Order Code RL30221

CRS Report for Congress

The Religious Liberty Protection Act: Background and Current Status

Updated April 25, 2000

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ABSTRACT

On July 15, 1999, the House adopted a slightly modified version of H.R. 1691, the "Religious Liberty Protection Act of 1999" (RLPA) by a vote of 306-118. The measure is a response to the Supreme Court's 1997 decision in *City of Boerne, Texas v. Flores* and raises significant policy and legal issues. This report provides background on the judicial and legislative context of RLPA, summarizes congressional action on it in the 105th and 106th Congresses, and frames some of the legal issues that appear to be implicated.

The Religious Liberty Protection Act: Background and Current Status

Summary

On July 15, 1999, the House adopted a slightly modified version of H.R. 1691, the "Religious Liberty Protection Act" (RLPA), by a vote of 306-118.. Prior to final passage the House rejected an amendment to limit RLPA's application with respect to certain state and local nondiscrimination measures, 190-234. The bill (along with a modified Senate version , S. 2081) now awaits action in the Senate.

RLPA is part of an ongoing conversation between Congress and the Supreme Court about whether religious practices ought to be given special treatment by government and about Congress' power to mandate such treatment. Prior to 1990 the courts had generally applied (although often with a light hand) a strict scrutiny test to government actions that imposed substantial burdens on the exercise of religion. But in 1990 in *Employment Division v. Smith,* the Court largely eliminated the strict scrutiny test for free exercise cases. In response Congress in 1993 enacted the "Religious Freedom Restoration Act" (RFRA) reapplying (and extending) the strict scrutiny test to all government actions, including those of state and local governments, that impose substantial burdens on religious exercise. But in *City of Boerne, Texas v. Flores* in 1997 the Court held that Congress lacks the power under § 5 of the Fourteenth Amendment to impose RFRA on state and local governments. RLPA is a response to that decision and would re-apply a strict scrutiny standard to the actions of state and local governments on the basis not of § 5 (except with respect to land use decisions) but of Congress' powers to attach conditions to federal funding programs and to regulate commerce.

RLPA raises several major issues. First is the policy question of whether, and to what degree, religious exercise ought to be protected by federal law from burdensome interference by state and local governments, *i.e.*, whether religious exercise should be afforded special treatment by government or should, instead, be treated neutrally. RLPA is intended to be broadly protective of religious exercise, and revisions that have occurred since it was first introduced in 1998 have made it increasingly so. A second issue concerns whether Congress has the constitutional power to mandate that state and local governments give religion special treatment. Questions have been raised about whether RLPA exceeds Congress' power under the spending clause by imposing a condition on federal grants that is coercive on the states and that has little nexus to the individual spending programs to which it is attached; whether RLPA's use of the commerce power violates principles of federalism; and whether its reliance on § 5 of the Fourteenth Amendment in its land use provisions satisfies the requirements the Supreme Court has articulated for Congress' exercise of that power. Question has also been raised about whether state and local nondiscrimination statutes ought to be exempted from its purview.

This report provides background on the Supreme Court's decisions in *Smith* and *Boerne* and Congress' passage of RFRA; summarizes legislative action on RLPA in the 105th and 106th Congresses; and frames the salient legal issues that appear to be implicated by RLPA. It will be updated as events warrant.

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The Religious Liberty Protection Act: Background and Current Status

Introduction

On July 15, 1999, the House of Representatives adopted a slightly modified version of H .R. 1691, the "Religious Liberty Protection Act of 1999" (RLPA), by a vote of 306-118. Prior to that vote the House rejected an amendment to limit RLPA's applicability with respect to some state and local nondiscrimination measures, 190-234. In the Senate the measure has been referred to the Judiciary Committee, while a slightly modified version (S. 2081) has been placed on the Senate calendar without referral to committee.

First introduced in the second session of the 105th Congress, RLPA is part of an ongoing conversation between Congress and the Supreme Court. For the quarter of a century prior to 1990 the courts had generally applied a strict scrutiny test to government actions that imposed substantial burdens on religious exercise. In order for a burden on a religious practice to be sustained as constitutional under that test, government had to demonstrate that its action served a compelling public purpose and did so by means no more restrictive of religious exercise than necessary to accomplish the purpose. If the government could not so demonstrate, it had to exempt the religious practice in question from the law or regulation or action that imposed the burden.

The courts often applied the strict scrutiny test with a light hand, however; and during the 1980s the Supreme Court became increasingly disenchanted with the test. That disenchantment culminated in 1990 in *Employment Division, Oregon Department of Human Resources v. Smith*[1] in which the Court largely eliminated the strict scrutiny test as the standard government must meet to justify actions that impose substantial burdens on the exercise of religion. It held instead that **no** religious exemptions are compelled by the free exercise clause from governmental regulations that are religiously neutral and generally applicable, no matter how severe their impact on the religious practice.

In response Congress in 1993 enacted the "Religious Freedom Restoration Act" (RFRA)[2] reapplying (and extending in part) the strict scrutiny test to all government actions that impose such burdens, including those of state and local governments, as

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[1]494 U.S. 872 (1990).

[2]P.L. 103-141 (1993); 42 U.S.C.A. 2000bb *et seq.*

a statutory mandate. But in *City of Boerne, Texas v. Flores*[3] in 1997 the Court held RFRA's coverage of state and local governments to exceed Congress' power under § 5 of the Fourteenth Amendment. RLPA is a response to that decision and would re-apply a strict scrutiny standard to the actions of state and local governments on the basis not of § 5 (except with respect to land use decisions) but of Congress' powers to attach conditions to federal funding programs and to regulate commerce.

RLPA, thus, raises serious questions about the extent to which religious exercise ought to be given special treatment by government and about Congress' power to mandate such special treatment by statute. This report provides background on the Supreme Court's decisions in *Smith* and *Boerne* and Congress' adoption of RFRA; summarizes legislative action on RLPA in the 105th and 106th Congresses; and frames some of the salient legal issues implicated by RLPA.

The *Smith* Decision

The free exercise clause of the First Amendment provides in pertinent part that "Congress shall make no law ... prohibiting the free exercise (of religion)."[4] It has long been clear that this clause protects religious beliefs absolutely from governmental interference, but over the past century the Court has used various standards of review in applying the clause to government actions that have impinged on religious practices. In 1963 in *Sherbert v. Verner*,[5] however, the Court seemed to settle on the strict scrutiny standard as the basic standard of judicial review. Religious interests, the Court said, are to be considered of "paramount importance" in the constitutional scheme and government actions infringing those interests are to be viewed as highly suspect. As a consequence, the Court held that government actions alleged to interfere with religious practices are constitutional only if they can be shown to serve some compelling public interest and to be no more restrictive of religious practices than necessary. Absent such a showing, the religious practice had to be exempted from the governmental statute or regulation or action that imposed the burden.

Over the next quarter of a century the courts did not always apply this strict scrutiny standard with unfailing rigor. Indeed, religious interests prevailed in only a minority of the reported cases,[6] and in the 1980s the Supreme Court indicated a

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[3]521 U.S. 407 (1997).

[4] By its terms the free exercise clause is applicable only to the actions of the federal government. But it has been held also to be part of the liberty protected by the due process clause of the Fourteenth Amendment from undue interference by the states. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940).

[5]374 U.S. 398 (1963).

[6]One author found that the Supreme Court itself rejected 13 of the 17 free exercise claims it heard during this period and that between 1980 and 1990 the U.S. courts of appeal rejected 85 of the 97 claims they heard. *See* Ryan, James E., "*Smith and the Religious Freedom Assessment Act: An Iconoclastic Assessment*," 78 VIRGINIA LAW REVIEW 1407, 1414-1417 (1992). An assessment by Judge Noonan of the U.S. Court of Appeals for the 9th Circuit resulted in a slightly different count. He found that from 1963 to 1988 the Supreme (continued...)

growing disenchantment with the test by applying a lower standard of review to free exercise claims by prisoners and military personnel.[7] But the test still seemed to some to stand as a norm that gave a degree of special protection to religious exercise from burdensome governmental regulations or actions.

However, in 1990 in *Employment Division, Oregon Department of Human Resources v. Smith, supra,* the Supreme Court largely abandoned strict scrutiny as the constitutional test for free exercise cases, 5-4. It retained strict scrutiny for governmental actions that **intentionally** discriminate against religion or a particular religious group,[8] but it abandoned strict scrutiny for governmental actions that simply S**ct** of burdening religious practice. The Court said that so long as laws are religiously neutral and generally applicable, they may be uniformly applied to all persons without regard to **any** burden or even prohibition placed on their exercise of religion. The free exercise clause, the Court said, **never** "relieves an individual of the obligation to comply with a `valid and neutral law of general applicability' on the ground the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" In *Smith* itself, that standard of neutrality meant that the free exercise clause was construed to mandate no religious exemption from Oregon's laws criminalizing the possession and use of drugs for Native Americans who use peyote in sacramental ceremonies and, consequently, no eligibility for unemployment benefits for two Native Americans who lost their jobs because of their participation in such a ceremony. More generally, the Court asserted that the question of whether religious practices ought to be accommodated by government was a matter to be resolved by the political process and not the courts, although it admitted that "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in ...."

The Religious Freedom Restoration Act

The specific result in *Smith* was upsetting to some.[9] But it was the Court's abandonment of strict scrutiny for facially neutral laws and relegation of most free

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[6](...continued)
Court rejected 13 of 19 free exercise claims and the U.S. courts of appeal rejected 60 of 67 free exercise claims they heard during that period. *See* Appendix in EEOC v. Townley Engineering & Mfg. Co., 859 F.2d 610 (9th Cir. 1988) (Noonan, J., dissenting).

[7]*See, e.g.*, Goldman v. Weinberger, 475 U.S. 503 (1986) (holding strict scrutiny not to apply to governmental burdens on religious exercise in the military) and O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (holding strict scrutiny not to apply to governmental burdens on religious exercise in prisons).

[8]It also retained strict scrutiny for cases involving denials of unemployment compensation to persons who were unemployed due to a conflict between their faith and the requirements of a job and for what it termed "hybrid" cases, *i.e.*, cases that involved not only a free exercise claim but another constitutional claim as well.

[9]Congress in 1994 made the religious use of peyote by members of the Native American Church legal under federal law. See P.L. 103-344 (Oct. 6, 1994); 42 U.S.C.A. 1996a. Oregon, similarly, amended its law and decriminalized the religious use of peyote after Smith. See Ore. Rev. Stat. 475.992(5) (1996 Supp.).

exercise concerns to the political process that generated widespread alarm in the religious community and elsewhere. That alarm quickly coalesced into a broad-based organization known as the Coalition for the Free Exercise of Religion.[10] Its efforts resulted in the introduction by bipartisan sponsors in both the House and the Senate of a proposed "Religious Freedom Restoration Act of 1990" (RFRA) (H.R. 5377, S. 3254). After three years of consideration, Congress enacted a modified version of RFRA into law in 1993.[11]

None of the versions of RFRA considered by Congress addressed any specific free exercise concern. Rather, the intent was to restore (and slightly expand) the strict scrutiny test as the general standard governing the interaction of government and religious exercise. Because a constitutional amendment would have been required to do that for the judicial interpretation of the First Amendment, RFRA was crafted to impose the strict scrutiny test as a **statutory** standard. As enacted, RFRA provided that a statute or regulation of general applicability can lawfully burden a person's free exercise of religion only if it can be shown to be "essential to further a compelling governmental interest and (to be) the least restrictive means of furthering that compelling governmental interest." RFRA made the standard applicable to governmental action at every level — federal, state, and local — and included those areas, such as the military and prisons, that the Supreme Court had excluded from the application of the strict scrutiny test in the previous decade.[12] As the means of enforcement, RFRA allowed aggrieved parties to bring suit if they believed their free exercise of religion had been restricted by government in violation of the statutory standard.

City of Boerne, Texas v. Flores

One of the issues that received some attention (albeit limited) during Congress' three years of intermittent debate about RFRA was whether Congress had the constitutional power to enact it. Some contended that RFRA violated constitutional principles both of federalism and of separation of powers, but Congress ultimately decided it had sufficient power under § 5 of the Fourteenth Amendment[13] to apply the measure to the states and under the necessary and proper clause of Article I to apply it to the federal government.[14]

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[10]The Coalition eventually comprised 67 organizations ranging across the political and religious spectrum. Its breadth is shown by the inclusion of such ordinarily disparate groups as the People for the American Way and the Traditional Values Coalition.

[11]P.L. 103-141 (Nov. 16, 1993); 42 U.S.C.A. 2000bb *et seq.* For a fuller description of RFRA's consideration by Congress, *see* CRS, *The Religious Freedom Restoration Act: Its Rise, Fall, and Current Status* (January 21, 1999) (CRS Report 97-795).

[12]*See* cases cited in n. 7.

[13]The Fourteenth Amendment, *inter alia*, bars the states from depriving "any person of life, liberty, or property, without due process of law." "Liberty" has been held to include religious liberty, and Section 5 provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

[14]Article I, § 8, provides: "The Congress shall have Power ... To make all Laws which shall

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Nonetheless, arguments against the measure's constitutionality were pressed in litigation under RFRA. In *City of Boerne, Texas v. Flores, supra*, one of the arguments proved successful: On June 25, 1997, the Supreme Court held RFRA to be unconstitutional as applied to the states, 6-3, on the grounds Congress lacked the power under § 5 of the 14th Amendment to impose a strict scrutiny standard regarding religious exercise on the states. *Boerne* involved a conflict between a local Catholic church that wanted to raze much of its existing structure and build a larger sanctuary and the city of Boerne's designation of the original sanctuary as an historic structure under its historic preservation ordinance. Archbishop Flores sued on behalf of the church, arguing in part that the city's denial of a building permit substantially burdened the church's religious practices in violation of RFRA and that the church, therefore, ought to be exempt from the city's historic preservation ordinance. The city responded by contending that RFRA was unconstitutional.

The Supreme Court agreed with the city's argument, holding that as applied to the states RFRA "exceeds Congress' power." The Court stated that § 5 of the 14th Amendment gives Congress the power to enforce the provisions of the Amendment but no power to adopt legislation that "alters the meaning" or the substance of the rights it protects. Moreover, it said, in Congress' exercise of its remedial or preventive power under § 5, there must "be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." Yet in enacting RFRA, the Court asserted, Congress not only had failed to develop a legislative record that showed extensive denials of religious liberty but also had made RFRA so broad that it intruded "at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter." Particularly with respect to the states, it noted, RFRA constituted "a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." As a consequence, the Court concluded, RFRA "reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved ... and contradicts vital principles necessary to maintain separation of powers and the federal balance."

Thus, after *Boerne* state and local governments are no longer bound by RFRA because, as to them, RFRA is unconstitutional. The Court also hinted in *Boerne* that RFRA might be unconstitutional with respect to the federal government on separation of powers grounds. But that issue was not squarely before the Court, and the Clinton Administration continues to maintain that RFRA is constitutional as applied to the federal government.[15]

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[14](...continued)
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." For Congress' constitutional justifications for RFRA, *see* H.Rept. 103-88, 103d Cong., 1st Sess. (1993) and S.Rept. 103-111, 103d Cong., 1st Sess. (1993).

[15]The U.S. courts of appeal have reached conflicting conclusions regarding the constitutionality of RFRA as applied to the federal government after Boerne, and the Supreme
(continued...)

The Religious Liberty Protection Act

105th Congress. Although RFRA codified an expansive version of strict scrutiny and made it applicable to all governmental actions, judicial decisions applying the statute do not appear to have differed markedly in result from those of the pre-*Smith* era. Religious claimants still lost far more often than they won.[16] Nonetheless, after lengthy consultations within the Coalition for the Free Exercise of Religion and among members of Congress, the "Religious Liberty Protection Act of 1998" (RLPA) was introduced on June 9, 1998, with bipartisan sponsorship in both the House and the Senate (H.R. 4019, sponsored by Representatives Canady and Nadler, and S. 2148, by Senators Hatch and Kennedy). As introduced, RLPA would have re-imposed a strict scrutiny test with respect to religious practices on state and local governments using different Congressional powers than that struck down in *Boerne*. As introduced, RLPA would have barred state and local governments

> (1) from substantially burdening a person's religious exercise "in or affecting commerce" or "in a program or activity, operated by [such a] government, that receives Federal financial assistance," unless application of the burden furthers a compelling public interest and is the least restrictive means of doing so;
>
> (2) from imposing any land use regulation that "substantially burdens religious exercise, unless the burden is the least restrictive means to prevent substantial and tangible harm to neighboring properties or to the public health and safety"; and
>
> (3) from imposing any land use regulation which "denies religious assemblies a reasonable location in the jurisdiction or excludes religious assemblies from areas in which nonreligious assemblies are permitted."

Reflecting a continuing controversy over prisoner suits under RFRA, the bill also required that prisoner suits under RLPA remained subject to the "Prison Litigation Reform Act of 1995."[17] Enforcement of the bill's requirements, as under RFRA, was

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[15](...continued)
Court has as yet not chosen to resolve the conflict. *Compare, e.g.,* In re Young, 141 F.3d 854 (8th Cir.), *cert. den.*, 119 S.Ct. 43 (1998) (holding RFRA to be constitutional in the context of U.S. bankruptcy laws) *with* Patel v. United States, 1997 U.S. App. LEXIS 34067 (10th Cir. 1997) (refusing to consider a federal prisoner's RFRA claim and citing Boerne as holding RFRA to be unconstitutional).

[16]One author found that of the 168 cases involving RFRA decided before *Boerne*, the RFRA claim had been rejected in 143 instances and granted in only 25. *See* Lupu, Ira. C., *The Failure of RFRA*, 20 U. ARKANSAS LITTLE ROCK LAW JOURNAL 575, 591 (1998) and n. 6.

[17]P.L. 104-1334, Title VIII (April 26, 1996); 18 U.S.C.A. 3626. The Act does not restrict the right of prisoners to institute suit but limits the relief the courts can provide. It states that relief ordered by the courts in any prisoner suit relating to prison conditions must be "narrowly drawn, extend[] no further than necessary to correct the violation of the Federal right, and [be] the least intrusive means necessary to correct the violation of the Federal right." It further requires that in devising appropriate relief "[t]he court shall give substantial weight
(continued...)

to be by persons asserting a violation of the act as a claim or defense against a state or local government in judicial proceedings. In order to rectify some decisions under RFRA that had given "religion" a narrow meaning, the proposal also gave a broad definition to "religious exercise," defining it to mean

> an act or refusal to act that is substantially motivated by a religious belief, whether or not the act or refusal is compulsory or central to a larger system of religious belief.[18]

On June 16 and July 14, 1998, the Subcommittee on the Constitution of the House Judiciary Committee held hearings on RLPA,[19] and on June 23 the Senate Judiciary Committee did so as well.[20] Most witnesses supported the enactment of RLPA. But some contended that its reliance on the spending and commerce powers[21] still exceeded Congress' constitutional powers, that it constituted an excessively expansive use of federal power, and that it denigrated religion by equating it with commercial enterprises.

On August 6, 1998, the Subcommittee on the Constitution of the House Judiciary Committee, by voice vote, ordered a revised version of H.R. 4019 reported to the full committee. Significant changes made by the subcommittee were to

> (1) delete the section based on Congress' commerce power;

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[17](...continued)
to any adverse impact on public safety or the operation of a criminal justice system caused by the relief" and allows any party to petition the court for the termination of such relief after two years.

[18]This definition was a direct response to a number of court decisions which had limited the applicability of RFRA by narrowing the range of religious practices within its purview. Some courts, for instance, had held RFRA applicable only if the practice burdened by government was "compelled" by religious belief and, thus, excluded from its protection religious practices merely "motivated" by religious belief. Other courts had limited the applicability of RFRA by requiring that the practices and beliefs be "central" to the person's religion. *See, e.g.*, Goodall v. Stafford County, 60 F.3d 168 (4th Cir. 1995), *cert. den.*, 516 U.S. 1046 (1996); Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995); Crosley-El v. Berge, 896 F.Supp. 885 (E.D.Wis. 1995); Luckette v. Lewis, 883 F.Supp. 471 (D.Ariz 1995); and Weir v. Nix, 890 F.Supp. 768 (S.D. Iowa 1995). One case required as a condition of RFRA's applicability that the religious practice burdened by government be both central to the claimant's belief system and compelled by that belief system. *See* Bryant v. Gomez, 46 F.3d 948 (9th Cir. 1995).

[19]*Hearings on H.R. 4019 Before the Subcommittee on the Constitution of the House Judiciary Committee*, 105th Cong., 2d Sess. (June 16 and July 14, 1998)).

[20]*Hearing on the Religious Liberty Protection Act of 1998 (S. 2148) Before the Senate Judiciary Committee*, 105th Cong., 2d Sess. (June 23, 1998).

[21]Article I, § 8, of the Constitution provides that "Congress shall have Power To lay and collect Taxes ... to pay the Debts and provide for the common Defence and general Welfare of the United States ... (and) To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes ...."

(2) replace the bill's restrictions on state and local land use regulations with requirements that any state or local land use regulation

(a) which imposes a substantial burden on religious exercise be subject to a strict scrutiny test, if the regulation permits "individualized assessment of the proposed uses to which real property would be put";

(b) treat religious assemblies "on equal terms with nonreligious assemblies";

(c) not discriminate "on the basis of religion or religious denomination"; and

(d) not unreasonably exclude religious institutions from a given jurisdiction;

(3) add an enforcement provision allowing the federal government to sue for injunctive or declaratory relief against state and local governments; and

(4) revise the definition of "religious exercise"to mean "conduct that constitutes the exercise of religion under the first amendment to the Constitution; however, such conduct need not be compelled by, or central to, a system of religious belief; the use, building, or converting of real property for religious exercise shall itself be considered religious exercise of the person or entities that use or intend to use the property for religious exercise."

The subcommittee rejected amendments to bar RLPA from being used as a defense in civil and criminal actions based on federal, state, or local child welfare laws, civil rights laws, and environmental protection laws, *i.e.*, to exclude those areas from the application of RLPA. The measure was scheduled to be marked up by the full Judiciary Committee on September 10, 1998, but the Starr Report arrived that day and no further action occurred on the bill in the 105th Congress.

106th Congress. In the present Congress RLPA was initially re-introduced on May 5, 1999, by Rep. Canady (R.-FL) and 10 cosponsors as H.R. 1691. The bill retained most of the changes that had been made by the Subcommittee on the Constitution in its markup last year, with the major exception that it reinserted the provision based on the commerce clause and allowed land use suits to be brought under that provision as well as under the more detailed land use section. The subcommittee held a hearing on H.R. 1691 on May 12, 1999,[22] that found substantial support for the bill but that also retraced the concerns voiced the previous year about the constitutionality of the measure's reliance on the spending and commerce powers, whether it constitutes too expansive a use of federal power, and whether its use of the commerce power denigrates religion by equating it with commerce. Testimony also was given raising in a more forceful manner than previously concerns about the civil rights implications of the proposal, *i.e.*, whether RLPA would or should override state and local measures barring discrimination in employment, housing, and public accommodations on the basis of race, marital or parental status, sexual orientation, gender, or disability.

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[22]*Hearing on H.R. 1691, the "Religious Liberty Protection Act of 1999," Before the Subcommittee on the Constitution of the House Judiciary Committee*, 106th Cong., 1st Sess. (May 12, 1999) (unprinted).

On May 26, 1999, the subcommittee ordered a slightly modified version of the bill reported to the full committee. As reported by the subcommittee, the major provisions of H.R. 1691 included the following:

> (1) Section 2 would require a state or local government to justify any substantial burden it places on a person's religious exercise, even under a rule of general applicability, by showing that application of the burden is necessary to serve a compelling public interest
>
> (a) in any program or activity it operates which receives federal financial assistance, and
>
> (b) in any instance in which the burden, or its removal, would affect commerce with foreign nations, among the several states, or with Indian tribes.
>
> (2) Section 3 would impose a strict scrutiny standard on any state or local land use regulation which imposes a substantial burden on a person's religious exercise if the regulation allows the government to make "individualized assessments" of the proposed uses to which a property would be put.
>
> (3) Section 3 would, in addition, bar a state or local government from imposing land use regulations that
>
> (a) fail to treat religious entities on an equal basis with nonreligious entities,
>
> (b) discriminate against any entity on the basis of religion or religious denomination, or
>
> (c) unreasonably exclude a religious entity from a given jurisdiction.
>
> (4) Section 4 of H.R. 1691 would provide that aggrieved parties may bring suit and obtain "appropriate relief" against state and local governments and that the federal government can institute suit to enforce compliance with the Act.

During its markup the Subcommittee on the Constitution adopted an amendment proffered by Rep. Canady slightly altering the definition of the term "religious exercise" in the bill.[23] It also rejected two amendments by voice vote — (1) a substitute amendment put forward by Rep. Watt (D.-NC) entitled the "Religious Liberty Enforcement Act of 1999" that, in place of RLPA's strict scrutiny requirements, would have required government simply to make "fair and reasonable accommodation of the special requirements of persons acting pursuant to their religious convictions" and (2) an amendment by Rep. Nadler (D.-NY) limiting RLPA's applicability by allowing it to be used as a defense against state and local housing nondiscrimination statutes only by small landlords; as a defense against state and local employment nondiscrimination statutes only by religious entities and small businesses; and not at all with respect to state and local statutes barring discrimination in public accommodations.[24]

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[23]As modified, the definition provides that "religious exercise" means "any exercise of religion, whether or not compelled by, or central to, a system of religious belief, and includes (A) the use, building, or conversion of real property by a person or entity intending that property for religious exercise; and (B) any conduct protected as exercise of religion under the first amendment to the Constitution."

[24]Rep. Nadler's amendment would have added the following to § 4 of the bill:

(continued...)

On June 23, 1999, the House Judiciary Committee ordered the revised version of H.R. 1691 reported to the House by voice vote.[25] The Committee also rejected by voice vote the amendment that Rep. Nadler had previously offered in the subcommittee to limit its use against state and local laws prohibiting discrimination in housing, employment, or public accommodations, *i.e.*, to bar RLPA from being used as a defense against the application of such laws. As noted above, the Nadler amendment would have permitted RLPA to be invoked as a defense only by small landlords against the application of housing nondiscrimination laws and by religious entities and small businesses against the application of employment nondiscrimination laws.

On July 15, 1999, the full House, after brief debate, adopted RLPA without change, 306-118.[26] As in the subcommittee and full committee, the House also rejected the Nadler amendment, 190-234.[27]

In the Senate H.R. 1691 was held at the desk for several months before being referred to the Judiciary Committee in November, 1999.[28] The committee has as yet held no hearings or taken any other action on the bill. But on February 22, 2000, Sen. Hatch (R.-Utah), the committee chairman, introduced a modified version of RLPA (S. 2081)[29] which has been placed directly on the Senate calendar without referral to

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[24](...continued)

(c) PERSONS WHO MAY RAISE A CLAIM OR DEFENSE. — A person who may raise a claim or defense under subsection (a) is —

(1) an owner of a dwelling described in section 803(b) of the Fair Housing Act (42 U.S.C. 3603(b)), with respect to a prohibition relating to discrimination in housing;

(2) with respect to a prohibition against discrimination in employment:

(A) a religious corporation, association, educational institution (as described in 42 U.S.C. 2000e-2(e)), or society, with respect to the employment of individuals who perform duties such as spreading or teaching faith, other instructional functions, performing or assisting in devotional services, or activities relating to the internal governance of such corporation, association, educational institution or society in carrying on of its activities; or

(B) an entity employing five or fewer individuals and with gross annual revenues of $500,000 or less; or

(3) any other person, with respect to an assertion of any claim or defense relating to a law other than a law:

(A) prohibiting discrimination in housing and employment except as described in paragraphs (1) and (2); or

(B) prohibiting discrimination in a public accommodation.

[25]*See* H.Rept. 106-219, 106th Cong., 1st Sess. (July 1, 1999).

[26]145 CONG. REC. H 5608 (daily ed. July 15, 1999).

[27]*Id.* at H 5607.

[28]*Id.* at S 15086 (daily ed. Nov. 11, 1999).

[29]146 CONG. REC. S 680 (daily ed. Feb. 22, 2000).

committee.[30] As a consequence, the measure could be taken up on the Senate floor at any time. S. 2081 retains most of the provisions of H.R. 1691 but limits the scope of the interstate commerce clause provision by requiring that RLPA applies only if the burden on religious exercise or its removal has a "substantial effect" on commerce. S. 2081 also adds a provision stating that RLPA does not abrogate the states' sovereign immunity. That provision appears to mean that aggrieved individuals could not bring suit against the states in either the federal or the state courts to rectify perceived violations of their free exercise rights. Instead, suits against the states for violations of RLPA could be instituted only by the federal government; individuals would be able to bring suit only against state officials for declaratory and injunctive relief and for damages.[31]

Finally, it should be noted that both H.R. 1691 and S. 2081 continue to generate controversy about their implications for state and local civil rights statutes.

Selected Legal Issues

RLPA is a response to the Supreme Court's decision in *City of Boerne, Texas v. Flores, supra,* holding Congress to lack the power under § 5 of the Fourteenth Amendment to impose a strict scrutiny standard with respect to religious exercise on state and local governments. Thus, it deliberately uses different Congressional powers than did RFRA. Section 2 of RLPA relies on Congress' commerce and spending powers, while § 3 concerning land use still relies largely on § 5 of the Fourteenth Amendment. The following subsections briefly describe the constitutional controversies over these provisions and the issue of the impact of RLPA on state and local civil rights provisions.

(1) Spending power. Section 2 of both H.R. 1691 and S. 2081 would impose a strict scrutiny standard with respect to governmental burdens on religious exercise "in a program or activity, operated by a (state or local) government, that receives Federal financial assistance." In other words, it makes use of Congress' spending power under Article I, § 8, of the Constitution — "The Congress shall have Power to Lay and collect Taxes ... to pay the Debts and provide for the common Defence

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[30] *Id.* at S 738 (daily ed. Feb. 23, 2000).

[31] Recent decisions by the Supreme Court have made clear that the 11th Amendment and historic notions of state sovereignty limit the extent to which the federal government can authorize suits against the states. The Court has held that Congress does not have the authority under Article I of the Constitution to authorize suits against the states in either federal court (Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996)) or state court (Alden v. Maine, 527 U.S. 706 (1999)). It has also held that Congress **can** abrogate state immunity from suit under the Fourteenth Amendment (Fitzpatrick v. Bitzer, 427 U.S. 445 (1976)) but that it must be justified by the legislative record and proportional to its remedial purpose (Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999) and College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666 (1999)). The Court has also implied that state immunity from suit can be abrogated as a condition of their acceptance of federal funds (Alden v. Maine, *supra*) but that any abrogation of state immunity from suit must be "unmistakably clear in the language of the statute itself" (Atascadero State Hospital v. Scanlon, 473 U.S. 235, 242 (1985)).

and general Welfare of the United States ..." – and attaches a string to federal assistance to state and local governments. Such conditions on federal assistance are a common way of implementing federal policies and are binding on the recipients. They can be avoided only if the recipient refuses to accept the federal money.

Although generally given broad sway by the courts, such conditions are, nonetheless, subject to certain standards laid down by the Supreme Court. In *South Dakota v. Dole*[32] the Court most recently articulated the following tests:

> (1) the exercise of the spending power must be in pursuit of "the general welfare";
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> (2) the condition must be stated unambiguously so that the states can "exercise their choice knowingly, cognizant of the consequences of their participation"[33];
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> (3) conditions must be reasonably related to 'the federal interest in particular national projects or programs,'"[34] *i.e.*, there must be a nexus between the spending program and the condition attached to the spending;
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> (4) the conditions must not violate other constitutional provisions; and
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> (5) a particular condition might exceed Congress' power if the states do not retain a real choice about whether or not to accept the federal money with the condition, *i.e.*, the "financial inducement offered by Congress [must not be] so coercive as to pass the point at which 'pressure turns into compulsion.'"[35]

Thus, the constitutional question about this portion of § 2 concerns whether it meets these tests, particularly the Court's sufficient nexus and non-coercion tests.

(2) Commerce power. Section 2 of H.R. 1691 and S. 2081 also would bar state and local governments from substantially burdening religious exercise absent a compelling reason

> in any case in which the substantial burden on the person's religious exercise affects, or in which a removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

(As noted above, S. 2081 requires, in addition, that the effect on commerce be "substantial") Thus, this part of § 2 employs Congress' Article I, § 8, power over commerce: "The Congress shall have Power ... To regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes ...." The primary constitutional question appears to concern whether, and the extent to which, this power may now be limited by principles of federalism. Decisions by the Supreme Court since the 1930s have repeatedly indicated that Congress' power under the commerce clause is extensive and can reach even minor transactions that potentially

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[32]483 U.S. 203 (1987).

[33]*Id.* at 207, quoting Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981).

[34]*Id.* at 207.

[35]*Id.* at 211, quoting Steward Machine v. Davis, 301 U.S. 548, 590 (1937).

have an effect on commerce.[36] Indeed, the commerce power has been given such a broad construction that it has been described as "the most potent grant of authority in § 8."[37]

But several decisions by the Supreme Court in the past decade (including the *Boerne* decision) have given a higher value to federalism concerns than formerly.[38] In *Printz v. United States*,[39] for instance, the Court struck down a provision of the Brady Act that required local law enforcement officers to conduct background checks on prospective gun purchasers on federalism grounds, stressing that "the Constitution established a system of 'dual sovereignty.'" "The Framers," the Court said, "rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the state and federal governments would exercise concurrent authority over the people ...."[40] Moreover, in *United States v. Lopez, supra*, the Court struck down the "Gun-Free School Zones Act of 1990" barring persons from possessing guns within a certain distance of public schools on the grounds it exceeded Congress' power under the commerce clause — the first time the Court has invalidated a federal statute resting on the commerce clause in more than a half century.[41] The Court stated:

> Under the theories that the Government presents ..., it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to

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[36]*See, e.g.*, United States v. Darby, 312 U.S. 100 (1941); Katzenbach v. McClung, 379 U.S. 294 (1964); Hodel v. Virginia Surface Mining & Reclamation Association, 452 U.S. 264 (1981); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Maryland v. Wirtz, 392 U.S. 183 (1968).

[37]CRS, *Constitution of the United States of America: Analysis and Interpretation* (1996), at 165.

[38]*See, e.g.*, New York v. United States, 505 U.S. 144 (1992) (striking down the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 as violating the Tenth Amendment); United States v. Lopez, 514 U.S. 549 (1995) (holding the "Gun Free School Zones Act" to exceed Congress' power to regulate interstate commerce); City of Boerne, Texas v. Flores, *supra* (holding the Religious Freedom Restoration Act to be unconstitutional as applied to the states on federalism grounds); Printz v. United States, 521 U.S. 898 (1997) (striking down the provision of the Brady Act requiring local law enforcement officers to conduct background checks on prospective gun purchasers); Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) (holding Congress to have no power to subject the states to suit in federal courts); Alden v. Maine, 67 U.S.L.W. 4601 (1999) (ruling Congress to have no power to subject the states to suit in state court); and Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 67 U.S.L.W. 4580 (1999) (holding Congress to have failed to meet the exacting standards of Boerne in attempting to subject states to suit for patent infringements in federal court).

[39]521 U.S. 898 (1997).

[40]*Id.* at 910.

[41]United States v. Lopez, *supra*.

> accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.[42]

> The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent was a local student at a local school; there is no indication that he had moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce. To uphold the government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States .... This we are unwilling to do.[43]

Most recently, in *Alden v. Maine, supra,* the Court held Congress to be without power under Article I to subject states to suit in state courts under the Fair Labor Standards Act,[44] stating that "the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution and which they retain today ... except as altered by the plan of the Convention or certain constitutional amendments."

Taken together, these decisions raise questions about the scope of the powers reserved to the states or denied to the federal government under the Constitution and, consequently, about the constitutionality of H.R. 1691's and S. 2081's use of the commerce power.

(3) Section 5 of the 14th Amendment. Section 3(b) of RLPA would impose a number of restrictions on state and local land use decisions — a strict scrutiny standard with respect to any burdens such decisions place on religious exercise if in making the decision the government "has the authority to make individualized assessments of the proposed uses to which real property would be put"; a prohibition on regulations that fail to treat religious institutions equally with nonreligious institutions; a prohibition on regulations that discriminate on the basis of religion; and a prohibition on "unreasonably" excluding religious institutions from a given jurisdiction. The section may to an indeterminate extent rely on Congress' commerce power, as land use decisions often have substantial economic impacts. That possibility seems buttressed by the fact that, unlike last year's version of RLPA, H.R. 1691 and S. 2081 do not limit challenges to land use decisions to § 3 but allow them to be made under § 2 as well. But the section also appears to rely on one aspect of the Supreme Court's decision in *Employment Division, Oregon Department of Human Resources v. Smith, supra,* and to be an effort to meet the requirements the Court set forth for the exercise of Congress' power under § 5 of the Fourteenth Amendment.

In *Smith*, as noted above, the Court largely abandoned strict scrutiny as the applicable constitutional test for alleged violations of the free exercise clause of the

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[42] *Id.* at 564.

[43] *Id.* at 567-68.

[44] 29 U.S.C.A. 201 *et seq.*

First Amendment. But it retained strict scrutiny in three respects — (1) cases involving **intentional** discrimination against religion; (2) cases raising hybrid constitutional claims, *i.e.*, alleged violations of both free exercise rights and of some other constitutional right; and (3) cases denying a religious exemption in a program which allows exemptions for other reasons. With respect to the last category, the Court stressed that strict scrutiny was first applied to religious claims in cases challenging denials of unemployment compensation, *i.e.*, cases in which the government could make "individualized ... assessments of the reasons for the relevant conduct." That history, it said, stood "for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[45]

Thus, the first part of § 3 of H.R. 1691 and S. 2081 appears to be an effort to build on the latter category of cases for which strict scrutiny remains the constitutional standard. Subsection (b)(1)(A) of § 3 would impose strict scrutiny on the implementation of state and local land use regulations to the extent that the government "has the authority to make individualized assessments of the proposed uses to which real property would be put ...." The constitutional question that might be raised about the section is whether the standard the Court articulated is, in fact, applicable to programs other than unemployment compensation that use "individualized assessments." Although the Court did not impose any conditions on this aspect of its ruling in *Smith*, it has not as yet considered the continued applicability of the strict scrutiny standard for any other kinds of programs.

The other parts of § 3 appears to rely on § 5 of the Fourteenth Amendment and to be an attempt to satisfy what the Court said in *Boerne* (and now in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, supra*) about Congress' exercise of its power under § 5. In striking down RFRA on federalism grounds in *Boerne*, the Court stressed in part the limitations of the legislative record that had been made during its consideration by Congress. "The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years," it said. "Rather," it stated, "the emphasis of the hearings was on laws of general applicability which place incidental burdens on religion ... (and) centered upon anecdotal evidence ...." As a consequence, the Court concluded that the evidentiary record underlying RFRA failed to show "legislation enacted or enforced due to animus or hostility to the burdened religious practices or ... some widespread pattern of religious discrimination in this country."[46] For that reason the sweeping nature of the remedy imposed by RFRA, it asserted, lacked congruence and proportionality to the wrong it was designed to correct.

Similarly, in the Court's decision last summer in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, supra*, it reinforced the standards it had articulated in *Boerne* for Congress' exercise of power under § 5. In that case Congress had in 1992 amended the patent laws and expressly abrogated the states' immunity from suit for claims of patent infringement. But the Court held the statute to be an invalid exercise of Congress' § 5 authority. It said that Congress had not

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[45]Employment Division, Oregon Department of Human Resources v. Smith, *supra*, at 884.

[46]City of Boerne, Texas, v. Flores, *supra*, at 530-31.

only failed to identify a pattern of patent infringement by the states but also had not explored whether the states provided any remedies to aggrieved patent holders. Congress, it stated, had "barely considered ... whether the States' conduct might have amounted to a constitutional violation under the Fourteenth Amendment." As a consequence, it concluded, Congress' abrogation of state immunity from suit was "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."

Consequently, to support this aspect of RLPA, the House Subcommittee on the Constitution attempted to develop a hearing record showing substantial discrimination against religious bodies in state and local land use decisions.[47] Moreover, unlike RFRA, § 3 specifically isolates land use decisions as a discrete element of the wrong to be remedied. The constitutional question appears to be whether these factors are sufficient to meet the requirements the Court has set forth in *Boerne* and *Florida Prepaid* for Congress' exercise of its § 5 power.

(4) RLPA's impact on civil rights provisions. Another legal issue, and the one that has proven to be the most politically contentious, concerns whether RLPA's requirement that states not impose a substantial burden on religious exercise absent a compelling interest might limit the application of state and local nondiscrimination laws. The issue has emerged in part because of several court decisions involving the application of state or local laws barring marital status discrimination in housing to landlords who refused to rent to unmarried couples because of the landlords' religious beliefs against premarital sexual relations. A panel of the U.S. Court of Appeals for the Ninth Circuit and the state supreme courts in Massachusetts and Minnesota have held such landlords to be entitled to a religious exception from the nondiscrimination laws on the grounds the governmental interest in preventing marital status discrimination in housing does not rise to the level of a compelling interest.[48] The supreme courts in Alaska, California, and Michigan, in contrast, have held that the state interest in preventing discrimination in housing is sufficiently compelling and that denial of a religious exception does not constitute a substantial burden on a landlord's religious exercise.[49]

Thus, the issue is far from settled. But the question of whether nondiscrimination statutes or regulations can pass muster under a strict scrutiny standard, *i.e.*, whether they serve compelling public purposes, also exists in other

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[47]*See* Hearings on H.R. 4019 Before the Subcommittee on the Constitution of the House Judiciary Committee, 105th Cong., 2d Sess. (June 16 and July 14, 1998) and Hearing on H.R. 1691, the "Religious Liberty Protection Act of 1999," Before the Subcommittee on the Constitution of the House Judiciary Committee, 106th Cong., 1st Sess. (May 12, 1999) (unprinted).

[48]Thomas v. Municipality of Anchorage, 165 F.3d 692, *opinion vacated and rehearing en banc granted*, 192 F.3d 1208 (9th Cir. 1999); Attorney General v. Desilets, 418 Mass. 316, 636 N.E.2d 233 (Mass. 1994); Cooper v. French, 460 N.W. 2d 2 (Minn. 1990) (plurality holding).

[49]Swanner v. Anchorage Equal Rights Commission, 874 P.2d 274 (Alaska), *cert. den.*, 513 U.S. 979 (1994); Smith v. Fair Employment and Housing Commission, 12 Cal.4th 1143, 913 P.2d 909 (1996); and McCready v. Hoffius, 459 Mich. 131, 678 N.E.2d 743 (1998).

contexts, including race,[50] gender,[51] disability[52] and sexual orientation.[53] To the extent state and local statutes mandating nondiscrimination on these bases are held to serve public purposes that are not deemed to be compelling, RLPA would seem to mandate exemptions from their application for persons whose religious beliefs justify discrimination on those bases. The questions, thus, are the extent to which that might be the case and whether such exemptions are, nonetheless, desirable

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[50]It is now settled that strict scrutiny applies to all governmental classifications based on race, whether invidious or benign. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

[51]Whether governmental classifications based on gender are subject to strict scrutiny or an intermediate standard of scrutiny is uncertain. In the 1970s and early 1980s the Court seemed to establish an intermediate standard of scrutiny as the applicable standard, requiring governmental discrimination based on gender to serve "important" public interests and to be "substantially related" to the achievement of those interests to pass constitutional muster. *See, e.g.*, Califano v. Webster, 430 U.S. 313 (1977); Massachusetts Personnel Administrator v. Feeney, 442 U.S. 256 (1979); and Mississippi University for Women v. Hogan, 458 U.S. 718 (1982). But more recently in United States v. Virginia, 518 U.S. 515 (1996) the Court said that the state had to demonstrate "exceedingly persuasive justifications" for its gender-based policy at the male-only Virginia Military Institute. That standard seems closely akin, if not identical to, the compelling interest standard.

[52]*See, e.g.*, Heller v. Doe, 509 U.S. 312 (1993) (refusing to designate the mentally retarded as a suspect class); City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (holding mentally disabled not to be a suspect class); Amos v. Maryland Department of Public Safety and Correctional Institutions, 1999 U.S.App. LEXIS 13873 (4th Cir. 1999) (holding the mentally retarded not to be a quasi-suspect class); Doe v. University of Maryland Medical Systems Corp., 50 F.3d 1261 (4th Cir. 1995) (extending rational basis scrutiny to all classifications based on disability); and Moore v. Farrier, 984 F.2d 269 (8th Cir.), *cert. denied*, 510 U.S. 819 (1993) (holding the physically disabled not to be a suspect class). *But see* Pottgen v. Missouri State High School Activities Assn, 857 F.Supp. 654 (E.D. Mo. 1994) (terming government's interest in prohibiting discrimination on the basis of disability to be compelling).

[53]*See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996) (eschewing the fundamental rights approach of the state courts in the case and striking down Colorado's statute under a rational basis standard of review); Equality Foundation of Greater Cincinnati v. City of Cincinnati, 128 F.3d 289 (6th Cir. 1997) (holding homosexuality not to be a suspect class or to involve a fundamental right); and Richenberg v. Perry, 97 F.3d 256 (8th Cir. 1996), *cert. denied,* 118 S. Ct. 45 (1997); Thomasson v. Perry, 80 F.3d 915, 928 (4th Cir.), *cert. denied*, 519 U.S. 948 (1996); and Jackson v. U.S. Department of the Air Force, 1997 U.S.App. LEXIS 39954 (9th Cir. 1997)(all using a rational basis standard of review to examine the military's "don't ask, don't tell" policy regarding homosexuality).