

THOMAS, J., concurring

SUPREME COURT OF THE UNITED STATES

No. 03–9877

JON B. CUTTER, ET AL., PETITIONERS *v.* REGINALD
WILKINSON, DIRECTOR, OHIO DEPARTMENT OF
REHABILITATION AND CORRECTION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[May 31, 2005]

JUSTICE THOMAS, concurring.

I join the opinion of the Court. I agree with the Court that the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) is constitutional under our modern Establishment Clause case law.¹ I write to explain why a proper historical understanding of the Clause as a federalism provision leads to the same conclusion.²

¹The Court properly declines to assess RLUIPA under the discredited test of *Lemon v. Kurtzman*, 403 U. S. 602 (1971), which the Court of Appeals applied below, 349 F. 3d 257, 262–268 (CA6 2003). *Lemon* held that, to avoid invalidation under the Establishment Clause, a statute “must have a secular legislative purpose,” “its principal or primary effect must be one that neither advances nor inhibits religion,” and it “must not foster an excessive government entanglement with religion.” 403 U. S., at 612–613 (internal quotation marks and citation omitted). Under the first and second prongs, RLUIPA—and, indeed, any accommodation of religion—might well violate the Clause. Even laws *disestablishing* religion might violate the Clause. Disestablishment might easily have a religious purpose and thereby flunk the first prong, or it might well “strengthen and revitalize” religion and so fail the second. McConnell, Establishment and Disestablishment at the Founding, Part I: Establishment of Religion, 44 Wm. & Mary L. Rev. 2105, 2206–2207 (2003) (hereinafter McConnell).

²The Court dismisses the parties’ arguments about the federalism aspect of the Clause with the brief observation that the Court of Appeals did not address the issue. *Ante*, at 7–8, n. 7. The parties’ conten-

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I

The Establishment Clause provides that “Congress shall make no law respecting an establishment of religion.” Amdt. 1. As I have explained, an important function of the Clause was to “ma[ke] clear that Congress could not interfere with state establishments.” *Elk Grove Unified School Dist. v. Newdow*, 542 U. S. 1, 50 (2004) (opinion concurring in judgment). The Clause, then, “is best understood as a federalism provision” that “protects state establishments from federal interference.” *Ibid.*; see also *Zelman v. Simmons-Harris*, 536 U. S. 639, 677–680 (2002) (THOMAS, J., concurring); *Lee v. Weisman*, 505 U. S. 577, 641 (1992) (SCALIA, J., dissenting). Ohio contends that this federalism understanding of the Clause prevents federal oversight of state choices within the “‘play in the joints’” between the Free Exercise and Establishment Clauses. *Locke v. Davey*, 540 U. S. 712, 718–719 (2004).

tions on this point, however, are fairly included in the question presented, which asks “[w]hether Congress violated the Establishment Clause by enacting [RLUIPA].” Pet. for Cert. i. Further, both parties have briefed the federalism understanding of the Clause, Brief for Respondents 25–33; Reply Brief for Petitioners 12–16, and neither suggests that a remand on it would be useful or that the record in this Court lacks relevant facts, *Good News Club v. Milford Central School*, 533 U. S. 98, 119, n. 9 (2001).

Also, though RLUIPA is entirely consonant with the Establishment Clause, it may well exceed Congress’ authority under either the Spending Clause or the Commerce Clause. See *Sabri v. United States*, 541 U. S. 600, 613 (2004) (THOMAS, J., concurring in judgment) (for a spending clause condition on a State’s receipt of funds to be “Necessary and Proper” to the expenditure of the funds, there must be “some obvious, simple, and direct relation” between the condition and the expenditure of the funds); *United States v. Lopez*, 514 U. S. 549, 587 (1995) (THOMAS, J., concurring) (“The Constitution not only uses the word ‘commerce’ in a narrower sense than our case law might suggest, it also does not support the proposition that Congress has authority over all activities that ‘substantially affect’ interstate commerce”). The Court, however, properly declines to reach those issues, since they are outside the question presented and were not addressed by the Court of Appeals.

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In other words, Ohio asserts that the Clause protects the States from federal interference with otherwise constitutionally permissible choices regarding religious policy. In Ohio's view, RLUIPA intrudes on such state policy choices and hence violates the Clause.

Ohio's vision of the range of protected state authority overreads the Clause. Ohio and its *amici* contend that, even though "States can no longer establish preferred churches" because the Clause has been incorporated against the States through the Fourteenth Amendment,³ "Congress is as unable as ever to contravene constitutionally permissible *State choices regarding religious policy*." Brief for Respondents 26 (emphasis added); Brief for Commonwealth of Virginia et al. as *Amici Curiae* 6–13. That is not what the Clause says. The Clause prohibits Congress from enacting legislation "respecting an *establishment* of religion" (emphasis added); it does not prohibit Congress from enacting legislation "respecting religion" or "taking cognizance of religion." P. Hamburger, *Separation of Church and State* 106–107 (2002). At the founding, establishment involved "coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*," *Newdow, supra*, at 52 (THOMAS, J., concurring in judgment) (quoting *Lee, supra*, at 640–641 (SCALIA, J., dissenting, in turn citing L. Levy, *The Establishment Clause* 4 (1986))), including "governmental preferences

³Ohio claims the benefit of the federalism aspect of the Clause, yet simultaneously adheres to the view that the Establishment Clause was incorporated against the States through the Fourteenth Amendment. Brief for Respondents 25–26. These positions may be incompatible. The text and history of the Clause may well support the view that the Clause is not incorporated against the States precisely because the Clause shielded state establishments from congressional interference. *Elk Grove Unified School Dist. v. Newdow*, 542 U. S. 1, 50–51 (THOMAS, J., concurring in judgment). I note, however, that a state law that would violate the incorporated Establishment Clause might also violate the Free Exercise Clause. *Id.*, at 53, n. 4, 54, n. 5.

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for *particular* religious faiths,” 542 U. S., at 53 (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 856 (1995) (THOMAS, J., concurring)). In other words, establishment at the founding involved, for example, mandatory observance or mandatory payment of taxes supporting ministers. See 542 U. S., at 52 (THOMAS, J., concurring in judgment); *Lee, supra*, at 640–641 (SCALIA, J., dissenting); McConnell 2131; Levy, *The Establishment Clause* 10 (2d ed. 1994). To proscribe Congress from making laws “respecting an establishment of religion,” therefore, was to forbid legislation respecting coercive state establishments, not to preclude Congress from legislating on religion generally.

History, at least that presented by Ohio, does not show that the Clause hermetically seals the Federal Government out of the field of religion. Ohio points to, among other things, the words of James Madison in defense of the Constitution at the Virginia Ratifying Convention: “There is not a shadow of right in the general government to intermeddle with religion. Its least interference with it would be a most flagrant usurpation.” *General Defense of the Constitution* (June 12, 1788), reprinted in 11 *Papers of James Madison* 130 (R. Rutland, C. Hobson, W. Rachal, & J. Sisson eds. 1977). Ohio also relies on James Iredell’s statement discussing the Religious Test Clause at the North Carolina Ratifying Convention:

“[Congress] certainly [has] no authority to interfere in the establishment of any religion whatsoever Is there any power given to Congress in matters of religion? Can they pass a single act to impair our religious liberties? If they could, it would be a just cause of alarm If any future Congress should pass an act concerning the religion of the country, it would be an act which they are not authorized to pass, by the Constitution, and which the people would not obey.” De-

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bate in North Carolina Ratifying Convention (June 30, 1788), in 5 *Founders' Constitution* 90 (P. Kurland & R. Lerner eds. 1987).

These quotations do not establish the Framers' beliefs about the scope of the Establishment Clause. Instead, they demonstrate only that some of the Framers may have believed that the National Government had no authority to legislate concerning religion, because no enumerated power gave it that authority. Ohio's Spending Clause and Commerce Clause challenges, therefore, may well have merit. See n. 2, *supra*.

In any event, Ohio has not shown that the Establishment Clause codified Madison's or Iredell's view that the Federal Government could not legislate regarding religion. An *unenacted* version of the Clause, proposed in the House of Representatives, demonstrates the opposite. It provided that "Congress shall make no laws touching religion, or infringing the rights of conscience." 1 *Annals of Cong.* 731 (1789); see also *Wallace v. Jaffree*, 472 U. S. 38, 96–97 (1985) (REHNQUIST, J., dissenting). The words ultimately adopted, "Congress shall make no law respecting an establishment of religion," "identified a position from which [Madison] had once sought to distinguish his own," Hamburger, *supra*, at 106. Whatever he thought of those words, "he clearly did not mind language less severe than that which he had [previously] used." *Ibid.* The version of the Clause finally adopted is narrower than Ohio claims.

Nor does the other historical evidence on which Ohio relies—Joseph Story's *Commentaries on the Constitution*—prove its theory. Leaving aside the problems with relying on this source as an indicator of the original understanding, see *U. S. Term Limits, Inc. v. Thornton*, 514 U. S. 779, 856 (1995) (THOMAS, J., dissenting), it is unpersuasive in its own right. Justice Story did say that "the whole power over the subject of religion is left exclusively

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to the state governments, to be acted upon according to their own sense of justice, and the state constitutions.” Commentaries on the Constitution of the United States 702–703 (1833) (reprinted 1987). In context, however, his statement concerned only Congress’ inability to legislate with respect to religious *establishment*. See *id.*, at 701 (“The real object of the amendment was . . . to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government”); *id.*, at 702 (“[I]t was deemed advisable to exclude from the national government all power to act upon the subject It was impossible, that there should not arise perpetual strife and perpetual jealousy on the subject of ecclesiastical ascendancy, if the national government were left free to create a religious establishment”).

In short, the view that the Establishment Clause precludes Congress from legislating respecting religion lacks historical provenance, at least based on the history of which I am aware. Even when enacting laws that bind the States pursuant to valid exercises of its enumerated powers, Congress need not observe strict separation between church and state, or steer clear of the subject of religion. It need only refrain from making laws “respecting an establishment of religion”; it must not interfere with a state establishment of religion. For example, Congress presumably could not require a State to establish a religion any more than it could preclude a State from establishing a religion.

II

On its face—the relevant inquiry, as this is a facial challenge—RLUIPA is not a law “respecting an establishment of religion.” RLUIPA provides, as relevant: “No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, . . . even if the burden results from a rule of

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general applicability, unless the government demonstrates that imposition of the burden on that person,” first, “further[s] a compelling governmental interest,” and second, “is the least restrictive means of furthering that compelling governmental interest.” 42 U. S. C. §§2000cc–1(a)(1)–(2). This provision does not prohibit or interfere with state establishments, since no State has established (or constitutionally could establish, given an incorporated Clause) a religion. Nor does the provision require a State to establish a religion: It does not force a State to coerce religious observance or payment of taxes supporting clergy, or require a State to prefer one religious sect over another. It is a law respecting religion, but not one respecting an establishment of religion.

In addition, RLUIPA’s text applies to all laws passed by state and local governments, including “rule[s] of general applicability,” *ibid.*, whether or not they concern an establishment of religion. State and local governments obviously have many laws that have nothing to do with religion, let alone establishments thereof. Numerous applications of RLUIPA therefore do not contravene the Establishment Clause, and a facial challenge based on the Clause must fail. See *United States v. Booker*, 543 U. S. ___, __ (2005) (slip op., at 2) (THOMAS, J., concurring in part and dissenting in part); *United States v. Salerno*, 481 U. S. 739, 745 (1987).

It also bears noting that Congress, pursuant to its Spending Clause authority, conditioned the States’ receipt of federal funds on their compliance with RLUIPA. §2000cc–1(b)(1) (“This section applies in any case in which . . . the substantial burden is imposed in a program or activity that receives Federal financial assistance”). As noted above, n. 2, *supra*, RLUIPA may well exceed the spending power. Nonetheless, while Congress’ condition stands, the States subject themselves to that condition by voluntarily accepting federal funds. The States’ voluntary

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acceptance of Congress' condition undercuts Ohio's argument that Congress is encroaching on its turf.