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The Religious Liberty Protection Act: The Validity of Using Congress' Commerce and Spending Powers to Protect Religion

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THE RELIGIOUS LIBERTY PROTECTION ACT: THE VALIDITY
OF USING CONGRESS' COMMERCE AND SPENDING POWERS
TO PROTECT RELIGION

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I. INTRODUCTION

Congress enacted the Religious Freedom Restoration Act in 1993.¹ In passing this legislation, Congress attempted to require States that place a burden on an individual or group's "free exercise" of religion to show a compelling State interest for doing so.² The constitutional authorities that Congress relied on in enacting this legislation were sections one and five of the Fourteenth Amendment.³ In 1997, the Supreme Court ruled that the RFRA was an unconstitutional attempt by Congress to use section five of the Fourteenth Amendment to "control cases and controversies."⁴

Now, despite the Supreme Court's invalidation of the RFRA, Congress is once again trying to protect religion. On July 15, 1999, the House of Representatives passed the Religious Liberty Protection Act (RLPA) by a 306-118 vote.⁵ The RLPA has stalled in the Senate, as potential problems with the Bill continue to be debated. The RLPA would require courts to overturn federal, state, and local laws which unduly burden the exercise of religion, unless the government could show a "compelling state interest" for the law, and that the law is the "least restrictive means" of promoting that interest.⁶ Unlike the RFRA, which was premised on the Fourteenth Amendment Enforcement Clause, the RLPA is premised on Congress' commerce and spending powers.⁷

Although the Religious Liberty Protection Act appears, on its face, to be simple, there are many constitutional issues which call into question the validity of the proposed bill. This note will focus on the constitutional problems of using Congress' commerce and spending powers to protect religion. It will examine the problem of attaching religious conditions to the States' receipt of federal funds, and the potential problem that may result from using the spending power to protect religious exercise.

¹42 U.S.C. § 2000bb(b) (1993).

²*Id.*

³Section 1 of the amendment states: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws." U.S. CONST. amend. XIV, § 1. Section 5 of the amendment gives Congress the power to "enforce, by appropriate legislation, the provisions of [that] article." U.S. CONST. amend. XIV, § 5.

⁴*See City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding that the RFRA exceeded Congress' § 5 enforcement powers).

⁵Religious Liberty Protection Act of 1999, H.R. 1691, 106th Cong. (1999).

⁶*Id.*

⁷*Id.*

The note then turns to the commerce clause justification for the RLPA. It will point out the major flaw in using the commerce clause to protect religious exercise, namely, that religions with little or no commercial component will not be protected by the RLPA. It will also look at the problem of reconciling the RLPA and the Establishment Clause, which prohibits Congress from passing laws “respecting religion.”⁸ The note will examine a key case in the Establishment Clause area, *Larson v. Valente*.⁹ It will point out that by protecting those religions that affect commerce, and not those that do not, the RLPA is, in effect, a law respecting the establishment of religion. The note will then turn to the effect that the RLPA will have on civil rights laws, and the possible unintended consequences of the RLPA. Finally, this note will consider the RLPA’s predecessor, the RFRA, as it relates to Congress’ power to enforce constitutional rights under section five of the Fourteenth Amendment.¹⁰

II. THE BILL: H.R. 1691- THE RELIGIOUS LIBERTY PROTECTION ACT

A. *The Language of the Proposed Law*

Section 2(a) of the RLPA provides a general rule which reads as follows:

A government shall not substantially burden a person’s religious exercise: (1) in a program or activity, operated by a government, that receives Federal financial assistance; or (2) 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; even if the burden results from a rule of general applicability.¹¹

B. *The Two Exceptions Wherein a Government May Burden Religious Exercise*

Section 2(b) of the RLPA lists the exceptions to the general rule set out in Section 2(a). The exceptions apply to instances when a government may substantially burden a person’s religious exercise.¹² Section 2(b) makes allowances for the government to substantially burden a person’s religious exercise if the government can demonstrate that application of the burden to the person: “(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”¹³

⁸U.S. CONST. amend. I.

⁹456 U.S. 228 (1991).

¹⁰*See supra* note 3.

¹¹Religious Liberty Protection Act, H.R. 1691, 106th Cong. § 2(a) (1999).

¹²*Id.* at § 2(b).

¹³*Id.*

III. THE CONSTITUTIONAL GROUNDS UPON WHICH THE RLPA IS PREMISED

A. *The Religious Liberty Protection Act as an Exercise of Congress' Spending Power*

Section 2(a) of the RLPA makes the provisions of the Bill applicable to any program or activity, operated by a government, that receives Federal financial assistance.¹⁴ The RLPA defines a “program or activity” by using the same definition of the term as used in the Civil Rights Act of 1964.¹⁵ It has been held by at least one court that actual receipt of federal funds by a particular program or activity is not the test of being subject to the conditions attached to those funds; the test, rather, is whether the program or activity is part of the operations of a State or local government that has received federal financial assistance.¹⁶ In other words, the program or activity need not itself have received federal financial assistance to be bound by the federal “free exercise” condition of the RLPA, but need only be part of the operations of a government that has received federal funds in any capacity.¹⁷

Article I, Section 8, Clause 1 of the Constitution states: “The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; . . .”¹⁸ The Supreme Court has held that Congress’ power to “provide for the common Defence and general Welfare of the United States” allows Congress the power to “authorize expenditure of public monies for public purposes [which] is not limited by the direct grants of legislative power found in the Constitution.”¹⁹ The Court went on to say, however, that while Congress’ spending power is not limited to express grants of power found in the Constitution, it may not use its spending power to usurp State powers reserved by the Tenth Amendment.²⁰ Incident to Congress’ spending power is its power to attach conditions on the receipt of federal funds.²¹ Congress has used this power “to further broad policy objectives by conditioning

¹⁴*Id.* at § 2(a)(1).

¹⁵Title VI of the Civil Rights Act of 1964 states: “For the purposes of this subchapter, the term “program or activity” and the term “program” mean all of the operations of—(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or (B) the entity of such State or local government that distributes such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government; (2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or (B) a local educational agency (as defined in section 198(a)(10) of the Elementary and Secondary Education Act of 1965), system of vocational education or other school system; . . . any part of which is extended federal financial assistance.” 42 U.S.C. § 2000d-4a (1964).

¹⁶*See* Hodges by Hodges v. Public Bldg. Comm’n, 864 F. Supp. 1493 (N.D. Ill. 1994).

¹⁷For a more detailed discussion see Kristian D. Whitten, *Conditional Federal Spending and the States’ “Free Exercise” of the Tenth Amendment*, 21 CAMPBELL L. REV. 5 (1998).

¹⁸U.S. CONST. art. I, § 8, cl. 1.

¹⁹Whitten, *supra* note 17, at 14 (quoting *United States v. Butler*, 297 U.S. 1, 66 (1935)).

²⁰*Id.*

²¹*See* *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.”²²

In 1987, the Supreme Court decided a key case on conditional federal spending in *South Dakota v. Dole*.²³ In *Dole*, the Court held that a federal statute conditioning states’ receipt of a portion of federal highway funds on the states’ adoption of a minimum drinking age of twenty-one was a valid exercise of Congress’ spending power.²⁴ In so holding, the Court discussed the general restrictions on Congress’ spending power, as articulated in various earlier Supreme Court cases.²⁵ The first of these restrictions is that the exercise of the spending power must be in pursuit of the “general welfare.”²⁶ The Court noted that in considering whether a particular expenditure is intended to serve the general welfare, courts should defer greatly to the judgment of Congress.²⁷ The second restriction on Congress’ spending power as noted in *Dole* is that if Congress wishes to condition the States’ receipt of federal funds, it “must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.”²⁸ The third restriction on the spending power is that conditions on federal grants might be illegitimate if they are unrelated “to the federal interest in particular national projects or programs.”²⁹ Finally, other constitutional provisions may provide an independent bar to the conditional grant of federal funds.³⁰

The *Dole* Court found that the first three limitations did not apply to the federal statute at hand.³¹ The Court concluded that the provision was designed to serve the general welfare, the conditions upon which the States were to receive funds were clearly stated by Congress, and that the condition was germane to the federal purposes.³² In assessing the fourth restriction on the spending power, the Court in *Dole* found that the independent constitutional bar limitation on the federal spending power is not “a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly.”³³ The Court found, instead, that the language of their earlier opinions “stands for the unexceptional proposition that the power may not be used to induce the States to engage in activities that would themselves be

²²*Id.* (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980)).

²³483 U.S. 203 (1987).

²⁴*Id.* at 212.

²⁵*Id.* at 207.

²⁶*Id.* (citing *Helvering v. Davis*, 301 U.S. 619, 640-41 (1937)).

²⁷*Id.*

²⁸483 U.S. 207 (quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1,17 (1981)).

²⁹*Id.* (citing *Massachusetts v. United States*, 435 U.S. 444, 461 (1978)).

³⁰*Id.* (citing *Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256, 269-70 (1985)).

³¹483 U.S. at 208.

³²*Id.*

³³*Id.* at 210.

unconstitutional.”³⁴ The Court went on to note that “in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion’.”³⁵ Because the financial inducement at issue in the *Dole* case was a mere 5% of South Dakota’s federal highway funds, the Court found it to be only a mild encouragement to the states.³⁶ The Court found that the threat of losing such a small portion of highway funds if South Dakota did not comply with the twenty-one drinking age did not amount to Congress regulating “those purposes which are within the exclusive province of the states.”³⁷

The spending power reliance in the Religious Liberty Protection Act is sure to cause problems. Constitutional scholars have already noted that the only way for state and local governments to avoid the RLPA’s mandate would be to forgo all federal financial assistance.³⁸ The RLPA is Congress’ attempt to regulate an area reserved to the states. The First Amendment to the Constitution states: “Congress shall make no law respecting the establishment of religion...”³⁹ This clause of the First Amendment, known as the Establishment Clause, is a limitation on Congress’ power, and not a delegation of power. The Tenth Amendment to the Constitution reserves all powers not delegated to the United States to the States or to the people.⁴⁰ In the RLPA, Congress is attempting to regulate an area, namely religion, that is reserved to the states. Forcing states to either accept RLPA’s mandate, or refuse all federal financial assistance, “runs afoul of the Tenth Amendment.”⁴¹

Under *South Dakota v. Dole*, when “the financial inducement offered by Congress [is] so coercive as to pass the point at which pressure turns into compulsion” there is an unconstitutional exercise of Congress’ spending power.⁴² The Religious Liberty Protection Act is about as coercive as legislation can get. State and local governments can either take federal funds with the RLPA liability, or take no funds at all.⁴³ Under *South Dakota v. Dole*, this Act is an unconstitutional use of Congress’ spending power.

The RLPA is also contrary to other restrictions on Congress’ spending power as articulated in *Dole*. Although the Act was likely intended to serve the general

³⁴*Id.*

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

³⁶483 U.S. at 211.

³⁷Whitten, *supra* note 17, at 19-20.

³⁸See, e.g., Kristian D. Whitten, *Cracks in the Church Wall: Religious Liberty Protection Act Would Violate Establishment Clause*, LEGAL TIMES, July 26, 1999, at 17.

³⁹U.S. CONST. amend. I.

⁴⁰Amendment 10 reads: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

⁴¹Whitten, *supra* note 38.

⁴²*Dole*, 483 U.S. at 211.

⁴³*Religious Liberty Protection Act: Hearings on H.R. 1691 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. (1999) (statement of Marci A. Hamilton, Yeshiva University, Benjamin N. Cardozo School of Law).

purposes, it does not unambiguously condition the States receipt of federal funds, as is required.⁴⁴ The RLPA states that “[A] government shall not substantially burden a person’s religious exercise in a program or activity, operated by a government, that receives Federal financial assistance.”⁴⁵ This rather unclearly mandates that governments comply with the RLPA, or, should they choose not to comply, must refuse all federal funds or be subject to the liabilities of the RLPA.

The RLPA can also be seen as violating another restriction on Congress’ spending power as set forth in *South Dakota v. Dole*: there must be a connection between the spending and the condition attached to the spending.⁴⁶ *Dole* clearly states that conditions on federal funds may be illegitimate if they are unrelated “to the federal interest in particular national projects or programs.”⁴⁷ RLPA applies to all programs or activities that receive federal financial assistance.⁴⁸ This may apply to anything from federally funded clinics and hospitals to single mothers receiving federal welfare checks. The relationship between these types of federal funds and the conditions mandated in the RLPA is tenuous at best.

B. The Religious Liberty Protection Act as an Exercise Of Congress’ Commerce Clause Power

In addition to the problems posed by the RLPA’s spending power reliance, there are problems raised by the Bill’s reliance on the commerce clause. Section 2(a)(2) of the RLPA prohibits governments from substantially burdening a person’s religious exercise “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; even if the burden results from a rule of general applicability.”⁴⁹ Scholars fear that the Bill’s reliance on Congress’ commerce power⁵⁰ will offer no protection to religious free exercise that has little or no commercial component.⁵¹ Furthermore, there will be many cases in which the effect on commerce cannot be proven, and will therefore not be protected by the RLPA.⁵²

⁴⁴*Dole*, 483 U.S. at 207.

⁴⁵Religious Liberty Protection Act at § 2(a)(1).

⁴⁶*Dole*, 483 U.S. at 207.

⁴⁷*Id.*

⁴⁸Religious Liberty Protection Act at § 2(a)(1).

⁴⁹*Id.* at § 2(a)(2).

⁵⁰The Commerce Clause gives the Congress the power to “regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art. I, § 8, cl. 3.

⁵¹See Whitten, *supra* note 38.

⁵²*Id.*

Because RLPA is not limited to activities that substantially affect commerce, it can be seen as exceeding Congress' power under the commerce clause.⁵³ Under *U.S. v. Lopez*, courts must ask whether a law regulates activities that "substantially affect" interstate commerce.⁵⁴ The Court in *Lopez* also held that courts must consider the "inherent limits of federalism on the exercise of the commerce clause."⁵⁵ Furthermore, Congress cannot use the commerce clause power in a way that would "convert congressional authority under the commerce clause to a general police power of the sort retained by the States."⁵⁶

IV. THE RELIGIOUS LIBERTY PROTECTION ACT AND THE ESTABLISHMENT CLAUSE PROBLEM

A. *The First Amendment Prohibition on Laws "Respecting Religion"*

Although the RLPA is premised on Congress' commerce and spending powers, some constitutional experts believe that neither justification is sufficient to overcome the First Amendment, which prohibits Congress from enacting laws "respecting an establishment of religion."⁵⁷ Much like its predecessor, the RFRA, the RLPA attempts to define the scope of religious free exercise protected by the First Amendment, thus violating the Establishment Clause. The RLPA may be viewed as a law that does, in fact, respect religion. Looking, for example, at the commerce clause justification for the RLPA, it would appear that the RLPA is a law respecting religion. The RLPA protects religions that affect commerce, but not religions that do not affect commerce.⁵⁸ This is, in effect, a law "respecting an establishment of religion," and is, therefore, in violation of the First Amendment Establishment Clause.⁵⁹ The Supreme Court has held that "the clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."⁶⁰ By protecting those religions that affect interstate commerce, and not protecting religions that do not affect interstate commerce, the RLPA is clearly preferring one religion over another, in direct violation of the Supreme Court's holding.⁶¹

⁵³*Religious Liberty Protection Act: Hearings on H.R. 1691 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. (1999) (statement of Marci A. Hamilton, Yeshiva University, Benjamin N. Cardozo School of Law).

⁵⁴514 U.S. 549, 558-59 (1995).

⁵⁵*Id.* at 566.

⁵⁶*Id.* at 567.

⁵⁷See Whitten, *supra* note 38 (quoting, U.S. CONST. amend. I).

⁵⁸Religious Liberty Protection Act at § 2(a)(2).

⁵⁹See Whitten, *supra* note 38.

⁶⁰*Larson v. Valente*, 456 U.S. 228 (1981).

⁶¹See Whitten, *supra* note 38.

B. Larson v. Valente

At issue in *Larson v. Valente* was the constitutionality of a Minnesota statute that imposed certain registration and reporting requirements upon only those religious organizations that solicited greater than fifty percent of their funds from nonmembers.⁶² The statute at issue, the Minnesota Charitable Solicitation Act⁶³ was designed to protect the public from contributing to fraudulent charities, and required charities to register and disclose the contributions they received with the Minnesota Department of Commerce.⁶⁴ From the time the Act was passed in 1961, until 1978, all “religious organizations” were exempted from the provisions of the Act.⁶⁵ Then, in 1978, the Minnesota Legislature amended the Act to include a “fifty percent rule.”⁶⁶ The rule required that only those religious organizations that received more than fifty percent of their total contributions from members or affiliated organizations would remain exempt from the registration and reporting requirements of the Act.⁶⁷ Those religious organizations that received fifty percent or less of their contributions from members or affiliated organizations would be subject to the registration and reporting requirements.⁶⁸

Appellee Valente, a member of the Unification Church, brought suit in the United States District Court for the District of Minnesota seeking a declaration that the Act, on its face and as applied to the Unification Church through the so-called “fifty-percent rule” constituted an abridgment of their First Amendment rights of expression and free exercise of religion, as well as a denial of their right to equal protection of the laws guaranteed by the Fourteenth Amendment.⁶⁹ Valente also argued that the fifty-percent rule discriminated among religious organizations, and thus violated the Establishment Clause.⁷⁰ The District Court found the Act to be facially unconstitutional with respect to religious organizations, and was therefore entirely void as to such organizations.⁷¹ The United States Court of Appeals for the Eighth Circuit affirmed the District Court’s holding that the fifty-percent rule violated the Establishment Clause.⁷² The Supreme Court then granted certiorari.

In finding for Valente, the Supreme Court held that the fifty-percent rule of the statute clearly granted denominational preferences, and thus declared the statute invalid.⁷³ The Court found that the effect of the fifty-percent rule was to impose the

⁶²*Larson*, 456 U.S. at 230.

⁶³MINN. STAT. §§ 309.50-309.61 (1969).

⁶⁴*Larson*, 456 U.S. at 231.

⁶⁵*Id.*

⁶⁶*Id.*

⁶⁷*Id.* at 232.

⁶⁸*Id.*

⁶⁹*Id.* at 233.

⁷⁰*Larson*, 456 U.S. at 234.

⁷¹*Id.* at 235.

⁷²*Id.* at 237.

⁷³*Id.* at 246.

registration and reporting requirements of the Act on some religious organizations, but not on others.⁷⁴ The Court noted that had the provisions of the Act been designed to operate evenly, on all religions, the registration and reporting requirements would have been permissible.⁷⁵ However, the fifty-percent rule was, in the Court's words, "the selective legislative imposition of burdens and advantages upon particular denominations."⁷⁶ The Court found that the fifty-percent rule was designed with "the explicit intention of including particular religious denominations and excluding others."⁷⁷ The Court found that the fifty-percent rule in the Act set up the precise type of official denominational preference that the Framers of the Constitution forbade.⁷⁸ The Court also stated that the constitutional prohibition of denominational preferences is "inextricably connected with the continuing vitality of the Free Exercise Clause."⁷⁹ The Court went on to say that equality of all religions would be impossible in the face of official denominational preferences, such as the one at issue in Minnesota's fifty-percent rule.⁸⁰

As the Supreme Court noted in *Larson v. Valente*, the "clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."⁸¹ The RLPA allows for an official preference of one religious group over another; namely, the preference of those religions that "affect, commerce" over those religions that do not.⁸² The RLPA, therefore, is clearly in violation of the Establishment Clause.

C. *Employment Division v. Smith*

In *Employment Division v. Smith*, respondents Smith and Black were fired by a private drug rehabilitation organization for ingesting peyote, a hallucinogenic drug, for religious purposes during a ceremony of their Native American Church.⁸³ Respondents were then denied unemployment compensation by the State of Oregon under a state law which disqualified employees discharged for misconduct.⁸⁴

⁷⁴*Id.* at 253.

⁷⁵*Id.*

⁷⁶*Larson*, 456 U.S. at 254.

⁷⁷*Id.*

⁷⁸*Id.* at 255.

⁷⁹*Id.* at 245.

⁸⁰*Id.*

⁸¹*Larson*, 456 U.S. at 244.

⁸²Religious Liberty Protection Act at § 2(a)(2).

⁸³494 U.S. 872 (1990).

⁸⁴*Id.* Oregon law prohibited the knowing or intentional possession of a "controlled substance" unless prescribed by a medical doctor. OR. REV. STAT. § 475.992(4) (1987). "Controlled substance" was defined to include drugs classified in Schedules I through V of the Federal Controlled Substances Act, 21 U.S.C. §§ 811-812. Peyote was included in the Schedule I classification, and possession constituted a Class B felony under Oregon law. OR. REV. STAT. § 475.992(4)(a) (1987).

Respondents claimed a religious exemption from the Oregon law,⁸⁵ charging that the law prohibited their free exercise of religion.⁸⁶ The Oregon Supreme Court held that the Oregon statute made no exception for the sacramental use of peyote, and that Smith and Black's religious use of the drug was within the prohibition of the statute.⁸⁷ However, the Court went on to find that the prohibition was invalid under the Free Exercise Clause, and that the State could not deny employment benefits to respondents for having used peyote for a religious purpose.⁸⁸ The Supreme Court granted certiorari to examine the issue of whether the Free Exercise Clause of the First Amendment permits Oregon to include religiously used peyote in its prohibition of use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such use of peyote.⁸⁹

In its opinion, the Supreme Court first looked at the history and background of the Free Exercise Clause. The Court noted that the free exercise of religion means the right to believe and profess whatever religious doctrine one desires.⁹⁰ This right of free exercise, the Court stated, includes not only the right to believe and profess one's religious doctrine, but also the right to perform (or abstain from performing) physical acts based upon those beliefs.⁹¹ The Court found that it would be unconstitutional for a State to ban such acts or abstentions only when engaged in for religious reasons, but not when engaged in for non-religious reasons.⁹²

The Court then went on to differentiate the above examples from the case at bar. The respondents in *Smith* contended that their religious motivation in using peyote placed them beyond the reach of the criminal law, even though the law was not specifically directed at their religious practice, and the law was constitutional as applied toward those who use the drug for other reasons.⁹³ Respondents further argued that "prohibiting the free exercise of religion" included requiring any

⁸⁵The First Amendment prohibition on laws establishing religion was incorporated into the Fourteenth Amendment in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), making that amendment applicable to the states. The Court in *Cantwell* held that the Fourteenth Amendment's due process clause incorporated the section of the First Amendment that reads, "Congress shall make no law respecting . . . the free exercise [of religion]." *Id.* at 303.

⁸⁶*Employment Division*, 494 U.S. at 872.

⁸⁷*Id.* at 876.

⁸⁸*Id.*

⁸⁹*Id.* at 874.

⁹⁰*Id.* at 877.

⁹¹*Id.* The Court here noted certain types of physical acts that would constitute religious free exercise. They include, among others, assembling for worship, participating in sacramental use of bread and wine, or abstaining from eating certain foods.

⁹²*Employment Division*, 494 U.S. at 877. The Court cited instances when action would be unconstitutional in this regard. For example, if a state passed a law that banned the casting of statues only when the statue was to be used for worship purposes, the law would be unconstitutional.

⁹³*Id.* at 878.

individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires).⁹⁴

In finding for petitioner, the Court held that because respondents' ingestion of peyote was prohibited under Oregon law, and because that prohibition was constitutional, the State could, consistent with the Free Exercise Clause, deny the respondents unemployment compensation when they were dismissed due to the use of the drug.⁹⁵ In so holding, the Court examined their precedents, and found that no case had ever held that an individual's religious beliefs excuse him from compliance with an otherwise valid law that prohibits conduct the State is allowed to regulate.⁹⁶ The Court looked at a line of cases which held that the right of free exercise does not relieve an individual from an obligation to comply with valid laws of general applicability.⁹⁷ The first such case that the Court looked at was *Reynolds v. United States*.⁹⁸ In that case, the Court rejected the claim that criminal laws against polygamy could not be constitutionally applied to individuals whose religion required the practice.⁹⁹

The next case the Court looked at was *Prince v. Massachusetts*,¹⁰⁰ wherein the Court held that a mother could be prosecuted under child labor laws for using her children to dispense literature in the streets, regardless of her religious motivation.¹⁰¹ Another case the Court looked at was *Braunfeld v. Brown*,¹⁰² in which a Sunday-closing law was upheld against the claim that it burdened the religious practices of persons whose religions compelled them to refrain from working on other days of the week.¹⁰³ The final precedent that the Court looked at was *Gillette v. United States*,¹⁰⁴ under which the Supreme Court sustained the military Selective Service System

⁹⁴*Id.*

⁹⁵*Id.* at 890.

⁹⁶*Id.* at 879. The Court noted a succinct description of this notion by Justice Frankfurter in *Minersville School Dist. Bd. Of Ed. V. Gobitis*, 310 U.S. 586, 594-95 (1940):

Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.

⁹⁷*Employment Division*, 494 U.S. at 879.

⁹⁸98 U.S. 145 (1879).

⁹⁹*Employment Division*, 494 U.S. at 879 (citing *Reynolds v. United States*, 98 U.S. 145 (1879)).

¹⁰⁰321 U.S. 158 (1944).

¹⁰¹*Employment Division*, 494 U.S. at 880 (citing *Prince v. Massachusetts*, 321 U.S. 158, 171 (1944)).

¹⁰²366 U.S. 599 (1961).

¹⁰³*Employment Division*, 494 U.S. at 880 (citing *Braunfeld v. Brown*, 366 U.S. 599 (1961)).

¹⁰⁴401 U.S. 437 (1971).

against the claim that it violated free exercise by compulsorily enrolling persons who opposed a particular war on religious grounds.¹⁰⁵

The Court found that the crux of respondents' argument, that when otherwise prohibited conduct is coupled with religious convictions, the conduct must be free from governmental regulation, went against all prior Court decisions, as laid out in the previously set forth holdings.¹⁰⁶ Because the Court found there to be no contention that the Oregon drug law was an attempt to regulate religious beliefs, the rule to which the Court had adhered ever since *Reynolds* applied, namely, that religious practices may be interfered with if the interference results from a valid law of general applicability, not designed to target religious beliefs or practices directly.¹⁰⁷ Respondents argued that although an exemption from generally applicable criminal laws need not be automatically given to religiously motivated individuals, the claim for a religious exemption must be evaluated by the courts under the balancing test set forth by the Supreme Court in *Sherbert v. Verner*.¹⁰⁸ The *Sherbert* court adopted a balancing test which required states to show a "compelling state interest" to justify burdening an individual's religion.¹⁰⁹ The Court in *Employment Division v. Smith*, however, abandoned the *Sherbert* test, holding that generally applicable state laws may be applied to religious practices even when not supported by a compelling state interest.¹¹⁰ Furthermore, the Court found that although states may allow for a nondiscriminatory religious-practice exemption for otherwise illegal activities (such as ingesting peyote), this exemption is not constitutionally required.¹¹¹

The RLPA cannot be seen as a religious-practice exemption, as permitted by *Employment Division v. Smith*. Instead, it is a realignment of power between church and state; it forces a state to make accommodations for religion even if the state determines that such an accommodation goes against the general welfare.¹¹² The RLPA grants privileges to religion over all other interests.¹¹³ Congress lacks the power to privilege religion in such a way.¹¹⁴ Although the Supreme Court noted in

¹⁰⁵*Employment Division*, 494 U.S. at 880 (citing *Gillette v. United State*, 401 U.S. 437, 461 (1971)).

¹⁰⁶*Employment Division*, 494 U.S. at 882.

¹⁰⁷*Id.*

¹⁰⁸*Id.* at 883 (citing *Sherbert v. Verner*, 374 U.S. 398 (1963)).

¹⁰⁹*Id.*

¹¹⁰*Id.* at 882. The Court found that "To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the state's interest is 'compelling'- permitting him, by virtue of his beliefs, 'to become a law unto himself,' contradicts both constitutional tradition and common sense." *Id.* at 885 (citing *Reynolds*, 98 U.S. at 145).

¹¹¹*Id.* at 890.

¹¹²Religious Liberty Protection Act: Hearings on H.R. 1691 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 106th Cong. (1999) (statement of Marci A. Hamilton, Yeshiva University, Benjamin N. Cardozo School of Law).

¹¹³*Id.* at 371.

¹¹⁴*See id.*

Smith that certain nondiscriminatory religious-practice exemptions may be permissible, it has not given any indication that legislatures have the power to privilege religion in such an across-the-board manner as done in the RLPA.¹¹⁵ The RLPA is not a permissible accommodation, but rather an unconstitutional establishment of religion.¹¹⁶

V. THE RELIGIOUS LIBERTY PROTECTION ACT AND CIVIL RIGHTS

A. *Claims Under the Religious Liberty Protection Act May Be Used to Defeat Civil Rights*

The RLPA would provide federal statutory protection for religious exercise to replace or increase the constitutional protection which was available before the Supreme Court's decision in *Employment Division v. Smith* lowered the standard of review for free exercise claims.¹¹⁷ The RLPA requires that a state or local government shall not substantially burden a person's religious exercise unless the government demonstrates a compelling governmental interest for doing so, and that the burden is the least restrictive means for furthering that compelling governmental interest.¹¹⁸ The RLPA does not have a provision which specifically addresses its potential effect on state and local civil rights laws.¹¹⁹ Many experts worry that an unintended consequence of the RLPA will be the use of religious free exercise as a defense to civil rights claims.¹²⁰

One area protected by civil rights laws, marital status, is sure to face an RLPA religious exercise defense. Many landlords claim that their religious beliefs about premarital sex requires them to deny housing to unmarried couples, despite state or local fair housing laws which forbid discrimination based on marital status for housing.¹²¹ The RLPA will allow landlords to use a religious exercise defense in

¹¹⁵*Id.*

¹¹⁶*Id.*

¹¹⁷494 U.S. 872 (1990).

¹¹⁸Religious Liberty Protection Act of 1999, H.R. 1691, 106th Cong.

¹¹⁹During the subcommittee discussion on the Religious Liberty Protection Act in the 105th Congress, Congressman Robert C. Scott offered an amendment to ensure that the RLPA would not create any defense to civil rights claims. The amendment stated that "[n]othing in this Act shall be construed to provide a defense to any other civil or criminal action based on any Federal, State, or local civil rights law." The amendment was rejected by the subcommittee, and is not part of the RLPA as it is now written.

¹²⁰See, e.g., *Religious Liberty Protection Act: Hearings on H.R. 1691 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. (1999) (statement of Christopher E. Anders, Legislative Counsel to the American Civil Liberties Union). In his testimony, Mr. Anders stated, "Our concern [the ACLU] is that some courts turn a federal statutory shield for religious exercise into a sword against state and local civil rights laws."

¹²¹*Religious Liberty Protection Act: Hearings on H.R. 1691 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. (1999) (statement of Christopher E. Anders, Legislative Counsel to the American Civil Liberties Union).

denying housing to unmarried couples, in violation of fair housing laws.¹²² When using standards of review similar to the “compelling governmental interest” standard set forth in the RLPA, several courts have recently ruled on cases whereby a defendant in a civil rights action defended on the grounds of religious liberty.¹²³

Defendants in civil rights cases have also used a religious liberty defense in cases involving race or sexual orientation. The World Church of the Creator, for example, claims a religious belief in promoting the white race.¹²⁴ Gay lawyers say the RLPA will allow conservative Christian landlords to refuse to rent to gays and lesbians, despite state laws protecting homosexuals from housing discrimination.¹²⁵ In *Thomas v. Municipality of Anchorage*, a landlord of a building in which he was not a resident successfully argued that the application of strict scrutiny to the fair housing laws would permit him to discriminate against unmarried couples seeking rental.¹²⁶ Using the same reasoning, the RLPA may allow conservative Christians and other religious people may be allowed to discriminate against homosexuals in housing and employment by claiming a religious belief in doing so.¹²⁷

B. Application of the Four-Part RLPA Test to Civil Rights Claims

The Religious Liberty Protection Act states that:

A [state or local] government shall not substantially burden a person’s religious exercise in a program or activity, operated by a government, that receives federal financial assistance [or impose a substantial burden on religious exercise if the burden affects interstate commerce], even if the burden results from a rule of general applicability. . . [unless the] government demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.¹²⁸

Therefore, in deciding cases which involves a religious free exercise defense to a civil rights claim, courts under the RLPA must apply a four-part test. First, is the defendant’s discrimination a “religious exercise”?¹²⁹ Second, does the applicable state or local anti-discrimination law “substantially burden” the defendant’s religious

¹²²*Id.*

¹²³*See, e.g., Thomas v. Municipality of Anchorage*, 165 F.3d 692 (9th Cir. 1999) (holding that the governmental interest in preventing marital status discrimination was not compelling).

¹²⁴John Cloud, *Law on Bended Knee*, TIME, Sept. 13, 1999, at 32.

¹²⁵*Id.*

¹²⁶165 F.3d 692 (9th Cir. 1999).

¹²⁷*Religious Liberty Protection Act: Hearings on H.R. 1691 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. (1999) (statement of Marci A. Hamilton, Yeshiva University, Benjamin N. Cardozo School of Law).

¹²⁸Religious Liberty Protection Act of 1999, H.R. 1691, 106th Cong.

¹²⁹*Religious Liberty Protection Act: Hearings on H.R. 1691 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. (1999) (statement of Christopher E. Anders, Legislative Counsel, American Civil Liberties Union).

exercise?¹³⁰ Third, is the government's interest in eradicating the discrimination "compelling"?¹³¹ Finally, are uniformly applied anti-discrimination laws the least restrictive means of furthering any compelling governmental interest?¹³²

1. Is Discrimination "Religious Exercise" Under RLPA?

Using the Language of the Religious Liberty Protection Act, the first part of the test that courts must utilize is to ask whether a refusal to comply with civil rights laws is religious exercise.¹³³ The definition of "religious exercise" in the RLPA is very broad, allowing any civil rights defendant who can show that his or her discriminatory actions were "substantially motivated by religious belief" to meet the first prong of the RLPA test.¹³⁴ Using a similar standard to the one set forth in the RLPA, courts have held that the refusal to rent an apartment to an unmarried couple based on a landlord's religious belief that premarital sex is sinful is religious exercise.¹³⁵ In the employment context, courts have held that hiring decisions can be deemed religious exercise, if the employer can demonstrate that the decision was based on religious belief or doctrine.¹³⁶

2. Do State and Local Civil Rights Statutes "Substantially Burden" Religious Exercise?

The second part of the RLPA test requires that in order for the RLPA protection to be available, the state or local law must "substantially burden" an individual's religious exercise.¹³⁷ The purpose for this part of the RLPA test is to avoid litigation over laws which are neutral, or have only a small impact on religious exercise.¹³⁸ Congress did not define "substantial burden" as it applies to the RLPA, and there is

¹³⁰*Id.*

¹³¹*Id.*

¹³²*Id.*

¹³³*Id.*

¹³⁴The RLPA defines religious exercise as "an act or refusal to act that is substantially motivated by religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief." H.R. 1691 § 7(a)(3).

¹³⁵*See Smith v. Fair Employment & Housing Comm'n*, 913 P.2d 909 (Cal. 1996). This case was decided when the RFRA, the RLPA's predecessor was still good law. The court in *Smith* stated that "while the renting of apartments may not constitute the exercise of religion, if Smith claims the laws regulating that activity indirectly coerce her to violate her religious beliefs, we cannot avoid testing her claim under the analysis codified in RFRA." *Id.* at 923.

¹³⁶*See EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272 (9th Cir. 1982) (holding that a retaliatory action taken by a religious publisher against employee who instituted EEOC proceedings alleging sex discrimination was religious exercise because church doctrine prohibited lawsuits by members against the church).

¹³⁷H.R. 1691 § 2(a).

¹³⁸*Religious Liberty Protection Act: Hearings on H.R. 1691 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. (1999) (statement of Christopher E. Anders, Legislative Counsel, American Civil Liberties Union).

no generally applicable test to determine when a “substantial burden” exists.¹³⁹ Circuit Courts, however, have adopted a broad reading of “substantial burden” during the years when the RLPA’s predecessor, the RFRA, was in effect. In *Mack v. O’Leary*, the Seventh Circuit held that:

A substantial burden on the free exercise of religion [within the meaning of the RFRA] is one that forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person’s religious beliefs, or compels conduct or expression that is contrary to those beliefs.¹⁴⁰

The Tenth Circuit has held that to exceed the “substantial burden” threshold, governmental regulation must “significantly inhibit or constrain conduct or expression that manifests some central tenet of a [person’s] individual beliefs.”¹⁴¹ The Eighth Circuit found that a substantial burden was imposed when a person is compelled “by threat of sanctions, to refrain from religiously motivated conduct.”¹⁴²

The California Supreme Court has held that compliance with state fair housing laws does not constitute a substantial burden on religious free exercise. In *Smith v. Fair Employment & Housing Comm’n*, a landlord argued that her religious beliefs prevented her from renting apartments to unmarried couples.¹⁴³ The court found that because the landlord’s religious beliefs did not require her to rent apartments, but merely to refrain from renting to unmarried couples, there was no substantial burden on her religious free exercise.¹⁴⁴ The court noted that if the landlord did not wish to comply with the State’s housing anti-discrimination laws, that she had the opportunity to sell her rental properties and put the capital in other investments.¹⁴⁵ The court held that no religious exercise was burdened if the landlord followed the alternative course of placing her capital in another investment.¹⁴⁶

The Court in *Smith v. Fair Employment & Housing Comm’n* used an analysis for “substantial burden” that is a great deal stricter than the analysis required under the RLPA. Under the RLPA, courts may view the choice of switching to another occupation to avoid anti-discrimination laws as too harsh, and determine that the burden is indeed substantial.¹⁴⁷ Should courts determine that changing professions to avoid fair housing laws constitutes a substantial burden to a landlord’s free exercise

¹³⁹*Id.*

¹⁴⁰80 F.3d 1175, 1179 (7th Cir. 1996).

¹⁴¹*See* *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995).

¹⁴²*See* *Brown-El v. Harris*, 26 F.3d 68, 70 (8th Cir. 1994).

¹⁴³913 P.2d 909 (Cal. 1996).

¹⁴⁴*Id.* at 925.

¹⁴⁵*Id.*

¹⁴⁶*Id.* at 926.

¹⁴⁷*Religious Liberty Protection Act: Hearings on H.R. 1691 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. (1999) (statement of Christopher E. Anders, Legislative Counsel, American Civil Liberties Union).

of religion, the RLPA would allow the landlord to engage in discriminatory housing practices if the practice was deemed a religious free exercise.¹⁴⁸

3. Is the Governmental Interest in Eradicating Discrimination Compelling?

The third part of the RLPA test requires that a government must have a compelling interest to justify the imposition of a substantial burden to an individual's religious exercise.¹⁴⁹ Courts are sharply split on this part of the RLPA test when deciding civil rights cases wherein a defendant has raised a religious liberty defense.¹⁵⁰ In most cases, the government's interest in eradicating racial and sex-based discrimination has been found to meet the compelling interest standard.¹⁵¹ However, because newly protected classes such as sexual orientation, disability, and marital status do not receive the same level of scrutiny as race and sex, it is more difficult to persuade courts that the governmental interest in preventing discrimination on such grounds is compelling.¹⁵² Courts are divided on whether or not preventing discrimination against these groups is a compelling governmental interest.¹⁵³

Courts have also been reluctant to find a compelling governmental interest in ending certain types of discrimination when other state or local laws discriminate against the class. For example, laws forbidding fornication or sodomy have provided support for the conclusion that there is no compelling governmental interest in protecting against discrimination based on marital status or sexual orientation.¹⁵⁴ In *Cooper v. French*, the Minnesota Supreme Court stated, "How can there be a compelling state interest in promoting fornication when there is a state statute

¹⁴⁸*Id.*

¹⁴⁹Religious Liberty Protection Act at § 2(b)(1).

¹⁵⁰*Religious Liberty Protection Act: Hearings on H.R. 1691 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. (1999) (statement of Christopher E. Anders, Legislative Counsel, American Civil Liberties Union).

¹⁵¹*See, e.g.*, *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (holding that the government has a fundamental, overriding interest in eradicating racial discrimination in education); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (holding that the state government's compelling interest in eradicating discrimination against its female citizens justifies the impact on the male members' associational freedoms).

¹⁵²*Religious Liberty Protection Act: Hearings on H.R. 1691 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. (1999) (statement of Christopher E. Anders, Legislative Counsel, American Civil Liberties Union).

¹⁵³*See, e.g.*, *Gay Rights Coalition v. Georgetown Univ.*, 536 A.2d 1 (D.C. App. 1987) (holding that the District of Columbia's interest in prohibiting educational institutions from denying equal access to benefits on the basis of sexual orientation is compelling); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1993) (holding that Anchorage's interest in prohibiting marital status discrimination in housing is compelling); *But see Cooper v. French*, 460 N.W.2d 2 (Minn. 1990) (holding that there was no compelling governmental interest in ending discrimination against unmarried couples).

¹⁵⁴*Religious Liberty Protection Act: Hearings on H.R. 1691 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. (1999) (statement of Christopher E. Anders, Legislative Counsel, American Civil Liberties Union).

prohibiting it?”¹⁵⁵ Likewise, courts have found that a government interest in ending discrimination based on marital status is not compelling in light of state and local laws which favor married couples.¹⁵⁶ In this way, the RLPA’s “compelling governmental interest test” may make it more difficult for state and local governments to attempt to eradicate certain types of discrimination.

4. Are Uniformly Applied Anti-Discrimination Laws the Least Restrictive Means Available?

The final part of the Religious Liberty Protection Act’s test is whether the challenged state or local law uses the least restrictive means to achieve the government’s compelling interest.¹⁵⁷ There has been general agreement among state courts deciding this issue that uniform application of anti-discrimination laws is the least restrictive means for a government to achieve its compelling interest.¹⁵⁸ In *Minnesota ex. Rel. McClure v. Sports & Health Club, Inc.*, for example, the owners of a health club hired only employees whose religious beliefs were consistent with the owners’ religious beliefs, even though state law prohibited employment discrimination based on religion, sex, and marital status.¹⁵⁹ The court found that “the state’s overriding compelling interest of eradicating discrimination based upon sex, race, marital status, or religion could be substantially frustrated if employers, professing as deep and sincere religious beliefs as those held by appellants, could discriminate against the protected classes.”¹⁶⁰

Because civil rights laws normally contain certain exemptions for religious organizations, proponents of RLPA will likely argue that the government cannot have a compelling interest in the uniform application of civil rights laws.¹⁶¹ A less restrictive means than the uniform application of civil rights laws may be available under the Religious Liberty Protection Act: granting exemptions from civil rights laws to individuals who hold sincere religious beliefs which forbid them from

¹⁵⁵460 N.W.2d 2, 10 (Minn. 1990).

¹⁵⁶*See, e.g., Cooper v. French*, 460 N.W.2d 2 (Minn. 1990) (noting preferential treatment of married couples in employee life and health insurance benefits).

¹⁵⁷*Religious Liberty Protection Act: Hearings on H.R. 1691 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. (1999) (statement of Christopher E. Anders, Legislative Counsel, American Civil Liberties Union).

¹⁵⁸*See, e.g., Swanner v. Anchorage Equal Rights Comm’n*, 874 P.2d 274, 280 n.9 (Alaska 1993) (finding that “the most effective tool the state has for combating discrimination is to prohibit discrimination; these laws do exactly that. Consequently, the means are narrowly tailored and there is no less restrictive alternative.”); *See also Gay Rights Coalition v. Georgetown Univ.*, 536 A.2d 1, 39 (D.C. App. 1987) (stating that “the District of Columbia’s overriding interest in eradicating sexual orientation discrimination, if it is ever to be converted from aspiration to reality, requires that Georgetown equally distribute tangible benefits to the student groups.”).

¹⁵⁹370 N.W.2d 844 (Minn. 1985).

¹⁶⁰*Id.* at 853.

¹⁶¹*Religious Liberty Protection Act: Hearings on H.R. 1691 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. (1999) (statement of Christopher E. Anders, Legislative Counsel, American Civil Liberties Union).

obeying anti-discrimination laws.¹⁶² However, granting exemptions from civil rights laws may increase the number of people claiming a religious defense for their discriminatory actions.¹⁶³ For this reason, uniform application of civil rights laws may be the least restrictive means to accomplish the goals of anti-discrimination laws.¹⁶⁴

The American Civil Liberties Union, which helped draft the Religious Liberty Protection Act, as well as the 1993 Religious Freedom Restoration Act, now opposes the bill unless an amendment makes it clear that religious claims cannot be used to defeat civil rights laws.¹⁶⁵ The ACLU believes that unless Congress amends the RLPA to respond to the potential civil rights problems, or develops an alternative approach to addressing the problem of increasing protection for religious exercise against neutral state and local laws, the RLPA may provide a new defense to state and local civil rights claims made by persons who already receive the least protection from the courts and the federal government.¹⁶⁶ The official ACLU position on the Religious Liberty Protection Act is that Congress should not pass the bill without ensuring that it will not deprive persons of their civil rights under state and local laws.¹⁶⁷

¹⁶²*Religious Liberty Protection Act: Hearings on H.R. 1691 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. (1999) (statement of Christopher E. Anders, Legislative Counsel, American Civil Liberties Union).

¹⁶³*Religious Liberty Protection Act: Hearings on H.R. 1691 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. (1999) (statement of Christopher E. Anders, Legislative Counsel, American Civil Liberties Union).

¹⁶⁴*See Minnesota ex rel. McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 853 n.16 (Minn. 1985) (stating that if the court permitted the exemption in this case, other employees, “if they could demonstrate their beliefs were sincere and based on accepted theological concepts, would be permitted to discriminate contrary to the state’s public policy of affording equality of opportunity and equal access to public accommodation to all its citizens. To permit such an exception would substantially emasculate the state’s public policy of ensuring civil rights for citizens.”); *Attorney General v. Desilets*, 636 N.E.2d 233, 240 (Mass. 1994) (finding that “the practical problems of administering a law with the exemption that the defendants seek may be shown to be such as to make the operation of such an exemption impractical.”); *See also Brown v. Dade Christian Schools*, 556 F.2d 310, 323 (5th Cir. 1977) (Goldberg, J., concurring) (“[W]hen recognizing the [free exercise] claim will predictably give rise to further claims, many of which undoubtedly will be fraudulent or exaggerated, the situation is different. In that event the court must either recognize many such claims . . . or draw fine and searching distinctions among the various free exercise claimants. The latter course would raise serious constitutional questions with respect to the proper functioning of the courts in sensitive religious clause adjudication.”).

¹⁶⁵John Cloud, *Law on Bended Knee*, TIME, Sept. 13, 1999, at 33.

¹⁶⁶*Religious Liberty Protection Act: Hearings on H.R. 1691 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. (1999) (statement of Christopher E. Anders, Legislative Counsel, American Civil Liberties Union).

¹⁶⁷*Religious Liberty Protection Act: Hearings on H.R. 1691 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. (1999) (statement of Christopher E. Anders, Legislative Counsel, American Civil Liberties Union).

VI. THE RELIGIOUS LIBERTY PROTECTION ACT AND CONGRESS' POWER TO ENFORCE CONSTITUTIONAL RIGHTS UNDER SECTION FIVE OF THE FOURTEENTH AMENDMENT

Section One of the Fourteenth Amendment States:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.¹⁶⁸

Section Five, which is the final provision of the Amendment, states, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."¹⁶⁹

A. *The Religious Liberty Protection Act's Predecessor: The Religious Freedom Restoration Act*

In 1993, Congress enacted the Religious Freedom Restoration Act¹⁷⁰ in direct response to *Employment Division v. Smith*, which held that a state need not demonstrate a "compelling interest" to justify laws of general application that incidentally burden the free exercise of religion.¹⁷¹ The RFRA essentially overturned *Smith* by requiring federal and state governments to meet the compelling interest test when substantially burdening a person's exercise of religion.¹⁷² The RFRA sought to restore the compelling interest test as set forth in *Sherbert v. Verner*,¹⁷³ and to guarantee its application in all cases where free exercise of religion is substantially burdened, and to provide a claim or defense to persons whose religious exercise is substantially burdened by government.¹⁷⁴ The RFRA passed with broad support,

¹⁶⁸U.S. CONST. amend. XIV, § 1.

¹⁶⁹U.S. CONST. amend. XIV, § 5.

¹⁷⁰42 U.S.C. § 2000bb (1994). The RFRA stated, in relevant part, that "(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution; (2) laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise; (3) governments should not substantially burden religious exercise without compelling justification; (4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. § 2000bb (1994).

¹⁷¹494 U.S. 872, 884-85 (1990).

¹⁷²42 U.S.C. § 2000bb-1(b)-2(a) (1994).

¹⁷³374 U.S. 398 (1963).

¹⁷⁴42 U.S.C. § 2000bb(b) (1994).

and was extremely popular.¹⁷⁵ In enacting the Religious Freedom Restoration Act, Congress relied on Section One of the Fourteenth Amendment, and its power under Section Five of that Amendment, to “enforce, by appropriate legislation, the provision of [that] article.”¹⁷⁶

B. City of Boerne v. Flores

The case of *City of Boerne v. Flores* concerned the constitutionality of the Religious Freedom Restoration Act.¹⁷⁷ The city of Boerne, Texas passed an ordinance authorizing the city’s Historic Landmark Commission to set up an area of proposed historic landmarks and districts.¹⁷⁸ Under the ordinance, the Commission had final approval of all construction affecting historic landmarks or buildings in a historic district.¹⁷⁹ Shortly after the city passed this ordinance, St. Peter’s Catholic Church applied for a building permit to enlarge the church.¹⁸⁰ Because the city’s Historic Landmark Commission found St. Peter’s to be located in a historic district, they denied the application.¹⁸¹ The Archbishop of the San Antonio Diocese then brought suit in the United States District Court for the Western District of Texas challenging the denial of the permit.¹⁸² In his claim, the Archbishop relied on the Religious Freedom Restoration Act as one basis for relief from the city’s refusal to issue the building permit.¹⁸³ The District Court concluded that the RFRA exceeded Congress’ power of enforcement under Section Five of the Fourteenth Amendment.¹⁸⁴ The Fifth Circuit reversed the District Court, finding the RFRA to be constitutional.¹⁸⁵ The Supreme Court then granted certiorari.

In deciding *City of Boerne v. Flores*, the Supreme Court looked at the language of the RFRA. It noted that the RFRA prohibited the government from substantially burdening a person’s exercise of religion unless the government can demonstrate that the burden “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”¹⁸⁶ The Court stated that in the RFRA, Congress relied on its Fourteenth Amendment

¹⁷⁵See Joan Biskupic, *Supreme Court Overturns Religious Freedom Statute*, WASH. POST, June 26, 1997 at A1.

¹⁷⁶42 U.S.C. § 2000bb (1994).

¹⁷⁷521 U.S. 507 (1997).

¹⁷⁸*Id.* at 512.

¹⁷⁹*Id.*

¹⁸⁰*Id.* Built in 1923, the church seated only about 230 worshippers, and was too small for its growing parish. In order to meet the needs of the growing congregation, the Archbishop of San Antonio gave permission to the parish to enlarge the building.

¹⁸¹*Id.*

¹⁸²*Id.*

¹⁸³*City of Boerne*, 521 U.S. at 512.

¹⁸⁴*Id.*

¹⁸⁵*Id.*

¹⁸⁶521 U.S. at 515-16 (quoting 42 U.S.C. §2000bb-1 (1994)).

enforcement power in enacting the most far reaching and substantial of RFRA's provisions, those which impose its requirements on the States.¹⁸⁷ Because of the disagreement over whether or not the RFRA was a proper exercise of Congress' Section Five enforcement power, the Court next analyzed in detail this portion of the respondent's argument.

The respondents in *City of Boerne v. Flores* argued that the Religious Freedom Restoration Act was a permissible enforcement legislation.¹⁸⁸ They contended that Congress, through the RFRA, was only protecting by legislation one of the liberties guaranteed by the Fourteenth Amendment's Due Process Clause, the free exercise of religion, beyond what is necessary under *Employment Division v. Smith*.¹⁸⁹ The respondents in *Boerne* further argued that Congress' Section Five power was not limited to remedial or preventive legislation, but was a positive grant of legislative power to Congress.¹⁹⁰ The Supreme Court agreed with the respondents that Congress has the power under Section Five of the Fourteenth Amendment to enforce the provisions of that Amendment, and that under that power Congress can enact legislation enforcing the constitutional right to the free exercise of religion.¹⁹¹

The Supreme Court next stated, however, that Congress' power under Section Five of the Fourteenth Amendment extended only to enforcing the provisions of the Fourteenth Amendment.¹⁹² The Court found the design of the Amendment and the text of Section Five to be inconsistent with the idea that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States.¹⁹³ The Court stated:

Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."¹⁹⁴

The Court noted the important distinction between Congressional measures which remedy or prevent unconstitutional actions and measures that make a

¹⁸⁷*City of Boerne*, 521 U.S. at 516.

¹⁸⁸*Id.* at 517.

¹⁸⁹*Id.*

¹⁹⁰*Id.* at 518.

¹⁹¹*Id.* The Court noted that the "provisions of this article" to which § 5 refers include the Due Process Clause of the Fourteenth Amendment. Congress' power to enforce the Free Exercise Clause flows from the Court's holding in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (holding that the "fundamental concept of liberty embodied in [the Fourteenth Amendment's Due Process Clause] embraces the liberties guaranteed by the First Amendment.")

¹⁹²*City of Boerne*, 521 U.S. at 519.

¹⁹³*Id.*

¹⁹⁴*Id.*

substantive change in the governing law.¹⁹⁵ The Respondents contended that the RFRA was a proper exercise of Congress' remedial or preventive power.¹⁹⁶ It prevented and remedied laws which were enacted with the unconstitutional object of targeting religious beliefs and practices.¹⁹⁷ The Court found this argument unconvincing, stating that although preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved.¹⁹⁸ The Court found this congruence lacking between the means and the ends of the RFRA.¹⁹⁹ The Court found the RFRA to be a substantive change in constitutional protections rather than remedial or preventive legislation.²⁰⁰

Finally, the Supreme Court held that the RFRA's attempt to redefine the standard for judging constitutionally-protected religious freedoms as set forth in *Employment Division v. Smith* was an unconstitutional attempt to use Section Five of the Fourteenth Amendment to "control cases and controversies."²⁰¹ The Court held that Congress' power under Section Five did not authorize it to pass "general legislation upon the rights of the citizens."²⁰² Furthermore, the Court held that Congress may not define the meaning of the First Amendment's "free exercise" clause, and may not by general legislation impose its definition of free exercise on the States.²⁰³

VII. CONCLUSION

The Supreme Court's decision in *City of Boerne v. Flores* was criticized by many.²⁰⁴ One commentator suggested that the Boerne opinion was "an almost ungracious disparagement of the purposes and objectives of the Religious Freedom Restoration Act."²⁰⁵ Supporters of the Boerne opinion argued that "RFRA tried to turn the First Amendment on its head" by saying that the Fourteenth Amendment gives Congress "a positive right" to protect free exercise of religion by "appropriate legislation."²⁰⁶ The Boerne decision drove Senators Orin Hatch and Ted Kennedy,

¹⁹⁵*Id.* at 520.

¹⁹⁶*Id.* at 529.

¹⁹⁷*Id.*

¹⁹⁸*City of Boerne*, 521 U.S. at 530.

¹⁹⁹*Id.*

²⁰⁰*Id.* at 532.

²⁰¹*Id.* at 536.

²⁰²*Id.* at 524.

²⁰³*Id.* at 536.

²⁰⁴*See, e.g.,* David G. Savage, *High Court Overturns Religious Freedom Act Ruling: Justices Say Congress had No Authority to Pass Law, Which Requires Government to Bend Rules to Accommodate Church Members' Practice*, L.A. TIMES, June 26, 1997, at A1 (stating that "[t]he least dangerous branch of government has turned out to be the most dangerous for those who value religious freedom" and that the *Boerne* opinion would "go down in history . . . among the worst mistakes [the] Court has ever made."

²⁰⁵Robert F. Drinan, S.J., *Reflections on the Demise of the Religious Freedom Restoration Act*, 86 GEO. L.J.101 (1997).

²⁰⁶Paul Clark, *The Court and States' Power*, WASH. TIMES, July 18, 1997, at A21.

and Representatives Charles Canady and Jerold Nadler to introduce new legislation that would reinstate the “compelling state interest” test.²⁰⁷ This legislation came to be known as the Religious Liberty Protection Act, and the constitutional justifications for it were Congress’ spending power and the commerce clause.²⁰⁸

Like its predecessor, the Religious Freedom Restoration Act, the Religious Liberty Protection Act is a quite controversial piece of legislation. The spending power reliance in the RLPA is sure to cause problems. The only way for a state or local government to avoid RLPA’s mandate would be to forgo all federal financial assistance. Under *South Dakota v. Dole*, this can be viewed as a “financial inducement so coercive that it passes the point at which pressure turns into compulsion.”²⁰⁹ Such an inducement was held unconstitutional in that case.²¹⁰ The RLPA gives states only two options: take federal funds with the RLPA liability, or take no funds at all. These two options may easily be viewed as having reached the point where pressure turns into compulsion. The commerce clause justification for the RLPA is also flawed. *United States v. Lopez*²¹¹ precludes the RLPA’s reliance on the commerce clause. The commerce clause is a poor way to justify religious protection, as those religious practices with little or no commercial component would not be protected.²¹² Furthermore, there will be many cases in which the effect on commerce can’t be proven, and will fall outside of the RLPA protection.²¹³

The Religious Liberty Protection Act also poses an Establishment Clause problem. By protecting religions that affect commerce, and not protecting those religions that do not, the RLPA is, in fact, an Establishment of religion. It favors one religion over another. As the Supreme Court pointed out in *Larson v. Valente*, “the clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”²¹⁴ By protecting religions with a commercial component, and not protecting religions with little or no commercial component, the RLPA is “officially preferr[ing]” one denomination over another, in violation of *Larson v. Valente*.²¹⁵

Claims under the Religious Liberty Protection Act may be used to defeat civil rights. Defendants in civil rights cases will likely be able to use religious free exercise claims as a defense under the RLPA. Landlords may be exempt from fair housing laws by claiming that their religious beliefs prohibit them from renting to unmarried couples or homosexuals. The American Civil Liberties Union, an initial

²⁰⁷Kristian D. Whitten, *Conditional Federal Spending and the States’ “Free Exercise” of the Tenth Amendment*, 21 CAMPBELL L. REV. 5 (1998).

²⁰⁸*Id.*

²⁰⁹483 U.S. 203 (1987).

²¹⁰*Id.*

²¹¹514 U.S. 549 (1995).

²¹²Kristian D. Whitten, *Cracks in the Church Wall: Religious Liberty Protection Act Would Violate Establishment Clause*, LEGAL TIMES, July 26, 1999.

²¹³*Id.*

²¹⁴456 U.S. at 244.

²¹⁵*Id.*

author of the Religious Liberty Protection Act, now opposes the bill unless an amendment is added making it clear that religious claims may not be used to defeat civil rights laws.²¹⁶

In its last attempt to pass legislation to protect religion, Congress was overruled by the Supreme Court. The Religious Freedom Restoration Act, the predecessor of the Religious Liberty Protection Act, was Congress' first attempt to protect religious exercise.²¹⁷ The RFRA was premised on different constitutional grounds than the RLPA, but its goals were much the same.²¹⁸ In 1997, the Supreme Court struck down the Religious Freedom Restoration Act in *City of Boerne v. Flores*.²¹⁹ The Religious Liberty Protection Act appears to be an attempt by Congress to pass almost identical legislation using different constitutional grounds.

If it is passed by the Senate and signed into law by the President, the Religious Liberty Protection Act is sure to face a Supreme Court challenge, just as the Religious Freedom Restoration Act did. The RLPA is likely to create unintended results, such as giving official preference to certain religions at the expense of others, forcing states to forgo federal financial assistance, and adversely impacting the enforcement of civil rights laws. The Religious Liberty Protection Act places a heavy burden on governments, which are forced to prove a "compelling governmental interest" for any act or measure that may be viewed as burdening religion, even in the case of laws of general applicability. Furthermore, the RLPA gives religions a legal tool to fight nearly every law that a state or local government might pass. A possible solution to the problems sure to surface if the RLPA passes the Senate and is signed into law is for Congress to focus on individual areas where burdens on religious conduct exist, rather than passing sweeping legislation such as the Religious Liberty Protection Act. As the RLPA stands now, a whole host of challenges are likely to be brought should the legislation become law, including challenges to the commerce and spending constitutional justifications for the bill. As one constitutional scholar has noted of the RLPA, "This bill is an unvarnished request from religious lobbyists to permit religious individuals and institutions to break a wide variety of laws."²²⁰

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²¹⁶Religious Liberty Protection Act: Hearings on H.R. 1691 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 106th Cong. (1999) (statement of Christopher E. Anders, Legislative Counsel, American Civil Liberties Union).

²¹⁷42 U.S.C. § 2000bb (1994).

²¹⁸Both the RFRA and the RLPA attempt to revive the "compelling governmental interest" standard in lieu of the standard set forth in *Employment Division v. Smith*, 494 U.S. 872 (1990). Both prohibit state or local governments from substantially burdening religious exercise unless the government has a compelling interest and is using the least restrictive means to accomplish that interest.

²¹⁹521 U.S. 507 (1997).

²²⁰*Religious Liberty Protection Act: Hearings on H.R. 1691 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. (1999) (statement of Marci A. Hamilton, Yeshiva University, Benjamin N. Cardozo School of Law).