NOTES

INCARCERATION, ACCOMMODATION, AND STRICT SCRUTINY

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INTRODUCTION

SINCE Congress passed the Religious Land Use and Institutionalized Persons Act ("RLUIPA")[1] in 2000, federal courts

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have reviewed hundreds of claims brought by prisoners seeking religious accommodations.[2] Despite previous efforts to curb prisoner litigation,[3] there has been a significant increase in suits brought by inmates claiming religious exemptions.[4] Indeed, in 2008 alone, federal courts heard well over one hundred RLUIPA prisoner claims, including over a dozen appeals.[5] These claims have raised persistent and important issues, and lower federal courts have struggled to resolve them in a consistent and coherent fashion.

More specifically, federal courts have divided over the question of how to apply strict scrutiny under RLUIPA. According to the statute, government policies imposing a substantial burden on a prisoner's religious exercise must be justified as the least restrictive means of achieving a compelling state interest. But courts have not agreed on how this standard of review should be applied in the prison context. Some courts apply a deferential model of review, finding most religious burdens to be insubstantial and relying on the judgment of prison administrators regarding the weight of state interests. Other courts, however, are applying a "hard look" model

[1] Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. § 2000cc (2006)).

[2] Westlaw search of all federal cases using terms "RLUIPA" and "prison" and "substantial burden," conducted on December 16, 2008. This search retrieved 628 total cases. Of these cases, 79 were from federal appellate courts and 549 from district courts.

[3] See, e.g., Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, §§ 801–10, 110 Stat. 1321 (1996) (codified as amended in 18 U.S.C. § 3626 (2006), scattered sections of 42 U.S.C. § 1997, and scattered sections of 28 U.S.C.); see also Margo Schlanger, Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders, 81 N.Y.U. L. Rev. 550, 554, 590–95 (2006); Margo Schlanger, Inmate Litigation, 116 Harv. L. Rev. 1555, 1557–60 (2003); Alison Brill, Note, Rights Without Remedy: The Myth of State Court Accessibility After the Prison Litigation Reform Act, 30 Cardozo L. Rev. 645, 651–64 (2008). But see Charles F. Sabel & William H. Simon, Destabilization Rights: How Public Law Litigation Succeeds, 117 Harv. L. Rev. 1015, 1037–43 (2004) (providing a more optimistic account of the P.L.R.A.).

[4] Between 1997 and 2000, federal courts reviewed 318 claims by prisoners claiming religious exemptions. By contrast, since 2005, federal courts have reviewed 1158 claims by religious inmates. In 2008 alone these courts heard over 350 claims for religious accommodation. RLUIPA accounts for much of this recent increase. Between 2001 and 2004, lower courts heard 68 prisoner cases under RLUIPA. But between 2005 and 2008 these courts heard 564 such claims. These claims for religious accommodation have been on the rise since the passage of RLUIPA, and the sharpest rate of increase has come since 2007.

[5] Westlaw search of all federal cases in 2008 using terms "RLUIPA" and "prison" and "substantial burden," conducted on December 16, 2008.

of review that takes more seriously claims that prison policies burden religion and requires prison officials to demonstrate the need for such policies.

The rise of a hard look model under RLUIPA is surprising. First, in reviewing claims for religious accommodation outside the prison context, courts have often applied strict scrutiny with far less stringency than the standard traditionally requires. Courts have held that burdens on religious practice had to be unbearable in order to count as "substantial," while accepting "less than compelling" government interests to satisfy the standard.[6]

Second, commentators predicted that courts would be even more deferential in the prison context. Of those who might bring claims for religious exemptions, incarcerated persons would be among the least likely to benefit from judicial review of governmental action.[7] There are a number of reasons for such skepticism. First, courts may doubt that prisoners are sincere in the religious beliefs they claim and hold suspicion that such beliefs are feigned in an effort to obtain special treatment.[8] Second, courts may generally lack sympathy for those convicted of criminal offenses.[9] Finally, courts may doubt their own institutional competence to review decisions regarding the administration of a prison.[10] In light of these considerations, few expected to see a change in the level of deference accorded to prison officials.

Moreover, critics argued against adopting strict scrutiny in the prison context, claiming that it would dilute the standard as applied to other areas of the law. They feared that applying the language of strict scrutiny to prisons would force courts to weaken the level of review, which would in turn diminish its force in other contexts.

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[6] See James E. Ryan, Note, *Smith* and the Religious Freedom Restoration Act: An Iconoclastic Assessment, 78 Va. L. Rev. 1407, 1417–22 (1992); see also Erwin Chemerinsky, Constitutional Law: Principles and Policies 1248 (3d ed. 2006); Kent Greenawalt, Religion and the Constitution: Free Exercise and Fairness 165–71 (2006); Ira C. Lupu, The Failure of RFRA, 20 U. Ark. Little Rock L. Rev. 575, 585 (1998) [hereinafter Lupu, The Failure of RFRA].

[7] See Daniel J. Solove, Note, Faith Profaned: The Religious Freedom Restoration Act and Religion in the Prisons, 106 Yale L.J. 459, 470 (1996); see also Greenawalt, supra note 6, at 165–71; Lupu, The Failure of RFRA, supra note 6, at 585.

[8] See Greenawalt, supra note 6, at 170.

[9] See id.; see also Solove, supra note 7, at 475–79.

[10] See Lupu, The Failure of RFRA, supra note 6, at 597–98; Solove, supra note 7, at 479–80.

Given low rates of success under previous accommodation regimes, commentators predicted that prisoners would face similar difficulties under RLUIPA as federal courts deferred to the judgment of prison administrators.

Indeed, several circuit courts have adopted this "deferential" model of review when applying strict scrutiny under RLUIPA. Yet, in adjudicating claims brought by religious inmates, other circuits have applied the same formal standard of review in a much more rigorous manner. These circuits have employed a variety of doctrines within the strict scrutiny framework that have made it more difficult for prison administrators to deny accommodations. This new "hard look" model—resembling the approach taken under strict scrutiny in racial discrimination and content-based speech restriction cases—is an important development in the law of religious accommodation. Defying conventional predictions, this model of review has led to a markedly increased rate of success for prisoner accommodation claims.

This Note seeks to answer three questions: (1) How have federal courts applied strict scrutiny under RLUIPA? (2) Has RLUIPA conformed to commentators' skeptical predictions? (3) If not, what explains the emergence of a rigorous form of strict scrutiny?

In addressing these questions, this Note will proceed in four Parts. Part I will begin with a very brief history of the varying levels of scrutiny applicable to claims for religious accommodation. It will then outline three widely accepted claims regarding the consequences of these standards for religious claimants. Part II will describe the emergence of two models of review under RLUIPA and document the existing conflict among the federal courts of appeals. Part III will attempt to explain why some courts have departed from the deferential model of review and why the conventional views identified in Part I have not consistently held true under RLUIPA. In doing so, Part III will argue that (1) new statutory language, (2) increased confidence in constitutional foundations, (3) the narrow scope of the Act, and (4) the importation of doctrinal formulations developed within other strict scrutiny regimes have combined to allow prisoners to benefit from more rigorous review. Finally, Part IV will discuss some possible implications of these results and attempt to extract a few general lessons for those

seeking to expand religious accommodation beyond the confines of the prison context.

I. STRICT SCRUTINY IN RELIGIOUS ACCOMMODATION

To understand why recent developments under RLUIPA are surprising it is important to consider briefly the history of religious accommodation. That history has led most commentators to reach three skeptical conclusions: (1) the formal level of scrutiny is irrelevant to the success of claims for religious accommodation and no doctrinal formulation will lead to more exemptions; (2) prisoners, as a group, are least likely to benefit from judicial review of accommodation claims; (3) using the language of strict scrutiny in prisoner cases threatens to undermine the force of the standard in other contexts. This Part surveys the history and the resulting skepticism of the standard of review for religious accommodation claims.

A. A Brief History of the Standard

RLUIPA was passed against the backdrop of important changes in the law governing religious accommodation. The recent history of this law dates back to 1963 when the Supreme Court decided *Sherbert v. Verner*, which applied strict scrutiny to a claim for religious accommodation under the Free Exercise Clause of the First Amendment.[11] Under *Sherbert*, laws substantially burdening religion could not be enforced unless they were shown to be the least restrictive means of achieving a compelling governmental interest.[12] This ruling seemed to offer religious citizens a powerful tool to resist state impositions on the practice of their faith. In 1990, however, the Court severely limited this accommodation regime in *Employment Division v. Smith*.[13] Writing for the majority, Justice Scalia announced that the strict scrutiny test from *Sherbert* did not apply to otherwise valid and generally applicable laws. The Court held that such laws needed only to meet rational basis review to survive claims for religious exemptions.[14] Scholars, church leaders,

[11] 374 U.S. 398, 399–403, 406 (1963).
[12] Id. at 406.
[13] 494 U.S. 872, 884–89 (1990).
[14] Id. at 888.

and religious citizens across the country denounced the decision and demanded that Congress "restore" the religious liberty taken away by the Court.[15]

In 1993, Congress responded by enacting the Religious Freedom Restoration Act ("RFRA").[16] RFRA reinstated the strict scrutiny regime under *Sherbert* and required courts to apply the compelling interest/least restrictive means test to facially neutral and generally applicable laws that substantially burdened the free exercise of religion.[17] In 1997, the Supreme Court decided *City of Boerne v. Flores*, which declared RFRA unconstitutional because it exceeded the scope of congressional power under Section 5 of the Fourteenth Amendment.[18] Thus, after *Boerne*, state laws that interfered with the exercise of religion were subject only to rational basis review under *Smith* (subject to two exceptions).[19] Following *Boerne*, several states enacted their own RFRAs, thereby elevating the level of scrutiny applied to state law.[20]

In the prison context, the evolution of the applicable standard of review has followed a similar path. In 1987, the Supreme Court decided *Turner v. Safley*, which held that, under the Free Exercise Clause, prisoners are not entitled to exemptions from prison policies that are rationally related to a legitimate penological interest.[21]

[15] See, e.g., John Delaney, Police Power Absolutism and Nullifying the Free Exercise Clause: A Critique of *Oregon v. Smith*, 25 Ind. L. Rev. 71, 71–72 (1991); Michael W. McConnell, Free Exercise Revisionism and the *Smith* Decision, 57 U. Chi. L. Rev. 1109, 1110–11 (1990); Ryan, supra note 6, at 1409–10.

[16] Religious Freedom Restoration Act of 1993, Pub. L. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb (2006)).

[17] 42 U.S.C. § 2000bb(a)–(b) (2006).

[18] 521 U.S. 507, 529–36 (1997). *Boerne* held that RFRA was unconstitutional as applied to the *states*. It did not reach the question of whether RFRA is permissible as applied to federal law. The Court has not yet directly addressed that question, but it has presupposed the constitutionality of RFRA in reviewing a federal statute. See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 423–24 (2006).

[19] The exceptions are for (1) "hybrid" claims involving other constitutional rights such as free speech, and (2) claims involving individualized factual assessment. See Employment Div. v. Smith, 494 U.S. at 881–84.

[20] State RFRAs exist in Alabama (by state constitutional amendment), Arizona, Connecticut, Florida, Idaho, Illinois, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, and Texas. See Eugene Volokh, The First Amendment and Related Statutes: Problems, Cases and Policy Arguments 953–54 (2d ed. 2005).

[21] 482 U.S. 78, 89 (1987).

The *Turner* Court identified four factors to be considered when reviewing actions taken by prison administrators: (1) whether there is a "valid, rational connection" between the prison regulation and the government interest justifying it, (2) whether there is an alternative means available to the prison inmates to exercise the right at issue, (3) whether an accommodation would have a significant "ripple effect" on the guards, other inmates, and prison resources, and (4) whether there is an alternative that fully accommodates the prisoner at "de minimis cost to valid penological interests."[22]

The standard of review applied in *Turner* and its progeny[23] achieved a deferential effect analogous to the Court's decision in *Smith*. While *Smith* directed courts to defer to legislative judgments, *Turner* left those delicate policy decisions largely to prison officials.[24] Together, *Smith* and *Turner* defined the contours of minimal scrutiny applicable to claims for religious exemption. But since RFRA contained no exception for institutional settings, in 1993 the Act extended strict scrutiny to religious accommodation claims brought by prisoners. When RFRA was invalidated in 1997, the standard applied to state prisoner claims reverted to the deferential test established under *Turner*.

Finally, in 2000, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA), which re-established strict scrutiny for government actions regarding land use or federally funded institutions (including prisons) that substantially burden religious exercise.[25] Section 2 of RLUIPA applies a compelling interest/least restrictive means test to religious land use,[26] and Section 3 applies the same test to the religious exercise of institutionalized persons.[27] This compelling interest test significantly elevated the level of scrutiny over the standards applicable under *Smith* and *Turner*.

In 2005, the Supreme Court heard an Establishment Clause challenge to RLUIPA in *Cutter v. Wilkinson*.[28] The *Cutter* Court af-

[22] Id. at 89–91 (internal citations omitted).
[23] See especially O'Lone v. Estate of Shabazz, 482 U.S. 342, 348–53 (1987).
[24] See Solove, supra note 7, at 470.
[25] Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. § 2000cc (2006)).
[26] 42 U.S.C. § 2000cc (2006).
[27] Id. § 2000cc-1.
[28] 544 U.S. 709, 713 (2005).

firmed the constitutionality of RLUIPA, holding that the heightened standard of review did not impermissibly favor religion.[29] The Court invited as applied challenges, but, so far, it has not addressed the question of how to apply strict scrutiny under the Act.

B. Three Forms of Skepticism

RLUIPA has been received with skepticism in the academic literature. As mentioned above, there are three main reasons for this reaction. First, critics claim that adjusting the formal level of scrutiny applicable to claims for religious accommodation is irrelevant to the actual success of religious claimants. The second reason for skepticism stems from Section 3 of RLUIPA, which applies specifically to institutionalized persons. Critics insist that not even the most sympathetic statutory or doctrinal formulation is capable of improving the chances of success in prisoners' claims for religious exemptions. A final objection to RLUIPA stems from fear that using the language of strict scrutiny in this context will diminish its force in areas where it does belong, such as equal protection and free speech.

1. General Skepticism about Strict Scrutiny

Many scholars claim that the formal level of scrutiny applied to religious accommodation cases has little or no effect on outcomes.[30] *Sherbert* was supposed to introduce a constitutional standard for religious accommodation highly favorable to religious claimants. To satisfy the requirements of the Free Exercise Clause, courts were to analyze closely the compelling interest proffered by the government and determine that there were no less restrictive means capable of accomplishing that interest. In other areas of the law, this level of scrutiny is often described as "'strict' in theory, fatal in fact."[31] Thus, when the *Smith* Court ruled that strict scrutiny

[29] Id. at 720.

[30] See, e.g., Christopher L. Eisgruber & Lawrence G. Sager, The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct, 61 U. Chi. L. Rev. 1245, 1247 (1994); Ira C. Lupu, The Trouble with Accommodation, 60 Geo. Wash. L. Rev. 743, 756 (1992); McConnell, supra note 15, at 1127; Ryan, supra note 6, at 1413–29.

[31] Gerald Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972).

did not apply to generally applicable laws, many believed that a damaging blow was struck to religious liberty in America.[32]

This reaction to *Smith* was based on the assumption that *Sherbert* was protective of religious liberty. But it is now widely agreed that this assumption was false. The regime of accommodation prior to *Smith* did not provide much protection for religious liberty, and most claims for exemptions brought in federal courts were rejected. In an oft-cited study, Professor James Ryan demonstrated that religious claimants fared no better under the strict standard established in *Sherbert* than under the weaker standard announced in *Smith*.[33] Professor Ryan surveyed decisions in the federal courts over the decade preceding *Smith* and found that "despite the apparent protection afforded claimants by the language of the compelling interest test, courts overwhelmingly sided with the government when applying that test."[34] The courts rarely required more than the mere assertion of a compelling interest; nor did they require the government to show that its choice of means was least restrictive. Moreover, courts refused to hold that religious practices were "substantially burdened" unless the government engaged in coercion that precluded *every* meaningful religious practice "central" to the claimants' faith. In short, the "strict scrutiny" regime announced in *Sherbert* was a paper tiger—courts did not engage in the kind of searching inquiry characteristic of heightened scrutiny regimes, and they routinely deferred to asserted government interests to justify serious impingements on religious liberty.[35]

Given the evidence that religious claimants were no more successful under *Sherbert* than they were after *Smith*, Professor Ryan predicted that claims for religious accommodation under the newly enacted RFRA would fare similarly.[36] Since RFRA merely "re-

[32] See, e.g., Edward McGlynn Gaffney, Douglas Laycock & Michael W. McConnell, An Open Letter to the Religious Community, First Things, Mar. 1991, at 44.

[33] Ryan, supra note 6, at 1416–37.

[34] Id. at 1412, 1417–22; see also Ira C. Lupu, Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion, 102 Harv. L. Rev. 933, 933–36 (1989).

[35] See, e.g., Chemerinksy, supra note 6, at 1252–57 (remarking that, rather than using strict scrutiny, the pre-*Smith* cases "reflect a variety of techniques that the Court used to deny free exercise clause claims"); Eisgruber & Sager, supra note 30, at 1247 (describing pre-*Smith* scrutiny as "strict in theory but feeble in fact"); McConnell, supra note 15, at 1127 (characterizing strict scrutiny under the pre-*Smith* regime as a "misnomer").

[36] Ryan, supra note 6, at 1439–40.

stored" the pre-*Smith* regime, and since that regime provided less protection than many had previously thought, the government would continue to prevail on the vast majority of claims for religious accommodation.

That prediction proved to be accurate. By 1998, five years after the enactment of RFRA, it was already clear that the Act had not met the expectations of its supporters. In an article appropriately entitled "The Failure of RFRA," Professor Ira Lupu demonstrated that the "restoration" of heightened scrutiny of state actions burdening religious exercise did not lead to greater protection of religious liberty.[37] As Professor Lupu noted, "[a] close look at RFRA's record . . . shows that RFRA failed to produce any substantial improvement in the legal atmosphere surrounding religious liberty in the United States."[38]

The failure of RFRA led some to pessimistic conclusions. The principal lesson was that raising the level of scrutiny, either by constitutional interpretation or statutory enactment, would have little impact on the success rate of religious claimants seeking exemptions.[39] According to Lupu, "a crisply codified doctrine of free exercise exemptions cannot be made to work."[40] By the time RLUIPA was enacted, it seemed unlikely that federal courts would apply a rigorous form of strict scrutiny in the context of religious accommodation.

2. The Plight of Prisoners

If there is general skepticism in the academic literature about the use of strict scrutiny to promote religious accommodation, that skepticism applies with even greater force to claims for religious free exercise in the prison context. Prisoners reside in heavily controlled environments that regulate nearly all aspects of their lives. They are subject to strict policies regarding grooming, diet, per-

[37] Lupu, The Failure of RFRA, supra note 6, at 585.

[38] Id.

[39] Id. at 597. In addressing whether Congress should enact a new RFRA on an alternative constitutional basis, Professor Lupu advised that "[e]ven if Congress were to enact a new federal RFRA, based perhaps on the spending power, . . . judicial tendencies . . . would make it no more likely than its predecessor to succeed as a policy matter." Id.

[40] Id.

sonal possessions, group interaction, and other restrictions that may burden religious practices. Although restrictions are subject to both constitutional and statutory controls, in the last twenty years prisoners have not been successful in advancing constitutional free exercise claims under *Turner*.[41] Likewise, prisoners were not successful under RFRA's codified heightened scrutiny.[42]

Under the *Turner* constitutional standard, prisoners have generally failed in their claims for religious exemptions.[43] But, even under RFRA's supposedly elevated level of scrutiny, prisoners were unlikely to receive the benefits of an accommodation regime.[44] Professor Greenawalt writes, "[F]ederal claims of state prisoners should have flourished most after RFRA was adopted . . . and again after RLUIPA was adopted. Even then, and most definitely in other periods, a prisoner's prospects for relief have never been promising."[45] State RFRAs have been similarly ineffective in providing increased accommodation to religious inmates.[46] These results were so stark that Professor Lupu suggested a different standard should be developed specifically for prisoners more in accord with the deference routinely granted by courts.[47] Both under minimal and heightened scrutiny, prisoners have had little success convincing the courts to grant them religious exemptions.[48]

Several factors might have contributed to the frustration of prisoner claims in court. First, prisoners are among the least favored

[41] Solove, supra note 7, at 459–60.
[42] Id.
[43] See Greenawalt, supra note 6, at 167.
[44] Id. at 169; Solove, supra note 7, at 484.
[45] Greenawalt, supra note 6, at 169.
[46] Id.
[47] Lupu, The Failure of RFRA, supra note 6, at 597–98.
[48] Daniel Solove and Ira Lupu have both offered evidence supporting this position. In a detailed analysis of prisoner cases under RFRA, Solove demonstrated that courts did not view prison policies with any skepticism, but rather continued to defer to the judgment of prison administrators. Solove, supra note 7, at 484. Under RFRA, religious practices of prisoners were treated as fungible and were often doubted for their sincerity. Id. at 486. Courts required the burden on religious practice to be unbearable before finding it to be substantial, while simultaneously accepting even the most conclusory and unsupported assertions of compelling government interests. Id. at 474–75. Professor Lupu conducted a study of reported cases under RFRA in which prisoners succeeded in only nine of the ninety-nine cases that reached trial. Ira C. Lupu, Why the Congress Was Wrong and the Court Was Right—Reflections on *City of Boerne v. Flores*, 39 Wm. & Mary L. Rev. 793, 802–03 (1998).

and most marginalized groups in society. Even courts that are sympathetic to claims for religious accommodation may be more suspicious when such claims are made by prisoners. Courts may be reluctant to find in favor of individuals in "a situation they have brought on themselves by antisocial behavior."[49]

Second, courts may doubt the sincerity of some claims and suspect that they are being brought by prisoners who have strong incentives to invent religious burdens. Courts may suspect that claimed religious beliefs are inauthentic and that prisoners are either in search of special treatment or are "aiming to flout prison rules."[50]

Finally, many prisoner claims are brought by inmates expressing minority beliefs often difficult for courts to understand. Some claims are brought by members of potentially less favored groups such as the Nation of Islam.[51] Many others are brought by members of groups, such as Native American religions, whose belief structures may be unfamiliar to the courts.[52]

Given low levels of prisoner success under previous regimes and the several factors that might contribute to judicial skepticism of

[49] Greenawalt, supra note 6, at 170.

[50] Id.

[51] Id.; see, e.g., In re Long Term Admin. Segregation of Inmates Designated as Five Percenters, 174 F.3d 464, 469–71 (4th Cir. 1999) (rejecting a Free Exercise Clause challenge to a prison's designation of the Five Percent Nation of Islam as a gang subject to heightened security measures); Johnson v. Baker, No. 94-3828, 1995 WL 570913, at *4 (6th Cir. Sept. 27, 1995) (rejecting Free Exercise Clause and RFRA challenges to a prison's denial of a separate religious service for a member of the Nation of Islam); Gholson v. Murry, 953 F. Supp. 709, 721 (E.D. Va. 1997) (finding that, under RFRA, the prison's practice of serving food to members of the Nation of Islam on plates that previously had touched pork did not substantially burden the practice of their religion).

[52] See, e.g., Hamilton v. Schriro, 74 F.3d 1545, 1551–56 (8th Cir. 1996) (rejecting a Free Exercise Clause and RFRA challenge to a prison hair length restriction brought by a Native American prisoner); Standing Deer v. Carlson, 831 F.2d 1525, 1528–29 (9th Cir. 1987) (rejecting a Free Exercise Clause claim brought by a Native American alleging that a prison regulation banning religious headgear in the dining hall unconstitutionally burdened his religious practice); Lucero v. Hensley, 920 F. Supp. 1067, 1072–73 (C.D. Cal. 1996) (holding that Native American inmates failed to show that a prison's refusal to let them keep ceremonial animal hides in housing units violated a mandatory precept of their religion); see also Bowen v. Roy, 476 U.S. 693, 699 (1986) (holding that the state's use of a Native American child's social security number in determining eligibility for welfare benefits did not impair her parents' freedom to exercise their religious beliefs).

inmate claims, commentators agreed that prisoners were very unlikely to benefit from adjustments to the standard of review. Thus, many anticipated that the language in RLUIPA, which specifically covered all institutionalized persons, would never be applied literally to religious claims made by prisoners.

3. Dilution of Strict Scrutiny in Other Contexts

In addition to misgivings about whether searching review would be applied to claims for religious exemption, critics have also argued that applying strict scrutiny in the context of religious accommodation, especially with regard to prisoners, will lead courts to weaken the application of such scrutiny in other areas of the law.

In *Smith*, Justice Scalia expressed this concern, writing that "if 'compelling interest' really means what it says . . . watering it down here would subvert its rigor in the other fields where it is applied."[53] Scholars agree. This concern takes a narrow form and broad form. The narrow version is that applying strict scrutiny in the prison context will undermine its application in all other religious accommodation cases. The broad version is that applying strict scrutiny in any religious accommodation context will weaken the standard in other legal contexts.[54]

Commentators advancing the narrow concern argue that applying strict scrutiny in prisons, with their unique mission and circumstances, will force judges to weaken the standard. They argue that these interpretations will spread beyond the institutional context and undermine the scrutiny applied to other claims for religious accommodation. For example, Professor Lupu writes, "because judges are especially unwilling to impose a strict version of RFRA on prison administrators, such litigation generates interpretations of any general religious liberty statute that in turn will tend to

[53] Employment Div. v. Smith, 494 U.S. 872, 888 (1990).

[54] Professors Volokh, Eisgruber, and Sager have expressed concern that the weak form of strict scrutiny applied in accommodation cases will lead courts to lower the level of scrutiny applied in other contexts. See Christopher L. Eisgruber & Lawrence G. Sager, Why the Religious Freedom Restoration Act is Unconstitutional, 69 N.Y.U. L. Rev. 437, 447–48, 473–74 (1994); Eugene Volokh, A Common-Law Model For Religious Exemptions, 46 UCLA L. Rev. 1465, 1500 (1999); see also Greenawalt, supra note 6, at 215 ("If judges and legislators continue to use the language of compelling interest, everyone should be clear that its force for standard equal protection and free speech contexts differs from its force for free exercise exemptions.").

weaken the Act in non-prison litigation" and "prison cases should be made subject to an explicitly different standard than non-prison cases, so that the results in the latter are not dragged down by the interpretations in the former."[55]

Those taking the broader view argue that applying strict scrutiny in any religious accommodation case will require judges to undermine the standard. They argue that these interpretations will leak out of the accommodation context and infect the formulation in all other areas in which it is applied. For example, Professor Volokh claims, "courts might export the watered down religious exemption strict scrutiny into other cases, or, less directly, weaken strict scrutiny in these other cases by diluting its formerly forceful symbolism through its feeble-in-fact application in religious freedom cases."[56] Similarly, Professors Eisgruber and Sager argue that applying heightened judicial protection in religion cases, where the rationale for such protection is weak, threatens to water down the heightened protection against racial discrimination or weaken the privileged status of speech.[57]

In sum, there appears to be consensus on three points. First, the formal level of scrutiny applicable to claims for religious accommodation will have little effect on the outcome of cases. Second, no doctrinal formulation is capable of leading to greater success of prisoner claims for exemptions in the courts. Finally, employing a compelling interest test in the context of religious accommodation—where it is necessarily weaker—threatens the integrity of the standard in other areas of the law. As we shall see, however, recent cases arising under RLUIPA provide reasons to question each of these conclusions.

II. STRICT SCRUTINY UNDER RLUIPA

RLUIPA is the most recent attempt to protect religious liberty through codification of a heightened standard of review. Section 3 of RLUIPA applies strict scrutiny to policies burdening the religious exercise of those in prison or otherwise confined.[58] It states:

[55] Lupu, The Failure of RFRA, supra note 6, at 597–98.
[56] Volokh, supra note 54, at 1500.
[57] Eisgruber and Sager, supra note 54, at 447–48, 473–74.
[58] 42 U.S.C. § 2000cc-1 (2006).

> 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.[59]

Under the statute, an incarcerated plaintiff has the burden of proving three elements. First, the claimant must demonstrate that the prison policy at issue interferes with his "religious exercise."[60] RLUIPA specifies that the term religious exercise "includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[61] Second, while centrality and compulsion need not be alleged, the plaintiff must demonstrate that his religious beliefs are "sincer[e]."[62] Third, the plaintiff must prove that the prison policy "substantially burdens" the practice of his religion. Demonstration of these three elements makes out a prima facie RLUIPA claim and shifts the burden to the government to prove that its policy is (1) "the least restrictive means" of achieving (2) "a compelling governmental interest."[63] Failure to prove either of these elements entitles the plaintiff to an exemption from the challenged prison policy.

Since the Act's inception, there has been a significant increase in claims for religious exemption brought by prisoners.[64] Hundreds of cases have been heard in the federal district courts over the past few years, and an increasing number of claims are making their way to federal courts of appeals. This new development provides an excellent opportunity to evaluate the validity of the views described in Part I of this Note. The remainder of this Part details the pattern of results in prisoner cases brought under RLUIPA's strict scrutiny regime. These results should put one in a better position to answer three questions arising from the three skeptical theses de-

[59] Id.
[60] Id.
[61] Id. § 2000cc-5(7)(A).
[62] Cutter v. Wilkinson, 544 U.S. 709, 725 n.13 (2005).
[63] 42 U.S.C. § 2000cc-2(b).
[64] There have been over 500 RLUIPA claims brought by prisoners since 2005. See supra note 2.

scribed above. Respectively, they are: (1) Is the formal level of scrutiny irrelevant to the outcome of religious accommodation cases? (2) Do prisoners always fare poorly in their claims for religious exemptions from prison policies? (3) Is there any evidence that the use of "watered down" strict scrutiny in accommodation cases has diluted the review under other strict scrutiny regimes?

A. Two Models of Strict Scrutiny

Lower courts appear to be split over the method and manner of applying strict scrutiny under RLUIPA. Two distinct models of review have emerged from the profusion of lower court cases applying this provision. I will refer to these as the "deferential model" and the "hard look model," respectively.

Under the deferential model, courts show substantial deference to the judgment of prison administrators who devise and implement an institution's penal policies. Courts following this traditional approach employ various doctrines that make it more difficult for prisoners to establish successful claims. First, with regard to the initial question of whether a prison policy imposes a substantial burden, courts employing the deferential model review prison schemes holistically—asking whether a prison scheme is overly restrictive of religion "all things considered"—rather than focusing exclusively on the challenged policy.[65] Furthermore, courts require that prison policies be "coercive" to present a cognizable burden.[66] The policies must also infringe on a religious practice that is "central" or "fundamental" to the prisoner's overall system of beliefs.[67] Second, courts applying the deferential model provide ample opportunity for prison administrators to demonstrate that policies which impose a substantial burden are justified. In analyzing whether the state has a compelling interest in the challenged prison policy, courts require little more than the mere assertion of an interest in safety or security.[68] They refrain from questioning the reasons behind apparent inconsistencies within penological schemes, review the state's interest in retaining a general prison policy

[65] See infra Subsection II.B.1.a.
[66] See infra Subsection II.B.1.b.
[67] See infra Subsection II.B.1.c.
[68] See infra Subsection II.B.2.a.

rather than its interest in applying the policy to *a particular inmate*,[69] and accept "administrative convenience" as a compelling state interest.[70] Third, in demonstrating that a challenged policy is "narrowly tailored," these courts engage in minimal consideration of potentially less restrictive alternatives,[71] reject appeals to accommodations made in other correctional facilities,[72] tolerate a high level of inconsistency within prison regimes, and generally defer to the judgment made by prison administrators that a policy is "the least restrictive means."[73]

By contrast, courts applying the new "hard look model" of strict scrutiny depart from these traditionally deferential doctrines, and employ a far more rigorous form of review. Regarding the question of substantial burden, these courts isolate the imposition placed on religious practice by a particular challenged policy, focusing on whether a specific rule, without reference to the general tenor of the penal scheme, imposes a substantial burden.[74] These courts also find that coercion is not necessary to establish a substantial burden.[75] Pressure or the presentation of a difficult choice can alone be sufficient. They have also abandoned any form of "centrality" requirement, replacing it with a plaintiff-friendly inquiry into prisoner sincerity.[76] Moreover, for the government to establish a compelling interest, these courts require the state to demonstrate that interest, rather than merely assert it.[77] They also rigorously scrutinize inconsistencies in prison polices to "smoke out" illicit or pretextual motives,[78] reject "administrative convenience" or post hoc rationalizations as compelling interests, and weigh only the consequences of not providing *a particular accommodation* when calculating the government interest.[79] Finally, these courts employ a robust narrow tailoring analysis that prioritizes the scrutiny required

[69] See infra Subsection II.B.2.c.
[70] See infra Subsection II.B.2.b.
[71] See infra Subsection II.B.3.a.
[72] See infra Subsection II.B.3.b.
[73] See infra Subsection II.B.3.c.
[74] See infra Subsection II.C.1.a.
[75] See infra Subsection II.C.1.b.
[76] See infra Subsection II.C.1.c.
[77] See infra Subsection II.C.2.a.
[78] See infra Subsection II.C.2.b.
[79] See infra Subsection II.C.2.c.

under RLUIPA over considerations of "due deference." They demand that prison administrators actually consider less restrictive alternatives,[80] welcome comparisons to other correctional facilities that have made similar accommodations,[81] and require a high degree of consistency within prison schemes.[82]

The upshot of this divergence is not merely the use of different vocabulary to reach the same results. Instead, the doctrinal split in the application of strict scrutiny is having a real effect on case outcomes. Prisoners are winning cases under the new model of review that they were unlikely to win under the deferential model.[83] And the results of claims for exemptions now appear to depend, at least in part, on the circuit in which the cases are brought.[84]

To demonstrate precisely how these models differ, and the consequences of this divergence, I proceed by each element of an

[80] See infra Subsection II.C.3.a.

[81] See infra Subsection II.C.3.b.

[82] See infra Subsection II.C.3.c.

[83] For instance, under RFRA, prisoners tended to lose cases involving religious implements that might be dangerous, or demands to worship at certain times or in certain groups. But under RLUIPA, these kinds of claims have met with more success. For example, in *Spratt v. Rhode Island Department of Corrections*, 482 F.3d 33, 34–35 (1st Cir. 2007), the First Circuit ruled for a prisoner who demanded the right to preach during worship. The Second Circuit and the Ninth Circuit have each ruled in favor of prisoners requesting permission to worship in groups and to celebrate religious holidays. Shakur v. Selsky, 391 F.3d 106, 120 (2d Cir. 2004); Greene v. Solano County Jail, 513 F.3d 982, 989–90 (9th Cir. 2008). Even the Fourth Circuit held in favor of a prisoner who demanded admittance to congregational prayers during Ramadan. Lovelace v. Lee, 472 F.3d 174, 194 (4th Cir. 2006). As for personal property, the Third Circuit granted an exemption from a regulation limiting the number of books an inmate could keep in his cell. Washington v. Klem, 497 F.3d 272, 274 (3d Cir. 2007). Although the case did not involve a religious implement that could itself be dangerous, the government argued that the book limit prevented inmates from hiding weapons and other contraband. In this area, hard look courts at least have been willing to vacate grants of summary judgment to the government when prison administrators fail to demonstrate why the religious property is dangerous.

[84] The cases described below show a split among the circuits over outcomes, not just a conflict over methodologies. There are several instances in which it appears clear that a factually identical claim would come out differently before a different court. For example, the claims in *Warsoldier v. Woodford*, 418 F.3d 989, 996–1001 (9th Cir. 2005), and *Hoevenaar v. Lazaroff*, 422 F.3d 366, 369–72 (6th Cir. 2005), appear almost identical. Both involve a claim by a Native American prisoner for an exemption from a hair length policy. The Sixth Circuit applied the "deferential model" and denied the exemption while the Ninth Circuit applied the full panoply of "hard look" tools and granted the exemption. It seems clear in these two cases that the methodology was outcome-determinative.

RLUIPA claim. The following chart previews and summarizes conclusions of the coming Sections.

		Model 1: Deferential	**Model 2: Hard Look**
Courts of Appeals		5,6,8,10,11	1,2,3,4,7,9
Substantial Burden	**Focus of Burden**	Holistic	Specific Policy
	Governmental Means	Coercion	Pressure or Hard Choice
	Authenticating Device	Centrality	Sincerity
Compelling Interest	**Method of Proof**	Assertion	Demonstration
	Administrative Convenience	Accepted	Rejected
	Scope of State Interest	Facial	As Applied
Narrow Tailoring	**Consideration of Alternatives**	Minimal	Robust
	Institutional Comparison	No	Yes
	Attitude Toward Inconsistency	Toleration	Skepticism

B. The Deferential Model

1. Substantial Burden

To trigger strict scrutiny by federal courts, prisoners must initially demonstrate that an institutional policy substantially burdens their religion.[85] If a prisoner is unable to make such a showing, the government is not required to show that the challenged policy is the least restrictive means of achieving a compelling state interest. Historically, courts have avoided this searching review by making more stringent the threshold inquiry into substantial burden. Courts applying the deferential model of review have employed many of the same doctrines that allowed courts under *Sherbert* and RFRA to avoid the more difficult questions that arise under the compelling interest test.[86]

[85] 42 U.S.C. § 2000cc-1 (2006).

[86] See Lupu, The Failure of RFRA, supra note 6, at 596; Ryan, supra note 6, at 1416–37; see also Chemerinsky, supra note 6, at 1248; Solove, supra note 7, at 460.

a. Totality of the Circumstances Approach

Under the deferential model of review, courts assess whether an inmate's religion is substantially burdened "all things considered." In other words, courts ask whether the plaintiff's religious practice is unreasonably burdened by the entire set of prison policies in effect. It is not sufficient for a plaintiff to identify a discrete prison policy that burdens his religious practice. Rather, the plaintiff must show that the entire system of regulation adopted by prison administrators is not sufficiently tolerant of a given religion. Under this approach, religion-friendly policies in one context can be invoked to cure burdensome policies in another. Also under this approach, religious impositions created by prison policies have been held to be insubstantial if they are limited in duration or if religious prisoners have benefited from other accommodations. This holistic assessment of substantial burden has allowed prison administrators to marshal evidence of past sensitivity to religious concerns to make up for other discrete burdens placed on religious practice.

For example, in *Smith v. Allen*, the Eleventh Circuit found that a prison policy denying an inmate an article of religious property did not substantially burden the practice of his religion in light of all of the other accommodations he was given. The court wrote:

> [T]he Committee's denial of the quartz crystal should be placed in the larger context of its 2003 decision—a decision in which the Committee granted Smith's requests for, among other things, a Thor's hammer necklace; a candle in his cell; a fern tree; a number of religious "runes" to be used in practicing the Odinist faith; as well as permission to have a designated day of the week to practice his Odinism; and permission to recognize four Odinist holidays. Put simply . . . the Committee granted almost the entirety of Smith's request, permitting him to have a number of religious items to practice his Odinism.[87]

The Eleventh Circuit insisted that the prisoner's particular claim for a religious accommodation—the possession of a small quartz crystal—be considered in the larger context of how the prisoner's religious practice had been treated as a whole. The court found that prison administrators had been more than generous in their

[87] Smith v. Allen, 502 F.3d 1255, 1277 n.13 (11th Cir. 2007).

accommodations of the prisoner's religion and that their laudable efforts had to be considered when evaluating the particular policy challenged.[88]

Courts have also found that a correctional facility's willingness to consider alternative accommodations weighs against a finding of substantial burden. In *Patel v. U.S. Bureau of Prisons*, the Eighth Circuit held that allowing a Muslim prisoner to receive a vegetarian meal mitigated the level of burden imposed by refusing to provide him *halal* meat.[89] In *Smith v. Allen*, the Eleventh Circuit found that the prison's offer to allow the plaintiff to possess a single candle rendered their policy denying him a fire pit in connection with his practice of Odinism an insubstantial burden.[90] Courts applying the deferential model have shown a willingness to probe the general character of an institution's approach to religious accommodation, and, upon finding a lack of animus or callous indifference toward religion, these courts have reasoned that, in context, a discrete burden is insubstantial.[91]

[88] Id. at 1277.

[89] Patel v. U.S. Bureau of Prisons, 515 F.3d 807, 815 (8th Cir. 2008).

[90] Smith v. Allen, 502 F.3d at 1280.

[91] See also Adkins v. Kaspar, 393 F.3d 559, 571 (5th Cir. 2004) (finding that a promise to allow a prospective volunteer to attend services supports the prison's contention that their group worship policy does not substantially burden the prisoner's religion); Jones v. Rieben, No. 2:04cv1029-MHT, 2008 WL 4080360, at *5 (M.D. Ala. Sept. 2, 2008) (holding that "the question of whether a challenged action constitutes a substantial burden must be determined from the record as a whole and not merely by reference to the specific official action Jones complains about"); Grady v. Holmes, No. 07-cv-02251-EWN-CBS, 2008 WL 3539274, at *5 (D. Colo. Aug. 12, 2008) (holding that "[a]ll that is required is a reasonable opportunity to practice one's religion and [the prisoner's] allegations do not support a claim that such an opportunity has been denied him"); Copenhaver v. Mich. Dept. of Corr., No. 05-CV-73286, 2007 WL 2406925, at *7 (E.D. Mich. Aug. 20, 2007) (holding that denying a Jewish inmate a kosher salad did not constitute a substantial burden because, among other reasons, the prison administrators allowed him to finish the rest of his kosher meal absent the salad); Brown ex rel. Indigenous Inmates at N.D. State Prison v. Schuetzle, 368 F. Supp. 2d 1009, 1023 (D.N.D. 2005) (holding that the prison's failure to appoint a pipe keeper did not substantially burden a Native American prisoner's religion because the prison regulations as a whole "afforded a reasonable opportunity to exercise their religious freedoms").

b. Coercion

Courts following the deferential model have also required a showing of outright coercion to find that a religious practice is substantially burdened. In 1988, the Supreme Court decided *Lyng v. Northwest Indian Cemetery Protective Association*, which rejected a Free Exercise Clause challenge to the government's construction of a road through sacred Indian burial grounds. Writing for the majority, Justice O'Connor stated that the Free Exercise Clause "affords an individual protection from certain forms of government compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures."[92] After *Lyng*, many lower courts took this language to mean that a religious claimant could not make out his prima facie case for substantial burden unless the government's policies were coercive.[93] Under both *Turner* and RFRA, this reasoning was consistently applied to

[92] 485 U.S. 439, 448 (1988) (quoting Bowen v. Roy, 476 U.S. 693, 700 (1986)).

[93] See, e.g., Bauchman v. W. High Sch., 132 F.3d 542, 557 (10th Cir. 1997) (rejecting a free exercise challenge brought by a Jewish student who was asked to sing Christian devotional music in choir class because, citing *Lyng*, she failed to show the necessary element of coercion); Newdow v. U.S. Cong., 435 F. Supp. 2d 1066, 1076–77 (E.D. Cal. 2006) (rejecting a RFRA claim that printing "in God we trust" on money substantially burdens plaintiff's religious practice because the motto is not coercive); Harper ex rel. Harper v. Poway Unified Sch. Dist., 345 F. Supp. 2d 1096, 1107–08 (S.D. Cal. 2004) (holding that a student who was ordered not to wear a homophobic t-shirt by his school stated a claim under the Free Exercise Clause that his religion was substantially burdened because he was threatened with coercion); Johnson v. Dade County Pub. Sch., No. 91-2952-CIV-UUB, 1992 WL 466902, at *6 (S.D. Fla. Nov. 25, 1992) (rejecting a free exercise claim for an exemption from part of the school curriculum and noting, with citation to *Lyng*, that a showing of coercion is required for burdens analysis); Healy v. Indep. Sch. Dist. 625, No. 3-90 CIV 46, 1991 WL 337534, at *4 (D. Minn. Mar. 5, 1991) (holding that denying transportation reimbursement to parents sending their children to religious schools does not substantially burden their free exercise of religion and citing *Lyng* for the proposition that coercion is required to demonstrate such a burden); see also Parker v. Hurley, 514 F.3d 87, 99 (1st Cir. 2008) (denying a religious accommodation to school children whose parents objected to curriculum materials intended to encourage respect for gay persons and holding, with citation to *Lyng*, that a showing of coercion is required for the plaintiffs to demonstrate a substantial burden on their religious exercise); Anspach ex rel. Anspach v. City of Phila., Dept. of Pub. Health, 503 F.3d 256, 272 (3rd Cir. 2007) (rejecting a free exercise claim brought by a minor who was advised to take emergency contraception pills that violated her religious practice because the plaintiff did not allege any sort of coercion).

claims for religious exemptions.[94] Lower courts deciding RLUIPA cases under the deferential model have continued to employ this doctrine in the prison context, making it difficult for claimants to carry their initial burden of persuasion.

For example, in *Adkins v. Kaspar*, the Fifth Circuit relied heavily on the reasoning in *Lyng* to find that the Texas Department of Criminal Justice's policy prohibiting group worship without an outside volunteer did not place a substantial burden on the free exercise of the plaintiff's religion. The plaintiff, a member of the Yahweh Evangelical Assembly (YEA), sought an exemption from the prison's policy because of the unavailability of outside volunteers. Quoting *Lyng*, the Fifth Circuit denied that "incidental effects of government programs . . . which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification."[95] In other words, without a tendency to coerce religious prisoners, a generally applicable prison policy cannot constitute a substantial burden.

The prisoner in *Adkins* had argued that there was outright coercion—that the prison policy prohibited members of YEA from any group worship because there were no available volunteers. The Fifth Circuit, however, declined to characterize the situation that way. Instead, the court held that the inability to congregate resulted "from a dearth of qualified outside volunteers[,] . . . not from some rule or regulation that directly prohibits such gatherings."[96] The government had not coerced the members of YEA into abstaining from group worship; rather the scarcity of volunteers dictated the outcome. In holding that outright coercion was required to constitute a substantial burden, the Fifth Circuit found that conditions precedent placed on more general religious accommodations were not themselves coercive when they could not be satisfied.

Lower courts applying the deferential model have also held that other forms of pressure—including high economic cost—are insufficient to constitute a substantial burden. In *Patel v. U.S. Bureau of Prisons*, the Eighth Circuit held that the prison's failure to offer *ha-*

[94] See Lupu, The Failure of RFRA, supra note 6, at 594–95; Solove, supra note 7, at 465.

[95] *Adkins*, 393 F.3d at 569 (quoting *Lyng*, 485 U.S. at 450–51).

[96] Id. at 571.

lal meals on a daily basis did not constitute a substantial burden on a prisoner's practice of Islam. Prison administrators argued that *halal* meals could be purchased from the commissary on days when they were not made generally available. Despite the prisoner's testimony that the cost of such purchases would be "prohibitive," the Eight Circuit held that "Patel has not shown that [this financial burden] is substantial."[97]

Courts applying the deferential model have refused to allow impositions short of coercion—including accommodations contingent on scarce resources and high economic cost—to qualify as a substantial burden.[98] Again, by elevating the threshold requirement of proving substantial burden, courts applying the deferential model have decreased the number of government policies that might otherwise trigger strict scrutiny.

c. Evaluating Centrality

Finally, under the deferential model, courts have retained the traditional requirement that a prison policy impose a burden on a sufficiently important religious practice to merit heightened scrutiny. Under both *Sherbert* and RFRA, federal courts often required that a government policy interfere with a "central tenet" of a religion in order to constitute a substantial burden.[99] These courts also

[97] Patel v. U.S. Bureau of Prisons, 515 F.3d 807, 814 (8th Cir. 2008).

[98] Id.; *Adkins*, 393 F.3d at 571; see also Jones v. Rieben, No. 2:04cv1029-MHT, 2008 WL 4080360, at *5 (M.D. Ala. Sept. 2, 2008) (defining substantial burden as "significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly" (quoting Smith v. Allen, 502 F.3d 1255, 1277 (11th Cir. 2007))); Abdulhaseeb v. Calbone, No. CIV-05-1211-W, 2008 WL 904661, at *24 (W.D. Okla. Apr. 2, 2008) (finding that the substantial burden test under RLUIPA requires coercion) (citing *Lyng*, 485 U.S. at 450–51); Jackson v. Ellis, No. 3:07cv67/LAC/EMT, 2008 WL 89861, at *4 (N.D. Fla. Jan. 7, 2008) (holding that a prison's failure to supply Muslim reading material and failure to designate a special diet for Muslims does not impose a substantial burden on religion because it was not "significant pressure which directly coerces the religious adherent"); Avila v. McDonough, No. 3:05cv280/LAC/EMT, 2007 WL 2480246, at *7 (N.D. Fla. Aug. 30, 2007) (holding that a prison policy prohibiting an inmate from possessing certain religious jewelry did not impose a substantial burden because it did not "directly coerce[]" him to conform his behavior to the prison's requirements in violation of his faith).

[99] See, e.g., Mack v. O'Leary, 80 F.3d 1175, 1179 (7th Cir. 1996); In Re Young, 82 F.3d 1407, 1418 (8th Cir. 1996); Bryant v. Gomez, 46 F.3d 948, 949 (9th Cir. 1995); Abdur-Rahman v. Mich. Dep't of Corr., 65 F.3d 489, 491–92 (6th Cir. 1995); Werner v. McCotter, 49 F.3d 1476, 1480 (10th Cir. 1995); Graham v. Comm'r, 822 F.2d 844,

required that the religious practice in question be mandatory or compelled by the claimant's faith, not merely recommended. These centrality and compulsion requirements proved to be an enormous hurdle for religious claimants under previous strict scrutiny regimes. Federal courts frequently held that burdens placed on religious practice by government policies were merely "incidental" or "insubstantial" because the religious practices at issue were not fundamental aspects of the claimant's system of beliefs.[100]

Largely because of this pattern of analysis, the drafters of RLUIPA included a provision intended to make it possible for more prisoners to satisfy the threshold substantiality inquiry.[101] Section 8 of RLUIPA states that "the term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[102] The drafters intended RLUIPA to remove the many "frivolous or arbitrary rules" that restrict the religious practice of prisoners in "egregious and unnecessary ways."[103] They observed that the centrality inquiry placed an obstacle in the way of claimants attempting to secure an accommodation under both *Sherbert* and RFRA, and they specifically sought to eliminate that barrier.[104]

Despite the statutory language and legislative history of RLUIPA, lower courts adopting the deferential model continue to use some form of the centrality inquiry in their evaluation of substantial burden. For instance, in *Smith v. Allen*, the Eleventh Circuit relied on the testimony of a prison chaplain to assess the "importance" of certain aspects of the prisoner's religious practice. The court stated, "the Chaplain found . . . that the sources that Smith submitted did 'not show[] the *necessity* of [a pine] fire' . . . . Failing such evidence, we are unable to find how, if at all, the denial of a pine fire pit effectuated a substantial burden on his obser-

851 (9th Cir. 1987); see also Greenawalt, supra note 6, at 204–08; Derek L. Gaubatz, RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions, 28 Harv. J.L. & Pub. Pol'y 501, 529–34 (2005).

[100] See sources cited supra note 99.

[101] 42 U.S.C. § 2000cc-5(7)(A) (2006).

[102] Id.

[103] 146 Cong. Rec. S7775 (July 27, 2000) (joint statement of Sens. Hatch and Kennedy on RLUIPA).

[104] 146 Cong. Rec. E1564 (Sept. 21, 2000) (statement of Rep. Charles T. Canady).

vance of Odinism."[105] The court held that, without a demonstration that the practice in question was a *necessary* component of the prisoner's religious practice, he would be unable to establish his prima facie case.

Further, in evaluating the substantiality of the burden, the same prison officials questioned the role of the requested quartz crystal in the *formal* practice of Odinism. The Court relied on the testimony of a prison chaplain who "conducted independent research on the tenets of Odinism [and] held discussions with chaplains in other prisons on the religion's doctrines" and found "no supporting materials validating the need for a crystal in connection with Smith's practice of Odinism."[106] Following this testimony, the court denied that Smith's religion was substantially burdened because there was "no evidence to demonstrate that a small quartz crystal was *fundamental* to his practice of Odinism."[107] This inquiry into whether the religious practice is "fundamental" is functionally identical to a revival of the centrality inquiry.[108]

Further inspection of the Eleventh Circuit's opinion in *Smith* helps to illustrate why the centrality inquiry has worked systematically to the detriment of religious claimants. In investigating how important or "fundamental" the prisoner's claims were to the practice of his religion, the court looked to "third party sources" to answer the question.[109] In addition to soliciting testimony from a non-Odinist chaplain, the court consulted those sources to determine how important the requested accommodations were to the prisoner. The court dismissed the prisoner's testimony that the religious property was "essential" and instead held the burden to be a

[105] Smith v. Allen, 502 F.3d 1255, 1280 (11th Cir. 2007) (emphasis added).

[106] Id. at 1277 (internal quotation marks omitted).

[107] Id. at 1278 (emphasis added).

[108] Recently, the Eighth Circuit attempted to distance itself from basing a decision on centrality, following the Supreme Court's guidance in *Cutter v. Wilkinson*. Gladson v. Iowa Dep't of Corr., 551 F.3d 825, 832 (8th Cir. 2009) (citing Cutter v. Wilkinson, 544 U.S. 709, 725 n.13 (2005)). But the court held that the plaintiffs failed to demonstrate a substantial burden on their religion because they did not show that the policy "denie[d] them reasonable opportunity to engage in those activities that are *fundamental* to their religion." Id. at 834 (emphasis added). While it is clear that the *Smith* and *Gladson* courts were aware of the Supreme Court's views regarding centrality in *Cutter*, it seems that the "fundamental activity" test creates an identical requirement for proving substantial burden.

[109] *Smith v. Allen*, 502 F.3d at 1277–78.

mere inconvenience because the sources gave "[no] indication that a small, quartz crystal is necessary to observe the rites of Odinism."[110] The discussion contains no analysis of the prisoner's sincerity, as permitted under RLUIPA. Instead, the court in *Smith* performed its own independent theological interpretation of the tenets of Odinism and determined that the quartz crystal was not "essential" to its practice.[111]

Employing the deferential model of strict scrutiny, some courts have retained the centrality inquiry from pre-RLUIPA case law. Rather than focus on sincerity as a way to keep out fraudulent claims, these courts have continued to ask how important a particular practice is to the prisoner's religious beliefs. And just as this centrality inquiry proved to be a major hurdle to prisoner claims under *Sherbert* and RFRA, courts employing the deferential model are following the same line under RLUIPA.[112]

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[110] Id. at 1278.

[111] This reflects precisely a concern that Justice Scalia expressed when writing for the majority in *Employment Division v. Smith*, to wit, "It is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the free exercise field, than it would be for them to determine the 'importance' of ideas before applying a 'compelling interest' test in the free speech field." 494 U.S. 872, 886–87 (1990). On Justice Scalia's view, both inquiries involve an impermissible government determination of what is to be orthodox in a matter beyond the scope of limited government. By retaining the centrality inquiry from RFRA under alternative designations, the Eleventh Circuit turned the focus away from the sincerity of belief and decided for the prisoner what aspects of his religious practice were important enough to justify an exemption.

[112] See Patel v. U.S. Bureau of Prisons, 515 F.3d 807, 813 (8th Cir. 2008) (finding no substantial burden and stating that "[s]ubstantially burdening one's free exercise of religion means that the regulation 'must significantly inhibit or constrain conduct or expression that manifests some central tenet of a person's individual religious beliefs'" (quoting Murphy v. Mo. Dep't of Corr., 372 F.3d 979, 988 (8th Cir. 2004))). In a footnote, the *Patel* court acknowledged the possible conflict with the definitions section of RLUIPA, but that recognition did not seem to affect its analysis in any way. Id. at 813 n.7; see also Murphy v. Mo. Dep't of Corr., 506 F.3d 1111, 1115 (8th Cir. 2007) ("Whether or not RLUIPA's definition includes such a requirement, we have held that it is necessary to show that the existence of a sincerely held tenet or belief that is central or fundamental to an individual's religion is a prerequisite to a 'substantially burdened' claim under RLUIPA."); Strutton v. Meade, No. 4:05CV02022 ERW, 2008 WL 4534015, at *25 (E.D. Mo. Sept. 30, 2008) (holding that the substantial burden test requires that the prison policy constrain some action that "manifests some central tenent [sic] of a person's individual religious beliefs") (quoting Murphy v. Mo. Dep't of Corr., 372 F.3d 979, 988 (8th Cir. 2004)).

2. Compelling Interest

If a prisoner is successful in demonstrating that an institutional policy places a substantial burden on his religious practice, the burden of proof shifts to the government to prove that the challenged policy is the least restrictive means of achieving a compelling state interest. Under *Sherbert* and RFRA, courts rarely required the government to do more than *assert* a compelling interest in safety or security. Further, courts accepted rationales traditionally held to be "less than compelling," such as the government's interest in administrative convenience or cost reduction.[113] In the prison context, courts typically found a compelling state interest whenever the government relied on the need to maintain order and security. Again, there are a handful of circuit courts that have continued to apply this traditional deferential model of review, leading to lower rates of success for prisoners making claims for religious exemptions.

a. Mere Assertion of Compelling Interest

Courts employing the deferential model have refused to substitute their own judgment for that of prison administrators when evaluating the strength of the government interest in enforcing a policy. These courts routinely point to the joint statement of Senators Kennedy and Hatch, which said that courts are to give "due deference to the experience and expertise of prison and jail administrators."[114] Courts following this model defer to prison officials who claim that the governmental interest is compelling, even when officials fail to produce any evidence for their claims other than their own testimony.

[113] Ryan, supra note 6, at 1418; see, e.g., Reese v. Coughlin, No. 93 Civ. 4748 LAP, 1996 WL 374166, at *8 (S.D.N.Y. July 3, 1996) (granting summary judgment to prison officials who claimed that the possession of tarot cards "can be used to gain psychological control or influence over other inmates"); Phipps v. Parker, 879 F. Supp. 734, 736 (W.D. Ky. 1995) (sustaining a regulation forcing a Hasidic Jew to receive a haircut and stating "[s]ome interests, like quick identification, cannot be realistically achieved by any other method").

[114] 146 Cong. Rec. S7775 (July 27, 2000) (joint statement of Sens. Hatch and Kennedy on RLUIPA); see also Fegans v. Norris, 537 F.3d 897, 902 (8th Cir. 2008); Fowler v. Crawford, 534 F.3d 931, 937 (8th Cir. 2008); Longoria v. Dretke, 507 F.3d 898, 902 (5th Cir. 2007); Baranowski v. Hart, 486 F.3d 112, 125 (5th Cir. 2007); Hoevenaar v. Lazaroff, 422 F.3d 366, 370 (6th Cir. 2005).

The Sixth Circuit's opinion in *Hoevenaar v. Lazaroff* illustrates the type of reasoning employed by courts that have adopted the deferential model. The district court had held that a prison's failure to accord a Native American inmate an exemption from a grooming regulation imposed a substantial burden on his practice of religion and was not justified as the least restrictive means of achieving a compelling state interest. In reversing this decision, the Sixth Circuit held that "the district court's analysis does not reflect the requisite deference to the expertise and experience of prison officials."[115] The *Hoevenaar* court stated that testimony from the warden and a security specialist within the prison system presented "valid and weighty concerns" and that "the district court did not give proper deference to the opinions of these veterans of the prison system."[116] Further admonishing the lower court, the Sixth Circuit charged it with "substituting its judgment in place of the experience and expertise of prison officials."[117]

Similarly, in *Fowler v. Crawford*, the Eighth Circuit showed deference to the judgment of prison administrators who asserted that a prison's refusal to provide a sweat lodge for Native American inmates served the prison's compelling interest in security. The court held that

> the pertinent query is whether a federal appeals court, far removed from the realities of institutional life at JCCC, or state prison officials—well familiar with (1) the size and nature of JCCC's population, (2) the staffing problems and budgetary restrictions under which they labor, and (3) the various religious practices they are asked to accommodate—is best suited to make such a decision. The answer is clear . . . .[118]

The *Fowler* court did not look any further than the testimony of a prison administrator for its answer to the question of compelling interest.

The Eighth Circuit recently extended *Fowler* in *Fegans v. Norris*. The *Fegans* court applied the deferential approach in holding that a hair length policy was the least restrictive means to achieve a

[115] *Hoevenaar*, 422 F.3d at 371.
[116] Id. (internal citations omitted).
[117] Id. at 370.
[118] *Fowler*, 534 F.3d at 943.

compelling state interest.[119] The court reached this conclusion by holding that the testimony of a prison official was sufficient to establish the state's compelling interest in safety and security.[120] Sounding notes of deference similar to those of the Sixth Circuit in *Hoevenaar*, the *Fegans* court pointed to Congress's expectation that courts give "due deference to the experience and expertise of prison and jail administrators."[121] The court further analogized to the deference owed to administrators under *Turner*. In support of its view, the court also cited *O'Lone v. Estate of Shabazz*, a free exercise case decided under the *Turner* standard, which held that "judgments regarding prison security 'are peculiarly within the province and professional expertise of corrections officials'" and "courts should ordinarily defer to their expert judgment in such matters."[122] Despite the fact that the *Turner* standard is understood to be significantly less rigorous than the standard established under RLUIPA,[123] the Eighth Circuit essentially equated the deference due under statutory strict scrutiny to that which is due under the *lower* constitutional standard set forth in *Turner*.

The dissent in *Fegans* pointed to Eighth Circuit precedent in *Teterud v. Burns*, which held that, under RFRA, prison administrators needed to present "empirical proof" to support their assertions of compelling interest.[124] In order to find that the defendants satisfied the same requirement under RLUIPA, the majority held that testimony from prison administrators is the equivalent of empirical proof. The court explained that this testimony "described specific (i.e., empirical) examples of inmates who had done just these things under a previous policy that permitted long hair."[125] Thus, the court concluded that the testimony of prison officials was sufficient to establish the state's interests as compelling.

Not all courts following this deferential model have equated testimony with empirical proof. Some courts have instead held that, under a regime of "due deference," evidence or empirical proof is

[119] *Fegans*, 537 F.3d at 902–03, 905–06.
[120] Id. at 904.
[121] Id. at 903 (quoting 146 Cong. Rec. S7775 (July 27, 2000) (joint statement of Sens. Hatch and Kennedy on RLUIPA)).
[122] Id. (quoting Hamilton v. Schriro, 74 F.3d 1545, 1553 (8th Cir. 1996)).
[123] See, e.g., Murphy v. Mo. Dep't of Corr., 372 F.3d 979, 988 (8th Cir. 2004).
[124] 522 F.2d 357, 361 (8th Cir. 1975).
[125] *Fegans*, 537 F.3d at 904.

simply not necessary. For example, the *Fowler* court held that, when veterans of a correctional facility legitimately believe that a compelling penological interest is at stake, "officials charged with managing such a volatile environment need [not] present evidence of actual problems to justify security concerns."[126] In fact, in *Fowler*, the court appears to have held that the state can establish a compelling interest whenever a prison administrator invokes considerations of "safety" or "security." Indeed, the first sentence of the court's compelling interest analysis states, "a prison's interest in order and security is always compelling."[127] Though the court stops short of putting it in these terms, this statement indicates that the Eighth Circuit may be willing to treat "security" as a per se compelling interest, which would limit the entire strict scrutiny analysis to the issue of least restrictive means. This explanation would also help to make sense of the language in *Fowler* that seems simply to assume that safety and security are always compelling in the prison context.[128]

The dissent in *Fegans* noted the implications of adopting such a per se rule. Judge Melloy stated that the majority flipped the statutorily mandated burden of proof on the issue of compelling interest from the defendant to the plaintiff. He wrote that the majority "put[] the burden on Fegans to demonstrate that males do not pose a greater security risk than females," but "under RLUIPA, Fegans does not have the burden of proof."[129] Based on the Eighth Circuit's contemporaneous analysis, the majority might have responded that it did not reverse the burden of proof, but rather found that the testimony of prison administrators satisfied that burden and shifted the onus back onto the prisoner to refute that testimony with his own "proof." But regardless of whether the *Fegans* court reversed the correct allocation of the burden of proof, it remains quite clear that circuits applying the deferential model hold that the assertion of a compelling interest in safety or security

[126] Fowler v. Crawford, 534 F.3d 931, 939 (8th Cir. 2008).

[127] Id.

[128] Id. at 941 ("Given the obvious security concerns surrounding the sweat lodge itself, we are loathe to suggest that had Fowler shown some willingness to soften his demand the outcome of this case might differ.").

[129] *Fegans*, 537 F.3d at 911 (Melloy, J., dissenting).

by experienced prison administrators is sufficient to show a compelling interest without any further demonstration.

b. Administrative Convenience as Compelling Interest

Despite the fact that "administrative convenience" rationales for government policies are less than compelling in other contexts,[130] deferential courts have routinely held that administrative convenience is compelling enough to satisfy strict scrutiny in the context of religious accommodation.[131] This is particularly true in the institutional context. Prison administrators regularly argue that the state's interest in administrative cost-saving or simplicity is inextricably linked to interests in maintaining order and security. This link to the clearly compelling interest in security was accepted as a matter of course under *Sherbert* and RFRA,[132] and courts adopting the deferential model under RLUIPA have followed much the same course.[133]

In *Baranowski v. Hart*, the Fifth Circuit held that a Texas prison's interest in administrative cost-control was a compelling interest justifying the prison's refusal to provide kosher meals to a Jewish inmate.[134] The court explained that "evidence submitted by Defendants establishes that TDCJ's budget is not adequate to cover the increased expense of either providing a separate kosher kitchen or bringing in kosher food from the outside."[135] The court crystallized its reasoning, saying, "[W]e hold that this policy [denying kosher food] is related to maintaining good order and controlling costs and, as such, involves compelling governmental interests."[136] The *Baranowski* court went on to treat budgetary concerns and maintaining order as essentially one and the same.[137]

[130] See, e.g., Frontiero v. Richardson, 411 U.S. 677, 690 (1973). The Supreme Court has held that administrative convenience rationales fail even under intermediate scrutiny. See Reed v. Reed, 404 U.S. 71, 76 (1971).
[131] Ryan, supra note 6, at 1418–20.
[132] See Solove, supra note 7, at 481–84.
[133] See *Fegans*, 537 F.3d at 902–03; Baranowski v. Hart, 486 F.3d 112, 125 (5th Cir. 2007); Hoevenaar v. Lazaroff, 422 F.3d 366, 371–72 (6th Cir. 2005).
[134] 486 F.3d at 125.
[135] Id.
[136] Id.
[137] Id. at 125–26.

In *Hoevenaar*, the Sixth Circuit held that a different kind of administrative concern—that of avoiding officer confusion—could be a compelling interest. The court urged deference to the testimony of a prison administrator who insisted that an exemption from a hair length regulation would cause administrative confusion.[138] The court quoted the prison warden at length, stating that "individualized exemptions are problematic because they cause . . . problems with enforcement of the regulations due to staff members' difficulties in determining who is exempted and who is not."[139] The *Hoevenaar* court insisted on deference to the prison administrator's testimony that avoiding such administrative mix-ups is a compelling state interest.

The Eighth Circuit accepted a similar administrative rationale in *Fegans*. There the court deferred to prison officials who testified that the "strain on prison resources and inmate-staff relations" caused by the increased need for searches was a compelling reason to deny a religious exception to a grooming policy.[140] Much like the court in *Baranowski*, the *Fegans* court connected this administrative rationale to the more established compelling interest in prison safety. The court stated that an administrative segregation would "not lessen the safety risk to correctional officials assigned to pat down the prisoners, and . . . would place a strain on the ADC's facilities, which are already full."[141] Contrary to holdings under other strict scrutiny regimes, courts following the deferential model have found that administrative rationales provide compelling state interests, especially when connected to more traditionally accepted rationales like security and order.

c. Facial Review of Government Interest

Under the deferential model, rather than evaluate whether the state has a compelling interest in refusing to make an individual religious exception, courts look to see if the state has a compelling interest in the regulatory scheme *as a whole*. This broad view of government interest allows prison administrators to offer general

[138] *Hoevenaar*, 422 F.3d at 371.
[139] Id.
[140] Fegans v. Norris, 537 F.3d 897, 902–03 (8th Cir. 2008).
[141] Id. at 906.

evidence and arguments about safety and security without having to show that making the one requested exception will undermine an entire policy.[142]

In *Fegans*, the Eighth Circuit provided a good example of this approach. The *Fegans* majority held that individualized review of the challenged policy *as applied to a particular plaintiff* was not required. The court wrote:

> [P]articularly given the Supreme Court's emphasis in *Cutter* on giving "due deference to the experience and expertise of prison and jail administrators in establishing *necessary regulations* and procedures to maintain good order, security and discipline . . . ," we do not interpret RLUIPA to prevent a prison from applying certain important security regulations to all inmates without providing for exemptions.[143]

In dissent, Judge Melloy pointed out the tension between this approach and Section 3 of RLUIPA, which provides that prisons cannot impose a substantial burden on the religious exercise of a prisoner "*even if the burden results from a rule of general applicability*."[144] Judge Melloy stated that the prison administrators only considered evidence supporting the state interest when enacting

[142] This interpretation of the compelling interest test conflicts with the Supreme Court's holding in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006). In *O Centro*, the Court reviewed a claim under RFRA for a religious exemption from the Controlled Substances Act involving sacramental use of an hallucinogenic drug called *hoasca*. The Court held that RFRA's compelling interest test required a "case-by-case" analysis of the government's interest in denying a requested exemption, and that "the Government's mere invocation of the general characteristics of Schedule I substances . . . cannot carry the day." Id. at 431–32 (citing Employment Div. v. Smith, 494 U.S. 872, 899 (1990) (O'Connor, J., concurring in judgment)). Presumably, this analysis applies equally to the compelling interest test under RLUIPA, given that RFRA cases interpreting the standard of review have precedential effect under RLUIPA. See Longoria v. Dretke, 507 F.3d 898, 904 (5th Cir. 2007) ("[T]he compelling government interest/least restrictive means standard was carried over from RFRA to RLUIPA. . . ."); *Hoevenaar*, 422 F.3d at 370 ("RFRA cases . . . [are] applicable to cases brought pursuant to the RLUIPA."); Murphy v. Mo. Dep't of Corr., 372 F.3d 979, 987 (8th Cir. 2004) ("[We] conclude that Congress intended that the language of [RLUIPA] is to be applied just as it was under RFRA."). Thus, the holistic approach to compelling interest under the deferential model is likely invalid under the principles set forth in *O Centro*.

[143] *Fegans*, 537 F.3d at 907 (internal citations omitted).

[144] Id. at 909 (Melloy, J., dissenting) (citing 42 U.S.C. § 2000cc-1(a) (2006)) (emphasis in original).

the policy as a whole and did not inquire as to the strength of the government's interest in adhering to that policy *in this particular case*. The holistic assessment adopted by the majority in *Fegans* is another doctrinal formulation that makes it easier for the government to establish the presence of a compelling interest.

3. Narrow Tailoring

Once a compelling interest is identified, RLUIPA requires the government to prove that the means chosen are narrowly tailored to achieve the state's end. The government must show that the policy actually implemented was the "least restrictive means" of achieving the proffered interest. Under strict scrutiny regimes in other contexts, this inquiry often involves an assessment of conceivably less restrictive alternatives and a judgment as to how "close" the connection is between the policy and the state's interest.[145] In these contexts, the presence of plausible less restrictive alternatives, or the existence of a significant degree of over- or under-inclusiveness, is fatal to the general formulation. Under *Sherbert* and RFRA, however, courts often simply assumed that a challenged policy was narrowly tailored, or they asserted that the fit between the means and the ends was reasonably close.[146] Again, a handful of circuit courts have continued to apply this traditional deferential model of review under Section 3 of RLUIPA.

a. Minimal Consideration of Alternatives

Courts applying the deferential model do not require prison administrators to demonstrate that they seriously considered alternative policies that might be less restrictive of an inmate's religious practice. Rather, cursory consideration of alternatives, or even an absence of any consideration whatsoever, may be sufficient to satisfy the narrow tailoring prong of RLUIPA. Indeed, a number of courts have simply deferred to the testimony of prison administrators who assert that their policy is the least restrictive means of achieving the state interest because there are no less restrictive alternatives.

[145] See Chemerinsky, supra note 6, at 674.

[146] See Lupu, The Failure of RFRA, supra note 6, at 585, 596; Ryan, supra note 6, at 1416–37.

In *Fowler*, the Eighth Circuit accepted the testimony of prison administrators who stated there were no less restrictive means available to achieve security. The court declined to require further explanation of what alternatives were actually considered or why those alternatives were rejected. Quoting an earlier Eighth Circuit case heard under RFRA, the court wrote, "It would be a herculean burden to require prison administrators to refute every conceivable option in order to satisfy the least restrictive means prong . . . ."[147] Similarly, the Eighth Circuit in *Fegans* required prison administrators to do no more than assert that the means adopted were narrowly tailored to state ends. Indeed, as the dissenting opinion pointed out, the case record was entirely devoid of any evidence that prison administrators considered less restrictive alternatives when faced with Fegans' request for an exception.[148]

In addition to employing the idea of "due deference" under the compelling interest prong, some courts hearing RLUIPA cases have incorporated this concept into their narrow tailoring analysis as well. These courts have held that a prison administrator's testimony that the challenged policy is the least restrictive means has the effect of shifting the burden back onto the prisoner to present a less restrictive alternative. Consequently, many courts applying the deferential model have not required the government to identify any specific alternatives that were actually considered. For instance, in *Hoevenaar*, the Sixth Circuit rebuked the district court for failing to give appropriate deference to a prison administrator's testimony that "long hair presented a risk to prison safety and security *and that no viable less restrictive means of achieving that goal existed*."[149] The *Hoevenaar* court found no need to discuss any proposed alternatives or to specify the reasons why those options would prove unworkable. Similarly, in *Fegans*, the Eighth Circuit deferred to a prison official's testimony that "there was no less restrictive means to address ADC's security concerns."[150] Again, in his dissent, Judge Melloy noted that this testimony was not accompanied by any mention of possible alternatives or any empirical

[147] Fowler v. Crawford, 534 F.3d 931, 940 (8th Cir. 2008) (quoting Hamilton v. Schriro, 74 F.3d 1545, 1556 (8th Cir. 1996)).
[148] *Fegans*, 537 F.3d at 910 (Melloy, J., dissenting).
[149] Hoevenaar v. Lazaroff, 422 F.3d 366, 371 (6th Cir. 2005) (emphasis added).
[150] *Fegans*, 537 F.3d at 903.

evaluation of those possibilities. Thus, in addition to deferring on the question of when a governmental interest is compelling, some courts have deferred to testimony from prison officials on the issue of least restrictive means, and have not required institutional defendants to show that any alternative policies were *actually* considered.

b. Rejection of Institutional Comparison

In an effort to bolster their claims for religious accommodations, prisoners often point to other correctional facilities that have made comparable exceptions to policy. They argue that if another correctional facility has made the same or similar accommodation without suffering significant adverse consequences in terms of safety or security, then such an approach is a bona fide less restrictive means of achieving the state interest. For that reason, the challenged policy cannot possibly be narrowly tailored.

Courts applying the deferential model of review reject these arguments based on institutional comparison.[151] While some of these courts make factual distinctions pertaining to the individual institutional context or argue that accommodations would lead to absurd results, other courts either reject such comparisons entirely or hold that whatever probative weight they may carry is outweighed by the need for "due deference." In some instances, these different doctrinal formulations are deployed side by side to undermine the relevance of a prisoner's proposed institutional comparison.

Some courts applying the deferential model make factual distinctions between prisons, such as the level of security or size of the institution, to soften the potential impact of institutional comparisons. For example, in *Fowler*, the Eighth Circuit held that the difference in size and availability of volunteers between the defendant's prison and another prison that had accommodated a prisoner's request for a sweat lodge stripped the institutional comparison of its force and made its invocation inapposite. The court wrote, "JCCC's inmate population is over twice the size of PCC's inmate population . . . . This alone suggests that officials at JCCC may well be unable to accommodate religious practices that PCC

[151] See infra notes 152–55, 160–62.

may accommodate."[152] Other courts applying this model have appealed to the level of security,[153] the number of prison personnel,[154] the level of government running the prison,[155] and a host of other factors to undermine the institutional comparisons.

The *Fowler* court, however, did not rely only on these factual distinctions to dismiss the plaintiff's appeal to institutional comparisons. The court further held that, even in the absence of normatively relevant factual distinctions, it is simply not the role of the federal judiciary to engage in that kind of second-guessing. In *Fowler*, the Eighth Circuit quoted the First Circuit in *Spratt v. Rhode Island Department of Corrections*,[156] and cited the Third Circuit in *Washington v. Klem*,[157] for the proposition that "evidence of policies at one prison is not conclusive proof that the same policies would work at another institution."[158] Those citations were somewhat ironic because the courts in both *Spratt* and *Klem* used such institutional comparisons to undermine the conclusion that the prison policies at issue were the least restrictive means.[159] The *Fowler* court, however, in applying the deferential model, held that even when such comparisons may appear to be helpful, they "[do] not outweigh the deference owed to the expert judgment of prison officials who are infinitely more familiar with their *own* institutions than outside observers."[160] Additionally, the Eighth Circuit made

[152] *Fowler*, 534 F.3d at 942 n.12.

[153] See, e.g., Mann v. Wilkinson, No. C2-00-706, 2008 WL 4332520, at *2 (S.D. Ohio Sept. 17, 2008) (distinguishing the state interests of the maximum security facility in question from other institutions with lower security levels).

[154] See, e.g., *Fowler*, 534 F.3d at 935–36 (rejecting an institutional comparison to a significantly larger prison); see also Gooden v. Crain, 405 F. Supp. 2d 714, 718 (E.D. Tex. 2005) (rejecting a comparison to other prisons on the basis that the institution in question had fewer officers than they are authorized to hire).

[155] See, e.g., Daker v. Wetherington, 469 F. Supp. 2d 1231, 1239 (N.D. Ga. 2007) (distinguishing between the interests of federal and state-run institutions); *Gooden*, 405 F. Supp. 2d at 718 (rejecting a comparison to the federal prison system that "has much more money to spend on security").

[156] 482 F.3d 33, 42 (1st Cir. 2007).

[157] 497 F.3d 272, 285 (3d Cir. 2007).

[158] Fowler v. Crawford, 534 F.3d 931, 941 (8th Cir. 2008) (quoting *Spratt*, 482 F.3d at 42).

[159] *Klem*, 497 F.3d at 285–86; *Spratt*, 482 F.3d at 42–43.

[160] *Fowler*, 534 F.3d at 942 (quoting Hamilton v. Schriro, 74 F.3d 1545, 1557 n.15 (8th Cir. 1996)); see also *Daker*, 469 F. Supp. 2d at 1239 ("[T]he court perceives within the RLUIPA room for a particular prison to decline to join the 'lowest common denomi-

precisely the same argument in *Fegans* when confronted with examples of more liberal grooming policies.[161] In both cases, the Eighth Circuit first appealed to factual distinctions between the institutions in question and then again invoked the idea of deference to reject whatever force remained from the institutional comparison.

The *Fowler* court went even further and held that institutional comparisons are not only unhelpful, but also potentially dangerous.[162] The court held that judicial use of comparative analysis would deter prison administrators across the board from making any accommodations *in the first place*. They reasoned that if experimenting with accommodations created a binding precedent on all other correctional facilities within a jurisdiction, prison administrators would avoid making any exceptions for religious practice. The court argued that allowing institutional comparison would discourage prison officials within one system from accommodating inmates' religious practices, knowing that if their institution accommodated a particular religious practice, then all institutions would likely have to accommodate the same practice, regardless of the facts and circumstances.[163] Courts applying the deferential model have employed these several doctrines to avoid what they believe would produce counterproductive results.

c. Tolerance of Inconsistency

Finally, courts applying the deferential model tolerate a considerable amount of inconsistency within prison regulations before finding that a religious accommodation is required. For instance, in *Fegans*, the Eighth Circuit held that a grooming restriction applicable to males was still the least restrictive means to achieve a compelling state interest despite the fact that no such policy was applicable to females. Prison administrators did not present any evidence to account for that differential treatment. Instead, the court relied on testimony from a prison administrator that

nator' when, in the discretion of its officials, the removal of a challenged restriction poses an appreciable risk to security.").

[161] Fegans v. Norris, 537 F.3d 897, 905 (8th Cir. 2008).

[162] *Fowler*, 534 F.3d at 942.

[163] Id.

"[w]omen are not generally as violent as men."[164] The court held that statement to be a sufficient basis for the defendant to resist any adverse inference from differential treatment. Similarly, the *Fegans* court considered whether a medical exemption from a shaving requirement undercut the prison's contention that it had implemented a narrowly tailored policy. The court concluded that, because inmates receiving the medical exemption had to "round[] the corners" on their beards, the same accommodation would not have satisfied the prisoner's religious demands.[165] It was on this ground that the court distinguished *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*[166] and found that a seemingly inconsistent policy was in fact principled and defensible.[167] In these several ways, courts applying the deferential model have tolerated a certain level of inconsistency in prison schemes and have resisted arguments presented by prisoners that such inconsistencies should undermine the state's case for narrow tailoring.[168]

C. The Hard Look Model

The hard look model departs sharply from the traditional deferential approach described above. Under this new model, prisoners have had far more success demonstrating that their religious practices have been substantially burdened, and courts have been more skeptical of the government's asserted interests.

1. Substantial Burden

Courts employing the hard look model have taken a very different approach to the threshold inquiry into whether prison policies substantially burden the prisoner's free exercise of religion. These

[164] *Fegans*, 537 F.3d at 905.
[165] Id. at 906–07.
[166] 170 F.3d 359, 366 (3d. Cir. 1999) (holding, under the Free Exercise Clause, that the existence of a medical exemption from a police department's facial hair policy required the creation of a religious exemption for Muslim officers).
[167] *Fegans*, 537 F.3d at 907.
[168] See also Longoria v. Dretke, 507 F.3d 898, 904–05 (5th Cir. 2007) (rejecting the claim that a hair length restriction applied only to men was not the least restrictive means of achieving security); Atomanczyk v. Quarterman, No. 2:07-CV-0052, 2008 WL 941205, at *3 (N.D. Tex. Apr. 3, 2008) (holding that an argument regarding the underinclusiveness of a prison policy which does not apply to females "lacks an arguable basis in law and is frivolous").

courts have adopted various doctrines that have enabled prisoners to make out prima facie claims for accommodation, thereby shifting the burden of persuasion onto the government. Specifically, they have focused their inquiry on the particular policy challenged, have not required coercion as a precondition to finding a substantial religious burden, and have replaced the "centrality" inquiry with a sincerity inquiry that amounts to little more than a rubber stamp.

a. Isolating the Imposition

Under the hard look model, courts analyze the burden imposed by individual prison policies, rather than asking whether the prison rules are reasonable on the whole. Under the deferential model, states defeated prisoner claims by showing that their penological schemes were religion-friendly as a whole, or that unjustified impositions only happened once. Under this "totality of the circumstances" approach to "substantial burden," courts overlooked serious impositions on religion because the rest of the scheme was not overly abusive of religious practice.[169] Under the hard look model, however, courts examine the imposition placed on religion by isolating discrete prison policies. A generally religion-friendly scheme cannot rescue individual policies that do not meet strict scrutiny on their own.

For example, in *Shakur v. Selsky*, the Second Circuit rejected the claim that a one-time deprivation never constitutes a substantial burden.[170] That approach marked a stark departure from pre-RLUIPA prisoner case law, where one-time impositions on religion were almost always held to be de minimis, even if the deprivation was quite serious.[171] Similarly, in *Spratt v. Rhode Island Department of Corrections*, the First Circuit rejected the government's

[169] See supra Subsection II.B.1.a.
[170] 391 F.3d 106, 120 (2d Cir. 2004).
[171] See, e.g., Rapier v. Harris, 172 F.3d 999, 1006–07 n.4 (7th Cir. 1999) (holding that the failure to provide a non-pork food tray three times out of 810 was a de minimis burden on the prisoner's free exercise of religion and was thus not capable of giving rise to a claim under the Free Exercise Clause); Walsh v. La. High Sch. Athletic Ass'n, 616 F.2d 152, 158 (5th Cir. 1980) (holding that de minimis burdens on the free exercise of religion do not raise constitutionally cognizable issues); Ford v. McGinnis, 230 F. Supp. 2d 338, 348 n.10 (S.D.N.Y. 2002) (same).

view that a challenged policy did not substantially burden religion because it did not burden numerous other religious activities.[172] The government argued that a ban on preaching did not substantially burden the religion of an inmate because he remained free to "pray, sing, or recite during . . . services."[173] The court rejected that approach, analyzed the particular ban without discussion of other unburdened activities, and found that it substantially burdened the prisoner's religious practice.[174] Similarly, in *Lovelace v. Lee*, the Fourth Circuit held that evaluation of dietary policy and worship policy could not be lumped together, and that a prisoner's failure to comply with the reasonable requirements of the special dietary policy did not justify restriction from worship.[175] In an impassioned dissent, Judge Wilkinson argued that the group meals and accompanying prayers were "a single religious accommodation, not separate events."[176] But the majority refused to conjoin these policies and instead reviewed the burden on worship in isolation. The court found that the exclusion from worship was a substantial burden without analyzing whether the dietary rules were unduly restrictive.[177]

In these cases, federal courts evaluated prison policies individually—without reference to the rest of the prison scheme—and inquired whether the policy substantially burdened the religious claimant in the instance or instances identified. By approaching the threshold question of substantial burden in this way, these courts have made it easier for religious prisoners to carry their burden.

b. Coercion Is Not Required

Another pattern emerging under the hard look model is the elimination of the requirement that prison policies be coercive to constitute a substantial burden. This is somewhat of a departure from the Supreme Court's prior case law delineating what counts

[172] 482 F.3d 33, 38 (1st Cir. 2007).
[173] Id. (citing Brief of the Defendant-Appellee A.T. Wall at 11 n.6, Spratt v. R.I. Dep't of Corr., 482 F.3d 33 (1st Cir. 2007) (No. 06-2038)).
[174] Id.
[175] 472 F.3d 174, 188 (4th Cir. 2006).
[176] Id. at 213 (Wilkinson, J., dissenting).
[177] Id. at 188.

as a substantial burden.[178] In the past, courts held that coercion was required for an accommodation both under the Free Exercise Clause and under RFRA.[179]

Interpreting RLUIPA using the hard look model, however, courts have held that prison policies need not be coercive to constitute a substantial burden. Rather, "pressure" or the presentation of a "hard choice" may be sufficient to establish substantiality. In *Warsoldier v. Woodford*, the Ninth Circuit rejected the claim that a prison policy must be accompanied by physical force in order to constitute a substantial burden.[180] Instead, the court held that the reduction of benefits or the application of pressure on a prisoner to abandon his religious beliefs was enough to satisfy the threshold inquiry.[181] Similarly, in *Lovelace*, the Fourth Circuit formulated substantial burden in terms of "pressure" rather than coercion.[182] The court then found that the prison policy at issue substantially burdened the challenger's practice of religion, further noting that benign motivation for a policy is not enough to save it from strict scrutiny under RLUIPA.[183]

In *Washington v. Klem*, the Third Circuit took a somewhat different approach, but achieved the same functional effect. The *Klem* court adopted a disjunctive test, coupling the holdings of *Sherbert* and *Thomas v. Review Board*, according to which a substantial burden on religious practice exists when "1) a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available . . . OR 2) the government puts substantial *pressure* on an adherent to substantially modify his behavior and to violate his beliefs."[184] Thus, the claimant need not prove coercion to establish that his religious practice was substantially burdened. Instead, he only needs to show that he was pres-

[178] See Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 448–49 (1988); Bowen v. Roy, 476 U.S. 693, 700 (1986); United States v. Lee, 455 U.S. 252, 261 (1982).

[179] See supra notes 92–93.

[180] 418 F.3d 989, 996 (9th Cir. 2005).

[181] Id.

[182] Lovelace v. Lee, 472 F.3d 174, 187 (4th Cir. 2006) (quoting Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981)).

[183] Id. at 189.

[184] Washington v. Klem, 497 F.3d 272, 280 (3d Cir. 2007) (emphasis added) (citing Sherbert v. Verner, 374 U.S. 398, 410 (1963); Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 720 (1981)).

sured in order to meet the second element of the disjunctive test—which was precisely the result in *Klem*.[185]

Under RLUIPA, courts employing the hard look model have not required prisoners to allege that prison policies are coercive. The application of pressure or the imposition of a difficult decision has proven sufficient to satisfy the threshold matter of establishing a substantial burden on religious practice. This pattern of analysis has once again allowed more prisoners to carry their burden, thereby forcing the government to prove that the imposition was justified.[186]

c. Replacement of Centrality with Sincerity

Finally, under this model, federal courts have made it easier for prisoners to demonstrate a substantial burden on their religious exercise by substituting a sincerity inquiry in place of "centrality." Courts under both *Sherbert* and RFRA often required that a government action burden a central tenet of a religion in order to be substantial.[187] Further, these courts required that the religious practice burdened be "mandatory" or "compelled" by the claimant's religion, not merely discretionary or recommended.[188] But the language of RLUIPA states that "[t]he term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[189] While RLUIPA bars inquiry into centrality, however, it does permit inquiry into the sincerity of a prisoner's religious beliefs.[190] The result of this substitution under the hard look model has been the elimination of a

[185] *Klem*, 497 F.3d at 282.

[186] See also Shakur v. Schriro, 514 F.3d 878, 888 (9th Cir. 2008) (finding that a prison policy imposed a substantial burden because it put "substantial pressure" on an adherent to modify his beliefs); Warren v. Pennsylvania, 316 F. App'x 109, 114 (3d. Cir. 2008) (vacating summary judgment against a prisoner and holding that he only needed to allege that a policy put "substantial pressure" on him to modify his beliefs to state an RLUIPA claim); *Lovelace*, 472 F.3d at 187 (defining substantial burden in terms of substantial pressure rather than coercion).

[187] See, e.g., Coronel v. Paul, 316 F. Supp. 2d 868, 876–77 (D. Ariz. 2004); see also Gaubatz, supra note 99, at 529–31; Stephen C. Seeger, Note, Restoring Rights to Rites: The Religious Motivation Test and the Religious Freedom Restoration Act, 95 Mich. L. Rev. 1472, 1474–75 (1997).

[188] *Coronel*, 316 F. Supp. 2d at 876.

[189] 42 U.S.C. § 2000cc-5(7)(A) (2006).

[190] Cutter v. Wilkinson, 544 U.S. 709, 725 n.13 (2005).

perennial hurdle to religious claimants in prison, and the application of a sincerity inquiry that has amounted to little more than a rubber stamp.

The Seventh Circuit provided a clear example in *Koger v. Bryan*.[191] In *Koger*, the government offered testimony by the prison chaplain that dietary restrictions were not "compelled by" or "central to" the practice of Thelema. The district court relied on this testimony and the prison's clergy verification requirement to find that the plaintiff was unable to state a prima facie case because dietary restrictions were ancillary to and optional in his religious practice. The Seventh Circuit reversed, however, holding that the district court "would have required him to establish exactly what RLUIPA does not require."[192] In its place, the court merely required that the prisoner's religious beliefs be sincere, and then proceeded to assume that this was the case.[193] Noting that concepts of centrality and compulsion disadvantage members of minority religions that are often not duty-based, the court concluded that the clergy verification requirement imposed a substantial burden on Koger's religious exercise.[194] This finding allowed the accommodation claim to advance and eventually to succeed.[195]

The substitution of a sincerity inquiry for the centrality inquiry also affected the Fourth Circuit's analysis in *Lovelace*.[196] The court echoed language in *Cutter*, stating that "courts must not judge the significance of the particular belief or practice in question."[197] And again, in a single line, the majority rubber-stamped the plaintiff's religious beliefs as sincere.[198]

The language used in these cases indicates more than simple inattention to the sincerity question. Rather, courts appear to be avoiding the question of sincerity out of uncertainty as to how insincerity can be proven.[199] In *Lovelace*, the majority held that mere

[191] 523 F.3d 789, 797 (7th Cir. 2008).
[192] Id. at 798.
[193] Id.
[194] Id at 799.
[195] Id. at 800–01.
[196] Lovelace v. Lee, 472 F.3d 174, 188 (4th Cir. 2006).
[197] Id. at 187 n.2 (citing Cutter v. Wilkinson, 544 U.S. 709, 725 n.13 (2005)).
[198] Id.
[199] See Greenawalt, supra note 6, at 109–23; see also Marjorie Heins, "Other People's Faiths": The Scientology Litigation and the Justiciability of Religious Fraud, 9

inconsistency in practices or beliefs does not prove that a plaintiff's religion is inauthentic.[200] Under RLUIPA, hard look courts have conducted cursory or conclusory sincerity inquiries, recognizing that "faith admits of doubt," and, just as in *Smith*, that judicial tools are not particularly well fashioned for separating beliefs "truly held" from those that are feigned.[201]

To survive the threshold stage of their RLUIPA claims, prisoners must prove that their religious beliefs are substantially burdened. Under *Sherbert* and RFRA, federal courts used a variety of doctrines to avoid finding such a burden.[202] Under the hard look model, however, courts have been more likely to find that the burden on an inmate's religious practice is substantial. They have reached these results by isolating the specific restriction on religious practice, requiring less than outright coercion, and substituting a cursory sincerity inquiry for a searching evaluation of centrality. By doing so, these courts have enabled incarcerated plaintiffs to make out their prima facie cases more often, which has, in turn, led to a greater number of successful challenges.

2. Compelling Interest

When a religious claimant has made out a prima facie case by demonstrating that a government policy substantially burdens a sincere religious practice, the onus shifts to the state to demonstrate that the policy was the least restrictive means to achieve a compelling government interest.[203] Traditionally, at this stage courts looked favorably on the government's claim that the substantial burden imposed was justified by a compelling state interest.[204] As

Hastings Const. L.Q. 153, 165 (1981); Lupu, Where Rights Begin, supra note 34, at 953–55; Stephen Senn, The Prosecution of Religious Fraud, 17 Fla. St. U. L. Rev. 325, 326–27 (1990); James Boyd White, Talking about Religion in the Language of the Law: Impossible but Necessary, 81 Marq. L. Rev. 177, 187 (1998).

[200] *Lovelace*, 472 F.3d at 188.

[201] See Employment Div. v. Smith, 494 U.S. 872, 887 (1990).

[202] Chemerinsky, supra note 6, at 1248; Solove, supra note 7, at 474–86.

[203] 42 U.S.C. § 2000cc-2(b) (2006).

[204] See Ryan, supra note 6, at 1418; see also Thomas C. Berg, What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act, 39 Vill. L. Rev. 1, 34 (1994); Douglas Laycock and Oliver S. Thomas, Interpreting the Religious Freedom Restoration Act, 73 Tex. L. Rev. 209, 221–23 (1994); Michael Stokes Paulsen, A RFRA Runs Through It: Religious Freedom and the U.S. Code, 56 Mont. L. Rev. 249, 254 (1995).

noted above, these "less than compelling interests"[205] often included rationales such as administrative convenience or cost-saving. In the prison context, all that was typically required for the government to carry its burden was to make passing reference to institutional interests such as security or maintaining order, and the courts would accept such interests without any further scrutiny.[206]

Under the hard look model, however, courts are again employing a series of doctrines, not typically found in the accommodation context, that have raised the bar as to what counts as a compelling state interest. In using the doctrines discussed below, these courts have given strict scrutiny under RLUIPA the rigor that previous accommodation regimes lacked, allowing religious prisoners, in particular, to succeed far more often on their claims for exemptions.

a. Demonstration, Not Assertion

As a matter of course, courts using the deferential model accept state interests in "security" or "orderly administration" as compelling interests in operating a prison, without requiring that administrators provide any sort of proof or evidence to support their claims. Under the hard look model, however, courts have required prison officials to demonstrate that their asserted interests are truly compelling.

In *Koger*, the Seventh Circuit refused, without more evidence, to accept the assertion that providing a meatless diet to a religious prisoner would cause inordinate administrative inconvenience.[207] The court held that prison officials failed to meet their burden because they "failed to show what effort would have been involved in providing a meatless diet to Koger [or] how this would have hampered prison administration."[208] In *Shakur v. Schriro*, the Ninth Circuit was "troubled" by a prison administrator's reliance on a cursory affidavit stating that provision of *halal* or kosher meals to religious prisoners would be cost prohibitive.[209] In finding that prison officials failed to demonstrate a compelling interest for lim-

[205] Ryan, supra note 6, at 1418.
[206] See supra Subsection II.B.2.a.
[207] Koger v. Bryan, 523 F.3d 789, 800–01 (7th Cir. 2008).
[208] Id.
[209] 514 F.3d 878, 890 (9th Cir. 2008).

iting prisoners' reading material, the Third Circuit stated in *Klem* that "the mere assertion of security or health reasons is not, by itself, enough for the Government to satisfy the compelling governmental interest requirement."[210] The *Klem* court demanded that the government demonstrate its asserted interests and show a nexus between those interests and the policy at issue.[211]

In rejecting the mere assertion of "security" as a compelling interest, and in requiring that prison officials demonstrate the security concern, the First Circuit in *Spratt* gave some content to what such demonstration might involve.[212] After noting that "merely stating a compelling interest does not fully satisfy . . . RLUIPA," the court mentioned several steps that correctional officials could have taken to carry their burden.[213] The court stated that citing studies and research or putting on expert testimony might have helped the government's case. The court also suggested that citing to past experimentation with similar policies might have made the asserted interest seem more compelling. In *Lovelace*, the majority was adamant that the government must provide support for its case, and that courts should refuse to fill in the gaps left open by prison administrators.[214] Thus, in both *Spratt* and *Lovelace*, the courts required the government to show that it took the religious imposition seriously and that it concluded, based on more than intuition or speculation, that accommodation was simply not workable. These cases make clear that some federal courts are no longer willing to let prison administrators appeal to vague or unsupported claims about "orderly administration" or "security" to brush away serious threats to prisoners' religious liberty.

b. Internal Consistency

Under the hard look model, courts hearing RLUIPA challenges have also analyzed the asserted compelling interest in light of other policy decisions made by prison administrators. These courts have asked whether, if the proffered interest is really compelling, other prison policies ought to be different. In *Warsoldier*, the Ninth Cir-

[210] Washington v. Klem, 497 F.3d 272, 283 (3d Cir. 2007).
[211] See discussion infra Subsection II.C.3.c.
[212] Spratt v. R.I. Dep't of Corr., 482 F.3d 33, 39 (1st Cir. 2007).
[213] Id.
[214] Lovelace v. Lee, 472 F.3d 174, 192 (4th Cir. 2006).

cuit doubted that the prison policy restricting the length of male inmates' hair served the prison's compelling interest in health and security, given that no such restriction was placed on female inmates.[215] This inconsistency in the prison scheme led the court to doubt that the asserted interests were compelling and contributed to the rejection of the government's case.[216]

Similarly, in *Klem*, the Third Circuit rejected the government's contention that a ten-book limit on reading materials served a compelling security interest given that no numerical limit was placed on magazines or other non-literature personal property posing concerns identical to those identified by prison administrators.[217] Under the hard look model, courts have begun looking for overall internal consistency in prison policies. They are rejecting asserted compelling interests on the grounds that significantly underinclusive rules raise doubts as to the authenticity of the government interest.[218]

c. Rejection of Administrative Convenience and Post Hoc Rationalizations

Two hallmarks of strict scrutiny in other areas of the law are (1) the rejection of "administrative convenience" as a compelling interest and (2) skepticism of asserted interests that appear pretextual or post hoc. But the routine acceptance of administrative convenience explanations and post hoc rationalizations in the context of religious accommodation is precisely what led many commenta-

[215] Warsoldier v. Woodford, 418 F.3d 989, 1000 (9th Cir. 2005).

[216] Note that the *Warsoldier* court found this policy inconsistency to have far greater probative weight than the *Fegans* court. See supra Subsection II.B.3.c. In *Warsoldier*, the Ninth Circuit found that the exclusion of females from the grooming requirement rendered the policy significantly underinclusive and, therefore, not narrowly tailored. In *Fegans*, however, the Eighth Circuit was confronted with very similar facts and found that the exclusion of females attended to a valid distinction and did not provide evidence that there were less restrictive means available. See id.

[217] Washington v. Klem, 497 F.3d 272, 283–84 (3d Cir. 2007).

[218] See also Warren v. Pennsylvania, 316 F. App'x 109, 114–16 (3d Cir. 2008) (vacating judgment in prison's favor and holding that a ten-book limitation was underinclusive and indicated that the policy was not the least restrictive means (citing *Klem*, 497 F.3d at 284)); Watts v. Dir. of Corr., No. CV F-03-5365 OWW DLB P, 2006 WL 2320524, at *6 (E.D. Cal. Aug. 10, 2006) (finding that grooming regulations that apply to male inmates but not female inmates fail the least restrictive means prong of RLUIPA).

tors to conclude that strict scrutiny is simply not an appropriate standard of review in this area. Again, under the hard look model, the tables have turned. Now, one can observe courts applying the searching review that strict scrutiny demands.

In prisons, administrative convenience has traditionally been accepted as a compelling interest because of the proffered link between orderly administration and security.[219] Prison policies that burden religion, yet serve some sort of cost-saving or administrative simplification function, are quickly connected to the compelling interest in prison security. Officials have routinely put forth the following chain of reasoning: the challenged policy saves the prison money or time; prisons operate on a fixed budget that is often very tight; most prison resources are needed to ensure the safety of the prison environment; making an exception to the prison policy would cost money; that money would be taken from resources needed to ensure prison security; and thus, the prison policy serves the compelling interest of maintaining prison security.[220]

While this reasoning was accepted under RFRA, this new model of review demands more. For example, in *Lovelace*, the Fourth Circuit rejected precisely this link between administrative convenience and the compelling governmental interest in prison security.[221] The traditional reasoning was deemed too attenuated, and, just as under other strict scrutiny regimes, administrative convenience was found not to be compelling.

Similarly, deferential courts would rarely, if ever, inquire into whether the interest asserted by prison administrators were "the real reason" or whether it were merely post hoc. Under the hard look model, however, courts have examined closely the authenticity of the proffered state interest. In *Spratt*, the First Circuit approvingly quoted the Congressional sponsors of RLUIPA, who stated, "[I]nadequately formulated prison regulations and policies

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[219] See Solove, supra note 7, at 479–84.

[220] See, e.g., O'Lone v. Estate of Shabazz, 482 U.S. 342, 347–50 (1987) (holding that prison work policies preventing Muslim prisoners from attending worship services contributed to orderly administration of the system and thus served the prison's interests in safety and rehabilitation); see also Hamilton v. Schriro, 74 F.3d 1545, 1555 (8th Cir. 1996); Phipps v. Parker, 879 F. Supp. 734, 736 (W.D. Ky. 1995); Diaz v. Collins, 872 F. Supp. 353, 359 (E.D. Tex. 1994).

[221] Lovelace v. Lee, 472 F.3d 174, 190 (4th Cir. 2006).

grounded on mere speculation, exaggerated fears, or *post-hoc rationalizations* will not suffice to meet the act's requirements."[222] The *Spratt* court then found that the affidavit filed by a prison administrator insisting that the prison ban on inmate preaching served the government's compelling interest in prison security was "self-serving" and insufficient to defeat a motion for summary judgment.[223]

3. Narrow Tailoring

Most of the strict scrutiny language under RLUIPA mirrors that under RFRA: substantial burdens may be imposed upon religious practices only when they are the least restrictive means of achieving a compelling governmental interest.[224] Under RFRA, however, courts often accepted the proffered governmental interest as compelling and left "least restrictive means" out of the analysis entirely. Even when courts did discuss the means chosen to achieve state ends, they often held that the policy was narrowly tailored, or that the fit between means and ends was reasonably tight. Under the hard look model, however, courts are taking the narrow tailoring aspect of strict scrutiny seriously and requiring prison administrators to show that no less burdensome means exist to achieve the stated governmental interest.

a. Actual Consideration of Alternative Means

Under the hard look model, courts have required prisons to show that their administrators actually considered other avenues to

[222] Spratt v. R.I. Dep't of Corr., 482 F.3d 33, 39 (1st Cir. 2007) (quoting 146 Cong. Rec. S7775 (daily ed. July 27, 2000)) (emphasis added).

[223] Id. For other examples of courts rejecting post hoc rationalizations, see *Hummel v. Donahue*, No. 1:07-cv-1452-DFH-TAB, 2008 WL 2518268, at *4–5 (S.D. Ind. June 19, 2008) (holding that the state interest in preventing violence was a post hoc rationalization for its policy banning group worship for Odinists); *Eley v. Herman*, No. 1:04-CV-416-TS, 2007 WL 1667624, at *4–5 (N.D. Ind. June 8, 2007) (holding that the state interest in jail security was a post hoc rationalization for its policy banning Muslim Jumu'ah services); *Marria v. Broaddus*, No. 97 Civ.8297 NRB, 2003 WL 21782633, at *15–16 (S.D.N.Y. July 31, 2003) (rejecting a prison's claim, based on evidence gathered after litigation, that the treatment of "Five Percenters" as a gang was justified by its compelling interest in security).

[224] RFRA, 42 U.S.C. § 2000bb-1 (2006); RLUIPA, 42 U.S.C. §§ 2000cc(a)(1), 1(a) (2006).

achieve their stated ends. For instance, in *Shakur v. Schriro*, the Ninth Circuit rejected a correctional facility's conclusory assertion that denying the plaintiff a kosher diet was the least restrictive means of furthering the government's compelling interest in limiting prison expenditures.[225] The court stated that "a prison 'cannot meet its burden to prove least restrictive means unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice.'"[226] Similarly, in *Greene v. Solano County Jail*, the Ninth Circuit required a prison to show that alternative means of achieving stated goals were *actually considered*. The court held that "no longer can prison officials justify restrictions on religious exercise by simply citing to the need to maintain order and security in a prison."[227] Likewise, in *Spratt*, the First Circuit insisted that prison administrators must not only specify what other means they considered, but they must also explain why those other means were infeasible.[228] The correctional facility was required not simply to assert but to demonstrate that other less restrictive policies were diligently considered and rejected for sufficient reasons.[229]

In contrast to the showing constitutionally required under *Turner*, courts under the hard look model have demanded evidence and documentation of the alternative means considered. Under *Turner*, "[the courts] have rejected the notion that prison officials . . . have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint."[230] By contrast, in *Warsoldier*, the Ninth Circuit insisted that actual consideration of other means must be documented and that "detailed evidence" about the alternatives and the basis for their rejection is required.[231] Hard look courts have refused to read "least restrictive means" out of the compelling interest test. Instead, demonstration of actual consideration has become a major

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[225] Shakur v. Schriro, 514 F.3d 878, 891, 893 (9th Cir. 2008).
[226] Id. at 890 (quoting Warsoldier v. Woodford, 418 F.3d 989, 999 (9th Cir. 2005)).
[227] Greene v. Solano County Jail, 513 F.3d 982, 989–90 (9th Cir. 2008).
[228] Spratt v. R.I. Dep't of Corr., 482 F.3d 33, 41 (1st Cir. 2007).
[229] Id. at 42.
[230] O'Lone v. Estate of Shabazz, 482 U.S. 342, 350 (1987) (quoting Turner v. Safley, 482 U.S. 78, 90–91 (1987)) (internal quotation marks omitted).
[231] Warsoldier v. Woodford, 418 F.3d 989, 998–1000 (9th Cir. 2005).

hurdle that prison administrators must overcome to survive the newly searching strict scrutiny under RLUIPA.

b. Institutional Comparison

Hard look courts have also strengthened strict scrutiny under RLUIPA by comparing the challenged policy with prison schemes adopted in other correctional facilities. When prison officials allege that a religious accommodation cannot be made without sacrificing a compelling interest, these courts have looked to see whether other prisons have managed to accommodate similar requests. If other prisons have made such exceptions without disastrous results, the responsibility then falls on prison administrators to explain what feature or features of their own environment are different from the other prison and why those differences make the requested accommodation infeasible.

In *Shakur v. Schriro*, the Ninth Circuit used such a comparative analysis to the benefit of a Muslim inmate.[232] The court discussed how another prison in Washington State served a *halal* meat diet that was "minimally more expensive than the standard diet."[233] The fact that another institution was able to make the religious accommodation at issue without sacrificing a compelling governmental interest suggested to the court that the defendants in *Shakur* were not employing the least restrictive means. Similarly, in *Spratt*, the First Circuit noted that other correctional facilities, including the entire Federal Bureau of Prisons, did not have a policy banning preaching by inmates. The court demanded that prison officials explain why their institution was different from these other prisons and why other institutions could make a religious accommodation without sacrificing a compelling interest.[234] The court stated, "[I]n the absence of any explanation by [the Department of Corrections] of significant differences between [this prison] and a federal prison that would render the federal policy unworkable, the Federal Bureau of Prisons policy suggests that some form of inmate preaching could be permissible without disturbing prison security."[235]

[232] Shakur v. Schriro, 514 F.3d 878, 890 (9th Cir. 2008).
[233] Id.
[234] *Spratt*, 482 F.3d at 42.
[235] Id.

In *Warsoldier*, the Ninth Circuit performed perhaps the most extended comparative analysis, showing just how powerful this line of inquiry can be. The court first pointed to other prison systems that made similar exceptions to grooming policies as evidence that such accommodation was feasible in the instant case.[236] Yet, the court minimized the salience of other instances identified by the government where similar restrictions were held to be the least restrictive means of furthering a compelling state interest. The court distinguished the examples provided by prison officials from the case at issue by noting that Warsoldier was housed in a minimum security prison. References to other cases where similar regulations were held to meet the least restrictive means test in higher security facilities were deemed inapposite.[237] The court insisted that a more individualized, fact-intensive, and situation-specific inquiry needed to be made when variables in the institutional context did not remain constant.

Notice how powerful this comparative analysis can be for prisoners claiming exemptions: plaintiffs are permitted, and even encouraged, to point to other prison accommodations in support of their case, but they can resist the inference that what has been deemed compelling in another prison is compelling in their particular institution. This approach allows prisoners to make favorable comparisons, yet it sharply restricts the useful comparisons available to correctional officials. This comparative inquiry is a major departure from the doctrine employed under the deferential model and has helped to establish the "least restrictive means" test as a formidable obstacle for prison administrators.

c. Internal Consistency

Just as under the compelling interest analysis, hard look courts have analyzed how the means employed to achieve a stated interest fit within the prison scheme as a whole. For example, in *Klem*, the Third Circuit viewed the correctional facility's security interest

[236] *Warsoldier*, 418 F.3d at 1000 ("Surely these other state and federal prison systems have the same compelling interest in maintaining prison security, ensuring public safety, and protecting inmate health as CDC. Nevertheless, CDC offers no explanation why these prison systems are able to meet their indistinguishable interests without infringing on their inmates' right to freely exercise their religious beliefs.").

[237] Id. at 998–99.

with skepticism after learning that, while prisoners were limited to possession of ten books at one time, a corresponding limit was not placed on magazines or other inmate personal property.[238] In its "Least Restrictive Means" analysis, the court noted that "these two policies evince a flexibility in the prison regulations that belies the 'compelling' nature of the policies with respect to safety and security."[239] By "examining prison policies on their own terms,"[240] the court found an underinclusive policy that raised doubts as to the authenticity of the interest and the means chosen to achieve it.

The *Spratt* court followed much the same course when it analyzed the facility's preaching ban for consistency. In a rhetorical flourish, the court asked:

> Why are inmates banned from preaching when they are free to become leaders under other circumstances? Likewise, why is Spratt still allowed to stand in front of his congregation and read scripture if it is his appearance in the pulpit that is problematic? If it is the "teaching" element of scripture that is so troubling, why are inmates permitted to assist instructors in educational programs at the prison? Why would allowing preaching only under strict prison supervision be a less effective solution to the purported "threat to institutional security"? These questions, all unanswered, suggest that [the Department of Corrections] has not given consideration to possible alternatives.[241]

Although foreign under previous accommodation regimes, under the hard look model, searching review for policy inconsistencies has led courts to doubt that the means chosen by prison administrators are "least restrictive," and has contributed to the recent success of prisoner claims for accommodation.

D. Preliminary Conclusions

The analysis of RLUIPA claims presented above strongly suggests two sets of preliminary conclusions. First, the doctrines employed under the hard look model diverge sharply from those tra-

[238] Washington v. Klem, 497 F.3d 272, 284–85 (3rd Cir. 2007).
[239] Id.
[240] Id.
[241] Spratt v. R.I. Dep't of Corr., 482 F.3d 33, 42 (1st Cir. 2007).

ditionally applied under the deferential model.[242] Second, the results from courts applying the hard look model call into question the three skeptical theses described in Part I. While courts applying the deferential model have hewed closely to scholarly predictions, this new, more searching model of review challenges the traditional take on religious accommodation. This unexpected development suggests that current conceptions regarding the standard of review for claims to exemptions are flawed.

First, the strict scrutiny applied by hard look courts has not proven to be "feeble in fact." Rather, these courts are applying a variety of doctrines to find that prison policies substantially burden the exercise of religion and are not the least restrictive means of achieving a compelling government interest. The move from a minimal scrutiny regime under *Turner* to a strict scrutiny framework under RLUIPA *has* led to the favorable results in accommodation cases often thought unattainable.

Further, as a class, prisoners have not been particularly disfavored in these courts, as has been assumed. Rather, prisoners seem to be doing particularly well under this new model of review, succeeding more often than under any previous regime. By isolating the imposition on religious practice for burdens analysis, abandoning the requirement of outright coercion, and replacing a searching centrality requirement with a cursory sincerity inquiry, courts have allowed a greater number of prisoners to make out a prima facie case for accommodation under RLUIPA. And, by requiring prison administrators to demonstrate that their asserted interests are compelling, analyzing the nexus between prison goals and the means employed for internal consistency and external congruence, and rejecting government rationales that appear pretextual or post hoc, these courts have granted an increasing number of religious accommodations.

Finally, there has been no evidence that using strict scrutiny in the context of religious accommodation has diluted the searching nature of the review in other areas of the law. On the contrary, it seems that these courts are importing notions of strict scrutiny from other regimes, such as equal protection and free speech, into accommodation cases, thereby elevating the level of review usually

[242] See chart, supra Section II.A.

applied to claims involving religious exercise.[243] In other words, rather than the use of strict scrutiny in the accommodation context weakening review in other areas, the developments of strict scrutiny under the First and Fourteenth Amendments are being incorporated into the religion context, thus heightening the stringency of review traditionally applied.

What explains this change of course? Why are some courts now taking a hard look at accommodation cases? Why are prisoners no longer encountering the same skepticism of their religious claims? And why have some courts adopted strict scrutiny concepts from the areas of equal protection and free speech when scholars have insisted that such scrutiny is inappropriate or infeasible?[244] Part III aims to answer these questions. Part IV suggests some implications of the answers developed below.

III. EXPLAINING STRICT SCRUTINY UNDER RLUIPA

A. Statutory Text and Constitutionality

The first question, then, is why skeptical predictions regarding the application of strict scrutiny to religious accommodation have proven false in many cases under RLUIPA. What accounts for the success of religious claimants under this regime when similar attempts to codify heightened scrutiny have proven ineffective? Several explanations appear plausible.

1. New Language in RLUIPA

Much of the language in RLUIPA tracks the language of RFRA and applies it in more narrowly defined contexts. In both statutes, the terms substantial burden, compelling interest, and least restrictive means are used. But Section 8 of RLUIPA includes language defining "religious exercise" that was not present in RFRA. This section reads, "The term 'religious exercise' includes any exercise

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[243] See infra Section III.C.

[244] See Greenawalt, supra note 6, at 214–15; Volokh, supra note 54, at 1499–500 ("[Strict] scrutiny applicable to content-based speech restrictions and to racial and religious classifications . . . shouldn't be used to describe the necessarily weaker test applicable to religious exemption claims.").

of religion, whether or not compelled by, or central to, a system of religious belief."[245] This section was a response to the pervasive trend under RFRA where courts would deny that a religious claimant's exercise was substantially burdened, either because that aspect of his faith was not "central" to his beliefs or because the practice was not mandated by religious creed.[246]

This statutory change, made in the definitions section of RLUIPA, may account for at least part of the increased success of prisoner claims.[247] Under RFRA, when courts inquired into whether a religious practice was "central" to a system of beliefs, or was "compelled by" a prisoner's faith, they were frequently required to engage in some sort of theological interpretation of the prisoner's religion. To decide whether a religious practice were central, courts under RFRA had to evaluate how "important" the practice was to all members of the religion. That evaluation was often conducted from an "objective" perspective, and courts tended to rely on testimony from clergy members about the practice in question. In doing so, courts largely ignored the deeply personal nature of some religious practices and failed to take into account a prisoner's individual spiritual beliefs.[248]

Use of the centrality and compulsion tests also worked repeatedly to the disadvantage of incarcerated claimants.[249] Most prisoner cases involve claims by members of nontraditional religions.[250] Many claims are brought by Native Americans and worshippers without any identifiable faith community.[251] But the requirements of centrality and religious obligation are derived from Judeo-Christian notions of the nature of religious practice. In turn, such

[245] 42 U.S.C. § 2000cc-5(7)(A) (2006).

[246] See, e.g., Hicks v. Garner, 69 F.3d 22, 26 n.22 (5th Cir. 1995); Goodall v. Stafford County Sch. Bd., 60 F.3d 168, 172–73 (4th Cir. 1995); Bryant v. Gomez, 46 F.3d 948, 949 (9th Cir. 1995); Muhammad v. N.Y. Dep't of Corr., 904 F. Supp. 161, 191 (S.D.N.Y. 1995); Best v. Kelly, 879 F. Supp. 305, 308–09 (W.D.N.Y. 1995); Gaubatz, supra note 99, at 527 nn.109–13, 532 nn.125–30.

[247] Gaubatz, supra note 99, at 522–34.

[248] See Greenawalt, supra note 6, at 109–18; see also Gaubatz, supra note 99, at 522–34; Winnifred Fallers Sullivan, Judging Religion, 81 Marq. L. Rev. 441, 453 (1998).

[249] Gaubatz, supra note 99, at 522–34; see also Solove, supra note 7, at 475–79.

[250] See Greenawalt, supra note 6, at 170.

[251] See Heather Davis, Comment, Inmates' Religious Rights: Deference to Religious Leaders and Accommodation of Individualized Religious Beliefs, 64 Alb. L. Rev. 773, 775 (2000).

concepts often provide a sort of linguistic bias against nontraditional believers. For example, the compulsion test often worked to the disadvantage of incarcerated claimants under RFRA because many nontraditional religions, including most Native American religions, are not duty-based. Their religious traditions often carry great symbolic importance, but, in the end, are ultimately at the individual's discretion. Thus, any burden imposed on such a religion by a prison policy would be deemed insubstantial almost automatically, and the prisoner's claim would be dismissed in the early stages of litigation. Likewise, those with individualized religious beliefs[252] may find it difficult to prove that any of their practices are central to or compelled by their religion without having any authoritative or standardized materials.

In *Klem*, the Ninth Circuit illustrated how jettisoning such inquiries could lead to increased prisoner success.[253] In that case, the district court required that the religious practice in question be central to the prisoner's system of beliefs.[254] The court of appeals noted that these inquiries were not appropriate under RLUIPA, and the district court had erred in conducting them.[255] As religious traditions are subject to various interpretations, and minority religions often contain elements that are not obligatory, the doctrine under RFRA often worked to the detriment of religious claimants. Under RLUIPA, this shortcoming was recognized, and the issue has been remedied in many courts.

While it appears clear that changes in the statutory language have some explanatory power for the divergent results under RFRA and RLUIPA, there is likely more to the story. Words can only do so much. Consider the results of accommodation claims under RFRA: after *Smith*, Congress reinstated strict scrutiny by statutory enactment. The change in the standard of review could not have been clearer. Yet courts became quite inventive in manipulating the formal doctrine to avoid the implications of the stat-

[252] See id. at 775 n.19 (distinguishing between the phrases "individualized beliefs," which describes the beliefs of a person who practices a unique and unrecognized religion, and "individualized religious beliefs," which describes the beliefs of a person who practices a personal variation of a recognized religion).

[253] Washington v. Klem, 497 F.3d 272, 281–82 (3rd Cir. 2007).

[254] Id.

[255] Id.

ute. In practice, strict scrutiny proved to be conceptually malleable, and courts employed a variety of doctrines to avoid finding substantial burdens on religion or to find compelling interests to justify such burdens. Merely directing the courts to act or reason differently has often been insufficient to affect outcomes.[256] Some further explanation is required.

2. Constitutional Footing

The failure of RFRA has been attributed, at least in part, to its weak constitutional foundations.[257] Congress chose to ground the Act in its enforcement power pursuant to Section 5 of the Fourteenth Amendment,[258] despite its questionable application and despite the availability of alternatives.[259] Under RFRA, many courts had reservations about the Act's constitutionality, which in turn affected the manner in which they applied its terms.[260]

Rather than using Section 5 as the sole basis for passing RLUIPA, Congress anchored the statute in its powers over commerce and spending.[261] Although this diversification avoided the problems identified in *Boerne*, RLUIPA has not been without its constitutional skeptics. Some have questioned Congress' asserted authority under the Commerce[262] and Spending Clauses,[263] while

[256] Lupu, The Failure of RFRA, supra note 6 at 592–97; Volokh, supra note 54, at 1494–503.

[257] Lupu, The Failure of RFRA, supra note 6, at 577–85.

[258] See S. Rep. No. 103-111, at 14 (1993) ("[RFRA] falls squarely within Congress' section 5 enforcement power."); see also City of Boerne v. Flores, 521 U.S. 507, 516 ("Congress relied on its Fourteenth Amendment enforcement power in enacting the most far-reaching and substantial of RFRA's provisions, those which impose its requirements on the States.").

[259] See Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary, 102d Cong. 385–87 (1992) (statement of Professor Ira C. Lupu) (suggesting use of the commerce and spending powers to diversify the constitutional basis for the Act).

[260] See Lupu, The Failure of RFRA, supra note 6, at 576 ("Because of these failures of [constitutional] planning and process, RFRA became law in a way which created a substantial likelihood of judicial evisceration of its goals."); see also Cheffer v. Reno, 55 F.3d 1517, 1523 n.11 (11th Cir. 1995) (expressing doubt as to the constitutionality of RFRA and then finding that plaintiff's religion was not substantially burdened).

[261] 42 U.S.C § 2000cc(a)(2) (2006).

[262] Evan M. Shapiro, The Religious Land Use and Institutionalized Persons Act: An Analysis Under the Commerce Clause, 76 Wash. L. Rev. 1255, 1278–88 (2001) (argu-

others have argued that RLUIPA violates the Establishment Clause.[264] In 2005, however, the Supreme Court decided *Cutter v. Wilkinson*, which upheld the constitutionality of RLUIPA.[265] Since then, claims for religious accommodation by prisoners have skyrocketed and have met with considerably more success.[266] This evidence suggests that resolving doubts as to constitutionality contributes to the success of plaintiffs claiming entitlement to religious exemption.

As detailed above, however, this new constitutional certainty has not had a uniform effect across circuits. In fact, nearly half of the federal courts of appeals seem not to have been emboldened by any sort of newfound constitutional confidence. Yet, taking a closer look at the constitutional history of RLUIPA in the two most polarized circuits—the Ninth and the Sixth—provides some additional evidence for the argument of constitutional certainty.

The Ninth Circuit has decided several RLUIPA cases in favor of religious prisoners.[267] These cases have contained some of the

ing that by enacting RLUIPA Congress exceeded its authority under the Commerce Clause).

[263] Gregory S. Walston, Federalism and Federal Spending: Why the Religious Land Use and Institutionalized Persons Act of 2000 is Unconstitutional, 23 U. Haw. L. Rev. 479, 501–05 (2001) (arguing that RLUIPA exceeds Congressional authority under the Spending Clause).

[264] Marci A. Hamilton, God v. The Gavel: Religion and the Rule of Law 141–72 (2005) (arguing that RLUIPA violates the Establishment Clause); Ruth Colker, *City of Boerne* Revisited, 70 U. Cin. L. Rev. 455, 472–73 (2002) (same); Ada-Marie Walsh, Religious Land Use and Institutionalized Persons Act of 2000: The Land Use Provisions are Both Unconstitutional and Unnecessary, 10 Wm. & Mary Bill Rts. J. 189, 201–07 (2001) (same). But see Roman P. Storzer & Anthony R. Picarello, Jr., The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices, 9 Geo. Mason L. Rev. 929, 995–1001 (2001) (arguing that the RLUIPA's land use provision does not violate the Establishment Clause); Matthew D. Krueger, Note, Respecting Religious Liberty: Why RLUIPA Does Not Violate the Establishment Clause, 89 Minn. L. Rev. 1179 (2005) (same).

[265] See Cutter v. Wilkinson, 544 U.S. 709, 713 (2005).

[266] See, e.g., Koger v. Bryan, 523 F.3d 789, 804 (7th Cir. 2008); Shakur v. Schriro, 514 F.3d 878, 890 (9th Cir. 2008); Greene v. Solano County Jail, 513 F.3d 982, 991 (9th Cir. 2008); Washington v. Klem, 497 F.3d 272, 285–86 (3rd Cir. 2007); Spratt v. R.I. Dep't of Corr., 482 F.3d 33, 41 (1st Cir. 2007); Lovelace v. Lee, 472 F.3d 174, 199 (4th Cir. 2006); Warsoldier v. Woodford, 418 F.3d 989, 1001 (9th Cir. 2005).

[267] See, e.g., *Shakur*, 514 F.3d at 893 (reversing summary judgment for the defendant on the prisoner's claim for a dietary accommodation); *Greene*, 513 F.3d at 988–89 (finding that the jail's policy prohibiting a prisoner from attending group worship sub-

strongest statements about strict scrutiny of prison regulations burdening religion, putting prison administrators on guard that impositions on religion will be thoroughly and carefully reviewed. In the Sixth Circuit, however, prisoner claims under RLUIPA have been far less successful.[268] Sixth Circuit courts are skeptical of prisoner claims and have held to the deference employed under previous accommodation regimes.

These divergent results should be most alarming to anyone who believes in the value of uniformity among the federal courts.[269] It appears highly likely that two identical claims brought by prisoners—one in the Sixth Circuit and one in the Ninth Circuit—would come out differently. In fact, comparing the merits and results in

stantially burdened his religion and a genuine issue of material fact existed as to whether it were justified as the least restrictive means of achieving a compelling government interest); *Warsoldier*, 418 F.3d at 1002 (holding that the California Department of Correction's hair grooming policy failed strict scrutiny under RLUIPA). Prisoners have been similarly successful at the district court level within the Ninth Circuit. See, e.g., Lewis v. Ryan, No. 04cv2468 JLS (NLS), 2008 WL 1944112, at *24–25 (S.D. Cal. May 1, 2008) (holding that a prison policy refusing to provide a Muslim plaintiff with *halal* meat was a substantial burden not supported by a compelling interest); Walls v. Schriro, No. CV 05-2259-PHX-NVM (JCG), 2008 WL 544822, at *6–7 (D. Ariz. Feb. 26, 2008) (holding that a correctional facility's failure to provide a prisoner with a vegetarian diet prepared only by Hare Krishna devotees was a substantial burden not adequately supported by a demonstrated compelling state interest); Stoner v. Stogner, No. 3:06-cv-00324-LRH (VPC), 2007 WL 4510202, at *6 (D. Nev. Dec. 17, 2007) (holding that confiscation of an item of personal property with religious significance imposed a substantial burden and the prison administrator was required to consider a policy less restrictive than an outright ban).

[268] See, e.g., Hoevenaar v. Lazaroff, 422 F.3d 366, 371 (6th Cir. 2005) (holding that the district court failed to give adequate deference to the judgment of prison officials who concluded that the prisoner's hairstyle posed a serious security threat); see also Coleman v. Granholm, No. 06-12485, 2008 WL 919642, at *6 (E.D. Mich. Apr. 2, 2008) (holding that a Michigan Department of Corrections policy restricting access to radios, tape players, and television programs did not substantially burden plaintiff's practice of religion); Fuller v. Burnett, No. 2:06-cv-80, 2008 WL 793744, at *5 (W.D. Mich. Mar. 24, 2008) (upholding the denial of a dietary accommodation on sincerity grounds where the prisoner lacked requisite knowledge about his religion); Kitchen-Bey v. Hoskins, No. 2:06-cv-251, 2008 WL 680399, at *5 (W.D. Mich. Mar. 7, 2008) (holding that the confiscation of a prisoner's notes and research did not constitute a substantial burden on his religion because he failed to show that they were necessary to the practice of his religion).

[269] Uniformity is often hailed as a paramount virtue of federal law. But see Amanda Frost, Overvaluing Uniformity, 94 Va. L. Rev. 1567, 1570–71 (2008) (arguing that uniformity in the federal law is overvalued and that there may be significant advantages to variation across federal courts).

Warsoldier and in *Hoevenaar* provides perhaps the starkest contrast. Both cases involved prisoner challenges to hair length restrictions. In each case, prison administrators offered testimony that the prison policy furthered a compelling interest in security. In *Warsoldier*, the Ninth Circuit demanded that prison administrators produce evidence to demonstrate the danger long hair posed to prison security. In *Hoevenaar*, however, the Sixth Circuit rebuked the district court for demanding evidence and held that "the district court did not give proper deference to the *opinions* of . . . veterans of the prison system."[270] The Ninth Circuit has been unwilling to defer to the expert opinions of prison officials who merely assert a compelling interest in security. The Sixth Circuit, however, still sees a major role for such deference and holds that reliance on a prison administrator's expertise is consistent with strict scrutiny under RLUIPA.

Why have the Sixth and the Ninth Circuits applied the same formal standard so differently? One answer might be that the circuits took different views on the constitutionality of RLUIPA.

In 2002, the Ninth Circuit was one of the first courts of appeals to rule on the constitutionality of RLUIPA in *Mayweathers v. Newland*.[271] The court upheld RLUIPA against a facial challenge, first holding that the Act was a legitimate use of Congressional spending power,[272] and then holding that it did not violate the Establishment Clause.[273] The *Mayweathers* court also held that RLUIPA was not an attempt to revise the Supreme Court ruling in *Smith*, as the statute rested on different grounds and was much narrower in application.[274] This ruling sat undisturbed in the Ninth Circuit, and its reasoning was explicitly affirmed by the Supreme Court in *Cutter*. Since its inception, RLUIPA has stood on firm constitutional ground in the Ninth Circuit, and an impressive body of prisoner-friendly case law has been built on that ground.

By contrast, in 2003, the Sixth Circuit heard *Cutter v. Wilkinson*, before it was heard by the Supreme Court, and held RLUIPA un-

[270] *Hoevenaar*, 422 F.3d at 371 (emphasis added).
[271] 314 F.3d 1062, 1065 (9th Cir. 2002).
[272] Id. at 1066–68.
[273] Id. at 1068–69.
[274] Id. at 1070.

constitutional.[275] The circuit court held that RLUIPA violated the Establishment Clause because it impermissibly endorsed religion over non-religion without showing that religious rights were at any greater risk of infringement.[276] Since then, RLUIPA cases heard in the Sixth Circuit have been adjudicated under a cloud of uncertainty or skepticism regarding the Act's constitutionality. As with RFRA, this constitutional uncertainty may have affected the analysis of courts in the Sixth Circuit. Cases heard there before the Supreme Court heard *Cutter* seemed to apply strict scrutiny in name only, anticipating that eventually such heightened scrutiny for religious accommodation would be struck down.[277] But, even after 2005, it appears that the Sixth Circuit remains hostile to prisoner claims under RLUIPA, evidencing a sort of unconstitutionality hangover.[278] An initial explanation for the jurisprudential split between the Sixth Circuit and the Ninth Circuit, then, seems to be the lingering effect of adjudication regarding the Act's constitutionality.

It could certainly be argued that the relationship between constitutional certainty and prisoner success is correlative not causative. In other words, it may just be that a court skeptical of RLUIPA's constitutionality under the Establishment Clause is less likely to have sympathy for an accommodation claim due to wholly exogenous factors. Still, given the pattern of results across circuits after *Cutter* and the constitutional litigation regarding RLUIPA in the Ninth and Sixth Circuits, some limited evidence remains, indicating that the two variables are linked. This thesis could help to explain the pattern of results under both RFRA and RLUIPA in the two most polarized circuits.

[275] Cutter v. Wilkinson, 349 F.3d 257, 264 (6th Cir. 2003).

[276] Id. at 267.

[277] See, e.g., Johnson v. Martin, No. 2:00-CV-75, 2005 WL 3312566, at *8 (W.D. Mich. Dec. 7, 2005) ("Congress has taken the Supreme Court's fears in *Turner* and made them a reality. Courts are now 'the primary arbiters of what constitutes the best solution to every administrative problem,' as RLUIPA 'unnecessarily perpetuate[s] the involvement of the federal courts in affairs of prison administration.'" (quoting Turner v. Safley, 482 U.S. 78, 89 (1987))).

[278] See, e.g., Berryman v. Granholm, No. 06-CV-11010-DT, 2007 WL 2259334, at *3 (E.D. Mich. Aug. 3, 2007) (holding that the temporary suspension of a Jewish inmate from a kosher meal plan did not substantially burden his religion); see also sources cited supra note 268.

B. Prisoners Not (So) Disfavored

Despite changes in statutory language and constitutional grounding, many predicted that prisoners would not receive more favorable treatment.[279] But that prediction has not been borne out by the cases. Why have prisoners finally been able to break through pervasive skepticism in the courts? One possible answer, first offered by Professor Ryan, is that some prison regulations are so egregious that they cannot be ignored.[280] This explanation, however, is insufficient to explain recent prisoner success, and a more plausible answer lies in the modest scope of RLUIPA.

1. Political Process Theory?

Professor Ryan has offered a hypothesis for why, despite their disfavored status, prisoners might be successful in pressing their claims.[281] He argues that prisoners challenge egregious deprivations of religious liberty not encountered outside of coerced environments.[282] Thus, when prison cases do succeed, it is not because of the formal level of scrutiny applied, but because of the outrageous nature of the restrictions. Citing John Hart Ely, Professor Ryan speculates that these restrictions are only seen in the prison context because the rights of those with representation in the legislature "have already been secured."[283]

If true, this hypothesis could help explain why prisoner claims are meeting with some success under RLUIPA. But there are several problems with this account. First, prisoners are faring better under RLUIPA than under previous accommodation regimes, suggesting that there is something special about RLUIPA rather than about prisoner claims. Second, increased success under RLUIPA is not limited to the prison context. Under Section 2 of RLUIPA, land use claimants are succeeding at a higher rate than under any previous accommodation regime.[284] Third, and most important, the policies successfully challenged by religious prisoners under

[279] See supra Subsection I.B.2.
[280] Ryan, supra note 6, at 1436.
[281] Id.
[282] Id.
[283] Id. (citing to John Hart Ely, Democracy and Distrust (1980)).
[284] Comment, Religious Land Use in the Federal Courts Under RLUIPA, 120 Harv. L. Rev. 2178, 2179 (2007).

RLUIPA are not the kind of extreme or egregious infringements of "basic and fundamental" liberties Professor Ryan had in mind. In *Klem*, the challenged prison regulation limited inmates to a maximum of ten books kept in their cells at one time.[285] In *Shakur*, the prison policy at issue denied a *Muslim* inmate access to kosher meals.[286] In *Warsoldier* and *Gooden v. Crain*, prisoners successfully challenged rather routine institutional grooming regulations.[287] Even in *Lovelace*, the administrative action challenged was the removal of a prisoner from Ramadan activities *after he was observed breaking the fast*.[288] Thus, the political process theory hypothesis does not seem to fit the facts of successful prisoner claims under RLUIPA. A better explanation of these developments lies not in what is distinctive about prisoners, but rather in what is distinctive or new about RLUIPA.

2. Statutory Specificity

To obtain the passage of RFRA, its sponsors had to build and maintain a coalition among many different religious and secular groups. As Professor Lupu noted, "If any mainstream religious group felt excluded, the political coalition supporting the Act would have unraveled."[289] Thus, RFRA was cast in general terms and applied to religious accommodations in all contexts. Several scholars have attributed the failure of RFRA to this broad-based application.[290] The general view has been that religious accommodation is more appropriate in some contexts than in others. Part of the mistake made in RFRA was a failure to draw such distinctions. Most notably, at the time RFRA was passed, many thought that strict scrutiny was completely inappropriate in the prison context. In 1993, a handful of prison administrators and state attorneys general, supported by Senators Reid and Simpson, attempted to secure

[285] Washington v. Klem, 497 F.3d 272, 275 (3rd Cir. 2007).
[286] Shakur v. Schriro, 514 F.3d 878, 882 (9th Cir. 2008).
[287] Gooden v. Crain, 255 F. App'x 858, 860 (5th Cir. 2007); Warsoldier v. Woodford, 418 F.3d 989, 991 (9th Cir. 2005).
[288] Lovelace v. Lee, 472 F.3d 174, 182–83 (4th Cir. 2006).
[289] Lupu, The Failure of RFRA, supra note 6, at 577.
[290] See, e.g., Douglas Laycock & Oliver S. Thomas, Interpreting the Religious Freedom Restoration Act, 73 Tex. L. Rev. 209 (1994); id.

an exemption from RFRA for prisons.[291] Although this effort failed by a narrow margin, the view that RFRA was not intended for use in prisons may have spilled over into the courts adjudicating prisoner claims.

In stark contrast, RLUIPA is very specific in its coverage. It applies in only two contexts: government land use regulations and regulations of persons housed in institutions receiving federal funding.[292] In *Spratt*, the First Circuit found this distinction to be important, noting, "[w]hereas RFRA had applied to all action by 'Government,' RLUIPA is substantially narrower in scope."[293] The specificity of RLUIPA removed lingering doubts about whether Congress intended strict scrutiny to be applied in prison cases. Thus, in addition to firm constitutional footing, RLUIPA's specificity may contribute substantially to an explanation of prisoner success under the statute.

C. Importation of Strict Scrutiny

Finally, the concern that using strict scrutiny in the context of accommodation would dilute its force in other contexts has proven to be unfounded. Instead, several courts adjudicating RLUIPA cases have reached out to other bodies of law, where strict scrutiny is applied, and borrowed concepts developed outside of the accommodation context for their analyses. Understanding how and why this "cross-pollination" occurred is crucial to explaining the success of prisoners under the new regime and may point the way toward the expansion of religious accommodation.

1. Absorption, Not Dilution

Despite predictions, there is no evidence to suggest that the resurrection of strict scrutiny in religious accommodation has diluted its effect in other areas of the law. Rather, the prisoner cases discussed above suggest that the reverse is true: RLUIPA courts are importing notions of strict scrutiny from equal protection and free speech jurisprudence into the accommodation context. Considering that strict scrutiny in these other areas is traditionally described as

[291] Lupu, The Failure of RFRA, supra note 6, at 583.
[292] 42 U.S.C. §§ 2000cc(a), 1(a) (2006).
[293] Spratt v. R.I. Dep't of Corr., 482 F.3d 33, 37 (1st Cir. 2007).

"fatal in fact,"[294] it is no wonder that religious prisoners are encountering more success than ever before.

In *Warsoldier*, the Ninth Circuit relied on equal protection and free speech jurisprudence to give content to strict scrutiny under RLUIPA. In rejecting a prison grooming policy, the *Warsoldier* court cited to *United States v. Playboy Entertainment Group* and *City of Richmond v. J. A. Croson*.[295] *Playboy* was a free speech case that required the government to demonstrate that a less restrictive alternative to scrambling sexually explicit television programming would be ineffective.[296] *Croson* was an affirmative action case holding that Richmond's minority set-aside program was not narrowly tailored, in part because the city failed to demonstrate that it had considered race-neutral means to achieve the same objective.[297] The *Warsoldier* court also cited to *Hunter ex rel. Brandt v. Regents of the University of California*, another affirmative action equal protection case, to explain what is required to establish that a policy is the "least restrictive means." In 2008, the Ninth Circuit explicitly reaffirmed its reasoning in *Warsoldier*, including the citation to *Playboy*.[298]

This importation of strict scrutiny concepts has not been limited to the Ninth Circuit. In *Klem*, the Third Circuit cited to *Warsoldier* approvingly.[299] The *Klem* court explained, "In other strict scrutiny contexts, the Supreme Court has suggested that the Government must consider and reject other means before it can conclude that the policy chosen is the least restrictive means . . . . [W]e agree with the Ninth Circuit in *Warsoldier* that this requirement applies with equal force to RLUIPA."[300]

New importations are also evident in recent district court cases. In *Hudson v. Dennehy*, a Massachusetts district court cited to *Ca-*

[294] Gerald Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972). But see Adam Winkler, Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts, 59 Vand. L. Rev. 793, 794 (2006) (challenging the idea that strict scrutiny is "fatal in fact," especially with reference to affirmative action cases).

[295] Warsoldier v. Woodford, 418 F.3d 989, 999 (9th Cir. 2005).

[296] United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 824 (2000).

[297] City of Richmond v. J. A. Croson, 488 U.S. 469, 507 (1989).

[298] Greene v. Solano County Jail, 513 F.3d 982, 989 (9th Cir. 2008).

[299] Washington v. Klem, 497 F.3d 272, 284 (3rd Cir. 2007).

[300] Id.

sey v. City of Newport.[301] *Casey* was a free speech case, which held that a city amplification ban was not narrowly tailored to serve the government's interest in noise reduction.[302] The *Hudson* court cited *Casey* for the proposition that strict scrutiny requires the government to consider and reject other plausible regulations before determining that the policy chosen is the least restrictive means of furthering a compelling government interest.[303] Since March 2008, other district courts have made similar reference to *Casey* in both the First Circuit[304] and the Fourth Circuit.[305]

2. The Court as Catalyst

This importation of heightened scrutiny doctrine from other contexts helps explain the increased success of claims under RLUIPA. But a puzzle still remains: why have some federal courts looked to other strict scrutiny contexts to give content to strict scrutiny under RLUIPA? One plausible answer comes from the Supreme Court's opinion in *Cutter v. Wilkinson*.[306]

Nearly a decade before *Cutter*, in *Lewis v. Casey*, the Supreme Court cautioned against using bona fide strict scrutiny in the prison context.[307] The Court wrote, "Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration."[308] Still cognizant of the need to consider the exigencies of prison administration, in 2005 the *Cutter* Court cited *Grutter v. Bollinger* for the proposition that "context matters" in the application of strict scrutiny.[309] In *Grutter*, the Court held that some deference should be given to admissions officers at the Uni-

[301] Hudson v. Dennehy, 538 F. Supp. 2d 400, 410 (D. Mass. 2008).
[302] Casey v. City of Newport, R.I., 308 F.3d 106, 120 (1st Cir. 2002). Although *Casey* involved a content-neutral regulation, the court employed a rigorous narrow-tailoring analysis to vacate the district court's ruling. Id. at 114–16.
[303] *Hudson*, 538 F. Supp. 2d at 410.
[304] Starr v Cox, No. 05-cv-368-JD, 2008 WL 1914286, at *15 (D.N.H. Apr. 28, 2008).
[305] Williams v. Jabe, No. 7:08cv00061, 2008 WL 5427766, at *8 (W.D. Va. Dec. 31, 2008).
[306] 544 U.S. 709 (2005).
[307] 518 U.S. 343, 361 (1996).
[308] Id.
[309] *Cutter*, 544 U.S. at 723 (citing Grutter v. Bollinger, 539 U.S. 306, 327 (2003)).

versity of Michigan Law School. This citation was supposed to allay fears that strict scrutiny was incapable of taking the unique context of prison administration into account. By citing to a well-known equal protection case, however, the Supreme Court sent a rather clear signal to lower courts that it considered strict scrutiny in accommodation to be the same as in other regimes. Only since the decision in *Cutter* have several courts explicitly imported concepts of strict scrutiny from equal protection and free speech contexts into accommodation, where previously such importation was almost unthinkable.[310] Over the years, the concept of strict scrutiny has been refined and intensified in these other contexts. Courts have developed doctrines to review government actions and have given robust content to the standard of review.[311] By citing *Grutter*, the Supreme Court gave lower courts the green light to import strict-in-fact strict scrutiny into RLUIPA cases.

3. Beyond Parchment Barriers

The new language in RLUIPA Section 8, which eliminates the centrality and compulsion tests employed under RFRA, surely has some explanatory power in accounting for the increased success of prisoner claims documented in Part II. As the nation's experience under *Sherbert* and RFRA has taught us, however, words can only do so much. To borrow from James Madison, the strict scrutiny standards applicable in the context of religious accommodation before RLUIPA were mere "parchment barriers" to infringements on religious liberty.[312] But several other factors have served to enhance the rigor of strict scrutiny in many courts under RLUIPA. First, the increased success of prisoners after *Cutter*, and the higher rate of success in the Ninth Circuit as compared to the Sixth Circuit, provide some evidence that confidence in the constitutionality of heightened scrutiny for accommodation affects the way that scrutiny is applied in practice. Further, RLUIPA made clear that Congress intended strict scrutiny to be applied in the prisons spe-

[310] See, e.g., Greene v. Solano County Jail, 513 F.3d 982, 989 (9th Cir. 2008); Washington v. Klem, 497 F.3d 272, 284 (3d Cir. 2007); Warsoldier v. Woodford, 418 F.3d 989, 996–99, 1002 (9th Cir. 2005).

[311] See Chemerinsky, supra note 6, at 931–40, 694–748 (discussing content-based speech restrictions and classifications based on race and national origin).

[312] The Federalist no. 48, at 332–33 (James Madison) (Jacob E. Cooke ed., 1961).

cifically, thereby eliminating lingering doubts as to its applicability in this unique context. Finally, the Supreme Court's citation in *Cutter* to an equal protection case may have encouraged lower courts to apply the kind of searching review typically limited to equal protection and free speech. Firm constitutional footing, statutory specificity, and the importation of hard look strict scrutiny from other areas of the law all contribute to a full explanation for increased prisoner success under RLUIPA, where, by contrast, an account based exclusively on simple changes in statutory language falls short.

D. A Possible Methodological Objection

A possible objection to the explanations presented above is that they ignore the extra-legal or political preferences of federal judges. According to this objection, the results described in Part II of this Note are best explained by differences in political ideology. The aim of this Note, however, is not to undertake an analysis based on attitudinal methodology.[313] Instead, it has focused on legal methods that might have made a difference for the circuits involved. While an empirical investigation regarding the relationship between political orientation and case outcomes is beyond the scope of this project, attempts to explain the results along ideological lines would encounter several problems.

First, prisoners have been significantly more successful under RLUIPA than under RFRA. An explanation based on ideology would have to explain why prisoner claims under RFRA did not encounter success in accord with the political preferences of

[313] Attitudinal theories claim that judicial decisions are best explained by the ideological preferences of judges. See, e.g., Robert A. Carp et al., Judicial Process in America 294 (2004); Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited 86 (2002); Cass Sunstein et al., Are Judges Political? An Empirical Analysis of the Federal Judiciary 4–6 (2006); Gregory S. Sisk et al., Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions, 65 Ohio St. L.J. 491, 492 (2004); see also Richard A. Posner, How Judges Think 19–56 (2008). For recent criticism of the attitudinal model, see Barry Friedman, Taking Law Seriously, 4 Perspectives on Politics 261, 263 (2006); see also Orley Ashenfelter et al., Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes, 24 J. Legal Stud. 257, 257 (1995) (finding that personal characteristics and the political party of the president appointing a judge are not significant predictors of judicial decisions).

judges. Attitudinal theorists may find it difficult to explain the new developments described in Part II based on a liberal swing in the composition of the federal courts.

Second, prisoner claims under RLUIPA have not produced results strictly along ideological lines. While results from the Ninth Circuit seem in line with the court's liberal reputation, prisoner success in the Fourth Circuit is more difficult to explain in political terms. There does appear to be some correlation between the traditional political orientation of the circuits and the results of prisoner cases, but significant exceptions cast doubt on the attitudinal thesis.

Third, based on the bipartisan coalition formed to pass RLUIPA, it is unclear that religious accommodation in the prisons breaks down neatly along ideological lines. The House and the Senate both passed the Act without dissent.[314] Members of Congress on both sides of the aisle recognized that prisoners were often subject to arbitrary restrictions on the practice of their faiths and needed stronger protection.[315] A joint statement by Senators Kennedy and Hatch introduced the Act in the Senate, amid strong support from diverse groups, such as the American Civil Liberties Union, the Christian Legal Society, Americans United for Separation of Church and State, and the Family Research Counsel.[316] In short, liberals and conservatives joined together in support of greater protection for religious liberty in prisons. In attempting to measure the relationship between ideological orientation and case results, an attitudinal theorist might have difficulty identifying what counts as the "conservative" or the "liberal" outcome.

An attitudinal study of RLUIPA prison cases may provide additional insights into the nature of judicial decisionmaking in this context. Still, such an account would need to explain these contrary indications. This Note, however, offers a more traditional legal explanation for the division among the courts that identifies sound constitutional grounding, statutory specificity, and influence from

[314] See 146 Cong. Rec. E1563 (daily ed. Sept. 22, 2000) (statement of Rep. Charles T. Canady).

[315] See, e.g., 146 Cong. Rec. S7774, S7775 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy).

[316] See id. at S7776–78.

other heightened scrutiny regimes as the primary determinants of increased prisoner success.

IV. BEYOND RLUIPA

So what do the prisoner cases convey about religious accommodation in other areas?

For those who want to expand the scope of religious accommodation, the first lesson is that it is a mistake to sacrifice sound constitutional reasoning for political consensus-building. RFRA showed how inadequate attention to constitutional foundations opens the door for judges to subvert the intent of congressional action through restrictive textual interpretation. By contrast, RLUIPA was enacted with far more attention to securing sound constitutional footing. The drafters took critics' advice, abandoning exclusive reliance on the tenuous foundation provided by Section 5 of the Fourteenth Amendment in favor of the more established commerce and spending powers. The drafters also diversified the constitutional basis of the Act, hinging Section 2 on a different constitutional theory from Section 3. If advocates or legislators wish to seek accommodation outside of RLUIPA's two narrowly defined categories, they need to keep in mind the lessons of RFRA: even clear and strong statutory language does little good when anchored on dubious constitutional ground.

The second lesson from prisoner cases under RLUIPA is one of statutory specificity. If advocates of accommodation wish to extend beyond RLUIPA's confines, they should seek to do so incrementally. Experience under RFRA showed that codified but generic standards of accommodation—applyied to everything from unemployment compensation to the military to prisons—leave courts uncertain as to which of these diverse contexts Congress had in mind when legislating. By singling out prisons, and by creating a robust legislative history regarding Congressional intent, RLUIPA assured that courts would not read in an unspoken exception for institutional settings. Whatever advocates deem to be the next front in the battle to extend religious liberty, they would be well advised to seek accommodation one step at a time rather than in one fell swoop.

Results under RLUIPA show, however, that advocates need not restrict themselves to only the most modest proposals. While the most aggressive strategies may be foreclosed, groups favoring accommodation still have several different avenues available to them.

Strategies for accommodation can be arrayed on a spectrum according to the method of exemption and the number of statutes affected. With RFRA, supporters of accommodation chose the most aggressive strategy. They sought to provide exemptions by changing the standard of review for all federal and state statutes. On the opposite end of the spectrum is a modest strategy, which aims at specific exemptions from particular laws. This kind of strategy produced an exemption from federal drug laws for the religious use of peyote.[317]

After surveying the results of claims for religious accommodation under the strict scrutiny regime that existed prior to *Smith*, Professor Ryan concluded that strategies aiming to alter the standard of review will never be successful. He suggested that religious groups adopt an approach on the more modest side of the spectrum. Professor Ryan argued that if religious groups wish to gain protection for religious liberty, they should turn their attention away from the courts. Instead, they should seek generally stated legislative exemptions from particular laws.[318] While not as narrow as the approach behind the peyote exception, this strategy does not attempt to modify the standard of review and only targets one piece of legislation at a time.

Recent RLUIPA cases suggest that a more aggressive strategy may also be effective. Like RFRA, RLUIPA targeted the standard of review to protect religious liberty. But unlike RFRA, which applied to all laws, RLUIPA only applies in two particular contexts. The increased success of prisoner claims under RLUIPA indicates that, under the right circumstances, courts may be willing to provide more robust protection for religious liberty. In other words, proponents of accommodation can be successful even when they do not target specific pieces of legislation, but instead aim to alter the standard of review.

[317] 42 U.S.C. § 1996a(b)(1) (2006).
[318] Ryan, supra note 6, at 1445–50.

Professor Ryan's skeptical prediction regarding RFRA proved to be quite accurate. His recommendation, however, that religious groups forgo the courts entirely, might have been overly pessimistic. RLUIPA prisoner cases show that adjustments to the standard of review, limited to more specific contexts, can lead to significant religious accommodations. Of course these different strategies can be pursued concurrently. With RLUIPA in place, religious groups can continue to seek more specific exemptions from the legislature. The point is that those who favor religious accommodation need not limit themselves to the most modest approaches. Statutory enactment of strict scrutiny is capable of making a difference in the context of religious accommodation, provided legislation has a solid constitutional foundation and is specifically formulated to address a particular area of concern.

Finally, proponents of religious accommodation might consider explicitly attaching a new strict scrutiny regime to a more developed regime of heightened scrutiny. This could be done directly by specific statutory reference, such as "this compelling interest test is to be interpreted in the same way as in the context of equal protection." Alternatively, it could be done indirectly by, for example, instructing courts to review government actions "in a manner consistent with other strict scrutiny regimes." It was widely believed that strict scrutiny under RFRA meant something different from regular strict scrutiny, even though the legal terminology was identical. And even under RLUIPA, it took a Supreme Court reference to another strict scrutiny regime to encourage lower courts to import more searching forms of review. Explicit statutory reference to other, more developed strict scrutiny regimes may help to eliminate the fortuity involved in the development of RLUIPA case law, and will make plain what kind of strict scrutiny the legislature intends.

CONCLUSION

Despite the enactment of legislation that has made it more difficult for prisoners to bring lawsuits, the number of prisoner cases under RLUIPA has increased significantly in recent years. Even more surprising, and despite predictions to the contrary, many of these cases have been successful. While some courts continue to

follow a deferential model of review, others are employing searching review of prisoner claims for religious exemptions. These unexpected developments call for a reevaluation of the three skeptical theses identified in Part I of this Note. First, it is clear that the formal level of scrutiny applicable to claims for religious accommodation can have a real and substantial effect on the rate of success. Next, it is not inevitable that prisoners will fare poorly in their claims for accommodation. Though they may be disfavored, their claims have not been consistently disregarded under a legislative scheme aimed specifically at institutionalized persons. Finally, courts and legislatures need no longer worry that using the language of strict scrutiny in the context of religious accommodation will undermine the strength of the standard in free speech or equal protection cases. Those who wish to expand the scope of religious accommodation in the American legal system should pay close attention to the lessons being taught by RLUIPA. Astute attention to constitutional detail, specific and incremental extension of accommodation, and explicit linkage to existing heightened scrutiny regimes may provide the clearest path to success in the courts. Prisoners are on the front line in the battle over the proper scope of religious liberty, and the language of strict scrutiny is their most powerful weapon. Since prison litigation under RLUIPA shows no signs of abating, these cases will continue to test the limits of religious accommodation, and they may provide the best template for future efforts to expand the scope of accommodation.