SAVING THEIR OWN SOULS: How RLUIPA Failed to Deliver on its Promises

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ABSTRACT

The accompanying article explores the evolution of religious free exercise claims as considered under the First Amendment, Religious Freedom Restoration Act (RFRA) and now the Religious Land Use and Institutionalized Persons Act (RLUIPA). My Master of Theological Studies thesis explored questions of free exercise among death row inmates at San Quentin Prison in California. Now, nearly ten years later, I explore whether RLUIPA has made the kind of inroads we expected and hoped for.

Unfortunately—due in major part to federal legislation (PLRA) curtailing civil lawsuits by prisoners—RLUIPA’s impact has been limited at best. Examining court decisions from across the states and circuits, I explore areas of the law where progress can be seen—and where it has been caught in a web of technical filing requirements, impediments, and hyper-technical legalities. While there have been some successes related to prisoners’ religious practice, it has been inconsistent, modest, and much harder-fought than expected. In fact, after examining legislative history from RFRA, RLUIPA, and PLRA, it is unclear whether Congress indeed intended the inroads toward religious free exercise that it publicly praised. The first of its kind to examine RLUIPA in light of the PLRA, this piece describes the reality of slow progress toward improved religious freedom in prison and offers recommendations for fulfilling the promises RLUIPA originally offered.
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I  INTRODUCTION

In the summer of 2001, as a graduate student in law and theology, I began work on a master’s thesis that examined the predicament of the men of faith on San Quentin’s Condemned Row. I was working in the California Appellate Project—mostly assisting with direct appeals and state habeas petitions on behalf of the men on condemned row—when a colleague guided me into theological conversations with some of our clients.¹ The men I worked with had been ostracized from their communities and separated from their friends and families. They lived each day under a sentence of death. On Condemned Row, they waited—up to five years to be assigned a court-appointed appellate attorney, on judges’ rulings, and to find whether the legal system would ultimately exact the penalty it had prescribed. Some struggled with guilt or loss, and all endured the boredom of days spent in solitary cells.

If anyone needed the solace of faith, it was these men. I began the project, frankly, with a fair amount of skepticism that the “faithful” had become so opportunistically or in order to manipulate the system. (I had once read a case about a prisoner who filed a lawsuit for not being offered a so-called religiously-mandated diet of lobster and champagne, which pretty well summed up my thoughts on prisoner religious practice.) I was also personally dissatisfied by supernatural answers to life’s questions and approached the prisoners’ religious beliefs with a mixture of agnostic temerity and hyper-educated condescension. But after the year spent

¹ The topics of religion and capital punishment frequently overlap, even outside the context of religious practice on death row. See Gary J. Simson & Stephen P. Garvey, Knockin’ on Heavens Door: Rethinking the Role of Religion in Death Penalty Cases, 86 Cornell L. Rev. 1090 (2001).
corresponding and meeting with them and their attorneys or spiritual advisors, I was more impressed by the modesty of their requests and the persistence of the prison’s denials than anything else.

In 2001, nearly every aspect of each man’s religious practice was subject to (and limited by) the policies of the wardens of San Quentin. For example, limits upon personal property also regulated what religious articles—if any—a prisoner might keep in his cell. Grooming regulations required that prisoners’ hair be kept short and trimmed, which often conflicted with religious mandates to grow one’s hair or beard. Prisoners were entirely at the mercy of the prison with regard to the diet prepared, the religious services offered, and the counseling or spiritual advice available. And frequently, what was offered or forbidden forced a prisoner to break a requirement of his faith.

Until the passage of the short-lived Religious Freedom and Restoration Act (RFRA) in 1993, prisoners’ legal claims related to their free exercise were evaluated under a test that required them both to justify the importance of a particular practice and to prove that a prison’s concerns about safety and budgeting (or any other concerns a Warden might offer) were not justified under the circumstances.² Such litigation also put prisoners in the position of establishing the sincerity of their faith and the action which that faith requires. And in most cases employing the Turner v. Safley³ analysis, courts were frequently in the position of evaluating the “centrality” of a prisoner’s practice to the tenets of his faith group.⁴

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² See infra for a more comprehensive description of this test that was established by the Supreme Court in Turner v. Safley.
But the previous decade had been an active one for free exercise and offered promise of new legal standards and, perhaps, new prison policies. The Religious Freedom and Restoration Act\(^5\) required the government to provide evidence of a “compelling interest” in cases of freedom of religion.\(^6\) It, however, was struck down as applied to state law by the United States Supreme Court in 1997\(^7\) as overreaching Congressional authority. Only a year before I began my work in California, a defiant U.S. Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA). That Act was far more generous than the *Turner* test, but it was too soon to tell whether the men would ever enjoy the Act’s promised benefits.

First, RLUIPA, like RFRA, seemed vulnerable to an Establishment Clause challenge and was clearly destined to be the subject of federal litigation.\(^8\) Another great uncertainty lay within a piece of legislation passed after RFRA and before RLUIPA: the Prison Litigation Reform Act (PLRA).\(^9\) The PLRA was intended to weed out meritless or inartfully-brought prisoners’ civil legal claims, and because of this it remained doubtful that a *pro se* prisoner would be able to advocate successfully enough to find a sympathetic ear in the federal courts.\(^10\) The project changed me and how I thought of prison lawsuits related to religious practice. I came to understand these lawsuits as overwhelmingly reasonable, modest, and related to the core of

\(^6\) (2)(b) of RFRA states that the government may interfere only if it demonstrates that the law is "the least restrictive means of furthering that compelling government interest."
\(^7\) *City of Boerne, Texas v. Flores*, 117 U.S. 507 (1997).
\(^8\) Although an Establishment Clause issue was not the basis for the majority of the Supreme Court’s declaring RFRA unconstitutional, the Establishment issue was noted by Justice Stevens in his concurrence. *Id.* at 536-37 (Stevens, J., concurrence).
faithful practice. And so I became particularly interested in whether our courts offered a means by which to vindicate otherwise-frustrated needs to practice as a follower sees fit.

I fully appreciate that some—perhaps even many—prisoner religious claims are self-serving, meritless, or abusive. Some suits are merely the outgrowth of boredom, frustration with prison authority or are cynical expressions of a prisoner with far more intentions to file serial lawsuits than to practice a religion of any stripe\textsuperscript{11}.

However, I believe the law of free exercise (particularly free exercise in prison), employs legal tests that are sufficient to ferret out the “nonbeliever” or the abusive litigant. I still think this question needs exploration despite the concerns about prisoners “working” the system.

So years later, this article follows on, examining how RLUIPA has borne up under constitutional scrutiny, and whether it has had its intended impact upon the men of faith who live in American prisons. If, for example, the purpose of RLUIPA were to remove encumbrances upon religious practice in prison, has it succeeded? Or has RLUIPA been another disappointment, given the deference traditionally given to prison officials?

II PERSPECTIVES AND CONTEXT

It was not man who implanted in himself the taste for what is infinite and the love of what is immortal; these instincts are not the offspring of his capricious will; their steadfast foundation is fixed in human nature, and they exist in spite of his efforts.
--de Tocqueville, Democracy in America

Why does all of this matter? What difference does it make whether this new test under RLUIPA has been effective or has fostered a change for prisoners? I will begin with a broad inquiry into the fundamental need of many to belong to a religious group and the importance religious practice has had in the United States. More specifically, this chapter will focus upon the importance of religious practice among incarcerated persons generally and the needs and motivations of prisoners, prison chaplains, and prison administrators.

Religion shapes the identity, teaches the soul, and dictates understanding of the self and orientation to the world. According to a relatively recent poll, “an overwhelming majority (96%) of Americans endorse a belief in God or a universal spirit.”\(^\text{12}\) Though religious orientation and belief may vary, as explained by Karen van der Merwe, “people want to understand themselves and the world in which they live. This quest for understanding and meaning is ultimately a spiritual endeavor as it entails searching for meaning beyond the self, thus transcending the self.”\(^\text{13}\)

For many—and more specifically, in our American context—belief in a higher authority or power is fundamental to being human.\(^\text{14}\) Or, as Douglas Laycock has put it, religious beliefs


\(^{13}\) Karen van der Merwe, A Psychological Perspective on the Source and Function of Religion, HTS Theological Studies 2010, at 1, 4. (“Religion provides the framework or meaning, as the quintessence of meaningfulness is connectedness with God, self and others.”) Id.

\(^{14}\) See also Gary J. Simson, Endangering Religious Liberty, 84 Cal. L. Rev. 441 (1996).
are “important enough to die for, to suffer for, to rebel for, to emigrate for, to fight to control the government for.” 15

It is true that our nation values the separation of Church and State, but, of course that too may be motivated by our collective understanding of the importance of our freedom to practice (within limited limitations) our religion as dictated by our conscience. “Within the liberty guaranteed by the Religion Clauses,” writes Douglas Laycock, “the free human beings who make up the sovereign People may experience a Great Awakening of Christianity, a mass conversion to Islam or New Age mysticism or any other faith, or an overwhelming swing to atheism.”16 Not surprisingly, then, in a 2007 poll conducted by the First Amendment Center, 74% of respondents stated that “the right to practice the religion of your choice” is essential and 57% found the “right to practice no religion” to be essential.17

Just as the People demand the freedom of conscience and room for plurality, space for religious ritual is important for several reasons. It connects the believer to her inward soul, her outward community, and to the God she seeks. Symbolic or not, religious ritual means something: it transports those who take part to a world of higher and better things—to clearer

16 Id. at 313.
insight, to deeper conviction, or stronger connection. Ritual is also a sign of membership in a group, which is of no small importance. Dietary laws, the Christian sacraments, the pillars of Islam, ritual grasses, and the like, not only link the pious to the deity but also link someone to others who recognize that deity. Robert Bellah, discussing Durkheim’s notions of ritual and community, writes,

In . . . ritual interaction the members of the group, through their shared experience, feel a sense of membership, however fleeting, with a sense of boundary between those sharing the experience and those outside it; they feel some sense of moral obligation to each other, which is symbolized by whatever they focused on during the interaction; and, finally. . . what Durkheim calls moral force.18

That is, religion, through ritual and belonging, sets up standards of obligation to members of that community and informs that group’s understanding of belonging, morality, and roles within that community.

A. The Conflicting Constituencies

One of the problems with accommodating religious practice in prison is that there are several different constituencies involved, each with varied interests and motivations and each with legitimate concerns.

First, take the interests of the prisoners. As populations diversify, so do religious beliefs.19 On the other hand, connectedness to community (sometimes a new one, sometimes

18 Robert Bellah, “Durkheim and Ritual” in Alexander and Smith, Eds. Cambridge Companion to Durkheim, manuscript. –.
19 See also Laycock, J. Contemp. Legal Issues at 317 (“…the affirmative goal is to create a regime in which people of fundamentally different views about religion can live together in a peaceful and self-governing society.”); Daniel O. Conkle, Religious Truth, Pluralism, and Secularization: The Shaking Foundation of American Religious Liberty, 32 Cardozo L. Rev. 1755, 1768 (2011) (“Religion in America has become radically diverse, and it is likely to become even
one of importance from a time before his incarceration) becomes especially important. As acknowledged by Justice Brennan, dissenting, in *O’Lone v. Shabazz*, “[i]ncarceration 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.” 20

The tale of a prisoner—formerly lawless, apathetic and angry-- undergoing a process of renewal or rebirth is not a new one. Certainly one of the most well-known stories of a conversion experience in prison is the one that Malcolm X tells in his autobiography.

> But people are always speculating—why am I as I am? To understand that of any person, his whole life, from birth, must be reviewed... I am spending many hours [in the preparation of this book] because the full story is the best way that I know to have it seen, and understood, that I had sunk to the very bottom of the American white man’s society when—soon now, in prison – I found Allah and the religion of Islam and it completely transformed my life.21

But Malcom X is not the only story of prison religion conversion and the truth is that many prisoners become motivated only after a conviction to learn and seek personal enlightenment. Religion, as it offers prisoners help and purpose generally, also encourages learning and self-improvement. Belief and faithful commitment may also lead them to help others—whether in a “faith-sharing” sense or in a purely altruistic sense. It also offers belonging and acceptance: acceptance often by a deity, but also from the welcoming embrace of like-minded people in a similar situation. A primary purpose of religion practice “in prison is not only to reduce anti-social behavior/criminal behavior or relapse into criminal activity but also to

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counteract the tendency of prisons to dehumanize people and help prisoners prevent a further decline in their humanity.”

In a society continually at risk of violence, religion may “prevent the further deterioration of inmates by helping them to cope with being a social outcast in a prison situation that is fraught with loss, deprivation, and survival challenges.”

Anyone who has reviewed prisoners’ free exercise lawsuits and their outcomes is familiar with administrators’ reasons for denying or curtailing certain practices. Safety, order, and budget are all, of course, valid concerns for a prison administrator, and it is worthwhile to note that such concerns are difficult to ensure.

Richard Symes, a longtime prison minister, observes that prison wardens have considerations and concerns that are difficult to understand and seem draconian to the outsider. “I think that almost all rules are made to help implement the prison’s intention to create a safe place for everyone. . . . It is also true that the prison staff will on occasion ignore, twist, and unfairly administer the rules to either favor or punish a specific prisoner.”

Likewise, the Congressional record surrounding RLUIPA itself includes an acknowledgment of inappropriate limitations on prisoners’ religious practice:

“It is well known that prisoners often file frivolous claims; it is less well known that prison officials sometimes impose frivolous or arbitrary rules. Whether from indifference,

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23 *Id.*

24 Richard A. Symes, *As Though you were in Prison with Them*, 53 Presbyterian Criminal Justice Program, Kentucky 2000.
ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways.”

Although religious accommodation is traditionally a factor making prison administration more difficult, and, like most institutions, prisons are unwilling to do more than they have to as a matter of law, a prisoner’s faith does offer some ancillary benefits for prison officials. As discussed above, prisoners with hope and purpose are, pragmatically, easier to control. Prisoners have more to lose and more at stake when attached to a faith group, and many men, through religious study, learn anew the importance of respect for authority.

There are, of course, notable exceptions to this general rule, and attendant concerns and fears about these deviations result in discrimination against minority religious groups. While some groups advocate harmony and peace, other groups are suspected to advocate political agitation and overthrow of oppression.

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26 In the three years leading up to RLUIPA’s passage, Congress heard testimony and found that some officials in institutions impose arbitrary restrictions on the religious practices of prisoners. Many of these restrictions did not further an institution’s policy on discipline, order, or safety. Not surprisingly then, there is a congressional record supporting action to make it easier for prisoners to practice their religions and to more easily challenge restrictions upon their exercise.
27 Aaron K. Block, When Money is Tight, is Strict Scrutiny Loose?: Cost Sensitivity as a Compelling Governmental Interest Under the Religious Land Use and Institutionalized Persons Act of 2000, 14 Tex. J. on C.L. & C.R. 237, 247 (2009) (“Cutter declared that courts reviewing RLUIPA claims should recognize that “context matters” in the application of the Act’s strict scrutiny test. Referencing the Act’s legislative history, the Court noted that ‘lawmakers supporting RLUIPA were mindful of the urgency of discipline, order, safety, and security in penal institutions).
28 John W. Popeo, Combating Radical Islam in Prisons within the Legal Dictates of the Free Exercise Clause, 32 New Eng. J. on Crim. & Civ. Confinement 135, 140-41 (2006) (However, government officials, even under RLUIPA, still look at ways to regulate religion within prisons. For example, “based on the fear of Islamic radicals exploiting prisons chaplaincies and institutional programs provided for inmates, government officials have proposed a number of more stringent requirements [on Islamic radicals].” ).
It is against this backdrop of varied interests, priorities, perspectives, needs, limitations, and guidelines that RLUIPA and free exercise claims are brought, defended against, and decided. No one can reasonably argue with a prison warden’s desire for order and safety; she has her staff and inmates’ safety to protect, as well as the public’s general confidence in the prison system.\(^{29}\) On the other hand, with religious practice and free exercise as closely-held American values—with attending practical applications in the prison context—provides a powerful countervailing reason to question restrictions burdening religious practice.

\(^{29}\) Religious Liberties Act ‘Compromise’ Compromises Local Authority, Nation’s Cities Weekly, July 24, 2000 (“Oversight of jails and corrections facilities involves weighing public safety, the security of staff and the safety and individual rights of inmates, as well as many other factors that affect budgetary and management decisions. This bill would restrict the ability of local governments to set appropriate corrections policies.”).
III THE UNDULATING LANDSCAPE OF FREE EXERCISE TESTS

A prisoner does not altogether forfeit his or her First Amendment right to free exercise of religion—even as it may be limited by incarceration.\(^{30}\) The Ninth Circuit in *Ward v. Walsh*\(^{31}\) so eloquently articulated, “[t]he right to the free exercise of religion is to be jealously guarded. It is the right of a human being to respond to what that person’s conscience says is the dictate of God… A human being does not cease to be a human being because the human being is a prisoner of the state.”\(^{32}\)

Decisions related to free exercise of religion among prisoners—or rather, the law of free exercise generally, since High Court analysis of prisoner free exercise claims has been limited at best—has undergone several incarnations from *Sherbert* through *Smith* to RFRA and RLUIPA.

Although the First Amendment to the United States Constitution provides, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,”\(^{33}\) the United States Supreme Court has long distinguished the freedom to believe from the freedom to act— or be exempted from reasonable and generally-applicable laws.\(^{34}\) Protection of religious organizations from the interference of the state has waxed and waned, with “heyday” of protection in the 1960’s and early 1970’s.

\(^{30}\) *Turner*, 48 U.S. at 84. In *Turner v. Safely*, the Supreme Court recognized that “Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.” *Id.*

\(^{31}\) 1 F.3d 873, 876 (1993). In *Walsh*, an Orthodox Jewish prisoner in a Nevada state prison brought suit under Section 1983 alleging that by denying him a kosher diet, clothes made of a single fabric, and access to an Orthodox rabbi; by refusing to allow him to have candles in his cell; and by disregarding his request to promise to not be transported on the Sabbath prison officials had violated his First Amendment right to free exercise.

\(^{32}\) *Id.*

\(^{33}\) U.S. CONST. amend. I.

\(^{34}\) See *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940).
Prisoners’ free exercise claims have never been appellate court darlings, but the likelihood of success in those cases have risen and fallen as the legal tests around general free exercise claims have undulated. Long before any statutes related to court review of free exercise claims (much less prisoner free exercise claims), the U.S. Supreme Court and lower appellate courts have struggled with appropriate tests and ranges of acceptable state limits on Americans’ right to practice as their consciences dictate.

A. Supreme Court Jurisprudence Prior to Employment Division v. Smith

Until Employment Division v. Smith, the Supreme Court’s early decisions interpreting Free Exercise claims held that generally-applicable state and local laws were constitutional as long as the laws served a rational government purpose. This test operated regardless of whether the laws inhibited a religious person from practicing a certain tenant of his faith.  

In 1963 the US Supreme Court’s decision in Sherbert v. Verner moved in a new direction: an otherwise neutral law that had a discriminatory impact upon a religious practice would be subject to strict scrutiny. If, then, a plaintiff could prove a “substantial burden” on his religious practice, the government was required to demonstrate that the “compelling governmental interest” motivating the law could not have been satisfied through less restrictive means. Nearly a decade later, in Wisconsin v. Yoder, the Court struck down a Wisconsin law

36 See Reynolds v. United States, 98 U.S. 145,166 (1978) (holding that a territory’s law criminalizing bigamy was constitutional, making the distinction between laws that interfere with religious practices versus those that interfere with religious belief or opinion); see also Cantwell, 310 U.S. at 303-04 (1940) (explicitly incorporating the Free Exercise Amendment, but making a distinction between freedom to believe and freedom to act).
38 Id.
39 Id.
requiring public school attendance of children under the age of sixteen. Finding that the children of the Amish plaintiffs were adequately educated within their own community, the Court held that the law unreasonably burdened the free exercise rights of those challenging the law.42

By the 1980’s, however, after the Sherbert/Yoder decisions, the Supreme Court purported to apply the strict scrutiny analysis when reviewing facially-neutral decisions; however, the Court failed to apply the strict scrutiny analysis as rigidly as it had in Sherbert and Yoder. For example, in Lyng v. Northwest Indian Cemetery Protective Association, the Supreme Court rejected a challenge to a forest service road that ran directly through a site sacred to several Indian tribes. The Court reasoned that the road only “incidentally” burdened the exercise of religion and did not “coerce” anyone to violate their religious beliefs. Further, in United States v. Lee, the Court refused to hold social security and unemployment insurance taxes unconstitutional as applied to Amish employers because, even though the taxes did burden Amish beliefs, the government had a compelling interest in preserving the social security system. Those in the Amish community refused to accept social security benefits, because their religion required caring for their own elderly; however, the Court noted that the only way the social security system could be preserved would be through mandatory payments to support the system, regardless of belief.

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41 Id.
42 Id.
44 Id.
45 Id.
47 Id.
48 Id.
B. Prisoners’ Free Exercise Cases and Precedent

At the same time the high Court was narrowing and revising its tests related to generally-applicable laws in relation to free exercise rights, it began to look at prisoners’ free exercise cases. In the late 1980’s, the Turner v. Safley test became the applicable standard governing prisoner’s claims under Section 1983—including free exercise claims. Under that analysis, the State was simply required to show that its action was “reasonably related” to a “legitimate penological interest.”49 It was an attempt to “balance” the protection of prisoners’ constitutional rights with legitimate correctional interests by considering a number of factors, such as the extent to which alternate avenues for religious practice remained open to inmates and the impact that accommodation would have on prison operations.50 Not surprisingly, very few prisoners’ lawsuits prevailed under the Turner analysis.

As the four Turner dissenters—Stevens, Brennan, Marshall, and Blackmun—presciently identified, “[t]he Court’s rather open-ended ‘reasonableness’ standard makes it much too easy to uphold restrictions on prisoners’ First Amendment rights on the basis of administrative concerns and speculation about possible security risks rather than on the basis of evidence that the restrictions are needed to further an important governmental interest.”51

For example, O’Lone,52 decided one week after Turner and using the test prescribed

49 Turner, 482 U.S. at 89.
50 The complete list of Turner factors require that courts consider (1) whether there existed a “valid, rational connection” between the prison regulation and the legitimate (and neutral) governmental interest justifying it; (2) whether alternative means of exercising the right remained open to prison inmates; (3) the sort of impact accommodation of the asserted constitutional right might have on guards and other prisoners, and on the allocation of prison resources generally; and (4) whether there exists a reasonable alternative to the prison regulation. 51 Turner, 482 U.S. at 101 (dissent, J. Stevens).
52 O’Lone, 482 U.S. 342. In O’Lone, the prisoners were of Islamic faith and contended that two prison regulations prevented them attending a Muslim service that was offered on Friday afternoons. Id.
therein, confirmed that prisons are, with some guidelines, allowed to limit fundamental rights (in that case, Muslim inmates’ desire to attend Ju’umah) by alleging that they have a reasonable justification for doing so. From the beginning of its opinion in *O’Lone*, the Court recognized it had recently determined a “proper standard” in *Turner v. Safley* to apply when an inmate is challenging a prison regulation and asserting it restricts inmates’ constitutional rights.53 It reiterated the notion that the *Turner* approach “ensures the ability of corrections officials ‘to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration’.”54

The Court declined to uphold the lower court’s requirement that prison officials should show that no reasonable method would allow prisoner’s religious rights to be accommodated without creating security concerns; instead, it looked to whether there were alternative means for exercising the prisoners’ religion, which was Islam, generally, rather than to whether there were alternative means for exercising the particular religious practice.55 After determining that prisoners could participate in other Muslim practices, such as observing Ramadan and dietary requirements, there was no obligation that the prison accommodate their desire to attend Jumu’ah.56

Cases decided under the *Turner/O’Lone* tests rarely moved beyond the Summary Judgment stage—frequently because of prisons’ defense on the basis of safety or budgetary

54 Id.
55 Id. at 350-52.
56 “By placing the burden on prison officials to disprove the availability of alternatives,” the Court explained, “the approach articulated by the Court of Appeals fails to reflect the respect and deference that the United States Constitution allows for the judgment of prison administrators.” Id. Even further, the Court found that a gathering for Jumu’ah among prisoners could threaten prison security and anger other inmates, who would not get to participate in the gathering. Id. at 352.
concerns. Under those four factors, courts did not focus upon legitimacy of a prisoner’s religion or the strength of his or her faith and more on the prison policy or action itself.⁵⁷

C. **Employment Division v. Smith and Legislative Responses Thereto**

The 1990’s saw a power struggle between the Court’s evolving standards related to free exercise and Congressional interest in protecting religious freedom.

In *Employment Division v. Smith*⁵⁸, the Supreme Court departed from its earlier precedent in *Yoder* and *Sherbert*.⁵⁹ Justice Scalia wrote for a 5-4 majority and announced that making peyote use criminal only incidentally burdened two members of a Native American religion’s sacramental use of peyote.⁶⁰ The Court reasoned that there was no need to apply strict scrutiny analysis because the standard is too stringent for general, neutral laws that are not overtly intended to restrict religious beliefs.⁶¹ This changed the landscape somewhat – and many were dismayed. “This court has said to Americans of all faiths that they have a constitutional right to believe their religion but no constitutional right to practice it.”⁶²

Although the plaintiffs argued that the Court should apply a *Sherbert/Yoder* analysis, the Court distinguished these cases by limiting *Sherbert* to its factual context as an unemployment

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⁵⁷ For example, the Supreme Court acknowledged that “there is no question that respondent’s sincerely held religious beliefs which compelled attendance at Jumu‘ah.” *Id.* at 345.
⁵⁸ 494 U.S. 872.
⁵⁹ See *Id.*
⁶⁰ Smith and Black were fired from their jobs for using peyote, a sacrament in the Native American church in which they were members. *Id.* at 872. They were subsequently denied unemployment benefits by the state of Oregon because they had been dismissed for work-related misconduct. *Id.* The State’s position was that the dismissals were based on criminal drug statutes and that the statutes were neutral and generally applicable. *Id.*
⁶¹ *Id.* at 881-82.
benefits case involving a system of individualized exemptions.\textsuperscript{63} It further reasoned that \textit{Yoder} was a “hybrid” case because it affected more than one fundamental right (free exercise of religion AND right for parents to direct education of their children). No particular standard of review was discussed, but it was clear that scrutiny less than strict scrutiny was applied to general laws of neutral applicability.\textsuperscript{64} However, if a law is not generally applicable or neutral, it would still be subject to the \textit{Sherbert/Yoder} strict scrutiny analysis so long as the law substantially burdened a religion practice.\textsuperscript{65}

\textbf{D. Free Exercise Power Struggles: Smith, RFRA and RLUIPA}

In response to constituents’ outcries, Congress essentially overturned the Supreme Court’s decision in \textit{Employment Division v. Smith} through enactment of the Religious Freedom Restoration Act (“RFRA”).\textsuperscript{66} The purpose behind RFRA was to return to the pre-\textit{Smith} analysis of free exercise claims—including, presumably (though not explicitly) claims brought by prisoners. More specifically, Congress intended to “restore the compelling interest test” and the strict scrutiny analysis from \textit{Sherbert/Yoder} by subjecting all laws that “substantially burden a person’s exercise of religion” to strict scrutiny, even if the state or local laws were generally applicable and neutral.\textsuperscript{67} In order for the state to survive a free exercise challenge brought by a prisoner under RFRA and its more stringent test, the State had to show not only a compelling

\textsuperscript{63}Id. Here, there was misconduct and plaintiffs were not subject to individualized exceptions because they violated Oregon’s controlled substance laws. Id.
\textsuperscript{64}Id. at 881-82.
\textsuperscript{65}See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 113 S. Ct. 2217 (1993) (applying strict scrutiny analysis to a non-neutral law that substantially burdened Santerian’s religious exercise of sacrificing animals).
\textsuperscript{67}See 42 U.S.C. § 2000bb-2000bb-4; see also Crist, supra note 6, at 1145-46.
interest justifying its substantial burden upon free exercise but also that the state had employed the “least restrictive means of furthering that compelling interest.”

It was controversial especially as related to prisoner’s religious practices. Some argued that RFRA created another series of rights to hardened criminals or would clog the court system. Huge discussion of how RFRA would create another series of rights that would be helpful and useful to hardened criminals. How the influx of cases will undermine other prison legislation and erode the court system. There are pages in the Congressional Record in the Senate regarding the harms RFRA could do to the prisons, court systems, prisoners, and prison wardens. However, some Congressman clearly thought RFRA would fix the damage the Smith decision had on religious freedoms. Senator Kennedy stated, “Since Smith more than 50 cases have been decided against religious claimants, and harmful ruling are likely to continue.”

The Supreme Court quickly responded to RFRA in Boerne v. Flores, and the power struggle continued. The High Court declared RFRA unconstitutional, because --although section 5 of the 14th Amendment gave Congress the power to enforce rights secured under the 14th Amendment-- it did not give Congress the power to change the substance of what those rights entailed or create new rights. Therefore, RFRA still applied to federal laws, but state or local laws were again subject to the Smith analysis. For prisoners, the effect of the Boerne decision was to restore the less restrictive reasonableness standard articulated in Turner and followed in O’Lone.

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68 See supra at 15.
71 Boerne, 521 U.S. 507.
72 Id. at 530, 532.
73 See Id.
E. The Religious Land Use and Institutionalized Persons Act

Undaunted, Congress initiated the Religious Land Use and Institutionalized Persons Act ("RLUIPA")\(^75\) less than a month after the Court’s decision in *Boerne v. Flores*.\(^76\) Immediately following the Supreme Court’s decision, legislators met and held their first of a series of hearings to consider what alternative sources of legislation were available to Congress in order to protect against religious discrimination and substantial burdens on one’s religious practice.\(^77\) One representative noted “Because the freedom to practice one’s religion is a fundamental right, we are meeting this morning....to consider what sources of authority Congress may utilize to protect this most precious freedom from government infringement.”\(^78\) Congress understood that local and state government had the ability to infringe upon a person’s religious free exercise, specifically through land use regulations and denial of religious exercise in state-run institutions.\(^79\)

Though prisoners’ free exercise claims had met with little success in the federal courts even as late as 2001, RLUIPA’s passage at the turn of the century offered promise and hope. Like its predecessor, it “restored” a “compelling interest test” for laws impacting religious practices and discarded the previous “rational basis test.”\(^80\) Enacted under congressional

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\(^76\) *Boerne*, 521 U.S. 507.


\(^78\) *Id.* (statement of Rep. Canady).

\(^79\) See *Id.*

Spending Clause powers rather than the powers invoked for RFRA under Section 5 of the Fourteenth Amendment, the relevant portion of RLUIPA reads,

“[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person--(A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest.” RLUIPA applies to any “program or activity that receives Federal financial assistance” or when “the substantial burden affects, or removal of that burden would affect [...] commerce . . . among the several states.”

Thus, RLUIPA applies to prisoners because prisons receive federal funding, and, at least theoretically, the “compelling interest test” offered hope for success to prisoners filing religious practice claims.

Under RLUIPA, if a prisoner is able to demonstrate that a substantial burden has been imposed on his or her religious practice, the burden of proof then shifts to the State to demonstrate both the existence of a “compelling governmental interest” and that the method complained of is the “least restrictive means of furthering” that compelling interest. The test is markedly more favorable to the prisoner than the Turner v. Safley test, under which the prisoner carried the factual burden and through which a prison might prevail by showing merely that its policies were “reasonably related’ to legitimate penological interests.”

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81 The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C.S. § 2000bb, under which many prisoners’ free exercise claims were brought, was found an unconstitutional exercise of Congress’ powers, and does not apply to the States. See Boerne, 521 U.S. 507, 117 S. Ct. 2157 (1997).
82 42 U.S.C. 2000cc-1(b)(1) and (2).
83 Id.
84 Id.
85 Turner, 482 U.S. at 93.
F. Constitutionality

The question of RLUIPA’s constitutionality was always an issue because it had always been in question for its predecessor.

In its clearest statement about religious practice in prison since its decision in *Turner v. Safley*, the United States Supreme Court in *Cutter v. Wilkinson*\(^{86}\) not only found RLUIPA to be constitutional but also offered guidance related to its application to prisoners’ free exercise cases. First, the Court “found RLUIPA’s institutionalized-persons provision compatible with the Establishment Clause because it alleviate[d] exceptional government-created burdens on private religious exercise.”\(^{87}\) RLUIPA, it continued, “thus protects institutionalized persons who are unable freely to attend to their religious needs” and who are also “therefore dependent on the government’s permission and accommodation for exercise of their religion.”\(^{88}\) *Cutter* also reaffirmed that the state must not, in its accommodation, confer any “privileged status on any particular religious sect” nor should the state “single[] out [any] bona fide faith for disadvantageous treatment.”\(^{89}\)

While courts may not enter into an inquiry regarding the sincerity of a prisoner’s beliefs or whether “the belief or practice in question is ‘compelled by, or central to, a system of religious belief’\(^{90}\) RLUIPA does permit inquiry regarding ‘whether the objector’s beliefs are ‘truly held.’”\(^{91}\)

\(^{86}\) 544 U.S. 709 (2005).
\(^{87}\) *Id.* at 720.
\(^{88}\) *Id.* at 721.
\(^{89}\) *Id.* at 724.
\(^{90}\) 42 U.S.C. § 2000cc-5(7)(a); 544 U.S. at 725, n.13 (emphasis added); Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024, 1032 (9th Cir. 2007).
\(^{91}\) *Ibid.* (internal citations omitted.)
Chapter Four: PLRA History and Impact, Generally

In the years that intervened the passage of RFRA and RLUIPA, another federal law related to civil lawsuits—whether or not related to religious practice—was passed. Though it has had little attention in the examination of the success and impact of RLUIPA, this little law has had a tremendous influence on whether RLUIPA has proven an effective tool for prisoners litigating about religious free exercise. The Prison Litigation Reform Act\textsuperscript{92} was signed into law in April of 1996 as a rider within an omnibus appropriations bill.\textsuperscript{93} The Omnibus bill was passed after Congress was unable to pass eight out of thirteen annual federal appropriations bills (which led to a brief government shutdown during November and December of 1995 and January of 1996).\textsuperscript{94} Whatever the cause of the Omnibus bill’s quick movement into law, there were at least some lawmakers who were unhappy with the inclusion of the PLRA rider with such sparse debate.\textsuperscript{95} While criticism of appropriations riders in general is beyond the scope of this article, two real problems have emerged from the passage of the PLRA: (1) a vast decrease in a prisoner’s ability to litigate even claims with merit\textsuperscript{96} and (2) an increase in litigation over the statutory construction of the PLRA.\textsuperscript{97}

\textsuperscript{95} 142 Cong. Rec. S2296 (1996) (statement of Senator Kennedy) Sen. Kennedy stated: Although a version of the PLRA was introduced as a free-standing bill and referred to the Judiciary Committee, it was never the subject of a committee mark-up, and there is no Judiciary Committee report explaining the proposal. The PLRA was the subject of a single in the Judiciary Committee, hardly the type of thorough review that a measure of this scope deserves.
PLRA, generally, and its Exhaustion Requirements 98

The PLRA, which applies to all prisoners’ federal civil rights cases, requires that “no action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.”99

Thus, it includes a requirement that all prisoners seeking to challenge a burden on the practice of their religious beliefs to exhaust all administrative remedies within the prison before beginning any litigation.100 The law’s mandatory exhaustion provision replaced the weaker exhaustion provision of the Civil Rights of Institutionalized Person Act which left discretion with the district courts to determine whether the prisoner had exhausted the administrative filing statistics, see Admin. Office of the U.S. Courts, Judicial Business of the United States Courts 1999 at 139 tbl. C-2A (1999), available at http://www.uscourts.gov/judbus1999/appendices/CO2ASep99.pdf


100 Not surprisingly, this requirement has made quite an impact upon civil litigation around prison conditions. See, e.g., Johnson v. Jones, 340 F.3d 624 (8th 2003)(Prisoner must exhaust administrative remedies BEFORE filing suit in federal court); McKinney v. Carey, 311 F.3d 1198, 1200 (9th Cir.2002) (affirming dismissal of inmate's complaint who was in the process of exhausting his administrative remedies); Medina-Claudio v. Rodriguez-Mateo, 292 F.3d 31, 36 (1st Cir.2002) (affirming dismissal when inmate failed to exhaust the administrative remedies in place); Jackson v. Dist. of Columbia, 254 F.3d 262, 269 (D.C.Cir.2001) (affirming dismissal of inmates' complaint because they had begun, but not yet exhausted, the prison grievance procedure); Freeman v. Francis, 196 F.3d 641, 645 (6th Cir.1999) (dismissing inmate's complaint brought under RFRA because he filed his federal complaint before allowing the administrative process to be completed); Perez v. Wisconsin Dep't of Corrections, 182 F.3d 532, 538 (7th Cir.1999) (remanding for dismissal and reversing the district court's refusal to dismiss when, at the time the district court was ruling on the motion to dismiss, the inmate had fully exhausted his administrative remedies but had not done so at the time of filing).
remedies available and whether such remedies were “appropriate in the interests of justice.”  

In addition to deterring even meritorious prisoner lawsuits, the PLRA has generated its own vast litigation about when exhaustion requirements apply and what they demand of prisoners.

Prior to 2001, the federal circuit courts were divided on the question of whether a prisoner who was seeking only monetary damages which could not be obtained through a prison’s grievance process must still exhaust all “available” remedies. The Fifth, Ninth, and Tenth Circuits held that the exhaustion requirement does not apply to situations in which the only remedy sought by a prisoner in the suit cannot be granted by the prison grievance process itself. The Third, Seventh, and Eleventh Circuits, on the other hand, determined that the exhaustion requirement does apply to situations where a prisoner is only seeking monetary damages. The Second and Sixth Circuits occupied the middle ground in the debate, holding that sometimes the prisoner must exhaust the grievance process and sometimes he must not, depending upon the particular facts of the case. This Circuit split was resolved in 2001 by the Supreme Court in Booth v. Churner. In Booth, the Supreme Court held that a prisoner who is only seeking monetary damages must still exhaust all prison remedies as long as the prison’s grievance committee has the authority to take some remedial action. Thus, this issue was essentially decided in favor of the prisons, a fact that has militated against prisoner claims regardless of their merit.

102 Id.
104 Id.
105 Id.
A decade after the PLRA’s enactment, in *Woodford v. NGO*, the United State Supreme Court settled a growing circuit split over the meaning of the term “exhaustion.”\(^{106}\) Although the text of the statute does not explicitly call for it, *Woodford* interpreted the PLRA’s administrative exhaustion requirement as requiring “proper” exhaustion.\(^{107}\) In the wake of that decision, it is not enough that the prisoner has confronted prison administrators with his complaint; rather, he must have followed the proper procedure in filing grievances and alleging interference with religious practice.\(^{108}\) According to one commentator, “the *Woodford* decision effectively leaves the ability to define the hurdles a prisoner must clear (in the form of prison grievance procedures) in the hands of prison officials, making them gate-keepers to both federal and, in some jurisdictions, state courts.”\(^{109}\)

2. **Filing Fees and Screening Process**

Once a prisoner has succeeded in satisfying the stringent administrative exhaustion requirement by patiently and timely navigating the prison administrative grievance process, the prisoner must still comply with the PLRA’s screening requirement. It requires federal courts to

\(^{106}\) *Woodford*, 548 U.S. at 87. The Ninth Circuit and the Sixth Circuit had interpreted a prisoner to have satisfied the PLRA’s ‘exhaustion’ requirement once all administrative remedies were no longer available.

\(^{107}\) *Id.* at 87. According to the *Woodford* Majority, the text of the PLRA “strongly suggests” the term ‘exhausted’ requires ‘proper’ exhaustion. But the dissent cautions that the Majority’s interpretation “essentially ignores the PLRA’s text.”

\(^{108}\) For one example, California Department of Corrections and Rehabilitation (“CDCR”) has an administrative grievance system for prisoner complaints. Regs., tit.15 SECTION 3084.1 (2007). Before filling suit prisoners must submit a CDC Form 602. There are four separate levels of appeals the first of which must be initiated within fifteen working days of the event being appealed. California prisoners must follow this process—including the filing of the initial grievance and timely appeals to each of the four levels of appeals—in order to satisfy the exhaustion requirement of § 1997e(a).

\(^{109}\) Shay at 293.
conduct a preliminary screening of all prisoner complaints against prison officials and dismiss—
*sua sponte*—any action or claim that in the court’s view is “frivolous or malicious,” “fails to
state a claim on which relief may be granted,” or “seeks monetary relief against a defendant who
is immune from such relief.

Under the PLRA, a prisoner usually must first pay a filing fee, and a prisoner who
cannot afford a full filing fee must pay an initial filing fee at the outset of litigation.\(^{110}\) Those
who cannot pay the initial filing fee may still file\(^ {111}\) but will usually be required to pay off the
balance of the filing fee on a monthly basis thereafter.\(^ {112}\)

Furthermore, under the PLRA’s “three-strike” rule, prisoners are essentially afforded
only three chances to get it right\(^ {113}\) A dismissal of the prisoner’s claim for any of the
aforementioned reasons counts as a strike. Prisoners who have had civil actions or appeals
dismissed three times before because they were either frivolous or malicious, or failed to state a
claim, will not be allowed to file *in forma pauperis* unless the prisoner can prove an “imminent”
threat of “serious physical injury.”\(^ {114}\)

Any of the requirements of this process, when coupled with the three strike rule, may
forever close the courthouse doors to aggrieved and deserving plaintiffs.

Finally, under the PLRA, federal courts may revoke “good time credits” from prisoners
who have filed “frivolous lawsuits.” This provision alone deters many prisoners from filing
lawsuits challenging their free exercise accommodation.

\(^{110}\) 28 U.S.C. § 1915(b)(1)
\(^{111}\) Id. § 1915(b)(4)
\(^{112}\) Id. § 1915(b)(2)
\(^{113}\) 28 U.S.C. § 1915(g)
Physical Injury Requirements

A significant puzzle—especially in the context of RLUIPA or First Amendment Claims—is the PLRA’s “physical harm” requirement. As with many other civil claims, the injury involved in the denial of the right to free exercise of religion is usually not physical; rather, it is emotional or spiritual. Applied strictly, the physical injury requirement of the PLRA would prevent most prisoners from asserting that they have been denied reasonable opportunities to practice their religious beliefs.

Immediately after PLRA’s passage, it was used as a defense to a New York prisoner’s free exercise claim. At issue in Harris v. Lord, however, was a question of retroactivity and the prisoner’s suit was allowed to continue.

Circuits are split on the issue. Some courts have held that 1997e(e)’s physical injury requirement does not apply to some claims. For example, in Saheed-Muhammad v. Dipaelo, that district court found “where the harm that is constitutionally actionable is the violation of intangible rights—regardless of actual physical or emotional injury—section 1997e(e) does not govern.” The court justified this decision by examining the language of the rider: “A prisoner is barred from bringing into federal court an action ‘for’ emotional damages suffered while in

\[\text{115}\]
\[\text{118}\] Id. at 474. For a more exhaustive discussion of the law’s physical harm requirement and its possible effects on prisoners’ claims, see Stacy Heather O’Brien, Closing the Courthouse Door: The Impact of the Prison Litigation Reform Act’s Physical Injury Requirement on the Constitutional Rights of Prisoners, 83 Va. L. Rev. 1189 (1997).
\[\text{119}\] Saheed-Muhammad v. Dipaelo, 138 F.Supp.2d 99, 107 (2001) (citing Memphis Community School District v. Stachura, 477 U.S. 299, 308 n. 11, 106 S.Ct. 2537, 91 L.Ed.2d 249 (1986) (which stated that courts should vindicate deprivations of certain “absolute” rights that are not shown to have caused actual injury because of their fundamental importance in organized society)).
custody, unaccompanied by physical injury. However, the constitutional violations of the type at issue here are not actions ‘for’ emotional distress.” 120 The court further reasoned that, “the severity of the violation is not measured by the independent physical harm they produce.” 121

Most pertinent, perhaps, is the distinction the Dipaeo court makes between First Amendment and Equal Protection claims brought by prisoners and frivolous claims brought by prisoners—those which the PLRA was intended to prevent: “it was not [PLRA]’s purpose to insulate from review all claims in which legitimate constitutional issues predominate without accompanying physical harm.” 122 “Plainly,” the court continues, constitutional claims are “qualitatively different from lawsuits seeking damages for ‘insufficient storage locker space, a defective haircut by a prison barber, the failure of prison officials to invite a prisoner to a pizza party for a departing prison employee, and yes, being served chunky peanut butter instead of the creamy variety.'”123

The Ninth, Sixth, and Seventh Circuits and a number of other district courts have likewise made distinctions between constitutional—particularly First Amendment—claims and other civil claims made by prisoners.124

120 Id.
121 Id. at 107.
122 Id. at 109.
123 Id.
124 “The deprivation of First Amendment rights entitles a plaintiff judicial relief wholly aside from any physical injury he can show, or any mental or emotional injury he may have incurred.” Canell v. Lightner, 143 F.3d 1210, 1213 (9th Cir.1998). See also Rowe v. Shake, 196 F.3d 778, 781 (7th Cir.1999) (A deprivation of First Amendment rights is a cognizable injury unencumbered by requirements of physical, mental or emotional injury); Williams v. Ollis, 230 F.3d 1361 (6th Cir. 2000) (the PLRA does not cover First Amendment retaliation claim); Mason v. Schriro, 45 F.Supp.2d 709, 720 (W.D.Mo.1999) (Equal Protection Claims under the Fourteenth Amendment could be brought without allegation of physical harm); Warburton v. Underwood, 2 F.Supp.2d 306, 315 (W.D.N.Y.1998) (District court declined to dismiss the plaintiff’s Establishment Clause claim for want of proof of physical injury because “such claims nevertheless deserve to be heard”).
Chapter Five: How have RLUIPA claims really fared in the Courts (and has PLRA made an Impact)?

A. Let’s be honest—any success is unusual and this test is the most friendly to prisoners—and some cases have won on the merits

Scholars, both supporters and detractors, have discussed various reasons why RLUIPA has been a useful new tool for some prisoner litigants. Whether advocating or criticizing, scholars noted that RLUIPA has increased prisoner litigants’ opportunities to challenge administrative processes that hinder religious practices. Derek L. Gaubatz explains that “while a prisoner. . . need only ‘provide with his grievance all relevant information reasonably available to him,’ prisoners should take care to explain, with reasonable specificity, how a challenged policy burdens their religious exercise.”125 Prison administrators are required to compile a record stating that burdening religious exercise is of lesser interest than advancing the government interest that challenges said practice. Turner/ O’Lone ensures that this requirement is less likely to prevail on a motion to dismiss or summary judgment. Consequentially, some cases will end up going to trial, however, Turner/O’Lone significantly increases prisoner litigants’ chances that the case will be resolved by settlement or even through the administrator process, making a trial unnecessary.126 Lower courts have consistently supported the Turner/ O’Lone ruling, rejecting the suggestion that cost and other monetary considerations are “sufficient justification[s] for the infringement of fundamental rights under the strict scrutiny standard.” 127

125 Derek L. Gaubatz 28 HARV. J. L. & PUB. POL’y 501, 539.
126 Id. at 544-45.
127 Id. at 547.
For reasons noted supra, prison administrators’ records often fail to amount to a “compelling
government interest,” thus, it is unsurprising that the majority of “RLUIPA diet cases have
resulted in courts denying motions to dismiss or summary judgment by the prison and/or ended
in favorable judgments or settlements for the plaintiff.” Of forty-six RLUIPA claims, only
seven have been dismissed based on prisoner litigants’ failure to establish a substantial burden;
this directly contrast with the seventy-five percent of RFRA claims that were filed and dismissed
for failure to establish substantial burden in the three and one half years before Boerne held that
RFRA was unconstitutional.” Likewise, there were roughly sixty discrete RLUIPA cases that
were either ruled on the merits of the claim or based on the constitutionality of the Act.”

Many scholars feared that the RLUIPA would result in a flood of prisoner litigants’
claims, predicting that “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.” Others suggested that the statute’s language would encourage
frivolous claims, resulting in unreasonable strains on the judicial system. After four years of
RLUIPA’s enactment, an assessment “reveals that the majority of prisoners' claims are
successful, even when important penological interests are at stake.” Critics not the few
RLUIPA cases that prison officials have lost in which they plead poverty as compelling
governmental interests, yet the courts “in these cases tend to be very equivocal about whether
avoiding increased costs may be a compelling governmental interest.”

128 Id. at 558-59.
129 Id. at 569.
130 Id. at 570.
131 Heaven Help Us, 14 Am. U. J. Gender Soc. Pol'y & L. 585, 599.
133 14 Tex. J. ON C.L. & C.R. 237, 249.
governmental officials that are concerned that RLUIPA gives certain groups, such as Islamic radicals, too much freedom. Even under the RLUIPA, these officials want to control and regulate religion within prisons. Officials state that concern is “based on the fear of Islamic radicals exploiting prisons chaplaincies and institutional programs provided for inmates, [thus] government officials have proposed a number of more stringent requirements [on Islamic radicals]. Even under RLUIPA, inmates are not entitled to a chaplain of their own unique religion”\(^\text{134}\)

In addition, many scholars believe that RLUIPA gives religious prisoners a broad right to claim the strict scrutiny review, while eliminating atheists and agnostics right to the same review: “the various exceptions RLUIPA provides send the message to non-religious inmates that they are outsiders to a privileged community.”\(^\text{135}\) Yet, “RLUIPA defines ‘religious exercise’ to include ‘any exercise of religion, whether or not compelled by or central to a system of religious belief.’ 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.”\(^\text{136}\)

**1. Winning on the merits**

Over the past decade, several RLUIPA cases have been successful on the merits with resulting relief for prisoners. In some important instances, prisoners’ lawsuits prevail because they have been prohibited from worshiping as their consciences dictate or accommodation (or proposed alternatives to their requested accommodation) has “substantially burdened” religious practice.

\(^\text{135}\) Am. U. J. Gender Soc. at 608.
\(^\text{136}\) Id. at 600.
The Ninth Circuit’s opinion in *Greene v. Solano County Jail* acknowledged that prisons may still curtail prisoners’ religious freedoms in some instances, but cautioned that “in light of RLUIPA, no longer can prison officials justify restrictions on religious exercise by simply citing to the need to maintain order and security in a prison.” Undoubtedly, this represents a leap in jurisprudence on prisoners’ religious practice claims.

Some categories of cases have been consistently successful, with others yielding mixed results. RLUIPA free exercise claims have been most successful when a prisoner’s claim has had no reasonable security impact, a minimal financial burden upon the prison administration, and has involved a core tenet of a prisoner’s religious beliefs.

For example, possession of religious articles and books have frequently been the subject of religious practice lawsuits—under the First Amendment Turner test, RFRA, and under RLUIPA. These have no perceptible financial impact (since these cases deal with possession—not provision-- of religious articles) and a limited realistic security interest. Under RLUIPA, some federal circuits have granted relief under these issues, though they failed under other tests. In *Charles v. Verhagen*, for example, a Muslim inmate sued prison officials for prohibiting him from possessing prayer oil and won relief at the district and circuit levels.

Challenges related to hair length and religious services have been common First Amendment claims and routinely lost under the Turner analysis, even before the PLRA. It is clear that these two successes would not have been possible if not for RLUIPA’s new legal test.

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137 In *Greene v. Solano County Jail*, the Ninth circuit found that a prison policy outright banning a particular religious practice—regardless of available alternatives—constitutes a “substantial[ ] burden” on one’s free exercise. 513 F.3d 982, 985 (2008).

138 348 F.3d 601 (7th Cir. 2003)(Denying relief, however, on an additional claim related to the prison’s rules restricting the number of religious feasts an inmate may observe per year). Cf. Borzych v. Frank, 439 F.3d 388 (7th Cir. 2006)(Court held that prison’s ban on white supremacist books did not violate RLUIPA).
Hair length, like beard length has been another area of success for many of the same reasons\textsuperscript{139}, though somewhat surprisingly not in all federal circuits.\textsuperscript{140}

For example, California prisoners who brought a claim about the right to wear beards and meet communally for Jumu’ah services without discipline won relief in the Ninth Circuit. That court was receptive to the prisoners’ arguments, determining that the prison had no compelling interest in regulating religiously-mandated beards.\textsuperscript{141} Similarly, addressing the issue of the Jumu'ah services, the court noted that while the prison’s interest in having a workforce of prisoners and a system that encourages participation in that work detail was a compelling interest, the policy of punishing Muslim prisoners who missed one hour of work detail a week to attend Jumu’ah services was not the least restrictive means of achieving that interest.\textsuperscript{142} The simple alternative of simply creating an exemption for Muslims that missed work detail while attending Jumu’ah services was clearly less restrictive.\textsuperscript{143}

Religious diet issues are perennial ones presenting important questions: of course diet is fundamental to the belief of many prisoners, but while it poses no threat to security, providing alternative meals can be expensive. For this reason, many of these cases have not been successful in the federal courts no matter the legal test under which the issue is considered. A very recent

\textsuperscript{139} Warsoldier v. Woodford, 418 F.3d 989 (9th Cir. 2005)(Native American inmate granted relief in the Ninth Circuit over the prison’s grooming and hair length policies because of the substantial burden on his religious practice and limited financial and security impact inmates’ long hair).

\textsuperscript{140} Thunderhorse v. Pierce, 364 Fed.Appx. 141 (5th Cir. 2010)(Reasoning that the hair length policy substantially burdened plaintiff’s religious exercise but was the least restrictive means of a compelling governmental interest in prison security).

\textsuperscript{141} In Mayweathers v. Terhune, the court reasoned that a half-inch beard made a prisoner no more difficult to identify, and therefore the risk of a bearded prisoner being able to escape unnoticed was exaggerated and the regulation was an overreaction. 328 F. Supp. 2d. 1086, 1088 (2004).

\textsuperscript{142} Id.

\textsuperscript{143} Id.
district court case, however, proved successful for a Jewish inmate who alleged a violation of RLUIPA for failure to provide a kosher diet. Likewise, once a prison provides accommodation to prisoners, prisoners may not be denied that accommodation without reasonable justification. When a Muslim prisoner was removed from the prison’s list of Ramadan participants after a guard filed a report that he had broken the fast, his RLUIPA claim against the prison was successful.

In a law review article entitled “Heaven Help Us” the author asserts that one of the consequences of RLUIPA is, “an assessment of actual RLUIPA actions reveals that the majority of prisoners’ claims are successful, even when important penological interest are at stake.” This is drastically overstated and oversimplified. The author cites that the consequence from another law review articles titled “RLUIPA at Four”. In reading that only seven out of forty RLUIPA cases were dismissed the author assumed that the other thirty three were successful. Instead of considering the other alternatives besides a dismissal – such as summary judgment – the author speedily leaps to the conclusion that all thirty three cases involving RLUIPA and prisoners were granted relief of some sort.

The author of “RLUIPA at Four” argues that the critics of RLUIPA – who stated and feared that the floodgates would open containing frivolous prisoner claims – were wrong. He

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144 Willis v. Commissioner, Indiana Dept. of Correction, 2010 WL 4457432 (S.D. Ind. Nov. 1, 2010) (denial of kosher diets substantially burdened inmate’s religious exercise and increased costs of providing kosher meals to inmates is not a “compelling interest”); Abdulhaseeb v. Calbone, 600 F.3d 1301 (10th Cir. 2010)(The “DOC” substantially burdened the inmates religious exercise by refusing to offer the prisoner a halal diet).
145 Lovelace v. Lee, 472 F.3d 174 (4th Cir. 2006). “An inmate…could decide not to be religious about fasting and still be religious about other practices, such as congregational services or group prayer. Such an inmate’s right to religious exercise is substantially burdened by a policy, like the one here, that automatically assumes that lack of sincerity with respect to one practice means lack of sincerity with respect to others.” Id. at 188.
asserts that in the past four years that have only been sixty cases while under RFRA there were ninety four. Again this is an oversimplified manner of thinking. The reason there are less cases is not because the prisons are complying but because of PLRA. Many of the cases never make it into the court room to be heard on the merits and more importantly, prisoners are fearful of asserting claims because of the difficulties with pro se litigants. 147

Lastly, the author gives an over simplistic version of what a prisoner might have to do to succeed in their cases. He stated, “While a prisoner, to successfully exhaust the administrative process, need only “provide with his grievance all relevant information reasonably available to him,”160 prisoners should take care to explain, with reasonable specificity, how a challenged policy burdens their religious exercise.”148

Wins on the merits without ultimate relief for the prisoners (litigation about remedy)

True relief—the freedom to practice as a prisoner’s conscience dictates—requires more than mere appellate court success. Even when a prisoner’s RLUIPA claim is successful on the merits, the implementation of new regulations (or inadequacy of new policies intended to address the problems complained of) has also sparked new RLUIPA claims. Because the PLRA does not require every prison within a system to implement the changes required by one prisoner’s successful lawsuit, progress has not uniformly applied to every prison or prison yard. Also, even when the prisoner has successfully won a RLUIPA claim based on the merits, seeing the fruitions of that can sometimes be difficult. In Washington v. Klem, after entering into a

147 Id. at 570-72.
148 Id. at 539.
settlement agreement the plaintiff was unable to enforce it and his motions to the court feel on deaf ears.\footnote{388 Fed. Appx. 85, 85-85 (2010) (After entering into a settlement agreement, plaintiff filed a pro se motion to enforce the agreement and to be appointed council. The Court of Appeals affirmed the District Court’s denial of the motions because the plaintiff failed to file the supporting documents expounding his reasons for seeking enforcement of the settlement).}

**B. Losses at MSJ on substantive issues**

While the advent of RLUIPA foreshadowed an increase in successful prisoner’s claims, a consistent trend of that sort has yet to emerge in the courts. The success described above notwithstanding, RLUIPA has not been the “magic bullet” of free exercise in prison. Disappointingly, a large number of cases have failed to move beyond the PLRA screening process or failed at the summary judgment stage. And, in the small number of cases that survive summary judgment, defendants usually did not prevail at the trial level.

Of these claims, many fail because the prison policies are either deemed not a substantial burden on the prisoner’s religious practice\footnote{Watkins v. Shabazz, 180 Fed. Appx. 773 (C.A. 9th 2006). See Keen v. Noble, 2007 WL 1080849 (E.D. Cal. 2007).} or the policy is justified by a compelling government interest—typically prison security and budgetary concerns.\footnote{Hall v. Ekpe, 2011 WL 2600514 (2d Cir. 2011) (Court affirms the District Court’s summary judgment in favor of the defendants after the Supreme Court held states do not waive their sovereign immunity merely because they accepted federal funds.).} While a prisoner may argue that his religious practices are being substantially burdened by a prison's regulations upon personal possessions, diet and group worship\footnote{Stavenjord v. Corr. Corp. of Am. (Not Reported in F. Supp. 2d) 2007 WL 215816, at *5 (D. Ariz. 2007).}, many courts are not sympathetic when there exists an unrestricted alternative means to a specific religious practice.\footnote{For example, though a}
prisoner may prefer a hot Kosher meal, non-rotating cold Kosher meals were found to acceptably satisfy a prisoner’s religiously-mandated diet.\textsuperscript{154} Furthermore, where an inmate has professed a desire to have access to certain religious objects or materials, some courts have still been reluctant to meet the prisoner’s requests, finding instead that the prison’s need for security was a compelling interest.\textsuperscript{155} In many instances, a prison’s failure to meet a request or its implementation of a policy banning a practice have been found lawful even under RLUIPA’s test (when, for example, failure to accommodate a group worship service was found to be due to a lack of volunteer resources rather than an overt policy banning the assembly.\textsuperscript{156}

As foreshadowed earlier, many prisoners’ claims dealing with religious dietary requirements fail to move beyond the summary judgment stage because of the existence of alternative diet programs provided by prisons. A number of these cases upheld prisons’ refusals to provide inmates with Halal meat because of the availability of foods that the prisons and courts deemed satisfactory substitutes.\textsuperscript{157} Prisoner claims revolving around religious dietary

\textsuperscript{155} Keen v. Noble, 2007 WL 1080849 (E.D. Cal 2007) (Holding that the compelling interest in security of the prison outweighed the prisoner's interest in building a "hof."); Jones v. Schriro, 2006 WL 2772641 (D. Ariz. 2006)(deciding that even if the prison regulation was a substantial burden upon the prisoner's religious practice, the prison's compelling interest in security outweighed.); Brunskill v. Boyd, 141 Fed.Appx. 771 (11th Cir. 2005)(holding that the prison’s hair length policy and limitation on possession of religious articles were the least restrictive means of furthering the institute’s compelling interests in security, health, and safety of its staff).
\textsuperscript{156} Smith v. Kyler, 295 Fed.Appx. 479 (3d Cir. 2008)
\textsuperscript{157} In Watkins v. Shabazz, the existence of both a vegetarian diet program and an option to purchase Halal meat at a de minimus cost to the prison with no cost to the prisoner precluded the prisoner from claiming that his religious practice was substantially burdened by the prison's failure to provide Halal meat. 180 Fed. Appx. 773 (C.A. 9th 2006). Similarly, in Sefeldeen v. Alameida, The Ninth Circuit Court found that the district court properly granted summary judgment because the prison had provided two alternatives to eating Halal meat—a vegetarian equivalent or the choice of finding a religious organization outside the prison willing to provide Halal meat. 238 Fed. Appx. 204, C.A. 9 (Cal. 2007), 2007 WL 1585599. Likewise, in Muhammed v. Sapp, the Eleventh Circuit affirmed summary judgment for the prison
requirements have also failed to move beyond the summary judgment stage for other reasons such as the court’s determination that the prison’s failure to provide a Kosher meal to a non-Jewish inmate does not violate RLUIPA and the court’s deference to a magistrate judge’s determination that an inmate had not exhausted his remedies with respect to allegations involving halal meat.

C. RLUIPA Cases that Moved Beyond Summary Judgment

Not all prisoners’ RLUIPA claims have been caught in the net of summary judgment. But this does not necessarily foreshadow ultimate success; many of those cases surviving summary judgment do so because of incomplete or insufficient factual records precluding summary judgment for either party. Yet others surviving summary judgment do so for reasons stemming from an inmate’s exhaustion of administrative remedies. Still, in more factually

when “alternative” or vegan meals—but not requested meals—were offered to Muslim inmates. 388 Fed.Appx. 892 (11th Cir. 2010).

157 Id.

158 Linehan v. Crosby, 346 Fed.Appx. 471 (11th Cir. 2009) (Granting summary judgment for the prison because failure to provide a Kosher meal to a non-Jewish inmate does not violate RLUIPA.)


160 Jova v. Smith, 582 F.3d 410 (2d Cir. 2009) (Holding that the grant of summary judgment for the defendants was improper because the District Court did not consider whether the institution’s practices in restricting the inmates’ diets and group worship satisfied the least restrictive means standard.); Sample v. Lappin, 424 F.Supp.2d 187 (D.D.C. 2006) (Court refused to grant summary judgment, as genuine issues of material fact existed as to whether the outright ban on Sample’s consumption of wine was the least restrictive means of furthering the government’s compelling interest in controlling intoxicants).

161 In Smith v. Ozmint, Smith fully exhausted his administrative remedies and did not encounter problems under the PLRA, having the defendants’ motion for summary judgment vacated on the RLUIPA claim. 578 F.3d 246 (4th Cir. 2009). In Orafan v. Goord, Defendants, in seeking summary judgment, alleged that the plaintiffs had not properly exhausted their administrative remedies, but the District Court found that these remedies were properly exhausted, allowing the court to reach the plaintiffs’ RLUIPA claims. 411 F.Supp.2d 153 (N.D.N.Y. 2006). In Pugh v. Goord, The court found that the plaintiffs had fully and properly exhausted their administrative relief thus denying the defendant’s motion for summary judgment and the PLRA proved no obstacle to the plaintiffs’ RLUIPA claim proceeding. 571 F.Supp.2d 477 (S.D.N.Y. 2008).
complex circumstances there is perhaps an indication that the courts are exhibiting a diminishing
deferece to prison officials’ judgment.\textsuperscript{162}

When a prisoner’s claim moves beyond the PLRA screening process, prison officials
continue to seek summary judgment or defend cases on the merits by simply offering better and
better-justified explanations for policies based on security or budgetary concerns.\textsuperscript{163}

\textbf{D. Reasons why - PLRA + difficulty of pro se litigation}

The exhaustion and screening requirements of the PLRA make it extremely difficult for a
prisoner to file suit, much less prevail upon the merits of a case. Before even reaching the
PLRA’s statutorily mandated screening process, it is not uncommon for a prisoner’s claim to be
dismissed for failure to exhaust administrative remedies—especially given the judicially-
engrafted procedural default rule.\textsuperscript{164} The PLRA’s exhaustion requirement provides an affirmative
defense where the defendant has the burden of raising and proving the absence of exhaustion.\textsuperscript{165}
Consider the “Woodford Rule.”\textsuperscript{166} As noted above, the Supreme Court ultimately ruled that the
administrative exhaustion requirement called for “proper” exhaustion. As one commentator
explained, “the Woodford Rule allows a prisoner’s mistakes in the prison grievance system to
scuttle potential federal constitutional claims.”\textsuperscript{167} Thus, dismissal on technical grounds

\textsuperscript{162} For example, in \textit{Shakur v. Schriro}, the Ninth Circuit Court of Appeals held that summary
judgment was improper after finding that the practice of Halal was a religious exercise that was
substantially burdened by prison policies. 514 F. 3d 878 (2008).
\textsuperscript{163} See e.g. \textit{Rouser v. White}, 2010 WL 2541268 (C.A. 9 2010) (After the plaintiff filed numerous
suits the defendants claimed he had not exhausted all of the administrative remedies and that the
plaintiff’s claims were improperly joined).
\textsuperscript{164} See e.g. \textit{Mathis v. Knowles}, 81 Fed.Appx. 906 (9th Cir. 2003).
\textsuperscript{165} Mello v. Martinez, 2010 WL 118394, at * 2 (E.D. Cal. 2010).
\textsuperscript{166} \textit{Woodford}, 548 U.S. at 86.
\textsuperscript{167} In \textit{Woodford}, the prisoner had filed a grievance with the prison officials. The California
Department of Corrections and Rehabilitation rejected the grievance as being untimely filed
since the prisoner filed the complaint six months after the restriction had initially been imposed
upon the plaintiff, exceeding California’s 15-working day rule. After an unsuccessful appeal to
frequently precludes federal courts from ever reaching the merits of cases involving the arguable violation of a constitutional right that has been so historically and vigilantly guarded.

And—generating a good deal of litigation on its own—the PLRA’s physical injury requirement has confounded progress on RLUIPA claims as well.

1. Failure to exhaust administrative remedies

In many prisoners’ RLUIPA cases, reviewing courts (both at the trial and appellate levels) held that a failure to exhaust administrative remedies warranted a grant of summary judgment in the prisons’ favor.\textsuperscript{168} In these cases, these errors left no room for amendment and re-filing; the PLRA requirements were absolute. Further, a sampling of California cases reveals that, in the first half of 2010 alone, a significant number of prisoner complaints have been dismissed for failure to exhaust administrative remedies.\textsuperscript{169}

2. Articulating a cognizable legal claim

the California Department of Corrections, the prisoner filed suit against prison officials. \textit{Id.} Shay at 293.
\textsuperscript{168} See Lindell v. Casperson, 360 F.Supp.2d 932 (W.D. Wis. 2005) (Wiccan inmate’s claims failed at Summary Judgment after he failed to exhaust administrative remedies under PLRA); Couch v. Jabe, 479 F.Supp.2d 569 (W.D. Va. 2006) (Muslim prisoner’s claim was dismissed for failure to exhaust administrative remedies); Rogers v. U.S., 696 F.Supp.2d 472 (W.D. Pa. 2010) (Muslim inmates sued prison officials for selling scented oils used in Muslim services at too high a cost, but defendants were granted summary judgment because of the Plaintiffs’ failure to exhaust administrative remedies); Abdulhaseeb v. Calbone, 600 F.3d 1301 (10th Cir. 2010) (Affirming the lower court’s ruling granting summary judgment to the prison because the inmates had failed to exhaust their administrative remedies before filing the RLUIPA suit.).
\textsuperscript{169} See e.g. Mello v. Martinez, 2010 WL 118394 (E.D. Cal. 2010) (where the Court held that the prisoner failed to state a cognizable claim). However, this is not to imply that prisoners acting pro se are never able to draft cognizable claims that survive the screening process but it is the exception.). \textit{See e.g.} A. Comundoivilla v. M.S. Evans, 2010 W.L. 1407851(C.D. Cal. 2010); Phillips v. Ayers, 2010 WL 1947015 (C.D. Cal. 2010).
The PLRA’s screening requirement may create a nearly-insurmountable barrier for pro se litigants seeking access to the courts.\textsuperscript{170} In order to avoid dismissal as “frivolous,” the plaintiff must craft a complaint with “an arguable legal and factual basis.”\textsuperscript{171} Similarly, in order to avoid dismissal for failure to state claim, the plaintiff must craft a complaint that, on one hand, contains more than “a formulaic recitation of the elements of a cause of action”\textsuperscript{172} but, on the other hand, satisfies the Federal Rules of Civil Procedure Rule 8 pleading requirement of a “short and plain statement showing that the pleader is entitled to relief.”\textsuperscript{173} Specifically, for a claim for relief under RLUIPA to be cognizable, the “plaintiff must link any RLUIPA claim together with specific defendants and specific conduct.”\textsuperscript{174} Crafting an intelligible complaint that ties critical facts to the relevant theory, and is simply, concisely and directly stated, is a difficult task at times for even the most sophisticated advocate—let alone a prisoner with limited literacy skills, education, access to legal research materials, and meager financial resources. For these reasons it is not surprising that numerous prisoners proceeding pro se fail to state cognizable claims under RLUIPA.\textsuperscript{175}

\textsuperscript{170} Shay and Kalb at 293.
\textsuperscript{171} Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th Cir. 1984).
\textsuperscript{172} Bell Atlantic Corp. v. Twombley, 550 U.S. 544, 555 (2007).
\textsuperscript{173} F.R.C.P. 8(a)(2).
\textsuperscript{174} Rider v. Felker, 2010 WL 476040 (E.D. Cal. 2010).
\textsuperscript{175} It is important to note that acting as a pro se litigant is extremely difficult because pro se litigants are often perceived in a more negative manner than litigants that are represented by counsel, especially in criminal cases. However, critics and scholars alike have “[o]ften overlooked . . . the effect that being pro se has on the litigants themselves; they often suffer more than judges, court administrators, and staff in pursuing their efforts to achieve justice.” Drew A. Swank, In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation, 54 Am. U. L. Rev. 1537, 1548-49 (2005).

Pro se litigants experience an incredible burden when filing a claim. After filing suit, the pro se litigant must then arrange for service of process, conduct discovery, schedule hearings, file motions, and eventually present evidence at trial. Most laypeople are rarely confronted with these aspects of a trial and most are not presented with an opportunity in which to develop these
3. **Physical injury requirements:**

Mayfield, an adherent of the Odinist/Asatru faith, brought an action alleging violations of RLUIPA for the facility’s preventing the inmate from participating in a group service known as Blotar. The district court granted the defendants’ motion for summary judgment because Mayfield did not sufficiently show a violation of RLUIPA. The 5th Circuit reviewed this grant de novo, reversing the grant but finding that the prisoner’s claims for compensatory damages under RLUIPA were barred by the PLRA’s physical injury requirements.\(^{176}\)

*RLUIPA at Four* fails to truly address the implication that the Prison Litigation Reform Act has on prisoners bringing any type of claim, including those claims brought under RLUIPA. The Article spends a mere three sentences addressing the fact that the PLRA is applicable to RLUIPA claims, and merely states that prisoners should properly plead claims within the complaints.\(^{177}\)

Requiring an indigent prisoner, who is likely asserting a claim *pro se*, to properly plead his or her allegations in a complaint (and stripping the prisoner of the right to assert these claims if he or she has not properly plead the complaint) is a harsh reality that exists under the PLRA. It

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\(^{176}\) Mayfield v. Texas Dept. of Criminal Justice, 529 F.3d 599 (5th Cir. 2008).

\(^{177}\) *Id.* at 539.
is also one that RLUIPA at Four fails to address. Moreover, although some courts have moved away from the physical harm requirement of the PLRA in the First Amendment or RLUIPA context, some have not.

Green brought suit against various prison officials under RLUIPA for their not providing him with hot Ramadan meals, not giving him substantial notice of substitutions, and not providing him with a halal diet. With respect to the RLUIPA claim, the defendant Almy was entitled to qualified immunity.\textsuperscript{178} The court sees the PLRA as a stumbling block only where the defendant Tudor, a librarian, raised exhaustion as an affirmative defense against the defendant’s non-RLUIPA, First Amendment claim.

Houseknecht brought an action against prison officials alleging a violation of RLUIPA for their allegedly denying him access to religious services and Bible study classes. Finding that the plaintiff did not establish that the prison’s action imposed a substantial burden on his free exercise, the court granted summary judgment to the defendants on the RLUIPA claim. The court also analyzed whether Houseknecht exhausted all his administrative remedies, as required under the PLRA, with respect to his retaliation claim, finding that the defendants had not met their burden of showing that no genuine issue of material fact remains. Accordingly, the court refused to grant summary judgment for the plaintiff’s failure to exhaust his remedies.\textsuperscript{179}

The language of RLUIPA indisputably offers a legal test more friendly to prisoners’ claims and there has indeed been some progress from that perspective. Change, if it has come at all, has come slowly, at great price, and in relatively limited areas of the law.

Chapter Six:

Comparing Public Rhetoric with Private Intent (Did Congress Understand PLRA’s Limitations on RLUIPA Litigation?)

Why has RLUIPA had only a mixed (at best) impact? There seemed to be such public support from such varied quarters. The answer may be in the legislative history of RLUIPA and RFRA.

After Employment Division v. Smith, liberals and conservatives alike offered their public statements in support of statutorily-enhanced protection of religious rights.\(^{180}\) RFRA was the direct response to Smith’s holding that “there is no special constitutional protection for religious liberty, as long as the law in question is neutral on its face as to religion and is a law of general application.”\(^{181}\) Senator Oren Hatch—a co-sponsor of the legislation—described RFRA as one of the most significant pieces of legislation to ever come before the Congress.\(^{182}\)

\(^{180}\) 139 Cong. Rec. S. 2180 (1993). Senator Orren Hatch described the bill in the following terms, “It has the backing of one of the broadest coalitions ever assembled before Congress. This coalition encompasses a wide range of religious faiths and an ideological spectrum ranging from the American Civil Liberties Union to the coalition for America.”

\(^{181}\) 139 Cong. Rec. S. 26178 (1993). Senator Kennedy stated that RFRA was “designed to restore the compelling interest test for deciding free exercise claims.”

Although there was widespread support for restoring the compelling interest test as a way to safeguard the First Amendment right to free exercise, RFRA’s legislative history reveals sharp divisions among lawmakers when it came to extending heightened protection to prisoners’ free exercise claims. Vigorous debate surrounded who was to be included and who was to be excluded from RFRA, and many shared Senator Reid’s concerns “with what this bill will mean in a prison setting.” As one lawmaker remarked, “[r]eligious liberty claims in a prison context present a far different problem for the operations of those institutions than they do in a civilian setting.” Senator Reid introduced an amendment that would have excluded the prison population from claiming heightened scrutiny for religious claims under RFRA. Growing concern over the increase in prisoner litigation in the federal court, fear that the Act would strip away the long-recognized deference granted to prison officials and interfere with prison administration, and deep-seated skepticism about prisoner’s claims are the primary reasons why the Reid Amendment received strong support from some lawmakers.

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183 139 Cong. Rec. S. 26408 (1993). Senator Simpson, “There is not a single thing that has come up in this debate that should lead anyone to believe that anything other than that we all believe in religious freedom for everybody.”
186 “Nothwithstanding any other provision of this act, nothing in this Act or any amendment made by this Act shall be construed to affect, interpret, or in any way address that portion of the First Amendment regarding laws prohibiting the free exercise of religion, with respect to any individual who is incarcerated in a federal, state, or local correctional, detention, or penal facility (including any correctional, detention, or penal facility that is operated by a private entity under a contract with a government).”
189 139 Cong. Rec. S. 26408 (1993). The legislative history for the floor debates discussing the proposed amendment are rife with comments made by proponents of the Amendment like this of Senator Simpson, “This Amendment would exempt prisons and prisoners to avoid the extraordinary creativity of people who spend their time figuring out how to concoct a new religion...”
A comment by Senator Jesse Helms captures the prevailing view among supporters of the amendment: “My reading of this legislation leads to the conclusion that inmates will be provided much greater latitude to assault legitimate prison authority, by masking disobedience under the guise of special privileges for religious observation.” 190 While the possibility for increasing the number and successes of prisoner lawsuits was a concern that nearly cost RFRA its passage, proponents of the amendment failed to persuade their colleagues that an un-amended RFRA would “open the floodgates for prisoner’s religion-based claims.” 191

The growing concern over increased prisoner litigation, however, did not die with the Reid amendment. A few years later, Senator Oren Hatch spoke as one of the PLRA’s sponsors and explained, “[Some] prison lawsuits may seem far-fetched, almost funny, but unfortunately . . . frivolous lawsuits by prisoners tie up the courts, waste valuable resources, and . . . [the PLRA] prohibits prisoners from suing for mental or emotional abuse, absent a prior showing of physical injury.” 192

RLUIPA, to a far lesser degree, involved floor debates about the potential for increasing frivolous litigation within the prisons, but again, the PLRA had been passed in the interval. 193 Because of the passage of the PLRA, Congress seemed far less concerned about RLUIPA’s possible “floodgate of litigation.” Although at least one critic feared that RLUIPA would result in “excessive litigation and unacceptable threats to important penological interests,” that is a vast

193 146 Cong. Rec. S. 7779 (2000). Senator Reid voiced his ongoing concern about extending heightened scrutiny to prisoners’ free exercise claims, “While I continue to believe that we should not extend the privilege of a strict scrutiny standard to restrictions on the free exercise of religion behind the bars of our nation’s prisons, I also recognize certain other realities.”
overstatement.\textsuperscript{194} In addition to the explicit mention in the bill’s text, some supporters of RLUIPA referenced the Prison Litigation Reform Act explicitly during debates: “[t]his provision does not require prison officials to grant religious requests that would undermine prison discipline, order, and security. . . . Thus, the courts will continue to be able to reject frivolous lawsuits with ease.”\textsuperscript{195}

The existence of the PLRA likely explains the absence of acrimonious debate about the litigious nature of prisoners and the dangerous effect RLUIPA would have on prison administration.\textsuperscript{196} Senator Reid maintained his concerns about the impact of extending strict scrutiny to prisoners’ free exercise claims but conceded, that many of his colleagues came to believe that PLRA made his amendment irrelevant.\textsuperscript{197} As Congressman Nadler observed, presciently, “This bill limits the rights of prison inmates to raise otherwise valid claims under the bill by specifically referencing the Prison Litigation Reform Act.”\textsuperscript{198} In fact, the PLRA effectively created a “carve-out” for prisoners’ claims, leading to an outcome not unlike what was advocated for and envisioned under the proposed Reid Amendment to RFRA.\textsuperscript{199}

Some members of Congress foresaw the PLRA’s imposed limitations on RLUIPA as a negative point, but this was surprisingly a minority view. Congressman Nadler, for one, said publicly that he would urge his colleagues to vote against the RLUIPA bill if the PLRA were

\textsuperscript{195} Melissa Rogers, General Counsel for Baptist Joint Committee on Public Affairs, 146 Cong. Rec. S. 7777 (2000).
\textsuperscript{196} 146 Cong. Rec. S. 7779 (2000). Senator Reid concedes that he still harbors concerns about extending strict scrutiny to prisons.
\textsuperscript{197} 146 Cong. Rec. S. 7779. (2000).
\textsuperscript{199} 145 Cong. Rec. H. H5598 (1999). Representative Nadler outright admits that the PLRA is a carve-out for prisoners’ free exercise claims.
specifically referenced or if the PLRA’s application were not in some way limited to certain claims.\(^{200}\) Others, previously critical of RFRA, threw their support behind RLUIPA after the passage of PLRA.\(^{201}\)

On its face, RLUIPA is the second attempt of a Congress seemingly determined to increase prisoners’ free exercise rights.\(^{202}\) According to the Department of Justice’s Statement on the Institutionalized Persons Provisions of RLUIPA, Congress found that prisoners and other patients residing in prisons, jails, or mental institutions are subjected to discriminatory or arbitrary denial of the ability to practice their faiths.\(^{203}\)

RLUIPA had bipartisan support from many politicians and lobbying groups, and members of Congress doubtless saw this as a groundswell worth responding to\(^{204}\). As one article noted, “Even more dramatic than this overwhelming bipartisan support is that RLUIPA was drafted and supported by a team of religious liberty and civil rights lawyers who are frequently divided as to how the United States Constitution should be interpreted and applied.”\(^{205}\)

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\(^{200}\) Id.


\(^{203}\) http://www.justice.gov/crt/about/spl/documents/RLUIPA10thAnnivSPLQAs.pdf


\(^{205}\) Timothy J. Houseal, RLUIPA: Protecting Houses of Worship and Religious Liberty, Delaware Lawyer, Fall, 2002.
Although RLUIPA’s primary support came from the more obvious prisoners’ rights
groups and ACLU lobbyists, other smaller groups supported RLUIPA as well.\textsuperscript{206} However, 
RLUIPA also has support from more strict religious practitioners, such as the Quakers. One of 
the main lobbyist groups supporting RLUIPA was Friends Committee on National Legislation 
(FCNL), a Quaker lobbyist group.\textsuperscript{207} 

There is more evidence of this bipartisan support when looking at the \textit{amicus curiae} 
briefs submitted to the Supreme Court in \textit{Cutter v. Wilkinson} supporting RLUIPA’s 
constitutionality and the prisoners’ rights to conform to their religious beliefs by growing their 
head length longer than allowed by prisons.\textsuperscript{208} After \textit{Cutter} was decided, Brian Fahling, senior trial 
atorney for the American Family Association Center for Law and Policy, quipped ruefully: “It is 
a sign of the times, I suppose, that it took a witch and a Satanist to secure the rights of inmates to 
worship.”\textsuperscript{209} 

Nolan noted Cutter v. Wilkinson was a “tremendous victory for those who work to transform the 
lives of inmates through faith” and also noted that faith is usually not encouraged in prisons due 
to the “extra work”). \textit{Id.} at 1. 
\textsuperscript{207} Friends Committee on National Legislation, \textit{Congress Moves to Protect the Free Exercise of 
Religion}, http://fcnl.org/resources/newsletter/oct00/congress_moves_to_protect_the_free_exerc 
e_of_religion/ (accessed July 19, 2011). This group praises Congress for protecting the religious 
liberty of individuals. 
\textsuperscript{208} Cite to appellate brief list for \textit{Cutter}, 411 U.S. 709 (2005). These included: the Rutherford 
Institute, the Americans United for Separation of Church and State, the American Civil Liberties 
Union, the Coalition for the Free Exercise of Religion, Senators Orrin G. Hatch and Edward M. 
Kennedy, the American Correctional Chaplains Association, Former state corrections officials, 
state prisoners, prison fellowship, the Jewish Prisoner Services International, the American 
Catholic Correctional Chaplains Association, the Prison Dharma Network, the Nation 
Association of Evangelicals, the Union of Orthodox Jewish Congregation, the states of New 
York and Washington, and others. 
\textsuperscript{209} B.A. Robinson, Religious Freedom Restoration Acts Additional Attempts at Federal 
2011).
Across the board—from floor debates to the Supreme Court’s consideration of its constitutionality, RLUIPA was far less controversial than its predecessor RFRA. However, that the PLRA was specifically referenced and acknowledged makes it questionable that Congress ever intended a flood of prisoners’ religious practice claims, much less a flood of successful ones. Beyond the practical realities of being pro se litigants, RLUIPA’s protection of prisoners’ religious practice has been severely hindered by the PLRA requirements. One Congressman noted that “[t]his bill limits the right of prison inmates to raise otherwise valid claims under the bill by specifically referencing the Prison Litigation Reform Act.” 210 This same Congressman stated he would urge his colleagues to vote against the RLUIPA bill if the PLRA was specifically referenced, or the PLRA’s application was not in some way limited to certain claims. 211 However, as one scholar convincingly notes, Congress made no attempt to reconcile the apparent PLRA and RLUIPA conflicts before RLUIPA’s enactment. 212

Whether Congressional passage of RLUIPA was a legitimate effort to more fully accommodate the imprisoned faithful or a safely-cynical passage of a popular law never intended to have much of an impact, RLUIPA has been a disappointment.

Ten years later, there have of course been inroads made and progress pushed, but most of this development falls short of RLUIPA’s shining promise.

Derek L. Gaubatz’s “RLUIPA at Four” discusses RLUIPA and describes the statute as a “remarkable departure” from the legislatures and courts’ previous attempts to restrict prisoners’ legal rights. 213 Still, decisions on the merits are rare, with actual relief for the prisoner even more

213 Gaubatz, supra n. 196 at 504.
so. Surviving summary judgment is a cold comfort and says little about changing policies, programs, or legal standards.

Legal impediments—such as the PLRA and the typical absence of counsel—greatly limit many prisoners’ ability to challenge, through litigation, prison policies and regulations that curtail their ability to practice as their consciences dictate. RLUIPA’s alleged intended effect—to help pro se prisoners bring their free exercise claims—is obviously diminished by these hurdles.

For all the helpful language, survival of summary judgments, and political rhetoric, unless a policy challenged or an impediment complained of is actually removed, RLUIPA has not been nearly as successful as prisoners once hoped. Whether a case survives a motion for summary judgment is an interesting academic question. A review of which cases actually grant the prisoners resolution and relief, however, is the truer test of the law. And those successes have been hard-fought and rare indeed.

**RECOMMENDATIONS & PROPOSED AMENDMENTS TO PLRA**

The strong bipartisan support rallied for RLUIPA’s initial passage must now be focused towards fixing this problem. Courts cannot change how the PLRA restricts RLUIPA, since the actual text makes PLRA restrictions explicitly applicable. The political process may be the only real remedy for this problem. If Congress truly intended to protect a prisoner’s rights, or is actually concerned about institutions arbitrarily restricting prisoner’s religious liberties, then there are only two options. First, Congress could specifically exempt RLUIPA claims from PLRA restrictions. Second, Congress could change the PLRA restrictions to ensure more cognizable prisoner’s claims can be litigated in court.
Strange partners—as with the original passage of RLUIPA—have worked at various points toward changes or amendments to the PLRA, which is widely acknowledged to have prevented substantial change otherwise possible under RLUIPA. Although never passed, the Prison Abuse Remedies Act of 2007, which was introduced in the House Judiciary Committee, offered a good deal of hope about how RLUIPA may have eventually become more effective.\textsuperscript{214}

“There are two kinds of walls in American prisons,” wrote ACLU Legislative Counsel Jesselyn McCurdy, “one that keeps prisoners from escaping, and another that keeps the abuse that happens inside from ever reaching the light of day. The Prison Litigation Reform Act creates prisons within prisons, except with paperwork instead of locks and administrative hurdles instead of bars.”\textsuperscript{215} The proposed amendment, among other things, would have exempted juveniles from PLRA’s restrictions, removed the “physical injury” requirement (particularly from free exercise and other constitutional violation claims), and softened exhaustion requirements for all prisoners’ civil lawsuits. The bill failed to progress out of the committee, but its diverse support may lead to the passage of a similar bill in a future legislative session.

That particular proposed bill garnered support from Jeanne Woodford, the former Warden of San Quentin State Prison; Stephen Bright, the President of the Southern Center for Human Rights; various Attorney Generals; and religious leaders from a variety of faith groups. Woodford, perhaps surprisingly, strongly supported and still supports the reform as one frustrated by the PLRA’s harsh restrictions: “For those prison officials who fear the courts, the PLRA provides an incentive to make their grievance procedures more complicated than

\textsuperscript{214} H.R. 4109 110th Congress.  
\textsuperscript{215} ACLU Legislative Counsel Jesselyn McCurdy, statements available online at http://www.aclu.org/prison/gen/34970prs20080422.html (last visited July 25, 2008).
necessary. As a result, prisoners and prison officials are more likely to get tied up in a game of ‘gotcha’ rather than spending that time resolving a prisoner’s complaint.”

And in addition to the “usual suspects” of civil rights and criminal defense litigators, conservative religious leaders also support more generous amendments to the PLRA. As one religious leader testified, “Few prisoners file grievance for the simple reason that they know it is useless to do so and, just as importantly, because they know they are likely to face retaliatory punishment if they do.” That understanding of the realities faced by prisoners mirrors their own concerns and frustrations and helps explain why RLUIPA has not been a more effective tool in free exercise litigation.

Whatever future legislative efforts may entail, any attempts to soften the impacts of the PLRA generally or specifically in relation to RLUIPA should address the PLRA’s burden. Each of these are impediments on their own, but taken together are daunting and frequently fatal to even substantial RLUIPA litigation.

Congress should reevaluate the failed Prisoner Abuse Remedies Act—or craft a document similar to that bill-- and include the initial proposals in the PLRA to ensure that the RLUIPA becomes more effective. Specifically pertaining to the “physical injury requirement,” these recommendations include:  

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218 Although this article is not focused on juveniles, one recommendations would be to repeal the provisions extending the PLRA to juveniles confined in juvenile detention and correctional facilities.
A. Physical Injury Requirement

Repeal the requirement that prisoners suffer a physical injury in order to recover for mental or emotional injuries caused by their subjection to cruel and unusual punishment or other illegal conduct.

B. Repeal the Entire PLRA

If the entire Act were to be repealed, legitimate prisoner claims could be heard in court in a more timely manner. Also, prison administrators determine what “exhaustion” is thus there is no guarantee that a prisoner would be able to exhaust all of the required avenues before being able to have their case heard in court.

C. Exhaustion Requirement

Amend the requirement for exhaustion of administrative remedies to require that a prisoner who has not exhausted administrative remedies at the time a lawsuit is filed be permitted to pursue the claim through an administrative-remedy process, with the lawsuit stayed for up to 90 days pending the administrative processing of the claim.

D. Restrictions on Equitable Authority

Repeal the restrictions on the equitable authority of federal courts in conditions-of-confinement cases.

E. Recovery of Attorney’s Fees

Amend the PLRA to allow prisoners who prevail on civil rights claims to recover attorney's fees on the same basis as the general public in civil rights cases.

F. Filing Fee Provisions
Repeal the filing fee provisions that apply only to prisoners\textsuperscript{219}.

CONCLUDING THOUGHTS: ON THEIR OWN (AGAIN)

From the prisoners’ and others’ observations and experiences, it is clear that fundamental changes to (or abandonment of) the Prison Litigation Reform Act are necessary in order for the legal test of RLUIPA to have the broad impact its text implies. Administrative remedies are frequently difficult to perceive or understand (much less to exhaust), and men have their own reasons for refraining from filing administrative complaints against the wardens who house them.

Nearly a decade later, men are still litigating issues related to fundamental requirements of their faith, and there is little to give hope that the litigation process will ever become easier, less burdensome, or less expensive. Pressure to change prison practices and policies that. On questions so fact driven, a claim that must always be brought by a pro se prisoner will never be a simple one, and although our hopes were great at the outset, the impact has been limited at the very best.

\textsuperscript{219} Prison Abuse Remedies Act of 2007, HR 4109