View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by Brooklyn Law School: BrooklynWorks

Journal of Law and Policy

Volume 10 | Issue 1 Article 6

2002

# Power to the Prisoner: The Importance of State Religious Freedom Acts in Preserving the Religious Liberties of Prisoners

Benjamin S. Fischer

Follow this and additional works at: https://brooklynworks.brooklaw.edu/jlp

Recommended Citation

Benjamin S. Fischer, *Power to the Prisoner: The Importance of State Religious Freedom Acts in Preserving the Religious Liberties of Prisoners*, 10 J. L. & Pol'y (2001).

Available at: https://brooklynworks.brooklaw.edu/jlp/vol10/iss1/6

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Journal of Law and Policy by an authorized editor of BrooklynWorks.

# POWER TO THE PRISONER: THE IMPORTANCE OF STATE RELIGIOUS FREEDOM ACTS IN PRESERVING THE RELIGIOUS LIBERTIES OF PRISONERS

*Benjamin S. Fischer**

## INTRODUCTION

Several states have enacted legislation restoring strict scrutiny[1] to any law, rule or regulation that interferes with an individual's free exercise of religion.[2] These state Religious Freedom Restoration Acts ("state RFRAs") were enacted to replace the Federal Religious Freedom Restoration Act ("RFRA"), which was declared unconstitutional by the Supreme Court in *City of Boerne v. Flores*.[3] While these state RFRAs may

---

*Brooklyn Law School, Class of 2002; B.A., Connecticut College, 1997. The author would like to thank his parents, Lynn and Jeff Fischer, and Emily Sollinger for their constant love and support.

[1] *See infra* note 35 and accompanying text (discussing the heightened standard of constitutional review, specifically, the compelling state interest and least restrictive means analysis implemented for claims of religious interference originally enacted under the Religious Freedom Restoration Act of 1993).

[2] ALA. CONST. amend. § 622 (2000); ARIZ. REV. STAT. ANN. § 41-1493.01 (1999); CONN GEN. STAT. ANN. § 52-571b (2001); FLA. STAT. ANN. § 761.03 (1998); IDAHO CODE § 73-402 (2000); 775 ILL. COMP. STAT. ANN. 35/15 (1998); N.M. STAT. ANN. § 28-22-3 (2000); R.I. GEN. LAWS § 42-80.1-3 (1993); S.C. CODE ANN. § 1-32-40 (2000); S.C. CODE ANN. § 1-32-40, 24-27-600 (2000); TEX. CIV. PRAC. & REM. § 110.003 (1999).

[3] 521 U.S. 507 (1997). The Court held that the Religious Freedom Restoration Act of 1993 was unconstitutional because Congress had exceeded the scope of its section 5 enforcement powers of the Fourteenth Amendment.

be effective in lieu of a Federal RFRA in preserving the religious rights of citizens of different states, they have been ineffective in addressing the religious needs of prisoners.

Recently, both houses of Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), a federal law that, among other things, would restore a compelling interest standard and a least restrictive means analysis to any infringement upon a prisoner's religious exercise of religion.[4] President Clinton signed it into law on September 22, 2000.[5] This federal religious freedom legislation, however, will not likely preclude the importance of state religious freedom legislation. The constitutionally tenuous nature of the federal religious protection legislation may only provide a short life span for RLUIPA.[6] If those states that have enacted RFRAs intend their legislation to play an important role in the protection of religious freedom of inmates, they should seek to apply their respective standards of review to laws and regulations that interfere with a prisoner's right to free exercise. Although states have the potential to provide more protection to prisoners' religious rights than the federal government, to date, they have not done so.

Part I of this note will discuss the importance of religious freedom and the Federal RFRA, focusing on its impact on prisoners' free exercise rights. Part II of this note will address the effectiveness of state RFRAs, concluding that current state RFRAs appear to be ineffective in addressing the religious rights of prisoners. Part II will also examine why state religious protection legislation is necessary despite the recent enactment of

---

*Id*. at 519. The Court stated that "Congress's power under section 5 . . . extends only to enforcing the provisions of the Fourteenth Amendment. . . . [Congress] has been given the power to enforce, not the power to determine what constitutes a constitutional violation." *Id*. at 519.

[4] S. 2869, 106th Cong. (2000); *see* 42 U.S.C.A. § 2000cc (2000); 42 U.S.C.A. § 2000cc-1 (2000).

[5] The White House, Office of the Press Secretary, Statement by the President, *available at* http://www.whitehouse.gov/library/hot_releases/September_22_2000_2.html (last visited Sept. 22, 2000).

[6] *See infra* Part II.A (discussing Congress' troubles in enacting religious freedom legislation).

a federal remedy, the RLUIPA. Ultimately, this note will conclude that even though religious protection legislation currently exists for prisoners, those prisoners will ultimately need state religious protection legislation in order to actually preserve their religious liberties.

## I. RELIGIOUS FREEDOM AND PRISONERS' RIGHTS: THE FAILURE OF THE FEDERAL RELIGIOUS PROTECTION LEGISLATION

### A. *The Importance of Religious Freedom in America*

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[7] The free exercise of religion is a fundamental right secured by the First Amendment of the Constitution.[8] The importance of religious free exercise in American life can be traced back to the inhabitants of the colonies of Maryland, Rhode Island, Pennsylvania, Delaware and Carolina in the middle of the sixteenth century.[9] The early colonies were often seen as sanctuaries for certain religious groups.[10] In 1649, Maryland passed the Act Concerning Religion, which contained the first free exercise clause.[11] In its colonial charter, Rhode Island

---

[7] U.S. CONST. amend. I.

[8] *Id.*

[9] *See* City of Boerne v. Flores, 521 U.S. 507, 551 (1997) (O'Connor, J., dissenting) (providing a historical outline of religious freedom in America).

[10] *Boerne*, 521 U.S. at 551 (O'Connor, J., dissenting).

[11] Act Concerning Religion of 1649, *reprinted in* 5 The Founders' Constitution 49, 50 (P. Kurland & R. Lerner eds. 1987); *Boerne*, 521 U.S. at 551 (O'Connor, J., dissenting). The Maryland Act provided that:

> [N]oe [sic] person . . . professing to believe in Jesus Christ shall from henceforth bee [sic] any waies [sic] troubled, Molested or discountenanced for or in respect of his or her religion not in the free exercise thereof . . . nor any way [be] compelled to the beleife [sic] or exercise of any other Religion against his or her consent, soe [sic] as they be not unfaithfull [sic] to the Lord Proprietary, or molest or conspire against the Civill [sic] Government.

afforded its citizens a "liberty of conscience," which protected its inhabitants from being "molested, punished, disquieted or called into question, for any differences in opinion, in matters of religion."[12] Other colonies also offered religious protection with charters that contained similar language.[13] These documents "suggest that, early in our country's history, several Colonies acknowledged that freedom to pursue one's chosen religious beliefs was an essential liberty."[14]Almost one hundred years later, in 1789, the Federal Constitution in its Bill of Rights, and every state constitution except Connecticut, had adopted a free exercise provision.[15]

In modern society, religion is a right taken very seriously not only by general members of the population, but also by the nation's political representatives. Many politicians do not view religion in the abstract or even on a policy level, but instead, make religious traditions and practices part of their own election

---

*Id*.

[12] Charter of Rhode Island and Providence Plantations, 1663, *reprinted in* 8 W. Swindler, SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 363 (1979).

[13] *See* First Charter of Carolina, Art. XVIII (1663); Fundamental Constitutions for East New Jersey, Art. XVI (1683); Concession and Agreement of the Lords Proprietors of the Province of New Caesarea or New Jersey (1664); New York Act Declaring Rights and Privileges (1691); Laws of West New Jersey, Art. X (1681).

[14] *Boerne*, 521 U.S. at 552 (O'Connor, J., dissenting).

[15] THE FEDERALIST NO. 85, at 513 (Alexander Hamilton) (Benjamin W. Wright ed., 1961). In deciding whether or not to adopt a bill of rights, there was much deliberation between the Federalists and Anti-Federalists. The Federalists believed that the rights to be protected in the Bill of Rights were already secure in the Constitution, and that the protection of some rights, might lead individuals to believe that other rights were not protected. *Id*.

Anti-Federalists, on the other hand, wanted their rights codified through explicit assurances that the federal government's power in the area of personal liberty would be restricted mainly because of their concerns that the "Federal Government would overwhelm the rights of states and individuals." *Boerne*, 521 U.S. at 549. In the end, the view of the Anti-Federalists won out, and the protection of religious freedom along with other individual liberties made their way into the Federal Constitution. *Id*.

platforms and legislative agendas.[16] The importance of religion has even united members of different political parties.[17] Both Republicans and Democrats seem to be in agreement on the importance of religious rights, and members of both political parties have embraced the issue by enacting legislation that provides more protection to religious exercise than is mandated under the Federal Constitution.[18] In addition, both civil libertarians and religious leaders, unlikely bedfellows, have joined together in the endorsement of religious protection legislation.[19] Their union provides another indication of the broad

---

[16] In the 2000 presidential race, the religious beliefs of presidential candidates Al Gore and George W. Bush, both born again Christians, received a tremendous amount of attention. Dirk Johnson, *The 2000 Campaign: The Voters; Hearing About God but Wondering About the Issues*, N.Y. TIMES, Sept. 5, 2000, at A23, (stating that George W. Bush declared a "Jesus Day" in his state and that Al Gore, before making a decision, often asks himself, "What would Jesus do?"). Voters and media outlets also dedicated a tremendous amount of press to the religious affiliations of Joe Lieberman, the first Jewish vice-presidential candidate. Since his nomination, Lieberman has often invoked the importance of his belief in God and in his values and belief that more individuals would be better off if they had a stronger commitment to religion. Gustav Niebuhr, *The 2000 Campaign: The Religion Issue; Lieberman Is Asked to Stop Invoking Faith in Campaign*, N.Y. TIMES, Aug. 29, 2000, at A19.

[17] In order to provide greater protection for religious freedoms in the face of state or federal laws that burden religion, even against laws that appear neutral on their face but have the effect of burdening religion, Congress has enacted the Religious Freedom Restoration Act (S. 578, 103rd Cong. (1993)), the Religious Land Use and Institutionalized Persons Act, and has debated the merits of the Religious Liberty Protection Act (H.R. 4019, 105th Cong. (1998)) for over two years. Both the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act (S. 2869, 106th Cong. (2000)) were co-sponsored by Senators Ted Kennedy (D-Mass.) and Orrin Hatch (R-Utah), politicians usually falling on opposite ends of the political and ideological spectrum. S. 578, 103rd Cong. (1993).

[18] *See supra* note 17 (noting the recent religious protection legislation proposed by both major political parties).

[19] For example, both the Leadership Conference on Civil Rights and the Baptist Joint Committee on Public Affairs wrote letters expressing their support for the Religious Land Use and Institutionalized Persons Act of 2000, the latest legislation that protects religious rights. *See* 146 CONG. REC. S7774,

appeal regarding the protection of religious liberties.

### *B. The Rise and Fall of the Religious Freedom Restoration Act: Congress' Attempt to Dignify Prisoners' Free Exercise Claims*

The freedom to exercise one's own religion is not absolute, especially when examined in the context of prisons.[20] While religious liberty is a vital element of American political rights, prisoners are often subject to a great deal of restrictions on their religious exercise.[21] Since prisoners are subject to twenty-four hour control by prison authorities, the exercise of their religious beliefs is often regulated; the day-to-day religious conduct of a prisoner generally rests in the control of others.[22] A prisoner's religious freedom, therefore, is a tenuous liberty. While prisoners retain the right of free exercise, the Supreme Court has developed a doctrine that affords prison officials much leeway in limiting the free exercise of prisoners under the First Amendment and significantly burdening their religious practice.[23]

---

S7777 (daily ed. July 27, 2000); *see also* 146 CONG. REC. E1563-01 (daily ed. Sept. 21, 2000) (statement of Rep. Canady) (noting that the Religious Land Use and Institutionalized Persons Act was "the product of the diligent efforts of more than 70 religious and civil rights groups from all points on the political spectrum").

[20] *See* Pell v. Procunier, 417 U.S. 817, 822 (1974) (holding that an inmate only retains those constitutional rights not incompatible with his status as a prisoner).

[21] *See, e.g.*, *Pell*, 417 U.S. at 822.

[22] Prisoners are "members of a 'total institution' that controls their daily existence in a way that few of us could imagine." O'Lone v. Estate of Shabazz, 482 U.S. 342, 354 (1987) (Brennan, J., dissenting) (citing E. Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates*, 1 (1961)). Prison is a "complex of physical arrangements and of measures, all wholly governmental, all wholly performed by agents of government which determine the total existence of certain human beings . . . from sundown to sundown, sleeping, waking, speaking, silent working, playing, viewing, eating, voiding, reading, alone with others." Morales v. Schmidt, 340 F. Supp. 544, 550 (W.D. Wis. 1972); *see also O'Lone*, 482 U.S. at 354-55 (Brennan, J., dissenting).

[23] *O'Lone*, 482 U.S. at 348 (finding that a prison regulation that restricted

Many of the liberties guaranteed in the Bill of Rights apply with particular caution to prisoners because of the dangerous nature of the prison environment coupled with the state's interest in rehabilitation.[24] Prior to a series of restrictive Supreme Court cases, a prisoner's religious rights could only be burdened by regulations "based upon penological concerns of the '*highest order.*'"[25] A prisoner's right to free exercise was tempered, however, in 1987 by the Supreme Court's decision in *O'Lone v. Estate of Shabazz*.[26] The *O'Lone* Court held that a prisoner's right to free exercise could be infringed if the infringement relates to a "legitimate penological interest."[27] The Court found that a prison restriction prohibiting Muslim inmates from attending weekly Jumu'ah services,[28] was reasonable, not only

---

Muslim inmates from attending weekly religious services was constitutional because the regulation was reasonably related to "legitimate penological objectives").

[24] The rights guaranteed to prisoners under the Bill of Rights and the Constitution have often been held by the Supreme Court to be limited in certain situations. *See Pell*, 417 U.S. at 822 (holding that an inmate only retains those constitutional rights not incompatible with his status as a prisoner); *see also*, Turner v. Safely, 482 U.S. 78 (1987) (upholding prison's First Amendment restriction regarding inmate-to-inmate correspondence); Hudson v. Palmer, 486 U.S. 517 (1984) (limiting an inmate's privacy expectation in determining that he has no reasonable expectation of privacy in his prison cell that would entitle him to Fourth Amendment protection); Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977) (restricting prisoners' First Amendment freedom of association rights by holding that prisoners have no right to form a labor union to redress grievances about prison security); Estelle v. Gamble, 429 U.S. 97, 104-105 (1976) (holding that an inmate's Eighth Amendment medical care claim must prove that the person acted with "deliberate indifference").

[25] S. Rep. No. 103-111, at 8, *reprinted in* 1993 U.S.C.C.A.N. 1892, 1899 (emphasis added).

[26] 482 U.S. 342, 348 (1987).

[27] *O'Lone*, 482 U.S. at 352 (holding that a prison's prohibition against Muslim inmates attending a weekly Jumu'ah service in another prison building was constitutional because the prison had determined that weekly attendance of this service posed security risks and administrative burdens that prison officials found unacceptable).

[28] A Jumu'ah service is a weekly Muslim congregational service

because it related to a legitimate penological interest—in this case, prison safety and order—but also because the court found that inmates were not deprived of the "ability to participate in other Muslim religious ceremonies."[29] In a companion case, *Turner v. Safley*, decided a week prior to *O'Lone*, the Court gave deference to prison administrators by allowing them to restrict inmate-to-inmate correspondence stating, "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform."[30] Moreover, the court found that "running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the Legislative and Executive Branches of Government."[31] This deferential standard displaced the previous "highest order" standard,[32] and lower federal courts went on notice that they were to afford deference to prison officials and administrators. After the *O'Lone* decision, prisoners were forced to live with a burden placed on their religious freedoms, and this burden did not require a substantial amount of justification from those imposing it.

A burden on religion has often proved troublesome to prisoners, many of whom attempt to rehabilitate themselves through spiritual or religious practice.[33] The deference afforded

---

commanded by the Koran that "must be held every Friday after the sun reaches its zenith and before the Asr, or afternoon prayer." *O'Lone*, 482 U.S. at 344; *see also Koran*, 62:9-10.

[29] *O'Lone*, 482 U.S. at 352.

[30] Turner v. Safely, 482 U.S. 78, 84 (1987) (citations omitted).

[31] *Id*. at 84-85.

[32] The Court established this "highest order" standard in *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (stating that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion").

[33] *See* Barnett v. Rodgers, 410 F.2d 995, 1002 (1969) (stating that "[r]eligion in prison subserves the rehabilitative function by providing an area within which the inmate may reclaim his dignity and reassert his individuality"); *see also O'Lone*, 482 U.S. at 368 (Brennan, J., dissenting) (stating that "[t]o deny the opportunity to affirm membership in a spiritual community, however, may extinguish an inmate's last source of hope for dignity and redemption"); Comment, *Religious Rights of the Incarcerated*, 125

to prison officials had detracted from the religious experience of the prisoner, significantly limiting how a prisoner can express himself through religion.[34] Thus, with the application of *O'Lone's* deferential, rational basis approach to the religious rights of prisoners, a prisoner's ability to use religion as an essential element of his rehabilitative process became quite tenuous, until however, Congress enacted RFRA.

The judicially established burden on a prisoner's right to freely exercise his religion began to dissipate in 1993 when Congress passed RFRA.[35] Congress was reacting to the Supreme

---

U. PA. L. REV. 812, 853-54 (1977) (stating that an "inmate's conscience is no less inviolable than that of an unconfined citizen, and a violation could well work an even greater harm upon the inmate, whose means of spiritual recovery are limited by the prison environment").

[34] The deference afforded to prison officials in matters of religious observance has provided the requisite authority for prison officials to deny inmates the right to perform many of the most basic and meaningful religious practices. *See* Rich v. Woodford, 210 F.3d 961 (9th Cir. 2000) (permitting the State of California to execute a man without allowing him to participate in a sweat lodge ceremony, an American Indian equivalent of a last rites ceremony where the man claimed that through the ceremony he would be "purifying his body, mind, and soul, [making] amends for the people he harmed on Earth and [preparing] him to cross over from this world to the next"); Young v. Lane, 922 F.2d 370, 375-76 (7th Cir. 1991) (upholding an Illinois prison regulation that restricted the wearing of yarmulkes); Kane v. Muir, 725 N.E.2d 232, 233 (Mass. 2000) (finding that a prisoner's complaint alleging confiscation of his rosary beads failed to state a cause of action).

[35] Pub. L. No. 103-141, 107 Stat. 1488 (1993). Claims brought under RFRA would be analyzed under a compelling interest test, as opposed to claims brought under the First Amendment's Free Exercise Clause in which prison administrators were given deference in their decision making that affected prisoners. *Id*.

Congress set forth five separate findings regarding why it believed that religious freedom legislation was necessary. Congress found the following:

> (1) the framers of the constitution, recognizing free exercise of religion as an unalienable right, secured its protection on the First Amendment to the Constitution;
>
> (2) laws neutral toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
>
> (3) governments shall not substantially burden religious exercise

Court's ruling in *Employment Division, Department of Human Resources v. Smith*, which held that a neutral, generally applicable Oregon law criminalizing the smoking of peyote was applicable to Native Americans who smoked peyote for religious observance.[36] The legislation had two purposes that, in effect, circumvented the *Smith* decision.[37] The first was to "restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened."[38] The second stated purpose of RFRA was to "provide a claim or defense to persons whose religious exercise is substantially burdened by government."[39]

RFRA specifically provided that the "government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability."[40] It further provided that the government may "substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in the furtherance of a compelling governmental interest; and (2) is the least restrictive

---

> without compelling justification;
>
> (4) in Employment Division v. Smith, 494 U.S. 872 (1990), the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
>
> (5) that the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing government interests.

42 U.S.C.A. § 2000bb(a)(1)-(5) (1993).

[36] 494 U.S. 872, 878-79 (1990); *see also Boerne*, 521 U.S. at 512 ("Congress enacted RFRA in direct response to the Court's decision in Employment Div. Dept. of Human Resources v. Smith.").

[37] 42 U.S.C.A. § 2000bb(b).

[38] 42 U.S.C.A. § 2000bb(b)(1) (citation omitted); *see also* Sherbert v. Verner, 374 U.S. 398, 406 (1963) (holding that a "showing merely of a rational relationship to some colorable state interest" would not justify substantial infringement of party's constitutional right to free exercise of religion).

[39] 42 U.S.C.A. § 2000bb(b)(2).

[40] 42 U.S.C.A. § 2000bb-1(a).

means of furthering that compelling governmental interest."[41] Claims brought under RFRA, unlike claims brought under the Free Exercise Clause of the First Amendment, were subject to the rigorous constitutional standard of strict scrutiny and were examined under a compelling state interest and least restrictive means analysis.[42]

The legislative history of RFRA indicates that, while the rights of prisoners were not explicitly mentioned in the text of the statute, the drafters of RFRA expressly intended for the legislation to apply to prisoners.[43] A Senate report on RFRA under the heading of "Application of [RFRA] to Prisoners' Free

---

[41] 42 U.S.C.A. § 2000bb-1(b)(1)-(2). RFRA was enacted as a direct response to the Supreme Court's decision in *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990) (holding that a neutral law of general applicability criminalizing the use of peyote should not withstand a free exercise challenge from a group of Native Americans who claimed that the use of peyote was an integral part of their religious practice). RFRA's purpose was "to restore the compelling interests test . . . in all cases where the free exercise of religion is substantially burdened." 42 U.S.C.A. § 2000bb-1(b)(1).

[42] In creating RFRA, Congress provided another avenue that supplemented the First Amendment's religious freedom protection. 42 U.S.C.A. § 2000bb-1. Claims brought under the First Amendment challenging the applicability of neutral laws that hindered religious freedom would be reviewed with a deferential slant to the states. *See Smith*, 494 U.S. 872. A claim brought under RFRA, however, would clothe itself in the strict scrutiny that a compelling interest and least restrictive means analysis requires. *See* 42 U.S.C.A. § 2000bb-1(b)(1)-(2); *see also* City of Richmond v. Croson, 488 U.S. 469 (1989) (holding that a minority set aside program was unconstitutional because it failed to meet the strict scrutiny requirements to set aside a certain percentage of jobs on the basis of race).

[43] S. Rep. No. 103-111, at 8 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1899. The report also noted that those who drafted the Act did "not intend [it] to impose a standard that would exacerbate the difficult and complex challenges of operating the Nation's prisons and jails in a safe and secure manner." *Id*. The Committee was confident that the courts would be able to distinguish between claims based on a violation of religious rights and claims that made under the guise of religious rights but brought primarily to obtain special privileges. *Id*. at 1899-1900. The Senate Committee was "confident that the compelling interest standard set forth in [RFRA would] not place undue burdens on prison authorities." *Id*. at 1900.

Exercise Claims" noted that, "as applied in the prison and jail context, the intent of [RFRA] is to restore the traditional protection afforded by prisoners to observe their religious rights which was weakened by the decision in *O'Lone v. Estate of Shabazz*."[44] Congress was concerned that the religious exercise of prisoners was being unduly burdened by prison officials and administrators, and subsequently felt that the reasonableness test established in *O'Lone* was insufficient.[45] It believed that prisoner claims should be addressed through "a more rigorous standard."[46] Furthermore, Congress was wary of "inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post hoc rationalizations," and believed that such regulations and polices would not "suffice to meet the act's requirements."[47] Moreover, when Congress was considering the merits of RFRA, an amendment was proposed that would have "prohibit[ed] the application of [RFRA] to an individual who is incarcerated in a Federal, State or local correctional, detention or penal facility."[48] The Senate overwhelmingly rejected this amendment.[49] Thus, RFRA's legislative history demonstrates Congress' intent—for courts to

---

[44] *Id*. at 1899.

[45] *Id*.

[46] *Id*.

[47] *Id*. at 1900.

[48] 139 CONG. REC. S14461-01 (daily ed. Oct. 27, 1993) (remarks of Sen. Simpson). Senator Alan Simpson, in the Senate's Judiciary Report regarding RFRA, expressed his displeasure and concern that the provisions of RFRA would apply with equal force to prisoners. *See* S. Rep. No. 103-111, at 8 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1899. Senator Simpson was specifically concerned about the effect RFRA would have on the increase in prison litigation because he believed that the least restrictive means test would allow "judges to establish their vision of how prisons should be run by forcing state or Federal government to allow increasingly burdensome forms of inmate contact." 139 CONG. REC. S14461-01 (daily ed. Oct. 27, 1993) (remarks of Sen. Simpson). Simpson also was concerned that inmates may "create religions just to obtain special benefits or to avoid certain prison requirements." *Id*.

[49] 139 CONG. REC. S14461-01 (daily ed. Oct. 27, 1993). This proposed amendment was defeated by a large margin in the Senate (58-41). *Id*.

apply a strict scrutiny standard when reviewing actions brought by prisoners under RFRA.[50]

Following RFRA's enactment, several inmates brought free exercise suits, and several federal courts, applying strict scrutiny (a compelling state interest test coupled with a least restrictive means analysis), found that prison officials had placed a substantial burden on prisoners' free exercise rights.[51] The Second Circuit, in *Jolly v. Coughlin*, held that a New York prison's mandatory tuberculosis testing program violated the religious rights of a Muslim inmate who refused to submit to the test for religious reasons.[52] The court found that the policy of sequestering those who would not submit to the test was not narrowly tailored to the objective of quelling the spread of the disease.[53] *Jolly* was one of the first cases that demonstrated the

---

[50] Although Congress sought to protect prisoners' religious rights through RFRA, and later, the RLUIPA, Congress has often restricted the rights of inmates in other areas. *See* Prison Litigation Reform Act of 1995, Pub. L. No. 104-134. The Prison Litigation Reform Act ("PLRA") has hampered prisoners' abilities to vindicate their rights through the federal courts. *Id.* Among other things, the PLRA has hampered prisoners' ability to vindicate their rights through the federal courts, barring prisoners from bringing litigation under 42 U.S.C. § 1983 unless they could demonstrate a "prior showing of physical injury" and restricting their ability to proceed *in forma pauperis*. *Id.* However, when protecting prisoners' religious liberties, Congress has gone to great lengths to insure the rights of prisoners. *See supra* Part I.A (detailing the importance of religious freedom in America, even between groups that span the political spectrum and accompanying discussion of RFRA's legislative history and its application to prisoners).

[51] RFRA was effectively utilized by several prisoners as a method to enforce their religious rights. *See, e.g.*, Jolly v. Coughlin, 76 F.3d 468 (2d Cir. 1996); Jihad v. Wright, 929 F. Supp. 325, 331 (N.D. Ind. 1996).

[52] 76 F.3d 468 (2d Cir. 1996).

[53] *Id.* at 477, 479 (noting that, although the plaintiff was held in "medical keeplock" for not submitting to the tuberculosis test, he "was not in "respiratory isolation" from the general prison population, and therefore, the "isolation of the plaintiff does not and could not further the state's compelling interest in protecting inmates and [Department of Corrections] staff from tuberculosis," especially when in the absence of respiratory isolation, tuberculosis can be detected by "periodic submission to chest x-rays and sputum samples").

effect that RFRA would have on prisons. The *Jolly* decision indicated that the courts would, in effect, have their say in dictating how prison officials should run their prisons.[54] In this example, a court was undermining a law of general applicability relating to the health of a prison's inmates, specifically by dictating how a prison should maintain itself in protecting the health of other inmates from a communicable disease.[55] Many have criticized this decision as undue judicial interference with prison safety and security.[56] It was a far cry from the deference afforded to prison administrators in *O'Lone*.[57] Formerly, a court would have looked deferentially at a regulation enacted in the interest of prison health because the regulation was considered "reasonably related to a legitimate penological interest."[58] Under RFRA, however, some courts began to look harder at prison restrictions and the burden those restrictions placed on prisoners' rights.[59] *Jolly* indicated that RFRA could be utilized as a legal weapon in the hands of prisoners to enforce their religious rights.[60]

Other courts followed the Second Circuit's lead. In *Jihad v. Wright*,[61] the Northern District of Indiana examined a prison regulation that required Muslim inmates who refused to submit to a tuberculosis ("TB") test be placed on "restrictive medical separation"[62] and "housed in very restricted conditions with TB positive inmates."[63] The court found that the prison's policy was

---

[54] *Jolly*, 76 F.3d 468.

[55] *See id*.

[56] *See, e.g.*, 146 CONG. REC. S7991-02 (daily ed. Sept. 5, 2000) (statement of Sen. Thurmond).

[57] O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987) (noting that a prison regulation is considered valid if it is rationally related to a legitimate penological interest).

[58] *O'Lone*, 482 U.S. at 349-350.

[59] *See supra* note 51.

[60] *Jolly*, 76 F.3d 468 (1996).

[61] 929 F. Supp. 325, 331 (N.D. Ind. 1996).

[62] *Id*. at 327.

[63] *Id*. at 331.

not the least restrictive means of preventing the spread of TB.[64] In holding that, as a "less restrictive measure, officials could have treated [the plaintiff] as an inmate at risk of developing active tuberculosis by requiring him to submit to periodic chest x-rays or sputum samples to determine if he had active TB and was therefore capable of infecting others," the court, in essence was creating prison policy.[65]

When Congress initially considered the language of the original RFRA, the term "substantially" in the substantial burden analysis was a last minute addition.[66] In fact, the House had initially passed RFRA without the inclusion of the term "substantially."[67] Is there really a difference between a substantial burden standard and a burden or restriction standard when applied to religious free exercise claims? Although Congress adopted the substantial burden in its RFRA, the definition of what constitutes a substantial burden in the federal courts has differed greatly from circuit to circuit.[68]

Under the few prison cases analyzed under RFRA, courts defined substantial burden differently. In *Jolly v. Coughlin*,[69] the Second Circuit, in determining whether a law or regulation amounted to a "substantial burden" of an individual's right to freely exercise his religion, held that its "scrutiny extends only to whether a claimant sincerely holds a particular belief and whether

---

[64] *Id.*

[65] *Id.*

[66] W. Cole Durham, Jr., *State RFRAs and the Scope of Free Exercise Protection*, 32 U.C. DAVIS L. REV. 665, 698 (1999) (explaining that the term "substantially was added as a qualifier to the Federal RFRA as an eleventh hour revision by the Senate, possibly as a counter to pressures to exempt prisoners from RFRA coverage").

[67] *See* 139 CONG. REC. H8714 (daily ed. Nov. 3, 1993) (statement of Rep. Hyde).

[68] Durham, *supra* note 66, at 703 (noting the different interpretations of "substantial burden" by federal circuit courts).

[69] *See Jolly*, 76 F.3d at 476 (noting that infringement upon a prisoner's sincerely held religious belief can constitute a substantial burden on one's right to exercise his or her religion).

the belief is religious in nature."[70] The court went on to state that an "inquiry any more intrusive would be inconsistent with our nation's fundamental commitment to individual religious freedom; thus courts are not permitted to ask whether a particular belief is appropriate or true—however unusual or unfamiliar the belief may be."[71] In the end, the Second Circuit considered "a substantial burden [to] exist[] where the state puts substantial pressure on an adherent to modify his behavior or violate his beliefs."[72] *Jolly's* substantial burden analysis was quite deferential to those bringing free exercise claims under the Federal RFRA. First, the court established a deferential standard in terms of what constitutes a religious belief.[73] Second, *Jolly* stated that religious exercise had been substantially burdened when pressure had been utilized to encourage an individual to alter or modify his beliefs.[74]

Other circuits were not as deferential to prisoners' beliefs as the Second Circuit in *Jolly*. In *McNair-Bey v. Bledsoe*, the Seventh Circuit held that a prison regulation that forced an inmate to wear his Moorish Science Temple of America pin on the inside of his clothing rather than on the outside, did not constitute a substantial burden on that inmate's right of free exercise.[75] The Seventh Circuit noted:

---

[70] *Jolly*, 76 F.3d at 476; *see also* Durham, *supra* note 66, at 695 (stating that courts "should not get involved in weighing centrality as a factor in eligibility for free exercise protection" and that "[a]llowing secular judges to make centrality assessments can lead to profoundly inappropriate results").

[71] *Jolly*, 76 F.3d at 476; *see also* Durham, *supra* note 66, at 696 ("[C]entrality analysis may simply not fit some traditions. Concern with centrality makes sense within religious traditions that have hierarchically structured norms, some of which are central . . . and others of which are more peripheral.").

[72] *Jolly*, 76 F.3d at 477.

[73] *Id*. at 476.

[74] *Id*. at 477.

[75] *See* McNair-Bey v. Bledsoe, 1998 WL 879503, at *2 (7th Cir. Dec. 9, 1998). The court in *McNair-Bey* held that the inmate was required to establish that "being able to wear his pin, displayed during religious celebrations and concealed all other times prevents from engaging in religious conduct or having a religious experience that his faith mandates." *Id*. at * 2 (emphasis

> [A] substantial burden on the free exercise of religion within the meaning of the RFRA is one that forces adherents of a religion to refrain from religiously motivated conduct or expression that manifests a *central tenet* of a person's religious beliefs, or compels conduct or expression that is contrary to those beliefs.[76]

Other circuits, including the Ninth Circuit, agreed that this more stringent standard should be used in order to determine if an individual's exercise has been substantially burdened.[77] For example, in *Bryant v. Gomez*, the Ninth Circuit dismissed the plaintiff's RFRA claim alleging that he had been denied the opportunity to participate in full Pentecostal services that would have included speaking in tongues and laying one's hands on others.[78] The court dismissed this claim because the plaintiff failed to provide "any facts to show that the activities which he wish[ed] to engage in [were] *mandated* by the Pentecostal religion."[79] The Ninth Circuit interpreted the substantial burden standard to apply to prisoners quite literally.

The Fifth Circuit's analysis of a substantial burden on prisoners' religious rights is similar to Seventh and Ninth Circuit's analysis. In *Diaz v. Collins* the prisoner plaintiff, a "Native American religious practitioner," brought an action under RFRA, claiming interference with his free exercise of religion because of prison regulations that restricted the length of his hair, the wearing of a headband, and the carrying of a

---

added).

[76] *Id*. (emphasis added).

[77] The Ninth Circuit agrees with the Seventh Circuit that the "interference [with religion] must be more than an inconvenience; the burden must be substantial and an interference with a tenet or belief that is central to religious doctrine." Graham v. Commissioner, 822 F.2d 844, 850-51 (9th Cir. 1987); *see also* Stefanow v. McFadden, 103 F.3d 1466, 1471 (9th Cir. 1996) (holding that, in order to show a free exercise violation under the substantial burden test, the inmate must prove that the law or regulation "prevents him from engaging in conduct or having a religious experience that his faith mandates").

[78] 46 F.3d 948, 949 (9th Cir. 1995).

[79] *Id*. at 949 (emphasis added).

medicine pouch.[80] The court found that the plaintiff did not demonstrate that his religion was substantially burdened because the record "disclos[ed] that it is not necessarily a *central tenet* of [the plaintiff's] religion that a medicine pouch or headband be worn at all times."[81]

In 1997, the Supreme Court in *City of Boerne v. Flores* declared RFRA unconstitutional.[82] The Court determined that Congress, which had relied on its enforcement powers under section 5 of the Fourteenth Amendment in enacting RFRA, had exceeded its constitutional authority.[83] In finding RFRA unconstitutional, the Court noted that Congress "has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."[84] The Court stated that Congress' power under section 5 of the Fourteenth Amendment is "remedial" and is not broad enough to encompass legislation that "makes a substantive change in the governing law."[85] In the absence of RFRA, therefore, the standard for evaluating an inmate's free exercise claim against prison officials reverted back

---

[80] 114 F.3d 69, 72 (5th Cir. 1997) (emphasis added).

[81] *Id.*

[82] City of Boerne v. Flores, 521 U.S. 507 (1997).

[83] Section 5 of the Fourteenth Amendment provides that "Congress shall have the power to enforce, by appropriate legislation, the provisions" of the Fourteenth Amendment. U.S. CONST. amend. XIV, § 5.

[84] *Boerne*, 521 U.S. at 519.

[85] *Id.* The Court stated that "RFRA is so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears instead, to attempt a substantive change in constitutional protections." *Id.* at 530. The Court went on to state more generally that "legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause." *Id.*

Most circuit courts interpreting the *Boerne* decision have found that "the Supreme Court invalidated RFRA only as applied to state and local law" but continued to assume that RFRA "is constitutional as applied to federal law." Worldwide Church of God v. Philadelphia Church of God, Inc., Nos. 99-55850, 56489, 55934, 56005, 2000 WL 1335890 at * 9 (9th Cir. 2000); Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 832 (9th Cir. 1999).

to the "legitimate penological interest" or rational basis test articulated in *O'Lone v. Estate of Shabazz*.[86]

## II. State Religious Freedom Acts and Their Application to Prisoners' Religious Freedom: Are State Religious Freedom Acts the Last Hope for Heightened Religious Freedom Protection for Inmates?

After *Boerne* pronounced RFRA unconstitutional, Congress scrambled to enact similar legislation with the purpose of passing the Supreme Court's constitutional scrutiny.[87] Congress first attempted to restore the compelling interest standard to laws that burdened an individual's free exercise of religion through the Religious Liberty Protection Act ("RLPA").[88] However, RLPA did not gain the support needed to pass both houses of Congress, mainly because many believed it would impede the effectiveness of other civil rights legislation (the law offered a blanket exception for religious freedom with respect to laws of general

---

[86] O'Lone v. Estate of Shabbaz, 482 U.S. 342 (1987). Since the *Boerne* Court found that RFRA "contradict[ed] vital principles necessary to maintain separation of powers and the federal balance," the Court held that the Act, as applied to the states, was unconstitutional. *Boerne*, 521 U.S. at 536.

Reversion back to *O'Lone's* deferential standard forced courts to make decisions that, among other things, prevented death row inmates from taking their Bibles to Bible study and allowed Texas school children to be disciplined for wearing rosary beads that were claimed by the school to be gang symbols. *In Support of H.R. 4019, the Religious Liberty Protection Act of 1998: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (July 14, 1998) (statement of Pat Nolan, President, Justice Fellowship).

[87] Less than a year after the *Boerne* decision, Congress was debating the constitutionality of the Religious Liberty Protection Act. *See, e.g.*, *Hearing on H.R. 4019, the Religious Liberty Protection Act of 1998: House Subcomm. on the Constitution of the House Comm. of the Judiciary,* 105th Cong. (June 16, 1998) (testimony of Douglas Laycock, University of Texas Law School). The Religious Liberty Protection Act would essentially overturn the Smith decision and return RFRA's strict scrutiny test to laws and regulations that interfered with an individual's free exercise of religion. *See* 145 CONG. REC. H5580-02 (daily ed. July 15, 1999) (remarks of Rep. Myrick).

[88] H.R. 4019, 105th Cong. (1998).

applicability).[89] Other concerns arose from Congress' enactment of the legislation through its Commerce Clause powers.[90]

---

[89] RLPA was proposed in response to the *Boerne* ruling. Senator Reid stated the following with respect to its enactment:

> [A] strict scrutiny standard [applies] to the actions of state and local governments with respect to religious exercise, but attempt[s] to draw its authority from Congressional powers to attach conditions to federal funding programs and to regulate commerce. While the companion measure passed the House of Representatives overwhelmingly in July 1999, the legislation stalled in the Senate when legitimate concerns were raised that RLPA, as drafted, would supersede certain civil rights, particularly in areas relating to employment and housing. Theses concerns were most troubling to the gay and lesbian community.
>
> [D]iscrimination based on race, national origin, and to a lesser certainty, gender, would have been protected, regardless of RLPA, because the courts have recognized that preventing such discrimination as a sufficient enough compelling government interest to overcome the strict scrutiny standard that RLPA would apply to religious exercise. Sexual orientation and disability discrimination, however, have not been afforded this high level of protection.

146 CONG. REC. S. 7774-01 at S7778 (remarks of Sen. Reid) (citation omitted). *See* Cary McMullen, *Canady's Religion Bill on its Way*, LAKELAND LEDGER, Aug. 19, 2000, at D1 (noting that the RLPA, introduced in 1998, "got lost" in President Clinton's impeachment proceedings, and the same bill introduced in 1999 passed the House but did not gain support in the Senate, mainly because "gay rights supporters became skittish that [RLPA] might allow religious persons to deny gays housing or employment on the grounds of conscience"). Thus, there was concern that gays and the disabled, groups that are afforded barely any constitutional protection, would suffer at the expense of creating a compelling interest test for all laws that interfered with religion. *See* 146 CONG. REC. S. 7774-01 at S7778 (remarks of Sen. Reid supporting RLUIPA); *see also* Cary McMullen, *Canady's Religion Bill on its Way*, LAKELAND LEDGER, Aug. 19, 2000, at D1.

[90] *Hearing on H.R. 4019, the Religious Liberty Protection Act of 1998: House Subcomm. on the Constitution of House Comm. on the Judiciary,* 105th Cong. (1998) (testimony of Michael P. Farris, Esq., Founder and President of the Home School Legal Defense Association).

> Quite simply, religion is not commerce. If RLPA is enacted, Christians and other people of faith will not be able to seek legal protection for [their] worship simply because it is commanded by God. Instead we will be required to prove in court that our religion is

In the period between the *Boerne* decision and the recent enactment of the RLUIPA, the eyes of prisoners turned to the states to protect their religious rights. While federal courts reverted back to the deferential standard for free exercise claims adopted in *O'Lone*,[91] states remained free to do more in the way of protecting religious liberties of its citizens.[92] In fact, even after the passage of RLUIPA, the importance of state RFRAs cannot be underestimated, especially in light of the fact that there has been speculation that the Supreme Court may find RLUIPA unconstitutional.[93]

### *A. State RFRAs and the Substantial Burden Requirement: Do Alabama, Connecticut, New Mexico and Rhode Island Make Things Easier for Prisoners?*

Most of the states that have passed state RFRAs in response to *Boerne* have done so with language almost identical to that of the Federal RFRA.[94] However, Alabama, Connecticut, New

---

interstate commercial activity.

*Id*.

[91] *See* O'Lone v. Estate of Shabbaz, 482 U.S. 342 (1987); *see also* Jackson v. Mann, 196 F.3d 316, 320 (2d Cir. 1999) (noting that "[a]n inmate is . . . entitled to a reasonable accommodation of his religious beliefs"); Reynolds v. Goord, 103 F. Supp. 2d 316, 336 (S.D.N.Y. 2000) (noting that the working "standard of review for a prison regulation that impinges on an inmate's constitutional rights is . . . whether a prison regulation is 'valid if it is reasonably related to legitimate penological interests'") (citing Turner v. Safley, 482 U.S. 78 (1987)).

[92] The deferential legitimate penological interest standard for prisoners' free exercise claims was quickly reapplied after the passage of RFRA. *See, e.g.*, *Jackson*, 196 F.3d at 320.

[93] *See infra* Part II.D.

[94] ARIZ. REV. STAT. ANN. § 41-1493.01; FLA. STAT. ANN. § 761.03; IDAHO CODE § 73-402; 775 ILL. COMP. STAT. ANN. 35/15 (West 2000); S.C. CODE ANN. §§ 1-32-40, 24-27-600; TEX. CIV. PRAC. & REM. § 110.003. These states all enacted RFRAs providing that the government shall not "substantially burden" a person's exercise of religion, even "if the burden results from a rule of general applicability." The state RFRAs went on to adopt the notion that if a government were to burden an individual's free

Mexico and Rhode Island passed RFRAs with burden standards that differed from the Federal RFRA.[95] These states have imposed a burden less than the "substantial burden" necessary to sustain a Federal RFRA claim. Both Rhode Island and New Mexico, instead of adopting the Federal RFRA's standard creating an action for any law that acts as a "substantial burden" on a person's exercise of religion, opted to apply a compelling interest standard to any "restriction" placed on a person's free exercise of religion.[96] Alabama and Connecticut have also adopted a less rigorous standard than the federal one by requiring only that the regulation "burden" the free exercise of religion.[97] At face value, it appears that Alabama, Connecticut, New Mexico and Rhode Island have made it easier for their citizens to bring free exercise claims.[98] While they have at least imposed less burdensome standards, however, the question remains whether the "burden" or "restriction" standard, as opposed to the "substantial burden" standard, will allow more prisoners to bring their free exercise claims.[99] The prospects of the religious

exercise of religion, it must demonstrate that the application of the burden is a "compelling governmental interest" and that the burden is "the least restrictive means" of furthering that compelling state interest.

[95] ALA. CONST. amend. § 622 (2000); CONN. GEN. STAT. ANN. § 52-571b (2000); N.M. STAT. ANN. § 28-22-3 (West 2000); R.I. GEN. LAWS § 42-80.1-3 (1993).

[96] R.I. GEN. LAWS § 42-80.1-3 (1993); N.M. STAT. ANN. § 28-22-3.

[97] *See* ALA. CONST. amend. § 622 (2000); CONN. GEN. STAT. ANN. § 52-571b (2000).

[98] These states are using their authority to guarantee more rights to the individual than the Federal Constitution allows. States have often provided more rights than the Federal Constitution. For example, in *People v. Class*, the New York Court of Appeals held that the New York Constitution provided protection from an unreasonable police intrusion into the interior of an automobile, where the Supreme Court had found no protection under the Federal Constitution. *See* New York v. Class, 475 U.S. 106 (1986); People v. Class, 67 N.Y.2d 431 (1986).

[99] Although Alabama, Connecticut, New Mexico and Rhode Island have adopted a standard that on its face appears to be less restrictive than the substantial burden standard, these statutes include no definitions or guidelines regarding what may constitute a "restriction" or a "burden." *See* ALA. CONST. amend. § 622 (2000); CONN. GEN. STAT. ANN. § 52-571b (2000);

freedom legislation adopted in these four states are encouraging to prisoners bringing free exercise claims in theory, but may not prove to be as valuable in practice.

In consciously removing the "substantial" from their religious protection burden standards, Alabama, Connecticut, New Mexico and Rhode Island may succeed in hearing the claims of prisoner plaintiffs where the federal courts failed.[100] Under a mere burden or restriction standard, prisoners may have a greater chance of getting their free exercise claims into court and of vindicating their religious rights. The problem, however, is that none of these four states define what a "burden" or "restriction" is under their respective statutes nor explain how those terms should be interpreted in the context of prisons.[101]

It appears as if only one state has even made a conscious attempt to clear up the confusion wrought by the "substantial burden" standard applied under the Federal RFRA. Idaho, in its religious freedom legislation, provides that the term "substantially burden is intended solely to ensure that this chapter is not triggered by trivial, technical or de minimis infractions."[102]

This provision in the Idaho RFRA attempts to delineate just how broadly its substantial burden standard is to apply. However, while it attempts to offer judges a guideline, the vagueness of its substantial burden standard may have no actual effect on the way judges apply the standard. Each judge may bring to the bench her own value judgments regarding what constitutes "trivial, technical or de minimis infractions."[103] This notion is especially true with religious ideologies, where one man's trivial infraction is another's serious deprivation. Thus, while Idaho's attempt to clarify the substantial burden standard is a noble one, judges still

---

N.M. STAT. ANN. § 28-22-3 (West 2000); R.I. GEN. LAWS § 42-80.1-3 (1993).

[100] *See supra* Part I.B for a discussion of the various interpretations of substantial burden applied by several federal courts in analyzing prisoners' claims under RFRA.

[101] *See supra* note 99 (noting that none of the four states define "burden" or "restriction").

[102] IDAHO CODE § 73-402(5) (2000).

[103] *Id.*

retain authority to determine what is or is not a "trivial, technical or de minimis infraction," and that standard has the potential to differ from judge to judge.[104]

It appears as if inmates in Alabama, Connecticut, New Mexico and Rhode Island will still have to take their chances, despite the imposition of a standard that on its face appears to be less stringent than the federal substantial burden standard.[105] The federal analysis indicates that the interpretation of what constitutes a substantial burden often depends on the notion of the reviewing court. Therefore, a state RFRA providing that a person's religious rights cannot be "substantially burdened" may not, in theory, be a more rigorous standard than a state RFRA that applies a "burden" standard.[106] Thus, the responsibility in interpretation rests with the courts of the states that have established RFRAs; if the experience of the federal courts is any indication, it may be difficult for state courts to apply these different burden standards with any inkling of consistency.

### *B. State RFRAs and Explicit Statutory Provisions Regarding the Religious Rights of Prisoners*

Of the states that have adopted RFRAs, only South Carolina's legislation explicitly notes its application to prisoners.[107] The South Carolina provision reads:

> A state or local correctional facility's regulation must be considered in furtherance of a compelling state interest if the facility demonstrates that the religious activity sought to be engaged by a prisoner is (1) presumptively dangerous to the health or safety of the prisoner; or (2)

---

[104] *Id.*

[105] ALA. CONST. amend. § 622 (2000); CONN. GEN. STAT. ANN. § 52-571b (2000); N.M. STAT. ANN. § 28-22-3 (West 2000); R.I. GEN. LAWS § 42-80.1-3 (1993).

[106] *See supra* Part I.B and accompanying discussion of the different interpretations of RFRA as applied to prisoners.

[107] S.C. CODE ANN. § 1-32-45 ("[T]his chapter does not affect the application of and must be complied with Chapter 27 of Title 24 concerning inmate litigation."); S.C. CODE ANN. § 24-27-500.

> poses a direct threat to the health, safety, or security of other prisoners, correctional staff, or the public.[108]

This statute, moreover, provides that a "state or local correctional facility regulation may not be considered the 'least restrictive means' of furthering a compelling state interest if a *reasonable accommodation* can be made to protect the safety to security of prisoners, correctional staff or the public."[109]

The lines drawn by the South Carolina legislature may reduce the amount of protection afforded to prisoners under its RFRA. For example, take the facts of *Jolly v. Coughlin*,[110] but imagine that the case was brought in a South Carolina state court. *Jolly* dealt with the clashing of a prisoner's religious rights against prison officials' desire to quell tuberculosis, a communicable disease.[111] The court found for the prisoner plaintiff despite the fact that prison officials were attempting control tuberculosis.[112] Under the South Carolina statute, the courts are instructed to find a compelling state interest when the religious activity sought to be protected may "pose a direct threat to the health, safety or security of other prisoners, correctional staff or the public."[113] Obviously, one's refusal to submit to a tuberculosis test because it violates the tenets of one's religion qualifies as something that may "pose a direct threat to the health, safety or security of other prisoners [or] correctional staff."[114] However, the inquiry does

---

[108] S.C. CODE ANN. § 24-27-500(A)(1)(2). This statute is made expressly applicable to South Carolina's Religious Freedom Restoration Act by S.C. CODE ANN. § 1-32-45.

[109] S.C. CODE ANN. § 24-27-500(B) (emphasis added). This reasonable accommodation standard was the standard implied by many of the federal courts after the Federal RFRA had been decided and the courts went back to applying a more deferential standard to prison officials. *See* Jackson v. Mann, 196 F.3d 316, 320 (2d Cir. 1999) ("[A]n inmate is only entitled to a *reasonable accommodation* of his religious beliefs.") (emphasis added).

[110] 76 F.3d 468 (1996).

[111] *Id.*; *see also supra* notes 52-55, 69-74 (discussing *Jolly* in greater detail).

[112] *Jolly*, 76 F.3d at 468.

[113] S.C. CODE ANN. § 24-27-500.

[114] S.C. CODE ANN. § 24-27-500(A)(1).

not end there. In South Carolina, the least restrictive means analysis is buttressed by a deferential "reasonable accommodation" standard.[115] In other words, if it would take anything more than a "reasonable accommodation" for a prison to change its regulation, the regulation would survive the strict scrutiny of the RFRA.[116] Thus, if the facts of *Jolly* were applied to a case arising in a South Carolina state court, there is a very good chance the court could determine that a prison's overhaul of its entire tuberculosis policy does not, in fact, constitute a "reasonable accommodation."[117] The Federal RFRA, on the other hand, does not distinguish its least restrictive means analysis between non-incarcerated individuals and prisoners.[118] Thus, although South Carolina's "reasonable accommodation" standard has not been defined by the courts, one could assume that, because the standard has been distinguished from a non-incarcerated individual's rights under its RFRA, it would work to limit the success of prisoners' free exercise claims by providing more leeway and deference to prison officials.[119]

A "reasonable accommodation" standard seems to mirror *O'Lone v. Estate of Shabazz* and its "legitimate penological interest" standard in terms of the deference afforded to prison officials.[120] Non-incarcerated individuals are not burdened by this deferential standard; it applies only to prisoners.[121] Presumably,

---

[115] S.C. CODE ANN. § 24-27-500(B).

[116] *Id.*

[117] *Jolly's* least restrictive means analysis offered alternatives to the prison's medical keeplock program. *Jolly*, 75 F.3d at 479. The court concluded that its suggested accommodations "represent[] a less restrictive alternative, and the defendants are therefore required to pursue it." *Id.*

[118] *See* 42 U.S.C.A. § 2000bb-1.

[119] S.C. CODE ANN. § 24-27-500(A)(1).

[120] O'Lone v. Estate of Shabazz, 482 U.S. 342, 352 (1987). The legitimate penological interest standard articulated in *O'Lone* was basically a rational basis type test under which the courts were not delving deeply into alternatives of prison administration as long as prison officials could justify the regulation as being related to a legitimate penological interest. *Id.*

[121] S.C. CODE ANN. § 24-27-500(B), *supra* note 109 (discussing the deferential "reasonable accommodation" standard).

when a non-incarcerated individual brings a claim under South Carolina's Religious Freedom Restoration Act, a court would apply a tougher standard of alternatives than the "reasonable accommodation" standard. In all probability, South Carolina lowered the bar out of fear that the accommodation of certain religious practices may undermine the security and safety of the prison system.[122] Therefore, while prisoners are provided with an extra layer of religious protection under RFRA, that protection may not prove, when applied, to be very effective as a result of South Carolina's potential limitation requiring prison officials to provide alternative measures to protect prisoners' free exercise.

### *C. The Practical and Theoretical Ineffectiveness of State RFRAs*

While state RFRAs may be the most practical solution to protecting prisoners' religious freedoms in the wake of *Boerne*, they have not accomplished this goal. Regardless of the individual protections provided by state RFRAs, this legislation has, until now, proven to be both practically and even theoretically defective in addressing prisoners' free exercise concerns. This appears to be the case because, even though some of these state RFRAs have been on the books for almost three years, no prisoner has successfully litigated under the nine state RFRAs currently in existence. The theoretical defect of state RFRAs and their application to the rights of inmates arises because prisoners do not possess the constitutionally guaranteed right to travel.[123] Thus, while citizens of the United States who wish to take advantage of more stringent religious protection laws are free to move from state to state, prisoners are left to rely on whether the state that incarcerates them (or, the state in which they are incarcerated) has enacted religious freedom legislation.

---

[122] S.C. CODE ANN. § 24-27-500(A)(1).

[123] *See* Saenz v. Roe, 526 U.S. 489, 510-511 (1999) (holding that "[c]itizens of the United States, whether rich or poor, have the right to choose to be citizens of the state wherein they reside").

### *1. The Practical Problem: The Lack of Litigation Under State RFRAs*

While the Federal RFRA provided an ample forum for prisoners to bring their free exercise claims, the state RFRAs do not yet appear to have the same success in bringing inmates into court.[124] Prisoners brought over 250 free exercise claims in the federal courts when the Federal RFRA applied to the states.[125] Contrastingly, in the three years since *Boerne* invalidated the federal RFRA and states began enacting their own RFRAs, virtually no recorded prisoner free exercise claims have been brought in reliance on a state RFRA.[126] The only recorded cases in which plaintiffs have brought free exercise claims under state RFRAs have been cases in which religious institutions have challenged a state or local zoning authority's decision to deny a building permit for a religious institution.[127] Thus far, prisoners have not benefited from the existence of state RFRAs, even in those states that apply the less restrictive burden standard.[128]

It is quite puzzling that there have been no recorded prisoner free exercise claims under state RFRAs. Granted, the pool of petitioners filing under state RFRAs has decreased in relation to

---

[124] *See supra* note 51 and accompanying text (discussing litigation brought under the Federal RFRA).

[125] *See* 146 CONG. REC. S7991-02 (Sept. 5, 2000) (remarks of Sen. Thurmond).

[126] Even the three states whose RFRAs run on a lesser standard than the "substantial burden" standard have not had any documented prisoner free exercise litigation.

[127] *See, e.g.*, First Baptist Church of Perrine v. Miami-Dade County, 768 So. 2d 1114 (Fl. Dist Ct. App. 2000) (rejecting the church's application for special exceptions and non-use variances to expand school, and finding no violation Florida's Religious Freedom Restoration Act); First Church of Christ, Scientist v. Historic Dist. Comm'n, 737 A.2d 989 (Conn. App. Ct. 1999) (dismissing plaintiff's action against defendant who had denied his application for a certificate of appropriateness to allow the installation of vinyl siding on its church building).

[128] The lack of recorded cases reflecting prisoners' use of these statutes is indicative that prisoners have not yet taken advantage of their provisions. If claims have been brought, those claims have not generated opinions.

the amount of those who had filed under the Federal RFRA.[129] This decrease, however, cannot explain why there have been absolutely no recorded inmate free exercise claims under state RFRAs. The fact that there are none, however, has shown that the practical effect of state RFRAs has not lived up to the possibilities that prisoners may have hoped for when they were enacted.

### *2. The Theoretical Problem: State RFRAs are Ineffective as Applied to Prisoners Because Prisoners Do Not Retain a Right to Travel*

It has long been a tenet in constitutional law that if a citizen opposes a certain law or regulation of the state in which he lives, that person has the right to move to another state and take advantage of its laws.[130] Thus for example, if an individual lives in New Jersey, a state where there is no state RFRA, and she seeks more protection of her religious freedoms, she can pack up and move to Idaho, a state that has enacted its own RFRA.[131] The Supreme Court has endorsed the notion that an individual has the right to travel, and that same individual who elects to change her state residency avails herself of the laws and privileges of the state she moves to.[132] A state is free to enact legislation for the benefit of its citizens.[133] If individuals from other states support

---

[129] Being a federal law, the RFRA provided a forum for any inmate in the country to contest a prison regulation he or she believed violated free exercise of religion rights. *See* 42 U.S.C.A. 2000bb-1. In terms of the number of people it effects, state RFRAs are obviously more narrow in scope because only prisoners living in that state can take advantage of the state religious protections laws.

[130] *See* Saenz v. Roe, 526 U.S. 489, 510-511 (1999) (holding that "[c]itizens of the United States, whether rich or poor, have the right to choose to be citizens of the state wherein they reside"). The Court found this right to travel inherent in the Privileges and Immunities Clause of the Constitution. *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.*

such legislation, they are free to move there.[134] Likewise, individuals who live in that state and are opposed to the legislation in question, remain free to move out of that state and avail themselves of the laws of another state.[135]

In the context of prisons, however, the right to travel has no application.[136] Under state RFRAs, prisoners are forced to have their religious freedoms evaluated depending on where they are incarcerated. Federal prisoners are especially affected because they are often transferred to a state where they did not commit the crime for which they are incarcerated. Prisoners may be forced to live in states where there is no legislation applying a compelling interest to a burden on their free exercise of religion. Thus, state RFRAs are ineffective when applied in the prison context because prisoners, unlike non-incarcerated individuals, have absolutely no opportunity to avail themselves of the laws of other states. Such an inconsistency supports the notion that a uniform federal standard is necessary in order to provide some consistency to inmate free exercise protection.

### *D. The Importance of State RFRAs Despite the Enactment of the Religious Land Use and Institutionalized Persons Act*

State RFRAs may still remain important despite the recent passage of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA").[137] The RLUIPA has restored strict scrutiny to laws or regulations that "impose a substantial burden on the religious exercise of a person residing in or confined to an institution" and land use regulations that "impose a substantial

---

[134] *Id* at 511. The Court noted that "the States . . . do not have any right to select their citizens." *Id*.

[135] *Id*.

[136] *See Pell v. Procunier*, 417 U.S. 817, 822 (noting that a prisoner retains only those privileges and immunities "that are not inconsistent with his status as a prisoner").

[137] 42 U.S.C.A. § 2000cc-1(a) (2000) (protecting the religious exercise of institutionalized persons); 42 U.S.C.A. § 2000cc(a)(1) (protecting land use as religious exercise).

burden on the religious exercise of a person, including a religious assembly, or institution."[138] State RFRAs, especially in the four states with a "burden" standard, remain vitally important because of the raging debate regarding the constitutionality of the RLUIPA.[139] Many were astounded by the speed in which the legislation passed both houses of Congress, especially in light of the concerns expressed by the Supreme Court regarding the constitutionality of such legislation in *City of Boerne v. Flores*.[140] As a result of how quickly it was passed, some critics of the legislation believe that more congressional hearings are necessary in order to determine whether RLUIPA would pass the Supreme Court's constitutional scrutiny.[141] Many are skeptical whether the extensive hearings that surrounded both the Federal RFRA and RLUIPA would quell the claims that RLUIPA was not adequately debated in Congress.[142] The call for more extensive debate is essentially based on the inherent problems in enacting federal legislation mandating that religion retain a certain federal privilege against state and local zoning and prison regulations that are considered generally applicable laws.[143] These problems were

---

[138] 42 U.S.C.A. § 2000cc(a)(1).

[139] After the *Boerne* decision, Congress had to confront the challenge of passing religious freedom legislation without exceeding its powers under the Constitution.

[140] *See* David W. Dunlap, *God, Caesar and Zoning*, N.Y. TIMES, Aug. 27, 2000, § 11, at 1 (noting that "[w]ith unanimity and astonishing speed—16 minutes elapsed from introduction to passage in the House of Representatives—Congress has acted to exempt religious institutions from land-use rules that excessively burden religious exercise").

[141] *See, e.g.*, Editorial, *Religion and Its Landmarks*, N.Y. TIMES, July 27, 2000, at A24 (stating that the "first responsibility of Congress is to slow things down and allow for hearings on a complicated matter that has received not nearly enough public debate about its potential consequences").

[142] *See, e.g.*, Peg Breen, President, New York Landmarks Conservancy, *Letter to the Editor: The Landmarks Bill*, N.Y. TIMES, Aug. 3, 2000, at A32. "[W]hile there were prior hearings on a much broader version of this bill [referencing RLPA], there has never been a fair representation of witnesses questioning the bill's constitutionality, necessity and effect. Unfortunately, the bill has since passed—without hearings and without debate." *Id.*

[143] Most of the criticism surrounding RLUIPA has fallen on the provision

addressed in *City of Boerne*, and Congress is attempting to circumvent them now.[144] Due to the likelihood that RLUIPA will not withstand the scrutiny of the courts, state RFRAs remain important tools, if utilized, to protect religious liberties of prisoners.[145]

Congress enacted RLUIPA under its section 5 enforcement powers under the Fourteenth Amendment, its Interstate Commerce powers and its Spending Clause powers.[146] It is well known, especially after *Boerne*, that the Supreme Court found constitutional problems in Congress' enactment of legislation that provides religious groups and individuals special privileges against laws of general applicability.[147] Constitutional scholars believe that the Supreme Court in *Boerne* already reprimanded Congress with respect to how Congress used its powers under the Fourteenth Amendment in its attempt to pass religious freedom legislation.[148] In order for Congress to enact legislation under

---

affecting land use regulations, not the provision that gives greater rights to prisoners to challenge state and local regulations. *See, e.g.*, Marci A. Hamilton, *When Churches Are Neighbors*, N.Y. TIMES, July 14, 2000, at A25 (detailing the negative effects of excluding religious groups from land use and zoning ordinances); Juan Otero, *Congress Moves to Federalize Local Land Use Control; Measure Passes Under Guise of Religious Liberty*, NATIONS CITIES WKLY, Aug. 7, 2000, at 1 (stating that "simply put, the bill would allow certain groups to disregard the rules as they are applied to everyone else, regardless of the will of the community itself").

[144] Hamilton, *supra* note 143, at A25.

[145] Hamilton, *supra* note 143, at A25 (claiming that RLUIPA is "unlikely to survive a constitutional challenge"); Otero, *supra* note 143, at 1 (pointing out the "serious legal flaws" of the approved measure).

[146] U.S. CONST. amend. XIV, § 5 (enforcement powers); U.S. CONST. art. I, § 8(3) (Commerce Clause); U.S. CONST. art. I, § 8(1) (spending powers). *See also* 146 CONG. REC. S7774-01, S7775 (July 27, 2000) (Exhibit 1: *Need for Legislation*) (noting that Congress' basis for its congressional authority to enact RLUIPA rests on the Spending Clause, the Commerce Clause and its powers under the Fourteenth Amendment to enforce the Constitution).

[147] *See Boerne, supra* note 82 and accompanying text (discussing the unconstitutionality of the RFRA).

[148] *See Boerne, supra* note 82 and accompanying text (discussing the unconstitutionality of the RFRA).

section 5 of the Fourteenth Amendment, "there must be a pattern of widespread and persisting constitutional violations by the states and the legislative solution must be proportional and congruent to those violations."[149] The principal flaw of Congress' enactment of RLUIPA under Congress' Fourteenth Amendment powers is the claim that "supporters of RLUIPA have cobbled together a short string of anecdotes that do not illustrate constitutional violations, and certainly do not illustrate widespread and persisting constitutional violations by the states."[150] In fact, some find similarities to *Boerne*, and have argued that there has been "no good evidence of widespread and persisting discrimination against churches."[151] Simply put, constitutional scholars view Congress' enactment of RLUIPA as almost directly disobeying the Supreme Court's warnings, which were issued in *Boerne*, regarding the use of Congress' Fourteenth Amendment powers.[152] Knowing that the Court took issue with Congress' enactment of religious freedom legislation under its section 5 Enforcement Powers, Congress enacted RLUIPA under two of its other constitutional powers: its power to regulate interstate commerce and its spending powers.

However, the enactment of this legislation under these powers

---

[149] Letter from Marci A. Hamilton to the United States Senate, July 24, 2000, at 1, *available at* http://www.marcihamilton.com/rlpa/rluipa/letter.htm (last visited Nov. 1, 2000) [hereinafter Letter from Hamilton to the Senate].

[150] *Id*. Hamilton insisted that in almost all of the instances where religious institutions had to bear the burden of a land use restriction, there was no proof that the religious institution was the target of religious discrimination. *Id*. Hamilton stated:

> [It is] telling that no land use official, city official, organization representing cities or counties, or historical preservation organization has been permitted to testify on religious liberty issues. Instead the hearings on the Religious Liberty Protection Act were stacked with religious interests to the exclusion of those with the most knowledge about land use practices.

*Id*.

[151] *Id*.

[152] *See Boerne, supra* note 82 (noting restrictions on Congress' enforcement powers under section 5 of the Fourteenth Amendment).

has also generated criticism from constitutional critics.[153] Specifically, those critics believe that the legislation will not survive a challenge to its constitutionality.[154] Recently, the current Supreme Court restricted Congress' power to enact legislation under its Commerce Clause powers in its ever-narrowing interpretation of the federalism doctrine.[155] Constitutional legislation under the Commerce Clause must "substantially affect" interstate commerce.[156] Several critics of RLUIPA are quite confident that the provisions of RLUIPA, on their face, would fail the Commerce Clause's "substantially affects" test.[157] Section 2 of RLUIPA provides in part, that strict scrutiny should be given to land use and prison regulations that only "affect" interstate commerce.[158] Since it relies on

---

[153] *See* Otero, *supra* note 143, at 2; Letter from Hamilton to the Senate, *supra* note 149, at 1; *Hearings on H.R. 4019, the Religious Liberty Protections Act*: *Before House Subcomm. on the Constitution of House Comm. of the Judiciary*, 105th Cong. (1998) (testimony of Michael P. Farris, expressing his concerns about using the Commerce Clause to pass religious legislation).

[154] *See* Otero, *supra* note 143, at 2; Letter from Hamilton to the Senate, *supra* note 149, at 1; *Hearings on H.R. 4019, the Religious Liberty Protections Act*: *Before House Subcomm. on the Constitution of House Comm. of the Judiciary*, 105th Cong. (1998) (testimony of Michael P. Farris, expressing his concerns about using the Commerce Clause to pass religious legislation).

[155] *See* United States v. Morrison, 529 U.S. 598 (2000) (holding that the Commerce Clause did not provide Congress with authority to enact civil remedies of the Violence Against Women Act because the activities protected in the act did not "substantially affect" interstate commerce); United States v. Lopez, 514 U.S. 549 (1995) (holding that since possession of a gun in a school zone did not "substantially affect" interstate commerce, the Gun Free School Zone Act was an unconstitutional use of power under the Commerce Clause).

[156] *See supra* note 155 (indicating the narrow interpretation of what "substantially affects" interstate commerce).

[157] *See* Otero, *supra* note 143, at 2; Letter from Hamilton to the Senate, *supra* note 149, at 1.

[158] 42 U.S.C. § 2000cc(2)(B) (2000); 42 U.S.C. § 2000cc1(b)(2) (2000) (stating that courts shall use strict scrutiny when a "substantial burden affects [interstate commerce]").

regulations that only "affect" interstate commerce, the Court is likely to find that Congress' enactment of RLUIPA under its Commerce Clause powers is an unconstitutional use of its powers. Other critics of the Commerce Clause are disconcerted that Congress has linked the flow of commerce to religion.[159]

Critics have also questioned Congress' use of its spending powers to enact this legislation.[160] Under the Spending Clause, there must be a "nexus" between the activity regulated and the spending condition that Congress imposes.[161] Under RLUIPA, strict scrutiny will apply when a "substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability."[162] Therefore, any entity under RLUIPA that receives federal funding (and this includes most prisons), and adopts a regulation that may substantially burden religious land use or an institutionalized person's free exercise, will be subject to strict scrutiny. Critics of Congress' use of the spending power to enact RLUIPA believe that the flaw lies in the lack of a focused nexus between the activity being regulated and the spending condition being imposed.[163] If Congress' use of its spending powers under RLUIPA is deemed to be over-inclusive and lack a central nexus to its regulation, it will fail to survive a constitutional challenge.

Thus, if the Supreme Court invalidates RLUIPA, state RFRAs will then be back in the religious freedom spotlight. Even

---

[159] *Hearings on H.R. 4019, the Religious Liberty Protections Act*: *Before House Subcomm. on the Constitution of House Comm. of the Judiciary*, 105th Cong. (1998), *supra* note 153 (testimony of Michael P. Farris, expressing his concerns about using the Commerce Clause to pass religious legislation, especially since Congress has linked the idea of religious protection and God with its power to regulate commerce, generally an economic power).

[160] *See* Letter from Hamilton to the Senate, *supra* note 149, at 1 ("There is no nexus in existence that can explain how the federal government can burden every program touched by federal money . . . with such a burdensome level of scrutiny and the surefire likelihood of litigation.").

[161] Flast v. Cohen, 392 U.S. 83, 102-03 (1968).

[162] 42 U.S.C. § 2000cc(2)(A); 42 U.S.C. § 2000cc-1(b)(1).

[163] *See* Otero, *supra* note 143, at 2; Letter from Hamilton to the Senate, *supra* note 149, at 1.

if RLUIPA does pass a constitutional challenge, state RFRAs may still have an important place in the protection of religious freedoms of prisoners. If for example an inmate fails to prevail on her RLUIPA claim because she has not proven that her religion has been "substantially" burdened, she may still have a claim in the state courts of Alabama, Connecticut, New Mexico or Rhode Island as the standard of the burden is a lower one.[164] Even the states that do have a substantial burden standard provide another forum for prisoners to test their luck to see how that standard will be interpreted.[165] This analysis depends on how the different state courts decide what, in fact, constitutes either a burden or a substantial burden.

## CONCLUSION

RLUIPA has received vocal criticism regarding both its purpose and constitutionality. Many constitutional scholars are eagerly awaiting the day when the Supreme Court will strike down the provisions of RLUIPA.[166] Since the constitutionality of RLUIPA is an issue that the Court is likely to address, the importance of state RFRAs looms large. If the Court invalidates RLUIPA, it will strike a near fatal blow to Congress' hopes to enact religious freedom legislation that provides significantly more protection than the First Amendment's Establishment Clause. Congress has repeatedly attempted to carve out religious freedom legislation that will satisfy the Supreme Court's

---

[164] *See supra* Part II.B (discussing the lower "burden" and "restriction" standards of Alabama, Connecticut, New Mexico and Rhode Island).

[165] The other states' RFRAs that work off of a "substantial burden" standard have not yet articulated how that standard should be applied to prisoners. *See* ARIZ. REV. STAT. ANN. § 41-1493.01; FLA. STAT. ANN. § 761.03; IDAHO CODE § 73-402; 775 ILL. COMP. STAT. ANN. 35/15; S.C. CODE ANN. § 1-32-40; S.C. CODE ANN. § 1-32-40, 24-27-600; TEX. CIV. PRAC. & REM. § 110.003. Theoretically, they could provide a less demanding standard than the one adopted under the RLUIPA.

[166] *See supra* Part II.D and accompanying discussion of the constitutional flaws of the RLUIPA.

scrutiny.[167] If RLUIPA is struck down, the federal government may be out of options to enact this type of legislation.

If they indeed run out of options to enact religious freedom legislation, the responsibility of providing greater protection for religious liberties will fall to the states. With respect to prisoners, states will have free reign regarding how much protection they want to offer the inmates of their respective states. Some states have advertently chosen to adopt a lesser burden standard in their RFRAs in order to get the religious freedoms claims of inmates into court.[168] Although these state courts have not actually defined what that burden standard is, the fact that they have adopted a lesser burden standard indicates that they want to provide *more* religious protection to their prisoners.[169] Only the test of time and the result of litigation will prove what this burden standard really is in practice. State religious freedom acts do matter and may be a prisoner's only option if RLUIPA is found unconstitutional. Although the states have been somewhat ineffective in addressing the religious rights of prisoners, they may be a prisoner's last hope in preserving more religious protection than the federal government will offer. And they may even prove to be effective if they continue to receive support in state legislatures and are ultimately drafted carefully enough to avoid the unclear interpretations that accompanied the Federal RFRA.

---

[167] *See supra* notes 17, 87.

[168] *See supra* Part II.B and accompanying text (regarding the burden standard applied in Alabama, Connecticut, Rhode Island and New Mexico).

[169] *See supra* Part II.B and accompanying text (regarding the burden standard applied in Alabama, Connecticut, Rhode Island and New Mexico).