The Gospel according to the Warden: RLUIPA, the First Amendment, and Prisoners' Religious Liberty Requests

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INTRODUCTION

In a classic scene from the movie The Shawshank Redemption, as the prisoners are lined up facing Warden Norton, the scoundrel prison administrator outlined his philosophy at Shawshank:

I am Mr. Norton, the warden. You are sinners and scum, that's why they sent you to me. Rule number one: no blaspheming. I'll not have the Lord's name taken in vain in my prison. The other rules you'll figure out as you go along . . . . I believe in two things. Discipline and the Bible. Here, you'll receive both. Put your faith in the Lord. Your ass belongs to me. Welcome to Shawshank.¹

As wards of the Maine correctional system, the prisoners' actions were subject to the dictates of Warden Norton and his administration.² Every amenity and privilege Shawshank afforded the inmates would be prison issue, including their religious practices as evidenced by the Bibles thrust upon them.³ Given the complexities of prison administration, prison officials may constitutionally make some regulations that would be unacceptable

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* Juris Doctor Candidate, University of North Carolina School of Law, 2014. A special thanks to all the educators that have taught and inspired me, most especially Butch and Letha Ricks.


² Id.

³ Id.
in almost any other context.\textsuperscript{4} But should a prison's penological interests allow the prison administration to define a prisoner's religion for them in a manner analogous to Warden Norton's prison-issue Bible?

While prisoners may "exist in a shadow world that only dimly enters our awareness," they still have rights based on societal expectations at large.\textsuperscript{5} Ultimately, "the society that these prisoners inhabit is our own,"\textsuperscript{6} and religious rights are some of society's most precious civil liberties.\textsuperscript{7} Many feel the government should not be able to inhibit the religious practices by unreasonably regulating spiritual practice or imposing a government endorsed version of religion. Prisoners have the same desire; however, their right to exercise their faith is understandably curtailed in the prison context.\textsuperscript{8} At the same time, however, prison walls are not a "barrier" to the Constitution.\textsuperscript{9} Prisoners are still entitled to some constitutionally recognized protection of their religious practices, and some inherently unconstitutional government actions are unacceptable even in the prison context.\textsuperscript{10}

Prisons must balance their penological objectives with the religious rights still available to prisoners during their incarceration.\textsuperscript{11} In addition to the Constitution, prisons are bound

\begin{itemize}
\item \textsuperscript{4} See O'Lone v. Estate of Shabazz, 482 U.S. 342, 354–55 (1987) (Brennan, J., dissenting) ("[P]rison is a complex of physical arrangements and of measures . . . which determine the total existence of certain human beings (except perhaps in the realm of the spirit, and inevitably there as well) from sundown to sundown, sleeping, waking, speaking, silent, working, playing, viewing, eating, voiding, reading, alone, with others." (quoting Morales v. Schmidt, 340 F. Supp. 544, 550 (W.D. Wis. 1972))).
\item \textsuperscript{5} Id. at 354.
\item \textsuperscript{6} Id. at 355.
\item \textsuperscript{7} See Braunfeld v. Brown, 366 U.S. 599, 603 (1961) ("The freedom to hold religious beliefs and opinions is absolute.").
\item \textsuperscript{8} See O'Lone, 482 U.S. at 348.
\item \textsuperscript{10} See O'Lone, 482 U.S. at 348.
\item \textsuperscript{11} See id. at 355–56 (Brennan, J., dissenting) ("Prison officials have the difficult and often thankless job of preserving security in a potentially explosive setting, as well as of attempting to provide rehabilitation that prepares some inmates for re-entry into the social mainstream.").
\end{itemize}
by the Religious Land Use and Institutionalized Persons Act (RLUIPA),\textsuperscript{12} which may require the prison to give additional consideration to a prisoner's religious rights.\textsuperscript{13} Under RLUIPA, when an inmate claims that a prison regulation imposes a "substantial burden" on a religious exercise, the prison must show that the regulation advances a "compelling governmental interest" and the regulation is the "least restrictive means of furthering that compelling governmental interest."\textsuperscript{14}

In order to overcome this strict scrutiny standard imposed by RLUIPA, some prisons have found it advantageous to make their own doctrinal determinations regarding inmates' requested religious observances.\textsuperscript{15} First, the prison analyzes and defines what constitutes an acceptable practice within the asserted religion.\textsuperscript{16} Based on this determination, the prison then rules that the prisoner is not entitled to a religious liberty because the requested liberty is not part of the asserted religion.\textsuperscript{17} While this approach may be convenient for prison administrators, it violates the First Amendment's Establishment Clause.\textsuperscript{18}

This Note asserts that the Establishment Clause forbids government entities from basing their decisions on their own interpretation of religious doctrine. As a government entity, prisons are still subject to this core tenet of the Establishment Clause despite their peonological interests. Accordingly, prisons that deny a religious liberty request based on their own determination of religious doctrine are violating the Establishment Clause.\textsuperscript{19}

As it will be referred to in this Note, the "doctrinal determination" approach is a convenient way for prisons to manage the complexities of prison administration and avoid strict scrutiny

\textsuperscript{13} Koger v. Bryan, 523 F.3d 789, 796 (7th Cir. 2008).
\textsuperscript{14} Id.
\textsuperscript{15} See infra Part V.
\textsuperscript{16} See infra Part V.A.2.
\textsuperscript{17} See infra Part V.A.2.
\textsuperscript{18} See infra Part III, V.A.2.
\textsuperscript{19} See infra Part III, V.A.2.
under RLUIPA. Due to its convenience, prisons will continue to use the doctrinal determination approach unless they are explicitly told not to. In order to prevent this problem from spreading, courts should undertake explicit analysis that shows how the doctrinal determination approach fundamentally conflicts with the First Amendment.

Prisoners' constitutional rights are based on the rights society holds as a whole, and Part II gives a general overview of the First Amendment’s Religious Clause outside of the prison context. This Part seeks to establish that while the Free Exercise Clause does not exempt all religiously motivated conduct from government control, it violates the Establishment Clause for government entities to base their decisions on religious doctrine. Part III will establish that while prison administrators may take actions that would be questionable under the Free Exercise Clause outside of the prison context, the Establishment Clause principles that bind government entities still apply to prisoners' management of their prisoners' religious liberties. Accordingly, the Establishment Clause forbids prisons from basing their decisions on doctrinal determinations. Part IV will provide a general overview of RLUIPA and its policy as applied in the prison context. Part V will show how RLUIPA's substantial burden test influences prisons to make doctrinal determinations. Because the doctrinal determination approach is convenient for prison administration, this unconstitutional reasoning will persist unless prisons are explicitly corrected by the courts. Part VI will show how courts can correct the prisons' unconstitutional reasoning, and will suggest some approaches for prisons to constitutionally comply with RLUIPA without excessive sacrifice of their administrative interests.

20. See infra Part V.
22. See infra Part VI.A.
II. THE FIRST AMENDMENT

A. Judicial Scrutiny of Government Actions

Courts employ varying levels of scrutiny when they examine the constitutionality of government actions that affect civil liberties. The amount of scrutiny depends on the civil liberty in question and the government action taken to restrict that liberty. Often, the level of scrutiny the court chooses will determine whether the government action will be upheld or not.

The most deferential level of scrutiny is the rational basis test. The rational basis test only requires that the government action be "rationally related to a legitimate state interest." A legitimate interest is one that is simply not "invidious or irrational." The challenger has the burden of proving that the government is seeking to achieve its purpose in an "arbitrary or irrational way." Under rational basis review, the court will give large deference to the government action, and the challenger is unlikely to succeed.

"Intermediate scrutiny" is a more searching standard than the rational basis test. Under intermediate scrutiny, the government bears the burden of proof, and they must show their action is "substantially related" to achievement of an "important governmental objective[]."

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24. Id. at 539–40.
25. Id. at 540.
26. Id.
29. See id. at 176–77.
30. See id.; see also CHEMERINSKY, supra note 23, at 540.
31. CHEMERINSKY, supra note 23, at 540.
32. See Craig v. Boren, 429 U.S. 190, 197 (1976); see also CHEMERINSKY, supra note 23, at 540–41.
The most stringent level of scrutiny is "strict scrutiny."33 Strict scrutiny limits the types of goals the government can assert to justify its action.34 In contrast to the rational basis test, the government bears the burden of proving the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."35 Under strict scrutiny, courts will employ stringent analysis to the government's goal and methods used to achieve the goal.36 When a court employs strict scrutiny, the government's action is much more likely to be declared unconstitutional.37

The First Amendment protections afforded to religious liberties are subject to varying levels of scrutiny.38 Religious practices and beliefs are among society's most cherished civil liberties. The First Amendments protects religious liberties through its two clauses: the Free Exercise Clause and the Establishment Clause.39 The circumstances surrounding the government's action and the clause at issue in the claim determine whether the court will employ deferential or strict scrutiny.40

B. Free Exercise Clause

The Free Exercise Clause states that "Congress shall make no law . . . prohibiting the free exercise [of religion]."41 In 1940, the Supreme Court applied—or incorporated—the Free Exercise Clause to the states in Cantwell v. Connecticut.42 In addition to

33. CHEMERINSKY, supra note 23, at 541–42.
34. See e.g., Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986) (plurality) (ruling that "providing minority role models for . . . minority students" was not a compelling state interest).
36. See infra note 39.
37. CHEMERINSKY, supra note 23, at 542.
38. See infra Parts II.B–C.
40. See infra Parts II B–C, III.
41. U.S. CONST. amend. I.
42. 310 U.S. 296, 303 (1940); see also CHEMERINSKY, supra note 23, at 1182.
violations through legislation, a state can violate the Free Exercise Clause by compelling the exercise of religion through a government entity. For example, in School District of Abington Township v. Schempp, the Court ruled that compelling a student to participate in a school prayer violated the Free Exercise Clause.

In order to be protected under the First Amendment, the particular practice or observance must be religious and sincere. At the same time, because "there is no single characteristic or set of characteristics that all religions have in common that makes them religions," it is often difficult to determine what beliefs are entitled to constitutional deference as a religion. The Supreme Court's reluctance to attempt to define religion is indicative of this difficulty. For example, while atheists do not believe in a god, they may be entitled to constitutional protections as members of a religion.

Despite the lack of a functional definition of religion, "the Court has made it clear that an individual's sincerely-held religious belief is protected by the First Amendment even if it is not the dogma or dominant view within the religion." The determination of whether a belief is sincere is analogous to determining if a person is acting in good faith. Additionally, whether a belief is sincere is not determined by its perceived importance in the context of a particular religion.

44. See id. at 222; see also Chemerinsky, supra note 23, at 1183.
45. Chemerinsky, supra note 23 at 1187, 1189–90.
46. Id. (quoting George C. Freeman, The Misguided Search for the constitutional Definition of "Religion," 71 Geo. L.J. 1519, 1548 (1983)) (internal quotation marks omitted).
47. Id.
48. Id.
49. Kaufman v. McCaughtry, 419 F.3d 678, 681–82 (7th Cir. 2005) ("A religion need not be based on a belief in the existence of a supreme being.").
51. See United States v. Ballard, 322 U.S. 78, 82 (1944) (noting that the district court correctly instructed the jury that "[t]he question of the defendants' good faith is the cardinal question in this case. You are not to be concerned with the religious belief of the defendants . . . .")
The Court outlined the current approach to Free Exercise cases in *Employment Division v. Smith*. In *Smith*, a private employer terminated the plaintiffs for misconduct due to their use of peyote, which is a "controlled substance" in Oregon, the state where the plaintiffs resided. The State denied plaintiffs' subsequent request for unemployment benefits because of the general law forbidding giving benefits to people dismissed for misconduct. However, the plaintiffs sought to compel the State to pay them unemployment benefits, arguing their use of peyote was compelled by their religion. In other words, plaintiffs sought an exception from the general law forbidding the payment of unemployment benefits to those dismissed for misconduct.

*Smith* ruled that the Free Exercise Clause protects the freedom to believe and the freedom to act. The freedom to believe is protected absolutely. For example, "[t]he government may not compel affirmation of religious belief, . . . punish the expression of religious doctrines it believes to be false, . . . [or] impose special disabilities on the basis of religious views or religious status . . . ." The Court recognized that the freedom to believe entails some action and ruled that it would be unconstitutional for a state to ban certain actions solely because they are motivated by religious beliefs. For example, "[i]t would doubtless be unconstitutional . . . to ban the casting of statues that are to be used for worship purposes or to prohibit bowing down before a golden calf."

Unless a law represents an attempt to "regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs," the rational basis test applies to a

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54. *Id.* at 874.
55. *Id.*
56. *Id.* The plaintiffs were members of the Native American Church. *Id.*
57. See *id.* at 878.
58. See *id.* at 877.
60. *Id.* (internal citations omitted).
61. See *id.* at 877–78.
62. *Id.* (internal quotations marks omitted).
Free Exercise Claim. The Smith Court ruled that "an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." For example, the government is within its right to collect a general tax. If someone adheres to a religion that prohibits paying taxes to an organized government, the Free Exercise Clause does not provide an exemption for that person to avoid paying the tax general tax. The government was within its right to levy the general tax, and the person's religious liberty interest does not afford them a specific exception to not comply with a valid law of general applicability. Accordingly, as long as there is a rational basis for the government action, the fact that it affects a religious practice does not invoke heightened scrutiny.

When a government action affects a religious practice, however, its validity depends upon the practical, secular justifications for the action and not religious doctrine. Smith ruled that Oregon law was not an attempt to regulate religious beliefs, and so applied rational basis review. The Court found that Oregon's peyote ban was based on the rational justification of prohibiting the general public from using harmful drugs. Further, there was a rational connection to Oregon's justification and the denial of unemployment benefits to those who were dismissed for the use of controlled substances, and the plaintiffs were not entitled to an exception based purely on their religious beliefs. Indicative of how a government entity should treat religious doctrine in reaching a decision, the Court simply noted what

63. Id. at 882.
64. Id. at 878–79.
65. Id. at 878.
66. Id.
67. See id.
68. See supra notes 59–67.
69. See infra notes 70–74.
70. See Smith, 494 U.S. at 882–83.
71. See id. at 882.
72. See id. at 883.
73. See id.
religion the plaintiffs' practiced, and its doctrine played no part in the Court's reasoning.  

C. The Establishment Clause

The Establishment Clause states that "Congress shall make no law respecting an establishment of religion." In 1947, the Court applied the Establishment Clause to the states in Everson v. Board of Education. In addition to passing legislation that recognizes an official religion, a state government can take an action that violates the Establishment Clause. For example, in Santa Fe Independent School District v. Doe, the Court held that it was unconstitutional for a high school to facilitate a student lead prayer before a football game because the prayer tended to separate nonadherants from the political community. Additionally, a government can violate the Free Exercise and Establishment Clause by mandating a religious practice. This was the case in School District of Abington Township v. Schempp, where a mandated school prayer prevented a nonadherent from adhering to religion according to their own conscience in a violation of the Free Exercise Clause, and it simultaneously established a state view of religion in violation of the Establishment Clause.

There are three main approaches to the Establishment Clause. The first approach is known as "strict separation" and it is synonymous with the colloquial phrase separation "between

74. Id. at 874, 878–80.
75. U.S. CONST. amend. I.
76. 330 U.S. 1, 7–8 (1947).
77. 530 U.S. 290, 296–97, 320 (2000) (quoting Lynch v. Donnelly, 465 U.S. 689, 688 (1984) (O'Connor, J., concurring) (“School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents that 'they are outsiders, not full members of the political community, and an accompanying message to adherants that they are insiders, favored members of the political community.'”)); see also CHEMERINSKY, supra note 23, at 1219.
79. CHEMERINSKY, supra note 23, at 1192.
80. Id.
Strict separation seeks to preserve religious liberty by forbidding government from comingling with religion entirely. The second major approach is the "neutrality theory," which states that "government cannot favor religion over secularism or one religion over others." In explaining the neutrality theory, one scholar states that "the religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance." The third major approach is the "accommodation" approach. Under this approach, the Court more fully recognizes the important role religion plays in society. The government only "violates the establishment clause . . . if it literally establishes a church, coerces religious participation, or favors one religion over others."

If there is no clear facial violation by law or government action, courts often apply the Establishment Clause test put forth in Lemon v. Kurtzman. The Lemon test seeks to guard against "the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'"

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81. Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) ("The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable.").
82. See id. at 31–32 (Rutledge, J., dissenting).
83. CHEMERINSKY, supra note 23, at 1193.
84. Id. (quoting Douglas Laycock, Formal, Substantive, and Disaggregated Neutrality Toward Religion, 39 DePaul L. Rev. 993, 1001 (1990)) (internal quotation marks omitted).
85. Id. at 1196.
86. Id.
87. Id.
88. 403 U.S. 602 (1971); CHEMERINSKY, supra note 23, at 1202. But see Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398–99 (1993) (Scalia, J., concurring) (describing the Lemon test as "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried. . . . When we wish to strike down a practice it forbids, we invoke it, . . . when we wish to uphold a practice it forbids, we ignore it entirely").
89. Lemon, 403 U.S. at 612 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).
Accordingly, Lemon employs a three-prong test.90 “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’”91

Among the most fundamental notions embodied in the Establishment Clause is that the government is not an authority on religious doctrine.92 Government involvement with religious doctrine has resulted in strife and persecution throughout history.93 This notion is embedded in the history of religious conflict that inspired the drafters of the Establishment Clause.94 As the Court noted in United States v. Ballard,95 “[t]he Fathers of the Constitution were not unaware of the varied and extreme views or religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree.”96 Rather than risk the strife that plagues society by having government base its decisions on religious doctrine, the Establishment Clause provides that government mandates should be based on secular factors.

Government decisions based on religious doctrine are unconstitutional under the Establishment Clause. For example, in Thomas v. Review Board of the Indiana Employment Security Division,97 the plaintiff asserted that his religion forbid him from working on an assembly line that made munitions, and his employment was subsequently terminated after he could not be accommodated within the company.98 Under Indiana employment law, a person is not entitled to unemployment benefits if they are

90. Id.
91. Id.at 612–13 (quoting Walz, 397 U.S. at 674).
92. See United States v. Ballard, 322 U.S. 78, 87 (1944) (ruling that the “Fathers of the Constitution” sought to craft a government where “[m]an’s relation to his God was made no concern of the state”).
94. Id. at 10.
95. 322 U.S. 78 (1944).
96. Id. at 87.
98. Id. at 709.
forced to leave due to their voluntary actions. However, the plaintiff felt an exception should be made because his unemployment was compelled by his religious beliefs. While the Supreme Court held that the government could give deference to the plaintiff's religiously motivated conduct, the Court ruled that whether the plaintiff's conduct was supported by his religion's doctrine was an irrelevant consideration for the government.

Even when the government provides special considerations for religious beliefs, the government may not base its decision on what is acceptable under the religion's doctrine. For example, in Frazee v. Illinois Department of Employment Security, the plaintiff's employment was terminated because he refused to work on the "the Lord's day," and he was subsequently denied unemployment benefits. Under Illinois employment law, a person may leave their job due to their religious convictions and still receive unemployment benefits. However, the Illinois Department of Employment Security determined the plaintiff was not entitled to unemployment benefits because his claim was not supported by his religion's doctrine. The Court ruled that it was "erroneous" for the government to base its determination on religious doctrine, and held that the government could only inquire into whether the plaintiff's beliefs were sincere.

If a government entity is allowed to make individualized determinations of religious doctrine, a court reviewing the entity's decision will inevitably have to make a determination on the doctrine. For example, in Ballard, the defendants were indicted

99. See id. at 711–12.
100. Id. at 710–12.
101. See id. at 715–16.
103. Id. at 830.
104. See id.
105. Id. at 830–31.
106. Id. at 834–35.
107. See Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 715–16 (1981) (ruling that the trial court gave inappropriate consideration to what was "scripturally acceptable"); United States v. Ballard, 322 U.S. 78, 87 (1944) (ruling that, if a trier of fact is forced to consider religious doctrine, they are entering a "forbidden domain").
with eighteen counts of mail fraud after they solicited funds for the “I Am movement.” The defendants asserted that they had, “by reason of supernatural attainments, the power to heal persons of ailments and diseases and to make well persons afflicted with any diseases, injuries, or ailments.” The main issue was whether or not the jury should have been allowed to consider the truth of defendants’ beliefs. Ultimately, the Ballard Court ruled that the issue of the defendants’ good faith could be submitted to the jury, but that the actual truth of what they believed was off limits for a court, as a government entity, to consider.

If a government entity bases its decision on a religion’s doctrine, the entity violates the Establishment Clause. Ballard recognized that, if the validity of the defendants’ religious beliefs was submitted to the jury, the Court would rule on whether a practice is acceptable in light of a particular religion’s doctrine. In effect, a court would be deciding whether or not the individual requesting a religious observance is a heretic. However, as the Court noted, “[h]eresy trials are foreign to our Constitution.” Allowing government entities to define religious doctrine in order

109. Id. at 80.
110. Id. at 85–86.
111. Id. at 86.
112. See infra notes 113–16.
113. See Ballard, 322 U.S. at 86–87.
114. See id.; see also THE NEW SHORTER OXFORD ENGLISH DICTIONARY 1223 (3d. ed. 1993) (defining “heretic” as “1 A person who holds an opinion or a doctrine contrary to the orthodox doctrine of the Christian Church. . . . 2 A person who holds an opinion or a doctrine contrary to the accepted doctrine of any subject”).
115. Ballard, 322 U.S. at 86 (noting that individuals may make whatever assumptions about religion that they want, but these assumptions are no concern of the court. “[W]e do not agree that the truth or verity of respondents’ religious doctrines or beliefs should have been submitted to the jury.”); Grayson v. Schuler, 666 F.3d 450, 453–54 (7th Cir. 2012) (ruling that a prison cannot base its ruling on what it determines to be an official requirement of a religion).
to justify a government’s action is contrary to fundamental notions embodied in the Establishment Clause.\textsuperscript{116}

III. THE FIRST AMENDMENT INSIDE THE PRISON CONTEXT

A. The Free Exercise Clause Inside the Prison Context

1. The \textit{Turner} Standard and its Principles

Whether a prisoner’s religious practices are protected under the Free Exercise Clause is determined by applying the balancing test outlined in \textit{Turner v. Safley}.\textsuperscript{117} The plaintiffs in \textit{Turner} were a male and female, incarcerated in the same prison, who wanted to get married and correspond through the prison’s mail system.\textsuperscript{118} The plaintiffs brought suit after the prison determined that allowing them to correspond or marry while in prison posed too great a safety risk.\textsuperscript{119} \textit{Turner} sought to create a standard that acknowledged prisoners’ rights without compromising legitimate penological interest.\textsuperscript{120}

The \textit{Turner} standard is not one of “heightened scrutiny,” and it seeks to avoid “subjecting the day-to-day judgments” of prison officials.\textsuperscript{121} The \textit{Turner} analysis does not depend upon an analysis of any religious doctrine.\textsuperscript{122} Rather, the \textit{Turner} analysis requires courts to discern the practical, objective impact an act has on the prison’s penological interests, independent of the tenet’s importance in the context of a religion.\textsuperscript{123} Accordingly, the \textit{Turner} Court articulated a reasonableness test that considered four factors:

\begin{itemize}
  \item \textsuperscript{116} See Ballard, 322 U.S. at 87 (noting that the Founding Fathers refrained from involvement with religious dogma).
  \item \textsuperscript{117} 482 U.S. 78 (1987).
  \item \textsuperscript{118} \textit{Id.} at 81–82.
  \item \textsuperscript{119} \textit{Id.} at 91–92, 97.
  \item \textsuperscript{120} See \textit{id.} at 89–90.
  \item \textsuperscript{121} \textit{Id.} at 86–87 (“In none of these four ‘prisoners’ rights’ cases did the Court apply a standard of heightened scrutiny . . . ”).
  \item \textsuperscript{122} See \textit{infra} notes 123–24 and accompanying text.
  \item \textsuperscript{123} See \textit{Turner v. Safely}, 482 U.S. 78, 86–89 (1987) (referencing decisions where prison regulations were based on a connection to an apparent penological interest).
\end{itemize}
(1) whether there is a "valid, rational connection" between the prison regulation and the legitimate governmental interest put forward to justify it;” (2) whether there were other reasonable means available for the prisoner to exercise the right; (3) whether affording the right will have an impact on prison administration; and (4) whether courts should take note that the absence of readily available alternatives should serve as evidence that a prison’s decision was reasonable.124

2. The Turner Standard’s Principles in Application

Outside the prison context, the ways people exercise their religion are not likely subject to governmental scrutiny because these exercises are not likely against the law.125 Even unconventional religious practices will likely remain free from government regulation in the context of normal society.126 For example, it is common for Rastafarians to wear dreadlocks.127 While this might not be considered a normal, neat, and clean hairstyle,128 Rastafarians who exercise their faith in this way will not have their hair length regulated by the government in a normal context.

However, what is innocuous outside a prison may pose a threat to the prison’s safety and security.129 The same dreadlock hairstyle on the street may be constitutionally banned in a prison.130 The Seventh Circuit addressed this issue in Grayson v. Schuler,131 noting that “a ban on long hair, including dreadlocks, even when motivated by sincere religious belief, would pass constitutional

124. Id. at 89–91.
125. See O’Lone v. Estate of Shabazz, 482 U.S. 342, 354–55 (1987) (Brennan, J., concurring) (stating “nor have state governments undertaken to prohibit members of the general adult population from speaking to one another, wearing beards, embracing their spouses, or corresponding with their lovers”).
126. See id.
127. See Grayson v. Schuler, 666 F.3d 450, 454 (7th Cir. 2012).
128. See id. at 451–52.
129. See infra notes 130–34 and accompanying text.
130. Grayson, 666 F.3d at 452.
131. 666 F.3d 450 (7th Cir. 2012).
muster” in the prison context because of the inherent challenges of prison administration. While dreadlocks may be harmless outside the prison context, inside the prison context “prison officials might fear that a shank or other contraband could be concealed in an inmate’s dreadlocks, or . . . they might want inmates to wear their hair short because inmates with long hair can more easily change their appearance, should they escape, by cutting their hair.”

A prison can permissibly regulate religious conduct provided that it does so based on secular, objective factors. While Grayson did not explicitly apply Turner factor by factor, its principles are evident in the Seventh Circuit’s reasoning. In terms of the first factor, the Grayson court noted that there was a valid connection between forbidding long hair and prison security, as long hair can be used to conceal contraband or a shank. In terms of Turner’s second factor, it seems there are few alternatives to having long hair that would pose a reduced safety threat. For example, if a prisoner requested hair extensions similar to dreadlocks, the hair extensions may still have the “formidable length and density” that would enable a prisoner to hide contraband. This is an objective observation that involves no consideration or scrutiny of religious doctrine. Regarding the third factor, the court thought that allowing the dreadlocks poses a burden on prison administration in addition to the safety risk because dreadlocks make it easier for a prisoner to change his appearance if he escapes. Also, long, braided hair presents more hygiene problems that could require the use of prison resources.

132. Id. at 452.  
133. See id. at 452.  
134. Id.  
135. See infra notes 136–40 and accompanying text.  
136. Grayson, 666 F.3d at 452.  
137. See id.  
138. Id.  
139. Id.  
140. Id.
B. The Establishment Clause Inside the Prison Context

1. Prisons’ Duty to Facilitate Prisoners’ Religious Observances

Prisoners are wards of the state, and prisons are responsible for inmates’ well-being and rehabilitation. Part of this responsibility entails allowing of some religious liberties in the prison context. This caretaking function means that a complete separation of church and state is not entirely feasible in the prison context. For example, tax dollars are used to provide for prison chaplains, which would be a clear violation of the Establishment Clause outside of the prison context. As the Court noted in Cutter v. Wilkinson, prisons may afford special privileges for religious liberties without offending the Constitution.

"[P]risoners have a constitutional right to participate in congregate religious services." At times, prisons may consider religious doctrine in order to accommodate a general religious observance. For example, in Davenport v. Artus, it was not unconstitutional for a prison to use the date a religious official suggested for determining when to allow special privileges for a religious holiday. Recognizing a date based on established religious doctrine as determined by a religious official is a valid way to afford a religious liberty because the decision is based on when

143. See Cutter, 544 U.S. at 720–21.
144. See id.
145. See Grayson v. Schuler, 666 F.3d 450, 453–54 (7th Cir. 2012);
CHEMERINSKY, supra note 23, at §12.12.
147. Id. at 719–20.
150. Id. at *2.
most adherents in the prison will want to observe the day of solemnity.\textsuperscript{151} The prison is not saying that the holiday should be celebrated on this day because of their interpretation of a divine mandate.\textsuperscript{152} Rather, in line with their duty to provide religious liberties, the prison is making a logical assumption of how to make the most efficient use of prison resources and accommodate the most inmates.\textsuperscript{153}

However, just because a prison accommodates religious practices in general does not mean it must grant a specific religious liberty request.\textsuperscript{154} For example, in \textit{Davenport}, a prison chaplain circulated a memo that incorrectly stated the date when the prison would facilitate a religious festival, and that some inmates were planning on partaking in the observance.\textsuperscript{155} The plaintiff wanted to attend the gathering, but was not allowed to because he had a conflicting work obligation.\textsuperscript{156} The prison administration denied the inmate's request to attend another time because the prison planned to facilitate the festival on a different date and because of the administrative concerns of allowing the inmate off of his work station for an unsanctioned event.\textsuperscript{157} The \textit{Davenport} court ruled that while a prisoner is entitled to practice his religion, he is not entitled to do so completely on his own terms.\textsuperscript{158}

A prison's reasoning in these determinations is key in balancing whether its involvement with religion violates the Establishment Clause.\textsuperscript{159} In reaching its decision, the prison in \textit{Davenport} did not say that the prisoner was making an incorrect interpretation of religious doctrine.\textsuperscript{160} Rather, the prison determined that allowing the inmate to leave his work post would

\begin{itemize}
  \item \textsuperscript{151} See id. at *17–19 (recognizing that prisons must balance their duty to preserve a prisoner's religious rights with the restraints of their penological resources).
  \item \textsuperscript{152} See id.
  \item \textsuperscript{153} See id.
  \item \textsuperscript{154} See infra notes 155–58 and accompanying text.
  \item \textsuperscript{155} \textit{Davenport}, 2011 U.S. Dist. LEXIS 12505, at *2, 6–8.
  \item \textsuperscript{156} \textit{Id.} at *2–4.
  \item \textsuperscript{157} \textit{Id.} at *6–8, 19–20.
  \item \textsuperscript{158} See \textit{id.} at *20–21.
  \item \textsuperscript{159} See infra notes 160–62 and accompanying text.
  \item \textsuperscript{160} \textit{Davenport}, 2011 U.S. Dist. LEXIS 12505, at *20–21.
\end{itemize}
unduly compromise prison administration, especially considering that he would be allowed to celebrate the festival on another date.\(^{161}\) The prison was not concerned with the correctness of the date in terms of the religion; the prison was concerned with the request's objective impact on penological interests that are not hinged on religious doctrine.\(^{162}\)

2. Doctrinal Determinations and the Establishment Clause

While a prison may be able to regulate religiously motivated behaviors, it must take care to not make individualized determinations regarding the prisoner’s religion.\(^{163}\) For example, in *Grayson*, a prisoner requested that he be able to wear dreadlocks, per his desire to observe the “Nazirite vow of separation” as an exception to the prison’s policy requiring prisoners to have neat hair.\(^{164}\) While the court acknowledged that the prison could forbid the prisoner from having long hair, the Seventh Circuit analyzed the prison’s method of reasoning with particular care.\(^{165}\) The court criticized the prison’s approach in concluding that Rastafarians could wear dreadlocks, but that such a practice was not supported by the prisoner’s religion, the African Hebrew Israelites of Jerusalem.\(^{166}\) Accordingly, the *Grayson* court took exception with the prison’s doctrinal determination in its opinion and ultimately ruled that the prison violated the prisoner’s constitutional rights.\(^{167}\)

A prison’s method of reasoning in denying a prisoner’s request thus determines whether the prison’s decision is constitutional. Neither prisoner in *Davenport* nor *Grayson* was constitutionally entitled to the respective practice they requested.\(^{168}\) However, the prison’s decision in *Davenport* was upheld, while the

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161. *See id.* at *20 (noting that “inmates still retain the right to observe recognized holidays which appear on the religious calendar”).
162. *Id.*
163. *See infra* notes 164–67 and accompanying text.
165. *See id.* at 453–54.
166. *Id.* at 453.
168. *See supra* notes 155–58, 164–7 and accompanying text.
prison’s determination in *Grayson* was rejected, due to their different approaches in reaching their respective determinations. In *Davenport*, religious doctrine may have been relevant in choosing the date to facilitate the religious observance. However, the prison in *Davenport* did not purport to weigh religious doctrine when it determined the prisoner could not leave his work station to observe the religious festival. In *Grayson*, the prison made an individualized determination of what practices were supported by the prisoner’s religion. While the prison’s determination in *Davenport* was acceptable under the Establishment Clause, the doctrinal determination based on the prisoner’s religion in *Grayson* was not.

Thus, when a prison denies a religious request based on a doctrinal determination, the prison violates the Establishment Clause. For example, in *Grayson*, the court noted that “[p]rison chaplains may not determine which religious observances are permissible because [they are] orthodox.” The court seemed to take exception with the way the prison acted as the surrogate religious official in determining whether the inmate should be allowed to wear dreadlocks. *Grayson* criticized the prison’s doctrinal determination in several ways. First, the court noted that “[t]he prison would be hard pressed to defend a rule that only Rastafarians may wear dreadlocks . . . unless it were certain that no other sect, and not even any individual prisoner’s private faith, considers wearing dreadlocks a religious observance.” Second, the court ruled that regardless of what a religion “officially” requires, “heresy is not excluded from the protection of the [First Amendment].” In candid dictum, the *Grayson* court observed

169. See supra notes 150–53 and accompanying text.
170. See supra notes 160–62 and accompanying text.
171. See supra notes 164–67 and accompanying text.
172. See infra notes 173–78 and accompanying text.
173. *Grayson*, 666 F.3d at 455 (citing Vinning-El v. Evans, 657 F.3d 591, 595 (7th Cir. 2011)).
174. See id. at 455.
175. Id. at 453–54.
176. Id. at 453.
177. Id. at 454.
that "the founders of Christianity (Jesus Christ, the Apostles, and St. Paul) were Jewish heretics; Luther and Calvin and the other founders of Protestantism were Catholic heretics."178

3. Doctrinal Determinations and the Lemon Test

The Lemon test is relevant in assessing the constitutionality of prisons making their determinations based on religious doctrine.179 Using religious doctrine to delegitimize an individual’s claim to religious liberty is troubling in light of Lemon’s third prong, which forbids "excessive government entanglement with religion."180 For example, the court in Grayson appears to recognize this problem with respect to the discussion of heresy.181 In addition, Grayson indicates that it would be hard to determine whether a prisoner should be afforded a religious liberty based on what a traditional African Hebrew Israelite of Jerusalem should believe, noting that “African Hebrew Israelites of Jerusalem might well deem taking the Nazirite vow an appropriate supplemental observance, and a religious believer who does more than he is strictly required to do is nevertheless exercising his religion.”182 On the other hand, the court stated that it could not base its decision solely on whether the prisoner’s practice were in line with the religion’s other doctrine, noting:

There is more to the Nazirite vow than just not cutting one’s hair, such as not eating or drinking any grape product or going near dead bodies, Numbers 6:4-6, and perhaps someone

178. Id.
181. See supra notes 177-79 and accompanying text.
182. Grayson, 666 F.3d at 454 (citation omitted).
who took the vow and let his hair grow but ignored the other proscriptions could be thought insincere—though . . . a sincere religious believer doesn’t forfeit his religious rights merely because he is not scrupulous in his observance; for what would religion be without its backsliders, penitents, and prodigal sons?\textsuperscript{183}

This situation could be further complicated if the requested observance is determined to be impermissible under the asserted religion, but is justified under another.\textsuperscript{184} In such a situation, the prison would be making two doctrinal determinations: one for the religion that allows for the observance, and another for the religion that does not.\textsuperscript{185} The prison would then have to pit their two doctrinal determinations against each other in order to show why one religion justifies an observance and the other does not support the observance.\textsuperscript{186} As the\textit{ Grayson} court noted, “such a rule would discriminate impermissibly in favor of one religious sect.”\textsuperscript{187} Additionally, the prisoner is forced to choose between staying with his current religion or switching his religious affiliation so he can partake in the requested observance.\textsuperscript{188} Even in the prison context, allowing a government entity to base its decisions regarding religious liberties on its own doctrinal determination runs afoul of the Establishment Clause.

IV. RLUIPA

The Court’s decision in\textit{ Employment Division v. Smith} marked a change in Free Exercise jurisprudence that caused public

\begin{quote}
\textsuperscript{183} Id.
\textsuperscript{184} See id. at 453.
\textsuperscript{185} See id. 454–55 (noting the difficulties of determining whether something is valid assertion of a religious exercise under one religion but not another).
\textsuperscript{186} See id.
\textsuperscript{187} Id. at 453.
\textsuperscript{188} See Koger v. Bryan, 523 F.3d 789, 799 (7th Cir. 2008).
\end{quote}
Before Smith, the understood standard of review for a Free Exercise claim was strict scrutiny, as outlined in Sherbert v. Verner. While Smith ruled that the constitutional standard for Free Exercise was the rational basis test, it also noted that states could enhance citizens' religious rights through the political process. Smith sparked public concern that the government would unduly interfere with religious liberties.

In response to Smith, Congress enacted the Religious Freedom and Restoration Act (RFRA), which mandated that courts apply strict scrutiny for all Free Exercise claims. Accordingly, RFRA sought to statutorily enforce the former controlling Free Exercise standard of Sherbert by mandating that courts apply strict scrutiny when a government action imposes a substantial burden on a person’s religious exercise:

Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability . . . [unless] [the] Government . . . demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

However, in City of Boerne v. Flores, the Court invalidated RFRA as it applied to states due to what the Court considered an improper assertion of power under the Fourteenth Amendment. The Boerne Court held that Congress can “enforce” constitutional

197. See generally id. (ruling that RFRA is unconstitutional as applied to the states).
rights by asserting the Fourteenth Amendment, but it cannot create new ones. The Court ruled that RFRA purported to create a new constitutional standard, and it could not be imported on the states through the Fourteenth Amendment. While RFRA was still valid against the federal government, citizens still felt their religious liberties were vulnerable.

In response to Boerne, Congress enacted RLUIPA and made the statute applicable to institutionalized persons. In contrast to RFRA, RLUIPA's scope is limited to claims relating to burdens associated with "land use regulation[s]" and "persons residing in or confined to an institution." Additionally, Congress asserted its authority to pass the statute by using its power under the Commerce Clause rather than the Fourteenth Amendment, as it had done when passing RFRA. Similar to RFRA's use of Sherbert's standard, RLUIPA requires courts to use strict scrutiny when a government action imposes "a substantial burden on the religious exercise" of an incarcerated person:

No Government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

199. See id.
200. Id.
201. See Cutter v. Wilkinson, 544 U.S. 709, 714 (2005) ("RLUIPA is the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens, consistent with this Court's precedents.").
204. See id.
205. Id.
Congress extended RLUIPA to prisoners in large part because of the arbitrary way prisons were managing prisoners' religious practices.\textsuperscript{206} Instances of prisons' capricious decision making were legion across the country.\textsuperscript{207} For example, a prison in Ohio refused to provide a Muslim prisoner with Halal food, despite offering Kosher food.\textsuperscript{208} Prisons in Michigan prohibited the lighting of Chanukah candles, even though the prison permitted "smoking, cooking and the lighting of votive candles."\textsuperscript{209} A priest responsible for ministering to prisoners in Oklahoma fought with a prison for nearly a year over whether he could administer a small amount of sacramental wine to Catholic prisoners.\textsuperscript{210} Congress felt that in

\begin{itemize}
  \item \textsuperscript{206} See Cutter v. Wilkinson, 544 U.S. 709, 716 (2005).
  \item \textsuperscript{207} See infra notes 208–10.
  \item \textsuperscript{208} Protecting Religious Freedom After Boerne v. Flores: Hearing Before the H. Comm. On the Judiciary, 105th Cong. 2d Sess., pt. 3, p. 11, n.1 (1998) [hereinafter Boerne Hearings] (statement of Marc D. Stern, Legal Dir., Am. Jewish Cong.). "Halal is an Arabic word that literally means 'permissible' or 'lawful.' Conventionally, halal signifies 'pure food' with regard to meat in particular by proper Islamic practice as ritual slaughter and pork avoidance." \textit{John Fishcer, The Halal Frontier: Muslim Consumers in A Globalized Market 1} (1st ed. 2011). The prison was able to maintain this position because they claimed that Halal food was unavailable, there was one firm that produced both Kosher and Halal food. \textit{Boerne Hearings, supra} at 11 n.1. The committee reports indicate that the prison's decision was not fair and it "should have been different." \textit{Id.}
  \item \textsuperscript{209} Boerne Hearings, supra note 208, at 41 (statement of Issac M. Jaroslawicz, Dir. Of Legal Affairs for the Aleph Institute). The candles on the menorah are "connected to light, which dominates Jewish symbolism as the "Lamp of God", the divine light . . . ." Rachel Hachilili, The Menorah, The Ancient Seven-Armed Candelabrum: Origin, Form, and Significance 206 (John J. Collins et al. eds., 1st ed. 2001). Given that the prison allowed inmates to maintain other sources of fire, it curiously maintained the reason it forbid the lighting of Chanukah candles fire safety. \textit{Boerne Hearings, supra} note 208, at 41. According to the committee report, "officials insisted on enforcing the ban even after some good-hearted institutional fire marshals offered to stand over the communal menorahs with fire extinguishers for the 40 minutes that the candles would burn." \textit{Id.}
  \item \textsuperscript{210} \textit{Boerne Hearings, supra} note 208, at 58–59 (statement of Donald W. Brooks, Reverend, Diocese of Tulsa, Okla.). Many adherent to the Catholicism believe that the sacramental wine literally becomes the blood of Jesus Christ. \textit{See} Bishop's Committee, The New Catholic Answer Bible T-1 (Louis F. Hartman, et al. eds., 1st ed. 2005).\end{itemize}
addition to the deferential *Turner* standard, more oversight was needed to avoid these erratic determinations regarding prisoners’ religious liberties.211

Under RLUIPA, prison administrators must give special attention to prisoners’ religious rights,212 as RLUIPA states no government regulation shall impose “a substantial burden on the religious exercise of a person” unless the regulation is “in furtherance of a compelling governmental interest” and “is the least restrictive means of furthering that compelling governmental interest.”213 Thus, if courts determine that a substantial burden exists, then RLUIPA requires courts to evaluate the prison’s regulation under the strict scrutiny standard.214

The statute was challenged in *Cutter v. Wilkinson*, and the Court ruled that, on its face, RLUIPA does not violate the Establishment Clause.215 The prisoner-plaintiffs sought redress under RLUIPA due to what they perceived as the prison unjustifiably placing a substantial burden on their various “nonmainstream” religious practices.216 The prison responded by saying that RLUIPA violated the Establishment Clause by improperly advancing religion.217 The *Cutter* Court ruled that just because a consideration is given to religious freedoms does not mean there is a constitutional requirement to give special consideration to secular freedoms as well.218 RLUIPA mandates

212. *See* Koger v. Bryan, 523 F.3d 789, 796 (7th Cir. 2008).
215. *Id.* at 714, 721 (2005) (“RLUIPA thus protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government’s permission and accommodation for exercise of their religion.”).
216. *Id.* at 712–13.
217. *Id.* at 713.
218. *Id.* at 724 (citing Corp. of Presiding Bishop of the Church of Jesus Christ of Latter- Day Saints v. Amos, 483 U.S. 327, 338 (1987)) (“Religious accommodations . . . need not ‘come packaged with benefits to secular entities.’”); Madison v. Riter, 355 F.3d 310, 318 (4th Cir. 2003) (“There is no requirement that legislative protections for fundamental rights march in lockstep.”)).
that its policies be enforced neutrally.\textsuperscript{219} RLUIPA imposes no affirmative duty to facilitate or subsidize religion,\textsuperscript{220} and prisons are still allowed to consider legitimate penological interests.\textsuperscript{221}

Despite the Cutter Court's ruling that RLUIPA does not violate the Establishment Clause, whether RLUIPA will persist is still not entirely clear. As noted above, the real issue with a federal statutory enhancement of religious liberties is how Congress asserted its authority to pass the statute in the first place.\textsuperscript{222} However, Cutter only granted certiorari on the RLUIPA Establishment Clause issue and did not address whether RLUIPA is a permissible assertion of Congress' power under the Commerce Clause.\textsuperscript{223} Accordingly, it is not guaranteed that RLUIPA will survive a challenge to Congress' authority in enacting the law.\textsuperscript{224}

V. ESTABLISHMENT CLAUSE ISSUES WITH PRISONS' APPLICATION OF RLUIPA

A. How RLUIPA's Substantial Burden Test Influences Prisons to Make Doctrinal Determinations in Violation of the Establishment Clause

1. Substantial Burden Analysis Under RLUIPA

RLUIPA does not provide an express definition for what constitutes a "substantial burden."\textsuperscript{225} Courts have described substantial burden in many ways. A substantial burden could be something that imposes "significant pressure which directly coe..."
the religious adherent to conform his or her behavior accordingly.\textsuperscript{226} A substantial burden could also be as strict a standard as having to demonstrate that the prison regulation made a sincerely regarded religious observance "effectively impracticable."\textsuperscript{227} "[A]t a minimum the substantial burden test requires that a RLUIPA plaintiff demonstrate that the government's denial of a particular religious item or observance was more than an inconvenience to one's religious practice."\textsuperscript{228}

In a RLUIPA claim, whether a court will uphold a prison's action largely depends on whether the action is found to constitute a substantial burden, because that determines whether strict scrutiny will be applied.\textsuperscript{229} An example of the outcome determinative nature of this decision is \textit{Benning v. Georgia},\textsuperscript{230} where the prison had a grooming policy that barred prisoners from having facial hair or long sideburns.\textsuperscript{231} The prison also had a policy of not providing for religious materials, but allowing prisoners to have them if the materials were purchased by the prisoner or donated.\textsuperscript{232} Ralph Benning, the prisoner and an adherent to Judaism, grew earlocks and facial hair in accordance with what he asserted were the tenets of Torah-Observant Judaism.\textsuperscript{233} Benning requested that he be allowed to keep his earlocks without cutting them.\textsuperscript{234} Additionally, Benning requested a depilatory because he claimed it was the only way he could remove his beard without offending his religion.\textsuperscript{235} Each of Benning's requests were denied, and Benning filed suit claiming that requiring him to remove his

\begin{thebibliography}{235}
\bibitem{226} Smith v. Allen, 502 F.3d 1255, 1277 (11th Cir. 2007) (quoting Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004)) (internal quotation marks omitted).
\bibitem{227} Koger v. Bryan, 523 F.3d 789, 799 (7th Cir. 2008).
\bibitem{228} \textit{Smith}, 502 F.3d at 1278 (citing \textit{Midrash}, 366 F.3d at 1227).
\bibitem{229} See \textit{infra} notes 230–37 and accompanying text.
\bibitem{231} \textit{Id.} at 1374–75.
\bibitem{232} \textit{Id.} at 1380–81.
\bibitem{233} \textit{Id.}
\bibitem{234} \textit{Id.} at 1375.
\bibitem{235} \textit{Id.} at 1374.
\end{thebibliography}
earlocks and to spend his own money for a depilatory substantially burdened his religious observance under RLUIPA. 236

The District Court for the Middle District of Georgia found that denying Benning’s request to keep his earlocks constituted a substantial burden. 237 The court then applied a precise analysis to the prison’s regulation, noting that the point of disagreement was “the area between the bottom of Benning’s ear canal and the bottom of his ear lobe, an area estimated . . . to be less than one half inch in length.” 238 The court acknowledged that the prison asserted “several compelling interests” for not allowing the earlocks, including safety and security, and hygiene. 239 However, the court went on to criticize the imprecise way the prison applied its policy to Benning’s circumstances, noting that the prison failed to offer a “sufficient basis to justify their concern that [the prison’s] interests will be compromised if they accommodate Benning’s request.” 240 In contrast to the earlock request, the court found that the prison’s decision to deny the depilatory request did not constitute a substantial burden because there was evidence that Benning could afford the depilatory and he was not otherwise denied a reasonable opportunity to practice his religion. 241 Accordingly, the prison was awarded summary judgment on the depilatory issue. 242

Given the similarity between the two prison regulations, it seems that both of Benning’s claims should have reached the same outcome in terms of the regulation’s impact on Benning’s religious practice. 243 Both requests involved the same grooming policy and facial hair. 244 The denial of the requests was based on the same justifications for the same prisoner. 245 However, the court felt

236. Id.
237. Id. at 1381.
238. Id. at 1382.
239. Id.
240. Id. at 1384.
241. Id. at 1381.
242. Id.
243. See infra notes 245, 247 and accompanying text.
244. See Benning, 845 F. Supp. 2d at 1374.
245. See id. at 1374–75.
persuaded by an Eight Circuit case[^246] that stood for the notion that requiring prisoners to finance their own religious practices did not constitute a substantial burden.[^247] Despite the *Benning* Court's reliance on precedent, the outcome of the case still seems curious.

The reasoning in *Benning* shows that there is no clear standard for what constitutes a substantial burden under RLUIPA.[^248] Despite holding that Benning's depilatory claim constituted a substantial burden, the court acknowledged that the outcome could have been different in another jurisdiction.[^249] In contrast to a Tenth Circuit ruling,[^250] the court felt that Benning had sufficient financial resources to pay for the depilatory, so the prison's stance on the depilatory did not constitute a substantial burden.[^251] As demonstrated by the *Benning* decision, there is no clear standard as to what specific factors will or will not be persuasive in a RLUIPA substantial burden determination.[^252] With no clear indication of what a court will find persuasive, prisons will look for any means they can to disprove the presence of a substantial burden.

[^247]: See *Benning*, 845 F. Supp. 2d at 1381 (citing *Patel*, 515 F.3d at 814). In *Patel*, the Eighth Circuit ruled that requiring a prisoner to pay for meals that complied with his religion's tenets did not constitute a substantial burden under RLUIPA. *Patel*, 515 F.3d at 814.
[^248]: See infra notes 249–53 and accompanying text.
[^249]: *Benning*, 845 F. Supp. 2d at 1381.
[^250]: Abdulhaseeb v. Calbone, 600 F.3d 1301, 1317–18 (10th Cir. 2010). The court in Abdulhaseeb ruled that an indigent plaintiff did not have to exhaust all available means of practicing his religion before he could assert that a prison's refusal to provide him with kosher food constituted a substantial burden. *Id.*
[^251]: *Benning*, 845 F. Supp. 2d at 1381.
[^252]: See *supra* notes 249–52 and accompanying text.
2. Prisons’ Doctrinal Determinations in Negating the Presence of a Substantial Burden

a. RLUIPA and Doctrinal Determinations

A strict textual reading of RLUIPA seems to suggest room for prisons to weigh in on whether there is a substantial burden. RLUIPA protects a sincere religious exercise regardless of whether it is “compelled by, or central to, a system of religious belief.” Yet, it seems that some religious justification will be necessary to prove the prison regulation poses something more than an “inconvenience.” While RLUIPA states that it is the plaintiff’s burden to prove there is a substantial burden, nothing in RLUIPA’s text provides strict rules for determining if a substantial burden exists. Furthermore, RLUIPA does not explicitly prevent a prison from providing input on whether its regulation imposes a substantial burden on a specific prisoner’s religion. Accordingly, there is no explicit impediment under RLUIPA that prevents a prison from determining what religious practices are worthy of deference under RLUIPA.

By making an individualized doctrinal determination, a prison can negate the assertion that its regulation imposes a substantial burden. RLUIPA requires that the requested exercise be religiously motivated. By making a determination that the prisoner is not an official adherent to a particular religion or that the asserted religion does not entail the requested exercise, the prison can thus determine that the religious justification is

253. See infra notes 255–58 and accompanying text.
255. See supra note 228 and accompanying text.
256. See 42 U.S.C. §§ 2000cc-1 to -5 (2006) (“[T]he plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff’s exercise of religion.”).
257. See id. The statute notes that “the government shall bear the burden of persuasion on any element of the claim” except for the substantial burden analysis. Id.
258. See infra notes 259–62 and accompanying text.
tenuous.\textsuperscript{260} The hope is that if the prison can establish that the
religious justification is tenuous, a court will be less likely to see this
burden as substantial.\textsuperscript{261} However, as noted above, this approach
raises serious questions regarding the Establishment Clause.\textsuperscript{262}

By itself, the strict text of RLUIPA is not enough to deter
prisons from making doctrinal determinations in order to negate
the presence of a substantial burden.\textsuperscript{263} There is no clear definition
of substantial burden in RLUIPA or the existing caselaw.\textsuperscript{264} As with
many case-by-case determinations, different factors may be more
persuasive to different courts in the course of a substantial burden
analysis.\textsuperscript{265} However, the key element in any substantial burden
determination is the prison regulations effect on the prisoner's
religious exercise,\textsuperscript{266} and there is nothing in RLUIPA that prevents
a prison from having input in this determination. Establishment
Clause issues notwithstanding, prisons will primarily look for ways
to refute the presence of a substantial burden, and in strict terms of
RLUIPA, making a doctrinal determination seems to be a viable
approach.\textsuperscript{267} In order to prevent the use of such unconstitutional
reasoning by prisons, courts need to make explicit reference to the
Establishment Clause issues from making doctrinal determination.

\textbf{b. The Doctrinal Determination Approach and Substantial Burden
Analysis}

In seeking to comply with RLUIPA, the prison in Benning
adopted the doctrinal determination approach.\textsuperscript{268} In denying
Benning's request for a depilatory, the prison relied on a rabbi's
interpretation for what it takes to officially become Jewish.\textsuperscript{269} In

\textsuperscript{260} See id. at 1377–78.
\textsuperscript{261} See id.
\textsuperscript{262} See supra Part III.B.
\textsuperscript{263} See infra notes 266–68 and accompanying text.
\textsuperscript{264} See supra Part V.A.1.
\textsuperscript{265} See supra notes 249–52 and accompanying text.
\textsuperscript{267} See supra notes 254–261 and accompanying text.
\textsuperscript{269} Id. at 1377–78.
order for Benning to be entitled to religious privileges as a Jew, the prison determined that he must either be born Jewish or go through a "formal conversion process." The prison justified their conclusion that Benning could not be Jewish by presenting a record of Benning's family history and citing Benning's admission that he had not gone through a formal conversion process. Further, the prison asserted that requiring Benning to cut his earlocks did not constitute a substantial burden because he could "practice his religion in other ways."

The prison's use of the rabbi's interpretation and Benning's genealogy offends fundamental notions of the Establishment Clause. The prison, as a government institution, based its decision on a religious official's opinion to determine who could be Jewish and who could not. The prison made a determination based on religious doctrine by saying that Benning could not be Jewish unless he complied with the view established by the prison via the rabbi. In other words, Benning could not be Jewish unless he complied with the prison's view of what it takes to become a Jew.

The court in *Benning* did not address the fundamental problems with the prison's approach to Benning's request. The court correctly noted that the law will recognize someone's faith as sincere even if they do not take a conventional approach to their respective religion. Although the prison's approach seems to be fundamentally wrong, the court describes it simply as "misplaced."

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270. *Id.* at 1378.
271. *Id.* Benning's mother was Jewish by birth, but she practice Christianity. *Id.*
272. *Id.* at 1380.
273. See infra notes 274–78 and accompanying text.
275. See *id*.
276. See *id*.
277. See *id*.
278. See infra notes 279–89 and accompanying text.
280. *Id.* at 1378; see supra notes 269–78 and accompanying text.
than “misplaced,” it was an affront to core constitutional principles embodied in the Establishment Clause.

Prisons often look to courts to determine the approach they should take with their regulations, and given their administrative concerns, prisons will adopt procedures to the extent the law allows. For example, in *Benning*, the prison’s interpretation of caselaw appears to have driven its belief that its position on Benning’s earlock request was permissible. The court felt the prison’s view of caselaw was inapplicable to the case at bar. However, just as the prison tried to use other cases to their advantage in *Benning*, the prison, and those like it, will look to case law to bolster their administrative determinations. As such, the prison could discern that because its doctrinal determination was merely “misplaced,” it could be useful in other areas. In terms of future religious liberty requests, the prison is not deterred from using its own doctrinal determinations in order to preserve its administrative regulations.

B. The Potential for Prisons’ Unconstitutional Doctrinal Determinations to Persist

1. The Utility of Doctrinal Determinations for Prisons

The doctrinal determination approach is not exclusive to the prison in *Benning*; there have been several cases in recent years where prisons have employed such reasoning.

As noted earlier, in the Seventh Circuit case of *Grayson v. Schuler*, a prison determined that an inmate, a member of the African Hebrew Israelites of Jerusalem, was not allowed to wear

282. *See supra* notes 270–78.
285. *See id.* at 1384.
286. *Id.* at 1378.
287. *See infra* notes 288–304 and accompanying text.
dreadlocks because the prison determined it was not a required tenet of his faith.\footnote{288}

In \textit{Sayed v. Profitt},\footnote{289} Hazhar Sayed, the prisoner and an adherent of Islam, requested to shower outside of "pod-time" so he could perform a "complete ablution" in order to observe Jumah.\footnote{290} Rather than basing its decision on secular, objective factors, the prison in \textit{Sayed} determined the prisoner was not entitled to his request based on a doctrinal determination, even though Sayed did not bring a RLUIPA claim.\footnote{291} The prison based its decision on the text \textit{Islam in Focus} and determined that Sayed could perform a "partial ablution" in his cell rather than taking a shower out of pod-time to receive a full ablution.\footnote{292} While the prison in Sayed may have been able to uphold its regulation without a doctrinal determination,\footnote{293} the prison elected to use an unconstitutional doctrinal determination to reach its decision.

In \textit{Koger v. Bryan},\footnote{294} a prisoner and an adherent of Thelema, requested a kosher diet in accordance with his asserted faith.\footnote{295} The prison denied his request due to its determination that members of Thelema had no dietary requirements.\footnote{296} Once again, the prison denied a religious liberty request based on its own doctrinal determination.\footnote{297}

A particularly egregious doctrinal determination was made by the prison in \textit{Nelson v. Miller}.\footnote{298} In \textit{Nelson}, Brian Nelson, a prisoner and practicing Catholic, requested he be afforded a non-
meat diet either every day or on Fridays as an act of penance. While the prison did provide non-meat meals for religious adherents, in order to receive such a meal, a prisoner's request had to be approved by the prison's chaplain, Carl Miller, an ordained Lutheran minister. In denying Nelson's request, Miller based his decision on his determination that a non-meat diet "is not required by the Roman Catholic faith nor does Jesus of God's Word command abstention from meat on Fridays for penance." Moreover, Miller sought to bolster his justification by citing bible passages that he thought illustrated "examples of true penance." Notwithstanding Miller's questionable synopsis of Catholic doctrine, Miller's doctrinal determination is an impermissible way to handle a prisoner's religious liberty request no matter what the underlying faith may be.

In many of these cases, the prisons that employ the doctrinal determination approach go to great lengths to deny simple and innocuous requests from prisoners. While some prisons forbid prisoners from growing long hair or beards because the extra hair can be used to hide contraband, the prison in Grayson allowed Rastafarians to grow dreadlocks. It seems that if prisons felt that safety was a concern, prisons would not allow any long hair at all. In Sayed, the prisoner was essentially requesting to be able to take a shower at a different time. The prisoner in Sayed was otherwise allowed to take showers, and it is not clear what safety concern or administrative burden would have been compromised by affording the prisoner's request. The concurring

299. Id. at 871.
300. Id. at 871–72.
301. Id. at 872.
302. Id.
303. See id. at 879 ("The Catholic clergy who opined on the matter... both opined that although not required, dietary discipline was a permissible and laudatory way for Nelson to engage in penance.").
304. See infra notes 305–10 and accompanying text.
305. Grayson, 666 F.3d at 453.
306. See id.
308. See id. at 947–48.
opinion in *Koger* went as far as describing the prison’s efforts to deny and litigate Koger’s request as a “waste of time.”

However, from the prisons’ perspective, contesting these seemingly mundane religious requests is not a waste of time. Inherent in the nature of managing hundreds of prisoners, many of whom have a history of violence, every decision a prison makes must be analyzed in the aggregate. An example of this can be found in one of the justifications for the grooming regulations in *Benning*. Despite the apparent innocuous nature of facial hair, the *Benning* court noted:

> [T]he growth of even a short beard would obscure facial features and makes hundreds of decisions that correctional officials have to make each day more difficult. When the prison staff must constantly be aware of the status of inmates beard length, certainly, the job of identification would be made more difficult.

Uniformity is a hallmark of prison management, and prison officials will continually preserve systematic procedures that further their administrative interests. The challenge for prisons in complying with RLUIPA is that a court can overrule a regulation even if it is one of general applicability and not aimed at any particular religion. If one regulation is found to impose a substantial burden, it can affect the prison’s regulations in general. For example, *Benning* notes that there were cases of prison regulations forbidding beards that were not found to impose a substantial burden. However, the court’s reluctance to apply this precedent to earlocks indicated that prisons would have to give extra

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312. *See* *Koger*, 523 F.3d at 800.


consideration whenever a prisoner requested to wear earlocks, complicating prison administration.315

Prisons cannot completely cut off prisoners from religious observances.316 At the same time, when prisons afford a liberty to one prisoner, they may have to afford the same liberty to many others.317 In Grayson, the Seventh Circuit ruled that since the prison allowed Rastafarians to wear dreadlocks, it could not prevent the plaintiff from wearing dreadlocks based on security concerns.318 When the prison gave a special accommodation for one group, it opened up the possibility that the prison would have to give the same accommodation to others.319 Thus, as the Grayson court noted, a “prison could not forbid Rastafarians [from wearing] long hair while permitting American Indians to do so.”320

Notwithstanding the Establishment Clause issues,321 prisons will use doctrinal determinations to avoid strict scrutiny. Making individualized doctrinal determinations allows prisons to afford religious liberties for one prisoner and deny them for another without the threat of a regulation being deemed a substantial burden.322 When prisons are able to define which requests are legitimate, whether or not something imposes a substantial burden thus depends on this doctrinal determination by the prison.323 For example, the prison in Sayed allowed other prisoners to receive a complete ablution via showering, but the prison was able to deny the prisoner in question his individual request due to its doctrinal determination that he was not required to do a complete ablution.324

315. See id.
317. See infra 318–21 and accompanying text.
319. See id.
320. Id. at 455 (citing Reed v. Faulkner, 842 F.2d 960, 963 (7th Cir. 1988)).
321. See infra notes 322–25 and accompanying text.
323. See id.
324. Id. at 947–48.
2. The Traditional Deference Given to Prison Administration

Courts are generally reluctant to second guess the judgment of prison administrators. This was a motivating factor in the formation of the *Turner* factors, as Justice Sandra Day O'Connor noted "prison administrators . . . , and not the courts, [are] to make the difficult judgments concerning institutional operations." As noted above, RFRA afforded the same protections as RLUIPA, and while RFRA was still enforced against the states, a committee report noted that "in most [RFRA] cases, courts found for prison officials." Furthermore, the committee report states that courts tended to not publish their opinions when they did rule in favor of a prisoner. Like RFRA, RLUIPA does completely ensure that prisoners' viable religious rights will not be infringed.

Even with the requirement of strict scrutiny under RLUIPA, courts will often decide in favor of the prison. For example, in *McFaul v. Valenzuela*, the prison had a regulation that prevented prisoners from having any items that cost more than twenty-five dollars. Anson McFaul, the prisoner and a practicing Celtic Druid, wanted a pentagram amulet with a black onyx stone that cost $61.95. The prison felt that McFaul should be able to use an amulet already in his possession and denied his request. McFaul explained why the particular pentagram's shape was important to his religion and offered a sworn statement from his "spiritual teacher." There were also indications that other prisoners had been allowed to retain items over the twenty-five

326. *Id.* at 89 (citing *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 128 (1977)).
328. *Id.*
329. *See infra* notes 330–41 and accompanying text.
330. 684 F.3d 564 (5th Cir. 2012).
331. *Id.* at 569.
332. *Id.* at 568–69.
333. *Id.* at 569–70.
334. *Id.* at 574.
dollar limit. However, the Fifth Circuit ruled that McFaul's explanations were conclusory and that McFaul provided "mixed evidence regarding the central-ity of the onyx" to his religion.

Neither RLUIPA nor the Constitution requires that the religious practice be a central tenant of the religion. Given McFaul's attempt to substantiate why he needed the amulet, the McFaul court may have overemphasized how important a practice has to be within a religion in order for a regulation to constitute a substantial burden. However, the court was more concerned with subjecting the prison's judgment to strict scrutiny, noting that holding McFaul had established a substantial burden would "open the door to finding that any inmate's assertion constitutes a sincerely held religious belief and that any limitation on that belief constitutes a substantial burden . . . ."

3. The Usefulness of Doctrinal Determinations Outside of RLUIPA Claims

While RLUIPA gives prisoners enhanced rights, they are statutory rights that can be repealed just as easily as they were granted. It would not be completely impossible for RLUIPA to be removed or altered. If RLUIPA is no longer in effect and prisons are allowed to make doctrinal determinations, prisoners will be at an even greater risk to being subject to arbitrary regulations of their religious practices. As noted above, courts are generally

335. Id. at 569.
336. Id. at 577.
338. See McFaul, 684 F.3d at 574–77.
339. See id. at 577 (citing Smith v. Allen, 502 F.3d 1255, 2278 (11th Cir. 2007)).
341. See supra notes 223–25; see also Cutter v. Wilkson, 544 U.S. 709, 726 (2005) (noting the possibility for "as-applied challenges" if the requests for religious accommodations under RLUIPA become "excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution").
342. See supra notes 206–12 and accompanying text.
reluctant to second guess prison administrators’ judgments.\textsuperscript{343} This will be especially true should there be no possibility of strict scrutiny under RLUIPA.\textsuperscript{344} For example, in Sayed, the Tenth Circuit expressly endorsed the prison’s doctrinal determination, holding that “[b]ased on Dr. Abdalati’s description of partial ablution, we conclude that no material factual dispute exists regarding whether Sayed can perform partial ablution at the sink in his cell.”\textsuperscript{345}

Even without RLUIPA, prisons may still find it advantageous to make doctrinal determinations in a prisoner’s religious request.\textsuperscript{346} In Sayed, the prison still asserted its doctrinal determination as a reason for denying Sayed's request at trial, despite not being subject to RLUIPA.\textsuperscript{347} Whether or not the prison had a valid reason for its regulation was never addressed because Sayed’s request was not considered problematic enough to warrant any review of the regulation at all.\textsuperscript{348} The prison was able to undercut the legitimacy of Sayed’s request without ever having to address the validity of its own regulation.\textsuperscript{349} Sayed shows that prisons’ doctrinal determinations can be useful in negating prisoners’ religious liberty, even without the possibility of strict scrutiny.\textsuperscript{350} Accordingly, even if RLUIPA is no longer in effect, unconstitutional doctrinal determinations will persist.

Unless courts explicitly note the fundamental constitutional problems with prisons’ doctrinal determinations, these

\textsuperscript{343} See Turner v. Safley, 482 U.S. 78, 89 (1987) (noting that courts should be cautious in questioning the judgments of prison administrators).

\textsuperscript{344} See Koger v. Bryan, 523 F.3d 789, 796 (7th Cir. 2008) (stating that if there is a substantial burden to a sincere religious practice, courts are to apply strict scrutiny to a prison regulation even if it is one of general applicability).

\textsuperscript{345} Sayed v. Profitt, 415 Fed. App’x 946, 949 (10th Cir. 2011).

\textsuperscript{346} See infra notes 347–51.

\textsuperscript{347} See Sayed, 415 F. App’x at 948. The prison was able to secure a summary judgment based on its determination that “partial ablution is acceptable prior to Jumah.” Id.

\textsuperscript{348} See id. at 949–50.

\textsuperscript{349} See id.

\textsuperscript{350} See id. at 948–49. Based on its determination that partial ablution was an acceptable practice for Sayed, the prison then had little difficulty showing that he could perform the ritual with his cell sink. Id.
determinations will continue.\textsuperscript{351} This problem seems to have been recognized in \textit{Grayson}. After deciding for the prisoner-plaintiff on Equal Protection grounds, Judge Richard Posner elaborated extensively on a prisoner’s right to exercise non-orthodox religious beliefs.\textsuperscript{352} Judge Posner expressly noted that “[p]rison chaplains may not determine which religious observances are permissible because [they are] orthodox” practices within a religion.\textsuperscript{353} Despite the general notion that pro se litigants should not be given any special treatment in litigation,\textsuperscript{354} Judge Posner went out of his way to include RLUIPA with the prisoner’s claim, giving special consideration to RLUIPA, despite it not being controlling in the court’s holding.\textsuperscript{355} Given this reference to RLUIPA, it seems that Judge Posner may have been trying to call attention to the constitutional issues of prisons’ doctrinal determinations in evaluating prisoners’ religious liberty requests.

\textbf{VI. PREVENTING THE ENTRENCHMENT OF UNCONSTITUTIONAL DOCTRINAL DETERMINATIONS}

\textbf{A. Ways for Courts to Address Prisons’ Doctrinal Determinations}

A court’s first option in addressing doctrinal determination issues can be found in RLUIPA itself.\textsuperscript{356} For example, in \textit{Koger}, the prison had a policy of determining whether a religious liberty would

\textsuperscript{351} See infra notes 352–56 and accompanying text.
\textsuperscript{352} Grayson v. Schuler, 666 F.3d 450, 453–54 (7th Cir. 2012).
\textsuperscript{353} \textit{Id.} at 455 (citing Vinning-El v. Evans, 657 F.3d 591, 595 (7th Cir. 2011)).
\textsuperscript{355} See \textit{Grayson}, 666 F.3d at 451. The plaintiff sought damages against the defendant in his personal and official capacity. \textit{Id.} The court held that the state’s sovereign immunity bars a plaintiff from seeking damages in a defendant’s official capacity, and that RLUIPA itself does not provide for damages in a defendant’s personal capacity. \textit{Id.} (citations omitted).
\textsuperscript{356} See infra notes 357–66 and accompanying text.
be granted based on whether it was central to the religion’s doctrine and requiring this to be proven through a clergy verification letter.\textsuperscript{357} The prison would only grant a religious liberty request if it determined the observance was supported by religious doctrine via the letter.\textsuperscript{358} In ruling on the inmate’s RLUIPA claim, the court held that it was incorrect for the prison to base its decision on the centrality of a religious practice respective to its doctrine.\textsuperscript{359} Accordingly, the Seventh Circuit went on to hold that the clergy verification requirement constituted a substantial burden on the inmate’s sincerely held religious belief.\textsuperscript{360}

In holding for the prisoner, \textit{Koger} took additional steps to show that the prison undertook an impermissible analysis under RLUIPA, noting that the prison officials did “\textit{exactly what RLUIPA provides they cannot.”}\textsuperscript{361} The court recognized that the prison was using a systematic approach that was not relevant to a RLUIPA determination.\textsuperscript{362} More pointedly, the court’s additional language serves as guidance to prisons that, in order to comply with RLUIPA, they should cease such doctrinal determinations.\textsuperscript{363} Not only was the prison’s religious determination unpersuasive, it was improper and should not be relevant to a court’s ruling.\textsuperscript{364} A prison

\textsuperscript{357.} See \textit{Koger v. Bryan}, 523 F.3d 789, 794–95 (7th Cir. 2008).
\textsuperscript{358.} See id.
\textsuperscript{359.} Id. at 799.
\textsuperscript{360.} See \textit{id.} at 797–800. \textit{Koger's} analysis of whether the belief was sincere was much more akin to a “good-faith test,” noting that Koger chose to continue to request the religious liberty under a religion that he knew the prison administration was unfamiliar with, which further indicated his sincerity because his chances of achieving the liberty would have been greater under a traditional religion. \textit{See id.} at 797. Ultimately finding for the plaintiff, the court held that the prison’s requirements were not part of a compelling state interest. \textit{Id.} at 801. Additionally, the court found that interest asserted by the prison, administration and order, were not compelling, and even if they were, it was not the least restrictive means by which the interest could be achieved. \textit{Id.}
\textsuperscript{361.} \textit{See id.} at 803 (emphasis in original).
\textsuperscript{362.} \textit{See id.}
\textsuperscript{363.} \textit{See id.} at 803 (“The prison officials violated this clearly established right because they required \textit{exactly what RLUIPA provides they cannot . . . }.”).
\textsuperscript{364.} \textit{See id.}
reviewing *Koger* thus might be persuaded to consider other secular reasons in evaluating a prisoner's religious liberty request.\textsuperscript{365}

In addition to noting how doctrinal determinations are not persuasive under RLUIPA, courts should directly address the Establishment Clause problems this approach creates. If a doctrinal determination is only addressed within the terms of RLUIPA, a prison could discern that their doctrinal determination was not inherently flawed, and such an approach still could be used for handling religious liberty requests until the prison must address a RLUIPA claim.\textsuperscript{366} *Koger* recognized this issue by addressing the prison's actions on a more fundamental, constitutional level, noting the prison used a "clergy-as-arbiter-of-orthodoxy standard that had long been rejected."\textsuperscript{367} *Koger*'s holding indicates that the prison is not just on the wrong end of the court's statutory interpretation—the prison's actions are questionable under an established constitutional standard.\textsuperscript{368} Prisons seeking to regulate prisoners' religious observance requests would be advised to reach their conclusions outside of religious doctrine after reading *Koger*'s holding.

While *Koger*'s admonishment of the prison may have been driven by its attempt to justify their qualified immunity ruling,\textsuperscript{369} the Seventh Circuit also seemed to recognize that prisons would look to

\textsuperscript{365} See id. at 801. The court seems to try to provide additional guidance in order to guide the prison's focus. See id. ("[P]rison officials are still entitled to the benefit of the long-standing requirement that a prisoner provide sufficient indicia that his request is borne of a sincerely held religious belief.").

\textsuperscript{366} See supra Part V.B.2.

\textsuperscript{367} See *Koger*, 523 F.3d at 803. The court cites two cases, *Frazee v. Ill. Dep't of Emp't Sec.*, 489 U.S. 829 (1989), and *Jackson v. Mann*, 196 F.3d 316 (2d Cir. 1999), that were decided on constitutional grounds when the government was attempting to justify an action based on a doctrinal determination. See *Koger*, 523 F.3d at 803 (citing Frazee, 489 U.S. at 834; Jackson, 196 F.3d at 320).

\textsuperscript{368} See *Koger*, 523 F.3d at 802–03.

\textsuperscript{369} See id. The court's constitutional language is driven by its discussion of whether Koger would be prevented from receiving damages due to qualified immunity. *Id.* at 802. The court noted that there was a clear standard established by statutes and the Constitution that prevented a prison from making a decision based on the prison's own doctrinal determination. See *id.* at 802–03.
its decision for future guidance. In contrast to Benning, Koger makes it clear that the prison was fundamentally wrong in its approach to addressing the prisoner’s religious liberty request, which decreases the possibility a prison will continue to use impermissible justifications in their decision making process.\textsuperscript{370} As noted above, prisons consider it advantageous to make decisions on religious liberties based on their own doctrinal determinations.\textsuperscript{371} In order to prevent them from doing this, courts should provide clear indications of the implications of such actions even if only technically making a ruling under RLUIPA.

Referencing constitutional concerns in a RLUIPA ruling will not necessarily result in an over-broad determination.\textsuperscript{372} Courts will seek to reach their decisions on statutory grounds before making a constitutional decision, and RLUIPA provides ample means to do this.\textsuperscript{373} At the same time, RLUIPA issues are inherently constitutional issues.\textsuperscript{374} Accordingly, the appropriate role of government in regulating religiously motivated conduct are an appropriate part of the discussion in a RLUIPA decision.\textsuperscript{375} Noting fundamental concerns will not result in a new constitutional decision every time this issue comes before a court. Similar to the approach taken in Koger, courts are well within their right to base their central holding on the statutory claim and then provide further guidance with basic constitutional notions.\textsuperscript{376}

By directly addressing the prison’s doctrinal determination, the Seventh Circuit’s opinion in Nelson shows that courts may directly correct the practice of doctrinal determinations.\textsuperscript{377} As noted

\begin{itemize}
\item \textsuperscript{370} See supra note 414.
\item \textsuperscript{371} See supra Part V.B.2.
\item \textsuperscript{372} See infra notes 373–77 and accompanying text.
\item \textsuperscript{373} See supra notes 357–62 and accompanying text.
\item \textsuperscript{374} See Cutter v. Wilkinson, 544 U.S. 709, 715 & n.5 (2005) (noting that Congress was concerned with unjustified curtailments of prisoners’ religious liberties).
\item \textsuperscript{375} See id.
\item \textsuperscript{376} See Koger v. Bryan, 523 F.3d 789, 801–03 (7th Cir. 2008). The court decided its case first based on the fact that the prison violated RLUIPA, then the court undertook a discussion of what was wrong with the prison’s approach. Id.
\item \textsuperscript{377} See infra notes 378–83 and accompanying text.
\end{itemize}
above, the chaplain in *Nelson* made a doctrinal determination in violation of the Establishment Clause. The court expressly affirmed *Koger’s* approach to substantial burden analysis and ruled that the prison’s determination constituted a substantial burden on Nelson’s sincerely held religious belief. Similar to *Koger*, the *Nelson* court explicitly addressed the shortcomings with Miller’s doctrinal determination, noting “[i]t simply is not appropriate for a prison official to argue with a prisoner regarding the objective truth of a prisoner’s religious belief.” The court still took care to expressly note that the chaplain’s letter “improperly entangled him in matters of religious interpretation” even though court acknowledged that Miller’s determination was not driven by malice towards Catholicism. Thus, the *Nelson* court’s willingness to expressly address the prison administrator’s reasoning shows that it is appropriate for courts to expressly the practice and result of doctrinal determinations in their opinions.

**B. Suggestive Approaches for Prisons’ RLUIPA Compliance**

Managing prisoners’ religious requests under RLUIPA may be difficult, but it is not impossible. While prisons cannot cut off prisoners from religious practice entirely, prisoners legitimately and constitutionally do not have the same expectations of freedom in

378. *See supra* notes 299–304 and accompanying text.
380. *Id.* at 881.
381. *Id.*
382. In slight contrast to *Koger*, the plaintiff in *Nelson* actually brought an Establishment Clause claim. *Id.* Accordingly, the court addressed the doctrinal determination expressly in a section that was separate from the RLUIPA claim. *Id.* at 881–82. However, given the *Nelson* court’s willingness to make specific note of the doctrinal determination, it appears the court would have made note of this in their RLUIPA discussion had the plaintiff not made a specific Establishment Clause claim.
383. *See Cutter*, 544 U.S. at 725–26 (noting that prisons operated for years under strict scrutiny); *Koger*, 523 F.3d at 802 (noting “RLUIPA did not announce a new standard, but shored up protections . . . which had seen frequent litigation in the prison context”).
their religious practices as the general public.\textsuperscript{384} RLUIPA seeks to preserve prisoners' religious rights, but it should not be construed to hamstring prison administrators' judgment.\textsuperscript{385}

Questioning whether a religious observance is sincere is a permissible inquiry under the Establishment Clause and RLUIPA.\textsuperscript{386} Prisons operate under budget constraints and have a right not to provide special privileges where it can be objectively determined the prisoner is not serious about a religious observance.\textsuperscript{387} For example, in \textit{Gardner v. Riska},\textsuperscript{388} a prison correctly denied kosher food to an inmate who repeatedly purchased non-kosher food from the prison's canteen.\textsuperscript{389} Likewise, in \textit{Sharp v. Johnson},\textsuperscript{390} the prison could deny a prisoner's request to lead his own religious service because of concerns that the prisoner was "more interested in placing himself in a leadership position over a group of inmates than obtaining a genuine religious accommodation."\textsuperscript{391} In contrast to doctrinal determinations, a prisoner's motive for requesting a religious observance is a valid inquiry for prison administration, and prisons may permissibility reject requests if they find the requests to be insincere.

\footnotesize


\textsuperscript{385} See Cutter, 544 U.S. at 723 (noting that "due deference to the experience and expertise" should be given to the judgment of prison administrators when a court is evaluating a RLUIPA claim (internal quotations omitted)).

\textsuperscript{386} See Koger, 523 F.3d at 799–800.

\textsuperscript{387} See Gardner v. Riska, 444 F. App’x 353, 355 (11th Cir. 2011) (noting that despite requesting Kosher meals, the record showed the plaintiff bought numerous non-Kosher items from the prisons canteen and heated and consumed these items in front of canteen workers). \textit{But see} Grayson v. Schuler, 666 F.3d 450, 454 (7th Cir. 2012) (in addressing sincerity, the court noted “for where would religion be without its backsliders, penitents, and prodigal sons?”).

\textsuperscript{388} 444 F. App’x 353 (11th Cir. 2011).

\textsuperscript{389} \textit{Id.} at 355.

\textsuperscript{390} 669 F.3d 144 (3d Cir. 2012).

\textsuperscript{391} \textit{Id.} at 148, 155.
A prison may also use doctrinal evidence presented by the prisoner to evaluate the prisoner's motives for the request. For example in Smith v. Allen, the inmate asserted that since many of the other world's religions used a quartz crystal, he should be able to use one when practicing Odinism. However, none of the sources the inmate used to justify this referenced Odinism, and the prison denied the inmate's request, calling it "incomplete and sketchy." In ruling on the inmate's subsequent RLUIPA claim, the court in Allen held that the inmate failed to establish that the prison's ruling constituted anything more than "an inconvenience" to his religious exercise. Accordingly, the inmate was unable to establish a substantial burden, and the prison was entitled to summary judgment.

In contrast to making doctrinal determinations, the prison does not violate the Establishment Clause by responding to an inmate's own doctrinal justifications. For example in Allen, the prison did not say that the crystal could not be important to an Odinist. Rather, the prison analyzed the plaintiff's logic. This distinction is fine but important. The prison did not make an impermissible doctrinal determination; the prison asserted that the inmate did not provide enough evidence to establish a substantial burden. This approach allowed the prison in Allen to comply with

392. See infra notes 393–98 and accompanying text.
393. 502 F.3d 1255 (11th Cir. 2007).
394. Id. at 1278.
395. Id. at 1262.
396. Id. at 1278–79.
397. Id. at 1279.
398. See infra notes 399–02 and accompanying text.
399. See Allen, 502 F.3d. at 1278 ("There is no mention in these third party sources of Odinism, nor is there any indication that a small, quartz crystal is necessary to observe the rites of Odinism.").
400. See id. at 1278 (11th Cir. 2007) ("Indeed, Smith has failed to establish the relevance of the crystal to his practice of Odinism, as he was obligated to do in order to demonstrate that the denial of that item would significantly hamper his religious observance.").
401. See id.
RLUIPA, the Establishment Clause, and still preserve its administrative decision.\footnote{See supra notes 400–02.}

RLUIPA has the potential to be less deferential to a prison regulation than a First Amendment claim.\footnote{See supra Part IV.} With this in mind, responding to a prisoner’s justifications can be a viable option for a prison in responding to a prisoner’s religious liberty requests in general.\footnote{See infra notes 406–08 and accompanying text.} For example, the prison in Sayed could have upheld its regulation without a doctrinal determination. As the plaintiff, it was Sayed’s burden to show how the regulation adversely affected his religious practice.\footnote{Sayed v. Profitt, 415 F. App’x 946, 947 (10th Cir. 2011).} However, Sayed offered little to no specific evidence showing how his religion was burdened by the prison’s decision.\footnote{Id. Sayed appears to have acquiesced to the prison’s use of Islam in Focus as an accurate statement of his beliefs. Id.} Accordingly, the prison could simply determine that Sayed failed to offer sufficient evidence that showed how his religious exercise was adversely affected. The prison’s decision would not be based on a doctrinal determination. Rather, it would be based on the objective and practical conclusion that Sayed could perform the requested religious observance in his cell without being given any special treatment that would burden prison resources.\footnote{See id. at 949–50.}

Thus, prisons can still preserve their prison regulations without using doctrinal determinations.

**CONCLUSION**

In seeking to manage their penological interests with a prisoner’s religious interests under the First Amendment and RLUIPA, prisons are well within their right to question whether a prisoner’s religious belief is sincere. Additionally, prisons may also objectively evaluate the specific justifications a prisoner uses to establish that there is a substantial burden. However, prisons may not make their own individualized determinations of what practices a prisoner’s religion does or does not support. Doctrinal
determinations are contrary to the fundamental Establishment Clause notion that government entities should not be authorities on religion, and despite the constitutional complexities of incarceration, this Establishment Clause principle is applicable in the prison context. In order to ensure that prisons do not make doctrinal determinations, courts should expressly note the constitutional problems with the doctrinal determination approach. When courts directly address the Establishment Clause problems with doctrinal determinations, prisons will be less likely to employ this unconstitutional method of addressing prisoners' religious liberty requests under RLUIPA.