failed to address: whether the tension between the two religious clauses can be eliminated. The note will also propose an analysis for resolving this tension.

II. *THOMAS*

A. *Facts*

In 1974, Eddie C. Thomas began working in the roll foundary at the Blaw-Knox Foundary and Machinery, Inc., a plant engaged primarily in weapons production.[11] After working nearly a year, the roll foundary closed whereupon the company transferred Thomas to a department that produced gun turrets for military tanks.[12] On his first day at his new position, Thomas discovered that the job entailed weapons-related work.[13] Troubled that working on producing armaments would violate his religious principles,[14] Thomas requested a

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8. *Id.* at 709.

9. *Id.* at 720.

10. *Id.* Despite the framer's intent that the religious clauses be at least compatible and mutually supportive, a serious tension exists between the two clauses. For example, spending funds to employ a chaplain in the armed forces violates the establishment clause. At the same time, to deny a soldier the right to "pastoral guidance" prohibits the free exercise of his religion. School District of Abington v. Schempp, 374 U.S. 203, 209 (1963). *See also* Gianella, *supra* note 5, at 1388-90.

11. Thomas v. Review Board, 271 Ind. 233, 235, 391 N.E.2d 1127, 1128 (1979), *rev'd*, 450 U.S. 707 (1981).

12. *Thomas*, 450 U.S. at 710.

13. *Id.* Upon inquiry, Thomas discovered that all remaining jobs at the plant were engaged in the production of armaments.

14. 271 Ind. at 235, 391 N.E.2d at 1128 (1979), *rev'd*, 450 U.S. 707 (1981). As a result of his wariness about working on armaments, Thomas consulted a fellow co-worker who like himself was a Jehovah's Witness, about the situation. His co-worker found nothing unscriptural about producing arms, indicating that he would continue his employment at the plant. *Id.* Thomas then consulted other members of his congregation to see whether or not they believed that continuing work would be unscriptural. The

layoff after discovering that all remaining departments in the plant were engaged in the manufacturing of armaments.[15] When the request was subsequently denied, Thomas quit[16] and applied for unemployment compensation benefits under the Indiana Employment and Security Act.[17]

At the administrative hearing which ensued, the hearing referee concluded that although Thomas had terminated his employment due to his religious beliefs, he was not entitled to collect unemployment compensation benefits because he had terminated his employment without "good cause in connection with [his] work," as required by the Indiana statute.[18] The Review Board adopted the referee's findings and denied Thomas unemployment compensation benefits.[19]

On appeal, the Indiana Court of Appeals considered whether the disqualifying provision of the Indiana Employment Security Act violated Thomas' first amendment rights to the free exercise of religion.[20] Relying upon the rationale of *Sherbert v. Verner*,[21] the court of appeals found that Thomas had terminated his employment as a result of his religious convictions and stated that the Indiana statute cast "an impermissable burden on his First Amendment guarantee to the free exercise of his religion."[22] As a result, the court held that

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record, however, never indicated whether the other members of the Jehovah's Witness made this decision. *Id.* at 236, 391 N.E.2d at 1128-29.

15. *Id.* at 236, 391 N.E.2d at 1129.

16. *Id.*

17. 450 U.S. at 710 (citing IND. CODE ANN. § 22-4-1-1 to 22-4-39-5 (Burns 1974 & Supp. 1983)).

18. *Id.* at 712. The hearing referee denied Thomas unemployment compensation benefits under the Indiana Employment Security Act which provides: ". . . an individual who has voluntarily left his employment without good cause in connection with the work or who was discharged from his employment for just cause shall be ineligible for . . . benefit rights. . . ." 450 U.S. at 709-10 n.1 (citing IND. CODE ANN. § 22-4-15-1(a) (Burns 1974 & Supp. 1983).

19. *Id.* at 712.

20. Thomas v. Review Bd. of Ind. Employment Sec. Div., 381 N.E.2d 888, 890 (1978).

21. Sherbert v. Verner, 374 U.S. 398 (1963) (denial of unemployment compensation to Seventh Day Adventist who refused to work Saturdays which in her faith was the Sabbath, violated the free exercise clause). *See infra* note 29.

22. 381 N.E.2d 888, 895 (1978). While the review board contended that granting benefits would constitute a violation of the establishment clause, the court of appeals held otherwise, maintaining that the contention was not supported and that the review board failed to distinguish *Thomas* from the holding in *Sherbert* which the Court asserted was controlling. 381 N.E.2d at 891. The court of appeals acknowledged the "tension" between the two religious clauses, and despite the Court's decisions in United States v. Seeger, 380 U.S. 163 (1963) and Welsh v. United States, 398 U.S. 333 (1970),

the statute was unconstitutional as applied to Thomas.[23]

The Indiana Supreme Court vacated the orders of the appellate court and denied Thomas unemployment compensation benefits.[24] The court found that Thomas had terminated his employment voluntarily based upon his personal philosophy rather than upon a religious choice. It held, therefore, that he was not protected by the free exercise clause of the first amendment.[25] The court concluded that denying Thomas unemployment compensation benefits only imposed an indirect burden on his free exercise rights, a burden which was justified by the legitimate state interest of maintaining a stable work force.[26] Furthermore, the court held that entitling unemployment compensation benefits to one who voluntarily terminated his employment "for personal reasons and personal belief which can somehow be described as religious beliefs," while denying benefits to other employees who terminated their employment for personal beliefs which were not religious, violated the establishment clause of the first amendment.[27]

Sherbert had not been modified or overruled and remained a viable precedent. 381 N.E.2d at 893-95.

In a dissenting opinion, Chief Justice Buchanan explained that in protecting the "Free Exercise" rights of Thomas, "the court comes dangerously close to contravening the Establishment Clause of the same amendment." *Id.* at 896. The dissent contended "that the First Amendment pendulum has been swung by the majority out of its natural arc in the Free Exercise area into an unnatural area in the Establishment Area. . . ." *Id.* at 896.

23. 381 N.E.2d at 895 (1978).

24. 271 Ind. at 245, 391 N.E.2d at 1134. The Indiana Supreme Court distinguished *Sherbert* from *Thomas* on the basis that the *Sherbert* holding was limited to situations where the employee was fired, whereas in *Thomas* the employee left work voluntarily. *Id.* at 242-43, 391 N.E.2d at 1132-33.

25. *Id.* at 245, 391 N.E.2d at 1134. The Indiana Supreme Court concluded that denying Thomas benefits did not violate his free exercise rights because Thomas was unclear as to just what were his religious beliefs. Furthermore, he was not required to violate a cardinal tenet of his religion as was the situation in *Sherbert* which required that a Sabbatarian either work on the Sabbath in violation of his religious principles or not work at all. *Id.* at 242-45, 391 N.E.2d at 1132-34.

26. *Id.* at 236-39, 391 N.E.2d at 1129-31. The Court has previously determined that,

> [i]f 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.

Braunfeld v. Brown, 366 U.S. 599, 607 (1961) (citation omitted).

27. 271 Ind. at 245, 391 N.E.2d at 1134.

The United States Supreme Court reversed the Indiana Supreme Court and held that the denial of unemployment compensation benefits violated Thomas' first amendment right to the free exercise of religion.[28]

III. ANALYSIS

In addressing the issue of whether denying Thomas unemployment compensation benefits violated the free exercise clause, Chief Justice Burger, writing for the majority, stated that the issue must be examined in light of the Court's prior decisions, particularly *Sherbert v. Verner*.[29]

The Court had previously determined in other cases that only those beliefs that were religious could be afforded protection by the free exercise clause of the first amendment.[30] Defining religious belief or practice, however, was "a most delicate question."[31] In *Thomas*, the Indiana Supreme Court held that Thomas' decision to quit was merely a "personal philosophical rather than a religious choice."[32] The United States Supreme Court, however, stated that what constituted a religious belief did not turn on the court's perception of that particular belief: a religious belief "need not be acceptable, logical, consistent or comprehensible to others in order to merit First Amendment protection."[33]

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28. 450 U.S. 707 (1981).

29. 374 U.S. 398 (1963). In *Sherbert*, a Seventh Day Adventist was fired from her job because she refused to work on Saturday, which in her faith is the Sabbath Day. Unable to find other employment as a result of her refusal to work Saturdays, Sherbert applied for unemployment benefits under the South Carolina Unemployment Compensation Act. The Act provided that a claimant is ineligible for unemployment compensation benefits if that person has failed, without good cause, to accept available, suitable work when offered. *Id.* at 399-401. The United States Supreme Court held that the South Carolina statute violated Sherbert's right to the free exercise of her religion, and thus violated the first amendment. *Id.* at 410.

30. *Id. See also* Wisconsin v. Yoder, 406 U.S. 205 (1972).

31. Welsh v. United States, 398 U.S. 333, 351-61 (1970) (Harlan, J., concurring); *see also* Torcaso v. Watkins, 367 U.S. 488 (1961); United States v. Ballard, 322 U.S. 78 (1944).

32. 271 Ind. at 239, 391 N.E.2d at 1131. The Court has previously established that a personal rather than a religious choice does not constitute a claim protected by the free exercise clause of the first amendment. Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972).

The Indiana Supreme Court's rationale was based on the fact that Thomas was struggling with his beliefs and could not express them clearly. Thomas admitted to the referee that he would not object to working for United States Steel or Inland Steel who produced steel, the raw product necessary for the production of tanks, "because . . . I would not be a direct party to whoever they shipped it to . . . [and] would not be chargeable in . . . my conscience." 271 Ind. at 241, 391 N.E.2d at 1131.

33. 450 U.S. at 714.

The United States Supreme Court in *Thomas*, however, never addressed the issue of the parameters of religion. Chief Justice Burger stated that it was not the Court's role to determine whether Thomas' beliefs were unreasonable;[34] rather, the function of the reviewing court was to determine whether the lower court was correct in finding Thomas terminated his job as a result of an "honest conviction" that his religious beliefs forbade the particular work.[35] Having established that Thomas' beliefs were religious, the Court found that the state's interests were not sufficiently compelling to outweigh the interests of Thomas in exercising his religious rights.[36]

The Supreme Court has traditionally defined the scope of the free exercise clause as prohibiting restrictions on the free exercise of any form of religion.[37] The intent of the framers of the Constitution in the religious clause was to build a wall of separation between church and state.[38] The state, however, was not to be deprived of all power to regulate activities that fell within the guidelines of the first amendment.[39] If the state could justify the regulation of religious expression as the least restrictive means of achieving a compelling state interest,[40] the regulation would be allowed.

In applying the balancing test, the Court found Indiana's interests were twofold: to avoid widespread unemployment and to avoid excessive inquiry by employers into the reglious beliefs of job applicants.[41] The Court in *Thomas* concluded that these interests were not sufficiently compelling to justify the burden placed upon the

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34. *Id.* at 715. Chief Justice Burger stated that "Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with . . . clarity and precision. . . ." *Id.*

35. *Id.* at 716.

36. *Id.* at 719.

37. Wisconsin v. Yoder, 406 U.S. 203 (1972).

38. Reynolds v. United States, 98 U.S. 145, 164 (1878); *see also* TRIBE, *supra* note 1, at 816-19.

39. *See* Sherbert v. Verner, 374 U.S. 398 (1963); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940).

40. 450 U.S. at 718. The Court in *Yoder* stated that only those interests of the highest order can outweigh a legitimate claim of the free exercise of religion. 406 U.S. at 215.

41. 450 U.S. at 718-19. Chief Justice Burger concluded that "there was no evidence in the record to indicate that the number of people who would have to choose between receiving benefits and exercising their religious rights "is large enough to create 'widespread unemployment,' or even to seriously affect unemployment. . . ." Furthermore, he concluded that the record did not indicate that employers will increase inquiries into job applicants' religious beliefs. *Id.* at 719.

right of free exercise of religion.[42] Consequently, the Court held that Thomas was entitled to receive unemployment compensation benefits unless, as the Review Board maintained, such payments violated the establishment clause.[43]

The final issue raised in *Thomas* was whether forcing the state to provide unemployment compensation benefits to Thomas would be a fostering of religion thereby violating the establishment clause.[44] The Court agreed that, to an extent, Thomas "gain[ed] a benefit from his religious beliefs, but this manifest[ed] no more than the tension between the two religious clauses which the Court resolved in *Sherbert*."[45]

> In holding as we do, plainly we are not fostering the 'establishment' of the Seventh-day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall.[46]

The Justices in *Thomas* asserted that unless they were prepared to overrule *Sherbert*, Thomas could not be denied unemployment compensation benefits.[47]

The crux of the constitutional problem, however, is exposed in Justice Rehnquist's dissent.[48] Justice Rehnquist stated that the majority's decision added "mud to the already muddied waters" of the first amendment.[49] Although Rehnquist agreed with the Court's acknowledgement that tension existed between the free exercise clause and the establishment clause of the first amendment,[50] he stated that the Court's decision did little to resolve the tension between the clauses or "offer meaningful guidance to other courts which must decide cases like this on a day-to-day basis."[51] Rehnquist believed that the tension was a result of improper interpretation of the reli-

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42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* *See also* Wisconsin v. Yoder, 406 U.S. 205, 220-21 (1972); Walz v. Tax Comm'n, 397 U.S. 664 (1970); O'Hair v. Andrus, 613 F.2d 931, 934-37 (D.C. Cir. 1979).
46. 450 U.S. at 719-20. (quoting *Sherbert*, 374 U.S. at 409).
47. *Id.* at 720 (Rehnquist, J., dissenting).
48. *Id.*
49. *Id.*
50. *Id.* at 720-21.
51. *Id.* at 722.

gious clauses.[52] Just as did the majority in *Sherbert*, Rehnquist asserted that the Court in *Thomas* viewed the free exercise clause more broadly than was warranted.[53] He claimed that the proper interpretation would follow the decision in *Braunfeld v. Brown*[54] and the dissent in *Sherbert*.[55]

In *Braunfeld*, the Court held that a Pennsylvania criminal statute which forbade the retail sale on Sunday of certain commodities did not violate the free exercise rights of Sabbatarians.[56] Chief Justice Warren, writing for the Court, explained that the statute did not make unlawful any religious practice; it simply made the practice of the Sabbatarian's religion more expensive.[57] The Court concluded that "[t]o strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, *i.e.*, legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature."[58] In *Thomas*, Rehnquist noted that under the *Braunfeld* rationale, Indiana had not discriminated against Thomas on the basis of his religious belief and, therefore, the statute did not violate his free exercise rights.[59] He further asserted that when a state had enacted a statute to advance secular goals, the free exercise clause did not require that the statute conform to the religious desires of any group.[60]

Rehnquist also agreed with the rationale established in Justice Harlan's dissent in *Sherbert*.[61] Justice Harlan had asserted that the majority's decision constitutionally compelled the state "to carve out an exception" and to provide benefits to those individuals who were

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52. *Id.*

53. *Id.* The Court in *Sherbert* held that religious classifications are not only permissible in some instances but may be required by the free exercise clause. 374 U.S. at 409-10.

54. 366 U.S. 599 (1961).

55. 450 U.S. at 722 (Rehnquist, J., dissenting).

56. 366 U.S. at 609-10. The appellants were merchants in Philadelphia in the retail sale of clothing and furniture who due to a Pennsylvania statute were prohibited from sale of these items on Sundays. All were members of the Orthodox Jewish Faith which requires the closing of their businesses and total abstention from any work on Saturdays. They claimed that enforcement of the statute prohibited the free exercise of their religion because the regulation restricting their business from operating Sundays forced the Sabbatarians to either suffer serious economic loss or give up their religious practice and work on Saturdays. *Id.* at 601-02.

57. *Id.* at 605.

58. *Id.* at 606.

59. 450 U.S. at 723.

60. *Id.*

61. *Id.* at 723 (Harlan, J., dissenting).

unavailable for work due to their religious beliefs.[62] Harlan concluded that such a holding was significant in two respects. First, it overruled *Braunfeld*.[63] Second, it required that the state "single out," for financial assistance, those individuals whose behavior was based upon religious motivations while similarly denying benefits to those individuals whose behavior was identical, but not religiously motivated.[64] Justice Harlan suggested that this might violate the state's obligation to remain neutral.[65] The state, he concluded, could not be "constitutionally *compelled* to carve out an exception" in this case.[66] "Those situations in which the Constitution may require special treatment on account of religion . . . are far and few between. . . ."[67]

Thus, Justice Rehnquist agreed with Justice Harlan's dissent in *Sherbert* that, although a state voluntarily could grant exemptions from state unemployment regulations to religious individuals, constitutionally, the state could not be required to grant the exemption.[68] Following the rationale in *Braunfeld* and Harlan's dissent in *Sherbert*, Rehnquist maintained that the denial of unemployment compensation benefits to Thomas would not discriminate against his religious beliefs but merely would make the practice more expensive.[69]

Justice Rehnquist was also disturbed by the Court's assessment of the establishment clause.[70] Even though the majority's decision required that the state provide direct financial assistance as a result of an individual's religious beliefs, the Court, while following the rationale of *Sherbert*,[71] held that it was not establishing religion.[72]

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62. *Sherbert v. Verner*, 374 U.S. 398, 420 (1963) (Harlan, J., dissenting).

63. 374 U.S. at 420-21. Harlan concluded that the secular purpose of the statute in *Sherbert* was much clearer than that involved in *Braunfeld*, and in addition, the indirect financial burden on the statute was far less. Thus, any difference between *Sherbert* and *Braunfeld* should be to the detriment of Sherbert. *Id.*

64. *Id.* at 422-23. *See* Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 22-26 (1961).

65. 374 U.S. at 422-23.

66. *Id.*

67. 374 U.S. at 423. *See, e.g.*, Baunfeld v. Brown, 366 U.S. 599 (1961) (Sunday closing laws upheld against free exercise challenge); Cleveland v. United States, 329 U.S. 14 (1946) (federal law prohibiting polygamy upheld over religious objections); Prince v. Massachusetts, 321 U.S. 158 (1944) (statute denying minors right to distribute religious literature upheld against free exercise challenge); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (compulsory smallpox vaccination upheld against religious objection).

68. 450 U.S. at 723.

69. *Id.* at 722.

70. *Id.* at 724.

71. 374 U.S. at 409-10.

Rehnquist contended that the majority's decision was inconsistent with prior establishment cases which required the Court to hold that the statute violated the establishment clause.[73] Rehnquist concluded that the proper approach to the establishment clause was developed in Justice Stewart's dissent in *Abbington School District v. Schempp*.[74]

In *Schempp*, the Court held a Pennsylvania statute that required reading of the Bible at the commencement of each school day unconstitutional because it violated the establishment clause.[75] Justice Stewart explained that the scope of the establishment clause was limited to "governmental support of proselytizing activities of religious sects by throwing the weight of secular authorit[ies] behind the dissemination of religious tenets."[76] Justice Rehnquist in *Thomas* explained, however, that government assistance that did not induce religious belief, but merely accommodated religious choice, was not impermissible government involvement in religion and thus did not violate the establishment clause.[77] Consequently, had Indiana voluntarily chosen to award unemployment compensation benefits to people who left their jobs due to religious reasons, the aid would be constitutional "because it redounds directly to the benefit of the individual."[78] Rehnquist, therefore, maintained that the majority interpreted the free exercise clause too broadly and thus the opinion conflicted with the scope of prior establishment clause cases.[79] The *Thomas* decision, therefore, exacerbates the tension between the two religious clauses.[80]

As a result of the analysis in *Thomas*, the Court once again failed to provide a solution to the tension that exists between the free exercise clause and the establishment clause. The Court in *Thomas* was correct in affirming the lower court's determination that the be-

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72. 450 U.S. at 719-20. *See supra* note 39 and accompanying text.

73. Torcaso v. Watkins, 367 U.S. 488, 495 (1961) (Court maintained that the government cannot constitutionally pass laws which aid religions as against non-believers); Everson v. Board of Education, 330 U.S. 1, 15-16 (1947) (Court asserted that the establishment clause forbids government to support or assist any or all religions and no state can pass laws which aid one or all religions).

74. 374 U.S. 203, 314 (1963) (Stewart, J., dissenting).

75. *Id.* at 205. *See also* McCollum v. Board of Education, 333 U.S. 203, 248-49 (1948) (Reed, J., dissenting).

76. 374 U.S. at 314.

77. 450 U.S. at 727.

78. *Id.*

79. *Id. Accord* Wolman v. Walter, 433 U.S. 229 (1977) (Court upheld dispursements of various items to parochial schools).

80. 450 U.S. at.727.

liefs held by Thomas were religious[81] and that the state's interests were not sufficiently compelling to outweigh the interest of protecting Thomas' religious beliefs.[82] The Court, however, failed to analyze adequately the tension between the establishment clause and the free exercise clause.

Justice Rehnquist, in his dissent, correctly condemned the majority's analysis of the establishment clause.[83] The decision in *Thomas* re-emphasized the Court's failure in *Sherbert* to explain sufficiently the scope of the establishment clause. In addition, the Court failed to explain why the Indiana Supreme Court was incorrect in applying the rationale of *Braunfeld* to deny Thomas unemployment compensation benefits.[84] Given the contrasting opinions of *Sherbert* and *Braunfeld*, it is unclear whether they are reconcilable.[85] At least one commentator has suggested that "*Sherbert* was an aberration when it was decided; it and *Braunfeld v. Brown*, decided two years earlier, are as irreconcilable as two cases not involving the same parties can be."[86] The question becomes whether there is an alternative solution to resolve the tension between the two religious clauses, "both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."[87]

IV. THE NEED FOR AN ALTERNATIVE ANALYSIS

The definition of religion under the religious clauses has evolved over time. In the nineteenth century, religion was defined narrowly, referring strictly to theistic beliefs such as a belief in

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81. *See supra* note 35 and accompanying text.

82. *See supra* notes 40-43 and accompanying text.

83. 450 U.S. at 724-27. *Compare* Braunfeld, *supra* notes 56-58 and accompanying text. Under *Braunfeld*, denying Thomas unemployment compensation benefits would not violate the free exercise clause because the state is not discriminating against Thomas based on his religious beliefs. Rather, the state is merely enforcing a general statute whose purpose and effect is to advance the state's secular goals.

84. 366 U.S. 599 (1961). The Court's rationale was that granting exemptions to the Sabbatarians would be administratively cumbersome and might frustrate the state's legitimate goal of providing a uniform day of rest. *Id.* at 607-09.

85. The United States Supreme Court did not address the legal implications of *Braunfeld* in its analysis.

86. *See* 374 U.S. at 417-18. Justice Stewart, in a concurring opinion, suggested that in light of *Sherbert*, *Braunfeld* "was wrongly decided and should be overruled." *Id.* at 418 (Stewart, J., concurring). *Compare* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1322 (1970).

87. *See* Ely, *supra* note 84 at 1322.

"God."[88] Today however, the scope of the definition of religion has changed dramatically,[89] not only from a public perspective but also from the Court's understanding of religion.[90] It is not clear from the majority's opinion in *Thomas* whether the Court has retreated in defining the scope of the establishment clause or has extended the liberties of the free exercise clause. It is apparent, however, that the *Thomas* Court's reliance on *Sherbert* in defining the scope of the establishment clause[91] raises the question of whether the *Thomas* Court's interpretation violates the first amendment. Since *Sherbert*, the Court has strongly suggested that an exemption granted solely to religious persons is unconstitutional.[92] This appraisal was conclusively indicated by the Court's construction of the draft law's conscientious objector provisions in *United States v. Seeger*[93] and *Welsh v. United States*.[94]

In *Seeger*, the defendant was convicted in the District Court of the Southern District of New York for having refused induction into the armed forces despite the claim that he was exempt from service under section 6(j) of the Universal Military Training and Service Act[95] because he was conscientiously opposed to war as a result of his "religious" beliefs.[96] The court of appeals, however, reversed[97]

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88. Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970).

89. *See* Davis v. Beason, 133 U.S. 333, 342-44 (1980) (holding that with respect to "common sense of mankind" polygamy is not a religious tenet); Reynolds v. United States, 98 U.S. 145, 164-68 (1878) (holding that the Mormon practice of polygamy was not protected by the religious clauses of the first amendment); *see also* Giannella, *supra* note 5, at 1386-88.

90. *See* TRIBE, *supra* note 1, at 826.

91. *See* Welch v. United States, 398 U.S. 333 (1970) (conscientious objector's definition of religious belief not limited to orthodox or parochial religious beliefs); United States v. Seeger, 380 U.S. 163 (1965) (court cannot require that the religious beliefs of conscientious objector be comprehensible or traditionally held religious doctrines); Torcaso v. Watkins, 367 U.S. 488 (1961) (nontheistic religions protected by first amendment); Fowler v. Rhode Island, 345 U.S. 67 (1953) (unorthodox or informal religious beliefs must receive first amendment protection); United States v. Ballard, 322 U.S. 78 (1944) (free exercise clause prohibits court from inquiring into truth or veracity of one's religious beliefs).

92. 450 U.S. at 719-20. The Court has determined that "neither a state nor the Federal Government . . . can constitutionally pass laws or impose requirements which aid all religions as against nonbelievers. . . ." Torcaso v. Watkins, 367 U.S. 488, 495 (1961).

93. *See infra* notes 92-93 and accompanying text.

94. 380 U.S. 163 (1965).

95. 398 U.S. 333 (1970).

96. 380 U.S. at 164-65. Section 6(j) of the Universal Military Training and Service Act states:

> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United

and the United States Supreme Court affirmed the appellate court's decision.[98]

The statute was challenged on two grounds: first, section 6(j) did not exempt non-religious conscientious objectors; and second, section 6(j) discriminated between different forms of religion because religion was defined as only those beliefs that were "in a relation to a Supreme Being."[99] In determining whether Seeger's beliefs were subject to first amendment protection under the statute, the Supreme Court concluded that the test of whether a belief was " 'in a relation to a Supreme Being' is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."[100] The courts, therefore, may not reject the beliefs because they find them incomprehensible: rather, their duty lies in deciding whether the beliefs asserted by the claimant are sincerely held[101] and whether they represent a religious belief.[102]

A few years later in *Welsh*, the Court extended the scope of beliefs which fall within the definition of religion under section 6(j) of the Universal Military Training and Service Act.[103] In *Welsh*, the claimant was convicted for having refused induction into the armed

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States who, by reason of religious training and beliefs, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individuals's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.

Selective Service Act of 1948, Pub. L. No. 759, 62 Stat. 604, 612-13, (1948) (current version at 50 U.S.C. app. § 456(j) (1976)). For the purpose of this article, the discussion will be limited to case No. 50 of the 3 cases brought before the United States Supreme Court in this cause of action. 380 U.S. at 166.

97. 380 U.S. at 166.

98. United States v. Seeger, 326 F.2d 846, 855 (1964).

99. 380 U.S. at 166.

100. *Id.* at 165. *See supra* note 94.

101. 380 U.S. at 165-66. The Court concluded that "[t]his construction avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with the well-established congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets." *Id.* at 176.

102. *See* United States v. Ballard, 322 U.S. 78, 81 (1944). The Court in *Ballard* upheld a conviction in the district court of mail fraud for distribution of religious literature and solicitation of funds accomplished through false and fraudulent representations because the defendant's beliefs were not honestly and sincerely held out as religious beliefs. *Id.* at 79, 82, 88.

103. 380 U.S. at 184-85. The Court quoted Justice Douglas in *Ballard*, where he stated: "Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some

forces.[104] Although the Court of Appeals affirmed,[105] the United States Supreme Court reversed because of the decision's fundamental inconsistency with *Seeger*.[106] The Court held that under the *Seeger* rationale, in order for a registrant's conscientious objection to war to be classified as religious pursuant to section 6(j), the claimant's opposition to war must stem from "the registrant's moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions."[107]

In a concurring opinion, Justice Harlan reluctantly affirmed the Court's opinion on constitutional grounds; however, he objected to the Court's statutory construction and raised many questions concerning this expanded interpretation of religion under section 6(j).[108] Harlan maintained that two options existed: first, Congress could eliminate all exemptions and thus create a "neutral" course of action which would not violate the free exercise clause;[109] or second, once the Court had chosen to exempt, it could not "draw the line between theistic and non-theistic religious beliefs on the one hand

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may be incomprehensible to others." *Id.* at 184 (quoting United States v. Ballard, 322 U.S. 78, 86 (1944)).

104. 398 U.S. 342-44.

105. *Id.* at 335 (Welsh was convicted for failing to comply with section 6(j) of the Universal Military and Training Service Act). *See supra* note 94.

106. Welch v. United States, 404 F.2d 1078 (9th Cir. 1978). The court of appeals affirmed the district judge's declaration, finding no religious basis for the claim. The court held that while the petitioner's "beliefs are held with the strength of more traditional religious convictions," these beliefs did not fall within the parameters of "religion" as defined in section 6(j). *Id.* at 1081 (construing Universal Military Training and Service Act, § 6(j), 50 U.S.C. App. § 456(j) (1976)).

107. 398 U.S. at 335. Welsh claimed that 6(j) exempted him from service because "I am by reason of my religious training and belief, conscientiously opposed to participation in war in any form." *Id.* at 336-37.

108. *Id.* at 339-40. The court further added that,

> [m]ost of the great religions of today and of the past have embodied the idea of a Supreme Being or a Supreme Reality—a God—who communicates to man in some way a consciousness of what is right and should be done, of what is wrong and therefore should be shunned. If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual "a place parallel to that filled by . . . God" in traditionally religious persons. Because his beliefs function as a religion in his life, such an individual is as much entitled to a "religious" conscientious objector exemption under § 6(j) as is someone who derives his conscientious opposition to war from traditional religious convictions.

Id. at 340.

109. *Id.* at 344-45.

and secular beliefs on the other."[110] Harlan concluded that any such distinction violated the establishment clause.[111]

It is readily apparent that the narrow scope of beliefs historically receiving religious protection under the first amendment[112] has evolved to include a broader range of beliefs granted protection by the religious clauses.[113] The Court's decisions in *Seeger* and *Welsh* indicate an apparent move toward broadening the scope of religiously protected activities. Although the Court's definition of religion in *Seeger* and *Welsh* is a statutory interpretation of "religious training and belief" as understood in section 6(j), it may suggest that the Court's ultimate definition of religion for constitutional purposes[114] is to provide constitutional protection to beliefs of an individual which are sincerely held moral and philosophical beliefs.[115] The Court has stressed that it is not for the Court to decide the truth or falsity of a claimant's religious beliefs, but to inquire only into the sincerity of the claimant's beliefs.[116]

It is evident that in *Seeger* and *Welsh*, the Court extended the definition of beliefs falling within the definition of "religion" to avoid declaring the statute unconstitutional for violating the establishment clause.[117] In both decisions, the Court appeared to be moving toward abolishing the requirement that beliefs must be religious to be afforded first amendment protection under a harmonious reading of the religious clauses. Under this approach, the Court may provide benefits to a person holding a particular belief, while not defining the belief as religious, in order to uphold the individual's

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110. *Id.* at 356. *See* 374 U.S. at 418 (Harlan, J., dissenting). *Cf.* McGowan v. Maryland, 366 U.S. 420 (1961) (Sunday closing laws based on State's desire for uniform day of rest held not violative of establishment clause because choosing another day would violate the concept of neutrality toward religion); Davis v. Beason, 133 U.S. 333 (1890) (Mormon's challenge that statute prohibiting polygamy violated their right to free exercise of religion upheld because polygamy illegal for all, not just Mormon faith). *See also* Kurland, *supra* note 62, at 22-23.

111. 398 U.S. at 356.

112. *Id. See* Walz v. Tax Comm'n, 397 U.S. 664, 694 (1970) (Harlan, J., separate opinion); School District of Abington v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring).

113. *See supra* note 5 and accompanying text.

114. *Id.*

115. *See* MANSFIELD, CONSCIENTIOUS OBJECTION, RELIGION AND PUBLIC ORDER, 8-9 n.104 (1965); *See also* Gianella, *supra* note 5, at 1425.

116. 398 U.S. at 339-40.

117. 322 U.S. at 86-93. In *Welsh*, Justice Harlan in a concurring opinion stated that it is "the intensity of moral conviction with which a belief is held" that must be analyzed to determine whether the belief falls within the definition of religion under section 6(j)." 398 U.S. at 358 (Harlan, J., concurring).

first amendment rights. Moreover, this would not violate the establishment clause because it would not promote one form of religion over another. Thus, to avoid violating the establishment clause, a court could extend the analysis of religion as developed in *Seeger* and *Welsh*. Therefore, to ease the tension between the free exercise clause and establishment clause, the Court should omit the "religious" belief requirement altogether and afford protection to all moral and philosophical beliefs that are sincerely held.

Given the foregoing analysis, the question becomes what effect the decision in *Thomas* will have on the Court's understanding of "religion," especially in light of *Seeger* and *Welsh*. *Thomas* clearly has not resolved the "tension" between the two religious clauses. By awarding Thomas unemployment compensation benefits because of his conscientious objection to producing armament, the Court, in effect, provided benefits to one with religious beliefs while similarly denying these benefits to those with equally strong morally held convictions. Under *Seeger* and *Welsh*, this violates the establishment clause. If the Court, however, were to extend benefits to individuals who concientiously objected to all war on the basis of moral or philosophical reasons, then extending benefits to an individual such as Thomas, based on his "religious" convictions, would not violate the establishment clause. Should the Court adopt this form of analysis in cases of conscientious objectors, the tension between the religious clauses might be reduced.

V. CONCLUSION

The two religious clauses of the first amendment have long been a source of interest and controversy. With the expansion of those beliefs requiring protection under the religious clauses, a tension has evolved between the two clauses. With the application of the first amendment to the states through the fourteenth amendment, the struggle between the clauses has escalated.

In *Thomas v. Review Board*, the United States Supreme Court was faced again with the question of how to reconcile the right of freedom of religious expression and the requirement that the state not establish religion. The Court, unfortunately, failed to analyze appropriately the problem. As a result, it initiated a policy that, in effect, establishes religion. The Court must seek a solution to this ongoing controversy because if extended to its logical extreme, each

clause will clash with the other.[118]

The Court in *Welsh* extended the scope of activities entitled to religious protection under the first amendment to "include those beliefs held out in opposition to war which stem from the registrant's moral, ethical, or religious beliefs about what is right or wrong and that these beliefs be held with the strength of traditional religious convictions."[119] The Court in *Thomas* could have extended this analysis and removed altogether the requirement that one's beliefs stem from religious faith in order for an individual to receive the status of a conscientious objector, and thus be exempt from the unemployment requirements of the Indiana statute. Rather, the Court should look strictly to the sincerity with which the individual holds his beliefs. The sincerity requirement is identical to that previously used by the Court in analyzing religious claims. Therefore, an adoption by the Court of the sincerity test is not only a logical extension of prior case law, but is also a feasible solution which will aid in relieving the tension between the free exercise clause and the establishment clause.

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118. *See* Ely *supra* note 84, at 1322.
119. 398 U.S. at 335.