Religious Liberty in America
A Rapid-Fire Overview

By Douglas Laycock

Three great sets of issues produce persistent controversy over the meaning of religious liberty in America: the funding of religiously affiliated activities; religious speech, with the allegation or reality of government sponsorship; and the regulation of religious practice.

Funding

The law on government funding of religiously affiliated activities has changed dramatically as the Supreme Court has struggled with two conflicting principles, announced in consecutive paragraphs in Everson v. Board of Education, 330 U.S. 1 (1947). First, the no-aid principle: “No tax in any amount, large or small, can be levied to support any religious activities or institutions.” Id. at 16. And second, the nondiscrimination principle: Government “cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Nonbelievers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.” Id.

In the beginning, the no-aid and nondiscrimination principles did not conflict; earmarked taxes for the support of colonial-era churches violated both principles. There is still consensus that government should not fund the religious functions of churches. But the modern cases are very different. Today, government is funding some secular services, and it offers the money on equal terms to religious and secular providers alike. In that context, the Court has to choose. Either government money will flow through to religious institutions or students in religious schools and patients in religious hospitals will forfeit instruction or services that the state would have paid for if the students and patients had chosen secular schools or hospitals.

The nondiscrimination principle prevailed until 1971, when the Court changed direction. In Lemon v. Kurtzman, 403 U.S. 602 (1971), the Court for the first time struck down a funding program, holding that states could not subsidize teachers’ salaries in religious schools. This no-aid principle predominated until 1985. But even in this period, it never completely triumphed. The Court restricted government aid to elementary and secondary schools but permitted aid to religious colleges. In K-12, states could provide books (but not maps) and bus rides to school (but not for field trips). Perhaps most absurd, the Court prohibited government-funded remedial instruction to low-income students in religious schools but permitted that same instruction in vans parked nearby. Few of the justices really believed in these distinctions, but some were unwilling to overrule earlier cases and some were still trying to preserve something of both competing principles: no aid and no discrimination.

Beginning in 1986, the Court progressively elevated the nondiscrimination principle and subordinated the no-aid principle. Since then, the Court has upheld six programs that permitted government funds to reach religious institutions. It has invalidated none.

Four Lemon-era decisions have been overruled in whole or in part.

The most important of the decisions since 1986 is Zelman v. Simmons-Harris, 536 U.S. 639 (2002), which upheld the use of vouchers to pay tuition at any public or private school, including religious schools. Zelman reasons that the government funding supports students, and their parents decide where to spend the money, and there is no state action in their choice of school. The Court also upheld long-term loans of equipment to religious schools if the equipment is distributed to all schools on the basis of enrollment. Mitchell v. Helms, 530 U.S. 793 (2000). Lemon’s
ban on direct cash grants to religious institutions is still good law, but in the school context, legislatures can deliver as much money as they are willing to spend in the form of vouchers.

Although Zelman largely eliminates federal constitutional barriers to voucher plans, these plans remain difficult to enact politically and are subject to state law challenges. Most state constitutions have detailed restrictions on financial aid to sectarian schools. Conflicting decisions of state supreme courts show that these clauses can be interpreted either way.

Some states aid secular private education but not religious education. It had been thought that extending these programs to religious schools would violate the federal Establishment Clause of the First Amendment, but after Zelman, that is clearly not true. And the Supreme Court generally says that government cannot discriminate against religion. Voucher supporters thought it followed that states violate the Free Exercise Clause when they fund private secular education but refuse to fund similarly situated religious education.

The Supreme Court rejected such a claim in Locke v. Davey, 540 U.S. 712 (2004). Under Davey, government funding of religious schools is permitted but not required, and with respect to funding, government is permitted to discriminate against religion. Despite the traditional suspicion of government discretion in constitutional law, government now can fund religious education, or not fund it, or fund it on condition that the student or the school comply with special regulations that apply only to those who accept government money. Parts of the opinion suggest that its rule is confined to programs for the training of clergy. Other parts suggest that it will apply generally to any exclusion of religious institutions from state funding programs.

For most of the twentieth century, this dispute over funding religious institutions was confined to schools. Religious hospitals and social service agencies received government funds with little controversy. That has changed with the Bush administration’s Faith-Based Initiative. These proposals increased the visibility of government grants to religious charities, and they

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**Paying for Praying**

**What’s Wrong with the Faith-Based Initiative?**

By Richard B. Katskee

Religious organizations have always been essential to the support network for the least well-off in American society. So what could be wrong with a government program that makes more money available to the soup kitchens, homeless shelters, and substance-abuse treatment programs that they provide? When it comes to President George W. Bush’s Faith-Based and Community Initiatives, the answer, sadly, is . . . quite a lot. Indeed, the Faith-Based Initiative is a case study for what goes awry when we dole out public money without regard for the constitutionally mandated separation of church and state.

Historically, religiously affiliated social-service providers made a simple choice. They could accept public funding and, in exchange, agree to deliver their charitable services as a secular organization would; or they could finance their charitable works entirely through private contributions, and run their programs as they pleased. Those choosing to accept government money— including such well-respected organizations as Catholic Charities, Lutheran Social Services, Jewish Family Services, and Habitat for Humanity—typically formed Section 501(c)(3) nonprofit corporations; made employment decisions based on merit rather than religious affiliation; helped all who demonstrated need according to neutral, secular criteria; and provided services without exacting religious obedience as the price for receiving a benefit. Those choosing instead to limit themselves to private funding remained free to commingle contributions with church assets; to hire and fire based on religious criteria; to provide services only to people of their own faith; and to condition a free meal or a bed for the night on the recipient’s willingness to accept religious instruction.

But in an effort to increase the number of faith-based social-service providers, the Bush administration has blurred the line between public and private, telling religious groups that they no longer need to choose between religious programming and public funding. Five years into this new system, it is becoming increasingly clear that the Faith-Based Initiative erodes faith in government while also corrupting religion and ill-serving the most vulnerable among us.

One of the most disturbing aspects of the initiative is that, under it, the federal government funds employment discrimination. A special exemption from Title VII (the federal law addressing employment discrimination) allows churches to hire and fire employees—even those without religious duties—based solely on whether, or how well, they adhere to the employers’ tenets of faith. The Bush administration has extended this exemption to all faith-based organizations—even those supported entirely by public money—thus giving them license to require applicants to pass religious tests or sign religious oaths to hold government-funded jobs.

What should be equally troubling is the lack of public oversight of faith-based organizations. The federal government now makes grants directly to houses of worship and unincorporated associations that do not file the federal tax returns that ordinary nonprofit entities must. Thus, the government essentially exempts grantees from the
introduced new protections for the autonomy of religious charities accepting government funds. Zelman suggests that there is no constitutional barrier to government funding of religious charities. But some social services may require direct grants to agencies instead of vouchers to the intended beneficiaries, because legislators will be reluctant to give vouchers to such vulnerable groups as neglected children, mentally ill persons, or drug addicts. And these programs are not so well funded that government can support all providers of services; government has to choose which agencies to support. So these programs may present questions of discretionary direct grants to religious charities, with the resulting risks of favoritism and religious discrimination.

There have been endless efforts to disguise government sponsorship of school prayer. In Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000), the Court held that school boards cannot conduct student elections to decide whether to have a prayer. Engel and Schempp involved prayer in classrooms, but more recently the Court has invalidated prayer at graduation in Lee v. Weisman, 505 U.S. 577 (1992), and at athletic events in Santa Fe. But in Marsh v. Chambers, 463 U.S. 783 (1983), the Court refused to invalidate prayer at legislative sessions, principally because of long tradition.

The secular side opened a second front when it began challenging government-sponsored religious displays. The Court held that public schools cannot display the Ten Commandments in

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**Speech**

In Engel v. Vitale, 370 U.S. 421 (1962), and School District v. Schempp, 374 U.S. 203 (1963), the Supreme Court held that public schools violate the Establishment Clause when school officials lead students in prayer or Bible reading. These cases provoked a religious backlash while simultaneously raising expectations that non-Christians no longer would be subjected to government-sponsored Christian religious observances. The result has been an escalating series of claims from both sides.

Critical safeguards of public accountability for use of public funds. And although the U.S. Constitution forbids using tax dollars for inherently religious activities or discriminatory programs, the Government Accountability Office recently reported that federal agencies have done such a poor job drafting regulations on the use of faith-based funding, and such a poor job monitoring compliance, that many grant recipients routinely violate the constitutional strictures and offer federal funds benefits to the needy on a pray-for-pay basis. See generally Government Accountability Office, Faith-Based and Community Initiative: Improvements in Monitoring Grantees and Measuring Performance Could Enhance Accountability 30–39, 53 (2006).

Nor do religious institutions fare any better under the Faith-Based Initiative. Nearly 400 years ago, Roger Williams, the Baptist leader who founded Rhode Island, warned that religious freedom would flourish only if religious institutions could choose their own precepts and priorities, and decide how best to pursue them, without governmental interference. But with taxpayer dollars now up for grabs, those institutions have substantial incentives to reorder their priorities—and perhaps even to distort the tenets of their faith—to increase their share of the spoils. The result is that they begin to cede important aspects of church governance to administrative agencies and officials whose preferences determine where the public dollars will flow.

The biggest losers of all under the Faith-Based Initiative are those whom the public funds were meant to help. Rather than making more money available to private social-service providers, the Faith-Based Initiative simply diverts government funds from the secular and religious organizations that for decades have used them to provide quality care to people of all faiths, now directing the money to less-experienced groups, many of which are also uninterested in reaching out to religiously diverse populations. When government shifts funds from organizations providing services on a nondiscriminatory basis to those favoring people who share their beliefs, members of minority faiths (whose religious institutions are least likely to compete successfully for government dollars) and the nonreligious are often left without reasonable options for obtaining badly needed services. In a nation founded on religious freedom, no one should have to submit to unwanted religious instruction or coerced prayer in order to receive the hot meal or medical care that taxpayer dollars provide.

James Madison and Thomas Jefferson, the architects of the First Amendment principle of church-state separation, warned that if religion became intermingled with government, both would suffer. One need look no further than the Faith-Based Initiative to see how prophetic that warning was. If the real motivation for this initiative is to recognize the value of religious institutions in serving the least well-off in American society, would we not do better to follow the path that Jefferson and Madison charted, letting institutions perform their charitable works as they see fit—free from the corrupting influences that come with the promise of easy public money—while ensuring that our tax dollars provide benefits to people of all faiths on equal terms?

Richard B. Katskee is assistant legal director at Americans United for Separation of Church and State in Washington, D.C. He litigates constitutional challenges brought under the Establishment, Free Exercise, and Free Speech Clauses of the First Amendment and is working on two cases challenging federal funding to faith-based organizations.

But it permitted a government-sponsored Nativity scene displayed alongside "secular" symbols of Christmas, such as Santa Claus and reindeer, in *Lynch v. Donnelly*, 465 U.S. 668 (1985). It similarly permitted a Christmas tree next to a menorah and a salute-to-liberty sign in *Allegeny County*.

Most recently, the Court decided that Texas can maintain a large granite monument displaying the Ten Commandments on the lawn of its state capitol, *Van Orden v. Perry*, 545 U.S. 677 (2005), but that two Kentucky counties cannot display the Ten Commandments on courthouse walls, surrounded by patriotic documents and a statement claiming that the Ten Commandments are the foundation of the Western legal tradition. *McCreary County v. ACLU*, 545 U.S. 844 (2005).

Only Justice Stephen Breyer supported both results. He approved the Texas display because it had been in place for forty years before it aroused controversy, which suggested, at least to him, that the display contained both a religious and a secular message and that the secular message predominated in public perception. He rejected the more recently installed Kentucky displays because county officials had stated clearly that their purpose in installing them was to promote Christianity.

The underlying conceptual dispute in these cases is about the scope of the government's obligation to be neutral. Must government be neutral toward religion only when it coerces someone's religious belief or behavior, or must government also be neutral in what it says about religion? The Court has found this distinction irrelevant to prayer. It has said that if there is a public event that many people attend for secular reasons, and someone offers a prayer at that event, government impermissibly is coercing persons who attend to participate in prayer. But that argument only goes so far; it is hard to find coercion in a passive display. So the Court also says government may not "endorse" a religious viewpoint; government must be neutral even in what it says about religion. This argument over endorsement, while at the heart of the dispute over government-sponsored religious speech, is largely irrelevant in other religious liberty contexts.

Although the Supreme Court tightly restricts government-sponsored religious speech, it vigorously protects religious speech by private citizens. Religious speakers have full rights of

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**The Faith-Based Initiative** Compassion in Action

By Jim Towey

When President George W. Bush launched his Faith-Based and Community Initiatives in 2001, the outcry from critics was immediate. "It's political!" "He's slying back the Religious Right!" "He's instituting a theocracy!" "He's tearing down the wall between church and state!"

Five years later, none of those dire predictions has turned out to be true. Federal court decisions have upheld Bush's effort as constitutional, very few federal grants have gone to conservative social service agencies, and Democrats are among the Faith-Based Initiative's biggest backers and beneficiaries. (Congressman Harold Ford of Tennessee and Senator Bill Nelson of Florida are among a large group of Democrats who have attended faith-based events with me.) According to one recent study, liberal African American churches have been bigger beneficiaries of the initiative than conservative ones.

**FINDINGS FROM A NATIONAL SURVEY** (Joint Center for Political and Economic Studies, Sept. 2006).

Further, the initiative has produced impressive, culture-changing results. Under its leadership, some addicts are finally allowed to choose where they receive treatment, instead of being required to participate in treatment programs that have failed them in the past. Children of prisoners have found loving mentors under a new program that utilizes small churches as shepherds of these hurting children. And the Compassion Capital Fund has delivered dramatic results and challenged the federal government's previous bias against small groups that do great works. To date, Bush has sought more than $1.3 billion to fund new faith-based and community programs, and Congress has provided $742 million, with more anticipated this year.

Just as important, the Faith-Based Initiative is taking root in the heartland of America. More than thirty governors, nearly half of them Democrats, have established faith-based offices, and more than one hundred mayors have followed suit. Florida Governor Jeb Bush has opened faith-based prisons, and although it is too early to know whether recidivism rates are lower among former inmates of these institutions, the data show that these prisons experience less violence than other state institutions. Willie Herenton, the Democratic mayor of Memphis, has been using faith-based groups to lower recidivism rates at the local level.

These gains have not come without a fight against the champions of a different religion—those preaching a secular orthodoxy—who had ruled the public arena for decades. Before regulatory changes instituted by this administration, the Metropolitan Council on Jewish Poverty in New York and other qualified faith-based groups had been told that they were not eligible for federal grants because of the religious names of their organizations.
free speech on government property as long as they speak without government sponsorship. They must be treated the same as other speakers, with no special access to facilities or to government-assembled audiences. This right to religious free speech extends even to elementary schools. Good News Club v. Milford Central School, 533 U.S. 98 (2001). The Court never has held, in any context, that religious speech by private actors is subject to restriction because of its religious content.

The Court's rules on religious speech have been remarkably stable for half a century. Yet from 1994 to 2005, these rules had the support of only two justices, Anthony Kennedy and Sandra Day O'Connor. Because the others were divided, Kennedy and O'Connor generally had six votes to prohibit government sponsorship of religious speech and at least five votes to invalidate government discrimination against private religious speech. But now O'Connor is gone. If President George W. Bush has accomplished what he hoped with his first two Court appointments, Kennedy is the new swing vote on these issues. And Kennedy had one important disagreement with O'Connor: he distinguished religious displays, which passersby may ignore, from religious exercises, which often trap a captive audience.

Many of the same political forces that support government funding of religious schools also support government-sponsored prayers. Why has the Court changed its mind on funding but not on prayers? The explanation again lies with Kennedy and O'Connor, who see these two sets of cases as very different. In the funding cases, each family gets a voucher, and each family can choose a religious or secular school. In the private religious speech cases, each speaker can decide what to say, and each person around him can decide whether to listen. But prayer at a government function requires a collective decision. Either there will be prayer for everyone, or there will be prayer for no one. If there is a prayer, there will be only one, and it will be in a form more consistent with some religious traditions than with others. No one gets to make an individual choice. By permitting vouchers and protecting religious free speech but restricting government-sponsored prayers, Kennedy and O'Connor protected the right of individual choice.

Practice

Regulation of religious practice is the most fundamental and least understood of the three sets of issues. Only in these cases can persons be threat-

Others were pressured to remove crosses or Stars of David, or to change the makeup of their boards of directors, to eliminate observable ties to religion. The great irony was that these advocates of strict separation of church and state had prided themselves on tolerance when in fact they were ruthlessly intolerant of helping faith-based groups and faith-filled people to provide publicly funded services. More irony: the charities that suffered the most under the old rules were the small, minority churches that were on the front line in fighting many of society's most difficult problems.

One of the vanguards of strict separation, Americans United for Separation of Church and State, was founded sixty years ago as Protestants and Other Americans United for Separation of Church and State because of its strident anti-Catholic bias. While the group's name has changed to be more politically correct, its anti-religious bias has not. When I left the Faith-Based Initiative's office earlier this year, the group said that I had waged an "unrelenting war against church-state separation."

Well, it was right about a war, but the one I fought was against those who would imprison the poor in federally funded programs that fail. From my perch at the White House, it seemed that the defenders of the status quo who routinely called for increased federal spending on social services never bothered to ask whether the groups getting the money ever delivered positive results affecting the lives of the poor. Did the addicts recover? Did the homeless find permanent housing? Did the destitute children receive quality services, or did we just throw money at them? Those questions were ignored by those who measured compassion by the size of block grants and who focused on giving more money to the same groups—e.g., the $7 billion Head Start program—without measuring effectiveness.

In establishing and implementing the Faith-Based Initiative program, Bush has been clear. He does not want church and state to become one. He has prohibited the use of federal funds to proselytize or discriminate, and groups that break these rules will lose their grants. He has made it clear that public money must go to the public purpose. But he also has opposed a different kind of religion-based discrimination—the kind that seeks to coerce a church-based organization to sell its soul and compromise its identity to receive federal funds and help more people. He has challenged the double standard that permits groups like Planned Parenthood to receive hundreds of millions in tax dollars each year while hiring according to their beliefs and tenets but prevents a faith-based program from exercising its civil rights to do the same.

Bush's Faith-Based Initiative will carry on after he leaves office. Why? Because the American people do not fear faith, and they know that the poor are seeking a type of help that the government can never provide—love and compassion, and companionship for the journey, and services that might transform a life.

Jim Towey was assistant to the president and director of the White House Office of Faith-Based and Community Initiatives from 2002 to 2006. He currently is president of St. Vincent College in Latrobe, Pennsylvania.
ened with civil or criminal penalties for practicing their religion.

From 1963 to 1990, the Supreme Court's position was that when a regulation burdens a religious practice, government must either exempt the religious practice from the regulation or show that applying the regulation to the religious practice is necessary to serve a compelling government interest. In *Sherbert v. Verner*, 374 U.S. 398 (1963), the leading case, the Court held that a state could not refuse unemployment compensation to a Sabbatarian who lost her job because she was unavailable for work on Saturdays.

Despite this rule, the Court did not actually exempt many religious practices from regulation. Prison and military regulations restricting religious practices in those settings were given much deference. And the Court found compelling interests in enforcing the draft, collecting taxes, and prohibiting racial discrimination in education. These findings of compelling interest were entirely plausible. In each of these cases, there were reasons of secular self-interest to adopt, or falsely claim, the religious belief that led to the exemption. But some commentators think that these interests were not compelling and that the Court was never serious about exempting religious practice from nonessential regulation.

In *Employment Division v. Smith*, 494 U.S. 872 (1990), involving a Native American employee fired and subsequently denied unemployment benefits because of his use of peyote in a religious ritual, the Court changed the rules. *Smith* introduced an additional requirement for litigants seeking religious exemptions: Is the law that burdens religious exercise "neutral" and "generally applicable"? If so, the burden on religion requires no justification. If not, the burden on religion is subject to the compelling interest test.

The Supreme Court has decided only one subsequent case under *Smith*. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), involved an Afro-Caribbean religion that sacrifices small animals to its gods. Hialeah argued that it had enacted a generally applicable ban on sacrifice. The church argued that the ordinances were a ban on killing animals for religious reasons, carefully drafted not to prohibit any killings of animals for secular reasons. The Court unanimously agreed with the church, holding that the ordinances were neither neutral nor generally applicable and that they served no compelling government interest.

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**Why has the Court changed its mind on funding but not on prayers?**

*Lukumi* gives substance to *Smith*’s requirements of neutrality and general applicability, but the meaning of those requirements remains sharply disputed. Government lawyers claim that nearly every law is neutral and generally applicable and that the only exceptions are laws designed deliberately to single out a religious practice. This argument has some support in *Lukumi*’s facts and in the *Smith* and *Lukumi* opinions. Lawyers for religious claimants say that to be generally applicable, a law must apply to all examples of the regulated conduct, with no, or very few, exceptions. This argument has some support in *Smith*’s facts, more support in the *Smith* and *Lukumi* opinions, and much support in the way those opinions distinguish *Sherbert* and other earlier cases that have not been overruled.

If the government lawyers are right, *Smith* provides very little protection for religious liberty. If the religious organizations are right, *Smith* provides substantial protection for religious liberty, but that protection is less inclusive, more complicated, and harder to invoke than the protection of *Sherbert*.

*Smith* provoked widespread disagreement among other branches and levels of government. In 1993, Congress enacted the Religious Freedom Restoration Act (RFRA) in an attempt to restore the *Sherbert* rule as a matter of statutory right. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court held RFRA, as applied to the states, beyond Congress's power to enact under Section 5 of the Fourteenth Amendment. But RFRA remains in effect as applied to the federal government. In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 126 S. Ct. 1211 (2006), the Court gave RFRA full and vigorous scope. In that case, involving religious use of a mild hallucinogen prohibited by the federal Controlled Substances Act, the Court unanimously held that the government had failed to prove its claim of compelling interest, and it unanimously rejected the government's claim that it need only point to congressional fact-finding in the course of enacting the Controlled Substances Act. The government's interpretation would have nullified RFRA's allocation of the burden of proof. The Court's holding makes RFRA an important protection for religious liberty.

Since 1992, thirteen states have adopted state RFRA's, and at least twelve states—arguably as many as seventeen—have interpreted their state constitutions in ways more consistent with *Sherbert* than with *Smith*. So, in one way or another, a majority of states have rejected *Smith*. But there has been remarkably little state court litigation under these provisions.

Most recently, in 2000, Congress also enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA). RLUIPA protects churches against local zoning laws that often make it difficult to buy or rent a place of worship. It applies only when the burden on religion would affect interstate commerce or when the zoning law is administered in an individualized

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enhance—rather than undermine—religious tolerance.

South Africa provides a good example of how a semipublic broadcasting authority can revamp its religious broadcasting system from one that entrenched discrimination to one that promotes cultural diversity as a national value.

Clearly, generating new forms of what scholars such as Appiah prefer to call “cosmopolitanism” requires a team effort. It therefore behooves us to play our humble parts, whether as religious or political leaders, educators, lawyers, media professionals, human rights activists, or simple laypersons, and whether as members of majoritarian or minority groups, to ensure that the call for more public expressions of religion in our ever-diversifying societies produces the most informed and equitable response possible.

Rosalind J. Hackett is a distinguished professor in the humanities and professor of religious studies at the University of Tennessee in Knoxville. She also serves as president of the International Association for the History of Religions.

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rather than a generally applicable way. These restrictions are designed to ensure that RLUIPA fits within specific congressional powers, thus avoiding a charge of excessive scope that led to RFRA’s invalidation. RLUIPA also protects the free exercise rights of prisoners in state prisons that accept federal funds. State officials have bitterly resisted RLUIPA. In *Cutter v. Wilkinson*, 544 U.S. 709 (2005), the Supreme Court unanimously rejected a claim that the prison provisions violate the Establishment Clause. States also are arguing in the lower courts, mostly unsuccessfully, that both the prison and the land use provisions exceed the scope of powers delegated to Congress.

**Continuing Controversy**

Deeply inconsistent constitutional visions make this area of law especially susceptible to the effect of new Supreme Court appointments. The cases on government religious displays are in jeopardy. Another Republican appointment could roll back some of the school prayer cases. Another Democratic appointment could overrule *Zelman* and invalidate vouchers again. *Smith* is more likely to be eroded than overruled; the disagreement there does not yet track party lines. Especially on the Establishment Clause issues, too many justices are interested in promoting or restricting religion. Not enough are interested in protecting liberty for believers and nonbelievers alike.

Douglas Laycock is the Yale Kamisar Collegiate Professor of Law at the University of Michigan Law School in Ann Arbor.

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**Religion and the U.S. Workplace**
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religious beliefs.

But the courts have recognized that a company may incur costs as well. For example, in *Farah v. Whirlpool Corp.*, No. 03-02-0424 (M.D. Tenn. Oct. 16, 2004), a jury upheld Whirlpool’s refusal to permit forty Muslim workers to leave the production line at the same time for evening prayers because doing so would create an undue hardship. Similarly, the U.S. Court of Appeals in Philadelphia recently found that a clinical testing company did not discriminate against an Orthodox-observant Jew when it refused to accommodate his religious prohibition against working on Saturdays because, although the plaintiff had made out a prima facie case of religious discrimination, the cost of revamping work assignments would have posed an undue hardship for the employer. *Aron v. Quest Diagnostics Inc.*, 174 Fed. Appx. 82 (3d Cir. 2006).

The Workplace Religious Freedom Act (WRFA) is a recently proposed federal bill that would increase employer obligations under Title VII. The proposed legislation would reverse the presumption announced by the Supreme Court in *Hardison*. Rather than finding an undue hardship wherever a de minimis cost arose, the WRFA would permit employers to decline to make requested accommodations only if they showed that they would incur identifiable increased costs, either in the form of lost productivity or in the cost of retaining, hiring, or transferring employees. In addition, the WRFA would ratchet up an employer’s obligations in accommodating an employee by requiring the employer to modify any job requirement that did not affect the “essential functions” of the job.

At the moment, however, neither the case law nor the statute provides sufficient guidance to employers regarding the scope of accommodation obligations. Given the proliferation of religions within the United States, and until further guidance is available, the safe bet for an employer is to treat each reasonable request for religious accommodation as presumptively legitimate and make an earnest effort to address the employee’s requested accommodation.

Samuel Estreicher is the Dwight D. Opperman professor of law at New York University School of Law and of counsel to Jones Day in New York City. Michael Gray is a partner in the Chicago office of Jones Day.