How much protection does religion need?

by Marci A. Hamilton in the July 15, 1998 issue

In June Congress held hearings on the Religious Liberty Protection Act of 1998 (RLPA). The new bill represents an attempt to breathe new life into the Religious Freedom Restoration Act (RFRA), which was declared unconstitutional by the Supreme Court a year ago. Like RFRA, RLPA aims to correct the Supreme Court's 1990 ruling in *Employment Division v. Smith*, which critics believe rendered an incorrect interpretation of the Constitution's free-exercise-of-religion clause.

In the *Smith* case, the court held that state-paid drug counselors who had lost their jobs for using peyote--an illegal narcotic--could be denied unemployment compensation benefits even though they had used the drug as part of a Native American religious service. In a now-famous formulation, the court declared that the Constitution does not require government to make exceptions for religious conduct if the law regulating the conduct is "generally applicable" and "neutral." The court added that extreme care should be taken whenever a law discriminates against religion, and that though it is not constitutionally required for government to accommodate religious conduct, government could accommodate such conduct in particular circumstances.

In the debate generated by *Smith* these details have been ignored. Religious lobbyists have been most rankled by *Smith's* general holding. Their arguments run something like this: We live in a society of pervasive regulation in which bureaucrats run a vast number of government programs and implement many laws. These bureaucrats are either indifferent or hostile to religion; therefore religions need extra protection in order to get a fair shake when general laws substantially affect (or, in legal terminology, burden) religious conduct. Religious lobbyists cite as evidence zoning laws that make it difficult for churches to expand or move; laws requiring autopsies that offend certain religious groups; and school dress codes that fail to accommodate religious sensitivities and beliefs.

The Coalition for the Free Exercise of Religion, an organization of 80 religious and civil liberties groups, led the fight for RFRA and now leads the battle for RLPA. The coalition recommends its own antidote to *Smith*. Whenever a person's religious conduct is constrained or limited by a generally applicable, neutral law, the government must accommodate that religious believer unless it can prove that the law addresses a compelling interest on the part of the government. Even then such a governmental interest must be satisfied through the least restrictive means.

The coalition claims that government has operated under such restraints for a long time and that RFRA would not have added any new benefits for religion. But in its decision invalidating RFRA the court stated explicitly that it had not employed the "least restrictive means" test in cases that involve generally applicable, neutral laws. The requirement that government prove that its law is the least restrictive means for each particular religious believer is in fact new and extremely burdensome. If constitutional, it would give religions new power to trump the day-to-day laws that govern everyone else. The "compelling interest" part of RFRA's test had been used in some cases, but by no means all of them. Prisons, for example, had not been required to prove that they had a compelling interest for a safety regulation that affected religious conduct, such as prohibiting the wearing of religious jewelry or regulating hair length.

RFRA would have subjected every local, state and federal law to the "compelling interest" and "least restrictive means" test. In the end, the Supreme Court struck the law on the grounds that it violated both the separation of powers and states' rights. According to the separation of powers, Congress may not reverse the Supreme Court's interpretation of the Constitution or amend the meaning of the free-exercise clause through simple majority vote. In light of states' rights, Congress cannot require local governments to abide by strictures that are extraordinarily more demanding than those of the Constitution. Rather, according to Section 5 of the 14th Amendment, Congress may "enforce" constitutional guarantees. Because RFRA attempted to create new rights rather than enforce existing ones, the court declared that Congress exceeded its own power in enacting it.

The new measure before Congress, RLPA, attempts to regain as much of RFRA's scope as possible. It mandates the same "compelling interest" and "least restrictive means" test (I will call this test "superstrict scrutiny") in cases in which government substantially burdens religious conduct. In a nod to the court's declaration that Congress could not create new constitutional rights against the states, RLPA is tied

not only to the 14th Amendment but also to Congress's powers to spend and govern commerce. Hence RLPA mandates superstrict scrutiny when religious conduct is substantially burdened in cases involving an activity that receives government financial assistance or cases involving commerce. In other words, wherever the federal government's dollars go, and wherever commerce exists, the RFRA/RLPA burden follows.

Like RFRA, RLPA would give churches more power than they have ever had in the political arena. According to RLPA, zoning laws (such as laws that limit building size to a proportion of the lot size, regulate on- and off-street parking, and require permits for building additions) must give way to claims of religious institutions or persons unless the burden on them is the least restrictive and the local government is preventing "substantial and tangible harm to neighboring properties or to the public health or safety."

Further, no local government may deny "religious assemblies a reasonable location in the jurisdiction." Presumably, this would mean that any religious group that comes into any overcrowded jurisdiction may insist on other entities moving out or insist that designated open space or a greenbelt be made available to them. Finally, no local government may exclude religious assemblies where nonreligious assemblies are permitted. This last requirement is ambiguous, but it apparently would prohibit local governments from designating commercial or residential areas off-limits to churches.

With RLPA in place, religions and religious individuals could trump laws that forbid discrimination on the basis of race, gender, sexual orientation, marital status and handicap. Although such laws probably meet the "compelling interest" part of the test, they are unlikely to be sufficiently tailored to be the "least restrictive means" of regulation for every religious believer. Testifying during the House hearings on RLPA recently, Marc Stern of the American Jewish Congress and a leader in the RLPA coalition stated that exempting the antidiscrimination laws from the reach of the bill would eventually gut the bill because advocates would begin to line up to have their set of special interests also excluded from RLPA's reach. He also stated that no religions discriminate on the basis of race. In short, the coalition will not agree to any language stating that antidiscrimination laws will not be trumped by RLPA.

Consider how the courts might apply the rules of RLPA: In one case decided under RFRA, Sikh elementary school children were permitted to attend school with small,

sharp knives attached to their legs as long as the scabbards were sewn shut. The court determined that the school had a compelling interest in safety, but that tailoring the scabbards (as opposed to refusing to permit the knives) offered the least restrictive means of accommodating these religious believers.

How would the RLPA standard apply when a religious believer beats (poisons, refuses medical treatment for or refuses to feed) his wife and children as part of his religion, and the family ends up at a shelter or county hospital that receives federal tax dollars? If the believer, in line with his religious beliefs, demands them back, the courts would have to determine which arrangement is the least restrictive means of serving the government's interest in the wife's and children's safety. It would be less restrictive to post a policeman in the house than to keep the family away from the believer, even though the societal cost would be immense. While RLPA attempts to alleviate all substantial burdens on religious conduct, it places no limit on the government's (and society's) burden in reaching the least restrictive means of accommodating every religious believer.

Because the "least restrictive means" test is a new entry in the calculus, we can't predict whether the courts would enforce it with vigor or water it down. Either way, we can be sure that RLPA would trigger tremendous amounts of litigation, especially because RLPA includes a provision that provides public funds for attorneys' fees--a virtual invitation to sue. When the government is sued more often, citizens pay through higher taxes to cover legal costs.

RLPA is as unconstitutional as RFRA, and perhaps even more insulting to its coordinate federal branch, the Supreme Court. If passed, it would lead to a new era of federal intervention in local decisions.

The factors that propelled the original success of RFRA--misinformation on the new standards and lack of information on their effects--have played instrumental roles in the progress of mini-rfras at the state level. To the extent that state legislators have been led to believe that the mini-rfras codify prior law, they have been willing to back the measures. Conversely, when legislators have understood that the "compelling interest" and "least restrictive means" test takes us into new legal territory, they have backed off.

Maryland's proposed mini-rfra was touted as a return to the pre-Smith standard, which had been embraced by the Maryland Supreme Court, and as long as it wore

the mantle of tradition it was welcomed. However, when legislators came to see the new issues raised by the new standard, the bill was withdrawn.

When the interests hurt by the legislation have made their views known, they have slowed the rush to enact statewide RFRAs. In Maryland, opponents included the American Academy of Pediatricians, child advocates concerned about child abuse and neglect, the Maryland counties organization, state prison guards concerned about prison safety, school boards, and various historical preservation groups. Each of these groups expressed concerns about the wisdom of forcing accommodation for each and every instance of religious conduct affected by the relevant laws. These organizations represent only the tip of the iceberg of groups likely to be affected by the law.

In California a single issue has come to the fore, one that has lain dormant in every other legislature that is considering a rfra measure: How will rfra interact with state and federal antidiscrimination laws? One of the principal aims of some RFRA advocates is to permit religious convictions to trump antidiscrimination laws affecting housing and employment. The California Assembly amended the original rfra language by adding the following phrase: “Nothing in this chapter shall be construed to alter existing protections against discrimination.” Some members of the coalition threatened to pull the bill altogether if the language was not deleted. For the time being, the Assembly’s language has been scrapped, and new language has been inserted that will permit the courts to weigh the laws forbidding discrimination against the interest in religious liberty on an ad hoc basis. At the same time, the California bill is coming under attack from the Department of Corrections and from women and children’s advocates who are concerned that the “least restrictive means” test will enable some institutions to refuse medical treatment for women and children in the name of religion.

The situation in Alabama reveals how far some groups will go to create leverage for churches against general, neutral laws. The Alabama legislature approved a state constitutional amendment that implements a standard even more burdensome than the standard proposed by RFRA. The federal RFRA required religious claimants to prove that a “substantial burden” was being placed on them. The Alabama rfra deletes the term “substantial,” in effect permitting those with insubstantial burdens on religious conduct to require the government to tailor its laws to their religion. The referendum will be put to the people this fall.

Passage of such laws will only be the beginning of the journey for statewide RFRAs. Inevitably they will face constitutional challenges. Like the federal RFRA, the state rfras are likely to be seen as violating the separation of powers between the legislature and the judiciary. Such laws also are vulnerable to the charge that they impermissibly establish religion by giving it a legal weapon no nonreligious entity can obtain and by encouraging greater entanglement between church and state. It will be years before we understand their actual effect or know their constitutionality for certain. In states like Maryland, the expense seems utterly wasted given that the state courts have interpreted the state constitution to require the pre-Smith standard. No legislative action is needed to preserve that standard.

In sum, the story of the Religious Freedom Restoration Act is far from over. Perhaps the greatest irony is that the fight for RFRA has reinvigorated the American Atheists, and they have become one of the best sources of information--along with the Freedom Forum--on issues relating to religious liberty legislation. For those interested in following further developments, the American Atheists and the Freedom Forum have outstanding Web sites.

Democratic Representative Jerrold Nadler of New York recently declared, in support of RLPA, that this society values religious conduct over other needs, such as uncongested streets. In my testimony to the House subcommittee on the Constitution, I responded that liberty is a zero-sum game. We do need to protect religious liberty. But to do so, we don’t need to insist that every religious claim trump every democratically enacted law. In the words of the framers of the Constitution, “individuals entering into society must give up a share of liberty to preserve the rest.” We need to locate the delicate balance of power between church and state that will maximize liberty for all. RLPA is not it.