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The Religious Freedom Restoration Act and The Religious Freedom Act: A Legal Analysis

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THE RELIGIOUS FREEDOM RESTORATION ACT AND THE RELIGIOUS FREEDOM ACT: A LEGAL ANALYSIS

SUMMARY

In 1990 in the case of *Employment Division, Oregon Department of Human Resources v. Smith* the Supreme Court largely abandoned the expansive interpretation of the free exercise of religion clause of the First Amendment which it had employed for several decades. It did so by eliminating use of the strict scrutiny test for most free exercise cases which challenge government regulations which are general in nature. The free exercise clause, the Court said, **never** "relieve[s] an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)'." So long as a law is religiously neutral on its face, it asserted, government may uniformly apply it to all persons regardless of any burden or even prohibition that may be placed on particular religious practices. Protection for particular religious practices must be sought in the political process and not in the courts, the Court stated, even though it recognized that "the political process will place at a relative disadvantage those religious practices that are not widely engaged in."

In response to that decision, a bill entitled the "Religious Freedom Restoration Act" (RFRA) was introduced in the 101st Congress and, in modified form, has been reintroduced in the 102d Congress. The bill would resurrect the strict scrutiny test largely abandoned by the Court in *Smith*, reimpose it on all government action burdening the exercise of religion, and afford an opportunity for judicial relief to persons who believe their ability to practice their religion has been burdened by government in violation of the Act. In other words, under the RFRA government could deny religious exceptions to laws of general applicability only if it could show that the denial of the exception was necessary to serve a compelling governmental interest and that no other means of serving that interest less burdensome to religion were available.

In addition, a bill entitled the "Religious Freedom Act" (RFA) has been introduced in the 102d Congress. Like the RFRA, the RFA would reinstate the strict scrutiny test as a statutory standard for government action affecting religion and afford aggrieved persons the opportunity for judicial relief. But unlike the RFRA, it would deny the opportunity for judicial relief for all claims under the RFA that challenged the tax exemption of a third party, the use or disposition of government funds or property, or restrictions on abortion. These amendments may not have much significance, however, because the claims that would be precluded either are not generally brought on free exercise grounds or could still be successfully pursued apart from the RFRA or the RFA.

This report examines the state of free exercise jurisprudence prior to *Smith*; summarizes the *Smith* decision; surveys the effect *Smith* has had on subsequent free exercise litigation; outlines the provisions of the RFRA and RFA; and analyzes their scope and effect, the legal significance of the exceptions to judicial review set forth in the RFA, and Congress' power to enact the legislation.

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INTRODUCTION

In 1990 in the case of *Employment Division, Oregon Department of Human Resources v. Smith*[1] the Supreme Court, by a 5-4 margin, largely abandoned the expansive understanding of the free exercise of religion clause of the First Amendment it had followed for several decades and substituted in its stead a restrictive view.[2] Previously, the Court had generally (although not always) applied a strict scrutiny test to government action burdening the exercise of religion, requiring the government to demonstrate a compelling public interest for its action and to show that no less burdensome course of action was feasible. Because that test was a difficult one for government to meet, its use often meant that various religious practices were found to be constitutionally entitled to exemptions from otherwise applicable statutes and regulations. But in *Smith* the Court renounced that test (except in a few specified instances). The free exercise clause, the Court said, never "relieve[s] an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" So long as a law is religiously neutral on its face, it stated, the government may uniformly apply it to all persons, regardless of any burden or prohibition that may be placed on particular religious practices. Protection for particular religious practices must be sought in the political process and not in the courts, the Court said, even though it recognized that "the political process will place at a relative disadvantage those religious practices that are not widely engaged in."

Soon thereafter legislation was introduced in the second session of the 101st Congress to overturn this aspect of the *Smith* decision.[3] Known as the

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1 494 U.S. 872 (1990).

2 The religion clauses of the First Amendment provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." The clauses have been held applicable not only to the Federal government but to the states as well. Cantwell v. Connecticut, 310 U.S. 296 (1940) (free exercise clause); Everson v. Board of Education, 330 U.S. 1 (1947) (establishment clause).

3 *See* H.R. 5377, 101st Cong., 2d Sess. (1990) (sponsored by Rep. Solarz with 99 cosponsors) and S. 3254, 101st Cong., 2d Sess. (1990) (sponsored by Sen. Biden with 8 cosponsors).

"Religious Freedom Restoration Act of 1990," the proposal would not have amended the Constitution but instead would have imposed a strict scrutiny test as a statutory requirement on all governmental action restricting any person's free exercise of religion. It would also have afforded persons aggrieved by particular governmental actions an opportunity for judicial relief. A subcommittee of the House Judiciary Committee held a hearing on the proposal in September, 1990,[4] but no further action was taken in the 101st Congress.

A modified version of the proposal has been reintroduced in the 102d Congress as the "Religious Freedom Restoration Act of 1991" (RFRA).[5] In addition, a slightly different version has recently been introduced under the title "Religious Freedom Act of 1991" (RFA).[6] Significant differences between the RFRA and the RFA in the 102d Congress center on amendments in the latter barring claimants under the bill from challenging the tax exemption of religious organizations, public funding of social welfare programs sponsored by religious groups, and legal restrictions on abortion or abortion funding.

This report provides a legal analysis of the "Religious Freedom Restoration Act of 1991" and of the "Religious Freedom Act of 1991." The following sections give an overview of free exercise jurisprudence prior to *Smith*, summarize the *Smith* decision, set forth how *Smith* has been applied in subsequent judicial decisions involving free exercise claims, outline the provisions of H.R. 2797 and H.R. 4040, and analyze such matters as the legal effect of the bills, the significance of the three amendments made in the RFA, and Congress' power to enact the legislation.

FREE EXERCISE JURISPRUDENCE PRIOR TO SMITH

The central question concerning the free exercise clause has been the extent to which it protects religiously motivated **action** from governmental interference. The Supreme Court has repeatedly noted that the clause "embraces two concepts--freedom to believe and freedom to act," and it has asserted that the first freedom is "absolute." But the second freedom, the Court has often observed, "cannot be."[7] The continuing challenge has been to define a principled basis for determining the permissible scope of that second freedom.

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[4] *Religious Freedom Restoration Act of 1990: Hearing Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary*, 101st Cong., 2d Sess. (September 27, 1990).

[5] H.R. 2797, 102d Cong., 1st Sess. (1991) (introduced by Rep. Solarz and 179 cosponsors).

[6] H.R. 4040, 102d Cong., 1st Sess. (1991) (introduced by Rep. Smith of New Jersey and 40 cosponsors).

[7] Cantwell v. Connecticut, *supra*.

Early decisions by the Court suggested that the free exercise clause provided virtually no protection whatever to religiously motivated action. In a number of cases in the late 19th century, the Court upheld a series of increasingly onerous governmental measures designed to eradicate the Mormon practice of polygamy--a statute making bigamy and polygamy crimes in Federal territories[8]; a statute barring bigamists and polygamists from voting, holding public office, and serving on juries in the territories[9]; a statute barring those who advocated the practice of bigamy or polygamy, or who belonged to organizations which so advocated, from voting or holding public office in the territories[10]; and, finally, a statute revoking the charter of the Mormon Church and confiscating all of its property not actually used for religious worship or burial.[11] All of these cases were premised on the view that "the State has a perfect right to prohibit polygamy, and all other open offenses against the enlightened sentiment of mankind, notwithstanding the pretence of religious conviction by which they may be advocated and practiced."[12]

At least by 1940, however, the Court began to read the free exercise clause more broadly. The Court continued to state that "[c]onduct remains subject to regulation for the protection of society," but in a variety of verbal formulations it made clear that the free exercise clause protects some religiously motivated acts as well. In striking down a statute for vesting a local official with too much discretion in determining whether to permit a religious group to solicit support for its views, for instance, the Court said, "in every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom."[13] A breach-of-the-peace conviction of two Jehovah's

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8 Reynolds v. United States, 98 U.S. (8 Otto) 145 (1878). In response to the argument that the Mormon faith imposed bigamy and polygamy as religious duties on its male members, the Court stated that under the First Amendment "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order." 98 U.S. at 164. To excuse a person from compliance with a general criminal law because of his religion, the Court said, would "permit every citizen to become a law unto himself." *Cf.* Cleveland v. United States, 329 U.S. 14 (1946) (sustaining a criminal conviction for polygamy).

9 Murphy v. Ramsey, 114 U.S. 15 (1885).

10 Davis v. Beason, 133 U.S. 333 (1890). The Court stated that "[i]t was never intended or supposed that the [First Amendment] could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society." 133 U.S. at 342.

11 The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890).

12 *Id.*, at 48-50.

13 Cantwell v. Connecticut, *supra*, at 304.

Witnesses for publicly playing a record belittling the Catholic faith was struck down for the reason that it was not based on a "statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State...."[14] A local ordinance imposing a flat license tax on all solicitors was struck down as applied to religious evangelists even though it was nondiscriminatory, the Court saying that "[f]reedom of press, freedom of speech, freedom of religion are in a preferred position."[15] The expulsion of Jehovah's Witnesses children from school for their religiously-based refusal to abide by a State statute requiring all schoolchildren to salute the flag and recite the Pledge of Allegiance each school day was struck down on the grounds that religious exercise is "susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect."[16]

The Court's broadened interpretation of the free exercise clause was not without limits, however. From 1940 to the early 1960s the Court held, for instance, that a State could, under its child labor laws, absolutely prohibit all street evangelism by children even when in the company of a parent, on the grounds "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults...."[17] It continued to hold polygamy to be subject to criminal prosecution even when motivated by religious faith.[18] And it held an Orthodox Jewish merchant not to be constitutionally entitled to an exemption from a Sunday closing statute, even though he thereby suffered an unequal economic penalty because his faith observed a Saturday Sabbath and required him to close his shop on that day as well.[19] In the latter case the plurality opinion stated the rule of the free exercise clause as follows:

> 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, supra*, at 607.

Within two years of making this statement, however, the Court held the free exercise clause to impose a strict scrutiny test on government action

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14 *Id.*, at 311.

15 Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943).

16 West Virginia Board of Education v. Barnette, 319 U.S. 624, 639 (1943).

17 Prince v. Massachusetts, 321 U.S. 158, 170 (1944).

18 Cleveland v. United States, 329 U.S. 14 (1946).

19 Braunfeld v. Brown, 366 U.S. 599 (1961).

burdening the exercise of religion. In *Sherbert v. Verner*[20] the Court held that a State could not deny unemployment compensation to a Seventh Day Adventist simply because she was not available for work, as required by the State law, on Saturday, her Sabbath. The facts were analogous to those in *Braunfeld*: In both cases the State had enacted a general economic regulation which indirectly imposed an economic burden on individuals because of the requirements of their faith. But in *Sherbert* the Court held that the burden could be upheld only if it were "justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate...'"[21]:

> It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."
> *Sherbert v. Verner, supra*, at 406, quoting *Thomas v. Collins*, 323 U.S. 516, 530.

Finding no compelling public interest to be served by South Carolina's requirement, the Court held the free exercise clause to preclude the State from denying unemployment benefits to persons who were unavailable for work on their Sabbath.

Since *Sherbert* the strict scrutiny test has generally been the standard employed for free exercise cases, although in recent years the Court evidenced some discontent with the test even prior to *Smith*. In *Wisconsin v. Yoder*[22] the Court, stating that "[t]he essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion,"[23] held the free exercise interests of the Old Order Amish to outweigh the interests underlying Wisconsin's compulsory education statute with respect to attendance beyond the eighth grade. Although admitting that "religiously grounded conduct must often be subject to the broad police power of the State," the Court asserted that "there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability."[24] Similarly, in *Thomas v. Review Board, Indiana Employment Security Commission*[25] the Court reaffirmed the strict scrutiny standard in holding that a State could not deny unemployment

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20 374 U.S. 398 (1963).

21 *Id.*, at 403, quoting NAACP v. Button, 371 U.S. 415, 438.

22 406 U.S. 205 (1972).

23 *Id.*, at 215.

24 *Id.*

25 450 U.S. 707 (1981).

benefits to a Jehovah's Witness who became unemployed because his interpretation of the Bible precluded him from working on an armaments production line. The Court said, "[t]he State may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."[26] In two subsequent decisions the Court continued to apply the strict scrutiny test to State denials of unemployment compensation to individuals who were unemployed because of a conflict between their faith and their jobs, reiterating that "the State may not force an employee 'to choose between following the precepts of her religion and forfeiting benefits...and abandoning one of the precepts of her religion in order to accept work.'"[27]

Each of these decisions employed the strict scrutiny standard with the result that religiously motivated conduct was held to be constitutionally exempt from government regulations of general applicability. In four other decisions in the past decade--all of them tax cases--the Court used the strict scrutiny standard but, nonetheless, upheld the government action at issue. In *United States v. Lee*[28] the Court held that an Amish employer was not constitutionally entitled to an exemption from paying the employer's portion of Social Security taxes, because, it said, "mandatory participation is indispensable to the fiscal vitality of the social security system."[29] In *Bob Jones University v. United States*[30] it upheld IRS' denial of a tax exemption to a religious college whose racially discriminatory practices were claimed to be mandated by religious belief on the grounds that "the Government has a fundamental, overriding interest in eradicating racial discrimination in education" and that that interest "substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs."[31] In *Hernandez v. Commissioner of Internal Revenue*[32] it upheld IRS' denial of a tax deduction to members of the Church of Scientology for payments they made for "auditing" and "training" services, stating that whatever burden the denial placed on the Scientologists' practice of their religion was justified by the compelling governmental interest in maintaining a uniform tax system, "free of 'myriad exceptions flowing from

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26 *Id.*, at 718.

27 Hobbie v. Unemployment Appeals Commission of Florida, 480 U.S. 136, 146, quoting Sherbert v. Verner, *supra*, at 404 (1987), and Frazee v. Illinois Department of Employment Security, 489 U.S. 829 (1989).

28 455 U.S. 252 (1981).

29 *Id.*, at 258.

30 461 U.S. 574 (1983).

31 *Id.*, at 604.

32 490 U.S. 680 (1989).

a wide variety of religious beliefs.'"[33] And in *Jimmy Swaggart Ministries v. Board of Equalization*[34] the Court rejected the notion that subjecting a religious organization's sale of religious materials to general sales and use taxes imposed any "constitutionally significant" burden on the organization's ability to carry out its religious ministry.

Each of these decisions preserved the form of strict scrutiny while belying the notion that the test is outcome-determinative. But in four other decisions in the years immediately preceding *Smith* the Court evidenced some discontent with the strict scrutiny test by holding it to be inapplicable in particular circumstances. It did not abandon the test altogether in these cases but instead carved out several exceptions. In *Goldman v. Weinberger*[35] the Court upheld the dress code of the military against the free exercise claim of a Jewish psychologist who sought to wear a yarmulke while on duty. Because "the military is...a specialized society separate from civilian society," the Court said, judicial review of its actions must be "far more deferential than constitutional review of similar laws or regulations designed for civilian society."[36] So long as the military regulations in question are reasonable and evenhanded, it held, the free exercise clause is not violated. Similarly, in *O'Lone v. Estate of Shabazz*[37] the Court rejected a free exercise challenge to a prison regulation, stating "we take this opportunity to reaffirm our refusal, even where claims are made under the First Amendment, to 'substitute our judgment on...difficult and sensitive matters of institutional administration' for the determinations of those charged with the formidable task of running a prison."[38] To be constitutionally valid, it said, prison regulations simply need to be "reasonably related to legitimate penological interests," such as security and rehabilitation.[39] Finally, in *Bowen v. Roy*[40] and *Lyng v. Northwest Indian Cemetery Protective Association*[41] the Court held strict scrutiny to be inappropriate with respect to government's management of its own affairs. The first case involved the government's use of Social Security numbers in managing the Aid to Families with Dependent Children program as applied to an Indian family whose religion

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33 *Id.*, at 699-700, quoting United States v. Lee, *supra*, at 260.

34 493 U.S. 378 (1990).

35 475 U.S. 503 (1986).

36 *Id.*, at 506-07.

37 482 U.S. 342 (1987).

38 *Id.*, at 353.

39 *Id.*, at 349.

40 476 U.S. 693 (1986).

41 485 U.S. 439 (1988).

believed personal numerical identifiers to be a "great evil"; the second concerned its building of a road through a portion of a national forest deemed sacred by several Indian tribes and used by them for religious ceremonies. Abjuring strict scrutiny, the Court in the second case concluded that "even if we assume that...the...road will virtually destroy the Indians' ability to practice their religion, the Constitution simply does not provide a principle that could justify upholding [their] legal claims."[42]

In sum, then, the Court's interpretation of the free exercise clause in the century prior to *Smith* demonstrates, on the whole, increasing solicitude for religion. From an early stance that suggested the clause provided virtually no protection for religiously motivated action, the Court began to balance the religious interest against the societal interest and, after 1940, began to move the religious interest into a preferred position. That solicitude crystallized into the strict scrutiny test in *Sherbert* in 1963, and strict scrutiny generally remained the applicable test prior to *Smith*. In the late 1980's the Court held the test to be inapplicable in *Goldman*, *O'Lone*, *Bowen*, and *Lyng*, but those cases appeared to be exceptions to the general rule, not replacements. Prior to *Smith*, it seems fair to say that strict scrutiny was the general rule for free exercise cases.

SUMMARY OF SMITH

The specific issue in *Smith* concerned the eligibility for unemployment benefits of two drug counselors who had been fired for ingesting peyote as part of a religious ritual of the Native American Church. But the broader issue--and the one that is addressed by the RFRA and the RFA--concerned the standard of review that should be applied by the courts to a free exercise of religion claim.

Smith and Black were employed by a nonprofit substance abuse organization in Oregon as drug and alcohol counselors. As a condition of their employment, they were required to agree to abstain from using alcohol and drugs. Nonetheless, during a religious ceremony of the Native American Church, of which both were members, they ingested peyote, a central element of the ceremony. As a result, they were fired. When they applied for unemployment benefits, the Oregon Employment Division denied their claims on the grounds they lost their jobs for "misconduct connected with work," one of several permissible grounds of denial under the State's statute. Smith and Black appealed that decision, arguing that because their use of peyote was religiously motivated, the State could not constitutionally deny their claims on that basis. The Oregon Supreme Court, employing a strict scrutiny analysis, agreed that the free exercise clause barred the State from denying them unemployment benefits.[43]

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[42] *Id.*, at 451-52.

[43] Smith v. Employment Division, Department of Human Resources, 301 Or. 209, 721 P.2d 445 (1986).

In its initial review, the U.S. Supreme Court decided that before it could address the constitutionality of the State's denial of unemployment compensation, it had to consider whether the conduct in question was criminal under State law. "If a State has prohibited through its criminal laws certain kinds of religiously motivated conduct without violating the First Amendment," the Court said, "it certainly follows that it may impose the lesser burden of denying unemployment compensation benefits to persons who engage in that conduct."[44] Consequently, because the State courts had considered neither whether the use of peyote in religious ceremonies was prohibited by the State's criminal laws nor, if so, whether that prohibition was compatible with the Oregon constitution or the free exercise clause, the Supreme Court remanded the case back to the State for further consideration.[45]

On remand the Oregon Supreme Court held that the State's criminal drug laws did apply to peyote and that they made no exception for the use of peyote in religious ceremonies. But the State court, again employing a strict scrutiny test, further held application of that criminal law to the good faith religious use of peyote by adult members of the Native American Church to violate the free exercise clause. The court, drawing heavily on the decision of *People* v. *Woody*, 61 Cal.2d 716, 40 Cal.Rptr. 69, 394 P.2d 813 (1964), noted that the use of peyote in the ceremonies of the Native American Church was a central practice of the faith, and that such use dated back at least to the 16th century. It further noted that Congress and at least 23 States have exempted the religious use of peyote from their drug laws, and that a Congressional committee had expressed the view that such religious use is constitutionally protected. Consequently, the court held that Oregon had no compelling public interest in applying its drug laws to the religious use of peyote, that consequently the free exercise clause mandated an exemption for such religious use, and that therefore Smith and Black were constitutionally entitled to receive unemployment benefits from the State.[46]

The Supreme Court reversed.[47] Although the matter of the standard of review had been neither briefed nor argued to the Court (both sides assuming that the strict scrutiny standard controlled), Justice Scalia, joined by Chief Justice Rehnquist and Justices White, Stevens, and Kennedy, held that strict scrutiny is not the appropriate standard of review for most free exercise claims. Religious beliefs are absolutely immune from government interference, he said, but religiously motivated conduct is not. More particularly, he asserted, "the record of more than a century of our free exercise jurisprudence" has made clear

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[44] Employment Division, Department of Human Resources v. Smith, 483 U.S. 660, 670 (1988).

[45] *Id.*

[46] 307 Ore. 68, 713 P.2d 146 (1988).

[47] Employment Division, Oregon Department of Human Resources v. Smith, 494 U.S. 872 (1990).

that the free exercise clause "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability,'" even though the law might "incidentally" burden a religious practice. The only cases in which that was not the holding, he asserted, were cases in which a free exercise claim was joined with other constitutional claims such as freedom of speech or parental control of their children's upbringing. This case, he said, is not such a "hybrid."

Moreover, he noted, although several cases have required government action burdening religious practices to be justified by a compelling public interest and to be no more restrictive of religious practice than absolutely necessary, the government action in question has been invalidated only in cases involving the denial of unemployment compensation to persons who have become unemployed for religious reasons.[48] Whatever the implications of those decisions, he said, "they at least have nothing to do with an across-the-board criminal prohibition on a particular form of conduct." The compelling public interest test, he said, is simply "inapplicable" to challenges to such criminal statutes. To apply the test here, Justice Scalia asserted, would permit a religiously motivated person "to become a law unto himself" and would create a "constitutional anomaly."

Nor, he said, could the compelling interest test be strengthened by limiting its application only to government action impinging on religiously motivated conduct deemed to be "central" to the individual's religion. An evaluation of the "centrality" or importance of particular practices to a religion is, he stated, "inappropriate" for judges and "not within the judicial ken": "Judging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims.'"

In addition, applying the test "across the board to all actions thought to be religiously commanded," he asserted, would "court...anarchy." It would "open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind -- ranging from compulsory military service...to the payment of taxes...to health and safety regulation such as manslaughter and child neglect laws..., compulsory vaccination laws..., drug laws, and traffic laws, to social welfare legislation such as minimum wage laws..., child labor laws..., animal cruelty laws..., environmental protection laws..., and laws providing for equality of opportunity for the races...." "The First Amendment's protection of religious liberty," he said, "does not require this."

The free exercise clause does bar government, Justice Scalia stated, from discriminating against religion or targeting particular religious practices. But it does not, he said, require the States to enact nondiscriminatory religious

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[48] *See* Sherbert v. Verner, 374 U.S. 398 (1963); Thomas v. Review Board, Indiana Employment Division, 450 U.S. 707 (1981); Hobbie v. Unemployment Appeals Commission of Florida, 480 U.S. 136 (1987); and Frazee v. Illinois Department of Employment Security, 489 U.S. 829 (1989).

practice exemptions for the ceremonial use of peyote, although they may do so if they wish. Justice Scalia concluded:

> 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 against the centrality of all religious beliefs. Because respondents' ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise clause, deny respondents unemployment compensation when their dismissal results from use of the drug.
> 110 S.Ct. at 1606.

Four Justices sharply criticized the majority's constriction of the strict scrutiny standard of review. Justice O'Connor joined the judgment of the Court but argued that the Court's articulation of the free exercise clause "dramatically departs from well-settled First Amendment jurisprudence..., is incompatible with our Nation's fundamental commitment to individual religious liberty..., and relegates a serious First Amendment value to the barest level of minimum scrutiny...." She agreed that a person does not have an "absolute right" to engage in religiously motivated conduct and that such conduct must be balanced against other societal interests. But religious liberty, she stated, is a preferred value, and thus the free exercise clause, properly interpreted, bars "encroachment upon this liberty, whether direct or indirect, unless required by clear and compelling governmental interests 'of the highest order.'"

The Court's decisions, she asserted, have consistently required the government to meet that standard when its actions have impinged on religious practices, and have made no distinction between "cases in which a State conditions receipt of a benefit on conduct prohibited by religious beliefs and cases in which a State affirmatively prohibits such conduct." Nor is it convincing to reject use of the test, she said, because some of the Court's cases have been hybrids or because in some instances the governmental action in question has been upheld. Far from relegating minority religions to the vagaries of the political process, she said, "the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility." The compelling interest test, she claimed, is a "fundamental part of our First Amendment doctrine" and "reflects the First Amendment's mandate of preserving religious liberty to the fullest extent possible in a pluralistic society."

Nonetheless, she said, application of the test in this case would not alter the result reached by the Court. Oregon, she stated, "has a significant interest in enforcing laws that control the possession and use of controlled substances by its citizens" because of the consequences of drug use for the health and

welfare of its population. "Although the question is close...," she asserted, "uniform application of Oregon's criminal prohibition is 'essential to accomplish...' its overriding interest in preventing the physical harm caused by the use of a Schedule I controlled substance ...and in preventing trafficking in controlled substances." Thus, she concurred with the Court that the free exercise clause mandated no religious exemption in this case.

Justice Blackmun, joined by Justices Brennan and Marshall, agreed with Justice O'Connor's critique of the Court's abandonment of strict scrutiny but dissented from the judgment. The majority's decision, he charged, "mischaracteriz[es] the Court's precedents" and "effectuates a wholesale overturning of settled law concerning the Religion Clauses of our Constitution." It is a "settled and inviolate principle of this Court's First Amendment jurisprudence," he argued, that "a state statute that burdens the free exercise of religion...may stand only if the law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means."

No such compelling interest existed in this case, he said. The public interest in question in this case, he claimed, was "not the State's broad interest in fighting the critical 'war on drugs...' but [its] narrow interest in refusing to make an exception for the religious, ceremonial use of peyote." The importance of Oregon applying its criminal law uniformly was belied in this case, he said, because Oregon had never made "significant enforcement efforts against other religious users of peyote" and offered "no evidence that the religious use of peyote... ever harmed anyone." Moreover, he argued, other States had found the religious use of peyote to work no permanent harm, the Federal Government and 23 States exempted the religious use of peyote from their restrictions on the use of controlled substances, "the carefully circumscribed ritual context in which respondents used peyote is far removed from the irresponsible and unrestricted recreational use of unlawful drugs," and illegal trafficking in peyote is virtually nonexistent. Thus, he concluded, an exemption for the religious use of peyote in this instance would be compatible with Oregon's interests in the health and safety of its people and in preventing drug trafficking. In addition, he said, the ceremonial use of peyote was an "essential ritual" of the Native American Church. Consequently, he concluded, Oregon's interests in this case were not "sufficiently compelling to outweigh respondents' right to the free exercise of their religion," and the State could not constitutionally deny them unemployment benefits.

In sum, then, the Court by a 6-3 majority in *Smith* held the free exercise clause not to compel Oregon to grant unemployment compensation benefits to individuals who lost their jobs due to conduct that was criminal under State law, even though that conduct was motivated by religious beliefs. By a 5-4 majority in *Smith* the Court substantially constricted the use of the strict scrutiny test for free exercise cases and relegated most religious claims for exemption from statutes of general applicability to the political process.

FREE EXERCISE DECISIONS SUBSEQUENT TO SMITH

The implications and scope of the Court's constriction of strict scrutiny in *Smith* have been explored in dozens of subsequent State and lower Federal court decisions. In the main the courts have given the non-exemption principle of *Smith* a broad reading, holding it to be applicable not only to criminal statutes impinging on religious practices but also to civil statutes and regulations. As a result, free exercise claims have become markedly unsuccessful.

The United States Courts of Appeal for the Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits, for instance, have all held *Smith* to dictate that religious exemptions **not** be granted in a variety of circumstances. These appellate courts have denied constitutional claims to religious exemption with respect to:

> (1) the alien verification and sanctions provisions of the Immigration Reform and Control Act, as applied to Catholic orders whose ministry involved offering employment to all persons in need without regard to their immigration status[49] and to a Quaker employer whose religious beliefs commanded that it welcome the sojourner and the poor[50];
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> (2) the New York City Landmarks Law, as applied to a church that sought to replace a landmarked auxiliary structure with an office tower as a way of financing its ministries[51];
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> (3) the New Jersey Rooming and Boarding House Act, as applied to an adult rehabilitation center operated by the Salvation Army[52];
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> (4) Federal and State laws criminalizing the distribution and possession of peyote except by the Native American Church (NAC), as

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[49] Intercommunity Center for Justice and Peace v. Immigration and Naturalization Service, 910 F.2d 42 (2d Cir. 1990) (an organization of Roman Catholic orders sought exemption claiming that the orders offered employment to all people in need without regard to their immigration status as part of their religious ministry).

[50] American Friends Service Committee v. Thornburgh, 951 F.2d 957 (9th Cir. 1991).

[51] St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990), *cert. den.*, 111 S.Ct. 1103 (1991) (local church sought an exemption from the city's landmarking ordinance so that it could raze an auxiliary structure and build an office tower in order to gain income for its religious ministries).

[52] Salvation Army v. Department of Community Affairs of the State of New Jersey, 919 F.2d 183 (3d Cir. 1990).

applied to a non-NAC religious group that also used peyote as a sacrament[53];

(5) Mississippi's avoidable consequences rule, as applied to a wrongful death suit by the family of a woman involved in a car accident who, because of her beliefs as a Jehovah's Witness, refused blood transfusions that might have saved her life[54];

(6) Kentucky's requirement of equivalency testing for students receiving instruction at home, as applied to a high school student whose religious beliefs deemed such testing to be unfair and more than God would want him to bear[55];

(7) Michigan's statute requiring autopsies to be performed in all instances of violent death, as applied to a motorist killed in a high speed police chase despite mother's assertion that an autopsy violated her and his Jewish beliefs[56];

(8) a decision by the Federal Bureau of Investigation to dismiss an employee whose religious beliefs compelled him to refuse to investigate two pacifist groups[57];

(9) a local community's zoning ordinance which excluded churches from a commercial and industrial zone[58];

(10) Ohio's workers compensation program, as applied to a church that believed contributions to a public social insurance scheme violated Biblical teachings[59];

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[53] Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991).

[54] Munn v. Algee, 924 F.2d 568 (5th Cir.), *cert. den.*, 112 S.Ct. 277 (1991).

[55] Vandiver v. Hardin County Board of Education, 925 F.2d 927 (6th Cir. 1991).

[56] Montgomery v. County of Clinton, Michigan, 743 F.Supp. 1253 (W.D. Mich. 1990), *aff'd mem.*, 940 F.2d 661 (1991).

[57] Ryan v. United States Department of Justice, 950 F.2d 458 (7th Cir. 1991).

[58] Cornerstone Bible Church v. City of Hastings, Minn., 948 F.2d 464 (8th Cir. 1991), *modifying on other grounds*, 740 F.Supp. 654 (D. Minn. 1990).

[59] South Ridge Baptist Church v. Industrial Commission of Ohio, 911 F.2d 1203 (6th Cir. 1990) (Boggs, J., concurring), *cert. den.*, 111 S.Ct. 754 (1991). The majority opinion rested primarily on United States v. Lee, 455 U.S. 252 (1982), which utilized a strict scrutiny analysis in denying an Amish employer an exemption from paying Social Security taxes for his employees without considering the effect of Smith.

(11) the National Labor Relations Act, as applied to efforts to unionize non-teaching employees at a Catholic residential school for boys[60]; and

(12) local ordinances that prohibited the ritualistic sacrifice of animals, adopted when adherents of the Santeria religion sought to establish a church and publicly practice such ritualistic sacrifices.[61]

The Federal district courts have handed down a number of post-*Smith* decisions to the same effect. Relying on the no-exemption principle stated in *Smith*, these courts have found the free exercise clause not to be violated where:

(1) an autopsy has been performed pursuant to State law despite a prohibition on autopsies in the religion of the decedent and his relatives[62];

(2) the public accommodations title of the Civil Rights Act of 1964 has been construed to require the Boy Scouts of America to admit into membership persons who are unwilling to profess a belief in God[63];

(3) an individual who has taken money on the basis of a claimed ability to ward off evil spirits has been convicted of grand larceny and fortune telling[64];

(4) third party levies for delinquent income taxes have been assessed against a Quaker organization that at the request of two employees refused to withhold the portion of their taxes devoted to military purposes by the government[65];

(5) a charitable solicitations ordinance that imposed disclosure and recordkeeping requirements on most charitable organizations that

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60 National Labor Relations Board v. Hanna Boys Center, 940 F.2d 1295 (9th Cir. 1991). The court's decision suggested that Smith might be limited to criminal cases only and used the strict scrutiny test in analyzing the case. Nonetheless, it concluded that jurisdiction by the NLRB in this instance did not violate the free exercise clause, "whether tested by the traditional balancing analysis, or the broad categorical standard of Smith." 940 F.2d at 1306.

61 Church of the Lukumi Babalu Aye, Inc. v. Hialeah, Florida, 723 F.Supp. 1467 (S.D. Fla. 1989), *aff'd per curiam*, No. 90-5176 (11th Cir. 1991), *cert. granted*, 60 U.S.L.W. 3652 (1992). The Supreme Court will hear and decide this case in its next Term, which begins in October, 1992.

62 Yang v. Sturner, 750 F.Supp. 558 (D.R.I. 1990) (Hmong parents of son who died for unknown reasons said the autopsy not only mutilated his body in violation of their faith but also prevented his spirit from becoming free).

63 Welsh v. Boy Scouts of America, 742 F.Supp. 1413 (N.D. Ill. 1990).

64 Ballard v. Walker, 772 F.Supp. 1335 (E.D. N.Y. 1991).

65 United States v. Philadelphia Yearly Meeting of the Religious Society of Friends, 753 F.Supp. 1300 (E.D. Pa. 1990).

solicited funds within the city made no exception for religious organizations[66];

(6) the government has engaged in covert surveillance of the worship services and other activities of churches involved in the Sanctuary movement[67];

(7) the Age Discrimination in Employment Act has been applied to a religiously affiliated hospital[68];

(8) a requirement of a State Agricultural Worker Protection Act requiring employers to have insurance or to post a liability bond in order to protect agricultural workers who are injured while being transported by the employer has been applied to an employer who claimed to hold religious objections to acquiring such insurance or posting such a bond[69]; and

(9) regulations have been imposed limiting the services which can be performed by volunteers in proprietary nursing homes.[70]

State court decisions are to the same effect. In the wake of *Smith* these courts have rejected free exercise claims made by:

(1) Christian Scientist parents convicted of felony child abuse and third degree murder after unsuccessfully relying on spiritual means to treat their child's juvenile diabetes[71];

(2) a minister subjected to an investigation under the State's Deceptive and Unfair Trade Practices Act for soliciting contributions by mail by promising "hot" lottery numbers revealed to him by God[72];

(3) a spouse whose claim for damages in a wrongful death suit against a physician who was negligent in treating his wife was held to be subject to a principle of proportionate liability because she refused,

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66 Church of Scientology v. City of Clearwater, 756 F.Supp. 1498 (M.D. Fla. 1991).

67 Presbyterian Church (U.S.A.) v. United States, 752 F.Supp. 1505 (D. Ariz. 1990). The court employed a strict scrutiny analysis but concluded by noting that Smith mandated no exception on religious grounds to governmental surveillance undertaken in good faith.

68 Lukaszewski v. Nazareth Hospital, 764 F.Supp. 57 (E.D. Pa. 1991).

69 Calderon v. Witvoet, 764 F.Supp. 536 (C.D. Ill. 1991).

70 Greater New York Health Care Facilities Association, Inc. v. Axelrod, 770 F.Supp. 183 (S.D. N.Y. 1991).

71 Hermanson v. Florida, 570 So.2d 322 (Fla. App. 2d Dist. 1990).

72 Florida Department of Legal Affairs v. Jackson, 576 So.2d 864 (Fla. App. 3d Dist. 1991).

as a Jehovah's Witness, to accept blood transfusions made necessary by the negligence that might have saved her life[73];

(4) a church subjected to a State consumer use tax on items it purchased from out-of-State religious suppliers[74];

(5) homeowners whose erection of three crosses in their front yard was held to violate the setback requirements of the city's zoning ordinance[75];

(6) trustees of a church that alleged improper distribution of the church's assets following its dissolution[76];

(7) a church sued by an associate pastor who had been dismissed alleging sexual harassment, breach of contract, defamation, and wrongful termination[77];

(8) a church that refused to obtain a State license for its child care center because the licensing requirements would have prohibited it from disciplining children by spanking in accord with its understanding of the Bible[78];

(9) a member of Iowa Operation Rescue whose antiabortion activities at Planned Parenthood facilities were permanently enjoined[79]; and

(10) a defendant convicted of growing marijuana who claimed marijuana use was a sacrament of the Universal Industrial Church of the New World Comforter of which he was a minister.[80]

In only one instance subsequent to *Smith* has a court found the government regulation in question to be a religiously neutral law of general

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[73] Corlett v. Caserta, 204 Ill.App.3d 403, 562 N.E.2d 257 (Ill. App. 1st Dist. 1990).

[74] Hope Evangelical Lutheran Church v. Iowa Department of Revenue and Finance, 463 N.W.2d 76 (Iowa 1990), *cert. den.*, 111 S.Ct. 1585 (1991).

[75] Elsaesser v. City of Hamilton Board of Zoning Appeals, 61 Ohio App.3d 641, 573 N.E.2d 733 (1990).

[76] Prince v. Firman, 584 A.2d 8 (D.C. 1990).

[77] Black v. Snyder, 471 N.W.2d 715 (Minn. App. 1991). Although the court perceived no free exercise problem in adjudicating the suit, it dismissed all of the claims except the one pertaining to sexual harassment on the grounds adjudication would create excessive entanglement in violation of the establishment clause.

[78] Health Services Division, Health & Environment Department of New Mexico v. Temple Baptist Church, 814 P.2d 130 (N.M. App. 1991).

[79] Planned Parenthood of Mid-Iowa v. Maki, 478 N.W.2d 637 (Iowa 1991).

[80] Oregon v. Venet, 797 F.2d 1055 (Or. App. 1990).

applicability but nonetheless held it to violate the free exercise clause. In *Hill-Murray Federation of Teachers, St. Paul v. Hill-Murray High School, Maplewood*[81] a State court held application of the Minnesota Labor Relations Act to a private Catholic high school to violate the Minnesota Constitution, the establishment clause, and the free exercise clause. On the latter issue the court said the NLRA was "a law of general applicability which regulates neither religious beliefs nor conduct," but said its use to certify a teachers union at the school would "significantly infringe on church autonomy and interfere with church control of that institution." Thus, the court held such an application of the statute to be unconstitutional.

Strict scrutiny has been used as the standard of review in a few free exercise cases subsequent to *Smith*. In six instances courts have found the matter in question to fall within one of the exceptions stated in *Smith*, *i.e.*, the government regulation or action specifically targeted religion[82] or the right asserted was hybrid in nature, involving both free exercise and another constitutional right such as the right of parents to direct the upbringing of their

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[81] 471 N.W.2d 372 (Minn. App. 1991).

[82] In United States v. Board of Education of the School District of Philadelphia, 911 F.2d 882 (3d Cir. 1990), a Federal appellate court held that Smith had "no bearing" on a case challenging a school board regulation which prohibited public school teachers from wearing religious garb. The court held the regulation to be specifically addressed to religious practice and, therefore, appropriate for strict scrutiny review even after Smith. Nonetheless, the court upheld the regulation. In United States v. Boyll, 774 F.Supp. 1333 (D. N.M. 1991) a Federal district court held strict scrutiny to be appropriate with respect to an indictment of a non-Indian member of the Native American Church who had imported peyote from Mexico for use in the sacraments of the Church. The court said that the government regulation in question--21 CFR 1307.31--was not a neutral and generally applicable regulation but was specifically targeted at particular religious practices, and that therefore it fell within an exception to the Smith rule. Finding no compelling government purpose in denying non-Indian members of the Church the right to possess and use peyote afforded Indian members by the regulation, the court dismissed the indictment.

children.[83] Even under strict scrutiny, however, only three of these free exercise claims were successful.[84]

Finally, in four instances State courts have resorted to their State constitutions in order to get around the dictate of *Smith*. Three of the decisions have emanated from Minnesota. In *Minnesota v. Hershberger*[85] the court originally ruled, under a strict scrutiny analysis, that the Amish had a free exercise right under the First Amendment to be exempt from a State law requiring slow-moving vehicles to display fluorescent orange emblems.[86] After remand from the Supreme Court for reconsideration in light of *Smith*, the court again reached the same conclusion but this time on State constitutional

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[83] In Society of Separationists, Inc. v. Herman, 939 F.2d 1207 (5th Cir. 1991) a Federal appellate court held the free exercise clause to be violated by a judge's imprisonment for contempt of a prospective juror who refused to swear or affirm to tell the truth. The court found the prospective juror to have a genuine belief that a "God-free" affirmation was nonetheless a religious affirmation. The court noted that Smith "excepts religion-plus-speech cases from the sweep of its holding." In Zummo v. Zummo, 394 Pa.Super 30, 574 A.2d 1130 (1990), the court employed strict scrutiny because the case involved both free exercise and parental rights. At issue was a provision of a custody and visitation order that prohibited the father from taking his children to religious services other than Jewish ones. The court concluded that, absent evidence of a substantial risk of harm, the government could not constitutionally impose restrictions on any parent's religious indoctrination of his or her children. In State of Vermont v. Delabruere, 154 Vt. 248, 577 A.2d 254 (1990) the court used strict scrutiny for the same reason--both free exercise and parental rights were implicated. Nonetheless, the court sustained the conviction of two parents for violating the State's compulsory education statute. The parents had insisted on sending their children to a private school that refused, for reasons of religious doctrine, to report any information to the State, as required by State law for the school to be a permissible alternative to public education. The court said that the State had a compelling interest in ensuring the quality of education and that the burden placed on the school by the reporting requirement was minor. Similarly, in People v. DeJonge, 188 Mich. App. 447, 470 N.W.2d 433 (1991), the court used strict scrutiny but sustained the conviction of two parents for violating the State's compulsory education statute by sending their children to a school that failed to hire certificated teachers as required by State law. The court said the State had a compelling interest in ensuring the quality of education offered in the private school, and the certificated teacher requirement served that purpose.

[84] *See* United States v. Boyll, supra; Society of Separationists, Inc. v. Herman, supra; and Zummo v. Zummo, supra.

[85] 462 N.W.2d 393 (Minn. 1990).

[86] *See* Minnesota v. Hershberger, 444 N.W.2d 282 (Minn. 1989).

grounds. In *State by Cooper v. French*[87] the same court again relied on the State constitution to uphold a landlord's religiously based refusal to rent a house to a woman who planned to cohabit with her fiance, and contrasted that conclusion with what it said was the lesser level of protection afforded religious exercise under *Smith*. And in *Matter of Welfare of T.K. and W.K.*[88] a Minnesota appellate court held the religious conscience provision of the State constitution to be violated by the State's removal of two children from a home due to the parent's religiously based refusal to allow the State to check the quality of their home schooling by having the children take a national standardized test. Although the court found the State's interest in education to be compelling, it held removal of the children from the home not to be the least restrictive alternative available to the State to ensure the educational quality of their home schooling. Finally, in *John v. Donahue*[89] a California appellate court held a landlord who refused to rent to an unmarried cohabiting couple to be constitutionally exempt under the California constitution from a statute prohibiting discrimination on the basis of marital status. The court, using a strict scrutiny analysis, found the State's interest in protecting unmarried cohabiting couples not to be a "paramount and compelling State interest" and the burden on the respondents' practice of their religion to be "substantial."

In sum, then, State and lower Federal court application of the principle of non-exemption stated in *Smith* has resulted in the denial of most free exercise claims, except where the claim has involved one of the exceptions to the principle or has been adjudicated under a State constitution.

SUMMARY OF RFRA AND RFA

In simplest terms, both the RFRA and the RFA would reimpose a strict scrutiny test on government action burdening the exercise of religion, not as a constitutional matter but as a statutory requirement. Both would apply that test to government action at all levels--Federal, State, and local, and to laws and regulations already existing as well as those enacted in the future.

The Religious Freedom Restoration Act (H.R. 2797) states its purposes to be "(1) to restore the compelling interest test set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of religion is burdened; and (2) to provide a claim or defense to persons whose religious exercise is burdened by government."[90] 2To those ends the bill would impose a strict scrutiny test on all government action--Federal, State, local--burdening any person's exercise of his or her religion. In its operative

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87 460 N.W.2d 2 (Minn. 1990).

88 475 N.W.2d 88 (Minn. App. 1991).

89 2 Cal.Rptr.2d 32 (Ct. App. 2d Dist. 1991).

90 H.R. 2797, § 2(b), 102d Cong., 1st Session (1991).

section the RFRA provides that "[g]overnment may burden a person's exercise of religion only if it demonstrates that application of the burden to the person--(1) is essential to further a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[91] The bill would further permit any person who believes his or her religious exercise to have been burdened in violation of these standards to seek appropriate relief in a judicial proceeding.[92] The bill provides that standing to seek such relief would be governed by the general rules of standing under Article III of the Constitution.[93] The bill specifically states that "[n]othing in this Act shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion."[94]

The Religious Freedom Act (H.R. 4040) states its purposes and its operative rule in essentially the same words as the RFRA,[95] and also affords an aggrieved person the opportunity for judicial relief.[96] In language not included in the RFRA, however, the RFA would except three matters from this allowance of judicial review:

> (2) Nothing in this Act shall be construed to authorize a cause of action by any person to challenge--
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> (A) the tax status of any other person;
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> (B) the use or disposition of government funds or property derived from or obtained with tax revenues; or
>
> (C) any limitation or restriction on abortion, on access to abortion services or on abortion funding.
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> § 3(c)(2).

The RFA does not include the prophylactic language in the RFRA regarding the establishment clause, but does include a definition of the term "person" that

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91 *Id.*, § 3(b).

92 *Id.*, § 3(c).

93 *Id.*, § 3(c).

94 *Id.*, § 7.

95 H.R. 4040, §§ 2(b) and 3(b), 101st Cong., 1st Sess. (1991). The RFA uses the term "codify" instead of "restore" in the first purpose and the phrase "religious practice" instead of "religious exercise" in the second. In addition, it substitutes the phrase "the practice of religion by any person" for the RFRA's phrase "a person's exercise of religion" in its statement of the strict scrutiny requirement.

96 *Id.*, § 3(c)1).

provides "the term 'person' includes both natural persons and organizations, associations, corporations, or other entities."[97]

Both bills include similar "Findings" sections that affirm the historic importance of religious freedom and the sensibility of the compelling interest test as a way of balancing religious liberty and competing governmental interests.

LEGAL ANALYSIS OF THE RFRA AND RFA

Scope and Effect: In *Smith* the Supreme Court largely abandoned strict scrutiny as the appropriate standard of review for most cases arising under the free exercise of religion clause of the First Amendment. Under the principle of that case, no religious practice needs to be exempted from, or accommodated by, any law of general applicability because of its religious nature. Neither the RFRA nor the RFA would alter that situation. That would remain the constitutional standard unless and until the Court reinterprets the free exercise clause or the Constitution is amended. Instead, both bills would impose a strict scrutiny standard on all government action burdening religion *as a statutory requirement.* In other words, both bills would require government action affecting religion to meet a statutory test that is higher in most instances than what the First Amendment now requires.

Both bills would, thus, give religious exercise greater protection than is now generally afforded by the free exercise of religion clause of the First Amendment. In one sense the bills would restore, as a statutory matter, the constitutional test that was applicable prior to *Smith*. But both bills would also do more. As noted above, even prior to *Smith* the Court had held strict scrutiny not to be applicable with respect to military regulations, prison regulations, and government's management of its internal affairs.[98] The RFRA and RFA contain no such exceptions: strict scrutiny would be applicable to **all** government action burdening religious exercise.

But in neither bill does this heightened standard of review presume to be outcome-determinative. Free exercise claims now, after *Smith*, are generally not successful. Under the strict scrutiny standard of the RFRA or RFA such claims would seem to have a greater likelihood of success. But neither bill gives any guarantee that any particular religious exercise should be exempted from governmental regulation. They require, instead, that the government's interests and its means of effecting those interests be balanced against the religious interest. If the government's interests are compelling and can be served in no less intrusive way, then a particular religious practice may be regulated, limited, even prohibited. But if the government's interests are of a lesser degree of

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[97] *Id.*, § 5(4).

[98] Goldman v. Weinberger, supra; O'Lone v. Estate of Shabazz, supra; Bowen v. Roy, supra; and Lyng v. Northwest Indian Cemetery Protective Association, supra.

importance, or there are alternative means of serving those interests, both bills would require that the religious practice in question be exempted from the governmental regulation.

Smith itself illustrates that the strict scrutiny standard is not in itself outcome-determinative. Justices O'Connor, Blackmun, Brennan, and Marshall all employed the strict scrutiny standard in analyzing the case but they reached different conclusions. Justice O'Connor concluded that the government's interest in fighting drug abuse was compelling in nature and would be undermined by an exemption for Indian religious use of peyote. But Justices Blackmun, Brennan, and Marshall all disagreed, saying that the issue was not the government's war on drugs but whether the government had any compelling reason to criminalize the Indians' use of peyote in religious sacraments. Absent any evidence that Oregon had ever sought to prosecute Indians for such use or that such use was harmful to health, these Justices asserted that Oregon had no compelling interest that would justify applying its criminal drug laws to the use of peyote in the worship rites of the Native American Church.

The same is true with respect to the Supreme Court's other decisions which did not employ strict scrutiny and to the post-*Smith* judicial decisions summarized above. Several courts in the latter category indicated that they would have reached different results if the strict scrutiny test were still applicable[99]; consequently, it seems likely that a statutory strict scrutiny test

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[99] Each of the State courts that upheld a free exercise claim on the basis of a strict scrutiny analysis under their State constitutions noted the difference with the post-Smith First Amendment. *See* Minnesota v. Hershberger, *supra* (upholding Amish exemption from State requirement of orange fluorescent emblems on their buggies); State by Cooper v. French, *supra* (upholding right of landlord to refuse, for religious reasons, to rent to unmarried cohabiting couple); Matter of Welfare of T.K. and W.K., *supra* (upholding right of parents to withhold children educated at home from standardized testing by the State); and Donahue v. Fair Employment and Housing Commission, *supra* (upholding right of landlord to refuse, for religious reasons, to rent to unmarried cohabiting couple). In Yang v. Sturner, supra, which found no free exercise violation in the performance of an autopsy on a Laotian Hmong, the Federal district court had previously handed down a contrary decision prior to Smith but felt compelled to recall it after the decision, stating: "The law's application did profoundly impair the Yangs' religious freedom; however, under Employment Division I can no longer rule that this impairment rises to a constitutional level." *Id.*, at 560. In United States v. Philadelphia Yearly Meeting of the Religious Society of Friends, *supra*, which upheld IRS levies against the Meeting for failure to withhold taxes from two employees who for reason of conscience refused to pay the military portion of their income taxes, the Federal district court made its regret about the conclusion dictated by Smith plain, stating: "It is ironic that here in Pennsylvania, the woods to which Penn led the Religious Society of Friends to enjoy the blessings of religious liberty, neither the Constitution nor its Bill of Rights protects the policy of that society not to coerce or violate the consciences of its employees and members with respect to their religious

would result in different outcomes in those cases (at least, so long as the same judges heard the cases). But most of the State and lower Federal courts involved in those decisions did not comment on the matter. Thus, whether adoption of the RFRA or the RFA and application of the test in future cases of a similar nature would result in different outcomes is, in the main, uncertain. In short, in contrast to *Smith*, the RFRA and RFA would require that the religious interest be balanced against the government interest, but neither bill would mandate what result should be reached in that balancing process.

The differences between the bills other than the three limitations on judicial relief in the RFA appear to be minor. On the one hand, the statement in the RFRA that the establishment clause is unaffected by the bill (§ 7) states what would be the case anyway, and thus its absence in the RFA would seem to be of no substantive effect. On the other hand, the definition of "person" in the RFA to include both natural persons and organizations would seem to state what "person" would likely be construed to mean anyway, although having the definition in the bill would eliminate any ambiguity on this issue.

Legal Significance of RFA Amendments: As noted in the preceding section, both the RFRA and the RFA would afford aggrieved persons an opportunity for judicial relief. The RFRA says that standing in such cases would be governed by the general rules of standing under Article III of the Constitution. Those rules generally require that claimants "allege[] such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[100] More specifically, standing to make a constitutional claim requires that the claimant have suffered "a distinct and palpable injury," that there be "a fairly traceable causal connection between the claimed injury and the challenged conduct," and that "the exercise of the court's remedial powers would redress the claimed injuries."[101] A person whose ability to practice his religion in some respect is actually burdened by governmental action, thus, would be able under the RFRA to gain judicial review of that action.

The RFA would similarly permit a person "whose religious practice has been burdened in violation of this Act" to seek judicial relief, but it would exclude from that authorization any claim that (1) challenges the tax status of any other individual or organization, (2) contests the use or disposition of government funds or property, or (3) disputes "any limitation or restriction on abortion, on access to abortion services or on abortion funding." Judicial relief under the RFA, in other words, would not be available to a person aggrieved by government action in any of these circumstances.

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principles, or to act as an agent for our government in doing so." *Id.*, at 1306.

100 Baker v. Carr, 369 U.S. 186, 204 (1962).

101 Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 72-74 (1978).

The significance of these limitations on judicial relief under the RFA is uncertain, however, because it is not clear that a suit could be successfully brought in these circumstances even absent the limitations. With respect to the first limitation, the sponsor of the RFA indicated that it is intended to "protect the tax status of religious organizations."[102] But our research has disclosed no case successfully challenging the tax status of a third party on the basis of the free exercise clause. In the leading case of *Abortion Rights Mobilization, Inc. v. Regan*[103] an unsuccessful challenge was made to the tax exemption of the Roman Catholic Church on the grounds the Church engaged in extensive political activity on the abortion issue in violation of the statutory conditions of its tax exemption.[104] A Federal district court initially found several of the clergy plaintiffs and a religious organization to have standing to argue the case on the grounds the tax exemption amounted to a governmental preference for the Church's position on abortion that "denigrated" the religious beliefs and communities of those with a different view.[105] That ruling was eventually overturned on appeal and the case was dismissed. But even apart from that reversal, it is important to note that the standing found by the district court was based not on any alleged free exercise violation but on the establishment clause.

Two other cases challenging the tax status of third parties did involve free exercise claims, but both were unsuccessful. *Diffenderfer v. Central Baptist Church of Miami, Florida, Inc.*[106] concerned in part a claim that a property tax exemption accorded a church's property used in part as a commercial parking lot violated the free exercise clause. But the Federal district court rejected that claim on the authority of *Walz v. Tax Commission of New York*.[107] *Haring v. Blumenthal*[108] was a suit by an IRS employee alleging

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[102] 137 CONG. REC. E4187 (Nov. 26, 1991) (statement of Rep. Christopher Smith).

[103] 544 F.Supp. 471 (S.D. N.Y. 1982), *reconsideration den.*, 603 F.Supp. 970 (S.D. N.Y. 1985), *reversed and dism'd*, 885 F.2d 1020 (2d Cir. 1989), *cert. den.*, 110 S.Ct. 1946 (1990).

[104] Federal law conditions the tax exemption of religious organizations, in part, on their not participating in any political campaigns and not devoting a substantial portion of their activities to influencing legislation. 26 U.S.C. 501(c)(3) (1988).

[105] 544 F.Supp. at 479-80.

[106] 316 F.Supp. 1116 (S.D. Fla. 1970).

[107] In Walz an unsuccessful challenge was made to the property tax exemption accorded by the State of New York to property owned by religious organizations and used exclusively for religious purposes. The complainant alleged that the exemption indirectly required him "to make a contribution to religious bodies" in violation of the establishment of religion clause. He asserted

that he had been denied a promotion because, for religious reasons, he opposed IRS' policies regarding the tax exemption of organizations that performed abortions. But the court held he had no standing to seek an injunction against those policies.

In short, it appears unlikely that a suit challenging the tax status of another party could be successfully brought under the RFA even absent the first limitation on judicial relief.

With respect to the second exclusion, the RFA's sponsor indicated in introducing the bill that it is intended to protect the capacity of religious organizations . "to participate in Government-sponsored social service programs."[109] However, the primary legal basis for challenging the disbursement of public funds to religious organizations for educational or social service purposes has been the establishment clause, not the free exercise clause,[110] and the second exclusion in the RFA would have no effect on that use of the establishment clause. Suits challenging the public funding of programs operated by religious organizations could still be instituted on that basis.

The second exclusion would, of course, preclude any allegation from being raised that such public funding in some way burdened an individual's religious practice in violation of the RFA. But in the free exercise context such allegations have not posed a serious obstacle to public funding of religious programs. The few allegations which have been made that public funding of the programs of religious organizations violates the free exercise clause have been

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no free exercise violation and, in fact, the Court upheld the tax exemption in part on the basis of free exercise considerations.

[108] 471 F.Supp. 1171 (D.D.C. 1979).

[109] 137 CONG. REC. E4187 (remarks of Rep. Christopher Smith).

[110] *See, e.g.*, Everson v. Board of Education, 330 U.S. 1 (1947) (provision of bus transportation to sectarian schoolchildren); Tilton v. Richardson, 403 U.S. 672 (1971) (Federal grants for the construction of academic buildings at sectarian colleges); and Bowen v. Kendrick, 487 U.S. 589 (1988) (Federal grants for adolescent pregnancy prevention and care services). The Court generally disallows taxpayer suits challenging the constitutionality of the expenditure of public funds, *see* Frothingham v. Mellon, 262 U.S. 447 (1923), but in Flast v. Cohen, 392 U.S. 83 (1968), the Court held taxpayer suits based on the establishment clause challenging the expenditure of public funds to be permissible. In contrast, the Court in Valley Forge Christian College v. Americans United, 454 U.S. 464 (1981), held that taxpayers had no standing to challenge an administrative decision to transfer a parcel of federal property to a religious college as a violation of the establishment clause, because the transaction did not implicate Congress' power to tax and spend under Article I, Section 8, of the Constitution.

uniformly rejected by the courts.[111] As the Supreme Court stated in *Tilton v. Richardson, supra*, "[a]ppellants claim that the Free Exercise Clause is violated because they are compelled to pay taxes, the proceeds of which in part finance grants (to religious institutions). Appellants, however, are unable to identify any coercion directed at the practice or exercise of their religious beliefs."[112] It seems doubtful that, even absent the second exclusion in the RFA, a serious case could be made that public funding of the programs of religious organizations in some way burdens an individual's ability to practice his own religion.

The second exclusion also seems to go further than simply precluding a challenge from being made under the RFA to the public funding of the programs of religious organizations. It would seem to bar as well any claim from being made under the RFA by an individual or organization that has been **excluded** from participating in a publicly funded program. In the unemployment compensation cases,[113] for instance, the States denied unemployment benefits to individuals who, for reasons of religious belief and practice, were unable to comply fully with particular requirements of the programs. The Supreme Court, using a strict scrutiny analysis, consistently held such denials to violate the free exercise clause; and even after *Smith* that heightened level of protection under the free exercise clause apparently still applies. But under the second exclusion an analogous claim could not be made under the RFA by a person who is denied benefits in such circumstances. Similarly, in *Witters v. Washington Department of Services for the Blind*[114] the Washington Supreme Court held the State constitution to prohibit the grant of any assistance under a vocational rehabilitation program to a blind student to enable him to obtain training for a religious vocation from a private Bible college.[115] The student argued that that denial of assistance violated the free exercise clause. But the court held the

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[111] *See* Board of Education v. Allen, 392 U.S. 236 (1968); Tilton v. Richardson, 403 U.S. 672 (1971); Meek v. Pittenger, 374 F.Supp. 639 (E.D. Pa. 1974), *aff'd on other grounds*, 421 U.S. 349 (1975).

[112] Tilton v. Richardson, *supra*, at 689. *See also* Board of Education v. Allen, *supra*, at 248-49: "...it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion...and appellants have not contended that the New York law in any way coerces them as individuals in the practice of their religion."

[113] Sherbert v. Verner, *supra*; Thomas v. Review Board of the Indiana Unemployment Security Division, *supra*; Hobbie v. Unemployment Appeals Commission of Florida, *supra*; and Frazee v. Illinois Department of Employment Security, *supra*.

[114] 112 Wash.2d 363, 771 P.2d 1119, *cert. den.*, 110 S.Ct. 147 (1989).

[115] The United States Supreme Court had previously held such a grant of assistance **not** to violate the establishment clause of the First Amendment. *See* Witters v. Washington Department of Services to the Blind, 474 U.S. 481 (1986).

denial to have no coercive effect on the student's practice of his religion, and the United States Supreme Court denied *certiorari*. Under the second exclusion the student would be barred from arguing to a court that the denial of assistance burdened his practice of his religion in violation of the RFA.

The third exclusion is intended, according to the RFA's sponsor, to bar "religiously based challenges to abortion-restrictive statutes."[116] Free exercise claims have not been a frequent component of abortion litigation, and as yet no decision has turned on such a claim. In the leading case of *Harris v. McRae*,[117] which challenged the constitutionality of the Hyde amendment limiting the use of Medicaid funds for abortion, the Federal district court specifically held that "[t]he liberty protected by the Fifth Amendment extends certainly to the individual decisions of religiously formed conscience to terminate pregnancy for medical reasons."[118] But the Supreme Court set aside that ruling, holding that the plaintiffs lacked standing to raise the free exercise issue "because none alleged, much less proved, that she sought an abortion under compulsion of religious belief."[119] Thus, a definitive ruling on whether the free exercise clause might mandate an exception to a statute that otherwise forbids abortion has not occurred. But the argument continues to be made that in at least some circumstances, such as when the life of the mother is endangered, some religious faiths require an abortion.[120]

Whether such claims could be made under the RFRA or the RFA (absent the third limitation) depends, of course, on whether the Supreme Court overturns its ruling in *Roe v. Wade*,[121] which held the constitutional right of privacy to encompass a woman's decision to terminate a pregnancy, and thus makes it possible for the States or the Federal government to legislate additional restrictions on abortion. Assuming that happens, it seems likely that, absent the third limitation, claims could be made in certain instances under either the RFRA or the RFA that a woman's ability to practice her religion was burdened by an abortion restriction. But it seems doubtful that most such claims would have any likelihood of success. If the Court overturns *Roe* on the basis that government has a compelling interest in fetal life before as well as after viability--a suggestion made by the plurality opinion in *Webster v. Reproductive*

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116 137 CONG. REC. E4187 (Nov. 26, 1991) (remarks of Rep. Christopher Smith).

117 448 U.S. 297 (1980).

118 McRae v. Califano, 491 F.Supp. 630, 742 (E.D. N.Y. 1980).

119 Harris v. McRae, *supra*, at 320.

120 *See, e.g.*, Brief of Agudath Israel of America as *Amicus Curiae* at 10-12, Webster v. Reproductive Health Services, 492 U.S. 490 (1989) and Doe v. Ada, Civ. No. 90-00013 (D. Guam, filed 1991).

121 410 U.S. 113 (1973).

Health Services[122]--or if the States subsequently legislate abortion restrictions on the express or implied rationale that they have a compelling interest in protecting fetal life, then a religion-based claim under either the RFRA or the RFA could not be successful. The reason is that both bills permit government to restrict the practice of religion if the restriction "is essential to further a compelling governmental interest." In the scenario outlined, that requirement would be met.

The one situation in which a religion-based claim to entitlement to abortion might prevail would be one in which a State legislated an absolute ban on abortion, even when the mother's life is endangered, and a pregnant woman whose life was endangered held the religious belief that in that situation abortion was required. It seems unlikely that a State would enact such an absolute ban, but at least Orthodox Judaism, apparently, does teach that abortion is mandated if the life of the mother is seriously threatened.[123] If this conflict between an absolute ban on abortion and a genuine religious mandate of abortion ever occurred, it does seem possible that a successful claim could be made under the RFRA or the RFA, absent the third limitation. But it is important to note that in that, situation, it is also likely that a successful claim could be made apart from the RFRA or the RFA, even if the third limitation were enacted. Such a conflict would implicate as well a woman's right under the due process clause of the Fourteenth Amendment to her life and liberty, and that right would likely provide a compelling argument for relief from the statute.[124] Moreover, even after *Smith* it is possible for an individual to seek an exemption from a statute of general applicability (such as a statute absolutely banning abortions) on the basis of the free exercise clause of the First Amendment if the free exercise right is joined with another constitutional right, such as the due process right to life.[125] In the described scenario, such a hybrid claim under the Constitution likely could be successfully made. A claim under the RFRA or the RFA, in other words, would be redundant.[126]

In sum, the first two limitations on the availability of judicial relief under the RFA appear to guard against claims that are generally not pursued on free

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122 492 U.S. 490 (1989).

123 *See* McRae v. Califano, *supra*, at 695.

124 Dissenting in Roe v. Wade, *supra*, at 173, then-Justice Rehnquist stated: "If the Texas statute were to prohibit an abortion even where the mother's life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective...."

125 *See* Smith, *supra*, at 881-82.

126 For a more detailed analysis of the impact of this legislation on access to abortion, *see* Johnny H. Killian, "Impact of Proposed Free Exercise of Religion Bill on Access to Abortion" (November 18, 1991) (American Law Division Memorandum).

exercise of religion grounds. The third limitation appears to preclude claims that likely could not be pursued successfully under the RFRA or the RFA anyway or, in the one limited scenario described, could still be successfully pursued apart from the RFRA or RFA.

Congressional Power To Enact: Both the RFRA and the RFA would protect religious practices from governmental interference that cannot be justified on grounds of compelling public necessity. That protection would apply with respect to the actions of both the Federal government and the States and their subdivisions. Congressional power to enact this legislation, thus, must be sufficient for all levels of government.

With respect to the States and their subdivisions, such power would seem to be conferred by Section 5 of the Fourteenth Amendment to the Constitution. The due process clause of the Fourteenth Amendment provides that no State may "deprive any person of life, liberty, or property, without due process of law,"[127] and the "liberty" portion of this amendment has repeatedly been held to incorporate and apply to the States the religious freedom protections of the First Amendment.[128] Section 5 of the Fourteenth Amendment, moreover, gives Congress the explicit power "to enforce, by appropriate legislation, the provisions of this article" with respect to the States, and the Supreme Court has repeatedly held that Congress may use this power to define and protect rights that are more expansive than what the Court has held to be constitutionally protected.[129] Thus, even though the RFRA and the RFA would provide religious exercise broader protection from State interference than does the Constitution (as interpreted in *Smith*), it would seem to be a constitutionally permissible exercise of Congress' power under Section 5.

With respect to the Federal government, congressional power to enact either the RFRA or the RFA would seem to derive from the necessary and proper clause of Article I, Section 8, of the Constitution.[130] The First Amendment, like the due process clause of the Fourteenth Amendment, imposes a limitation on governmental power with respect to religion by providing that "Congress shall make no law...prohibiting the free exercise (of religion)...." Just

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127 Amendment XIV, Section 1.

128 *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1940); Zorach v. Clauson, 343 U.S. 306 (1961); and Smith, *supra*.

129 *See* Katzenbach v. Morgan, 384 U.S. 641 (1966); Oregon v. Mitchell, 400 U.S. 112 (1970); City of Rome v. United States, 446 U.S. 156 (1980); and Thornburg v. Gingles, 478 U.S. 30 (1986).

130 The necessary and proper clause provides that "[t]he Congress shall have Power...To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

as Section 5 of the Fourteenth Amendment gives Congress broad authority to implement the provisions of that Amendment, the necessary and proper clause gives Congress broad authority to formulate and adopt measures it deems necessary to carry out the other mandates of the Constitution.[131] Chief Justice Marshall described the broad scope of the power conferred by the necessary and proper clause in *McCulloch v. Maryland*[132]:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.
> 17 U.S. at 421.

That power would seem to be sufficient for Congress to apply the strictures of either the RFRA or the RFA to the Federal government.

CONCLUSION

In *Employment Division, Oregon Department of Human Resources v. Smith, supra*, the Supreme Court substantially narrowed the protection afforded religious practices by the free exercise clause of the First Amendment. For several decades the Court had generally applied a strict scrutiny test or some variant thereof to free exercise cases and had required government to demonstrate that any burdens it placed on religious exercise were justified by a compelling public interest. But in *Smith* the Court held that balancing of interests no longer to be required and said that the free exercise clause was never violated by laws of general applicability, regardless of their impact on religious exercise. As a result, free exercise claims are now generally rejected by the courts.

Both the RFRA and the RFA would resurrect the strict scrutiny standard and apply it to all governmental action burdening religious exercise, both State and Federal. The standard would apply not as an application of the free exercise clause but as a statutory standard. Both the RFRA and the RFA would afford aggrieved persons the opportunity for judicial relief, except that the RFA would preclude suits that challenged the tax status of a third party, the disposition of government funds, and restrictions on abortion. Each of these limitations, however, would seem to preclude suits that are generally not pursued on free exercise grounds or that could continue to be pursued on legal grounds other than those afforded by the RFRA or the RFA. While both bills would require a balancing of the religious and societal interests at stake in a

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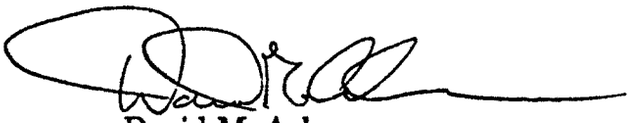
131 Katzenbach v. Morgan, *supra*, at 650.

132 17 U.S. (4 Wheat) 316 (1819).

given situation and would place the burden of justification on the government, neither bill would compel any particular outcome.



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