THE PEW FORUM ON RELIGION & PUBLIC LIFE

The Constitutional Status of the Religious Land Use and Institutionalized Persons Act

Cutter v. Wilkinson

On March 21, 2005, the Supreme Court will hear oral argument in *Cutter v. Wilkinson* (No. 03–9877), a case that tests the constitutionality of a major section of the Religious Land Use and Institutionalized Persons Act of 2000 (commonly known as RLUIPA). RLUIPA is an Act of Congress designed to protect the religious freedom of persons who are confined to state or local institutions, including prisons. The law also aims to safeguard the religious freedom of faith organizations that are subject to state and local land-use regulations. The *Cutter* litigation began as three separate lawsuits brought by a number of prisoners in Ohio who alleged that their religious liberties were being abridged by state correctional authorities. The case, however, has evolved beyond the mere application of RLUIPA to any particular person or religious practice and has become a fundamental challenge to the constitutionality of a major portion of the Act itself.

Cutter involves both the First Amendment prohibition on government establishment of religion and the delicate balance of powers between the federal and state governments (usually referred to as federalism). In the *Cutter* litigation, the state of Ohio argues that RLUIPA violates the Establishment Clause because the statute unduly favors religion. In the sections of RLUIPA at issue in the case, Congress requires that prison officials accommodate inmates' religious needs in certain cases, even if doing so means exempting the inmates from general prison rules. Since the law does not require prison officials to similarly accommodate inmates' secular needs or desires, Ohio claims that the statute impermissibly advances religion.

Cutter also raises complex issues of federalism. Ohio asserts that Congress may be constitutionally free to require the federal government to accommodate religion in federal prisons, but that it lacks the authority under the Constitution to impose RLUIPA and its scheme of religious exemptions on state and local governments. Ohio buttresses its federalism argument by invoking the original meaning of the Establishment Clause, which was first adopted in part as a limit on the power of Congress to interfere with states' authority over church-state matters. Seen in light of that original meaning, Ohio asserts, the Establishment Clause and the doctrine of federalism converge to bar Congress from imposing on the states a regime of federal legislative policies about religion.

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LEGAL BACKGROUNDER

An Overview of RLUIPA

The *Cutter* litigation includes only cases brought under Section 3 of RLUIPA, which addresses the religious liberty of institutionalized persons. This part of the Act provides that "No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution…." For purposes of Section 3, "government" means any branch of state or local government, and "institution" means any governmental facility in which persons are confined as a result of crime, delinquency or mental or physical illness. Section 8 of the Act defines "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."

RLUIPA attempts to address federalism concerns by limiting its applicability to those state and local institutions that receive federal financial assistance, or to cases in which the religious burden in question impacts interstate commerce. Although under the Constitution the states possess the primary authority to regulate in areas such as health, education and welfare, Congress often acts in those same areas, using its spending power and its authority to regulate interstate commerce.

RLUIPA provides that a state can limit religious freedom if it "demonstrates that imposition of the burden…(A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest." To put it another way, Section 3 of RLUIPA requires government officials to alleviate substantial government-imposed burdens on religiously motivated actions, unless the imposition of those burdens is necessary to achieve very important public purposes. Even when a state or local government's objectives are very important, however, Section 3 obligates it to look for ways to minimize the effect on religious exercise of accomplishing those ends. For example, with respect to an inmate who observes Jewish dietary laws, a prison may have to offer the option of a meatless diet if prison officials reasonably decide that providing kosher meat is too costly or inconvenient.

RLUIPA thus sets up a three-step inquiry with respect to any challenged restriction on religious practice in state prisons: 1) Does the restriction substantially burden religious activity? 2) If so, how important are the government's reasons for imposing this restriction? and 3) Even if the government's reasons are very important, is the government able to accommodate the practice to some extent without unduly compromising the state's objectives?

The Proceedings in Cutter

Jon Cutter is one of a number of prison inmates who brought claims under Section 3 of RLUIPA against prison officials in Ohio. Cutter is a member of the Satanist religion, which his brief in the Supreme Court describes as a religion that "emerged as a protest against Judeo-Christian spiritual hegemony" (Pet. Brief at 5). Other plaintiffs are members of the Wiccan religion, which the brief describes as polytheistic and related to "pre-Christian nature religions"; members of the Asatru religion, an ancient polytheistic religion that originated in Northern Europe; and members of the Christian Identity Church, which preaches racial separation. The plaintiffs allege that Ohio prison officials denied these inmates access to various religious books, periodicals, ceremonial items and opportunities for group worship.

The state of Ohio opposed all of the plaintiffs' complaints under RLUIPA, asserting that the law is unconstitutional on its face. In particular, Ohio argued that Congress is not free to regulate religious liberty in Ohio prisons under the federal Spending Power just because the state had accepted federal funds (approximately $25 million annually) to cover various expenditures made within the state prison system. Furthermore, the state argued that Congress is not free to regulate religious activity in Ohio prisons under the federal power over interstate commerce because the regulation has only a trivial impact on interstate commerce — in this case, the denial of the right to a small number of prisoners to

order various books and ceremonial items from out of state. Finally, Ohio argued that because RLUIPA mandates religious accommodation, it is a "law respecting an establishment of religion," and therefore is prohibited by the First Amendment.

As Ohio's constitutional assertions applied to all of the plaintiffs' claims under Section 3, the various cases were consolidated for hearing in the U.S. District Court for the Southern District of Ohio. This lower court rejected all of the state's arguments, and held that the Spending Power supported RLUIPA, and neither the Establishment Clause nor any other part of the Constitution barred the Act. Ohio then appealed to the U.S. Court of Appeals for the 6th Circuit, which reversed the lower court ruling and held that Section 3 of RLUIPA did indeed violate the Establishment Clause of the First Amendment. The 6th Circuit noted that under the Free Exercise Clause, as interpreted by the Supreme Court, courts have applied a very deferential standard to state-imposed restrictions upon the religious freedom of prison inmates. This standard, created by the High Court in *Turner v. Safley* (1987) and *O'Lone v. Estate of Shabazz* (1987), asks whether the restrictions are rationally defensible in light of relevant penological concerns.

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In sharp contrast, RLUIPA imposes a more rigorous, religion-friendly standard upon state prison officials, requiring that they show a "compelling interest" and "least restrictive means" for any "substantial burden" they impose on the religious freedom of inmates. Thus, the 6th Circuit argued, "RLUIPA's inevitable effect is to give greater freedom to religious inmates, and to induce non-religious inmates to adopt a religion." Religious inmates, for example, might be able to successfully gain access to a particular book by advancing a RLUIPA claim, while secular inmates may not be able to successfully gain access to the same book by advancing a claim under the free speech provisions of the First Amendment. These effects, the circuit court concluded, unconstitutionally favor religious inmates and religious activities over their secular counterparts.

Because it held RLUIPA to be in violation of the Establishment Clause, the circuit court did not reach the questions of whether Congress had exceeded its Spending Power or its Commerce Power in enacting Section 3. The 6th Circuit's ruling creates a conflict among the federal courts on the validity of RLUIPA, because four other U.S. Courts of Appeal (the 4th, 7th, 9th and 11th Circuits) have upheld Section 3 of RLUIPA against similar constitutional attacks.

Cutter and the other inmate-plaintiffs successfully petitioned the Supreme Court to hear their appeal. They argue that RLUIPA is within the power of Congress under Article I to spend for "the general Welfare of the United States." They also argue that RLUIPA does not violate the Establishment Clause because the Act legitimately lifts government-created obstacles to religious practice in prison. For example, prison grooming policies may forbid inmates to wear facial hair, even though some inmates' religious beliefs may require them to have beards. If these inmates prevail in the Supreme Court, and RLUIPA is upheld, their cases would then be remanded to the lower courts for application of RLUIPA to the specific facts of each of their cases.

In supporting RLUIPA's constitutionality, the inmate-petitioners are joined by a wide variety of individuals and groups of varying ideological stripes who have filed amicus briefs in support of the Act. These include, among others, the solicitor general on behalf of the United States; the American Civil Liberties Union; the National Association of Evangelicals; Americans United for

Separation of Church and State; the Becket Fund for Religious Liberty; the Baptist Joint Committee; the Coalition for Religious Liberty (a coalition of more than 50 groups devoted to civil rights and liberties); Senators Orrin G. Hatch (R-Utah) and Edward M. Kennedy (D-Mass.); and the states of New York and Washington. The briefs filed on behalf of these interests defend the constitutionality of the law on its face, without taking any position on whether the law should protect the particular claims of these inmates. A coalition of groups representing law enforcement and prison officials from around the U.S. has filed an amicus brief on Ohio's side of the dispute. Amicus briefs also have been filed by a group of eight states, led by Virginia, and a coalition of groups representing public officials involved in land-use issues.

Although the case does not directly involve Section 2 of RLUIPA, which protects land use of religious entities, a decision either way will have considerable significance for the constitutionality of Section 2. If the Court upholds Section 3 of RLUIPA in the prison context, the same reasoning would likely lead the Court to uphold Section 2 in the context of land-use regulation. But if a majority of justices find that Section 3 of RLUIPA violates the Establishment Clause, they would likely reach the same conclusion about Section 2. If, however, the Court strikes down Section 3 on federalism principles, Section 2 might nonetheless survive because of differences between the prison context and land-use law. Although prison regulations might not have a significant impact on interstate commerce, zoning and other laws concerning land use are more likely to have such an impact because they have an effect on markets for real property.

The Background of RLUIPA

Understanding how and why RLUIPA came to be enacted in 2000 sheds considerable light on the constitutional issues involved in *Cutter v. Wilkinson*. The Act was the culmination of a series of ricocheting events in the Supreme Court and Congress in the 1990s. Prior to 1990, the Supreme Court had adopted a religion-friendly rule in Free Exercise clause cases involving alleged government burdens on religious practice. The Court's most dramatic invocation of this religion-friendly rule occurred in 1972, in *Wisconsin v. Yoder.* This case involved a group of Old Order Amish who challenged a Wisconsin law requiring children to attend school until the age of 16. The Amish contended — with expert testimony to back them up — that educating their teenage children in the company of non-Amish children would undermine the ability of the Amish community to retain its cohesion and continuity. Because of this asserted burden on their religious community, the Amish parents argued that the Free Exercise Clause of the First Amendment protected their right to withdraw their children from school after the eighth grade.

In adjudicating this matter, the Supreme Court applied a constitutional standard highly solicitous of religious freedom. The Court held, following at least one earlier decision (*Sherbert v. Verner,* 1963), that the burden on the Amish parents' rights under the Free Exercise Clause could only be justified if it were "necessary to accomplish a compelling state interest." The Court was not persuaded that Wisconsin's education requirements met this standard because the Amish had proven that they could do an adequate job of educating their teenagers for an orderly and independent life in their own community. Accordingly, the Court ruled that the state must permit the Amish to withdraw their children from school after eighth grade.

Although in later cases the Court frequently found reasons not to apply this religion-friendly standard, it endured until 1990 when the Court decided *Employment Division v. Smith*. This case involved drug and alcohol counselors who had been fired by a drug rehabilitation center because they had used peyote for sacramental purposes at a ceremony of the Native American Church. After the state rejected their claims for unemployment compensation because they had been fired for willful misconduct, the counselors brought suit under the Free Exercise Clause.

Ultimately, the Supreme Court rejected their claim, and in doing so explicitly repudiated the "compelling interest" test advanced in *Yoder.* The *Smith* opinion, written by Justice Antonin Scalia, asserted that the Free Exercise Clause creates no right to religious exemptions from generally applicable legal rules. Instead, the Clause only protects religion from being singled out for discriminatory treatment. So long as religious practices are treated the same as non-religious ones, the rule in *Smith* instructs judges not to look at the particular burden that the law imposes on religion, and requires only that the law reasonably serve legitimate (rather than "compelling") state purposes. In short, the rule in *Smith* is far less protective of religious freedom than the standard employed by the Court in *Yoder.* Despite substantial criticism from dissenting justices and other commentators, the Court expressly reaffirmed the *Smith* principle in 1993 in a case involving a prohibition on the Santeria rite of animal sacrifice (*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*).

The Court's repudiation of the religion-friendly "compelling interest test" in *City of Hialeah* sent shock waves through faith communities and interest groups that focus on religious liberty.

Although the outcome in *Smith* was no surprise — few people expected that the Court would recognize a First Amendment right to use a hallucinogenic substance — the Court's repudiation of the religion-friendly "compelling interest test" in *City of Hialeah* sent shock waves through faith communities and interest groups that focus on religious liberty. After a period of intense and complex political negotiation, a broad coalition of these groups prevailed upon Congress in 1993 to overwhelmingly pass the Religious Freedom Restoration Act (RFRA), which purported to reinstate by legislation the "compelling interest" test for all acts of government (federal, state and local) that substantially burdened religious liberty. RFRA had its most profound impact in state prisons, where it produced a large volume of litigation (though a relatively small number of victories for inmates).

In 1997, the constitutionality of RFRA came before the Supreme Court in *City of Boerne v. Flores.* The case involved a land-use dispute between the City of Boerne, a Texas town that had landmarked a Catholic church within a historically significant neighborhood, and a local archbishop who wanted to enlarge the church in ways inconsistent with the full preservation of its historic character.

In a sweeping decision, the Supreme Court held that RFRA was unconstitutional as applied to the states. The primary ground of the decision involved federalism. The court acknowledged that Congress has power to "enforce" the guarantees of the 14th Amendment against the states, and thereby impose norms of religious liberty on state and local governments. Nevertheless, the Court concluded that Congress lacked power to impose upon state and local governments the same religion-friendly standard that the Court itself had just repudiated in *Employment Division v. Smith* and *City of Hialeah.* Among other things, the Court pointed out that Congress had offered no evidence that state or local governments were systematically imperiling religious liberty. Such findings might have shown that the Court's pre-*Smith,* religion-protective standard was in fact necessary to maintain religious freedom against state and local government intrusion.

The Court studiously avoided the City of Boerne's argument that RFRA, by singling out religious liberty for favorable treatment, violated the Establishment Clause by favoring religious over secular activity. Only Justice John Paul Stevens, in a concurring opinion, addressed this question, and he asserted that RFRA indeed was inconsistent with the Establishment Clause because it favored

religious over secular reasons in seeking relief from general laws. The Court mentioned, but did not rest its decision upon, an argument invoking separation of powers — that is, that Congress was not free to replace the Court's chosen rule of decision in Free Exercise cases (from *Employment Division v. Smith*) with a different and stricter rule of Congress' choosing.

The *City of Boerne* decision left RFRA intact with respect to the federal government. But by invalidating the law on the state level, the court left states and localities bound — as a matter of federal, not state law — only by the standard of *Employment Division v. Smith,* in which the religion-friendly "compelling interest" test has been replaced by the more government-friendly "legitimate purpose" standard. This result led the same coalition involved in the fight for RFRA to return to Congress with a proposal that eventually became the Religious Land Use and Institutionalized Persons Act of 2000.

In addition to the history of litigation and federal legislation on religious liberty since 1990, the Court in *Cutter* will confront its own uneven path in prior cases involving government accommodation of religion.

The legislative process that produced RLUIPA included some detailed testimony about the plight of religious liberty in two contexts — land use (typically, zoning and historic preservation) and the treatment of prisoners and other institutionalized persons. In both contexts, this testimony indicated that many state and local governments were insensitive to religious freedom and tended to discriminate against unpopular or unknown faiths. The architects of RLUIPA hoped that a federal statute that was narrower than RFRA, coupled with evidence suggesting real threats to religious freedom and equality in these two particular contexts, might save RLUIPA from the constitutional fate that RFRA had met in 1997. Thus far, RLUIPA has generated a significant amount of litigation with respect to both land use and the rights of inmates, although it is too early to tell if the statute has made any appreciable difference in the overall climate of religious freedom.

The Law of Religious Accommodation

In addition to the history of litigation and federal legislation on religious liberty since 1990, the Court in *Cutter* will confront its own uneven path in prior cases involving government accommodation of religion. "Accommodation" is a constitutional term of art, and it is most often used to refer to government policies that relieve religious persons or entities from burdens that government imposes or may impose on them. Various accommodations appear in the law of every state, including Ohio. For example, Ohio exempts ordained ministers from its prohibition on practicing psychology without a license, and exempts those with religious objections from certain vaccination requirements. Indeed, Ohio's state courts, as a matter of state constitutional law, have imposed the religion-friendly "compelling interest" test on actions of the state government that substantially burden religious exercise.

The Supreme Court's most favorable pro-accommodation decision, emphasized by the *Cutter* petitioners and those filing amicus briefs in support of them, is *Corp. of Presiding Bishop v. Amos* (1987). In *Amos,* the Court unanimously upheld a broad exemption for religious organizations from the federal prohibition on religious discrimination in employment. The exemption was first set forth in the Civil Rights Act of 1964, which, among other things, banned employment discrimination. While drafting that act, Congress recognized that such a law would interfere with the freedom of religious organizations to select members of their own faith

communities for positions of religious significance — such as clergy or leadership posts. Accordingly, Congress exempted such organizations from the statutory prohibition on religious discrimination with respect to the carrying out of their "religious activities." But even that exemption proved hard to administer, and led to litigation over which positions involved religious activities. (The *Amos* case itself involved a building engineer at the Deseret Gymnasium, a fitness facility operated by the Church of Latter-day Saints as part of its overall vision of the well-being of its members.) To spare religious entities the burden of such litigation, Congress amended Title VII in 1972, expanding the exemption to cover hiring for all activities, rather than just "religious activities," of religious organizations.

The Court in *Amos* upheld this standard, stating that any regulation of the use of religious criteria in hiring by religious entities might threaten their religious freedom. It also held that Congress should be given room to make reasonable policies designed to relieve government-imposed burdens on that freedom. Relieving those burdens, the Court asserted, does not put the government in the constitutionally impermissible position of advancing religion; it simply permits religious entities to advance religion themselves. Thus, the Court concluded that the legislative exemption fell in a zone of permission between what the Free Exercise Clause might require and what the Establishment Clause would forbid. Within that zone, legislators are free to accommodate religion.

Two years later, however, in *Texas Monthly, Inc. v. Bullock* (1989), a narrowly divided (5–4) Court ruled unconstitutional a Texas law that exempted religious periodicals from a sales tax that applied to all other publications. In a plurality opinion, Justice William Brennan asserted that the Texas law impermissibly favored religious over secular publications. His opinion distinguished *Amos* on the ground that requiring religious organizations to pay the sales tax would not come into conflict with their religious tenets, and therefore would not significantly burden them. Because the tax did not substantially burden religious organizations, a law that exempted them from the tax — but did not exempt their secular counterparts — violated the Establishment Clause by favoring religion.

In addition to the ruling in *Texas Monthly,* the Court has suggested certain limits on laws that pressure non-governmental employers to make religious accommodations for their employees. In these cases, the Court has expressed concern that such laws may violate the Establishment Clause by effectively forcing some employees to subsidize the religious freedom of others. For example, in *Estate of Thornton v. Caldor* (1985), the Court ruled that a state may not require non-governmental employers to accommodate all employees' requests for a day off on their Sabbath. Such a requirement, the Court concluded, forced those who do not observe the Sabbath to bear the costs of their fellow employees' Sabbath observances.

The Competing Arguments in Cutter

As already noted, *Cutter* will be litigated against a complex backdrop of High Court decisions regarding permissible accommodation and the recent history of conflict between Congress and the Supreme Court over federal legislation on religious liberty. In addition, the case is connected to a broader tendency within the Supreme Court to insulate the states against what some justices perceive as congressional intrusion into areas of state authority. These themes — religious accommodation, separation of powers and the federal-state balance — swirl through the arguments over the constitutionality of RLUIPA.

OPPONENTS' ESTABLISHMENT CLAUSE ARGUMENTS

Ohio generally contends that RLUIPA, as applied in prisons, has the primary effect of advancing religion, because the Act is not religiously neutral, and creates "powerful incentives for religiosity" and an excessive entanglement between government and

religion. In a related argument, Ohio asserts that the Establishment Clause and the doctrine of federalism, read together, limit congressional authority to impose accommodations on the states. That is, even if Congress may constitutionally impose RLUIPA's rules on the federal prisons, and even if a state may impose similar rules of accommodation on its own prisons, Congress does not have the authority to impose such rules on state institutions.

This logic is derived from the history of the Constitution, which originally left the regulation of religion up to the states. Ohio argues that the Establishment Clause originally prohibited Congress from interfering with state regulation of religion, as well as from "declar[ing] a national religion." And while states have since become subject to the First Amendment's Establishment and Free Exercise Clauses, the Constitution leaves room for "play in the joints" between the two clauses. Legislative accommodations of religion typically operate within that zone of play, but Ohio contends that only the states themselves, rather than Congress, may dictate where in that zone the state's policy must fall.

Second, Ohio also asserts that RLUIPA is overly broad, in that it is not limited to a particular set of prison practices, such as respect for religious dietary laws or willingness to permit prisoners to possess religious texts. Instead, the Act imposes a standard that applies across the entire range of disputes relating to requests for accommodation. Such requests frequently trigger considerations of security, and therefore represent a substantial federal intrusion on state autonomy. For example, permitting white supremacist literature in prisons in the name of religious freedom, as RLUIPA may require, could reinforce patterns of racial violence and racial gang warfare. An accommodation of this type threatens prison security, Ohio asserts, and consequently creates dangers for guards, other inmates and the state itself.

Moreover, RLUIPA's religion-protective standard, echoing RFRA and the Court's pre-*Smith* decisions, permits refusal to accommodate only if the state can demonstrate that denial of the inmate's requests "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that…interest." Uncertainty among state officials about where to draw lines under these overly broad standards will lead to costly litigation, risky practices of accommodation, or both, Ohio argues. Even if security considerations present a compelling interest to deny the inmate's requests, the state asserts, the statutory requirement that the state use "the least restrictive means" to further that interest will effectively force the state to compromise its prison security. For example, a prisoner might for religious reasons seek an exemption from a prison rule forbidding the wearing of long hair. To the state's argument that long hair may permit concealment of weapons, a court might respond that the state must permit the religious exemption and, if necessary, frequently search the long hair of inmates entitled to the accommodation. To be forced by RLUIPA into such an accommodation of religious freedom, Ohio argues, might require prisons to spread already overtaxed resources or to endure greater security risks.

DEFENDERS' ESTABLISHMENT CLAUSE ARGUMENTS

In general, RLUIPA's defenders assert that the Act fits within the existing law of constitutionally permissive accommodation, and that it is not nearly so burdensome to states as Ohio claims. These supporters respond to opponents' arguments in several ways.

First, RLUIPA's defenders argue that the statute does not violate the Establishment Clause. The Act's supporters emphasize that it is limited to the relief of "substantial burdens." It therefore fits comfortably within the parameters of *Amos,* which upheld legislation that relieved a significant burden on religious organizations (in this case, the right to hire people of the same faith background), rather than the anti-accommodation ruling in *Texas Monthly,* which struck down a sales tax exemption that the Court did not see as similarly burdensome. In addition, supporters of the Act argue that, unlike the statute at issue in *Thornton v. Caldor,* RLUIPA does not give inmates an absolute right to accommodation, and lifts governmentally imposed (as opposed to

privately imposed) burdens on religious exercise. In the past, courts have frequently found that inmate complaints, such as the inability to worship with a particular religious group, do not rise to the level of "substantial burden" on religious freedom. Thus, many complaints will not trigger the Act's protections, and prison officials will be under pressure to relieve only those burdens which significantly impede religious observance.

Second, RLUIPA's defenders justify the general language of Section 3 by referring to the pervasive problem of religious freedom in any prison system. Because inmates are so heavily restricted in their freedom, many prison rules — concerning diet, personal appearance, reading materials and other possessions, or associations among inmates — present potential issues of religious liberty. Moreover, unpopular religions (such as the Satanism or white supremacist faiths presented in this case) are likely to be disfavored in a situation of highly discretionary accommodations, that is, one in which prison officials may choose, practice by practice, when to relieve inmates of particular burdens. Thus, RLUIPA's generic protection is necessary in order to prevent discriminatory patterns of accommodation.

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Third, RLUIPA's defenders argue that the law as implemented does not unduly compromise prison security. Courts frequently conclude that security concerns are "compelling interests," and courts understand that most accommodations in prison raise concerns of security. Courts will therefore impose only those accommodations that do not threaten such concerns. For example, courts have been much more receptive to requests for dietary accommodations, which may involve cost and convenience but not security, than they have been to requests for religious implements (such as religious jewelry) that may double as weapons. These trends were evident in cases brought under RFRA and under the Free Exercise Clause, and are likely to play a significant role in RLUIPA litigation as well.

Fourth, RLUIPA's defenders question the sheer novelty of the state's argument about the convergence of federalism and Establishment Clause doctrines. There is only one Establishment Clause, and under current and longstanding law, it applies with equal force to all levels of government. If, without violating the Establishment Clause, states may enact their own generic religious liberty legislation (as some have), and if Congress may impose RFRA on the entirety of federal government activities (within and without prisons), then Congress should be free to impose the same degree of accommodation on the states. In sum, the historic character of the Establishment Clause — originally designed in part to prevent federal interference with state-established churches — should not limit the contemporary Congress any more than it limits today's courts.

ADDITIONAL FEDERALISM ARGUMENTS

Even if the Court rejects Ohio's assertion that the Establishment Clause protects states against congressionally dictated accommodations of religion, the Court may choose to confront other arguments relating to federalism in *Cutter.* Congress is a body of enumerated powers, meaning that it may only legislate as authorized by one or more of the Constitution's grants of such powers. The logic behind the concept of enumeration is driven by considerations of federalism. According to the 10th Amendment, which reflects these considerations, those "powers not delegated to the United States…nor prohibited by [the Constitution] to the States, are reserved to the States respectively, or to the people."

Does Congress have power under Article I, or any

other power-granting provisions in the Constitution, to enact a law that regulates religious freedom in state institutions? The defenders of RLUIPA assert that Congress indeed has such authority, and locate it either in the power to spend "for the general Welfare of the United States" (Art. I, sec. 8, cl.1), or in the power to regulate commerce "with foreign Nations, and among the several States, and with the Indian tribes" (Art. I, sec. 8, cl.3). The 6th Circuit did not reach these questions, and the Supreme Court, if it reverses the 6th Circuit, may simply remand for further consideration. Ohio, on the other hand, is appealing to this lack of affirmative federal power as an alternative ground upon which the Supreme Court can affirm the decision of the 6th Circuit, and so the Court may address these questions in order to bring finality to the litigation.

Of the two, the Commerce Power seems the weaker candidate to support Section 3 of RLUIPA. Although for many years the Court's interpretation of the Commerce Power made it appear virtually limitless, the Rehnquist Court has cut back the Commerce Power in several cases involving intrastate, non-economic behavior. In the unlikely event the justices reach this question in *Cutter,* they may see RLUIPA as controlling purely local, non-economic interactions between officials and prisoners, rather than as regulating economic transactions (such as purchasing books) into which prisoners hope to enter, and therefore not within the scope of the Commerce Power. On the other hand, RLUIPA itself requires a showing in each case that the government-imposed burden, or relief of that burden, will affect interstate, foreign or Indian commerce. That requirement may well be enough to preserve the constitutionality of RLUIPA on its face, since the Supreme Court has never invalidated a federal statute that requires such proof of commercial consequences on the facts of each case.

In contrast to recent developments under the Commerce Power, the Court has long viewed the Spending Power as expansive, and has imposed no recent limits on it. Since its last invalidation of a spending condition almost 70 years ago, in *U.S. v. Butler* (1936), the Court has repeatedly upheld an extremely broad power of Congress to effectuate national policy by imposing conditions on the receipt of federal funds. At least part of the rationale for the wide scope of this authority is that states, like private parties, are always free to escape such conditions by refusing the funds. The most recent and striking example of the breadth of this power appeared in *South Dakota v. Dole* (1987), in which the Court ruled 8–1 (with only Justice Sandra Day O'Connor dissenting) that Congress could condition federal highway funds on state enactment of laws that raised the drinking age to at least 21. All that the Court's doctrine requires is that the challenged condition be germane to the purpose of the expenditure to which it is attached, a requirement satisfied in *Dole* by the nexus between the drinking age and highway safety.

Ohio receives funds for its prisons from a variety of federal funding streams, including prison construction funds, funds for meals for youthful offenders and funds for unrestricted use in prisons. Ohio argues that RLUIPA's Section 3 is not germane to the particular purposes for which these funding streams have been created, because the funding programs are not concerned with religious practice. But the Supreme Court has been willing to uphold, in other contexts, protections of civil rights that cut across a broad range of state programs that receive federal monies for more particularized purposes. For example, the Supreme Court has upheld a federal statute that prohibits racial discrimination in any "program or activity," state-run or private, that receives federal funds.

Section 3 of RLUIPA mirrors these other federal statutes that impose conditions of nondiscrimination on any "program or activity," broadly defined, that benefits from the receipt of federal funds. As such, the section is arguably germane to the overarching concern of the federal government that its funds not be used in a program in which religious liberty is unreasonably burdened, or in which official discretion facilitates religious discrimination. Section 3 of RLUIPA rests comfortably on a lengthy and legally successful history of conditioning federal expenditures on state compliance with civil rights norms.

Thus the Court would have to break considerable new ground to hold that Section 3 of RLUIPA exceeds the affirmative scope of congressional power to condition its spending for the "general Welfare," as authorized by Article I.

Finally, Ohio has asserted that Section 3 of RLUIPA unconstitutionally "commandeers" state officers to act as agents of the federal government, in violation of the Constitution's 10th Amendment. In *Printz v. U.S.* (1997), the Court invalidated the federal requirement in the Brady Gun Control Act that state officers perform background checks on prospective gun buyers to insure that they are not purchasing weapons in violation of federal law. A closely divided Court ruled that state officers could not be made subject to affirmative federal duties in that way. But, as the defenders of RLUIPA argue, the law struck down in *Printz* did not rest on the Spending Power, and therefore gave the states no option by which they could escape these duties by refusing federal funding. Moreover, RLUIPA does not command any particular practice or effort by state officers. It merely requires religious accommodation, with the state retaining options about how it may accommodate when it imposes "substantial burdens" on religious liberty that it cannot justify under RLUIPA. So understood, defenders argue, RLUIPA does not commandeer officers of the states any more than does federal civil rights law, which courts have long been willing to enforce against the states.

Cutter v. Wilkinson presents almost all of the justices with hard choices.

The Justices' Dilemma

Cutter v. Wilkinson presents almost all of the justices with hard choices. Justices Scalia and Anthony Kennedy, as well as Chief Justice William Rehnquist, have consistently favored legislative accommodations of religion. Yet all three also have been inclined to protect state governments against what these justices see as intrusions by Congress on state autonomy. RLUIPA is both a generic accommodation statute and a federal regulation of state government. Although Justice Clarence Thomas also has expressed accommodationist sentiments on a number of occasions, he has argued more strongly than anyone else on the Court that the Establishment Clause should restrict states less than it restricts the federal government in making policy on the subject of religion. He might therefore be receptive to Ohio's argument that the Establishment Clause limits the power of Congress to regulate state policy involving religious accommodation. Justice O'Connor is the justice most inclined to rein in the Spending Power, and she alone may be unwilling to accept the invocation of it in this case.

Still other justices, including most prominently David Souter and Ruth Bader Ginsburg, have been inclined to give Congress a wide berth in regulating the states but have been skeptical of the religious preferentialism that accommodations of religion might seem to present. These justices may see particular applications of RLUIPA as constitutionally troublesome, especially if they shift burdens from some prisoners to others, in this case, non-religious inmates, or create incentives for pseudo-religiosity among prisoners looking to "game" the system.

Some members of the Court, including Justices Souter, O'Connor and Stephen Breyer, have expressed doubt about the Court's decision in *Employment Division v. Smith,* which repudiated the religion-friendly "compelling interest" standard. However, when the Court heard a federalism-based challenge to RFRA, which, after all, reinstated the very same religion-friendly standard rejected in *Smith,* none of these three justices were willing to rule that Congress could compel the states to obey RFRA's rules.

RLUIPA's basis in the Spending Power, which gives states the option of refusing federal prison

funds and thereby escaping some or all of the Act's obligations, may allow these same justices to uphold this newer law, although that is not certain. Indeed, only the vote of Justice Stevens, who is highly likely to follow his separate opinion in *City of Boerne* and conclude that RLUIPA impermissibly favors religion, seems entirely predictable in this case. For every other justice, RLUIPA will trigger a variety of conflicting sensitivities.

If, in spite of these conflicting intuitions, the court ultimately strikes down Section 3 of RLUIPA, the justices would likely be breaking new ground. One possibility rests upon Ohio's argument that the Establishment Clause has a heretofore unacknowledged federalism component that Congress must respect. A ruling for Ohio on this ground would touch all federal regulation designed to control the state's treatment of religious matters, and might have consequences, for example, for President Bush's faith-based and community initiative. Even more significant, the Court could limit, for the first time since 1936, the scope of permissible conditions on federal spending, calling into question the validity of a host of different, and in some cases very important, federal statutes. Given the sweeping implications for civil rights and other areas that such a ruling would engender, however, a decision limiting the use of the Spending Power seems highly unlikely.

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