DEAR GOD, GIVE ME BACK MY BOOKS: THE STANDARDIZED CHAPEL LIBRARY PROJECT AND FREE EXERCISE RIGHTS

Aamir Wyne[*]

I. INTRODUCTION

Early in 2007, the Federal Bureau of Prisons announced that all prison chapel reading materials would be limited to a single list of acceptable publications.[1] The impetus behind the Federal Bureau of Prisons's action was a 2004 report from the Department of Justice's Inspector General, which recommended that materials in prison libraries be cataloged and possibly tracked to prevent them from being used to "incite violence and hatred."[2] Instead of simply cataloging all library materials in federal prisons (the task proved too daunting), the Federal Bureau of Prisons decided to compile a limited list of acceptable books in what it called the Standardized Chapel Library Project.[3] These limitations brought about protests from Congress, First Amendment rights groups, and prisoners' rights groups. A class action suit is pending, but there has been no ruling on the constitutionality of the Standardized Chapel Library Project.[4]

The Federal Bureau of Prisons has the right to exclude certain materials due to safety issues from prison libraries; however, it cannot issue a single, limited list of acceptable religious texts, as such an issuance would unacceptably violate the free exercise rights of prisoners. To do so would be a violation of the First Amendment rights of individuals incarcerated in the federal prison system—unless the Federal Bureau of Prisons is able to show that it serves a compelling governmental interest with no viable alternatives. The prison system should either develop an effective means for cataloging and tracking materials within prison chapel libraries, or it should create a standard list of materials that are clearly unacceptable. The Standardized Chapel Li-

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* Juris Doctor Candidate, University of Pennsylvania Law School, May 2009.

1 Laurie Goodstein, *Critics Right and Left Protest Book Removals*, N.Y. TIMES, Sept. 21, 2007, at A13.

2 *Id.*

3 *Id.*

4 *Id.*

brary Project, as enacted, unacceptably infringes on prisoners' free exercise rights.

Under the First Amendment, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[5] As a rule, courts usually do not interfere with prison administration, due to the historical belief that convicted felons were civilly dead.[6] Federal courts have also shown much deference to the rules and practices of both federal and state prison administration—except when this administration infringes upon constitutionally protected rights.[7]

Specifically, the Supreme Court has ruled that in assessing whether or not a prison regulation infringes upon an incarcerated person's constitutional rights, courts should apply a balancing test that looks to the following factors: (a) if there is a valid governmental interest behind the prison regulation in question; (b) whether under this regulation the incarcerated person has other means of exercising his rights; (c) how the assertion of this right would impact prison costs and resources; and (d) whether there are alternative means that can be used to satisfy the governmental interest.[8] Further, since Congress's enactment of the Religious Land Use and Institutionalized Persons Act ("RLUIPA")[9] in 2000, the free exercise concerns of prisoners have merited a higher level of scrutiny by the courts.

Judicial attitudes towards the regulation of the federal prison system have been characterized largely by deference to decisions made by prison officials.[10] Federal courts have ruled, on First Amendment grounds, with regard to prisoners' personal possession of certain written materials.[11] The Supreme Court has found that inmates can be deprived of magazines, newspapers, and other written materials if prison administrators can demonstrate that this deprivation satisfies

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5 U.S. CONST. amend. I.

6 W.E. Shipley, Annotation, *Provision of Religious Facilities for Prisoners*, 12 A.L.R.3D 1276, 1278 (1967).

7 *See* Bounds v. Smith, 430 U.S. 817, 833 (1977) (noting that prison administrators have "wide discretion" to act, insofar as they do so within constitutional bounds).

8 Turner v. Safley, 482 U.S. 78, 88–91 (1987).

9 42 U.S.C. § 2000cc (2000).

10 *See, e.g.*, Banning v. Looney, 213 F.2d 771, 771 (10th Cir. 1954) ("Courts are without power to supervise prison administration or to interfere with the ordinary prison rules or regulations."); Desmond v. Blackwell, 235 F. Supp. 246, 249 (M.D. Pa. 1964) (holding that prison officials could limit the correspondence of Muslim prisoners for reasons of safety).

11 *See* Michael J. Yaworsky, Annotation, *Validity and Construction of Prison Regulation of Inmates' Possession of Personal Property*, 66 A.L.R.4TH 800, 819 (1988).

legitimate governmental interests—for example, in order to promote prison safety or to create incentives for good behavior.[12] Courts have further held that prison administrators may also restrict prisoners' access to printed pornographic materials without infringing on First Amendment rights.[13]

Within prisons, religious activities themselves may be regulated, as long as these regulations are not discriminatory, arbitrary, or unreasonable.[14] For example, in *Cooke v. Tramburg*,[15] the Supreme Court of New Jersey held that banning congregation of Nation of Islam prisoners did not meet the standard of "capricious or arbitrary" because it served the purpose of preserving prison order.[16] Similarly, in *Childs v. Pegelow*,[17] the Fourth Circuit held that prison officials did not have to adhere to meal times demanded by Muslim inmates, as it would unduly strain prison resources and prison officials had already made reasonable concessions to the meal times required by Islamic faith.[18] In some cases, prisoners are allowed to access additional materials that are only of critical religious value.[19] In other cases, prisoners are allowed to obtain a wide range of religious materials, ranging from books on general religious theory to periodicals—though courts have traditionally upheld prison restrictions on these materials if they seem to serve the interest of preserving order or safety within the prison system.[20] By and large, the case history focuses on restrictions upon the personal property of the inmates and their ability to obtain

12 Beard v. Banks, 548 U.S. 521, 530–31 (2006).

13 *See, e.g.*, Willson v. Buss, 370 F. Supp. 2d 782 (N.D. Ind. 2005) (upholding restrictions on prisoners' access to homosexual pornography on the grounds that while prisoners had the right to possess the material, there was no possible way the prison administration could protect inmates possessing such material from reprisals from other inmates); Snow v. Woodford, 26 Cal. Rptr. 3d 862 (Cal. Ct. App. 2005) (restricting prisoners' access to pornographic materials on the grounds that it negatively impacted inmate relations with female corrections officers).

14 *See* Shipley, *supra* note 6, at 1281.

15 43 N.J. 514 (1964).

16 *Id.* at 523.

17 321 F.2d 487 (4th Cir. 1963).

18 *Id.* at 490–91.

19 *See* Sutton v. Rasheed, 323 F.3d 236, 255–58 (3d Cir. 2003) (granting a member of the Nation of Islam access to religious texts specific to the Nation of Islam).

20 *See* Blazic v. Fay, 251 N.Y.S.2d 494, 494 (N.Y. App. Div. 1964) (holding that a prisoner should not be deprived of a right to receive religious material, unless that material may affect the proper discipline and management of the prison system). *But see* Ind v. Wright, 44 F. App'x 917, 921 (10th Cir. 2002) (holding that prisoners practicing a religion based in white supremacy should not have access to outside materials that could incite racial violence within prison). *See generally* Shipley, *supra* note 6 (collecting cases).

materials from outside of the prison itself.[21] It appears that no cases deal directly with materials that are already available in the chapel library of a federal prison and whether or not they can be withdrawn or limited without a specific cause. Case law concerning free exercise rights of prisoners, coupled with the passage of RLUIPA, provides more guidance on the issue.

This Comment examines the legal framework surrounding the First Amendment rights of individuals incarcerated in federal prisons. It aims to determine just what the government's compelling interests are in initiating the Standardized Chapel Library Project, and whether such an undertaking is compatible with the constitutional rights afforded to inmates in federal prisons. In order to overcome the constitutional difficulties of the Standardized Chapel Library Project, the Federal Bureau of Prisons must somehow show that the Project passes both RLUIPA scrutiny and the Supreme Court's balancing test for prison regulations that infringe on constitutional rights. In light of recent case law, it will be necessary for the Federal Bureau of Prisons to show (1) that there is a valid, compelling governmental interest in creating an enumerated list of religious materials that are to be made available in federal prison libraries; (2) that this enumerated list will still allow inmates to exercise their First Amendment rights with regard to religions; (3) just how allowing uncensored chapel libraries in federal prisons will impact prison safety and resources; and (4) whether there are other ways the government can achieve the ends of the Standardized Chapel Library Project without limiting the resources available in chapel prisons.

It will first be necessary to examine the limitations that the federal prison system may exert on a prisoner's free exercise rights. By exploring cases dealing with these matters in the past half-century, a theoretical framework of what has been historically allowed and prohibited with regard to religious practice within the federal prison system can be established. Further, such an examination will hopefully reveal just how these limitations have interacted with the First Amendment.

The Comment then examines the origins of the Standardized Chapel Library Project, comparing the actions of the Federal Bureau of Prisons to the recommendations made by the Department of Justice. These facts are then applied to the treatment of free exercise rights in courts and current legislation to show that the Standardized

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21 *See generally* Shipley, *supra* note 6 (collecting cases).

Chapel Library Project is in violation of current standards for prisoners' free exercise rights. In the past, federal courts have allowed prison administrators to limit the exercise of religion if the administration could make a compelling argument that such limitations promoted or aided prison safety. However, current standards range from a test for whether the policy is rationally related, to an examination of the penological interests, to a compelling interest test.[22] After examining the application of these standards, the Comment makes policy considerations in light of the controversial nature of the Standardized Chapel Library Project.[23]

II. BACKGROUND

The degree of First Amendment protection afforded to prisoners by courts has waxed and waned throughout history. Courts have traditionally weighed the interests of the State against those of the individual protected by the Constitution, and have given great deference to the determinations made by prison officials, with some emphasis on advances in prison efficiency and safety that have been achieved through the curtailment of rights.[24] Such practice brings with it a number of difficult questions, first and foremost whether First Amendment rights should be broadly sacrificed for what may prove to be either marginal or imaginary gains in security or economic efficiency. At the heart of the matter rests the question of just what rights a prisoner retains when incarcerated, and whether these rights should be dictated by prison officials or by judicial interpretation of the Constitution. The progression of prisoners' free exercise rights has grown from an early period of non-recognition, to a multifaceted debate that has encompassed the latter half of the twentieth century, to contemporary struggles between courts, prison officials, and congressional legislation designed to protect the free exercise of religion.

22 *Compare* Wisconsin v. Yoder, 406 U.S. 205 (1972) (applying a compelling interest standard to a compulsory school attendance law as applied to members of the Amish religion), *with* Resnick v. Adams, 348 F.3d 763 (2003) (upholding a requirement that Orthodox Jewish prisoners fill out standard prison forms to receive kosher meals on the grounds that it served a legitimate penological interest).

23 *See* Goodstein, *supra* note 1, at A13.

24 Mayu Miyashita, Comment, City of Boerne v. Flores *and Its Impact on Prisoners' Religious Freedom*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 519, 544–49 (1999); *see* Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501, 508–09, 552–53 (2005).

A. The Bad Old Days

Traditionally, the incarcerated were regarded as possessing no rights of their own, with their lives and actions beyond the reach of the Bill of Rights. The classic example is *Ruffin v. Commonwealth*,[25] in which Ruffin—an escaped convict who was tried and convicted for murdering the officer guarding him—argued that his conviction could not be upheld because a jury of his peers did not convict him.[26] The court found that Ruffin possessed no such right because the protections of the Constitution did not extend to the incarcerated.[27] Writing for the court, Judge Christian explained:

> [A]s a consequence of his crime, [Ruffin] not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State. He is *civiliter mortuus;* and his estate, if he has any, is administered like that of a dead man.[28]

An individual regarded as *civiliter mortuus* is considered "civilly dead," and no civil rights can be afforded to him.[29] Justice Christian effectively erased the rights identity of prisoners with his ruling, and for much of early American history, prisoners were only granted the meager rights afforded to them by state laws and prison officials.[30] This included a lack of First Amendment religious rights, which often found their utmost limit at traditional American notions of Christianity.[31]

Some courts hinted that a viable claim might have existed for prisoners' free exercise rights, but such a cause of action was not utilized. A telling example of this can be found in Justice Field's opinion in *Ho Ah Kow v. Nunan*,[32] heard by a circuit court in California in 1879. Ho Ah Kow, a Chinese citizen residing in the United States who was arrested and imprisoned in California, had been subject to a California law that mandated the shearing off of all prisoners' hair beyond a certain length.[33] At the time, it was customary for male Chinese immigrants in California to wear a queue, a long braid of hair at the back of the head that bore significant social and religious

25 62 Va. (21 Gratt.) 790 (1871).

26 *Id.* at 790.

27 *Id.* at 796.

28 *Id.*

29 BLACK'S LAW DICTIONARY 1035 (8th ed. 2004).

30 Gaubatz, *supra* note 24, at 506–07.

31 *Id.* at 506.

32 12 F. Cas. 252 (C.C.D. Cal. 1879).

33 *Id.* at 253.

significance.[34] Ho Ah Kow alleged that the State of California had infringed upon his rights by forcing him to cut his queue in prison.[35] The court held that the law requiring the hair cutting was invalid on equal protection grounds.[36] Interestingly, the court also noted that the California law was offensive to prisoners' religious rights, and posited that prison regulations forcing Jewish prisoners to eat pork would be similarly reprehensible.[37] In a sense, *Ho Ah Kow* stepped to the threshold of defending prisoners' free exercise rights, but hesitated at the last moment. True recognition of a viable claim given to prisoners whose First Amendment rights had been infringed did not come about until the 1960s.

B. The '60s: Free Love, Rock n' Roll, and First Amendment Rights for Prisoners

Up until the latter half of the twentieth century, courts rarely intervened on behalf of prisoners on free exercise grounds.[38] Courts took the attitude that it was their place only to decide who was deserving of punishment, and not to direct the manner in which that punishment was meted out.[39] Then, beginning in the 1960s, courts began to become more positively disposed to the notion that prisoners could potentially raise free exercise claims, responding to demands made in part by the increasing number of religious minorities in American prisons.[40]

The landmark case during this period was *Cruz v. Beto*,[41] which brought the issue of free exercise amongst prisoners to the doorstep of the Supreme Court. Cruz was a Buddhist inmate of the Texas Department of Correction, who alleged that the Department of Corrections prevented him, through punitive means, from holding Buddhist services and instructing other prisoners of Buddhist teachings.[42]

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34 *Id.*

35 *Id.*

36 *Id.* at 256.

37 *Id.* at 255.

38 Yehuda M. Braunstein, Note, *Will Jewish Prisoners Be* Boerne *Again? Legislative Responses to* City of Boerne v. Flores, 66 FORDHAM L. REV. 2333, 2339 (1998).

39 *See, e.g.*, Adams v. Ellis, 197 F.2d 483, 485 (5th Cir. 1952) (arguing that courts should not monitor prison administration, and should only intercede when an individual is unjustly imprisoned); Williams v. Steele, 194 F.2d 32, 34 (8th Cir. 1952) (holding that courts have no ability to supervise the disciplining of prisoners, and may only review habeas claims).

40 Gaubatz, *supra* note 24, at 507.

41 405 U.S. 319 (1972) (per curiam).

42 *Id.* at 319.

When Cruz attempted to share Buddhist materials with other inmates, he was placed in solitary confinement and restricted to a diet of bread and water.[43] At the time, the Texas Department of Corrections only recognized faiths based in Protestantism, Catholicism, or Judaism.[44] The Supreme Court held that the failure by the Texas Department of Corrections to afford Cruz a "reasonable opportunity" to pursue his faith was a violation of Cruz's free exercise rights under the First Amendment.[45] The Supreme Court's holding in *Cruz* gave hope to all inmates who felt that their religious rights were being curtailed.[46]

During the years immediately following *Cruz*, lower courts began developing varying standards of review for the free exercise claims of prisoners, showing more willingness to enforce prisoners' rights when they were curtailed for reasons of economic efficiency, and less when they were retrenched on grounds of prison security.[47] A number of circuits applied varying tests and levels of scrutiny to prisoners' First Amendment claims.[48]

In 1969, the District of Columbia Circuit established a very strict standard for examining prisoners' free exercise claims in *Barnett v. Rodgers*.[49] The prisoners in *Barnett* argued that the District of Columbia jail failed to meet the requirements of their Islamic dietary standards, violating the Free Exercise Clause of the First Amendment.[50] Prison officials of the District of Columbia at first argued that prison meals did not contain large amounts of pork, and then later, in the presence of contrary evidence, argued that making allowances for Muslims was not cost effective, as pork products constituted a significant portion of prison menus.[51] The Court of Appeals for the District of Columbia remanded the case for further examination, holding that prisoners' free exercise rights could only be limited if a "compel-

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43 *Id.*

44 *Id.*

45 *Id.* at 322.

46 Gaubatz, *supra* note 24, at 507.

47 Geoffrey S. Frankel, Note, *Untangling First Amendment Values: The Prisoners' Dilemma*, 59 GEO. WASH. L. REV. 1614, 1620–23 (1991); *see also* St. Claire v. Cuyler. 634 F.2d 109, 116 (3d Cir. 1980) (holding that prison officials could prevent the use of Muslim head coverings on grounds of security); Barnett v. Rodgers, 410 F.2d 995, 1003 (D.C. Cir. 1969) (invalidating prison regulations that deprived Muslim prisoners of pork-free meals on the grounds of costs).

48 Frankel, *supra* note 47, at 1622–24.

49 410 F.2d 995 (1969).

50 *Id.* at 997.

51 *Id.* at 998, 1001–02.

ling state interest" existed, and there were "no alternative forms of regulation."[52]

The outcome of this era of litigation produced no one clear standard of treatment for free exercise claims made by incarcerated individuals. In the wake of *Cruz v. Beto*,[53] courts began to honor the claims of prisoners who felt that prison regulations were infringing upon their free exercise rights. Just what kind of standard under which these claims were to be examined was left unresolved—*St. Claire v. Cuyler* allowed greater autonomy for prison officials who wished to enhance prison security, while *Barnett* suggested that a prisoner's free exercise of religion should be ensured unless it came into conflict with the compelling interests of the State.[54]

C. The '80s: Big Hair, Big Shoulders, Big Circuit Split

The 1980s brought further differences in the handling of prisoners' free exercise claims. In 1980, the Third Circuit in *St. Claire v. Cuyler* applied only reasonable basis review to a Muslim prisoner's free exercise claim, upholding a prohibition of traditional Muslim head-covering at the State Correctional Institution at Graterford, Pennsylvania on the grounds that it inhibited prison safety disrupting prison order.[55]

The Seventh Circuit took a more evenhanded approach in *Madyun v. Franzen*[56] in 1983. Madyun, an Illinois inmate, argued that his Islamic faith prevented him from being searched by female prison guards.[57] The court applied a balancing test that weighed Madyun's right to free exercise against the State's interest in uniformly applying prison regulations, giving deference to rules that could be "reasonably adapted" to protecting significant state interests.[58] The court held the State's ability to frisk Madyun, no matter the sex of the guard performing the search, was more important than Madyun's free exercise rights on grounds of safety and equal employment.[59]

52 *Id.* at 1000, 1003 (quoting Sherbert v. Verner, 374 U.S. 398, 403, 406 (1963)).

53 405 U.S. 319 (1972) (recognizing cause of action filed by Buddhist prisoner alleging denial of access to prison chapel, prohibition of contact with religious advisor, and solitary confinement on account of his sharing religious material with other prisoners).

54 634 F.2d 109, 116 (3d Cir. 1980); *Barnett*, 410 F.2d at 1000–01.

55 *St. Claire*, 634 F.2d at 113–14, 116.

56 704 F.2d 954 (7th Cir. 1983).

57 *Id.* at 956.

58 *Id.* at 960.

59 *Id.*

The Eleventh Circuit, in 1986, examined the issue in *Shabazz v. Barnauskas*.[60] Shabazz, a Muslim inmate of Florida State Prison, argued that the prison's prohibition of his ability to grow a beard represented a violation of his free exercise rights.[61] The court held that such a claim should be analyzed under the least restrictive means test, requiring that the government regulation be rationally related to a substantial governmental interest, and that the restriction on the right should be no greater than necessary to protect the governmental interest in question.[62] Under this standard of review, the Eleventh Circuit upheld Florida State Prison's prohibition on beards because it advanced the legitimate penological interest of prison security.[63]

These rulings created a plethora of standards governing prisoners' free exercise rights, with no definitive means of uniform enforcement. An individual incarcerated in one state could conceivably have very different free exercise rights than a prisoner incarcerated in another. This lack of legal symmetry did have grounding in penological security interests, but produced divergent results.

D. O'Lone/Turner*: If It's Reasonable, We Can Take Your Rights Away*

In 1987, the divergence of standards in free exercise claims was resolved. The Supreme Court's ruling in *O'Lone v. Estate of Shabazz*[64] standardized a test for prisoners' free exercise claims, and reduced the level of scrutiny for incursions upon prisoners' rights to that of "reasonableness."[65] In *O'Lone*, Muslim inmates of a New Jersey prison alleged that prison officials had refused to allow them to attend Jummah prayers, the traditional noontime Friday service of the Muslim religion.[66] New Jersey prison officials argued that regulations stipulated that inmates be working outside prison buildings during the times at which the Muslim inmates wished to congregate for prayer.[67] The Supreme Court held that the prison officials had a legitimate security interest in preventing the association of Muslim prisoners at certain times, especially since allowing such Friday congregations

60 790 F.2d 1536 (11th Cir. 1986).

61 *Id.* at 1537.

62 *Id.* at 1539.

63 *Id.* at 1540.

64 482 U.S. 342 (1987).

65 *Id.* at 349.

66 *Id.* at 344–47.

67 *Id.* at 345–46.

would place strain on prison resources during prisoner work hours.[68] In forming its opinion, the Court utilized a balancing test that it had set out in *Turner v. Safly*.[69] The *Turner* test mandated that a court assess a number of factors in order to determine whether a prisoner's free exercise rights had been unduly infringed.[70] These factors included: (a) whether there is a valid government interest behind the prison regulation in question; (b) whether under this regulation, the incarcerated person has other means of exercising his or her rights; (c) how the assertion of this right will impact prison costs and resources; and (d) whether there are alternative means that can be used to satisfy the governmental interest.[71]

In *Turner*, Missouri prison inmates challenged restrictions on their right to written correspondence and on their right to marry.[72] Missouri prisons had restricted prisoner correspondence to include only a prisoner's family, and had only allowed inmates to marry for "compelling" reasons, arguing that such restrictions were necessary to maintain prison security.[73] The Supreme Court upheld the restriction on correspondence, applying the above test and ruling that it did not infringe on First Amendment rights, but struck down the restriction on marriage as a violation of the prisoners' Fourteenth Amendment rights.[74]

The standards set forth in *Turner* and applied in *O'Lone* proved to be somewhat problematic. The *Turner* test had been conceived in order to deal with freedom of speech issues, which sometimes made it a difficult fit for free exercise issues.[75] The key difficulty hinges on the availability of alternative means of practice stated in the *Turner* test.[76] There are fundamental differences in the actual practice of the rights of free speech and free exercise, despite the fact that both fall under the First Amendment of the Constitution. Analogizing to the facts of *Turner* and *O'Lone* helps to illuminate these differences. The prisoners in *Turner* were deprived of their right to certain kinds of communication, but the deprivation was acceptable because they

68 *Id.* at 351–53.

69 482 U.S. 78 (1987).

70 *Id.* at 88–91.

71 *Id.*

72 *Id.* at 81–82.

73 *Id.* at 82.

74 *Id.* at 91, 96–97.

75 *See* Frankel, *supra* note 47, at 1637–41 (exploring this discordance).

76 *See Turner*, 482 U.S. at 88–91.

were allowed to utilize others.[77] Similarly, the prisoners in *O'Lone* were deprived of one kind of religious congregation, but the deprivation was acceptable because they could congregate at other times.[78] However, the two rights are not exactly analogous—eliminating one avenue of communication when others are present is not the same as prohibiting the Jummah prayer—which is roughly the same as eliminating the Sabbath for Jewish or Christian prisoners—while allowing prayer at other times. The point is not that one of these rights should trump the other in terms of exchange analysis; the point is instead that the two rights are fundamentally different, and very different results flow from analyzing them under a clumsy universal standard.

E. Religious Freedom Restoration Act: Free Exercise Is Back in Business

The difficulties created by the application of the *O'Lone/Turner* standard, along with public worries that free exercise claims by prisoners were too narrowly examined by courts, were assuaged in 1993 when Congress passed the Religious Freedom Restoration Act ("RFRA").[79] The Act mandated that all free exercise claims be examined under the compelling interest test that had been set forth in two early cases,[80] *Sherbert v. Verner*[81] and *Wisconsin v. Yoder*.[82] Since the Act's passage, the will of Congress has been added to the prisoners' struggle to gain free exercise rights.

Sherbert and *Yoder*, set almost a decade apart, deal with free exercise claims outside of the prison context. Their sentiment, however, is in line with the D.C. Circuit ruling in *Barnett*, holding the government to a stricter standard when free exercise claims are on the line.[83]

In *Sherbert*, the Supreme Court considered a claim brought by a Seventh Day Adventist in South Carolina.[84] The plaintiff argued that her faith prevented her from working on Saturday, the day that Adventists regard to be the Sabbath.[85] This belief had led her to be fired

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77 *Id.* at 96.
78 O'Lone v. Estate of Shabazz, 482 U.S. 342, 351–53 (1987).
79 42 U.S.C. § 2000bb (2000). These sentiments are echoed in Gaubatz, *supra* note 24, at 509.
80 42 U.S.C. § 2000bb(b)(1).
81 374 U.S. 398 (1963).
82 406 U.S. 205 (1972).
83 Barnett v. Rodgers, 410 F.2d 995, 1000, 1003 (D.C. Cir. 1969).
84 *Sherbert*, 374 U.S. at 399–400.
85 *Id.*

from multiple places of employ, resulting in her need to apply for unemployment benefits under the South Carolina Unemployment Compensation Act.[86] The State of South Carolina refused to grant her the unemployment compensation, arguing that she refused to accept work when it was offered to her.[87] The Supreme Court took a protective stance towards the Free Exercise Clause, and ruled that South Carolina, if it wished to uphold a curtailment of the Free Exercise Clause, had the burden of showing that such curtailment represented a compelling state interest.[88] The Court further stated that "no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'"[89] Ultimately, the Court held that South Carolina had failed to meet such a burden.[90]

The Court in *Yoder* applied the same standard that had been set out in *Sherbert*.[91] The plaintiffs in *Yoder* were members of the Old Order Amish religion residing in the state of Wisconsin.[92] Under their religious traditions, children would attend public or private school until the eighth grade, after which time they would withdraw from school.[93] The plaintiffs believed that high school attendance went against their religious tenets.[94] The State of Wisconsin had in place a law that compelled compulsory attendance of school for all children, no matter their religious beliefs, until the age of sixteen.[95] Wisconsin prosecuted the plaintiffs for removing their children from the education system before the appointed time, and the plaintiffs claimed that the state violated their free exercise rights.[96] The Court held that the State of Wisconsin had the burden of proving that forcing the Amish children to attend school represented a "state interest of sufficient magnitude to override the interest claiming protection under the

86 *Id.*

87 *Id.*

88 *Id.* at 403.

89 *Id.* at 406 (alteration in original) (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

90 *Id.* at 407.

91 Wisconsin v. Yoder, 406 U.S. 205, 236 (1972).

92 *Id.* at 207.

93 *Id.*

94 *Id.* at 208–09.

95 *Id.* at 207.

96 *Id.* at 208–09.

Free Exercise Clause."[97] Ultimately, the Court found the State of Wisconsin to be in violation of the Free Exercise Clause.[98]

The effect of RFRA on the free exercise claims by prisoners, in light of the standards set out in *Sherbert* and *Yoder*, was to tip the scales in favor of prisoners' rights.[99] Additionally, both of the rulings in *Sherbert* and *Yoder* prevailed against arguments made by the States in support of economic efficiency, suggesting that favoritism for such arguments in earlier cases involving prisoners' free exercise claims would no longer prove superior.[100]

F. The Boerne *Ultimatum*

Whether or not the RFRA would lead to such results remained unproven, as the Supreme Court struck it down just four years after it came into effect. In *City of Boerne v. Flores*,[101] the Supreme Court considered a case in which the Archbishop of San Antonio asserted a claim under the RFRA.[102] A Catholic church in the city of Boerne, Texas wanted to expand its building in order to accommodate growing church attendance.[103] The City of Boerne denied the church's application for expansion, arguing that the church had been zoned within a protected historic district, which subjected any proposed construction to approval by the city's Historic Landmark Commission.[104] The Archbishop asserted a claim under RFRA, arguing that the City of Boerne was unlawfully constraining the Church's religious freedom rights; the City of Boerne responded by challenging the constitutionality of RFRA.[105] The Court struck down the law on the grounds that RFRA was failing to achieve its stated purpose, namely that it was too great in scope to combat state laws that promoted religious bigotry and that it was a breach of the separation of powers.[106]

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97 *Id.* at 214.

98 *Id.* at 234.

99 *See e.g.*, Sasnett v. Dep't of Corr., 891 F. Supp 1305 (W.D. Wis. 1995) (holding that prison officials could not prevent prisoners from owning religious books and symbols).

100 *See Yoder*, 406 U.S. at 224 (describing the State's argument that Amish students who did not complete high school and later chose to leave Amish life would be unprepared for life outside of the Amish community); Sherbert v. Verner, 374 U.S. 398, 407 (1963) (describing the State's argument that allowances for compensation for those who could not work on Saturdays would damage the unemployment compensation fund).

101 521 U.S. 507 (1997).

102 *Id.* at 511–12.

103 *Id.*

104 *Id.*

105 *Id.*

106 *Id.* at 535–36.

The ruling in *Boerne* signaled that both the legislature and the judiciary believed that there was a need to protect First Amendment religious rights, but RFRA was not focused enough to achieve this end effectively. The gap left by the annihilation of RFRA was filled by Congress three years later.

G. RLUIPA: Restoring the Religious Freedom Restoration Act

Partly in response to the Supreme Court's actions in *Boerne*, Congress passed the Religious Land Use and Institutionalized Persons Act ("RLUIPA")[107] in late 2000, in order to enhance religious freedom claims made by both prisoners and those struggling against land use regulations.[108] The Act mandates that:

> 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 general applicability, unless the government demonstrates that imposition of the burden on that person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.[109]

The plaintiff bears the burden of proving that the regulation in question "substantially burdens" his or her religious freedom rights, and the government bears the burden on all other elements of the claim.[110] The jurisdiction extends to all programs and activities that receive financing from the federal government.[111] RLUIPA effectively upholds the same standards found in RFRA but narrows the scope, applying the legislation only to claims involving either land use or incarcerated persons.[112] Additionally, the compelling interest standard is tempered by the least restrictive means test that was used by the Eleventh Circuit in *Shabazz v. Barnauskas*.[113] Early on, RLUIPA caused a split amongst the circuit courts,[114] but was ultimately upheld.[115]

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107 42 U.S.C. § 2000cc (2000).

108 *Id.* § 2000cc–1; *see also* John J. Dvorske, Annotation, *Validity, Construction, and Operation of Religious Land Use and Institutionalized Persons Act of 2000 (42 U.S.C.A. §§ 2000cc et seq.)*, 181 A.L.R. FED. 247 (2002) (collecting cases).

109 42 U.S.C. § 2000cc–1(a).

110 *Id.* § 2000cc–2(b).

111 *Id.* § 2000cc(a)(2)(A).

112 *Id.* § 2000cc–1.

113 790 F.2d 1536, 1539 (11th Cir. 1986).

114 *See* Madison v. Riter, 355 F.3d 310, 316 (4th Cir. 2003) (discussing circuit split).

115 Cutter v. Wilkinson, 544 U.S. 709, 713 (2005).

Three cases, *Madison v. Riter*,[116] *Cutter v. Wilkinson*,[117] and *Lovelace v. Lee*[118] shed particular light on the courts' implementation of RLUIPA and are discussed below.

The Fourth Circuit considered *Madison v. Riter* in 2003, during a period where circuit courts had split in their treatment of RLUIPA.[119] Madison was an inmate in a Virginia Department of Corrections prison who adhered to a Christian denomination that obeyed dietary laws detailed in the Hebrew Scriptures, requiring him to keep a kosher diet.[120] While local corrections officials were happy to comply with his needs, their overseers in Richmond believed that adequate alternative diets were already provided in the facility in which Madison was incarcerated.[121] Madison sued the Department of Corrections, asserting a religious freedom claim under RLUIPA, and the Department of Corrections responded by challenging RLUIPA on constitutional grounds.[122] The Fourth Circuit looked to the Congressional intent behind RLUIPA, reasoning that the statute was crafted to comply with the Supreme Court's holding in *Boerne*, while still protecting the religious freedom rights of incarcerated persons.[123] The court further clarified the problem with free exercise claims that had manifested itself during the *O'Lone/Turner* era, in which free exercise rights and other First Amendment rights were adjudicated along the same broad standard. The court gave the example that, under *O'Lone/Turner*, a prisoner's right to possess pornography would be judged along the same standard as his or her right to possess religious materials.[124] The court held that RLUIPA was the appropriate remedy to this quandary, providing heightened protection to religious freedom rights in the penological context.[125] Ultimately, the Fourth Circuit held that

116 *Madison*, 355 F.3d at 316.

117 *Cutter,* 544 U.S. 709.

118 No. 7:03cv00395, 2007 WL 2461750 (W.D. Va. Aug. 24, 2007) (mem.).

119 355 F.3d at 316 (citing Charles v. Verhagen, 348 F.3d 601 (7th Cir. 2003) (upholding RLUIPA); Mayweathers v. Newland, 314 F.3d 1062 (9th Cir. 2002) (same); Cutter v. Wilkinson 349 F.3d 257 (6th Cir. 2003) (invalidating RLUIPA)).

120 *Id.* at 313.

121 *Id.*

122 *Id.* at 313–14.

123 *Id.* at 315; *see also* City of Boerne v. Flores, 521 U.S. 507, 535–36 (1997).

124 *Madison*, 355 F.3d at 319.

125 *Id.*; *see also* O'Lone v. Estate of Shabazz. 482 U.S. 342, 351–53 (1987) (ruling that prison restrictions on the prayer times of Muslim inmates were based on valid government interests, efficient, and afforded prisoners other means of exercising their First Amendment rights); Turner v. Safley, 482 U.S. 78, 96 (1987) (ruling that prison restrictions on written correspondence were efficient, valid government interests that still allowed prisoners other means to exercise their First Amendment rights).

RLUIPA's application in prisoners' religious freedom cases was constitutional, and remanded Madison's case for further consideration.[126]

In 2005, the Supreme Court considered the constitutionality of RLUIPA in the penological context in *Cutter*, putting an end to the circuit split. The inmates in *Cutter* were all incarcerated within the Ohio penal system, and belonged to the respective religious traditions of Satanist, Wicca, and Asatu religions, and the Church of Jesus Christ Christian.[127] All had raised claims under RLUIPA alleging that the Ohio penal system had failed to allow exercise of their religious beliefs.[128] The Ohio Department of Rehabilitation and Corrections had countered by challenging the constitutionality of RLUIPA.[129] The Sixth Circuit held below that RLUIPA was unconstitutional, on the ground that it violated the Establishment Clause by treating religiously-based claims within prison differently from those without.[130] The Supreme Court reversed, holding RLUIPA to be constitutional.[131] The Court clarified that while RLUIPA applied a compelling interest standard to prisoners' religious freedom claims, it did not trump an "institution's need to maintain order and safety."[132] Additionally, the Court held that RLUIPA mandated "due deference" to the superior penological knowledge of prison administrators when weighing considerations of safety, efficiency, and cost, and that courts should attempt to interpret compelling governmental interests in terms of the full context of the claim.[133]

The treatment of prisoners' religious freedom was further refined in 2007 by the Western District of Virginia in *Lovelace v. Lee*.[134] Lovelace was a member of the Nation of Islam and an inmate at the Keen Mountain Correctional Center in Virginia.[135] During the month of Ramadan, inmates at the correctional center were allowed to alter their meal times and attend group prayers in order to comport with the religious requirements of Ramadan.[136] Once inmates opted to adhere to the special schedule during Ramadan, they were not al-

126 *Madison*, 355 F.3d at 322.

127 Cutter v. Wilkinson, 544 U.S. 709, 712 (2005).

128 *Id.*

129 *Id.* at 713.

130 *Id.*

131 *Id.* at 713–14.

132 *Id.* at 722.

133 *Id.* at 723.

134 No. 7:03cv00395, 2007 WL 2461750, at *1–*3 (W.D. Va. Aug. 24, 2007) (mem.).

135 *Id.* at *1.

136 *Id.*

lowed to eat regular meals during the day in the prison cafeteria.[137] Violation of this prohibition would cause the inmate to be removed from the altered Ramadan scheduling, forcing them to rejoin regular prison meal times.[138] Lovelace was accused by prison officials of entering the cafeteria during regular meal times, and was then removed from the altered Ramadan schedule.[139] Lovelace contended that he had not entered the dining hall during regular meal times, and that his deprivation of the Ramadan schedule was instead a retributive move against him by the prison's cafeteria staff, with whom he had argued earlier in the day.[140] Lovelace initially sought administrative relief, and eventually asserted a claim under RLUIPA.[141] Prison officials later admitted that Lovelace had been falsely accused of breaking the prison's Ramadan rules.[142] The religious freedom claim, after being reviewed and remanded by the Court of Appeals, was treated to both a deferential review under RLUIPA standards and a review under the test set forth in *O'Lone/Turner*.[143] Prison officials argued that it was necessary to regulate the prisoners' observance of Ramadan under strict standards, as the allowance called for the use of additional prison staff to supervise the movement of prisoners during the nighttime hours.[144] Prison officials argued that these concerns, coupled with the costs of maintaining a special diet and meal times during Ramadan, constituted a compelling state interest in dealing harshly with inmates who violated the prison's Ramadan policies.[145] They further argued that there were no less restrictive means of balancing the prisoners' right to observe Ramadan against the needs of prison safety.[146] The court recognized the prison officials' concern as a sufficiently compelling interest under RLUIPA standards; however, it also held that the means by which the Ramadan rules were implemented—that violation of the fast precluded a prisoner from taking part in any Ramadan observances—were not the least restrictive means possible.[147] It is interesting, in light of the judicial history of

137 *Id.*

138 *Id.* at *1–*3.

139 *Id.*

140 *Id.*

141 *Id.*

142 *Id.*

143 *Id.* at *3–*5.

144 *Id.* at *8–*9.

145 *Id.*

146 *Id.*

147 *Id.* at *12–*17.

prisoners' freedom of religion claims, that the court considered the least restrictive means issue outside of the context of prison costs or efficiency.[148] The court's *O'Lone/Turner* analysis was similarly satisfied by the compelling interest arguments of prison officials.[149]

The current state of the law provides relief for religious freedom cases by prisoners under the standards of RLUIPA. Courts applying RLUIPA will most likely apply a standard that is in line with *Loveless* and *Cutter*, taking a deferential stance towards a prison administrator's definition of a compelling interest, while analyzing the least restrictive means of the prison regulations as a separate analytical prong.[150] As a final note, it is important to remember that the more lax *O'Lone/Turner* standards are also still applicable to free exercise claims made by prisoners, as RLUIPA exists as a statutory cause of action on its own.[151]

III. ANALYSIS

Under current doctrine, the Standardized Chapel Library Project not only constitutes a violation of prisoners' religious freedom rights under RLUIPA and their free exercise rights under the standards set forth by the Supreme Court in *Turner* and *O'Lone*, but is also against public policy. Even when viewed in a light that is deferential to the expertise of prison administrators, the Standardized Chapel Library Project, as executed, does not embody a compelling governmental interest; it places a substantial burden on the free exercise rights of prisoners, and it is not the least restrictive means of accomplishing its purported objectives. Further, the rational connection between the actions mandated by the Standardized Chapel Library Project and the professed purpose of the Project is tenuous at best. Alternative means are available for accomplishing the goals recommended by the federal government for the Project, means that would necessitate less of an infringement on prisoners' free exercise rights. The simple cataloging of books present in prison chapel libraries—just as public libraries across the United States already do—and making these records available to federal authorities, could easily solve the problem. These alternative means may place a mild strain on prison resources, but such efforts greatly outweigh the risks run by depriving prisoners

148 *Id.*

149 *Id.* at *18–*19.

150 *See id.*; Cutter v. Wilkinson, 544 U.S. 709, 723 (2005).

151 *See* Turner v. Safley, 482 U.S. 78, 88–91 (1987).

of access to religious texts. Finally, the Standardized Chapel Library Project clearly represents an extreme response to concerns voiced by federal authorities. Before beginning a more detailed legal analysis of the Project, it is necessary to clarify its origins and execution.

A. *Background of the Standardized Chapel Library Project*

The Federal Bureau of Prisons began implementing the Standardized Chapel Library Project early in 2007, but the Project's roots extend to a report that was released by the Inspector General of the Department of Justice in 2004.[152] The Department of Justice's report was prompted by congressional concerns that the Muslim service providers selected by the Bureau of Prisons might come from groups with ties to "exclusionary" and "extreme" forms of Islam.[153] The report analyzed the methods used by the Federal Bureau of Prisons in its selection of Muslim chaplains, and then offered recommendations on monitoring the actions of religious service providers once they were allowed access to correctional facilities run by the Federal Bureau of Prisons.[154] The Department of Justice Report offered sixteen suggestions to the Bureau of Prisons regarding Muslim service providers.[155] The bulk of these suggestions focused on reforming the Bureau of Prisons' interview process for Muslim service providers, increasing the education of prison staffers with regard to Islam, increasing information flow between the Bureau of Prisons and offices of federal law enforcement, improving monitoring for all prison religious services, and working closely with existing Muslim chaplains

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152 Goodstein, *supra* note 1, at A13 (providing the basic facts of the implementation of the Standardized Chapel Library Project); *see also* OFFICE OF THE INSPECTOR GEN., DEP'T OF JUSTICE, A REVIEW OF THE FEDERAL BUREAU OF PRISONS' SELECTION OF MUSLIM RELIGIOUS SERVICES PROVIDERS 3–4 (2004) [hereinafter MUSLIM RELIGIOUS SERVICES PROVIDERS] (analyzing the criteria used by the Bureau of Prisons in selecting Muslim religious representatives for inmates, and recommending heightened supervision for such service providers and the inmates to whom they minister). For a more developed discussion of the aftermath of the Project's implementation, see Neela Banerjee, *Prisons to Return Purged Items to Chapels*, N.Y. TIMES, Sept. 27, 2007, at A29. For a more thorough report of the motivations behind the Project, the works seized, and the litigation that followed, see Gerard V. Bradley, *Unholy Prison Break*, NAT'L REV. ONLINE, Oct. 2, 2007, *available at* http://article.nationalreview.com/?q=ZmY4ODIwYjE1MjYwNDU3ZjBlZGQ5YzI4NGU0OTZmZDg= (last visited Mar. 26, 2009).

153 MUSLIM RELIGIOUS SERVICES PROVIDERS, *supra* note 152, at 1.

154 *Id.* at 2.

155 *Id.* at 50–55.

to better the Muslim service provider selection process.[156] The penultimate suggestion made in the report dealt with prison libraries:

> The [Bureau of Prisons] should conduct an inventory of chapel books and videos and re-screen them to confirm that they are permissible under [Bureau of Prisons] security policies. The [Bureau of Prisons] should consider maintaining a central registry of acceptable material to prevent duplication of effort when reviewing these materials.[157]

This single suggestion would prove to be the primary motivating factor for the Standardized Chapel Library Project.[158]

Administrators from the Bureau of Prisons found the Department of Justice's recommendations for prison chapel libraries to be too arduous.[159] The Bureau began implementing the recommendation by attempting to take inventory of all items present in federal prison libraries, but soon changed their tactics.[160] Rather than finding other means to honor the Department of Justice's recommendation, the Bureau of Prisons sought to simplify the matter—they decided to create lists of acceptable materials for each of twenty religious categories, and remove all materials that did not comport with the standardized list.[161] This effort was the Standardized Chapel Library Project.[162] All removed materials were stored for further vetting.[163] If a religious service provider at the prison wanted to restore access to a specific text or object, he or she would be required to examine the entirety of the work, fill out a certification form, and then send the form on to the central offices of the Bureau in Washington, D.C., where administrators would decide whether or not to add the text to the Standardized Chapel Library Project.[164] The effects of the Project were widespread and absurd. Instead of storing confiscated materials, some books were destroyed.[165] The removed texts included works across religions that had no prior history of inciting radicalism. The Project excluded Jewish texts such as Maimonide's Code of Jewish Law, Zo-

156 *Id.*

157 *Id.* at 55.

158 Goodstein, *supra* note 1, at A13.

159 *Id.*

160 *Id.*

161 *Id.*

162 *Id.*

163 *Id.*

164 *Id.* The religious categories recognized by the Bureau of Prisons were: Bahai, Buddhist, Catholic, General Spirituality, Hindu, Islam, Jehovah's Witnesses, Judaism, Messianic, Mormon, Nation of Islam, Native American, Orthodox, Other Religions, Pagan, Protestant, Rastafarian, Sikh, and Yoruba. *Id.*

165 Complaint at 2, Milstein v. Lappin, No. 07–CV–07434 (S.D.N.Y. Aug. 21, 2007).

har, and *When Bad Things Happen to Good People* by Rabbi Harold S. Kushner.[166] Christian hymnals and guides, as well as religious commentary such as *The Purpose Driven Life* by Reverend Rick Warren were confiscated.[167] Muslim prayer books, prayer guides, and copies of the Hadith (the second most important Muslim religious source after the Qur'an) were removed.[168] The regulations and methodologies behind the selection of titles for the Standardized Chapel Library Project were never codified or publicized; instead they were implemented through internal memos at the Bureau of Prisons.[169] These memos initially called for the destruction of materials removed from chapel libraries; later, prison facilities were allowed to store the books.[170] Widespread protests of the Project led the Bureau of Prisons to halt its implementation late in 2007, but the Bureau has refused to reverse its policy.[171]

B. RLUIPA

The Standardized Chapel Library Project places a substantial burden on prisoners' religious freedom. Even when deference is given to the experience of prison administrators and special consideration is given to the environment of prison chapel libraries, the purposes behind the Project do not rise to the level of a compelling governmental interest. The Project is also not the least restrictive means of accomplishing what the Bureau of Prisons professes is its underlying rationale.

In order to trigger RLUIPA, the prisoner's religious exercise right must be substantially burdened by the actions or regulations of prison administrators.[172] A burden on religious freedom becomes substantial when it places a "significantly great restriction or onus upon such exercise."[173] In *Sanders v. Ryan*,[174] the District of Arizona held that prison administrators did not substantially burden a prisoner's religious freedom when they required him to discard some religious materials

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166 *Id.*
167 *Id.*
168 *Id.* at 3.
169 *Id.* at 10.
170 *Id.* at 10–12.
171 Goodstein, *supra* note 1, at A13.
172 42 U.S.C. § 2000cc–1(a) (2000).
173 Sanders v. Ryan, 484 F. Supp. 2d 1028, 1034 (D. Ariz. 2007).
174 *Id.*

in order to exchange them with an equal number of new ones.[175] Similarly, in *Adkins v. Kaspar*,[176] the Fifth Circuit held that preventing a prisoner from observing the Sabbath on a certain day was permissible if he was allowed to observe the Sabbath on an alternate day.[177] Additionally, in *Lovelace v. Lee*,[178] the Fourth Circuit held that preventing an inmate from observing the religious practices associated with Ramadan did constitute a substantial burden on the inmate's religious freedom.[179] The onus on religious freedom that leads to a substantial burden seems to occur when religious activities are limited without any kind of reciprocity. Religious materials can be confiscated, but they must be replaced by an equal number of new materials. Organized worship can be prevented on a certain day, as long as it is allowed on another. The entirety of one kind of religious practice cannot be taken away. Likewise, the unilateral removal of non-approved texts from prison chapel libraries through the Standardized Chapel Library Project, an action that greatly depleted the reserves of the chapel libraries affected, placed a substantial burden on prisoners' religious freedom.[180]

When gauging whether acts or regulations of prison administrators constitute a compelling state interest, deference is given to the superior experience of prison authorities, and the alleged compelling state interest should be examined in the full context of the regulation.[181] Concerns of order and safety within prisons have been widely recognized as compelling state interests.[182] Concerns that radical religious groups could negatively impact prison safety, as voiced in the Justice Department's report, comport with the government's compelling interest in maintaining prison safety. The Standardized Chapel Library Project is out of step with the goals expressed in the Justice Department's review of the Federal Bureau of Prisons' selection process for Muslim service providers.[183] It is clear when examining the totality of the Justice Department's review, that the intention of its recommendations was to ensure that the causes of incitement of radical Islam would be removed from the federal penal system, and

175 *Id.* at 1035.
176 393 F.3d 559 (5th Cir. 2004).
177 *Id.* at 571.
178 472 F.3d 174 (4th Cir. 2006).
179 *Id.* at 187.
180 Goodstein, *supra* note 1, at A13.
181 Cutter v. Wilkinson, 544 U.S. 709, 723 (2005).
182 *See, e.g.*, *id.* at 722.
183 MUSLIM RELIGIOUS SERVICES PROVIDERS, *supra* note 152, at 1.

that measures would be taken to monitor and harmonize religious practices within federal prisons.[184] The Standardized Chapel Library Project, as executed, departs from this purpose by widely removing primarily non-offensive religious materials, and therefore should not be viewed as having a rational relation to the compelling governmental interest of preventing religious extremism in federal prisons. In fact, the widespread outcry from prisoners that accompanied the carrying out of the Project[185] could be seen as directly going against the compelling governmental interest of preserving prison safety. When courts have sanctioned the limiting and removal of religious materials as part of a compelling governmental interest in preserving prison safety, it has been in the context of removing certain materials that by their very nature are clearly capable of inciting religiously motivated violence in prisons. In *Marria v. Broaddus*,[186] the Southern District of New York determined that prison officials' absolute ban on Five Percenter literature constituted a compelling state interest in preserving prison safety and precluded summary judgment, as such literature could possibly lead to racial and political unrest within the prison system.[187] In comparison, the Western District of Wisconsin, in *Lindell v. Casperson*,[188] held that prison administrators had a compelling governmental interest in preventing Wotanists from possessing materials relating to Nazism as required by the religion.[189] The Standardized Chapel Library Project fails to work with such precision, as it does not selectively remove materials that could potentially incite violence. Such slipshod enforcement should not be seen as an effective means of advancing something as important as a compelling governmental interest in prison safety.

The least restrictive means prong of RLUIPA stands alone as a separate disqualifying factor for acts or restrictions made by prison administrators, and it is not viewed with deference towards the economic efficiency of prison operations.[190] The simple fact is that the Standardized Chapel Library Project is not the least restrictive means for furthering the compelling governmental interest in keeping materials that may incite religious extremism out of prison chapel librar-

184 *Id.* at 50–55.

185 Goodstein, *supra* note 1; *see also* Complaint, *supra* note 165, at 2–3.

186 200 F. Supp. 2d 280 (S.D.N.Y. 2002).

187 *Id.* at 298.

188 360 F. Supp. 2d 932 (W.D. Wis. 2005).

189 *Id.* at 954–55.

190 *See* 42 U.S.C. § 2000cc–1(a)(2); Lovelace v. Lee, No. 7:03cv00395, 2007 WL 2461750, at *16–*17 (W.D. Va. Aug. 24, 2007).

ies. The Project would be far less restrictive if it was carried out as the Department of Justice intended. If the Federal Bureau of Prisons cataloged the books in prison chapel libraries, and, if necessary, developed a system of tracking them, then the few books that could incite religious extremism could be removed and prisoners' freedom of religion would remain unmolested.[191] If this project proved to be too taxing for prison resources, then the Federal Bureau of Prisons could compile an easily updateable list of texts that were known to incite religious violence and ensure that these were removed from prison chapel libraries.

C. O'Lone/Turner

Even under the more permissive *O'Lone/Turner* standard, the Standardized Chapel Library Project is still an unreasonable incursion on prisoners' free exercise rights. The test of review of First Amendment claims by prisoners established by the Supreme Court in *Turner* and then applied to free exercise claims in *O'Lone* examines acts or restrictions by prison administrators that affect prisoners' First Amendment rights under a four-point standard. In assessing whether or not a prison regulation infringes upon an incarcerated person's constitutional rights, the Court looks to the following balancing test: (a) if there is a valid governmental interest that reasonably relates to the prison regulation in question; (b) whether under this regulation the incarcerated person has other means of exercising his rights; (c) how the assertion of this right will impact prison costs and resources; and (d) whether there are alternative means which can be used to satisfy the governmental interest.[192] Under standards of reasonableness, the Standardized Chapel Library Project, viewed very permissibly, does seem to satisfy the legitimate governmental interest in protecting the order and safety of prisons by curtailing inmate access to materials that might incite religious extremism. If the Bureau of Prisons removes most literature from prison chapel libraries and leaves only a few books it knows to be benign, then it is almost assured of preventing inmate access to religious literature that may incite violence. However, given the actual effect of the Project—

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191 *See* MUSLIM RELIGIOUS SERVICES PROVIDERS, *supra* note 152, at 55.

192 O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987); Turner v. Safley, 482 U.S. 78, 88–91 (1987).

inciting outcry amongst prisoners—the likelihood of it actually quieting religious complaints of prisoners is doubtful.[193]

The question of whether the prisoners have other means of exercising their rights is debatable. Since the majority of books in chapel libraries tend not to be on the list of acceptable texts maintained by the Federal Bureau of Prisons, the effect of the Standardized Chapel Library Project has been to remove the majority of titles from prison chapel library shelves. This presents an unacceptable effect of removing all titles from religions that may be underrepresented in prison chapel libraries. While prisoners who practice religions that have a significant presence in a given chapel library may be able to find alternative reading materials, others may not be so lucky. Since the books are not replaced as they are removed, and the process for getting a book replaced on the shelf is arduous, there is a chance that prisoners following certain religions may be seriously deprived of necessary religious texts for long periods of time.[194] Additionally, the sensitive nature of religious belief makes it difficult to categorize some texts of a given religion as "important" and others as "unnecessary," making the Federal Bureau of Prisons' list of acceptable titles seem dangerously provocative.[195]

The costs of the Standardized Chapel Library Project, taken alone, are highly economical, as the Project simply involves removing books from prison chapel library shelves. The long-term costs of the Project may be higher, depending on the rate at which prisoners request new titles, or attempt to have books certified through the time-consuming restatement process.[196] Lastly, more effective alternatives, discussed above, exist for the Project.

D. Policy Argument

The Standardized Chapel Library Project should not be pursued as enacted on grounds of public policy, as the execution of the Project departs from the original plan recommended by the Department of Justice and because the Project has engendered widespread criti-

193 *See* Goodstein, *supra* note 1, at A13.

194 *See id.*

195 *See* Complaint, *supra* note 165, at 2–3. For example, a Jewish prisoner may desire access to a copy of the Torah, but it should not be the place of the Federal Bureau of Prisons to say that this same prisoner cannot have access to the Zohar, or the works of Maimonides, or the Talmud.

196 *See* Goodstein, *supra* note 1, at A13.

cism from public interest groups and legislators.[197] While taking steps to prevent domestic religious extremism is a legitimate and compelling governmental interest, it remains to be proven whether the Standardized Chapel Library Project actually implements the suggestions put forth by the Department of Justice in a matter that accomplishes these ends. Widespread deprivation of religious texts might do more to incense religious extremism within the federal prison system than the provision of unchecked religious materials would. More importantly, the Standardized Chapel Library Project fails to honor the Department of Justice's recommendations to both catalog and track the use of materials in prison chapel libraries; while the Project ensures that materials in prison chapel libraries will not deviate from a set list, the Bureau of Prisons still has no means of tracking the materials, nor does it know which prisons have which materials.[198] Further, support of only twenty broad religious categories raises the possibility that the Standardized Chapel Library Project will not honor some prisoners' religious beliefs.[199] Lastly, the criticism that the Project has drawn from myriad religions and both major political parties makes it unlikely that the Department of Justice's goals for tracking religious materials in prison chapel libraries can be successfully enacted through the Standardized Chapel Library Project.

IV. CONCLUSION

The Standardized Chapel Library Project is a clear violation of prisoners' religious freedom under RLUIPA and their free exercise rights under the standards set forth by the Supreme Court in *Turner* and *O'Lone*, and is against public policy. Even when viewed in a light that is deferential to the expertise of prison administrators, the Standardized Chapel Library Project, as executed, places a substantial burden on the free exercise rights of prisoners, fails to comport with the compelling state interest of preserving prison safety, and is not the least restrictive means of accomplishing its purported objectives. Further, the rational connection between the actions mandated by the Standardized Chapel Library Project and the professed purpose

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197 *See* MUSLIM RELIGIOUS SERVICES PROVIDERS, *supra* note 152, at 1; Goodstein, *supra* note 1, at A13.

198 MUSLIM RELIGIOUS SERVICES PROVIDERS, *supra* note 152, at 55; Goodstein, *supra* note 1, at A13.

199 *See* Goodstein, *supra* note 1, at A13. For a full list of religious categories considered by the Standardized Chapel Library Project, see *supra* note 164.

of the Project, as per the Department of Justice's recommendations, is tenuous at best. Alternative means are available for accomplishing the goals recommended by the federal government for the Project, means that would necessitate less of an infringement on prisoners' free exercise rights. The Federal Bureau of Prisons could simply implement the exact recommendations of the Department of Justice, or they could compile an updatable list of unacceptable materials that could easily be removed from chapel library shelves. These alternative means may place mild strain on prison resources, but such efforts greatly outweigh the risks run by depriving prisoners of access to religious texts, which could possibly incite violence and unrest within prison populations. Finally, the Standardized Chapel Library Project clearly represents an extreme response to concerns voiced by federal authorities, and it has encountered wide condemnation from both public interest groups and legislators.