

HEAVEN HELP US: THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT’S PRISONERS PROVISIONS IN THE AFTERMATH OF THE SUPREME COURT’S DECISION IN *CUTTER V. WILKINSON*

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INTRODUCTION

"There is not a shadow of right in the general government to intermeddle with religion."—James Madison, *Journal Excerpt*, 1788.¹

When President Clinton signed the Religious Land Use and Institutionalized Persons Act (RLUIPA) into law on September 22, 2000, he gave religious prisoners a powerful tool for challenging prison regulations that burden their religious freedom.² In *Cutter v. Wilkinson*, the Supreme Court upheld the constitutionality of RLUIPA and consequently strengthened an already potent method for the religious prisoner to bring claims against prisons—one that is unavailable to non-religious inmates.³

To understand the potential effects of RLUIPA, imagine a prisoner in jail for murder, who announces to his guards that he cannot perform his work duties on Wednesdays because Wednesday is a holy day in his religion, a form of Satanism.⁴ Until this point, he has never mentioned or demonstrated that he follows any religion.⁵ This prisoner also tells the guards that, because of his beliefs, he will need martial arts classes and special food.⁶ If the prison officials deny his

1. AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, WHAT GOD HAS PUT ASUNDER: JAMES MADISON QUOTES ON CHURCH AND STATE, available at <http://www.au.org/site/DocServer/Madison.pdf?docID=141> (last visited July 26, 2006).

2. See Office of the Press Secretary, Statement by the President (Sept. 22, 2000), available at <http://remnant-online.com/ubb/Forum24/HTML/000085.html> (stating that President Clinton supported RLUIPA because it would provide protection for the religious rights of Americans).

3. See 125 S.Ct. 2113, 2121 (2005) (finding that RLUIPA is constitutional because it is a valid accommodation of religion).

4. Cf. Gregory S. Walston, *Federalism and Federal Spending: Why the Religious Land Use and Institutionalized Persons Act of 2000 is Unconstitutional*, 23 U. HAW. L. REV. 479, 480 (2001) (noting that in one claim that arose under RLUIPA a prisoner sought to avoid his Monday work duties by declaring a religion with a Monday Sabbath).

5. Cf. Kevin M. Powers, *The Sword and the Shield: RLUIPA and the New Battle Ground of Religious Freedom*, 22 BUFF. PUB. INT. L.J. 145, 163 (2004) (indicating that there is no requirement that a prisoner give authorities notice of his religion in order to obtain protection under the First Amendment).

6. Cf. *Madison v. Riter*, 355 F.3d 310, 313 (4th Cir. 2003) (upholding a RLUIPA challenge to prison officials' refusal to provide a plaintiff inmate with a special kosher

request, a court will most likely hear this prisoner's claim under RLUIPA, even though the same court would probably dismiss his claim if it was not religious in nature.⁷ Thus, with the passage of RLUIPA, Congress enacted a law that favors inmates with religious beliefs over those who are agnostic or atheist, thereby blurring the traditional lines dividing Church and State.⁸

This Comment argues that the Supreme Court's analysis of RLUIPA's constitutionality will result in excessive litigation and unacceptable threats to important penological interests.⁹ Further, it contends that there is room for the Court to reexamine its application of Establishment Clause principles to RLUIPA to avoid these negative implications.¹⁰ Part I provides an overview of Establishment Clause jurisprudence and discusses the current state of prisoners' constitutional rights.¹¹ Additionally, Part I evaluates RLUIPA's enactment, the *Cutter* decision, and its background.¹² Part II.A argues that in *Cutter* the Court articulated a new standard in local prisons for adjudicating RLUIPA claims, which will lead to confusion in the lower courts.¹³ Finally, Part II.C considers the Court's Establishment Clause analysis in *Cutter* and suggests alternate perspectives that the Court could have considered.¹⁴

diet).

7. See Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1 (2005) (explaining that RLUIPA applies to cases in which the government imposes a substantial burden on *religious* exercise in a program or activity that receives federal funding or is subject to the Commerce Clause of the Constitution).

8. See Ada-Marie Walsh, *Religious Land Use and Institutionalized Persons Act of 2000: Unconstitutional and Unnecessary*, 10 WM. & MARY BILL RTS. J. 189, 189 (2001) (noting that RLUIPA protects only those citizens who adhere to an organized religious creed).

9. See *infra* Part II.B (discussing the way in which RLUIPA curtails prison officials' ability to guard against security threats and escape risks).

10. See *infra* Part II.C (explaining that a future Court could reexamine the unconstitutional burden RLUIPA places on non-religious prisoners).

11. See *infra* Part I.B (discussing the rational basis standard courts apply to prisoners' religious rights and other fundamental rights).

12. See *infra* Part I.D (discussing the factual circumstances and procedural history behind *Cutter*).

13. See *infra* Part II.A (explaining that, in *Cutter*, the Court placed restraints on RLUIPA's strict scrutiny standard).

14. See *infra* Part II.C (explaining that the *Cutter* Court's analysis focused on the Establishment Clause's requirement that there be neutrality between particular religions, instead of between religion and irreligion).

I. BACKGROUND

A. *Establishment Clause Doctrine*

The Establishment Clause of the First Amendment states, "Congress shall make no law respecting an establishment of religion."¹⁵ The Supreme Court has declared that the purpose of the Establishment Clause is to separate the Church from the State.¹⁶ Thus, the Establishment Clause attempts to protect against the government expressing a preference between religions or privileging a religion over non-religion.¹⁷ Neutrality is the fundamental requirement of the Establishment Clause.¹⁸ However, in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, the Court stated that the government may accommodate religious practices without violating the Establishment Clause.¹⁹

B. *Prisoners' Rights*

Prisoners do not forfeit their constitutional protections upon incarceration; however, lawful imprisonment deprives citizens of many privileges and rights.²⁰ Therefore, when the Supreme Court crafted a test for reviewing prisoners' constitutional claims, its goal was to balance the need to protect prisoners' constitutional rights and the desire not to restrict prison administrators' ability to perform their

15. U.S. CONST. amend. I, cl. 1; see *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (explaining that the framers of the Constitution purposely worded the Establishment Clause to prohibit laws "respecting religion" so that, although a law might not establish a religion, it might be one "respecting" religion in the sense that it could lead to establishment and consequently violate the First Amendment).

16. See *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15-16 (1947) (relying on the words of founding father Thomas Jefferson, the Court stated that the purpose of the "clause against establishment of religion by law" was to "erect a wall of separation between church and state").

17. See *id.* (interpreting the Establishment Clause).

Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. *Id.*

18. See *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968) (emphasizing that a democratic government must be neutral in all religious matters).

19. See 483 U.S. 327, 334 (1987) (rejecting an Establishment Clause challenge to a statutory exemption for religious organizations from a Title VII prohibition on religious discrimination).

20. Compare *Turner v. Saflev*, 482 U.S. 78, 95-97 (1987) (noting that subject to some restrictions, prisoners retain the fundamental right to marry), and *Lee v. Washington*, 390 U.S. 333, 333-34 (1968) (explaining that prisoners retain their right to equal protection of laws), with *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987) (explaining that the requirements of the prison system justify the need for prison regulations that constrict prisoners' constitutional rights, such as the right to marry).

jobs effectively.²¹ The resulting test is a rational basis standard, which the Supreme Court applies in most cases regarding prison regulations that burden prisoners' constitutional rights.²² Under a rational basis standard, courts will uphold a law if it is rationally related to a legitimate government purpose.²³ The Court articulated the four-part test in *Turner v. Safley* for analyzing the reasonableness of regulations that burden prisoners' fundamental rights: (1) whether there is a "valid, rational connection" between a prison regulation and a legitimate government interest; (2) whether there are alternative means available to the prisoner to exercise that right; (3) the impact of accommodating the religious right on prison resources, guards and other inmates; and (4) whether there are alternatives to the regulation in question.²⁴ When applying this test, courts generally give significant deference to prison administrators and are unlikely to interfere with the internal administration of prisons because the judiciary does not want to interfere with important penological objectives.²⁵ Further, courts do not want judicial interference to undermine prison security or endanger prison officials.²⁶ Courts accept that prison administrators are experts in their field and tend to know more about the supervision of their institutions than judicial officers.²⁷

21. See *Safley*, 482 U.S. at 85 (noting that when the Court developed a test for adjudicating prisoners' constitutional claims, it considered the difficulties of prison administration, as well as the importance of individual freedom).

22. See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 646 (2d ed., Aspen Publishers 2002) (1980) (explaining that the challenger bears the burden of proof under rational basis review).

23. See *Guerra v. Scruggs*, 942 F.2d 270, 279 (4th Cir. 1991) (noting that the rational basis test is deferential to the government).

24. See 482 U.S. at 89-90 (noting that the Court chose to apply a rational basis analysis instead of a strict scrutiny, which would hinder the ability of prison officials to run prisons).

25. See *Sandin v. Conner*, 515 U.S. 472, 482 (1995) (holding that courts should defer to prison and state officials who must cope with the explosive environment of penal institutions); *Pell v. Procunier*, 417 U.S. 817, 822-23 (1974) (listing as valid penal objectives the deterrence of crime, rehabilitation, and security).

26. See *Sheley v. Dugger*, 824 F.2d 1551, 1559 (11th Cir. 1987) (Edmonson, J., dissenting) (remarking that courts should increase deference to prison administrators in issues concerning prison security, even if a prison restriction interferes with prisoners rights).

27. See *Kendrick v. Bland*, 659 F. Supp. 1188, 1195-96 (W.D. Ky. 1987) (determining that trained prison administrators can resolve problems more effectively than judges).

C. Background of RLUIPA

1. The Religious Freedom and Restoration Act

A complete understanding of RLUIPA necessitates a discussion of RLUIPA's predecessor, The Religious Freedom and Restoration Act ("RFRA"), as RLUIPA re-enacts the same substantive constitutional standard of RFRA.²⁸ Both RFRA and RLUIPA apply a strict scrutiny standard of review to claims regarding religious rights, which is a higher standard than rational basis review.²⁹ Under strict scrutiny, courts only uphold a law that burdens religious rights if the government can prove that the law is necessary to achieve a compelling government interest.³⁰

Congress enacted RFRA in response to the Supreme Court's 1990 decision in *Employment Division, Department of Human Resources v. Smith*, in which the Court held that the Constitution does not require the application of a strict scrutiny standard to laws of general applicability that burden the free exercise of religion.³¹ RFRA prohibited federal and state governments from substantially burdening the free exercise of religion unless the government could show that the burden furthered a compelling government interest and was the least restrictive means of doing so.³²

Congress enacted RFRA in 1993 pursuant to its enforcement powers under the Fourteenth Amendment.³³ During the five years of RFRA's enactment, the Court frequently heard cases regarding prison regulations.³⁴ To invoke RFRA, a plaintiff had to show that a

28. See *Murphy v. Mo. Dep't of Corr.*, 372 F.3d 979, 987 (8th Cir. 2004) (explaining that Congress used the same strict scrutiny language from RFRA in the RLUIPA section that applies to prisoners).

29. See 146 CONG. REC. S7774-01 (joint statement of Sens. Hatch and Kennedy) (2000) (stating that the purpose of RLUIPA was to re-enact the strict scrutiny standard of RFRA and specifically apply it to institutionalized persons and land use provisions).

30. See 16A AM. JUR. 2D *Constitutional Law* § 387 (2004) (noting that in strict scrutiny review, the State generally has the burden of proving that a regulation that affects a fundamental right is necessarily related to a compelling interest).

31. See 494 U.S. 872, 890 (1990) (upholding a state law of general applicability criminalizing peyote use, which led to the denial of unemployment benefits to Native Americans, who lost their jobs because of their peyote use).

32. See 42 U.S.C. § 2000bb (2005) (opining that the compelling interest test is an appropriate test for striking a balance between religious liberty and competing government interests).

33. See U.S. CONST. amend. XIV, § 5 (empowering Congress to "enforce" the Fourteenth Amendment's guarantees of life, liberty, and property through "appropriate legislation").

34. See, e.g., *Hicks v. Garner*, 69 F.3d 22, 24 (5th Cir. 1995) (hearing a Rastafari inmate's challenge to prison grooming regulations under RFRA); *Show v. Patterson*, 955 F. Supp. 182, 190 (S.D.N.Y. 1997) (denying defendant's motion for summary

government action placed a substantial burden on the plaintiff's sincere religious belief.³⁵ If the plaintiff could show a substantial burden, the government had to prove it had a compelling interest in burdening the plaintiff's exercise of religion.³⁶

The Supreme Court declared RFRA unconstitutional in *City of Boerne v. Flores* on the grounds that Congress exceeded its enforcement powers under the Fourteenth Amendment.³⁷ The Supreme Court adopted the traditional interpretation of the Enforcement Clause of the Fourteenth Amendment and determined that Congress's power to enforce is solely "preventative" or "remedial."³⁸ The Court concluded that RFRA not only remedied constitutional violations, but also created constitutional rights in violation of the separation of powers doctrine.³⁹

2. Enactment of RLUIPA

Congress's response to *City of Boerne* was to enact RLUIPA, which narrowed RFRA's strict scrutiny standard to apply only to two areas: land use regulation and persons in institutions, including prisons, mental hospitals, and nursing homes.⁴⁰ Congress based the need for RLUIPA on three years of hearings, which concluded that inmates were at the mercy of prison officials, who often imposed arbitrary

judgment because prison officials may have violated the First Amendment religious rights of Muslim prison inmates by strip searching the prisoners); *cf.* *Storm v. Town of Woodstock*, 944 F. Supp. 139, 146 (N.D.N.Y. 1996) (finding that the local parking laws did not substantially burden the plaintiffs' free exercise of religion under RFRA); *Goehring v. Brophy*, 94 F.3d. 1294, 1303 (1996) (rejecting the plaintiff's claim that the University subsidized insurance program that covered abortions violated the free exercise of religion of students because the plan did not substantially burden their religious practice, and it satisfies strict scrutiny).

35. See *Sherbert v. Verner*, 374 U.S. 398, 403-04 (1963) (explaining that a substantial burden occurs when the government forces a person to choose between following his religion and giving up benefits or abandoning his religion).

36. See James A. Hanson, *Missouri's Religious Freedom Restoration Act: A New Approach to the Cause of Conscience*, 69 MO. L. REV. 853, 856 n.19 (2004) (noting that the strict scrutiny test applied to the government under RFRA and RLUIPA is the "strictest standard available at law").

37. See 521 U.S. 507, 524, 536 (1997) (finding RFRA unconstitutional pursuant to the Fourteenth Amendment in a case involving the Catholic Archbishop of San Antonio's challenge, under RFRA, to the local zoning authority's denial of a building permit to enlarge a church).

38. See *id.* at 529 (noting that the majority did not reach the issue of whether RFRA violated the Establishment Clause because the Court declared RFRA unconstitutional regarding the Enforcement Clause).

39. See *id.* at 532, 536 (explaining that RFRA's great flaw was that it attempted to change constitutional protections substantially by prohibiting state conduct that the Fourteenth Amendment does not prohibit).

40. See RLUIPA, 42 U.S.C. § 2000cc-1(a) (2005) (noting that RLUIPA's substantive language, which is identical to RFRA's, prohibits the government from placing a burden on religious exercise unless that burden furthers a "compelling" government interest and is the "least restrictive" means of doing so).

rules regarding the right to practice religion.⁴¹ Congress relied on the Judiciary Committee reports on RFRA, which concluded that RFRA did not unreasonably burden the federal prison system.⁴² Furthermore, RLUIPA creates a private right of action for people who believe the government has burdened their free exercise of religion.⁴³

D. *Cutter v. Wilkinson*

In *Cutter v. Wilkinson*, a practicing witch, a white supremacist minister, and followers of Asatru, a polytheistic Viking religion, all filed suit pursuant to RLUIPA.⁴⁴ The plaintiffs claimed that the Ohio Department of Corrections (“ODOC”) denied them their access to religious literature, denied them their freedom to conform their appearance to the requirements of their religions, and denied them a prison chaplain trained in their religions.⁴⁵

The ODOC admitted that it refused to grant some of the plaintiffs’ religious requests, yet argued that these denials were necessary because the plaintiffs’ religious practices threatened prison security.⁴⁶ The plaintiffs contended that their religious practices were in no way violent and posed no threat to prison security.⁴⁷

On November 7, 2003, a Sixth Circuit panel held that RLUIPA violated the Establishment Clause because the Act favors religious rights over other fundamental rights and that the statute’s primary

41. See 146 CONG. REC. S7774-01, S7775 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy) (noting that Congress held three hearings before the Senate Judiciary Committee and six before the House Subcommittee on the Constitution on the need for this legislation and noting that prisoners are often exposed to religious discrimination).

42. See *id.* (explaining that prisoners are in an extremely vulnerable position because their religious rights are in the hands of a few officials).

43. See 42 U.S.C. § 2000cc-2(a) (2005) (stating that any person may assert a violation of RLUIPA in a judicial proceeding and obtain appropriate relief against the government).

44. See 349 F.3d 257, 260 (6th Cir. 2003), *rev’d*, 125 S.Ct. 2113 (2005) (noting that the Sixth Circuit consolidated three cases in *Cutter* for the purpose of deciding the Ohio Department of Correction’s facial challenge to RLUIPA: *Gerhardt v. Lazaroff*, Case No. C2-95-517; *Hampton v. Wilkinson*, Case No. C2-98-275; and *Miller v. Wilkinson*, Case No. C2-97-382).

45. See *Gerhardt v. Lazaroff*, 221 F. Supp. 2d 827, 832-33 (S.D. Ohio 2002) (explaining that the plaintiffs originally brought their claims under the rational basis standard of *Turner v. Safley*, *rev’d sub nom.*, *Cutter v. Wilkinson*, 125 S.Ct. 2113 (2005). However, after the enactment of RLUIPA, the plaintiffs amended their complaints to contend that the more restrictive standards in RLUIPA applied to ODOC’s actions. *Id.*

46. See *id.* (noting that the defendants claimed, for example, that investigators linked the practice of Asatru to a 1993 riot at the Southern Ohio Correctional Facility, as well as murders and escapes at other Ohio prisons).

47. See *Cutter v. Wilkinson*, 125 S.Ct. 2113, 2117 (2005) (identifying that for the purposes of the case, the defendants conceded that these are bona fide religions and the plaintiffs do hold the beliefs of their respective religions).

purpose was not to accommodate religion, but to advance religion.⁴⁸ The Sixth Circuit was the only circuit to hold that RLUIPA violates the Establishment Clause.⁴⁹ As the Sixth Circuit noted, the “juggernaut” of circuit court opinions has come to the opposite conclusion regarding RLUIPA’s constitutionality.⁵⁰ The Fourth, Seventh, and Ninth Circuits rejected Establishment Clause challenges to RLUIPA, concluding that RLUIPA has a legitimate and secular legislative purpose and that the statute does not create more rights for religious inmates.⁵¹ As a result of this circuit split, the Supreme Court granted certiorari.⁵²

On May 31, 2005, Justice Ginsberg issued a unanimous opinion for the Supreme Court, reversing the judgment of the Sixth Circuit and upholding the constitutionality of RLUIPA.⁵³ The Court held that RLUIPA’s institutionalized persons provision does not violate the Establishment Clause because it merely alleviates “government-created” burdens on prisoners’ religious practice and, therefore, is a lawful accommodation of religion.⁵⁴ Further, the Court emphasized

48. See *Cutter*, 349 F.3d at 265, 2268-69, *rev’d*, 125 S.Ct. 2113 (2005) (explaining that the Sixth Circuit based its decision that RLUIPA violates the Establishment Clause on the Supreme Court’s test for adjudicating Establishment Clause challenges, articulated in *Lemon v. Kurtzman*); see also *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (creating a three-prong test, which remains the prevailing method to determine whether a statute complies with the Establishment Clause). Under the *Lemon* test, a statute is permissible if (1) it has a secular legislative purpose, (2) its primary effect neither advances nor inhibits religion, and (3) it does not create excessive entanglement between government and religion. *Id.*

49. See *Cutter*, 349 F.3d at 264, *rev’d*, 125 S.Ct. 2113 (2005) (holding that RLUIPA advances religion in violation of the Establishment Clause); see also Anne Y. Chiu, Comment, *When Prisoners’ Souls Are Weary and Their Religious Exercise Burdened, RLUIPA Provides Some Rest for Their Souls*, 79 WASH. L. REV. 999, 1017 (2004) (noting that the Sixth Circuit departed from the other circuits in holding that RLUIPA favors religious rights over non-religious rights).

50. See *Cutter*, 349 F.3d at 262, *rev’d*, 125 S.Ct. 2113 (2005) (noting that two district court opinions stood against the rest of the circuit courts, and these are the opinions on which the *Cutter* Court relied).

51. See *Madison v. Riter*, 355 F.3d 310, 317-19 (4th Cir. 2003) (concluding that prison officials violated RLUIPA when they denied a Jewish prisoner kosher meals); *Charles v. Verhagen*, 348 F.3d 601, 611 (7th Cir. 2003) (affirming a Muslim inmate’s right to access prayer oil in prison); *Mayweathers v. Newland*, 314 F.3d 1062, 1069 (9th Cir. 2002) (holding that, under RLUIPA, prison officials could not bar Muslim inmates from attending Friday prayer sessions).

52. See Respondents’ Brief in Response to Petition for Writ of Certiorari at 2, *Cutter*, 125 S.Ct. 308 (2004) (No. 03-9877) (noting that the parties to *Cutter* agreed that the question of RLUIPA’s alleged violation of the Establishment Clause was ripe for review).

53. See *Cutter*, 125 S.Ct. at 2116 (noting that Justice Thomas filed a concurring opinion in order to discuss how the issue of federalism applies to RLUIPA).

54. See *id.* (remarking that an act which removes government burdens is more likely to be an accommodation of religion than an endorsement of religion). The Court chose not to decide *Cutter* pursuant to the *Lemon v. Kurtzman* analysis, on which the Sixth Circuit relied for its decision. *Id.* at 2120.

that RLUIPA is consistent with the Establishment Clause because it does not differentiate between particular religions.⁵⁵ Additionally, the Court rejected the Sixth Circuit's argument that RLUIPA impermissibly advances religion by affording religion greater protection than other constitutionally protected rights.⁵⁶ Although the Sixth Circuit argued that, under RLUIPA, religious claims receive more protection than other constitutional claims because they receive strict scrutiny review, the Court emphasized that the Constitution does not require that all constitutional rights receive legislative protections at the same time or in the same manner.⁵⁷ Further, benefits to religious exercise need not be paired with benefits to non-religious constitutional rights.⁵⁸ According to the Court, if this were the case, "all manner of religious accommodations" would fail because each act of Congress, which provided for religious accommodation, would have to provide for a corresponding secular right.⁵⁹

Justice Ginsberg also emphasized that RLUIPA does not place the need to accommodate prisoners' religious activities above the need to maintain prison order and security.⁶⁰ The Court determined that prison security is a compelling state interest, and thus prison officials deserve deference in maintaining penal safety.⁶¹ The Court based this decision, in part, on precedent demonstrating that religious accommodation must be balanced to ensure it does not trump other significant interests.⁶² Further, the Court examined the legislative

55. See *id.* at 2123 (noting the Supreme Court had previously invalidated a statute that created a separate school district solely for a particular sect of Jews).

56. See *id.* at 2123-24 (reaffirming the Court's decision in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, where it held that a statute exempting religious organizations from Title VII's prohibition against discrimination was not unconstitutional, even though it singled out religious groups for a benefit).

57. See *id.* at 2124 (citing *Madison v. Riter*, 355 F.3d 310, 318 (4th Cir. 2003)) (noting that there is no legal requirement that legislative protections for constitutional rights "march in lockstep").

58. See *id.* (emphasizing that providing prisoners with a chaplain does not also require providing a political consultant or a publicist).

59. See *id.* (arguing that if the Court held RLUIPA unconstitutional, it could no longer grant military personnel permission to wear religious attire while in uniform); see also David L. Hudson Jr., *A Lower Bar to Religion Behind Bars*, A.B.A. J. E-REPORT 22 (2005) (quoting Anthony Picarello, President of the Becket Fund for Religious Liberty) ("If [the *Cutter* decision] had gone the other way, religion-only based accommodations which exist nationwide and at every level of government: federal, state and local would have been struck down wholesale").

60. See *Cutter*, 125 S.Ct. at 2122 (explaining that accommodation must be balanced so that it does not thwart other important interests).

61. See *id.* at 2122-24 n.13 (noting that when determining a compelling governmental interest "context matters").

62. See *Estate of Thornton v. Caldor*, 472 U.S. 703, 709-11 (1985) (striking down a law that weighed the religious interests of Sabbatarians over all other interests).

history behind RLUIPA and found that Congress enacted RLUIPA with the need to maintain penal order and security in mind.⁶³ Thus, the Court determined that if inmate requests for accommodations become excessive or imposed too many burdens on prison officials, then as-applied challenges would be appropriate.⁶⁴ The Court's unanimous decision both reaffirmed the principle that legislative accommodations of religion do not violate the Establishment Clause and stressed the importance of prison security and safety.⁶⁵

II. ANALYSIS

A. In the Aftermath of the Cutter Decision a New Standard of Review Emerges for Adjudicating RLUIPA Claims: Deferential Strict Scrutiny

Although the Supreme Court upheld RLUIPA's institutionalized persons' provision and its strict scrutiny standard of review, it did so with the caveat that RLUIPA requires significant deference to the judgment of prison officials.⁶⁶ Justice Ginsberg repeatedly emphasized that courts should interpret RLUIPA's elevated standard to incorporate deference to the prison system's interest in maintaining safety and order, often referring to RLUIPA's legislative history.⁶⁷ As a result, Justice Ginsberg called for a standard of review that is strict, yet deferential.⁶⁸

This decision could be interpreted to mean that the Court is calling for a new standard of review: one that falls somewhere between the rational basis approach urged by the Sixth Circuit and the absolute strict scrutiny that appears on the face of the statute.⁶⁹ If this is the

63. See 139 CONG. REC. 26190, S14350, S14364 (daily ed. Oct. 26, 1993) (remarks of Sen. Hatch) (predicting that courts would apply RLUIPA with due deference to the expertise of prison officials to maintain good order and discipline).

64. *But see Cutter*, 125 S.Ct. at 2124-25 (noting that the Court did not anticipate abusive prisoner litigation or excessive burdens on prison officials).

65. See *id.* at 2121 (noting that the government need not ignore compelling impositions state actions placed on religion).

66. See *id.* at 2124 n.13 ("It bears repetition . . . that prison security is a compelling state interest, and that deference is due to institutional officials' expertise in this area.").

67. See *id.* at 2122 (explaining that the Court does not interpret RLUIPA to elevate accommodation of religion over prisons' interest in security). The legislative history anticipated that RLUIPA be applied with deference to prison administrators. *Id.* at 2123 (citing 146 CONG. REC. S7774, S7775 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy)); 139 CONG. REC. 26190 (1993) (remarks of Senator Hatch).

68. See *Cutter*, 125 S.Ct. at 2123 (instructing that RLUIPA should be applied in a balanced way with "particular sensitivity to security concerns") (emphasis added).

69. See Marci Hamilton, *The Supreme Court's New Ruling on the Religious Land and Institutionalized Persons Act's Prison Provisions: Deferring Key Constitutional Questions*, June 2, 2005, <http://writ.news.findlaw.com/hamilton/20050602.html>

case, the *Cutter* decision was not a complete defeat for opponents of RLUIPA.⁷⁰ Under strict scrutiny, courts rarely, if ever, uphold regulations imposed by prison officials on inmates' religious freedoms.⁷¹ Indeed, strict scrutiny has been described by the Court as "strict in theory, fatal in fact."⁷² Therefore, by requiring lower courts to "appropriately" balance inmates' religious freedoms with deference to prisons' security interests, the Court places a significant limitation on RLUIPA's substantive standard.⁷³ However, by placing this constraint on RLUIPA's strict scrutiny standard, and thus creating a new standard of review, the *Cutter* decision will ultimately lead to indecision in the lower courts concerning the application of RLUIPA. Consequently, both the penal and court systems will struggle with the burden of an uncertain RLUIPA standard.

The seemingly contradictory standard announced in *Cutter* follows earlier Supreme Court decisions that required deference to administrators in the face of prisoners' constitutional rights claims.⁷⁴ Thus, one possible explanation for the Court's decision to articulate this confusing and diluted standard is to adhere, at least partially, to the rationale of its earlier prisoners' rights decisions.⁷⁵ RLUIPA's

(remarking that the standard of review expressed in *Cutter* resembles intermediate scrutiny review).

70. See THE PEW FORUM ON RELIGIOUS AND PUB. LIFE, THE PEW RESEARCH CTR., THE SUPREME COURT'S DECISION IN *CUTTER V. WILKINSON*: THE CONSTITUTIONAL STATUS OF THE LAND USE AND INSTITUTIONALIZED PERSONS ACT, 3 (June 2005) [hereinafter PEW FORUM, THE SUPREME COURT] (noting that Justice Ginsberg's "interpretive gloss on RLUIPA" may make it harder for prisoners to assert some RLUIPA claims in the future).

71. See generally Libby Huskey, *Constitutional Law—Affirmative Action in Higher Education—Strict in Theory, Intermediate in Fact?* *Grutter v. Bollinger*, 4 WYO. L. REV. 439, 454 (2004) (explaining that Supreme Court Justices in affirmative action cases referred to strict scrutiny as a very harsh test).

72. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 552 (1989) (Marshall, J., dissenting) (noting that the strict standard is appropriate for brutal and repugnant types of racism).

73. See PEW FORUM, THE SUPREME COURT, *supra* note 71, at 3 (noting that although the Court unanimously upheld RLUIPA, it placed important qualifications on the future application of the statute and that Justice Ginsberg "laconically dismissed" the idea that RLUIPA would impose a burden on prison officials).

74. See *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349-51 (1987) (recognizing the need to defer to the experience of prison officials and articulating a rational basis standard for prisoners' free exercise claims); see also *Turner v. Safley*, 482 U.S. 78, 85 (1987) (noting that in developing a test for inmates' constitutional rights, the Court must defer to the expertise of prison administrators).

75. See *Safley*, 482 U.S. at 85 (noting that only prison administrators have the expertise to deal with the specialized and difficult problems that arise in prisons); *Jones v. N.C. Prisoners' Labor Union Inc.*, 433 U.S. 119, 126 (1977) (arguing that the courts should give broad deference to prison officials because of the complicated nature of prison administration); *Pell v. Procunier*, 417 U.S. 817, 827 (1974) (explaining that considerations of prison security are "peculiarly within the province" of prison officials).

strict scrutiny standard ignores the important penological interests that were behind the Court's development of the *Turner* rational basis test and, therefore, places accommodation over the compelling interests of security and discipline.⁷⁶ Although RLUIPA's supporters contend that strict scrutiny is absolutely necessary to protect prisoners' religious rights, the *Turner* Court specifically rejected a strict scrutiny approach to inmates' fundamental rights because it would subject the day-to-day decisions of prison officials to an inflexible standard, placing a straightjacket on their ability to solve security problems.⁷⁷ The *Turner* Court believed that a strict scrutiny standard for prisoners' rights would "distort" the decision-making process because courts, which are ill-equipped to deal with prison security issues, would constantly second-guess prison administrators.⁷⁸ This rationale seemingly justifies the *Cutter* Court's new "strict but deferential" standard for RLUIPA.

Justice Ginsberg repeatedly referred to the legislative history behind RLUIPA and stressed that RLUIPA's proponents recognized the necessity of prison safety and discipline.⁷⁹ According to the Court, lawmakers supporting RLUIPA anticipated that courts would interpret RLUIPA with due deference to prison officials' expertise.⁸⁰ However, the legislative record behind the enactment of RLUIPA is troublesome.⁸¹ Both houses of Congress suspended the rules and no public hearings occurred before RLUIPA's extremely fast passage.⁸² Therefore, there was little debate about RLUIPA's constitutionality and no examination of the burdens it would place on prison officials.⁸³

76. See *Safley*, 482 U.S. at 84-85 (emphasizing the need for a standard that balanced the need to protect prisoners' rights and judicial restraint regarding inmate claims). Further, the Court recognized that the problems in prisons are complex, they require expertise, detailed planning, and are not easily remedied by judicial interference. *Id.*

77. See *id.* at 89 (deciding that prison officials, rather than the courts, are to make the difficult decisions regarding the operations of prisons).

78. See *id.* (noting that, under a strict scrutiny test, there is a possibility that a court could reverse every administrative judgment).

79. See *Cutter v. Wilkinson*, 125 S.Ct. 2113, 2123 (2005) (noting that the lawmakers who enacted RLUIPA meant for prison administrators to establish the regulations and procedures necessary to maintain order and security in prisons).

80. See *id.* (noting that the lawmakers who supported RLUIPA realized the necessity for maintaining safety and discipline in prisons).

81. See American Atheists, *Scaled-Down Religious Act is Done Deal-For Now*, Aug. 18, 2000, <http://www.atheists.org/flash.line.rlpa38.html> (commenting on the "Machiavellian" way in which Congress re-enacted the RFRA's strict scrutiny standard in RLUIPA, after the Court deemed RFRA unconstitutional).

82. See *id.* (noting that the passage of RLUIPA stunned professional lobbying groups who opposed RLUIPA's enactment).

83. See Marci A. Hamilton, *The Elusive Safeguards of Federalism*, 574 ANNALS

This whirlwind passage of RLUIPA was most likely a result of pressure from the myriad of powerful religious groups backing RLUIPA.⁸⁴ Congress did not discuss either the traditional deference given to prison officials or the reasons the Court gave rational basis review under *Turner* to prisoners' rights during the enactment of RLUIPA.⁸⁵ Further, Congress was aware that prisoners already had a remedy for infringement on religious rights: the *Turner* rational relation test that the Supreme Court has deemed acceptable for other fundamental rights.⁸⁶ RLUIPA's Congressional sponsors' statement that they expected federal courts to defer to the decisions of prison officials regarding which restrictions on the exercise of religion are necessary in the prison context seems insincere considering that the enactment of RLUIPA replaced *Turner* in the arena of religious challenges, which provided for deference to prison officials.⁸⁷ This inconsistency is another possible explanation for the Court's decision to modify RLUIPA's strict scrutiny standard.

Justice Ginsberg's analysis of RLUIPA and the Court's "strict but deferential" standard will likely lead to confusion in the lower courts regarding how to apply the statute.⁸⁸ On the one hand, the Court's decision to uphold RLUIPA offers support to the statute and strengthens its provisions.⁸⁹ On the other, Justice Ginsberg's

AM. ACAD. POL. & SOC. SCI. 93, 100 (2001) [*hereinafter* Hamilton, *Federalism*] (noting that both the House and the Senate passed RLUIPA within a half an hour of each other).

84. See *Beyond the Pledge of Allegiance: Hostility to Religious Expression in the Public Square: Hearing on S. H.R.G. 108-707 Before Subcomm. On the Constitution, Civil Rights and Property Rights of the Comm. On the Judiciary United States Senate*, 108th Cong. 143-161 (June 8, 2004) (statement of Melissa Rodgers, Professor, Wake Forest Divinity School) (explaining that a vast coalition urged the passage of RLUIPA, which included Muslims, Mormons, Methodists, and the National Association of Evangelicals).

85. See Hamilton, *Federalism supra* note 84, at 341 (noting that when accommodation of a right will have a "ripple effect" on fellow inmates, courts should be particularly deferential to prison officials).

86. See *Turner v. Safley*, 482 U.S. 78, 85 (1987) (noting the need for judicial restraint regarding the protection of prisoners' free exercise claims).

87. See 146 CONG. REC. S7774-01, S7774 (joint statements of Sens. Hatch and Kennedy) (noting that Congress should defer to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security, and discipline); cf. Lynn S. Branham, *Go and Sin no More: The Constitutionality of Governmentally Funded Faith-Based Prison Units*, 37 U. MICH. J.L. REFORM 291, 297 (2004) (arguing that the Supreme Court crafted the *Turner* test to make it difficult for prisoners' constitutional rights claims to be successful).

88. See PEW FORUM, THE SUPREME COURT, *supra* note 71, at 3 (commenting that Justice Ginsberg did not explain or even mention RLUIPA's "least restrictive means" requirement and that Justice Ginsberg maintained that courts must consider the context of cases when deciding "compelling interests").

89. See The Becket Fund for Religious Liberty, *RLUIPA Upheld Unanimously in Cutter v. Wilkinson*, May 31, 2005, <http://www.rluipa.com/index.php/article/395>.

repeated call for deference may lead lower courts to question the decision and consequently will foster more RLUIPA litigation.⁹⁰ This uncertainty could ultimately burden both the court and prison systems, which will be forced to contend with the increase in RLUIPA claims.⁹¹

B. The Implementation of RLUIPA Results in Excessive Requests for Accommodation and Unacceptable Burdens on Important Penological Interests

The Supreme Court's decision in *Cutter* will most likely result in an increase in litigation and thereby burden penological interests. Litigation will most likely increase whether the legal system is clogged by RLUIPA claims or whether prisoners interpret *Cutter* to strengthen RLUIPA. Increased RLUIPA claims will burden prison officials who must concern themselves with potential litigation, rather than conducting the ordinary business of running their prisons.⁹² In determining RLUIPA's constitutionality, the *Cutter* Court scrutinized the statute generally and failed to address specific applications of the statute.⁹³ This section examines the potential impact of RLUIPA, the Court's decision in specific cases, and the affect RLUIPA has already had on individual prison officials, local governments, and state departments of corrections.

In *Cutter*, Justice Ginsberg presumed that RLUIPA will not undermine the state's interest in security and implied that prisoners' claims under RLUIPA will not be overwhelmingly successful.⁹⁴ However, an examination of RLUIPA suggests that the opposite is true. First, the statute's language allows for frivolous claims, which

html (proclaiming that *Cutter* is a "thumping victory" for religious exercise).

90. See Charles C. Haynes, *Inside the First Amendment: With Little Fanfare, Religion Wins Big at the Supreme Court*, June 12, 2005, available at <http://www.nna.org/GR/FirstAmendEd06-12-05.htm> (noting that the Court's decision in *Cutter* will not end the debate regarding RLUIPA's constitutionality).

91. See Ruth Burdick, Note, *The Casey Undue Burden Standard: Problems Predicted and Encountered, and the Split over the Salerno Test*, 23 HASTINGS CONST. L.Q. 825, 826 (1996) (discussing the increase in litigation that a lack of guidance and method for using a new standard causes).

92. See Marci Hamilton, *Two Important Establishment Clause Issues the Supreme Court Will Decide This Term* (Oct. 21, 2004), <http://writ.news.findlaw.com/hamilton/20041021.html> [hereinafter Hamilton, *Important Issues*] (stating that under RLUIPA, every prison regulation is presumptively unconstitutional, resulting in difficulty in maintaining order).

93. See *Cutter v. Wilkinson*, 125 S.Ct. 2113, 2124 (2005) (emphasizing that the Court is responding to a facial challenge to RLUIPA and therefore the Court did not examine the constitutionality of the results of RLUIPA's application in specific circumstances).

94. See *id.* at 2123 (opining that the Court has no reason to believe that courts will not apply RLUIPA appropriately and with special attention to security needs).

place unreasonable strains on the prison and court system.⁹⁵ Second, an assessment of actual RLUIPA actions reveals that the majority of prisoners' claims are successful, even when important penological interests are at stake.⁹⁶

1. RLUIPA's "Religious Exercise" Requirement Allows for Excessive Litigation, Which Burdens Both the Prisons and Courts

Congress drafted RLUIPA in a way that allows for an excessive number of prisoners' claims.⁹⁷ In order to invoke RLUIPA, the first threshold a prisoner must reach is to show that a government action "substantially" burdens his "religious exercise."⁹⁸ However, under RLUIPA this is an extremely low bar.⁹⁹ The requirements of religious exercise are minimal and Congress designed them to allow for as many claimants as possible.¹⁰⁰ RLUIPA defines "religious exercise" to include "any exercise of religion, whether or not compelled by or central to a system of religious belief."¹⁰¹ This broad standard does not limit the types of religious activities that qualify as "exercise" under RLUIPA; thus, any spiritual act is eligible for protection.¹⁰²

95. See Stephen A. Haller, *On Sacred Ground: Exploring Congress's Attempts to Rein in Discriminatory State Zoning Practices*, 33 SW. U.L. REV. 285, 304-05 (2004) (noting that in the case of RLUIPA's land use provision, RLUIPA's broad definition of religious exercise could be used by a religious group to erect a health club or a drive-in restaurant).

96. See Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501, 515 (2005) (noting that only seven of the forty-six prisoner RLUIPA claims from 2000 to 2004 were dismissed for failing to demonstrate a substantial burden).

97. See Caroline Adams, *The Constitutional Validity of the Religious Land and Institutionalized Persons Act of 2000: Will RLUIPA's Strict Scrutiny Survive the Supreme Court's Strict Scrutiny?*, 70 FORDHAM L. REV. 2361, 2402 (2002) (contending that RLUIPA defines religious exercise more broadly than even the Supreme Court's interpretation allows).

98. See *Adkins v. Kaspar*, 393 F.3d 559, 567 (5th Cir. 2004) (noting that the plaintiff first must prove that the burdened exercise is religious and then that the burden is substantial); see also Gaubatz, *supra* note 97, at 515 (explaining that the Supreme Court defines substantial burden as a situation in which a government restriction placed on a privilege tends to inhibit religious exercise). An example of a substantial burden is when a person must choose between following his religion and forfeiting benefits, on one hand, and abandoning his religion on the other hand. *Id.*

99. See Powers, *supra* note 5, at 143 (noting that beliefs need not be coherent or systemic for the First Amendment to protect them).

100. See Hamilton, *Important Issues*, *supra* note 93, at 1 (stating that under RLUIPA, every prison regulation is presumptively unconstitutional, resulting in difficulty in maintaining order).

101. See 42 U.S.C. § 2000cc-5(7)(A); see also *United States v. Seeger*, 380 U.S. 163, 185 (1965) (articulating that the truth of a belief is not questionable).

102. See, e.g., *Pounders v. Kempker*, 79 F. App'x 941, 943 (8th Cir. 2003) (holding that prison's failure to provide a sweat lodge to Native American prisoners stated a claim under RLUIPA); *Goodman v. Snyder*, No. 00-C-0948, 2003 WL 715650, at *5 (N.D. Ill. Feb. 27, 2003) (determining that the use of tarot cards constituted a protected spiritual act under RLUIPA).

Further, the Supreme Court defines religious belief to include all beliefs that are sincere and “within the claimants own scheme of things, religious.”¹⁰³

In addition to its broad definition of religious exercise, RLUIPA precludes inquiry into whether a specific belief or practice is “central to a prisoner’s religion.”¹⁰⁴ This means that if a prisoner brings a RLUIPA action claiming that a prison regulation burdens his religious exercise, the act the regulation burdens does not have to be a key element to his religious practice.¹⁰⁵ Considering the complex security issues at stake in the prison system, it is possible that important prison regulations will be overruled for activities that are not at the crux of a prisoner’s religious practice.¹⁰⁶ For example, in *Goodman v. Snyder*, an Illinois prisoner brought a RLUIPA claim because prison officials refused to provide him with the lacto-ovo vegetarian diet required by his Wiccan religion and also because the officials denied his request for tarot cards.¹⁰⁷ The United States District Court for the East District of Illinois held that the prison’s refusal to provide the inmate with tarot cards violated the inmate’s rights under RLUIPA, even though the he never claimed the tarot cards were central to his religious practice.¹⁰⁸

In *Cutter*, the Supreme Court acknowledged RLUIPA’s minimal belief requirement and conceded that a court must follow an individual prisoner’s subjective opinion that a specific practice or request is a religious belief.¹⁰⁹ Thus, under RLUIPA, one could label

103. See *Seeger*, 380 U.S. at 185 (noting that a person cannot be forced to prove his religious convictions because what may be religious fact to one man may be unbelievable to another).

104. See *Cutter v. Wilkinson*, 125 S.Ct. 2113, 2124 n.13 (2005) (explaining that when a court examines the religiosity of inmates under RLUIPA, the issue is whether the inmates’ beliefs are truly held); see also *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 714 (1981) (holding that it is not the judiciary’s job to question the validity of particular beliefs or the validity of a litigant’s interpretation of religion).

105. See generally *Goodman*, 2003 WL 715650, at * 5 (denying a prison’s summary judgment motion regarding a Wiccan prisoner’s request for Tarot cards that he desired in connection with his religion, but that were not required for the practice of his religion).

106. See *Marria v. Broaddus*, No. 97 Civ. 8297, 2003 WL 21782633, at *15 (S.D.N.Y. July 31, 2003) (forbidding the New York prison system’s ban on the Five Percenters’ religious literature, even though the prison administrators presented evidence that the Five Percenters engaged in gang activity).

107. See *Goodman*, 2003 WL 715650, at *1 (noting that the prison officials argued that the use of tarot cards is often prohibited in prisons because they contained symbols, such as the devil and pitchfork, used by gangs).

108. See *id.* at *5 (noting that the court dismissed the defendant prison officials summary judgment motion).

109. See *Cutter*, 125 S.Ct. at 2124 n.13 (2005) (noting that the “truth of a [religious] belief is not open to question”).

virtually any practice in prison as “religious.”¹¹⁰ In the prison setting, RLUIPA’s minimal requirement for “religious exercise” means that not only may a prisoner claim to need special treatment, food, or access based on his religion, but also that society does not have to recognize his religion in any organized or accepted way.¹¹¹ To bring a claim under RLUIPA, all a prisoner must do is profess that he believes in something, anything, and he will receive RLUIPA’s strict scrutiny standard, while prison administrators must bear the burden of demonstrating why the challenged prison regulation was compelling.¹¹² Further, under RLUIPA, prison officials need not have any previous knowledge that a prisoner held alleged beliefs or necessitated certain “accommodations” before the administrator unknowingly may violate the prisoner’s exercise of these beliefs.¹¹³

There is no limit to the type or number of religious beliefs that prisoners can claim under RLUIPA; thus, there are few limits to the number of cases prisoners may bring under the statute.¹¹⁴ When prisoners realize that they may claim to be followers of any religion, regardless of its practices or creed, and that they can demand special rights under RLUIPA, contrived religions may become commonplace in prisons because of the benefits religious prisoners receive.¹¹⁵ Consequently, by upholding RLUIPA’s constitutionality, the Supreme Court has created a powerful weapon for religious groups.¹¹⁶ Under RLUIPA, the number of prisoners claiming religious burdens and unorthodox beliefs most likely will increase, just as it did under

110. See *Rouser v. White*, 944 F. Supp. 1447, 1454 (E.D. Cal 1996) (noting that in questions of religious practices, it does not matter what others regard as a religion, it matters what the litigant thinks).

111. See *Gallahan v. Hollyfield*, 516 F. Supp. 1004, 1006 (E.D. Va. 1981) (explaining that it is “fairly settled” that there is no requirement that a religion need meet any doctrinal test before it receives First Amendment protection).

112. See *Guru Nanak Sikh Soc. of Yuba City v. County of Sutter*, 326 F. Supp. 2d 1140, 1154 (E.D. Cal. 2003) (noting that if a plaintiff establishes a *prima facie* case that a prison regulation violates RLUIPA, the burden of proof shifts to the department of corrections).

113. See *Powers*, *supra* note 5, at 143 (explaining that if pre-registration cannot be a qualification for free assembly, neither can it be for the right to the free exercise of religion).

114. See Daniel R. Mandelker, *An Introduction to Religious Land Use Issues*, SHO18 A.L.I –A.B.A. LAW INSTITUTE – AMERICAN BAR ASSOCIATION 63, 79 (2002) (noting that RLUIPA has caused a “flurry” of threatened and actual litigation).

115. *Cf. Walston*, *supra* note 4, at 480 (noting that claims under RLUIPA include Satan worshippers and an inmate who made up his own religion with a Monday Sabbath so that prison officials would exempt him from Monday job duties).

116. See Kris Banvard, *Exercise in Frustration? A New Attempt by Congress to Restore Strict Scrutiny to Governmental Burdens on Religious Practices*, 31 CAP. U. L. REV. 279, 312 (2003) (noting that RLUIPA is a weapon for religious groups because it threatens a long and expensive lawsuit).

RFRA.¹¹⁷ As a result of the large number of claims, RLUIPA is particularly harmful to local governments because violations of RLUIPA will subject local governments to excessive lawsuits.¹¹⁸

2. A Study of RLUIPA Cases Since the Statute's Enactment Demonstrates the Judiciary's Tendency to Ignore Significant Security Interests, When Faced with Prisoners' Religious Claims

An examination of RLUIPA cases since its enactment in 2000 demonstrates the way in which the lower courts often push aside security concerns in light of prisoners' religious claims.¹¹⁹ Therefore, the *Cutter* decision to uphold RLUIPA is likely to lead to the misapplication of RLUIPA and exacerbate the problems prisoners face. The most common cases involving RLUIPA claims challenge prison regulations that forbid inmates from growing their hair past a certain length or wearing head coverings, meeting in groups to worship, and distributing specific types of banned literature.¹²⁰ However, these regulations are targeted towards specific security goals, which are based on the experience of prison administrators.¹²¹ Prison regulations forbidding long hair and beards are based on prison officials' beliefs that these regulations prevent inmates from hiding contraband in their hair and beards, changing their appearance to facilitate escape, and acknowledging gang affiliations through their appearances.¹²² Opponents of RLUIPA point to evidence that prison gangs often claim to be religious to further gang activities.¹²³ However, the majority of courts have held that prisons

117. *Gerhardt v. Lazaroff*, 221 F. Supp. 2d 827, 834 (S.D. Ohio 2002), *rev'd sub nom.*, *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003), *rev'd*, 125 S.Ct. 2113 (2005) (noting that, under RFRA, the number of religions Ohio prisoners claimed expanded, the religions in question were often extremely unorthodox, and prisoners demanded strange services, such as martial arts classes).

118. See Autumn L. Rierson, *RLUIPA: Three Years Later*, SJ053 A.L.I.-A.B.A.MERICAN LAW INSTITUTE-AMERICAN BAR ASSOCIATION 863, 865 (Apr. 2004) (noting that religious institutions are using RLUIPA to "strong arm" local communities and that local governments may also be subject to attorney's fees and possible damages).

119. See *Gaubatz*, *supra* note 97, at 570 (noting that courts are "skeptical" of prison administrators arguments that prison policies that ban certain religious literature or items are the least restrictive means of advancing a government interest).

120. See *id.* at 558 (noting that in these types of cases, prisoners' claims have had much more success than claims under RFRA or the *Turner* rational basis standard).

121. See *Hamilton v. Schriro*, 74 F.3d 1545, 1552-54 (8th Cir. 1996) (noting that the safety and security concerns in a hair length restriction challenge were based on the prison officials' experience in the prison system and were valid concerns).

122. See, e.g., *Hoevenaar v. Lozaroff*, 422 F.3d 366, 369 (6th Cir. 2005).

123. See Comment, *In the Belly of the Whale: Religious Practice in Prison*, 115 HARV. L. REV. 1891, 1903 (2002) (noting that in recent years, the concern over hate groups masquerading as religious groups has focused on pagan religions, such as Asatru).

may not categorically prohibit religious exemptions from grooming policies and that these regulations constitute a substantial burden on religious exercise.¹²⁴

For example, in *Hoevenaar v. Lazaroff*, the plaintiff claimed that an Ohio prison regulation, which stipulated that all inmates' hair be no more than three inches long violated RLUIPA.¹²⁵ The plaintiff was a Native American who began practicing a native religion while incarcerated in a facility that prohibited him from cutting his hair.¹²⁶ The prison officials argued that the purpose of the general prison ban on long hair was to prevent the concealment of contraband or inmate escape.¹²⁷ Specifically, the officials believed the plaintiff to be a particular security threat, as he had a "long history" of hiding contraband and had twice attempted to escape from prison.¹²⁸ However, the district court granted the plaintiff relief pursuant to RLUIPA.¹²⁹

Prison officials are also hesitant to allow religious inmates to gather in groups or have access to certain types of literature because they fear disrupters could utilize these methods to spread extremist views, ethnic hatred, or recruit members to gangs or other violent organizations.¹³⁰ Yet courts applying RLUIPA have rejected prison officials' general arguments that focus on the need to eliminate access

124. See *Warsoldier v. Woodford*, 418 F.3d 989, 998 (9th Cir. 2005) (determining that a regulation requiring a Native American man to keep his hair no longer than three inches was not the least restrictive means to further government interest); *Collins-Bey v. Thomas*, No. 03 C 2779, 2004 WL 2381874, at *2 (N.D. Ill. Oct. 25, 2004) (finding that a prison regulation that required the plaintiff to cut his hair in violation of his religious beliefs substantially burdened his religious exercise); *Mayweathers v. Terhune*, 328 F. Supp. 2d 1086, 1102 (E.D. Cal. 2004) (holding that a prison was unjustified in preventing Muslim prisoners from wearing beards).

125. See 422 F.3d at 367 (explaining that the prison regulation also banned any hairstyles that were determined by officials to be a threat to any penological interest).

126. See *id.* (noting that the inmate first commenced an administrative proceeding challenging the long hair ban, which was unsuccessful).

127. See *id.* (explaining that prison officials contended that, when assessing the security risk, it was not relevant that the plaintiff was a medium security prisoner because prisoners escape and contraband problems also occur in medium security prisons).

128. See *id.* at *5 (explaining that the safety concerns the prison officials expressed were based on their collective experience administering penal institutions).

129. See *Hoevenaar v. Lazaroff*, 276 F. Supp. 2d 811, 828 (S.D. Ohio 2003), *rev'd*, No. 03-4119, 2005 WL 2154948, at *1 (6th Cir. 2005) (noting that the Sixth Circuit reversed the district court's decision after the Supreme Court's ruling in *Cutter* because the district court failed to give appropriate deference to prison officials).

130. See, e.g., *Marria v. Broadus*, 200 F. Supp. 2d 280, 284 (S.D. N.Y. 2002) (explaining that prison officials do not allow violent groups to assemble or receive group literature because to do so would legitimize the status of the group and interfere with security); see also Anti-Defamation League, *Prison Extremism and the First Amendment*, http://www.adl.org/civil_rights/prison_ex.asp (last visited July 26, 2006) (noting that the Aryan Nation publishes a prison outreach newsletter to recruit inmates and spread ideas).

to literature and other inmates on the grounds of safety and security.¹³¹ For example, in *Marría v. Broaddus*, a New York district court rejected prison officials' evidence that the plaintiff prisoners posed a threat to prison security and thus, limitations on their access to literature and assembly were justified.¹³² The plaintiff in *Marría* was a member of the Nation of Gods and Earths or the Five Percenters, which shares many beliefs of the Nation of Islam, including the belief that the white man is the devil.¹³³ The New York Department of Correctional Services ("DOCS") maintained a policy that forbade the plaintiff from receiving his religion's newspaper or from assembling with other members of his group.¹³⁴ Although prison officials believed the Five Percenters to be involved in gang activity, the court ruled in favor of the plaintiff, denying the DOCS's motion to dismiss.¹³⁵

Decisions finding that prisoners' state RLUIPA claims or dismissing prison officials' summary judgment motions in the face of important security interests are disturbing, particularly because the Court has held that prisoners lose some of their rights when they are

131. See, e.g., *Coronel v. Paul*, 316 F. Supp. 2d 868, 881 (D. Ariz. 2004) (determining that a prison policy which forbid a Dianic pagan prisoner to attend other pagan worship services was a substantial burden on the free exercise of religion); *Borzch v. Frank*, 340 F. Supp. 2d 955, 968 (W.D. Wis. 2004) (finding that a prison's policy of forbidding plaintiff's Odinist literature constituted a substantial burden under RLUIPA); *Holiday v. Giusto*, No. CV 03-01385-AS, 2004 WL 1792466, at *7-8 (D. Or. Aug. 10, 2004) (denying prison's motion for summary judgment relating to Muslim prisoners' claim that they were denied the opportunity for group prayer); *Goodman v. Snyder*, No. 00-C-0948, 2003 WL 715650 at *5 (N.D. Ill. Feb. 27, 2003) (finding that prisoners' rights were substantially burdened by a ban on Asatru religious runes); Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501, 526 (2005) (discussing the holding in *Limbaugh v. Thompson*, where Native American prisoners' rights were substantially burdened by the prison's refusal to allow a sweat lodge).

132. See 200 F. Supp. 2d at 284 (noting that the New York State Department of Corrections submitted affidavits from its personnel and inmates from all New York prison facilities, which characterized the Five Percenters as a gang).

133. But see *id.* at 284 n.3 (remarking that, according to the plaintiff, there are many differences between the Five Percenters and the Nation of Islam). Additionally, according to the plaintiff, the Nation of Gods and Earths is not a gang. *Id.* at 284.

134. See *id.* at 282 (noting that the plaintiff became a member of the Five Percenters while incarcerated).

135. See *id.* at 298 (explaining that the court denied summary judgment to the DOCS because a question exists as to whether the ban on the Five Percenters' literature is reasonably related to the DOCS's security interests); see also *Lindell v. McCallum*, 352 F.3d 1107, 1111 (7th Cir. 2003) (finding that denying an inmate follower of Wotanism access to Wotanist literature and the ability to congregate with other Wotanists was a substantial burden on his free exercise). Wotanism pronounces the "Nordic Race" the chosen race and the plaintiff is an "avowed White Supremacist." *Id.* at 1108. However, the court rejected prison officials' argument that they would not acknowledge or endorse racist groups that disrupt prison life. *Id.* at 1110.

incarcerated.¹³⁶ However, whereas the courts restrict a typical prisoner's rights upon incarceration, RLUIPA abolishes these restrictions and allows prisoners to engage in practices that are consistent with their religious beliefs, regardless of whether a prison system has eliminated a practice because of safety concerns.¹³⁷ The many religious converts that arise in prisons under RLUIPA divert prison staff from important security issues and disrupt daily life in the prisons.¹³⁸

C. A Future Supreme Court Decision to Revisit the Cutter Court's Establishment Clause Analysis Could Avoid the Negative Impacts of RLUIPA

In its Establishment Clause analysis, the *Cutter* Court determined that RLUIPA is a valid accommodation of religion because it does not prefer one religion over another religion.¹³⁹ The Court emphasized this point repeatedly, noting that RLUIPA "will be administered neutrally among different faiths."¹⁴⁰ However, while the Court based its determination that RLUIPA is consistent with the Establishment Clause on the conclusion that RLUIPA applies equally to different religious sects, it did not fully address whether RLUIPA prefers religion over *irreligion*.¹⁴¹ In fact, Justice Ginsberg's sole analysis of the latter issue was in a footnote.¹⁴²

This section contends that RLUIPA resulted in the preferential treatment of religious prisoners and has the effect of persuading non-religious prisoners that they will receive better treatment in prison by feigning religious belief.¹⁴³ Thus, a future Court could reach the

136. See *Jones v. N.C. Prisoners' Labor Union Inc.*, 433 U.S. 119, 125-26 (1977) (holding that an inmate retains only those rights that are consistent with the important penological objectives of the prison system).

137. See *generally* *Madison v. Riter*, 355 F.3d 310 (4th Cir. 2003) (noting that these practices include wearing religious headgear and icons, having ungroomed hair and beards, receiving extremist literature, and refusing to submit to medical tests).

138. See Respondents' Brief in Response to Petition for Writ of Certiorari, *supra* note 53, at 19 (arguing that an additional effect of the large number of religious requests under RLUIPA is that the small number of prison chaplains must spend their time dealing with the requests instead of organizing religious programs).

139. See *Cutter v. Wilkinson*, 125 S.Ct. 2114, 2123 (2005) (noting that RLUIPA does not give any religious group privileged status).

140. See *id.* at 2115 (explaining that RLUIPA does not "differentiate among bona fide faith[s]").

141. See PEW FORUM, *THE SUPREME COURT*, *supra* note 71, at 2 (noting that the court emphasized that RLUIPA was necessary because majority faiths are often favored and minority religions disadvantaged).

142. See *Cutter*, 125 S.Ct. at 2122 n.10 (providing a response to the Respondent's notion that one effect of RLUIPA is that it encourages non-religious prisoners to "get religion," thereby advancing religion in violation of the Establishment Clause).

143. See Marci Hamilton, *California's Defeat of a State RLUIPA Bill: The Growing*

conclusion that RLUIPA violates the Establishment Clause, by approaching the Establishment Clause analysis of RLUIPA from a different perspective.¹⁴⁴

RLUIPA favors and protects those prisoners who follow an organized belief of religion over those without a system of religious belief.¹⁴⁵ As a result of RLUIPA's strict scrutiny standard, prisoners who claim to have a religious faith are exempt from many of the hardships that are part of prison life.¹⁴⁶ RLUIPA provides benefits solely on a religious basis because it is only applicable to religious prisoners, and thus, atheist and agnostic prisoners cannot utilize RLUIPA.¹⁴⁷ The enormous and disproportionate amount of protection RLUIPA gives to religious prisoners is evident in the many exemptions and privileges courts require prison officials to provide only to religious prisoners under RLUIPA's strict scrutiny standard.¹⁴⁸ Thus, RLUIPA's effect is to advance religion to the disadvantage of non-religious prisoners.¹⁴⁹

Proponents of RLUIPA argue that the Court previously has upheld statutes exempting religious organizations and persons from certain burdens; thus, RLUIPA does not advance religion.¹⁵⁰ However, RLUIPA is distinguishable from these rulings because in the cases in which the Court upheld religious exemptions, a number of secular

Backlash Against Religious Land Use and Institutionalized Persons Acts, Jan. 24, 2004, <http://writ.news.findlaw.com/hamilton/20040129.html> (last visited July 26, 2006) (stating that the effect of RLUIPA is to treat the non-religious and the religious unequally under the law).

144. See *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (explaining that a statute violates the Establishment Clause if it has the effect of advancing religion). To determine if a statute advances religion, the Court considers whether the act will induce religious exercise, rather than only protect it. *Id.*; see also *Texas Monthly v. Bullock*, 489 U.S. 1, 9 (1989) (noting that the State may not compel non-religious people to be religious).

145. See Walsh, *supra* note 8, at 189 (noting that eighteenth century essayist Samuel Johnson's maxim, "[t]o be of no church is dangerous," is more true in the time of RLUIPA than ever before).

146. See, e.g., *Figel v. Overton*, 121 F. App'x 642, 647 (6th Cir. 2005) (finding that a prisoner who alleged that the confiscation of prohibited publications violated his First Amendment right to free religion stated a claim under RLUIPA).

147. See 42 U.S.C. §2000cc-1 (reiterating that RLUIPA prohibits the state from imposing a burden on religious exercise).

148. See, e.g., *People v. Peterson*, No. 7687/01, slip op. at *4 (N.Y. Sup. Ct. Sept. 5, 2002) (upholding a Rastafari prisoner's challenge under RLUIPA to restrictions on hair lengths in prisons).

149. See Walsh, *supra* note 8, at 201 (explaining that RLUIPA advances religion to the detriment of non-religious groups because only religious individuals can use RLUIPA, and therefore non-believers are at a disadvantage).

150. See, e.g., *Mueller v. Allen*, 463 U.S. 388, 404 (1983) (upholding tax deductions for religious education); *Walz v. Tax Comm'n*, 397 U.S. 664, 674-75 (1970) (upholding a statute that exempted religious organizations from property taxes).

groups also received the benefit conferred, whereas RLUIPA applies only to religious organizations.¹⁵¹ The unequal treatment of religious and non-religious prisoners resulting from RLUIPA counters the Establishment Clause's fundamental principal of neutrality.¹⁵²

By enacting RLUIPA, Congress gave the religious community a broad right to claim strict scrutiny review, which atheists and agnostics do not have.¹⁵³ The various exceptions RLUIPA provides send the message to non-religious inmates that they are outsiders to a privileged community.¹⁵⁴

An additional effect of RLUIPA is that its potential benefits induce prisoners to feign a religious belief in order to receive the same benefits as religious inmates.¹⁵⁵ The Supreme Court has held that the government may not compel non-religious members of society to become religious.¹⁵⁶ However, under RLUIPA, this is exactly what happens.¹⁵⁷ As Congress noted when it enacted RLUIPA, the prison environment is one of limited freedoms, with little access to the outside world and where prison administrators regulate all actions.¹⁵⁸ Because of the restrictive nature of prison communities, prisoners treasure all exceptions to rules; thus, any exceptions can lead to jealousy among inmates.¹⁵⁹

151. See *Walz*, 397 U.S. at 707 (indicating that the property tax exemption statute applied generally to all non-profits that engaged in moral or mental improvement of others, including hospitals, libraries, and cemeteries).

152. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 654 n.3 (2002) (indicating that neutrality is the "touchstone" of the Establishment Clause).

153. Cf. Christopher L. Eisgruber & Lawrence G. Sager, *Why The Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 453-54 (1994) (noting that compared to religious groups, secular groups receive no preferential legal treatment).

154. See *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring) (condemning direct government endorsement of religion because it sends a message to non-religious citizens that they are not members of the political community, and a message to adherents that they are favored members of society).

155. See Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 292 n.357 (1989) (observing that if it were as burdensome to claim religious exemption as any other exemption, motives for fraudulent claims would decrease).

156. See *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) (noting that the government "may not compel affirmation of religious belief").

157. See *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (stating that the government cannot coerce anyone to participate in religion without violating the Establishment Clause).

158. See 146 CONG. REC. S7774, S7775 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy) (testifying that RLUIPA can offer a remedy to institutionalized persons because prison official often burden inmates' rights with unfair and arbitrary rules and restrict their liberty for reasons of indifference, ignorance, racism or monetary restraints).

159. See *Dehart v. Horn*, 227 F.3d 47, 52 (3d Cir. 2000) (noting that inmates can become jealous of other inmates' special religious diets); *Garrett v. Gilmore*, 926 F. Supp. 554, 557 (W.D. Va. 1996) (explaining that exceptions to prison rules cause

Under RLUIPA, religious inmates often receive preferential treatment and a privileged status. Non-religious inmates, however, remain limited in their exercise of fundamental rights, must eat a prison diet, and allow guards to cut their hair and censor their mail.¹⁶⁰ If a non-religious inmate is fed up with unequal treatment and wishes to have the same benefits as the religious inmates, his first option is to challenge the regulation under the *Turner* rational relation test, which is deferential to prison officials and is less likely to result in victory for the inmate.¹⁶¹ His second option is to claim that he shares the same religious beliefs as the inmates who receive the preferential treatment he envies and RLUIPA will protect him.¹⁶² Considering the isolated and restrictive environment prisoners are in, many prisoners will opt for the latter option and feign religious conversion.¹⁶³

Justice Ginsberg's fleeting analysis of whether RLUIPA privileges religion over nonreligion resides solely in a footnote.¹⁶⁴ In response to the Respondent's argument that RLUIPA bestows advantages on religious prisoners causing burdened, non-religious prisoners to "feign piety" to receive the same treatment, the Court advances several justifications.¹⁶⁵ First, the Court argues that the accommodations non-religious prisoners may gain by simulating religious conversion are not truly "benefits."¹⁶⁶ The Court's argument to support this assertion is hardly persuasive. The Court admits that some accommodations of religion, unavailable to non-religious prisoners, are obviously benefits, such as the "opportunity to assemble. . . [which] might attract joiners seeking a break in their closely guarded day."¹⁶⁷ However, the Court counters the example of

resentment among inmates).

160. See 60 AM. JUR. 2D. *Penal and Correctional Institutions* § 23 (2004) (noting that incarceration results in the removal or limitation of many privileges and rights normally afforded to citizens).

161. See *Farmer v. Perrill*, 288 F.3d 1254, 1261 (10th Cir. 2002) (describing the rational relation test under *Turner* as very deferential to prison officials).

162. See *Sasnett v. Sullivan*, 908 F. Supp. 1429, 1442-1444 (W.D. Wis. 1995) (evaluating a challenge under RFRA and worrying that prisoners might use religion as a pretext for secular desires).

163. See Shawn P. Bailey, *The Establishment Clause and the Religious Land and Institutionalized Persons Act of 2000*, 16 REGENT U.L. REV. 53, 76 (2003) (admitting that RLUIPA could encourage religion if courts allow inmates to abuse RLUIPA).

164. See *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003), *rev'd*, 125 S.Ct. 2113, 2122 n.10 (2005) (responding to Respondent's argument that RLUIPA goes beyond the permissible reduction of the free exercise of religion).

165. See *id.* (noting that Respondents argue that RLUIPA advances religion by encouraging inmates to become religious).

166. See *id.* (emphasizing "doubt" that all accommodations are considered "benefits" by inmates).

167. See *id.* (noting that Respondent's Brief argued that one effect of RLUIPA is

accommodation by noting that one state served a monotonous meal as its kosher diet.¹⁶⁸ It is hard to imagine that an unpleasant meal could compensate for the exclusion from the constitutional right to assemble. Further, the example of one specific instance of a religious accommodation that is moderately unpleasant does not lead to the conclusion that other religious accommodations are not benefits.¹⁶⁹ The Court's description of an unappetizing kosher meal does not negate the fact that under RLUIPA, religious prisoners receive access to literature, the right to assemble, and freedom from regulations prohibiting long hair and literature that non-religious prisoners do not.¹⁷⁰

Second, the Court notes that prisons already give special treatment to certain mainstream religious groups.¹⁷¹ The Court contends that because the prison system currently provides chaplains, places to assemble, and other services for conventional religions, accommodation under RLUIPA does not violate the Establishment Clause.¹⁷² However, this rationale does not address the issue at hand. By making the argument that all religious prisoners, including those who adhere to non-traditional religions, must be allowed accommodation under RLUIPA because those who adhere to traditional religions already are, the Court again focuses on RLUIPA's treatment of particular religions, instead of the burden on non-religious prisoners.¹⁷³ However, it does not matter which particular religious groups have access to literature or a place to assemble. The point is that *all* prisoners who are atheist cannot gain the right to assemble pursuant to RLUIPA.¹⁷⁴

to induce inmates to pretend to be religious in order to receive the statute's benefits).

168. *See id.* (noting that congressional hearings on RLUIPA revealed that one prison's kosher diet contained a fruit, a vegetable, a granola bar, and a nutritional supplement).

169. *See Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) (noting that the exercise of religion often involves the consumption of wine and specific foods).

170. *Compare Williams v. Snyder*, 150 F. App'x 549, 554 (7th Cir. 2005) (determining that a Rastafarian inmate who alleged prison officials requested he remove his dreadlocks stated a claim under RLUIPA), *with Williams*, 2005 WL 2346964, at *3 (holding that a Rastafarian prisoner's challenge to a prison hair length policy failed to state valid claims under equal protection, access to courts, due process, or the Eighth Amendment).

171. *See Cutter*, 125 S.Ct. at 2122 n.10 (noting that, in the case of mainstream religious faiths, inmates may attend religious congregations and have access to Bibles and other religious materials).

172. *Cf. Louise M. Holscher, Sweat Lodges and Headbands: An Introduction to the Rights of Native American Prisoners*, 18 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 33, 37 (1992) (noting that prisons usually accommodate mainstream religions).

173. *See Cutter*, 125 S.Ct. at 2123 (explaining that RLUIPA gives no specific religious group rights or benefits that other religious groups lack).

174. *See 42 U.S.C. § 2000cc(a)(1)* (2005) (explaining that RLUIPA only applies to challenges to governmental actions that burden inmates' religious exercise).

CONCLUSION

In his outspoken concurrence striking down RFRA in *City of Boerne*, Justice Stevens suggested that RFRA violated the Establishment Clause, stating that RFRA “provided the Church with a legal weapon that no atheist or agnostic can obtain”¹⁷⁵ Therefore, it follows that many anticipated that Justice Stevens would be the lone dissenter in *Cutter*.¹⁷⁶ However, this was not the case, most likely because, in *Cutter*, the Court failed to fully assess the impact RLUIPA has had on those prisoners who are not atheist or agnostic.¹⁷⁷

Like its predecessor, RLUIPA is much more than an accommodation of religion; it gives religious groups and inmates a powerful tool that they can use to gain benefits not available to others.¹⁷⁸ Under RLUIPA’s strict scrutiny standard, prisoners who invent religious reasons for their demands receive different treatment.¹⁷⁹ RLUIPA’s minimal requirements for proving a religious belief will lead to excessive litigation under RLUIPA and more and more prisoners will claim to be members of non-orthodox religions in order to benefit from the protections of religions.¹⁸⁰ Further, because RLUIPA’s strict scrutiny standard places the burden of proof on prison officials, government administrators ultimately will spend their time defending necessary prison procedures, instead of anticipating security concerns.¹⁸¹

The *Cutter* Court may have been aware of the many problems implicated by the statute’s strict scrutiny standard and thus, attempted to restrain the application of RLUIPA in their May 31, 2005 opinion.¹⁸² However, by requiring lower courts to adjudicate

175. See 521 U.S. 507, 537 (1997) (Stevens, J., concurring) (opining that the exemption at issue in *City of Boerne* was government preference for religion over no religion).

176. See PEW FORUM, THE SUPREME COURT, *supra* note 71, at 3 (surmising that it is possible the reason Justice Stevens did not dissent in *Cutter* was that he believed RLUIPA claims would fail even if the law were upheld).

177. See *id.* at 2 (noting that in analyzing the constitutionality of RLUIPA pursuant to the Establishment Clause the Court focused on congressional evidence that minority religions are often discriminated against in prisons and that RLUIPA helps relieve this problem).

178. See 42 U.S.C. § 2000cc-1 (establishing that RLUIPA is only available to people and institutions asserting religious rights).

179. See *supra* Part II.C (discussing that because under RLUIPA religious prisoners receive greater protection, non-religious prisoners have incentive to convert).

180. See *supra* Part II.B (noting that Congress designed RLUIPA’s requirements to allow as many claims as possible).

181. See *Walston*, *supra* note 4, at 480 (arguing that as a result of the excessive claims prisoners file under RLUIPA “no good act by prison officials will go unpunished”).

182. See *supra* Part II.A (explaining that the *Cutter* Court appeared to create a new standard of scrutiny for RLUIPA claims that is strict and deferential).

RLUIPA claims pursuant to strict scrutiny standards, yet “appropriately deferential” to prison officials, the Court created a standard that is confusing and may lead to inconsistent outcomes.¹⁸³

183. See, e.g., *Hoevenaar v. Lazaroff*, 422 F.3d 366, 372 (6th Cir. 2005) (determining that, based on the outcome of the *Cutter* decision, the district court failed to give proper deference to the prison system and therefore remanded the case); *Gooden v. Crain*, 389 F. Supp 2d 722, 728 (E.D. Tex. 2005) (rejecting a Texas prison’s motion to dismiss a Muslim inmate’s challenge to prison grooming regulation under RLUIPA because the *Cutter* court had determined that RLUIPA is a valid accommodation of religion).