

# Faith Profaned: The Religious Freedom Restoration Act and Religion in the Prisons

Daniel J. Solove

Incarceration by its nature denies a prisoner participation in the larger human community. To deny the opportunity to affirm membership in a spiritual community, however, may extinguish an inmate's last source of hope for dignity and redemption.

—Justice William J. Brennan<sup>1</sup>

When Congress passed the Religious Freedom Restoration Act (RFRA)<sup>2</sup> in 1993, it aimed to increase dramatically the level of protection for inmates' religious liberties, which had only received minimal judicial scrutiny in the past. RFRA was primarily a response to the 1990 case of *Employment Division v. Smith*,<sup>3</sup> in which the Supreme Court refused to apply strict scrutiny review when generally applicable laws burdened religious practices.<sup>4</sup> In addition to resurrecting strict scrutiny for these cases, RFRA extended this heightened level of protection to the free exercise claims of prisoners. "We want religion in the prisons," declared Senator Orrin Hatch, one of the original sponsors of RFRA. "It is one of the best rehabilitative influences we can have. Just because they are prisoners does not mean all of their rights should go down the drain . . . ."<sup>5</sup>

Despite RFRA's apparent drastic change in the degree of protection for prisoners' religious rights cases, RFRA's stated level of scrutiny is not the controlling factor in the way many courts are deciding prisoners' free exercise cases. The reason stems from two tendencies that have plagued the history of the judiciary's involvement in this area of law and continue to exist under RFRA. First, many courts have failed to understand and evaluate prisoners'

---

1. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 368 (1987) (Brennan, J., dissenting)

2. 42 U.S.C. §§ 2000bb to bb-4 (1994) [hereinafter RFRA].

3. 494 U.S. 872 (1990).

4. *See id.* at 886 n.3.

5. 139 CONG. REC. S14,367 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch)

religious free exercise claims properly, resulting in the undervaluation of burdens on religion when applying RFRA's substantial burden test.<sup>6</sup> Second, many courts have not employed sufficient skepticism when analyzing penological interests. Too much deference—what this Note will call “nonskepticism”—has led to decisions based on intuition and conjecture rather than on empirical data and facts. As a result, prison regulations of dubious validity and narrowness have easily passed muster despite RFRA's compelling interest and least restrictive means tests. This lack of skepticism has transformed RFRA's strict scrutiny into the de facto equivalent of minimal scrutiny. Congress, in crafting RFRA, failed to recognize the power of these tendencies to affect the outcome of the balance. By neglecting to eliminate them, RFRA has not established a uniform heightened protection of religion in prisons.

Part I of this Note sketches a brief history of prisoners' religious rights before RFRA and discusses how RFRA purported to redefine the way courts balanced religious free exercise against penological interests. Part II illustrates why numerous courts, in spite of RFRA, have not changed how they balance competing interests in prisoners' religious rights cases. Finally, Part III explains how courts can improve their application of RFRA's strict scrutiny.

## I. SCRIPTURE ON THE SCALES: THE TROUBLED HISTORY OF RELIGION IN PRISONS

### A. *Balancing Religious Free Exercise*

Judicial balancing, the dominant mode of constitutional jurisprudence in the latter part of this century,<sup>7</sup> has placed its imprint on the Free Exercise Clause. Generally, when a law conflicts with a constitutional right, a judicial balancing approach assigns values to the constitutional right and to the governmental interest that the law seeks to achieve. The weighing of the competing values does not occur directly, as if each were placed on a scale with the heavier side prevailing; instead, balancing uses various levels (or tiers) of judicial scrutiny,<sup>8</sup> with the weight of the right (and the manner in which it is infringed) determining the stringency of a court's review.<sup>9</sup>

---

6. See 42 U.S.C. § 2000bb-1(a) (1994) (“Government shall not substantially burden a person's exercise of religion . . .”).

7. See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 943–44 (1987).

8. See *id.* at 946 (“Constitutional standards requiring ‘compelling’ or ‘important’ state interests also exemplify this form of the balancing metaphor.”).

9. The origins of the levels of scrutiny can be traced to the famous footnote four of *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), in which the Court recognized that certain rights would receive increased judicial protection in the form of a “more searching judicial inquiry.” See also 4 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW* § 20.7, at 19 (2d ed. 1992) (discussing footnote four of *Carolene Products*).

Courts employ three levels of scrutiny when reviewing laws that inhibit constitutional rights: strict, intermediate, and minimal scrutiny. The standard for each level of scrutiny has basically the same structure. First, courts determine whether the government's interest—the goal of the law—meets a certain threshold of importance. The higher the level of scrutiny, the higher the threshold. Second, courts analyze the precision with which the law achieves the governmental interest. The higher the level of scrutiny, the more narrowly the government must tailor means to ends.

Strict (or “heightened”) scrutiny is the most rigorous form of judicial review; courts often refer to it as “the most rigid”<sup>10</sup> scrutiny or “the most exacting”<sup>11</sup> judicial examination. The Court has applied strict scrutiny to cases involving content-based restrictions on speech in public fora,<sup>12</sup> suspect classifications,<sup>13</sup> and laws that impair fundamental rights.<sup>14</sup> Under strict scrutiny, the government bears the burden of demonstrating that its interest is “compelling,”<sup>15</sup> “paramount,”<sup>16</sup> “overriding,”<sup>17</sup> or “of the highest order.”<sup>18</sup> The law must be narrowly tailored so that the fit between means and ends is extremely precise; in one common formulation of this tailoring, the government must use the “least restrictive means” of achieving the law’s purpose.<sup>19</sup> Rarely will a law survive the searching examination of strict scrutiny,<sup>20</sup> leading one scholar to declare that when suspect classifications are involved, strict scrutiny is “‘strict’ in theory and fatal in fact.”<sup>21</sup>

---

10. *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (holding that internment of Japanese citizens does not violate Equal Protection Clause).

11. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (holding that admissions policy with racial quotas violates Equal Protection Clause).

12. *See, e.g., Burson v. Freeman*, 504 U.S. 191, 198 (1992) (holding that ban on electioneering within 100 feet of polling places satisfies strict scrutiny).

13. *See, e.g., Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–94 (1989) (rejecting, under strict scrutiny, city’s requirement that fixed percentage of construction contracts be set aside for predominantly racial minority-owned businesses).

14. *See, e.g., Roe v. Wade*, 410 U.S. 113, 155, 163–64 (1973) (applying strict scrutiny to abortion law that burdened woman’s right to privacy).

15. *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (holding that total ban on indecent dial-a-porn services was invalid under strict scrutiny).

16. *Thomas v. Collins*, 323 U.S. 516, 530 (1945) (holding that statute requiring labor union organizers to register with state before soliciting membership, as applied to unregistered union organizer who gave public speech, violated First Amendment).

17. *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (holding that denial of tax-exempt status to religious university refusing to admit applicants engaged in interracial marriage satisfied strict scrutiny).

18. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (holding that Free Exercise clause mandated that Amish be exempted from mandatory schooling laws).

19. *Sable Communications*, 492 U.S. at 126.

20. *See Meyer v. Grant*, 486 U.S. 414, 425 (1988) (noting that burden of strict scrutiny is “well-nigh insurmountable” for infringements on political speech); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-6, at 1452 (2d ed. 1988) (“[T]here are very few cases which strictly scrutinize and yet uphold instances of impaired fundamental rights.”).

21. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

Intermediate scrutiny requires that governmental interests be “important”<sup>22</sup> or “substantial”<sup>23</sup> as opposed to “overriding.” Courts apply intermediate scrutiny in cases involving gender-based classifications;<sup>24</sup> time, place, and manner restrictions on speech in public fora;<sup>25</sup> and restrictions on commercial speech.<sup>26</sup>

Minimal scrutiny, often referred to as “rational-basis review,”<sup>27</sup> is the lowest form of constitutional scrutiny. When applying minimal scrutiny, courts will uphold the law if it has a “rational relation”<sup>28</sup> to a “legitimate governmental purpose.”<sup>29</sup> Unlike strict scrutiny, minimal scrutiny presumes that the law is valid and places the burden on the challenger “to negative every conceivable basis which might support [the law].”<sup>30</sup> Courts will sustain a law even if it is “based on rational speculation unsupported by evidence or empirical data.”<sup>31</sup> Minimal scrutiny is employed when reviewing restrictions of access to nonpublic fora,<sup>32</sup> nonsuspect classifications,<sup>33</sup> and infringements on nonfundamental rights.<sup>34</sup> As Professor Gerald Gunther observed, minimal scrutiny is “minimal . . . in theory and virtually none in fact.”<sup>35</sup>

Throughout the history of Free Exercise Clause jurisprudence, courts have struggled to find the proper way to balance religion with governmental and penological interests. Religion has been particularly difficult to place on the scale, for courts must evaluate religious practices without becoming entangled in theological issues. Balancing religion is particularly complicated in the prison environment. Engulfed in problems—prison gangs, overcrowding, violence, and riots—and exacerbated by limited finances, outdated facilities,

22. *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980) (holding that workers’ compensation statute that treated widows differently from widowers violated Equal Protection Clause).

23. *United States v. O’Brien*, 391 U.S. 367, 376 (1968) (upholding conviction of defendant who burned draft registration certificate in order to express antiwar beliefs).

24. *See, e.g., Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (holding that nursing school’s women-only admissions policy was unconstitutional).

25. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (upholding city’s requirement that performers in public parks only use sound equipment and technicians provided by city).

26. *See, e.g., Central Hudson Gas & Elec. Co. v. Public Serv. Comm’n*, 447 U.S. 557, 564–66 (1980) (holding that ban on promotional advertising by electric utilities was more extensive than necessary to further state’s interest in energy conservation and fair rate structure).

27. *Heller v. Doe*, 509 U.S. 312, 319 (1993) (holding that involuntary commitment of mentally retarded individuals did not violate equal protection or due process).

28. *Id.* at 320.

29. *Id.*

30. *Madden v. Kentucky*, 309 U.S. 83, 88 (1940) (holding that unequal taxation of in-state and out-of-state banks did not violate equal protection or due process).

31. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) (holding that statute’s distinction between separately and commonly owned buildings for purposes of franchise requirement had rational basis).

32. *See, e.g., International Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678–79 (1992) (upholding ban on face-to-face solicitation in airports but striking down ban on distribution of literature).

33. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 470–71 (1991) (upholding requirement that state judges retire at age of 70).

34. *See, e.g., id.* at 471.

35. Gunther, *supra* note 21, at 8.

and a soaring inmate population,<sup>36</sup> prisons must accommodate the demands of a panoply of faiths. Outside the prisons, religious adherents can select their own diets, places of worship, and religious leaders, but in the prisons, these aspects of religious life must be supplied and regulated by the penal institution.

Certainly incarceration necessitates some restrictions on rights, but it does not follow that all rights should be curtailed: "There is no iron curtain drawn between the Constitution and the prisons of this country."<sup>37</sup> The difficulties of prison administration create the potential for prisons to succumb to neglect, racism, and religious intolerance<sup>38</sup> and for prison officials to curtail inmates' rights not only when necessary, but also when merely convenient. To protect prisoners' right to the free exercise of religion, judges must employ some degree of scrutiny. The difficult issue is determining the extent to which rights must be curtailed and how carefully courts should probe into prison administration.

Complicating the balancing is the fact that prison administration is fraught with uncertainty. Penology is not a rigorous science but a set of ad hoc procedures, uncertain goals, and ambivalent and underanalyzed policies that vary widely from prison to prison.<sup>39</sup> In *Governing Prisons*,<sup>40</sup> John J. DiIulio, Jr. notes that there is a dearth of trustworthy information concerning prison management,<sup>41</sup> no uniformity among prisons concerning penological goals,<sup>42</sup> and only "fragmentary knowledge and untried opinions about how to improve prisons."<sup>43</sup> During the 1960s and 1970s, forty-two states drastically reformed their prison systems, yet "[t]hose responsible for these major organizational overhauls were mostly unaware of the related activities of other states."<sup>44</sup>

The efficacy and effects of prison policies are often shaded with doubt, and judges must make decisions in the face of uncertainty. Will accommodating certain religions incite animosity in other prisoners? Will making too many accommodations eviscerate the prison's control over

---

36. The prison population has more than quadrupled in the last 20 years, from 196,429 in 1970 to 910,080 in 1993. See U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 217 (1995).

37. *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974) (holding that prison disciplinary proceedings must meet minimal due process requirements).

38. See *infra* Section I.C; see also *Ross v. Coughlin*, 669 F. Supp. 1235, 1238 (S.D.N.Y. 1987) ("When Ross explained that he only ate kosher food, he was allegedly told, 'Where the fuck do you think you are, a Holiday Inn. You eat what's here or starve, cause you're in my home now, and I don't cater to no Jew bastards.'") (quoting prison official); *Inmates of Suffolk County Jail v. Eisenstadt*, 360 F. Supp. 676, 679-84 (D. Mass. 1973) (describing prison as run-down, vermin-infested, filthy, and overcrowded).

39. See JOHN J. DI IULIO, JR., *GOVERNING PRISONS: A COMPARATIVE STUDY OF CORRECTIONAL MANAGEMENT* 167-84 (1987); Norval Morris, *The Contemporary Prison: 1965-Present*, in *THE OXFORD HISTORY OF THE PRISON* 227, 227 (Norval Morris & David J. Rothman eds., 1995).

40. DI IULIO, *supra* note 39.

41. See *id.* at 11.

42. See *id.* at 249.

43. *Id.*

44. *Id.* at 237.

inmates? Will the cumulative cost of accommodations deplete limited prison resources?

Any accommodation of religion involves the potential for resentment, and any change in existing prison policy presents the possibility of danger. Almost all decisions invoke the fear of the slippery slope. These risks and uncertainties can easily lead to a complete refusal to make accommodations, and consequently, to the demise of judicial protection for prisoners' religious liberty. To safeguard prisoners' free exercise rights, judges cannot retreat from the task of balancing, no matter how daunting it may appear.

#### B. *Free Exercise in Flux*

Outside of the prisons, the Supreme Court's difficulty in finding an appropriate balance between religious free exercise and governmental interests led to the gradual formation, extensive erosion, and eventual abandonment of a strict scrutiny standard of review. Ultimately, the troubles of balancing religion resulted in the creation of RFRA—one of the most important chapters in the evolution of free exercise jurisprudence.

Initially, the Court did not use a balancing approach when deciding free exercise cases. In its earliest free exercise decision, *Reynolds v. United States*,<sup>45</sup> the Court held that Mormons should not be exempted from a generally applicable law prohibiting polygamy because exemptions for free exercise would "make the professed doctrines of religious belief superior to the law of the land."<sup>46</sup> Nowhere in the opinion did the Court speak in terms of balancing. Around the middle of the twentieth century, the Court began employing the rudiments of a balancing approach, requiring a tight link between legislative means and ends when religion was burdened.<sup>47</sup> The Court also began to examine whether religious exemptions could be made from laws of general applicability.<sup>48</sup>

Finally, in 1963, the Court began applying strict scrutiny in free exercise cases. In *Sherbert v. Verner*,<sup>49</sup> the Court granted unemployment compensation to employees dismissed because of conflicts between their work duties and their religion. After explicitly rejecting the "rational relationship" test, the Court applied strict scrutiny.<sup>50</sup> In *Wisconsin v. Yoder*,<sup>51</sup> the Court exempted

---

45. 98 U.S. 145 (1878).

46. *Id.* at 167.

47. See *Murdock v. Pennsylvania*, 319 U.S. 105, 116 (1943) (holding nondiscriminatory ordinance regulating solicitation was not "narrowly drawn"); *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940) (requiring statute prohibiting solicitation and inciting breaches of peace to be "narrowly drawn"); see also *TRIBE*, *supra* note 20, § 14-13, at 1253 (discussing *Murdock* and *Cantwell*).

48. See *Braunfeld v. Brown*, 366 U.S. 599, 608-09 (1961) (holding that Free Exercise Clause did not require Jewish store owner to be exempted from mandatory Sunday closing laws).

49. 374 U.S. 398 (1963).

50. See *id.* at 406.

51. 406 U.S. 205 (1972).

the Amish from mandatory schooling laws, stating that “only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion.”<sup>52</sup>

Strict scrutiny of free exercise claims differed slightly from strict scrutiny in other contexts. When laws burdening protected speech or involving suspect classifications failed strict scrutiny, the Court invalidated them. However, when a law that burdened religion failed strict scrutiny, the Court made an exception for the religious practice, and the law remained applicable to others. Thus the Court examined the narrow tailoring requirement in terms of whether an exception to the law could serve as a less restrictive alternative. In *Yoder*, for example, the Court concluded that “it was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish.”<sup>53</sup> In essence, the strict scrutiny test for free exercise cases balanced the need for uniformity in the law’s application with the burden on religion. Another, perhaps more crucial difference, was that courts would not scrutinize a law unless the plaintiff established that the burden on her religion was “substantial.”<sup>54</sup>

During the 1980s and early 1990s, the Court continued to articulate the strict scrutiny standard of *Sherbert* and *Yoder* for neutral laws of general applicability that infringed on the free exercise of religion.<sup>55</sup> However, in applying this standard, the Court weakened its stringency, and the religious liberty frequently lost to the governmental interest<sup>56</sup> or was found not to be substantially burdened.<sup>57</sup> The Court’s dilution of the strict scrutiny standard

---

52. *Id.* at 215.

53. *Id.* at 236.

54. *See, e.g., Sherbert*, 374 U.S. at 406.

55. *See, e.g., Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 384–85 (1990) (applying scrutiny of *Yoder* to generally applicable sales tax); *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989) (applying scrutiny of *Yoder* to denial of charitable deduction for payments to Church of Scientology for training sessions); *Frazee v. Illinois Dep’t of Employment Sec.*, 489 U.S. 829, 835 (1989) (“[T]here may exist state interests sufficiently compelling to override a legitimate claim to the free exercise of religion. No such interest has been presented here.”); *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 141 (1987) (applying “strict scrutiny” of *Sherbert* to denial of unemployment benefits to person discharged for refusing to work on her Sabbath); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (applying strict scrutiny to denial of tax-exempt status to university that refused admission to applicants engaged in interracial marriage or known to advocate interracial marriage or dating); *United States v. Lee*, 455 U.S. 252, 257–58 (1982) (applying scrutiny of *Yoder* and *Sherbert* to requirement that Amish participate in social security system); *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981) (applying scrutiny of *Yoder* to denial of unemployment benefits to claimant who quit because of religious objections to producing armaments).

56. *See, e.g., Jimmy Swaggart Ministries*, 493 U.S. at 394–97 (holding that generally applicable sales tax passed strict scrutiny even when tax was applied to religious materials); *Hernandez*, 490 U.S. at 700 (holding that denial of charitable deduction for payments to Church of Scientology for training sessions satisfied strict scrutiny); *Bob Jones Univ.*, 461 U.S. at 604 (holding denial of tax-exempt status to religious university refusing to admit applicants engaged in interracial marriage passed strict scrutiny). *Lee*, 455 U.S. at 257–58, 260 (concluding that uniform participation in social security system passed strict scrutiny even when participation in system was barred by religious doctrine).

57. *See, e.g., Jimmy Swaggart Ministries*, 493 U.S. at 391–92 (holding that sales tax applied to

culminated in *Employment Division v. Smith*.<sup>58</sup> In *Smith*, a Native American who was fired from a state job for his religious use of peyote, argued that the Free Exercise Clause required that he receive unemployment compensation. In denying his claim, the Court held that as long as a law was generally applicable and not designed to discriminate against a particular religion, the fact that it burdened religious freedom was irrelevant.<sup>59</sup> The Court explicitly rejected the ad hoc judicial balancing approach for free exercise accommodation cases:

It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.<sup>60</sup>

*Smith* eliminated strict scrutiny for free exercise claims involving neutral, generally applicable laws<sup>61</sup> and put the courts out of the balancing business.

### C. Prisoners' Religious Rights

Judicial scrutiny of prisoners' rights is a recent phenomenon. Until the 1960s, courts followed a "hands off" policy, rarely peeking into the shadowy realm of prison operation.<sup>62</sup> In the oft-quoted statement of one court, a prisoner was "the slave of the State."<sup>63</sup> Courts were reluctant to scrutinize prisoners' rights claims because of concerns about federalism and separation of powers, as well as a lack of familiarity with penology and prison administration.<sup>64</sup>

Starting in the 1960s and 1970s, courts began to order that prisons be reformed.<sup>65</sup> Courts intervened in prison administration because of inhumane conditions such as severe overcrowding, poor sanitation, and high levels of violence.<sup>66</sup> Judicial review of prison affairs also increased due to religious

---

religious materials was not "constitutionally significant" burden); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450-51 (1988) (holding that only burdens on religion that "coerce individuals into acting contrary to their religious beliefs" require *Sherbert's* level of scrutiny).

58. 494 U.S. 872 (1990).

59. *See id.* at 888-90.

60. *Id.* at 890.

61. *See id.* at 886 n.3. For a vigorous critique of *Smith*, see Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990).

62. *See, e.g.*, WILLIAM L. SELKE, PRISONS IN CRISIS 28-29 (1993); RICHARD G. SINGER & WILLIAM P. STATSKY, RIGHTS OF THE IMPRISONED 581 (1974).

63. *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871).

64. *See Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974).

65. *See SELKE, supra* note 62, at 28-36.

66. *See Rhodes v. Chapman*, 452 U.S. 337, 354-61 (Brennan, J., concurring) (describing instances of indecent prison conditions that spurred courts to intercede in prison affairs).

and racial discrimination. Several cases brought by African-American Islamic prisoners involving egregiously discriminatory treatment of prisoners based on their Muslim beliefs—commonly referred to as the “Black Muslim cases”—spurred even traditionally deferential courts to become more involved with the prisons. For example, in *Sewell v. Pegelow*,<sup>67</sup> two complaints alleged that all thirty-eight Muslims in the United States Reformatory at Lorton, Virginia, were kept in isolation for three months, denied medical care, and provided with insufficient nourishment. None of the Muslims had violated any disciplinary rule.<sup>68</sup> Unlike adherents of other religions, they were not allowed to wear metal symbols of their faith or consult with religious advisers. The court, while noting that “the maintenance of discipline in a prison is an executive function with which the judicial branch ordinarily will not interfere,”<sup>69</sup> held that the gravity of the allegations was sufficient to require a hearing.<sup>70</sup> In similar cases, courts began to require hearings rather than summarily dismiss claims, departing from the policy of noninvolvement in prison affairs.<sup>71</sup>

By the late 1970s, thirty-two state prison systems faced constitutional challenges.<sup>72</sup> *Cruz v. Beto*<sup>73</sup> was the first prisoner religious rights case to reach the Supreme Court. In *Cruz*, a Buddhist inmate was forbidden from worshipping in the prison chapel and from speaking to his religious advisor. When he shared his religious materials with other inmates, prison officials locked him in solitary confinement for two weeks on a diet of only bread and water. While the prison provided Catholic, Jewish, and Protestant chaplains, services, classes, and texts, it provided nothing for Buddhist worshippers. Moreover, prisoners who attended religious services were rewarded with “points of good merit” which increased “a prisoner’s eligibility for desirable job assignments and early parole consideration.”<sup>74</sup> Despite the gravity of the prisoner’s allegations, the district court summarily dismissed the complaint out of deference to prison officials, and the court of appeals affirmed.<sup>75</sup> The Supreme Court reversed, stating that while “prison officials must be accorded latitude in the administration of prison affairs,” federal courts must “enforce

---

67. 291 F.2d 196 (4th Cir. 1961).

68. *See id.* at 197.

69. *Id.*

70. *See id.* at 198.

71. *See* *Ross v. Blackledge*, 477 F.2d 616, 619 (4th Cir. 1973) (requiring hearing on prison’s denial of pork-free diet to Black Muslims); *Smith v. Blackledge*, 451 F.2d 1201, 1202 (4th Cir. 1971) (requiring hearing on prison’s denial of paid Black Muslim minister and pork-free diets for Black Muslim inmates); *Williford v. California*, 352 F.2d 474, 476 (9th Cir. 1965) (requiring hearing on alleged systematic harassment of Black Muslims); *Brown v. McGinnis*, 180 N.E.2d 791, 793 (N.Y. 1962) (requiring hearing of prison’s denial of Black Muslim ministers and services).

72. *See* C. Ronald Huff, *The Discovery of Prisoners’ Rights*, in *LEGAL RIGHTS OF PRISONERS* 47, 51 (Geoffrey P. Alpert ed., 1980).

73. 405 U.S. 319 (1972).

74. *Id.* at 320.

75. *See id.* at 321.

the constitutional rights of all 'persons,' including prisoners."<sup>76</sup> However, the Court did not establish a clear standard for the proper degree of scrutiny for prisoners' religious liberty cases.

In the decade following *Cruz*, the Supreme Court upheld regulations infringing on prisoners' other First Amendment rights if the regulations were a "rational response"<sup>77</sup> or "rationally related"<sup>78</sup> to the penological interest. Consistent across these cases was the Court's high level of deference to prison administrators. In *Pell v. Procunier*,<sup>79</sup> the Court rejected a First Amendment challenge to a ban on prisoners' rights to interview with the media because decisions about penological interests were "within the province and professional expertise of corrections officials."<sup>80</sup> Unless the record contained "substantial evidence" that administrators exaggerated these interests, "courts should ordinarily defer to their expert judgment in such matters."<sup>81</sup> The Court used similar deferential language in *Bell v. Wolfish*<sup>82</sup> when it upheld a regulation prohibiting prisoners from obtaining hardback books not mailed directly from publishers, book clubs, or bookstores.<sup>83</sup> Thus, the Supreme Court was beginning to fashion a minimal scrutiny standard for prisoners' First Amendment liberties.

However, after the Court handed down these decisions, lower courts continued to apply differing levels of scrutiny to prisoners' constitutional complaints, especially in cases involving inmates' religious rights claims.<sup>84</sup> This uneven scrutiny can be observed in cases involving prison policies regulating hair length that conflicted with religious practices of growing long hair and beards.<sup>85</sup> Prisons sought to justify their policies with penological

76. *Id.*

77. *Bell v. Wolfish*, 441 U.S. 520, 550 (1979) (upholding regulation preventing prisoners from receiving hardcover books from source other than bookstore, book publisher, or book club).

78. *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 129 (1977) (upholding regulations curtailing prisoner involvement in labor unions).

79. 417 U.S. 817 (1974).

80. *Id.* at 827.

81. *Id.*

82. 441 U.S. 520 (1979).

83. *See id.* at 551; *see also Procunier v. Martinez*, 416 U.S. 396, 405 (1974) (explaining that courts should remain deferential to prison officials because "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform").

84. Some courts required a level of scrutiny close to strict scrutiny. *See, e.g., Shabazz v. Barnauskas*, 790 F.2d 1536, 1539 (11th Cir. 1986) (applying "less restrictive means test"); *Gallahan v. Hollyfield*, 670 F.2d 1345, 1346 (4th Cir. 1982) (examining prison regulation for "less restrictive alternatives"). More frequently, courts required a minimal level of scrutiny. *See, e.g., Brown v. Johnson*, 743 F.2d 408, 412 (6th Cir. 1984) (holding that infringement on free exercise must be "reasonably related" to maintaining security); *Madyun v. Franzen*, 704 F.2d 954, 960 (7th Cir. 1983) (requiring that prison regulation have "important objective" and be "reasonably adapted to achieving that objective"); *Rogers v. Scurr*, 676 F.2d 1211, 1215 (8th Cir. 1982) (rejecting "least restrictive alternative" test in favor of reasonableness test); *St. Claire v. Cuyler*, 634 F.2d 109, 114 (3d Cir. 1980) (requiring only that state "produce evidence" that accommodating free exercise right "would create a potential danger to institutional security").

85. For some adherents, the practice of growing long hair and beards originates from language in the Bible. *See Leviticus 19:27* ("Ye shall not round the corners of your heads, neither shalt thou mar the corners of thy beard.").

interests such as facilitating identification, preventing prisoners from hiding contraband in their hair, reducing the time and physical contact involved in searching prisoners, and reducing the number of assaults by "predatory homosexuals."<sup>86</sup>

Some courts remained skeptical of these prison policies and took affirmative steps to investigate them. In *Moskowitz v. Wilkinson*,<sup>87</sup> a court-requested survey of forty-five state prison systems revealed that twenty-three allowed beards while twenty-two did not,<sup>88</sup> indicating that prison policy across the country was sharply divided on this issue. Based on this survey, the court held that because such a substantial number of prisons permitted beards, the antibeard regulation did not appear to be so essential for prison safety that it should override the prisoner's religious rights.<sup>89</sup> In *Gallahan v. Hollyfield*,<sup>90</sup> the court found that a Cherokee prisoner's asserted free exercise right to grow his hair long due to his religious traditions outweighed the prison's interest in prohibiting long hair. The court ruled that "less restrictive alternatives" were available, such as pulling the hair back in a ponytail and searching it for contraband.<sup>91</sup>

Other courts, however, were considerably more deferential toward prison administrators, refusing to second guess their discretion except in the most extreme cases. In *Cole v. Flick*,<sup>92</sup> the court upheld a prison's hair regulation that infringed on the asserted free exercise rights of a Cherokee Indian to grow his hair long.<sup>93</sup> The court held that "once the state proffers sincerely held and arguably correct beliefs regarding the necessity of a regulation . . . the burden is on the prisoner to make a showing by substantial evidence that these beliefs are unreasonable or that the regulation is an exaggerated response."<sup>94</sup> As the need for hair regulations was far from certain (as indicated by the *Moskowitz* survey), the extent to which prisoners' free exercise rights could outweigh penological interests turned on how carefully courts would question the justifications offered by prison officials.

In 1987, the Supreme Court, in *Turner v. Safley*<sup>95</sup> and *O'Lone v. Estate of Shabazz*,<sup>96</sup> established a test for balancing prison regulations against prisoners' religious rights. In *Turner*, a case involving inmate mail and marriage restrictions, the Court articulated a minimal scrutiny test for prisoners' rights claims: "[W]hen a prison regulation impinges on inmates'

---

86. *Cole v. Flick*, 758 F.2d 124, 127 (3d Cir. 1985).

87. 432 F. Supp. 947 (D. Conn. 1977).

88. *See id.* at 950 n.8.

89. *See id.* at 950-51.

90. 670 F.2d 1345 (4th Cir. 1982).

91. *See id.* at 1346-47.

92. 758 F.2d 124 (3d Cir. 1985).

93. *See id.* at 131-32.

94. *Id.*

95. 482 U.S. 78 (1987).

96. 482 U.S. 342 (1987).

constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”<sup>97</sup> The test also considered other factors: the existence of alternative means for prisoners to exercise their rights; the impact that accommodation would have on guards, inmates, and prison resources; and the alternatives available to the regulation that would accommodate the prisoner’s religious practice “at *de minimis* cost.”<sup>98</sup>

In *O’Lone*, the Court applied the *Turner* test to a case dealing explicitly with prisoners’ free exercise rights. *O’Lone* involved prison work policies that prevented Muslim prisoners from attending *Jumu’ah*, a Friday service commanded by the Qur’an.<sup>99</sup> The Court concluded that there was a “logical connection” between the regulation and the legitimate penological interests of safety and rehabilitation.<sup>100</sup> The Court also found that Muslim prisoners could express their faith in alternative ways, listing practices that Muslims could engage in at the prison.<sup>101</sup> Finally, the Court examined whether less burdensome alternatives were available at *de minimis* cost. Out of deference, the Court did not require the prison officials to prove the unavailability of less burdensome alternatives.<sup>102</sup> Thus the regulation passed muster under the *Turner* test.

*Turner* and *O’Lone* were not significant retreats in prisoner rights protection; they simply clarified what numerous courts were already doing. However, the Court crystallized the degree of scrutiny at the lowest level that courts had been using—a scrutiny so meager and deferential that it approximated the “hands off” doctrine.

#### D. *The Genesis of RFRA*

The Court’s judicial restraint in *Smith* and *O’Lone* had all but eviscerated the judiciary’s role in balancing religious liberty against governmental and penological interests: *Smith* delegated the task of balancing to the legislature while *O’Lone* surrendered it to prison officials.

Congress, however, placed the responsibility of balancing back on the courts. Spurred by a diverse coalition of religious groups,<sup>103</sup> Congress created RFRA in response to *Smith*, rejecting *Smith*’s holding that the balancing should be done by legislatures rather than judges. As the House Report declared: “It

---

97. *Turner*, 482 U.S. at 89.

98. *Id.* at 89–91.

99. See *Qur’an* 62:9 (A. Yusuf Ali trans., 1983).

100. See *O’Lone*, 482 U.S. at 350–51.

101. See *id.* at 352 (listing practices such as consulting with religious leaders, eating pork-free meals, fasting during *Ramadan*, and worshipping in congregation except during working hours).

102. See *id.* at 350.

103. The coalition, called the Coalition for the Free Exercise of Religion, was composed of over 50 religious organizations. For a partial list of these groups, see 139 CONG. REC. S14,362 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch).

is not feasible to combat the burdens of generally applicable laws on religion by relying upon the political process for the enactment of separate religious exemptions in every Federal, State, and local statute."<sup>104</sup> In addition, Congress criticized *Smith*'s level of protection for the free exercise of religion, observing that neutral laws of general applicability often severely threatened this fundamental liberty.<sup>105</sup> Senator Hatch, one of RFRA's original sponsors, declared: "The elimination of the compelling interest standard has led to a string of lower court decisions eroding freedom of religion in a wide variety of areas. . . . The *Smith* case was wrongly decided and the only way to change it is with this legislation."<sup>106</sup>

RFRA's preamble asserted that "in [*Smith*] the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion."<sup>107</sup> The purpose of RFRA was to "restore the compelling interest test as set forth in [*Sherbert*] and [*Yoder*]."<sup>108</sup> RFRA mandated that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" except if the government demonstrates a "compelling governmental interest" and the government uses "the least restrictive means of furthering that compelling governmental interest."<sup>109</sup> This is the language of strict scrutiny.<sup>110</sup> RFRA displaced *Smith*, creating a new statutory right to free exercise that would be protected with the most rigorous scrutiny.<sup>111</sup>

*Smith* was not RFRA's only target, for RFRA also undermined *O'Lone*. Both the Senate and House Reports sharply criticized *O'Lone* and stated that RFRA would eliminate *O'Lone*'s minimal scrutiny standard for prisoners' free exercise cases.<sup>112</sup> Accordingly, RFRA mandated that cases involving prisoners' religious free exercise be reviewed with the same strict scrutiny as regular free exercise cases,<sup>113</sup> promising prisoners a significant increase in the protection of their free exercise rights.

The extension of strict scrutiny to the prisons was one of the most hotly debated aspects of RFRA. A unanimous letter from all fifty state prison

104. H.R. REP. NO. 103-88, at 6 (1993).

105. See S. REP. NO. 103-111, at 4-5 (1993), reprinted in 1993 U.S.C.A.N. 1892, 1893-94, H.R. REP. NO. 103-88, at 2 (1993).

106. 139 CONG. REC. S14,353 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch).

107. 42 U.S.C. § 2000bb(a)(4) (1994) (citations omitted).

108. *Id.* § 2000bb(b)(1).

109. *Id.* §§ 2000bb-1(a)-(b).

110. See *supra* notes 10-21 and accompanying text (discussing strict scrutiny).

111. There has been a vigorous debate concerning the constitutionality of RFRA. See Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437 (1994); Bonnie I. Robin-Vergeer, *Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. CAL. L. REV. 589 (1996).

112. See S. REP. NO. 103-111, at 9-11 (1993), reprinted in 1993 U.S.C.A.N. 1892, 1898-1901, H.R. REP. NO. 103-88, at 7-8 (1993).

113. See S. REP. NO. 103-111, at 11, reprinted in 1993 U.S.C.A.N. 1892, 1900-01, H.R. REP. NO. 103-88, at 7-8.

directors implored Congress not to apply RFRA to the prisons because RFRA's "dramatic change in the legal standard applied in prison litigation will necessarily result in a dramatic increase in the amount and cost of litigation and will have a deleterious impact on security and limited prison resources."<sup>114</sup> Responding to these concerns, Senator Harry Reid introduced an amendment to exempt prisons from RFRA.<sup>115</sup>

Members of the Senate vigorously debated the amendment.<sup>116</sup> Senator Reid argued that strict scrutiny was too exacting a standard for prison officials to satisfy, requiring "full-blown evidentiary hearings" and permitting courts "to second guess prison officials on virtually every decision of prison administration."<sup>117</sup> Supporters of the Reid amendment contended that RFRA would increase already burgeoning prisoner litigation, entice prisoners to dress frivolous claims in the vestments of religion, place a severe strain on prison resources and finances, endanger prison security, and frustrate the ability of prison officials to control prisoners.<sup>118</sup>

Others strongly opposed the Reid amendment, including a multitude of religious groups<sup>119</sup> and Attorney General Janet Reno, the supervisor of the federal prison system.<sup>120</sup> Numerous senators asserted that the Reid amendment would inhibit legitimate claims but fail to halt abusive lawsuits and attested that free exercise cases accounted for only a minuscule percentage of prisoner litigation.<sup>121</sup> In addition, many senators—both conservative and liberal—underscored the rehabilitative aspects of religion for inmates.<sup>122</sup> For example, Senator Bob Dole argued: "[I]f religion can help just a handful of prison inmates get back on track, then the inconvenience of accommodating their religious beliefs is a very small price to pay."<sup>123</sup> Similarly, Senator Edward Kennedy declared: "We would encourage prisoners to be religious. There is every reason to believe that doing so will increase the likelihood that a prisoner will be rehabilitat[ed]."<sup>124</sup> The Senate rejected the Reid

---

114. 139 CONG. REC. S14,355 (daily ed. Oct. 26, 1993) (statement of Sen. Reid) (quoting letter).

115. *See id.* at S14,353.

116. *See id.* at S14,353–68; 139 CONG. REC. S14,461–68 (daily ed. Oct. 27, 1993).

117. 139 CONG. REC. S14,354 (daily ed. Oct. 26, 1993) (statement of Sen. Reid).

118. *See id.* at S14,354–61 (statements of Sens. Reid and Simpson).

119. *See id.* at S14,362 (statement of Sen. Hatch).

120. *See id.* at S14,351 (statement of Sen. Kennedy) (discussing letter from Attorney General Janet Reno to Senate Judiciary Committee).

121. *See* 139 CONG. REC. S14,462 (daily ed. Oct. 27, 1993) (statement of Sen. Lieberman) (observing that free exercise cases only account for two percent of all prisoner litigation); *id.* at S14,464 (statement of Sen. Coats) (observing that free exercise cases account for less than one percent of prisoner civil rights cases in Ohio); *id.* at S14,466 (statement of Sen. Hatfield) (observing that free exercise cases account for only one percent of prisoner litigation in New York).

122. *See id.* at S14,461–66 (statements of Sens. Hatch, Lieberman, Coats, Dole, Hatfield, and Danforth).

123. *Id.* at S14,466.

124. 139 CONG. REC. S14,351 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy).

amendment by a vote of 58 to 41,<sup>125</sup> and on November 16, 1993, President Clinton signed RFRA into law.

E. *RFRA's Heightened Protection*

A textual comparison of the standards of RFRA and *O'Lone* reveals that the scrutiny mandated by RFRA is significantly more rigorous. Under *O'Lone*, the governmental interest must only be "legitimate" to outweigh a prisoner's free exercise of religion; in contrast, RFRA requires a "compelling" governmental interest. Whereas *O'Lone* merely requires that there be no less burdensome alternatives to the regulation at de minimis cost, RFRA demands that the regulation be the "least restrictive means."

RFRA's legislative history, especially the rejection of the Reid amendment, indicates that numerous members of Congress intended to heighten the scrutiny for prisoners' religious rights. According to the Senate Report, "Prior to *O'Lone*, courts used a balancing test in cases where an inmate's free exercise rights were burdened by an institutional regulation; only regulations based upon penological concerns of the 'highest order' could outweigh an inmate's claims."<sup>126</sup> The Report stated that *O'Lone* "weakened this standard" and that the "intent of [RFRA] is to restore traditional protection afforded to prisoners' claims prior to *O'Lone*."<sup>127</sup>

The House Report also asserted that RFRA would heighten *O'Lone*'s minimal scrutiny to strict scrutiny.<sup>128</sup> Like the Senate Report, the House Report argued that the pre-*O'Lone* case law had established a strict scrutiny standard for religious free exercise in prisons: "Prior to 1987, courts evaluated free exercise challenges by prisoners under the compelling governmental interest test. . . . Strict scrutiny of prison regulations did not automatically assure prisoners of success in court."<sup>129</sup> The Report went on to declare that *O'Lone* lowered this strict scrutiny to a test in which "burdens on prisoners' free exercise of their religion are more easily upheld" and that RFRA would restore this heightened level of scrutiny.<sup>130</sup>

The Senate and House Reports, however, improperly characterized the pre-*O'Lone* case law as almost uniformly reviewing prisoners' free exercise cases with strict scrutiny. In fact, the pre-*O'Lone* case law was uneven and ambiguous, and numerous courts applied a level of scrutiny quite similar to that of *O'Lone*.<sup>131</sup> Although both Reports read the pre-*O'Lone* case law as

---

125. See 139 CONG. REC. S14,468 (daily ed. Oct. 27, 1993)

126. S. REP. NO. 103-111, at 9-10 (1993), reprinted in 1993 U.S.C.A.N. 1892, 1899

127. *Id.* at 10.

128. See H.R. REP. NO. 103-88, at 7-8 (1993).

129. *Id.* at 7.

130. See *id.*

131. See *supra* Section I.C.

much more clearly defined and protective than it actually was, both unequivocally stated that the *O'Lone* standard was too weak and that RFRA would heighten the protection.<sup>132</sup> Based on the Reports and the vigorous Senate debate, Congress appears to have intended to increase the protection afforded to prisoners' religious liberties. Congress believed that RFRA was restoring a rigorous level of scrutiny that demanded that prison officials justify their policies with sufficient evidence.<sup>133</sup> The supporters of RFRA's heightened protection of prisoners' religious rights regarded religion as a liberty so fundamental that it deserved strong protection in the prisons.<sup>134</sup>

#### F. *RFRA's Failed Redemption*

Despite the hopes of its drafters, RFRA has not significantly increased the protection of prisoners' religious rights. The infirmity of RFRA does not originate from the statute itself, but in the way that courts are applying it. Numerous courts articulate RFRA's strict scrutiny standard but nevertheless continue to decide cases in a manner that impersonates *O'Lone*.

In one sense, RFRA has done exactly what Congress said it was designed to do: turn back the clock to the law before *O'Lone*. Indeed, the post-RFRA case law is a reflection of the jurisprudence before *O'Lone*. But in another sense, RFRA has entirely failed to achieve Congress's objectives. RFRA was passed in the spirit of respecting the importance of religious faith. Congress rejected *O'Lone* because its scrutiny was too meager for such an essential liberty. Yet RFRA has spawned a mass of confusing and inconsistent case law in which many courts have shown little respect and understanding for prisoners' religious claims and have neglected to examine prison policies in any meaningful way. These problematic elements in many courts' balancing approaches to prisoners' religious free exercise are the same components from which *O'Lone* was constructed.

## II. PENOLOGICAL SINS: BALANCING PRISONERS' RELIGIOUS RIGHTS UNDER RFRA

RFRA's failure to provide an effective, uniform, heightened standard of review for prisoners' free exercise stems from two problematic trends in the way courts have balanced, and continue to balance, religion with penological interests: (1) insensitive approaches toward weighing prisoners' religious

---

132. See S. REP. NO. 103-111, at 10-11 (1993), reprinted in 1993 U.S.C.C.A.N. 1892, 1900-01; H.R. REP. NO. 103-88, at 7-8.

133. See S. REP. NO. 103-111, at 10-11; H.R. REP. NO. 103-88, at 7-8.

134. For the specific comments and rationales of supporters of RFRA's heightened protection of prisoners' religious free exercise, see 139 CONG. REC. S14,461-71 (daily ed. Oct. 27, 1993); 139 CONG. REC. S14,350-68 (daily ed. Oct. 26, 1993).

rights; and (2) nonskeptical approaches toward weighing penological interests. These trends, prevalent in the pre-*O'Lone* case law and culminating in *O'Lone*, continue to thrive under RFRA.

A. *Insensitivity Toward Evaluating Burdens on Religion*

RFRA resurrects the substantial burden test, the threshold requirement that must be satisfied before courts will evaluate the governmental interest. Determining whether a regulation substantially burdens religion has been, and continues to be, a task of excruciating difficulty. Judges have long recognized that making substantive judgments about religious matters is not within the proper function or competence of the judiciary. As the Supreme Court declared in *Thomas v. Review Board*:<sup>135</sup> "Courts are not arbiters of scriptural interpretation."<sup>136</sup> Unfortunately, courts must define the scope of what constitutes a religion; otherwise, any litigant can obtain the highest level of scrutiny by characterizing her actions as religious. Courts must also develop some method of evaluating the extent to which laws infringe upon religion; otherwise, government would be required to tiptoe on eggshells, forced to litigate and justify every law that caused the most minuscule inconvenience on religion. Accordingly, courts have had to finesse the line between defining and evaluating religion and making theological judgments.

The pre-RFRA case law reveals two basic trends in how courts have approached this most delicate of tasks. Sometimes, judges have adopted an open-minded approach, affording a high level of sensitivity towards the adherent's claims about her religion.<sup>137</sup> For example, the Court in *Thomas* declared that a substantial burden exists when government places "substantial pressure on an adherent to modify his behavior and to violate his beliefs."<sup>138</sup> According to *Thomas*, beliefs that were illogical, incomprehensible, and not fully developed would be protected, as well as idiosyncratic deviances from the traditional dogma of religious groups.<sup>139</sup> Respectful to the claims of the adherent, this tolerant approach focused on the harms imposed by government regulation rather than on judges' opinions about the importance of the religious practice.

On other occasions, however, courts evaluated burdens on religion from a more closed-minded approach. In *O'Lone*, the Court held that a regulation preventing Muslim inmates from attending *Jumu'ah* was justified, in part,

---

135. 450 U.S. 707 (1981).

136. *Id.* at 716.

137. *See, e.g.,* *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (holding that substantial burden exists when adherent is pressured, even by financial burden, to choose whether or not to follow "precepts" of her religion); *Teterud v. Burns*, 522 F.2d 357, 360 (8th Cir. 1975) ("Proof that the practice is deeply rooted in religious belief is sufficient").

138. *Thomas*, 450 U.S. at 718.

139. *See id.* at 714-16.

because Muslims at the prison could “observe a number of their religious obligations.”<sup>140</sup> In this approach, the Court imposed its own preconception about religious devotion—that religious practices are fungible—when evaluating the burdens on free exercise. While several courts under RFRA have maintained the former, more sensitive method when evaluating burdens on religion,<sup>141</sup> many have continued to contort particular faiths to judicially constructed models of religion.

In the most common instance of the latter approach, courts applying RFRA have held that the burden must interfere with a “central tenet” of the religion or with a practice “mandated” by the religion.<sup>142</sup> The central tenet test, however, understands religion in a very narrow manner, leading many courts applying RFRA to dismiss any practice not deemed absolutely obligatory. Using this approach, courts have thrown out RFRA cases involving restrictions on receiving religious literature,<sup>143</sup> engaging in congregational worship,<sup>144</sup> obtaining access to religious leaders,<sup>145</sup> and possessing sacred objects<sup>146</sup>

140. *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 352 (1987).

141. *See, e.g.*, *Mack v. O’Leary*, 80 F.3d 1175, 1179 (7th Cir. 1996) (holding that substantial burden “is one that forces adherents of a religion to refrain from religiously motivated conduct”); *Karolis v. New Jersey Dep’t of Corrections*, No. CIV.A.95-2241 (JEL), 1996 WL 411134, at \*3 (D.N.J. July 19, 1996) (adopting test of *Thomas*); *Muslim v. Frame*, 891 F. Supp. 226, 231 (E.D. Pa. 1995) (holding that substantial burden is one that affects “a practice motivated by a sincere religious belief”). Some courts have abstained from applying the substantial burden test altogether, opting to decide the case solely on the compelling state interest prong. *See, e.g.*, *Phipps v. Parker*, 879 F. Supp. 734, 736 (W.D. Ky. 1995) (“[T]he court is not in a position to judge the centrality of this religious belief to [the prisoner’s] free exercise of religion.”).

142. *See, e.g.*, *Abdur-Rahman v. Michigan Dep’t of Corrections*, 65 F.3d 489, 491–92 (6th Cir. 1995) (holding that practice must be “essential” or “fundamental”); *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995) (holding that burden must violate “central tenet” of religious beliefs); *Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995) (holding that burden must prevent mandated practice or interfere with central tenet of faith).

143. *See, e.g.*, *Hunter v. Baldwin*, No. 95-35330, 1996 WL 95046, at \*1 (9th Cir. Mar. 5, 1996) (“[T]here is nothing in the record to indicate that Hunter’s faith mandated that he receive and read the religious pamphlet in question.”); *Shabazz v. Parsons*, No. 95-6267, 1996 WL 5548, at \*1 (10th Cir. Jan. 8, 1996) (holding that denial of several issues of *Muhammad Speaks* to Nation of Islam prisoner was not substantial burden because “[h]e has not been denied the ability to engage in religious activities, and he still is capable of expressing his adherence to his faith”).

144. *See, e.g.*, *Smith v. Beatty*, No. 95-1493, 1996 WL 166270, at \*2 (7th Cir. Apr. 5, 1996) (finding that denial of communal worship was not substantial burden); *Wynn v. McManus*, No. 95-35466, 1996 WL 32110, at \*1 (9th Cir. Jan. 26, 1996) (holding that prisoner who could only attend one Sunday service every five weeks “failed to establish that any tenet of his religious faith mandated attendance at services every Sunday”); *Muhammad v. New York Dep’t of Corrections*, 904 F. Supp. 161, 191 (S.D.N.Y. 1995) (holding that prisoner “has not demonstrated that the generic Muslim service offends or ignores particular practices or beliefs that are mandated by [Nation of Islam] teachings”); *Best v. Kelly*, 879 F. Supp. 305, 308 (W.D.N.Y. 1995) (holding that prohibition on Jewish inmate from engaging in congregational meetings was not substantial burden).

145. *See, e.g.*, *Davidson v. Davis*, No. 92 Civ. 4040 (SWK), 1995 WL 60732, at \*6 (S.D.N.Y. Feb. 14, 1995) (holding that denial of access to rabbi was not substantial burden on Jewish inmate).

146. *See, e.g.*, *Miller-Bey v. Schultz*, No. 94-1583, 1996 WL 67941, at \*4 (6th Cir. Feb. 15, 1996) (per curiam) (holding that prison’s disposal of Moorish Science Temple practitioner’s nationality card, which must be kept at all times, was not substantial burden); *Reese v. Coughlin*, No. 93 Civ. 4748 (LAP), 1996 WL 374166, at \*7 (S.D.N.Y. July 3, 1996) (holding that Wicca practitioner’s “allegation that tarot cards are ‘like a Bible’ to him only establishes that the cards are important to him” rather than mandated by religion).

because these activities were not “mandated” by the prisoner’s faith.

The central tenet approach incorrectly views religion as a set of clear commands and injunctions. In contrast, sacred texts are often ambiguous and subject to a myriad of interpretations; leaders and practitioners of the same religious group often disagree about what practices are essential.<sup>147</sup> Additionally, the central tenet test dismisses practices not explicitly commanded by a religious authority but necessary for an adherent to express her faith. As Judge Richard Posner aptly observed:

Many religious practices that clearly are not mandatory, such as praying the rosary, in the case of Roman Catholics, or wearing yarmulkes, in the case of Orthodox Jews (optional because while Jewish men are required to cover their heads, the *form* of the head covering is not prescribed), are important to their practitioners, who would consider the denial of them a grave curtailment of their religious liberty.<sup>148</sup>

Rarely are there any religious practices that are absolutely obligatory, for often religions provide special exemptions for those suffering particular hardships. For example, a Muslim’s obligation to participate in even the most important practices, including the fast during the month of *Ramadan* and the prohibition on eating pork, are excused when adherents are constrained.<sup>149</sup> In fact, the existence of such a special exception led the court in the post-RFRA case of *Abdur-Rahman v. Michigan Department of Corrections*<sup>150</sup> to conclude that the inability to attend *Jumu’ah* due to work duty was not a substantial burden because *Jumu’ah* was not “fundamental” to Islam.<sup>151</sup> The court made this determination on the basis of the prison chaplain’s testimony that “Muslims may be legitimately excused from Friday services for reasons such as sickness and work activities.”<sup>152</sup>

A related way in which courts impose their own interpretations of religions when applying RFRA is by defining a substantial burden as a burden on a

---

147. For example, American Jews observe Jewish laws, practices, and rituals in a variety of combinations. See NATHAN GLAZER, *AMERICAN JUDAISM* 132–33 (2d ed. 1972) (“Judaism refers to an enormous body of practices, embracing one’s entire life, more than it refers to a body of doctrine.”). Muslims also differ widely about religious doctrines and practices. See PATRICK BANNERMAN, *ISLAM IN PERSPECTIVE: A GUIDE TO ISLAMIC SOCIETY, POLITICS AND LAW* 212–13 (1988).

148. *Mack v. O’Leary*, 80 F.3d 1175, 1179 (7th Cir. 1996).

149. See *Qur’an* 2:184 (A. Yusuf Ali trans., 1983) (“(Fasting) for a fixed / Number of days, / But if any of you is ill, / Or on a journey, / The prescribed number / (Should be made up) / From days later / For those who can do it / (With hardship), is a ransom, / The feeding of one / That is indigent.”), *id.* at 6:145 (eating “the flesh of swine” is forbidden, “[b]ut (even so), if a person / Is forced by necessity, / Without wilful disobedience, / Nor transgressing due limits,— / Thy Lord is Oft-forgiving, / Most Merciful.”).

150. 65 F.3d 489 (6th Cir. 1995).

151. See *id.* at 492.

152. *Id.* at 491.

religion as a whole.<sup>153</sup> Often, however, particular practices do not appear “substantial” when compared to the vastness of a religion in its entirety. Evaluating the substantial burden in this manner, courts determine the minimum set of practices adequate for prisoners to observe their faiths—an approach that regresses to one similar to *O’Lone’s*, which viewed religion as a menu of interchangeable practices.<sup>154</sup>

In applying their own conceptions of religion under RFRA, many courts are insensitive to the differences between religious denominations and individual interpretations of religious doctrine—differences that might not appear significant to the court but are very important to the adherents. For example, in *Johnson v. Baker*,<sup>155</sup> the court held that a Nation of Islam practitioner was not substantially burdened by attending regular Islamic services because the court was only aware of two differences between the faiths: beliefs in reincarnation and bodily positions for prayer.<sup>156</sup> The court, however, did not confirm its findings by examining scholarly literature. Even if these were the only distinctions, the judge still made a theological conclusion about the importance of these differences to the believers. Likewise, in *Muhammad v. City of New York Department of Corrections*,<sup>157</sup> the court made judgments about the nature of prisoners’ religious experiences: “I find that the generic Muslim services provide comfort and solace to [Nation of Islam] members without pressuring such members to commit acts forbidden by their religion or preventing them from engaging in conduct or having a religious experience mandated by their faith.”<sup>158</sup> In these and similar cases,<sup>159</sup> courts became “experts” on comparative religions, determining

---

153. Only one court has looked at a substantial burden as a burden on a specific religious practice. See *Muslim v. Frame*, 897 F. Supp. 215, 217 (E.D. Pa. 1995) (“The term ‘free exercise of religion,’ however, refers to particular practices of religion, not the practice of religion in general.”).

154. See, e.g., *Miller-Bey v. Schultz*, No. 94-1583, 1996 WL 67941, at \*4 (6th Cir. Feb. 15, 1996) (per curiam) (concluding that prison’s disposal of Moorish Science Temple practitioner’s nationality card was not substantial burden because “members who lose their cards are not prohibited from praying, reading the *Koran*, or attending religious services”); *Bryant v. Gomez*, 46 F.3d 948, 949–50 (9th Cir. 1995) (listing other means by which Pentecostal inmate denied separate group services could practice his religion); *Best v. Kelly*, 879 F. Supp. 305, 308 (W.D.N.Y. 1995) (finding that prison’s prohibiting Jewish inmate from group worship was not substantial burden because he “was allowed to practice his religious beliefs in the privacy of his cell as he saw fit”).

155. No. 94-3828, 1995 WL 570913 (6th Cir. Sept. 27, 1995).

156. See *id.* at \*5.

157. 904 F. Supp. 161 (S.D.N.Y. 1995).

158. *Id.* at 191.

159. See, e.g., *Bryant*, 46 F.3d at 949 (holding that denial of separate Pentecostal services was not substantial burden because general interfaith Christian services for Christians of all denominations was sufficient); *Crosley-El v. Berge*, 896 F. Supp. 885, 888–89 (E.D. Wis. 1995) (holding that denial of Moorish Science Temple services, despite inmate’s claim that his religion was distinct sect from Islam and that his religion forbade attending regular Muslim services, was not substantial burden because inmate’s faith could be accommodated in general Muslim service); *Akbar-el v. Muhammed*, 663 N.E.2d 703, 708 (Ohio Ct. App. 1995) (finding no substantial burden on Muslims of Moorish Science sect who wanted separate service from generic Muslim service).

when a particular sect was distinct enough to deserve a separate religious leader and worship service.

The insensitive approach many courts are using under RFRA to evaluate burdens on religion entangles courts too deeply in religious matters beyond their competence or understanding.<sup>160</sup> Judicial conceptions of religion often clash with how adherents of a religion understand their own faiths. Subtle differences in beliefs and practices, unessential in the eyes of many courts, can be of exceeding importance to the religious adherents, for religious devotion constitutes more than mere choices or preferences.<sup>161</sup>

The ghost of *O'Lone* still haunts the case law after RFRA. Many courts continue to respect the judgment of prison officials while not placing much weight on the judgment of religious adherents in matters concerning their own religions. If the free exercise claim does not satisfy the substantial burden test, the court will dismiss the case without examining the importance of the penological objective.<sup>162</sup> This result is itself a de facto nonbalance, one in which the penological interest escapes judicial scrutiny altogether.

#### B. *Nonskeptical Approaches Toward Evaluating Penological Interests*

Under RFRA, if a prisoner's claim survives the substantial burden test, then the court will examine whether the penological interest is compelling and whether the prison regulation is the least restrictive means for achieving that interest. Before RFRA, courts consistently afforded deference to the judgment of prison officials when making this examination. According to the Court in *O'Lone*, "[W]e have often said that evaluation of penological objectives is committed to the considered judgment of prison administrators, 'who are actually charged with and trained in the running of the particular institution under examination.'"<sup>163</sup>

Deference is the decision not to second guess the judgment of an institution out of respect for its authority and specialization. Judges lack the expertise of those ensconced in the day-to-day exigencies of prison life. Prison officials are more capable of anticipating dangers and costs and must bear the potential perils of a judge's decision to accommodate religion. As the Supreme

---

160. See Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 959 (1989) ("[R]esolving disputes over centrality creates the spectre of religious experts giving conflicting testimony about the significance of a religious practice, with the state's decisionmaker authoritatively choosing among them.").

161. See STEPHEN CARTER, *THE CULTURE OF DISBELIEF* 14 (1993) ("[R]eligions are more and more treated as just passing beliefs . . . rather than as the fundamentals upon which the devout build their lives.")

162. Ira Lupu has argued that the substantial burden test can also serve as a "gatekeeper" in regular free exercise cases. See Lupu, *supra* note 160, at 935.

163. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987) (quoting *Bell v. Wolfish*, 441 U.S. 520, 562 (1979)).

Court has noted, “[C]ourts are ill equipped to deal with the increasingly urgent problems of prison administration and reform.”<sup>164</sup>

However, the necessity and efficacy of many prison regulations are questionable at best. As one judge has explained: “Prison officials often do not feel that their primary obligation is the illumination or enforcement of constitutional rights. It is for this reason that our review cannot be passive.”<sup>165</sup> While prisons are “the most concrete embodiments of state power,”<sup>166</sup> prison officials lack direct accountability to the people, and the public is relatively unfamiliar with the internal workings of the prisons.

The partisan position of prison officials complicates their ability to draw a line between regulations that are convenient and those that are necessary. Several pre-RFRA cases illustrate that prison officials can exaggerate their claims and can create regulations based on intuition and conjecture. In *Hill v. Blackwell*,<sup>167</sup> the court deferred to the judgment of prison officials that a no-beard regulation served a compelling interest.<sup>168</sup> In his dissent, Judge Richard Arnold pointed out the exaggerated and “flippant” comments made by the prison warden, who testified at trial that without the no-beard rule, seventy-five percent of the inmates would grow beards, requiring the prison to take 10,000 identification photographs per week.<sup>169</sup> Yet Arnold exposed the warden’s hyperbole: Because the prison only had 2150 inmates, the warden’s estimates would result in five photographs of each inmate per week.<sup>170</sup>

In *Young v. Lane*,<sup>171</sup> the court upheld a prison regulation that prohibited Jewish inmates from wearing yarmulkes outside of their cells.<sup>172</sup> The prison argued that yarmulkes could be used for hiding weapons and for identifying gang members.<sup>173</sup> However, the prison did allow prisoners to wear baseball caps at any time.<sup>174</sup> Due to the prison’s interest in preventing the smuggling of contraband, the court in *Iron Eyes v. Henry*<sup>175</sup> upheld a regulation requiring short hair that conflicted with the religious beliefs of a Native American inmate. However, the prison did not bar other potential means of contraband smuggling such as “bonnets, handkerchiefs, and large boots.”<sup>176</sup> Cases like these demonstrate the need for courts to examine the claims of prison administrators carefully.

---

164. *Procunier v. Martinez*, 416 U.S. 396, 405 (1974).

165. *Iron Eyes v. Henry*, 907 F.2d 810, 821–22 (1990) (Heaney, J., dissenting).

166. DiIULIO, *supra* note 39, at 274.

167. 774 F.2d 338 (8th Cir. 1985).

168. *See id.* at 347.

169. *See id.* at 348–49 (Arnold, J., dissenting).

170. *See id.*

171. 922 F.2d 370 (7th Cir. 1991).

172. *See id.* at 377.

173. *See id.* at 376.

174. *See id.* at 375.

175. 907 F.2d 810 (8th Cir. 1990).

176. *Id.* at 814.

In creating RFRA, Congress attempted to establish a balance that would provide robust protection of prisoners' religious rights yet respect the judgment of prison officials. Thus, while elevating the level of scrutiny for prisoners' religious rights, Congress also instructed courts to maintain the deference traditionally afforded to prison officials. The Senate Report declared that under RFRA, the courts should still give "due deference to the experience and expertise of prison and jail administrators."<sup>177</sup> According to the House Report, "examination of such regulations in light of a higher standard does not mean the expertise and authority of military and prison officials will be necessarily undermined."<sup>178</sup>

However, there is a fundamental tension between scrutiny and deference. Both scrutiny and deference are instructions to courts about how skeptically they should evaluate and probe regulations. The critical difference between the various levels of scrutiny is the rigor of the courts' examination—and consequently, the weight of the burden on rulemakers to justify the tailoring of their rules. Deference dilutes a court's critical powers; the more deferential a court becomes, the less it investigates the regulation and the more it accepts the opinions of those who designed the regulation. Deference inclines toward an approach with a low degree of skepticism, and a nonskeptical approach can reduce even the highest level of judicial scrutiny to the virtual equivalent of minimal scrutiny. At its strongest level, deference leads to an approach identical to the "hands off" doctrine. In fact, courts often incorporate the level of deference in the standard of review.<sup>179</sup> As Justice Blackmun has remarked, courts can "substitute the rhetoric of judicial deference for meaningful scrutiny of constitutional claims in the prison setting."<sup>180</sup>

While the articulated level of scrutiny provides some guidance to judges about the level of skepticism to employ, deference remains a wild card. When navigating the competing demands of scrutiny and deference, skeptical courts demand more facts and data before deciding, requiring prison officials to substantiate their policies with sufficient evidence. For example, under *O'Lone's* minimal scrutiny test, a skeptical court struck down a prison policy that forced a Rastafarian inmate to shave his dreadlocks for an identification photograph, questioning the regulation and discussing the potentially less restrictive alternative of tying his hair back in ponytails.<sup>181</sup> In contrast, other courts employ a nonskeptical approach, deferring almost completely to prison officials no matter how speculative the policy. For example, a nonskeptical

---

177. S. REP. NO. 103-111, at 10 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1900

178. H.R. REP. NO. 103-88, at 8 (1993).

179. *See, e.g., O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987) ("To ensure that courts afford appropriate deference to prison officials, we have determined that prison regulations alleged to infringe constitutional rights are judged under a 'reasonableness' test . . .").

180. *Block v. Rutherford*, 468 U.S. 576, 593 (1984) (Blackmun, J., concurring).

181. *See Benjamin v. Coughlin*, 905 F.2d 571, 577 (2d Cir. 1990).

court applying RFRA's more rigorous strict scrutiny test sustained a regulation forcing a Hasidic Jew to receive a haircut.<sup>182</sup> The court concluded that "[s]ome interests, like quick identification, cannot be realistically achieved by any other method."<sup>183</sup> Nothing in the opinion indicated that the court considered the alternatives raised in other cases. Thus the vigor of scrutiny turns not on the level articulated by the courts, but on how skeptically courts analyze a regulation.<sup>184</sup>

Under RFRA, the courts remain divided between skeptical and nonskeptical approaches. While several courts have probed for more facts,<sup>185</sup> most courts have interpreted Congress's call for deference as requiring the withdrawal of skepticism of prison regulations. A clear example of the contrast between these approaches under RFRA is *Hamilton v. Schriro*.<sup>186</sup> When a Native American inmate challenged a prison's hair regulations,<sup>187</sup> the district court applied a skeptical form of strict scrutiny; noting that other maximum security jails permitted long hair, the court chastised the prison officials for failing to search for creative solutions.<sup>188</sup> However, the court of appeals reversed, ruling that "[t]he district court failed to give due deference to prison officials' testimony that long hair presented a risk to prison safety and security and that no viable less restrictive means of achieving that goal existed."<sup>189</sup> The court of appeals deferred to the officials' testimony that the regulation was the least restrictive means.

Nonskeptical courts under RFRA are failing to question the conclusory statements of prison officials.<sup>190</sup> For example, in *Diaz v. Collins*,<sup>191</sup> the court held that a hair regulation conflicting with a Native American inmate's

182. See *Phipps v. Parker*, 879 F. Supp. 734, 736 (W.D. Ky. 1995).

183. *Id.*

184. This phenomenon is also exemplified by the pre-*O'Lone* hair and beard prison regulation cases discussed *supra* text accompanying notes 84-94.

185. See, e.g., *Moorish Science Temple v. Benson*, No. 95-2549, 1996 WL 280076, at \*2 (8th Cir. May 29, 1996) (denying summary judgment because prison officials failed to explain how allowing inmates to add suffixes to their names would lead to identification problems); *Estep v. Dent*, 914 F. Supp. 1462, 1467 (W.D. Ky. 1996) (shaving earlocks of Hasidic Jew not least restrictive means of achieving security); *Campbell-El v. District of Columbia*, 874 F. Supp. 403, 408 (D.D.C. 1994) ("[T]he Court needs a more detailed description by the government as to how [blanket restriction on gatherings of more than ten or twelve prisoners in cellblock] is the least restrictive means for furthering its goals.").

186. 863 F. Supp. 1019 (W.D. Mo. 1994), *rev'd*, 74 F.3d 1545 (8th Cir. 1996).

187. The inmate also challenged the prison's complete ban on sweat lodge ceremonies. See *infra* notes 205, 242-44 and accompanying text.

188. See *Hamilton*, 863 F. Supp. at 1023-24.

189. 74 F.3d 1545, 1555 (8th Cir. 1996).

190. See, e.g., *Smith v. Beatty*, No. 95-1493, 1996 WL 166270, at \*2 (7th Cir. Apr. 5, 1996) (concluding, without in-depth analysis of specific facts, that prison policy satisfied least restrictive means test); *George v. Sullivan*, 896 F. Supp. 895, 898 (W.D. Wis. 1995) (accepting, without evidentiary support, claim by prison officials that prohibiting racially derogatory religious publications was least restrictive means of preventing animosity and violence); *Akbar-El v. Muhammed*, 663 N.E.2d 703, 708 (Ohio Ct. App. 1995) (failing to question prison chaplain's statement that altering four generic religious groupings—Protestant, Roman Catholic, Muslim, and Jewish—would "far exceed our ability" and would create security problems).

191. 872 F. Supp. 353 (E.D. Tex. 1994).

religious beliefs was the least restrictive means to prevent hidden contraband and to facilitate quick identification.<sup>192</sup> The court dismissed the inmate's argument that the prison's interest was not compelling because female prisoners were permitted to have long hair.<sup>193</sup> The court concluded: "The potential of hiding contraband in long hair cannot be vitiated except through a regulation that hair be kept short."<sup>194</sup> The phrasing of this conclusion is tautological; what is missing is the thorough analysis that strict scrutiny demands. The court failed to examine the likelihood that contraband would be concealed by inmates with long hair, the adequacy of other methods to prevent hidden contraband, the possibility of effective ways to search inmates' hair, and the merits of the policies and practices employed by other prisons.

When courts do not demand substantial evidence to justify prison regulations, there is no way to distinguish the prison's claims from mere speculation. For example, in *Reese v. Coughlin*,<sup>195</sup> the prison prohibited a prisoner from possessing tarot cards because "the cards can be used to gain psychological control or influence over other inmates."<sup>196</sup> The court summarily dismissed the case based on this justification without requiring corroborating evidence, testimony from psychological experts, or any further explanation.

Although strict scrutiny requires that the prison bear the burden of justifying its policies, many courts applying RFRA are virtually waiving this burden in the name of deference. Some courts are even placing the burden on the prisoner.<sup>197</sup> In *Loden v. Peters*,<sup>198</sup> the court permitted a prison to confiscate a book related to a prisoner's religion based on the findings of two prison committees that the book "pose[d] a clear and present danger to safety based upon its promotion of violent acts."<sup>199</sup> Since the prisoner did not "challenge these findings," the court held that the prison satisfied the compelling interest test.<sup>200</sup>

Courts using nonskeptical approaches diminish the vigor of RFRA's strict scrutiny by failing to examine less restrictive alternatives—even ones raised in other cases or practiced in other prisons. Under RFRA's least restrictive means test, some courts have upheld prison policies that censored potentially

---

192. *See id.* at 359.

193. *See id.* at 359 n.4.

194. *Id.* at 359.

195. No. 93 Civ. 4748 (LAP), 1996 WL 374166 (S.D.N.Y. July 3, 1996).

196. *Id.* at \*8.

197. Quoting Justice Blackmun that only an "unimaginative" judge "could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation," the court in *Hamilton v. Schroo*, 74 F.3d 1545 (8th Cir. 1996), concluded that although there might "be less restrictive means of achieving prison safety and security than completely prohibiting sweat lodge ceremonies," the prisoner "has failed to enlighten us as to any viable less restrictive means." *Id.* at 1556

198. No. 92 C20209, 1995 WL 89951 (N.D. Ill. Mar. 1, 1995)

199. *Id.* at \*10.

200. *Id.*

dangerous publications<sup>201</sup> without considering the alternative (used by another prison) of redacting the problematic portions.<sup>202</sup> One court entirely prohibited Native American sweat lodge ceremonies<sup>203</sup> due to safety concerns,<sup>204</sup> although other maximum security facilities allowed these ceremonies.<sup>205</sup> Several courts upheld hair regulations<sup>206</sup> despite the fact that numerous other prisons permitted long hair and beards, satisfying their penological interests in other ways.<sup>207</sup>

Due to nonskeptical approaches, cases decided under RFRA's strict scrutiny have resulted in outcomes comparable to cases decided under *O'Lone's* minimal scrutiny. Although Congress intended RFRA to provide a uniform heightened protection of free exercise rights in all prisons, many courts have failed to raise the level of protection when applying RFRA.

### C. *Nonskepticism and Insensitivity*

The problem of nonskepticism not only affects the compelling interest side of the balance, but also intensifies the problem of insensitivity by adversely affecting the substantial burden valuation. Under RFRA, in addition to being deferential to prison officials' judgment about penological concerns, some judges have relied on the judgments of prison authorities about the religion of prisoners. These courts have deferred to prison officials for *both* sides of the balance.

In several cases under RFRA, courts have accepted without question the theological conceptions of prison officials. For example, in cases involving religious sects that desire separate worship services, courts have rarely questioned the divisions that the prison established between religious denominations.<sup>208</sup> In addition, some courts have based their understanding of the prisoners' religious beliefs on the testimony of the prison chaplain, an employee of the penal institution.<sup>209</sup> This reliance is problematic because the

201. See *George v. Sullivan*, 896 F. Supp. 895, 898 (W.D. Wis. 1995); *Loden*, 1995 WL 89951, at \*10.

202. See *Lawson v. Singletary*, 85 F.3d 502, 504–05 (11th Cir. 1996) (describing prison's redaction policy).

203. A sweat lodge is a Native American place of worship, a "small enclosure constructed of bent withes covered with skins or blankets . . . that encloses heat for a sweat bath." SAM D. GILL & IRENE F. SULLIVAN, *DICTIONARY OF NATIVE AMERICAN MYTHOLOGY* 293 (1992).

204. See *Hamilton v. Schriro*, 74 F.3d 1545, 1556 (8th Cir. 1996).

205. See *Allen v. Toombs*, 827 F.2d 563, 565 (9th Cir. 1987) (describing sweat lodge facility at Oregon State Penitentiary).

206. See, e.g., *Hamilton*, 74 F.3d at 1555; *Phipps v. Parker*, 879 F. Supp. 734, 736 (W.D. Ky. 1995); *Diaz v. Collins*, 872 F. Supp. 353, 359 (E.D. Tex. 1994).

207. See *Moskowitz v. Wilkinson*, 432 F. Supp. 947, 950 n.8 (D. Conn. 1977) (describing survey revealing that more than 23 state prison systems permitted beards); *infra* notes 236–38.

208. See, e.g., *Bryant v. Gomez*, 46 F.3d 948, 949–50 (9th Cir. 1995); *Johnson v. Baker*, No. 94-3828, 1995 WL 570913, at \*5 (6th Cir. Sept. 27, 1995); *Crosley-El v. Berge*, 896 F. Supp. 885, 888–89 (E.D. Wis. 1995); *Akbar-El v. Muhammed*, 663 N.E.2d 703, 708 (Ohio Ct. App. 1995).

209. See, e.g., *Best v. Kelly*, 879 F. Supp. 305, 309 n.1 (W.D.N.Y. 1995).

prison chaplain can be partisan to the interests of the prison, and inmates, who often proceed *pro se*, may not have the resources to obtain their own experts or the ability to articulate their point of view adequately. For example, in *Abdur-Rahman v. Michigan Department of Corrections*,<sup>210</sup> the court held that *Jumu'ah* was not fundamental to Islam based solely on the testimony of the prison chaplain who noted that work was a valid excuse for missing the service.<sup>211</sup> Rather than assessing the substantial burden test in an independent and neutral way, the court deferred to a partisan prison employee to perform this task.

One of the most subtle manners in which some courts have undervalued prisoners' religious freedom is the way in which they have focused on the balancing test. Caught up in the question of how to divide up scant resources, some judges have ignored the question of the prison's valuation of religion in general. In *Merritt-Bey v. Delo*,<sup>212</sup> the prison kept a "canteen" of funds for religious groups. Inmates belonging to the Moorish Science Temple religion claimed that they were receiving fewer funds than other religions. The court ruled that the inmates failed to prove a substantial burden and held that prisons do not have to allocate resources equally among all religious groups.<sup>213</sup> However, the court neglected to question the total amount of funds the prison allocated to the religion "canteen" by not inquiring whether this amount was too small to protect the religious rights of all the inmates in the prison.

In *Woods v. Evatt*,<sup>214</sup> Muslim inmates filed a RFRA action because Christian inmates received superior accommodations for their worship. While Christians could use the visitation room for services, which permitted worship with family and friends, the Muslims were not allowed to use this room for their Friday *Jumu'ah* service. In addition, the prison allowed gifts in December but not during the Muslim holiday season.<sup>215</sup> The court held that the inmates failed the substantial burden test because accommodation did not have to be equal for all religious groups.<sup>216</sup> The prison contained 450 Christian prisoners and only 88 Muslims.<sup>217</sup> Using the visitation room on Fridays for Muslim services would disrupt visitation hours; Christian services occurred on Sunday, presenting no visitation conflicts.<sup>218</sup>

However, the court failed to consider that perhaps the very reason visitation hours did not occur on Sundays was because of the tradition of Sunday worship for Christians. Perhaps the prison's structure and routines were

---

210. 65 F.3d 489 (6th Cir. 1995).

211. *See id.* at 491.

212. No. 93-2194, 1994 WL 263780 (8th Cir. June 17, 1994)

213. *See id.* at \*1-2.

214. 876 F. Supp. 756 (D.S.C. 1995).

215. *See id.* at 762-63.

216. *See id.* at 766.

217. *See id.* at 765.

218. *See id.* at 764.

designed around Christian traditions. The problem might have been solved by rescheduling Friday visitation hours, yet the court did not consider this possibility; rather, it accepted the existing structure of prison practices as immutable. While the court's decision seemed reasonable given the space and budgetary constraints set up by the prison, the court did not question the parameters constructed by the prison authorities.

### III. FAITH IN THE FUTURE?

In enacting RFRA, Congress sought to raise the level of scrutiny in prisoners' religious rights cases. It depended upon the courts to put this greater protection into effect; however, RFRA's strict scrutiny standard has failed to clarify and stabilize this turbulent and troubled area of law. The way courts approach the balancing, not the articulated level of scrutiny, controls the amount of protection afforded to prisoners' religious rights. The tendencies of insensitivity and nonskepticism, prevalent in pre-RFRA case law, continue to thrive under RFRA and undercut its heightened level of protection.

This Part will propose measures to help guide judicial application of RFRA's strict scrutiny faithfully according to Congress's intent. Ultimately, there is no magic formula that will force courts to decide these cases properly; judges themselves must reform how they balance prisoners' RFRA cases. Otherwise, RFRA will remain a facade behind which many courts continue to balance in much the same way as the Court did in *O'Lone*.

#### A. *Evaluating Burdens on Religion*

Although Congress understood that protection of religious liberty could not be entrusted to majoritarian politics,<sup>219</sup> the insensitive approach used by many courts under RFRA assumes that all faiths fit majoritarian conceptions of religion. In order to evaluate burdens on religions more accurately, courts should weigh burdens on religious practices with sensitivity to the perspective of the adherent. This is best accomplished by using a sincerity test to determine whether prisoners are sincere in their claims that their religions are substantially burdened.

The sincerity test is not new; before RFRA, it was often a subcomponent of the substantial burden test, and in some cases, was used in lieu of the substantial burden inquiry.<sup>220</sup> It requires that the balancing must be done with a conscientious effort to understand the perspective of the religious adherent.

---

219. See H.R. REP. NO. 103-88, at 2-5; S. REP. NO. 103-111, at 4-7, reprinted in 1993 U.S.C.C.A.N. 1892, 1893-97.

220. See *United States v. Ballard*, 322 U.S. 78, 86-88 (1944) (holding that juries may determine sincerity, not truthfulness, of religious beliefs).

Under this test, religious experience is valued in a way that better reflects its importance to the individuals involved.

*Jolly v. Coughlin*,<sup>221</sup> decided under RFRA, provides an example of the way courts might approach this inquiry. In *Jolly*, a Rastafarian prisoner refused to submit to a tuberculosis test due to his religion. As a result, the prison kept him confined in medical “keeplock” for over three years. The court looked to whether the prisoner was being sincere in his claim or was merely filing a frivolous lawsuit.<sup>222</sup> The court concluded that the prisoner’s “steadfast adherence” to what he interpreted as the tenets of his faith, as evidenced by his willingness to remain confined in medical “keeplock” for such a long period of time, confirmed the sincerity of his beliefs.<sup>223</sup>

The sincerity test focuses on the prisoner’s statements and testimony. Courts cannot rely merely on the testimony of prison chaplains. When the prisoner’s allegations are scant, courts should request more specific information from the prisoner. For example, in *Johnson v. Baker*,<sup>224</sup> the court should have attempted to learn about the differences between Islam and the Nation of Islam by requesting additional information from the prisoner, consulting texts about these religions,<sup>225</sup> or seeking advice from a nonpartisan Islamic leader. Of course, the court should not rely only on outside sources—for each person is entitled to exercise her faith in a manner that is unique and nontraditional. The central inquiry for the court should have been whether the prisoner was using religion as a ploy to dress up a frivolous lawsuit. Outside sources should be consulted if the court suspects that the prisoner is making up wild allegations.

Ultimately, the substantial burden test is not where the balancing should be done; most RFRA cases should be decided on the compelling state interest and least restrictive means tests. It is better for a prisoner to lose in this more direct balancing than to lose because a judge misunderstands and undervalues her religion. Not all claims will survive the sincerity test. In *Prins v. Coughlin*,<sup>226</sup> an inmate who was transferred to another prison claimed that the facility provided only cold kosher food whereas the kosher diet at the other prison contained hot food items. If, after an inquiry by the court, the prisoner could not show how the qualitative difference in the kosher diets affected the practice of his religion, this RFRA claim would fail the sincerity test.

---

221. 76 F.3d 468 (2d Cir. 1996).

222. *See id.* at 476.

223. *See id.* (quoting *Jolly v. Coughlin*, 894 F. Supp. 734, 743 (S.D.N.Y. 1995)).

224. No. 94-3828, 1995 WL 570913 (6th Cir. Sept. 27, 1995).

225. An examination of some of the literature about the Nation of Islam reveals that under its current leader, Louis Farrakhan, the Nation of Islam has distanced itself from the regular Islamic community. *See* Albert J. Raboteau, *Muslim Movements*, in 1 THE ENCYCLOPEDIA OF RELIGION 100, 102 (Mircea Eliade ed., 1987). For example, the Nation of Islam differs from other Muslim groups in its strong emphasis on African-American oppression. *See* Akbar Muhammad, *Muslims in the United States*, in THE ISLAMIC IMPACT 195, 210 (Yvonne Yazbeck Haddad et al. eds., 1984).

226. 94 Civ. 2053 (MBM), 1995 WL 378526 (S.D.N.Y. June 26, 1995).

Of course, courts can use sincerity as a proxy for injecting their own prejudices and ignorance into the balance. A sincerity test demands a judgment about the credibility and honesty of the prisoner, which can be influenced by the eccentricity or unpopularity of the beliefs. As Professor Barbara Flagg notes, “[a]t a minimum, some objective manifestation of subjective experience must be present for that experience to be cognizable by others.”<sup>227</sup> Any type of judgment is always subject to these limitations; while a sincerity approach is not perfect, it encourages courts to focus on the prisoner’s point of view rather than on a myopic and inaccurate conception of religion such as the central tenet test.

### B. *Probing the Facts*

Although Congress sent conflicting signals when it combined strict scrutiny with deference, Congress wanted prison regulations to be examined thoroughly and carefully. The Senate Report on RFRA provided that “[i]nadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act’s requirements.”<sup>228</sup> Likewise, the House Report emphasized that “[s]eemingly reasonable regulations based upon speculation, exaggerated fears of thoughtless policies cannot stand.”<sup>229</sup> In these reports, Congress instructed courts to be skeptical of the claims of prison officials. Moreover, the reports’ explicit critique of *O’Lone* and the Senate’s rejection of the Reid amendment indicate that Congress wanted the courts to abandon *O’Lone*’s low level of scrutiny. Unfortunately, many courts have continued to employ nonskeptical approaches that have reduced RFRA to the functional equivalent of minimal scrutiny.

The best way to remain faithful to the intent of Congress—and to resolve the conflicting instructions of deference and strict scrutiny—is for courts to adopt a skeptical approach. Informed balancing depends upon a diligent, fair, and neutral examination of the facts. Burdens on religions or penological interests cannot be balanced based on mere guesswork or reliance on partisan players in the dispute. In his dissent in *Giano v. Senkowski*,<sup>230</sup> Judge Guido Calabresi aptly declared: “Words are cheap and facts are often surprising and always essential. Whenever the validity of claims by those in authority is measured through surmise, prejudgment and intuition in summary settings rather than through data demonstrated at leisure, the constitutional freedoms

---

227. Barbara J. Flagg, *The Algebra of Pluralism: Subjective Experience as a Constitutional Variable*, 47 VAND. L. REV. 273, 318 (1994).

228. S. REP. NO. 103-111, at 10 (1993), reprinted in 1993 U.S.C.C.A.N. 1892, 1900.

229. H. REP. NO. 103-88, at 8 (1993).

230. 54 F.3d 1050 (2d Cir. 1995).

of us all are put in peril.”<sup>231</sup> Courts applying RFRA should demand more empirical and factual support from prisons. Strict scrutiny demands that the burden fall squarely on prison officials to produce this information—not on prisoners lacking sophisticated knowledge about how prisons can accomplish their goals.

For example, in *Lawson v. Singletary*,<sup>232</sup> the prison maintained a redaction policy towards religious literature containing racist language. The court properly concluded that since this policy only deleted specific portions and did not ban the publications entirely, it satisfied RFRA’s least restrictive means test.<sup>233</sup> Further, the court correctly remanded the case to the district court to determine whether specific redactions were valid under RFRA and the Constitution.<sup>234</sup> The court noted that the prison should not be “required to adduce specific evidence of a causal link between text that it wants to remove and actual incidents of violence.”<sup>235</sup> While the court’s statement should not be interpreted as permitting the prison to avoid supplying any support for its redactions, the prison should not have to produce evidence of an almost certain correlation between racist language and violence.

The purpose of the judiciary is to serve as an impartial arbiter. The fact that courts are not swept up in the day-to-day administration of prisons is thus a virtue, not a defect. Courts are insulated from the biases and habitual thinking that comes from working within prison administration. Outside of the fray, courts can infuse creativity into the process. Creative solutions do exist. In *Helbrans v. Coombe*,<sup>236</sup> an Orthodox Jewish prisoner who did not want to shave his head and beard had a computer-generated image without hair for the necessary identification photos.<sup>237</sup> And in a pre-RFRA case, the court ruled that a prisoner who was required to receive a haircut for initial identification photographs could have his hair pulled back rather than cut.<sup>238</sup>

Courts must go beyond merely focusing on particular prison regulations. Many prison regulations burdening religion are inconsistent with other policies. For example, the regulations designed to prevent contraband smuggling in *Young v. Lane*<sup>239</sup> and *Iron Eyes v. Henry*<sup>240</sup> prohibited yarmulkes and long hair, respectively, but did not bar other potential means to hide weapons.<sup>241</sup> Discrepancies in prison policies such as these should be grounds for substantial skepticism about the prison’s compelling interest. A prison regulation cannot

---

231. *Id.* at 1062 (Calabresi, J., dissenting).

232. 85 F.3d 502 (11th Cir. 1996).

233. *See id.* at 513.

234. *See id.*

235. *Id.* at 513 n.15.

236. 890 F. Supp. 227 (S.D.N.Y. 1995).

237. *See id.* at 230.

238. *See People v. Lewis*, 502 N.E.2d 988, 989 (N.Y. 1986).

239. 922 F.2d 370 (7th Cir. 1991).

240. 907 F.2d 810 (8th Cir. 1990).

241. *See supra* text accompanying notes 171–76 for a discussion of these cases.

be viewed in isolation, but only in conjunction with the overall structure of prison life.

Courts should also request that prisons do a more detailed analysis of various alternatives to their current policies. Perhaps the best empirical data about what practices can and cannot be accommodated without jeopardizing safety comes from examining what other prisons—in the United States and elsewhere—are actually doing. For example, in *Hamilton v. Schriro*<sup>242</sup> the court rejected a Native American inmate's request for a sweat lodge ceremony because of safety concerns even though several other prisons successfully operated sweat lodge facilities for their inmates.<sup>243</sup> The court should have investigated the cost and safety problems of providing sweat lodges at these prisons. In fact, a good way to learn about penology is to examine the effects of various penal practices across the country. In *Moskowitz v. Wilkinson*,<sup>244</sup> for instance, the court conducted a survey of state prison hair regulations,<sup>245</sup> in an effort to acquire an independent basis for its decision. Not only will such information prove useful for judges in rendering decisions, but it will force prisons to share knowledge about penal practices.

Another possible means for courts to analyze and study penological interests is to appoint a special master. The special master would spend time studying the prison and report back with various observations and suggestions. Rather than proceed with an adversarial proceeding, courts should request that prison officials draft creative solutions which could then be shared with other prisons.

#### IV. CONCLUSION

At its best, balancing is a detailed and open examination into the justification, scope, and efficiency of the regulation in question. Balancing is a way for courts to reconcile, in an honest and public way, the competing interests of the individual and the community. If balancing is to be done carefully and candidly, courts must assign values only after diligent study of both sides. In the words of Justice Benjamin N. Cardozo: "If you ask how [the judge] is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection . . . ."<sup>246</sup>

---

242. 74 F.3d 1545 (8th Cir. 1996).

243. *See id.* at 1555–56. The district court noted that "[m]aximum security correctional facilities in other states permit sweat lodge ceremonies and the growth of long hair." *Hamilton v. Schriro*, 863 F. Supp. 1019, 1023 (W.D. Mo. 1994). In addition, the plaintiff's religion was accommodated in the prison in the state of Washington before he was transferred to Missouri. *See id.* at 1022.

244. 432 F. Supp. 947 (D. Conn. 1977).

245. *See id.* at 950 n.8.

246. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 113 (1921).

Unfortunately, these ideals are not embodied by many courts when balancing religion in prisons. RFRA, with its strict scrutiny protection, seemed to be a ray of hope for prisoners, a powerful protection of religious free exercise, a commitment by our government to respect religious liberty everywhere, even in our prisons. RFRA's idealistic origins, its pluralistic aspirations, and its strict scrutiny protection cannot venture into the harsh universe of the prison without the aid of the courts. Until the courts properly balance religion and penological interests under RFRA, the only increased protection prisoners will have is our prayers.

