KIRSCH V. WISCONSIN DEPARTMENT OF CORRECTIONS: [1] *WILL THE SUPREME COURT SAY "HANDS OFF" AGAIN?*

I. INTRODUCTION

"There's a grey stone chapel here at Folsom; a house of worship in this den of sin. You wouldn't think that God had a place here at Folsom, but He's saved the soul of many lost men."[2] *Does* religion have a place at the Folsoms of America? If so, who decides how much of a place religion can have in these prisons?

Some prison administrators welcome religion within the walls of the prison.[3] One Wisconsin Prison Security Director believes that religion even performs a legitimate security role in the prison.[4] On the other hand, some prison officials limit the practice of religion in prison for the sake of security.[5]

This Note examines the struggle of prison inmates to gain access to religious materials; materials that have been forbidden by prison officials. Part II of the Note will examine the historical development of inmates' constitutional rights.[6] It will also analyze the Supreme Court's standard for reviewing prison regulations involving inmates'

1. Kirsch v. Wisconsin Dep't of Corrections, 238 Wis. 2d 94, 617 N.W.2d 677 (table, full text in WESTLAW), 2000 WL 730379, at *1 (Wis. Ct. App. June 8, 2000).

2. JOHNNY CASH, *Greystone Chapel, on* AT FOLSOM PRISON AND SAN QUENTIN (Columbia Records).

3. Andy Hall, *Does Religion Reform Inmates?*; *Some Prisoners Say Religion Helps Them Turn Around, But Research is Spotty and Inconclusive,* WIS. ST. J., Feb. 28, 1999, at 1A. The author points to a South Carolina study that found that inmates who participated in Prison Fellowship Ministries were less than half as likely as other inmates to misbehave while incarcerated. *Id.* However, there have been relatively few studies examining the effectiveness of these prison chaplain programs. *Id*.

4. *Id.* at 1A. The security director stated that the religion program comforts inmates and provides an outlet for tension. *Id*. The chaplain program accounts for one-fourth of one percent of the Department of Corrections' current operating budget. *Id*.

5. Bell v. Wolfish, 441 U.S. 520, 546 (1979); *See infra* notes 19-22 and accompanying text. The Court said that maintaining institutional security and preserving internal discipline are essential goals that may require limitation of an inmate's Free Exercise rights. *Bell*, 441 U.S. at 546.

6. *See infra* Part II. A.

constitutional rights.[7] Moreover, the Note discusses Congress' attempt to set the standard of review.[8] The Note then examines the significance of the *Kirsch* decision.[9] Finally, the Note analyzes the fourth factor of the Turner Standard used in *Kirsch* and explores the possible effect of a new legislative act on prisoners' Free Exercise claims.[10]

II. BACKGROUND

A. History of Prisoners' Constitutional Rights

When do the reasons for limiting religion in prison outweigh an inmate's constitutional right of Free Exercise?[11] What test should be used to determine that question? Historically, prisoners' rights were extremely limited and the courts adhered to a hands-off doctrine.[12] The courts chose to defer to the prison administrations' decisions concerning regulations that burdened the Free Exercise of religion.[13] As a result of the hands-off doctrine, potentially worthy complaints were not given meaningful review and prison officials had little incentive to improve prison conditions.[14]

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7. *See infra* Part II. B.
8. *See infra* Part II. C.
9. *See infra* Part III and Part IV. A.
10. *See infra* Part IV. B and Part IV. C.
11. U.S. CONST. amend. I. The First Amendment contains the Free Exercise Clause:

> *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof*; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble; and to petition the Government for a redress of grievances.

Id. (emphasis added).

12. *See generally, e.g.*, Lorijean Golichowski Dei, Note, *The New Standard of Review for Prisoners' Rights: A 'Turner' for the Worse?*, 33 VILL. L. REV. 393, 399 (1988) (outlining the development of case law dealing with prisoners rights and describing the hands-off doctrine used by the courts). The hands-off doctrine described the courts' absolute deference to prison officials that continued until the 1960's. *Id*. Prisoners were generally not even permitted to engage in religious activities. Yehuda M. Braunstein, Note, *Will Jewish Prisoners Be* Boerne *Again? Legislative Responses to* City of Boerne v. Flores, 66 FORDHAM L. REV. 2333, 2334 (1998) (describing the background and development of Free Exercise for religious prisoners). In *Kelly v. Dowd*, the Seventh Circuit Court of Appeals declared that when a state prison refuses to provide religious materials to an inmate, the reasonableness of that refusal may only be determined by state courts. 140 F.2d 81, 83 (7th Cir. 1944).

13. Braunstein, *supra* note 12, at 2334. The key rationales offered to support the hands-off approach were: the perceived propriety of deferring to the prison officials' expertise; and federalism issues that could arise if federal courts intervened in controversies between state prisoners and state prisons. Roberta M. Harding, *In the Belly of the Beast: A Comparison of the Evolution and Status of Prisoners' Rights in the United States and Eurupe*, 27 GA. J. INT'L & COMP. L. 1, 9-10 (1998).

14. Sara Anderson Frey, *Religion Behind Bars: Prison Litigation Under the Religious*

Subsequently, the Supreme Court began to scrutinize some police conduct, which led to the gradual erosion of the hands-off doctrine.[15] In *Cruz v. Beto*, the Supreme Court extended the right of Free Exercise to the incarcerated.[16] In *Pell v. Pecunier*, the Supreme Court set forth a general standard for prisoners' First Amendment claims, which balanced the prisoners' constitutional rights against the prisons' interests.[17] The Court held that, as long as the prisoners had reasonable alternative

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Freedom Restoration Act in the Wake of Mack v. O'Leary, 101 DICK. L. REV. 753, 757 (1997) (describing the consequences of the hands-off doctrine).

15. Dei, *supra* note 12, at 401. The Court began tackling issues in which police conduct infringed upon the rights of accused individuals. *Id*. The Court began addressing criminal defendants' Fourth Amendment right to exclusion of evidence obtained in an unlawful search and seizure, the Fifth Amendment protection against self-incrimination, and the Sixth Amendment right to counsel. *Id*. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 444 (1966) (finding that confessions obtained in violation of fifth amendment procedural safeguards are inadmissible at trial); Escobedo v. Illinois, 378 U.S. 478, 491 (1964) (holding that confessions obtained after criminal suspect requested but was refused assistance of counsel were in violation of sixth amendment right and therefore inadmissible); Mapp v. Ohio, 367 U.S. 643, 654 (1961) (requiring that state courts exclude evidence obtained by unlawful searches and seizures).

These decisions led to the gradual erosion of the hands-off doctrine and allowed the Court to extend its jurisdiction to the issue of prisoners' Free Exercise rights. Dei, *supra* note 12, at 401. "When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." Procunier v. Martinez, 416 U.S. 396, 405-06 (1974). In *Martinez*, prisoners challenged mail censorship regulations that limited correspondence between inmates and persons outside the prison. *Id*. at 398-400. The Court held that the regulation was justified if it furthered an important or substantial governmental interest and the infringement on free speech was no greater than necessary. *Id*. at 413-14. Under that level of scrutiny, the Court found that the regulations did not further the substantial governmental interest. *Id*. at 415 (holding that the warden could not show how permitting inmates to send mail would lead to riots).

16. Cruz v. Beto, 405 U.S. 319, 322 (1972). *Cruz* involved a Buddhist prisoner who claimed that he was not allowed to pray in the prison chapel, consult with religious advisors, or share religious materials with other inmates. *Id*. at 319. The Court held that the restrictions denied the prisoner a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners. *Id*. at 322. Thus, the Court held that Texas had violated the inmate's First and Fourteenth Amendment rights. *Id*. The Court signaled the end of the hands-off doctrine when it said that while it is not the duty of the federal courts to supervise prisons, it is the duty of the court to enforce the constitutional rights of all persons, including prisoners. *Id*. at 321. However, in his dissent, Justice Rehnquist stated that the Framers would be surprised to know that prisoners have been included in the protections of the Fourteenth Amendment. *Id.* at 325-326 (Rehnquist, J., dissenting) (arguing that it would be better to leave this matter in the hands of prison officials).

17. Pell v. Pecunier, 417 U.S. 817 (1974). *Pell* involved a prison regulation that prohibited some inmates from interviewing with the media. *Id*. The regulation was enacted after a violent prison episode that the correction authorities attributed at least in part to the former policy of free face-to-face prisoner-press interviews. *Id*. These interviews had resulted in a small number of inmates gaining disproportionate notoriety and influence among the other inmates. *Id*. The Court balanced the prisoners' constitutional rights against the interests of the prison administration in maintaining security. *Id*. at 822-828. In doing so, the Court stressed that deference must be afforded to the prison administration's interests in determining whether the regulation is valid. *Id.* at 827.

means for exercising their rights, the regulation would be deemed valid.[18]

In *Bell v. Wolfish*, the Supreme Court applied a deferential standard of scrutiny in deciding whether a prison regulation violates First Amendment rights.[19] The Court applied a rational relationship standard and concluded that the regulation did not violate the First Amendment rights of the inmates.[20] The Court reasoned that the prison regulation was "a rational response by prison officials to an obvious security problem."[21] Once again, the Court strongly deferred to the decision-making of the prison administration.[22]

B. The Supreme Court's Standard

The Supreme Court did not set forth a bright line standard to determine prisoners' Free Exercise claims[23] until it decided *Turner v. Safley* in 1987.[24] In *Turner*, the Court announced the standard that must be used in determining the validity of constitutionally challenged prison regulations.[25] First, the Court reiterated that "prison walls do not form a barrier separating prison inmates from the protections of the Constitution."[26] The Court articulated the following standard: "[w]hen a

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18. *Id.* (quoting *Cruz*, 405 U.S. at 321). The Court, in *Pell*, held that the inmates had alternative means of communication such as mail correspondence. *Id.*

19. Bell v. Wolfish, 441 U.S. 520 (1979). One of the challenged prison regulations in *Bell* prohibited inmates from receiving hard cover books unless the books were mailed directly by the publishers or bookclubs. *Id*. at 528.

20. *Id*. at 550.

21. *Id*. at 550. The "obvious" security problems that the Court referred to included possible drug and weapon smuggling into the prison. *Id*. at 550-551.

22. *Id.* at 547-48. "Such considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." *Pell*, 417 U.S. at 827. The Court said that problems that arise day-to-day in a correctional facility are not susceptible to easy solutions. *Bell*, 441 U.S. at 548. Therefore, the Court determined that prison officials should be accorded a wide-ranging deference in the adoption and execution of prison policy. *Id*. The Court also believed that this deference was necessary in order to avoid allowing the judicial branch to violate the separation of powers by attempting to run the prisons. *Id*.

23. Braunstein, *supra* note 12, at 2349.

24. Turner v. Safley, 482 U.S. 78 (1987). *Turner* involved two prison regulations: 1) a restriction that denied inmate-to-inmate correspondence and 2) a restriction that prohibited inmates from marrying unless the prison superintendent determined that there were compelling reasons for the marriage. *Id*. at 81.

25. *Id*. at 89.

26. *Id*. at 84. Because prisoners retain these constitutional rights, "[w]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." *Id*. at 84 (quoting Procunier v. Martinez, 416 U.S. 396, 405-406

prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[27]

Thereafter, the Court established four factors to determine whether a regulation is reasonable.[28] The first factor requires that a "valid, rational connection" exist between the prison regulation and the legitimate governmental interest advanced to justify it.[29] The second factor considers whether there are alternative means available to inmates that would allow them to exercise their religious beliefs.[30] The third factor considers the impact that an accommodation of the asserted right will have on guards, other inmates, and the allocation of resources.[31] Finally, the fourth factor examines whether inmates can point to an easy and obvious alternative that fully accommodates their rights at de minimis cost to penological interests.[32] The Court made it clear that the

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(1974)).

27. *Id.* at 89.

28. *Id*. at 89-91.

29. *Id*. at 89 (quoting Block v. Rutherford, 468 U.S. 576 (1984). The regulation is deemed valid as long as it is neutral and not "arbitrary or irrational." *Id.* at 89-90. The *Turner* Court found that the marriage regulation was not logically related to legitimate security concerns. *Id*. at 97. Prison officials argued that they instituted the marriage regulation for the security purpose of preventing "love triangles" that could lead to violence. *Id*. Even with the leniency of this first factor, the Court still found that there was no logical connection between the marriage restriction and the formation of love triangles. *Id*. at 98 (reasoning that such love triangles could just as easily develop without a formal marriage ceremony).

On the other hand, the Court found that the correspondence regulation was reasonably related to a legitimate security concern. *Id.* at 93. The Court found the regulation to be content neutral and a logical advancement of the institutional goals of security and safety. *Id*. *But see* William Mark Roth, Turner v. Safley*: The Supreme Court Further Confuses Prisoners' Constitutional Rights*, 22 LOY. L.A. L. REV. 667, 688 (1989) (contending that the arguments that the regulation advanced safety and security goals were based on very speculative evidence).

30. *Turner*, 482 U.S. at 90. Once again, the Court asserts that if there are alternative means for the prisoners to exercise their constitutional rights, then courts should be "particularly conscious of the 'measure of judicial deference owed to corrections officials.'" *Id*. at 90 (quoting Pell v. Procunier, 417 U.S. 817, 827 (1974)). In *Turner*, the Court found that there were alternative means available for the prisoners to exercise their First Amendment rights. *Id.* at 92. However, this test is relatively easy for prison administrations to pass. When a court defines the constitutional right broadly, such as the *Turner* Court did when it said that the first amendment encompassed "all means of expression," then the regulation will only bar one small part of the total right. Roth, *supra* note 29, at 688-89. Therefore, barring inmate-to-inmate correspondence is a valid regulation, because the prisoners still have other means of expression available. *Turner*, 482 U.S. at 92.

31. *Turner*, 482 U.S. at 90. The Court found that the regulation satisfied the third factor based on the testimony of prison officials. *Id*. at 92. Rather than require specific evidence showing that problems would arise at the prison, the Court chose to defer to the expertise of the prison officials. *Id*.

32. *Id.* at 91. The Court further qualified this factor, with deference to prison officials, by stating that it was not a "least restrictive alternative" test. *Id*. at 90. The Court declared that prison officials shall not be required to "set up and then shoot down" every conceivable alternative method

new standard is a lesser standard than the strict scrutiny standard of review that some courts of appeal embraced prior to the *Turner* decision.[33]

One week after the *Turner* decision, the Supreme Court applied the four factors in a case involving a prison regulation that prevented some inmates from attending religious services.[34] The Court held that the regulation was valid, because it was reasonably related to the valid penological interest of maintaining security.[35]

The *Turner* Standard required courts to give extreme deference to the prison administration.[36] The Court went even further in *Employment Division v. Smith*, where the State of Oregon denied two Native Americans' unemployment compensation after they were fired for ingesting peyote as part of a religious ceremony.[37] The *Smith* Court held that Free Exercise rights are not violated when a state places burdens on religious practice, as long as the state law is facially neutral and generally applicable.[38] As a result of *Smith's* narrow reading of the Free

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of accommodation. *Id*. In order to show that the regulation is an "exaggerated response" by prison officials, there must be an easy and obvious alternative to the regulation. *Id*. Inmates bear the burden of showing that an alternative fully accommodates their rights, while only imposing a de minimis cost to penological interests. *Id.* at 91. The majority deferred to the opinions of the prison officials and held that monitoring inmate mail would exact more than a de minimis cost to the prison. *Id.* at 93 (holding that the burden placed on the staff would impose more than a de minimis cost).

33. *Id*. at 81.

34. O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987). The regulation at issue prohibited prisoners, assigned to work outside, from returning to the prison during the day except for emergency purposes. *Id*. at 347. Therefore, Muslim prisoners assigned to work outside were prohibited from participating in religious services that occurred during the day. *Id*.

35. *Id*. at 350-51.

36. Braunstein, *supra* note 23, at 2351. The *Turner* Court explained this "due deference" by stating that running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources. *Turner,* 482 U.S. at 84-85. The Court went on to say that these responsibilities are peculiarly within the province of the executive and legislative branches of government. *Id*. at 85.

37. Employment Division v. Smith, 494 U.S. 872 (1990). *Smith* involved two former employees of a private drug rehabilitation organization who were fired after ingesting peyote for sacramental purposes at a ceremony of their Native American Church. *Id.* at 874. Under Oregon law, it was criminal to ingest a controlled substance for any purpose. Or. Rev. Stat. § 475.992(4) (1987). *Today*, the State of Oregon recognizes, as an affirmative defense to the crime, the good faith practice of peyote ingestion for religious beliefs, Or. Rev. Stat. § 475.992(5) (1999). The State of Oregon denied their applications for unemployment compensation, pursuant to a state law that disqualified employees discharged for work-related "misconduct." *Smith*, 494 U.S. at 874. The petitioners argued that this denial violated their First Amendment Free Exercise rights. *Id*.

38. *Smith*, 494 U.S. at 878-90. The Court held that since the law was neutral and generally applicable-and not unconstitutional on other grounds- it was valid. *Id*. at 890. The Court determined that the State did not ban the ingestion of peyote solely because of the religious motivation behind the act for some people. *Id*. at 882. The Free Exercise Clause does not relieve an individual of the

Exercise Clause, the Clause only protected religious exercises from non-neutral laws that directly targeted or burdened those exercises.[39]

C. Congress's Standard

In 1994, Congress enacted the Religious Freedom Restoration Act (RFRA).[40] Congress enacted the RFRA for the precise purposes of overruling both: 1) *Smith's* narrow reading of the Free Exercise Clause; and 2) *Smith's* refusal to apply a strict scrutiny test in assessing the validity of a neutral governmental act that burdens religion.[41] Congress' power struggle with the Supreme Court over the Free Exercise Clause had begun. "[N]ever before, at least in the history of congressional consideration of Free Exercise matters, has Congress ever hurled such disrespectful and angry insults at the Supreme Court."[42]

Several courts found that the enactment of the RFRA rejected the *Turner* and *O'Lone* decisions as well.[43] The RFRA prohibited any

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obligation to comply with a law that incidentally forbids a religiously motivated act, when that law is also applied to those who engage in the same act for non-religious purposes. *Id*. at 879.

39. Eugene Gressman, *RFRA: A Comedy of Necessary and Proper Errors*, 21 CARDOZO L. REV. 507, 513 (1999).

40. 42 U.S.C. 2000bb to 2000bb-4 (1994); *See infra* notes 46-48 and accompanying text (explaining that the Supreme Court later held the RFRA to be unconstitutional).

41. *See, e.g*., Gressman, *supra* note 39, at 514 (arguing that the RFRA was a violation of separation of powers).

42. *Id*. at 514-515. Congress passed the RFRA, in direct response to *Smith*, with widespread bipartisan support and the approval of nearly all religious groups throughout the country. Braunstein, *supra* note 12, at 2356. However, a proposed amendment to the RFRA bill would have excluded prisoners from its protection. 139 Cong. Rec. S14, 353 (daily ed. Oct. 27, 1993). Proponents of the amendment to the bill feared: 1) that prisoners might use the RFRA for frivolous litigation; and 2) that the least restrictive means test might result in constant intrusion by the judiciary. Abbott Cooper, *Dam the RFRA at the Prison Gate: The Religious Freedom Restoration Act's Impact on Correctional Litigation*, 56 MONT. L. REV. 325, 335-37 (1995). The Senate Committee concluded that the first amendment doctrine was sufficiently sensitive to the demands of prison management; therefore, a special exemption for prison Free Exercise claims was unwarranted. S. REP. No. 103-111, pt. Vd (1993). The amendment to the bill failed, so the protection extended to prisoners. 139 Cong. Rec. 514, 468 (daily ed. Oct. 27, 1993). This extension was essential, because religious Free Exercise protections could possibly be more important for prisoners than for any other segment of society. Lee Boothby & Nicholas P. Miller, *Prisoner Claims for Religious Freedom and State RFRAs*, 32 U.C. DAVIS L. REV. 573, 585 (1999) (arguing that government-imposed burdens on religion will occur more often and in greater degree for those subject to twenty-four hour control and detainment).

43. Werner v. McCotter, 49 F.3d 1476, 1479 (10th Cir. 1995). The Tenth Circuit Court held that a prison system may not substantially burden a prisoner's right of Free Exercise in the absence of a compelling state interest and must employ the least restrictive means necessary to further their interest. *Id*. at 1479. The court stated that the RFRA legislatively overturned Supreme Court decisions, including *Turner* and *O'Lone*. *Id*. Another court also found that the RFRA rejected the reasonableness standard of *Turner* in favor of a compelling interest test. Campos v. Coughlin, 854 F. Supp. 194, 206 (S.D.N.Y. 1994). *Campos* dealt with a prison regulation that prohibited inmates

governmental action that "substantially burdened" the exercise of religion unless the action could be justified on the ground that it furthered a compelling governmental interest in the least restrictive manner.[44] As a majority of courts applied the compelling interest standard mandated by the Act, the RFRA generally produced positive results for prisoners.[45]

On June 25, 1997, the Supreme Court threw the next punch in this heated battle among the judiciary, the states, the legislature and the President.[46] In *City of Boerne v. Flores*, the Supreme Court struck down the RFRA as unconstitutional.[47] In a six-to-three decision, the Court ruled that Congress, in enacting the RFRA, exceeded its Enforcement Power under Section Five of the Fourteenth Amendment.[48]

"The far-reaching significance of the Court's decision [in *City of Boerne*] is hard to exaggerate."[49] The cause of religious freedom,

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from wearing Orisha beads in conformity with the Santeria religion. *Id*. at 197-199. The court held that the regulation violated the prisoners' Free Exercise rights under both the RFRA compelling interest standard and the previous *Turner* reasonableness standard. *Id*. at 205-212.
Moreover, legislative history reveals that Congress intended RFRA to supersede the *Turner/O'Lone* standard. H.R. REP. No. 103-88, at 7-8 (1993); S. REP. No. 103-111, at 9-11 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1897-1901; Cooper, *supra* note 42, at 332.

44. William G. Buss, *An Essay on Federalism, Separation of Powers, and the Demise of the Religious Freedom Restoration Act,* 83 Iowa L. Rev. 391, 392 (1998); *See* 42 U.S.C. 2000bb-1(a)-(b) (1994).

45. *See, e.g*., Braunstein, *supra* note 12, at 2361-2362. The compelling interest standard often proved too difficult a standard for prison administration to overcome. *See, e.g*., *id*. at 2362. *But see* Ira C. Lupu, *The Case Against Legislative Codification of Religious Liberty*, 21 CARDOZO L. REV. 565, 569-70 (1999) (contending that for the four years that RFRA was the law, it proved deeply disappointing and accomplished very little).

46. City of Boerne v. Flores, 521 U.S. 507 (1997).

47. *Id.* at 536. In *City of Boerne*, Bishop Flores applied for a city building permit in order to enlarge the Saint Peter Catholic Church, which was built in 1923. *Id*. at 511-12. The city denied the permit pursuant to an ordinance that protected historic landmarks. *Id*. Based on the RFRA, the church challenged the city's denial. *Id*.

48. *Id.* at 523. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, 5. The Supreme Court held that legislation which *alters* the Free Exercise Clause's meaning is not *enforcing* the Clause. *Boerne*, 521 U.S. at 519. The Court further stated that Congress does not enforce a constitutional right by changing what the right is. *Id*. The Court said that the Enforcement Clause provides Congress with remedial and preventive powers rather than substantive powers. *Id*. at 519-520. Moreover, the *Boerne* Court held that the RFRA was not remedial or preventive in its nature, because the legislative records lacked "examples of modern instances of generally applicable laws passed because of religious bigotry." *Id*. at 530. The Court stated that the RFRA is "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id*. at 532.

49. Buss, *supra* note 44, at 393. When the Court fails to recognize a prisoner's strong interest in religious exercise, the Court sends a message to society that religious freedom is not a fundamental human right; but rather it is a state created policy that the state can extend to and withdraw from people as it wishes. *Cf.* Boothby, *supra* note 42, at 603. Buss stated that the *Boerne*

generally, lost the right to rely on the sweeping protection of a federal statute.[50] The Supreme Court's decision in *Boerne* has returned prisoners' Free Exercise claims to the low-level standard of *Turner*.[51]

III. STATEMENT OF THE CASE

A. Statement of Facts

Waupun Correctional Institution (WCI) is a maximum-security institution in Wisconsin.[52]

Each of the Plaintiffs has at one time been housed in the adjustment center (AC) at WCI.[53] Before entering the AC, property officers search all of an inmate's personal property.[54] While in the AC, the prison administration allows inmates to possess three state-issued books, and a "Bible, Koran, or equivalent religious book" from their personal property.[55] Other than the "Bible, Koran, or equivalent religious

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decision means that the *Smith* precedent would control again; therefore, Free Exercise claims would be recognized only if government action specifically targets religious practices for adverse treatment. Buss, *supra* note 44, at 393. However, after the *Boerne* decision, most courts have applied the *Turner* standard instead of the *Smith* precedent. *See* Freeman v. Arpaio, 125 F.3d 732, 736 (9th Cir. 1997) (holding that the decision in *Boerne* restores the reasonableness test of *Turner* to Free Exercise cases); Washington v. Garcia, 977 F. Supp. 1067, 1070-72 (S.D. Cal. 1997) (holding that because the RFRA was overruled in *Boerne*, the appropriate standard to evaluate Free Exercise claims is the reasonableness standard used in *Turner*); Africa v. Horn, 701 A.2d 273, 275 (Pa. Commw. Ct. 1997) (finding that the compelling interest standards set forth in the RFRA no longer apply, and choosing to use the *Turner* reasonableness standard). Buss also argued that the *Boerne* decision will curtail Congress' ability to enhance any constitutional rights guaranteed by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Buss, *supra* note 44, at 393.

50. Buss, *supra* note 44, at 393.

51. *See, e.g.*, Braunstein, *supra* note 12, at 2367. While the *Turner* standard was largely unused during the three years that the RFRA controlled, courts resorted to the standard after the *Boerne* decision. *Id*. Some commentators have argued that *Turner* "is, and will no doubt remain, the law" unless state legislatures enact their own versions of the RFRA. *See* Boothby, *supra* note 42, at 584.

52. *Kirsch*, 2000 WL 730379 at *1. The institution houses approximately 1,175 inmates. *Id*.

53. *Id*. The prison houses inmates in the AC for violating disciplinary rules and for temporary lock-up pending an investigation of a disciplinary rule violation. *Id*. The AC houses sixty-five inmates. *Id*. The usual length of time spent in the AC is less than thirty days; however, the segregation can be for a much longer period of time if the inmate violates disciplinary rules while in the AC. *Id.* Larry Fuchs, the supervising officer of the AC, stated that inmates housed in the AC have demonstrated, through their behavior, that they are dangerous and present a threat to the security of the institution. Affidavit of Larry Fuchs at 4, Kirsch v. Wisconsin Dep't of Corrections, No. 95-CV-2867, (Wis., Dane County Cir., Branch 7, 1998) No. 95-CV-2867. The officer further stated that limitations on AC inmates' activities and property are necessary because the inmates present threats to institution safety, security, and discipline. *Id*.

54. *Kirsch*, 2000 WL 730379 at *1.

55. *Id*. The inmates may select the three state-issued books from the AC supply, which is a

book[s]," AC inmates may not possess religious materials such as interpretative or study books from their personal property.[56]

B. Procedural History

The Plaintiffs, inmates at the time of the action, filed a complaint claiming that the prison regulation violated their First Amendment right of Free Exercise of religion.[57] Specifically, the inmates cited the fact that the regulation prohibited them from possessing religious material (other than the "Bible, Koran, or equivalent religious book") from their personal property.[58] The prison administration defended the regulation by stating that it: 1) reduced the need for property officers to search inmate property,[59] 2) limited the amount of combustibles,[60] and 3) reduced the occasion for contraband.[61] The trial court entered a permanent injunction directing that each of the plaintiffs, when held in the AC, may possess in his cell a total of four books of his own choosing.[62]

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collection of 100-150 paperbacks. *Id*. These books are generally fiction material. *Id*. The WCI librarian obtains these books at used book sales. *Id*. In addition to the AC paperback collection, the inmates can select up to five books from the library legal collection. *Id.* at *2. Prison officials do not permit inmates to borrow books from the chapel library or the general library, except for legal materials. *Id*.

56. *Id.* at *1.

57. *Id*. at *3.

58. *Id*. at *3.

59. *Id*. at *1-*2. Property officers search the inmates' personal property and place any prohibited items in a property room separated from the inmates. *Id.* at *1. The prison administration argued that allowing more personal property into the AC would increase the burdens on property officers. *Id*. at *2. The prison administration further stated that the searches do not entirely control the risk of contraband being introduced into the AC. *Id*. at *7. According to the prison, a strict limit on the number of personal items an inmate can bring into the AC makes searching property for contraband easier. *Id*. at *2.

60. *Kirsch*, 2000 WL 730379 at *2. The prison argued that the regulation was important in order to limit the inmates' access to paper combustibles. *Id*. Inmates, in the past, had started fires in the AC. *Id*.

61. *Id.* at *2. The prison administration pointed to three occasions where a fire started because of a concealed match in the binding of a book. *Id*. The prison administration stated that limiting the amount of personal property to the "Bible, Koran, or equivalent religious book" decreased the amount of contraband introduced into the AC. *Id*.

62. *Id.* at *1. The trial court stated that the prisoners could choose four books, one of which could be a hardback, from either the inmate's personal property or the AC's supply of paperback books. *Id*. Before reaching this conclusion, the trial court first found that the prison *could* constitutionally limit the number of books to four. *Id*. at *3. The trial court agreed with the prison administration that the limits on the type and total amount of property allowed in the AC logically advanced the goals of safety and security. *Id*. The court found that such limits do protect against the risk of fire, clogged plumbing, and the security risk of blocked windows. *Id.*

However, the trial court concluded that the further regulation, which limited inmates to possession

The court of appeals applied the *Turner* factors[63] in analyzing whether the regulation violated the prisoners' Free Exercise rights.[64] Under the first factor, the court found that there was a valid and rational connection between the prison regulation and the legitimate government interest of security.[65] The court went on to find that the prison regulation satisfied the second factor,[66] because the opportunity to use the AC supply books qualified as alternative means for prisoners to exercise their rights.[67] After analyzing the third *Turner* factor, the court found that permitting the plaintiffs to possess four books from their personal supply (while housed in the AC) would have a significant ripple effect on prison staff and other inmates.[68]

Finally, the court examined the fourth factor of the *Turner* Standard.[69] The court decided that the regulation, which limited inmates

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of only one religious book from their personal property, was not reasonably related to institutional concerns of protecting against contraband. *Id*. at *3. The trial court determined that the regulation was invalid under the *Turner* test, because it was not reasonably related to legitimate penological interests. *Id*. In making that decision, the trial court analyzed the case under the four factors of the *Turner* standard. *Id.* at *3.

The trial court reasoned that prison officials already searched one book (the Bible, Koran, or equivalent religious book from an inmate's personal collection) for contraband; therefore, searching three more personal books would not pose significantly more security problems or an administratively onerous task. *Id.* at *3. The trial court ordered that an inmate could choose up to four books from his personal supply only once; the inmates, while in the AC, could not thereafter exchange these chosen books for other books in their personal possession. *Id*.

63. *Turner*, 482 U.S. at 89-91.

64. *Kirsch*, 2000 WL 730379 at *4-*5.

65. *Id*. The court of appeals reasoned that increasing the number of books allowed into the AC from an inmate's personal possession also increases the chances that contraband will make its way into the AC. *Id.* at *5. The court stated that an inmate's personal property was much more susceptible to contraband than books from the AC supply, because the AC books did not circulate throughout the prison. *Id*. Therefore, the court concluded that books from the AC supply do not present the same opportunity to introduce contraband. *Id*.

66. *Id.* at *6. This *Turner* factor considers whether there are alternative means available to the inmates, which would allow them to exercise their religious belief. *Id*.

67. *Id.* at *6. The court of appeals decided that the AC supply of mostly fiction paperbacks, the legal materials, and the one "Bible, Koran, or equivalent religious book" were enough for an inmate to freely exercise his or her religion. *Id*.

68. *Id.* at *7. The court of appeals stated that property searches cannot entirely control the risk of contraband being introduced into the AC. *Id*. The court found that allowing additional personal property would increase the risk of contraband such as matches being overlooked in a search. *Id*. Contraband presents a danger to other inmates and staff. *Id*.

69. *Id.* The court of appeals cited *Turner* in stating that the existence of easy and obvious alternatives may be evidence that the regulation is not reasonable but is an "exaggerated response" to prison concerns. *Id.* at *7 (quoting Turner v. Safley, 482 U.S. 78, 90 (1987)).

The court of appeals specifically stated that this fourth factor is *not* a "least restrictive alternative" test, in which the prison officials would have to "set up and then shoot down" every conceivable alternative method of accommodating the claimant's constitutional complaint. *Id.* at *8 (quoting

to possession of one book from their personal collection, was valid because an increase of three additional books from the inmate's personal collection would not be a "de minimis cost" alternative.[70]

Although the court of appeals acknowledged that the regulation significantly restricted prisoners' Free Exercise rights,[71] it determined that this was "precisely the type of judgment on which courts are to defer to the prison officials."[72]

IV. ANALYSIS

While the *Turner* factors may have given the impression that prisoners' Free Exercise challenges would be fairly considered, *Kirsch* reveals how the strong underlying principle of unwavering deference has overpowered all other considerations.[73] This disturbingly excessive role of deference is reminiscent of the Supreme Court's ancient hands-off approach to prisoners' complaints.[74] Moreover, the *Turner* Standard's

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Turner, 482 U.S. at 91). The court stated that in order for a claimant to show that the regulation fails this factor, the claimant would have to point to an alternative that accommodates the prisoner's rights at de minimis cost. *Id.* at *8.

70. *Kirsch*, 2000 WL 730379 at *8. The court of appeals stated that the prison administration considered the risks of contraband when they decided to create the regulation. *Id*. The prison administration believed that, even if they searched the personal property, increased personal property in the AC still increases the risk of the introduction of contraband. *Id*.

71. *Id*.

72. *Id.* Therefore, in deferring to the judgment of prison officials, the court reversed the trial court decision and remanded with instructions. *Id*. at *9. The trial court had previously entered an order of permanent injunctive relief that allowed inmates in the AC to choose how many of the four books would come from their personal collection. *Id*. at *3. The trial court stated that this method would meet security concerns without imposing an onerous burden on administration, because the prisoners could only choose the books from their personal collection at the time they were first placed in the AC. *Id*. The inmates would be prohibited from exchanging their personal books for other personal books while they were in segregation. *Id*. The court of appeals admitted that the trial court had made a genuine attempt to alleviate a significant restriction on the plaintiff's constitutional rights while still taking into account the interests asserted by the State. *Id.* at *8. However, the court of appeals, in a decision that is reminiscent of the old hands-off doctrine, concluded that it would be better to defer to the prison administration's judgment. *Id*.

73. Dei, *supra* note 12, at 429 (arguing that "the excessive role of deference in the *Turner* Court's reasonableness standard reduces the arguably intermediate standard of review to that of a rational relationship standard"); *See infra* Part IV. A. The excessively deferential standard essentially validates officials' actions based on assertions regarding possible administrative and security problems rather than on the basis of any proof that the regulations are necessary to further governmental interests. O'Lone v. Estate of Shabazz, 482 U.S. 342, 356 (1987) (Brennan, J., dissenting) (stating that the *Turner/O'Lone* reasonableness standard is "categorically deferential."); Dei, *supra* note 12, at 432. At the time of the *Kirsch* decision (after the Supreme Court had ruled the RFRA unconstitutional), *Turner* was the law of the land. Boothby, *supra* note 42, at 584.

74. Dei, *supra* note 12, at 429. Prior to the 1960s, courts applied the hands-off doctrine. Jonathan R. Haden, *A Balk at Constitutional Protection for Pretrial Detainees*, 48 UMKC L. REV. 466, 466 (1980); *See supra* notes 12-14 and accompanying text (discussing the hands-off doctrine).

fourth factor denies prisoners' meaningful judicial review.[75]

A. The Significance of Kirsch

The *Kirsch* Court concluded "The question . . . , representing as it does a balance of a number of competing factors, seems to us precisely the type of judgment on which courts are to defer to the prison officials, so long as it is reasonable."[76]

The *Turner* Court determined that *courts* must balance four competing factors in order to determine if the prison officials were reasonable.[77] In practice, however, courts like the *Kirsch* Court allow the *prison officials*, themselves, to balance the competing factors; arguing that this is "precisely the type of judgment on which courts are to defer to the prison officials."[78] When courts invariably defer to the prison officials' own balancing of the four *Turner* factors (factors that were created in order to determine the reasonableness of those very officials)[79] the result is merely a modern-day hands-off doctrine.[80] Prisoners' Free Exercise complaints do not receive a meaningful review when courts allocate such extreme deference to the prison administration.[81]

In his dissent in *O'Lone*, Justice Brennan maintained that the Court's objective in selecting a standard of review for inmates' constitutional challenges was not, as the majority declared, "[t]o ensure that courts afford appropriate deference to prison officials." *O'Lone*, 482 U.S. at 356 (quoting *O'Lone*, 482 U.S. at 349). Justice Brennan continued with his caution against such a strong deference to the judgment of prison officials:

> The Constitution was not adopted as a means of enhancing the efficiency with which government officials conduct their affairs, nor as a blueprint for ensuring sufficient reliance on administrative expertise. Rather, it was meant to provide a bulwark against infringements that might otherwise be justified as necessary expedients of governing. . . While we must give due consideration to the needs of those in power, this Court's role is to ensure that fundamental *restraints* on that power are enforced.

Id. at 356 (Brennan, J., dissenting).

75. *See infra* Part IV B.

76. *Kirsch*, 2000 WL 730379 at *8.

77. Turner v. Safley, 482 U.S. 78, 89-91 (1987). The Court reasoned that the "reasonably related to legitimate prison interests" test would allow courts to review the reasonableness of the regulation in a less intrusive way than when using a strict scrutiny analysis. *Id*. at 89. The Court then provided the four factors that courts must use to determine the reasonableness. *Id*. at 89-91.

78. *Kirsch*, 2000 WL 730379 at *8.

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

80. Dei, *supra* note 12, at 436 n.171 (citing Berger, *Withdrawal of Rights and Due Deference: The New Hands Off Policy in Correctional Litigation*, 47 UMKC L. REV. 1, 20 (1978). Dei found Berger's argument relevant to *Turner* in that "the newhands-on-but-highly-deferential doctrine" fails to protect prisoners' rights. *Id.*

81. *See* Berger, *supra* note 80, at 20. "The Supreme Court's effective stance has been not only a reluctance to reverse administrative decisions, but rather the grant of virtually unreviewable

This result is not due to a flaw in the reasoning of the *Kirsch* Court; rather, it is the natural result of the principle of extreme deference found within *Turner*.[82] When courts use the *Turner* standard, prison regulations are sustained "whenever the imagination of the warden produces a plausible security concern and a deferential trial court is able to discern a logical connection between that concern and the challenged regulation."[83] A standard that yields so greatly to a prison administration's "imagination" is "virtually meaningless" and is inadequate to protect prisoners' Free Exercise rights.[84]

B. A Criticism of Turner's *Fourth Factor*

Justice Brennan labeled the *Turner/O'Lone* reasonableness standard as "categorically deferential."[85] The extreme deference given to prison

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discretion to correctional officials on questions involving the constitutional rights of inmates." *Id.* (citation omitted).

82. A single reasonableness standard, like the one articulated in *Turner*, is inadequate to protect prisoners' constitutional rights. Dei, *supra* note 12, at 427. Absent *overwhelming* evidence of its unreasonableness, a prison regulation will be sustained. *Id.*

83. *Turner*, 482 U.S. at 100-101 (Stevens, J., dissenting). Justice Stevens offered some extreme examples of how far the "logical connection" between the regulation and the institutional concern can extend. *Id.* Justice Stevens pointed out that there would be a "logical connection" between the institutional concern for prison discipline and a regulation permitting the use of bullwhips on prisoners. *Id*. There would be a "logical connection" between the institutional concern for security and a regulation which would ban any and all inmate communications, because communications may lead to the arrangement of an escape. *Id*. Justice Stevens offered these examples to show the dangers in giving such strong deference to prison officials. Hopefully, Justice Stevens' extreme examples would be so shocking to a court, that it would refuse to defer to prison officials' "balancing" of the factors in such cases.

However, some recent cases may demonstrate that Justice Stevens' examples are not so "outlandish." For example, in *Doty v. Lewis*, the court held that a prisoner could not possess a cloth tapestry that depicted a "religious" symbol on it, due to security and safety concerns. Doty v. Lewis, 995 F. Supp. 1081, 1086 (D. Ariz. 1998). Prison officials stated that the regulation was necessary for security purposes, because the cloth tapestries could be patched together to make an officer's uniform for the purpose of escaping. *Id*. This explanation can tell us one of two things: either Arizona police officers are in need of some nicer uniforms, or the prison administration just realizes that it can offer any reason at all for the regulation and it will be found valid.

84. *See Turner*, 482 U.S. at 100 (Stevens, J., dissenting); *See* Dei, *supra* note 12, at 427.

85. O'Lone v. Estate of Shabazz, 482 U.S. 342, 356 (1987) (Brennan, J., dissenting). In a powerful argument, Brennan explained the harm of applying the *Turner* standard:

> Prisoners are persons who most of us would rather not think about. Banished from everyday sight, they exist in a shadow world that only dimly enters our awareness. They are members of a "total institution" that controls their daily existence in a way that few of us can imagine . . . . It is thus easy to think of prisoners as members of a separate netherworld, driven by its own demands, ordered by its own customs, ruled by those whose claim to power rests on raw nec- essity. Nothing can change the fact, however, that the society that these prisoners inhabit is our own . . . . When prisoners emerge from the shadows to press a constitutional claim, they invoke no alien set of principles drawn from a distant culture. Rather, they speak the language

officials results in a manipulated application of the *Turner* Standard because it allows courts to find a "reasonable security concern" based upon mere speculation.[86] However, it is the *Turner* Standard's fourth factor that proves to be an all-but-insurmountable obstacle for prisoners.[87] The fourth prong of the *Turner* Standard was a half-hearted attempt by the Court to insure that a regulation is not an overly restrictive means of accomplishing the penological goal.[88] The *Turner* Standard of scrutiny is "so meager and deferential" that it has revived the hands-off doctrine.[89]

"Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."[90] However, *the walls* are not the barriers preventing an inmate from exercising his/her First Amendment rights. The *true* obstacle is the burden placed on inmates to prove that exercising their constitutional rights will not require any extra effort on the part of the prison administration.[91] "Placing the burden on the inmates . . . virtually ensures their failure, especially since almost any change in the established method of operating to accommodate the right will be at some cost to governmental interests."[92]

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of the charger upon which all of us rely to hold official power accountable. They ask us to acknowledge that power exercised in the shadows must be restrained at least as diligently as power that acts in the sunlight.

Id. at 354-55 (Brennan, J., dissenting) (citation omitted).

86. Roth, *supra* note 29, at 686. Each of the four *Turner* factors can be manipulated by giving deference to prison officials rather than requiring the officials to produce specific evidence to support the regulation. *Id*. at 690 (arguing that the *Turner* Court's application of the third factor shows that the standard is easily manipulated). Rather than require specific evidence showing that problems would arise from correspondence between institutions, the *Turner* Court chose to defer to the expertise of the prison officials. *Id*.

87. Cheryl Dunn Giles, Turner v. Safley *and its Progeny: A Gradual Retreat to the "Hands-Off" Doctrine?*, 35 ARIZ. L. REV. 219, 230 (1993).

88. Giles, *supra* note 87, at 230. Consequently, it is rare for a court to acknowledge that an alternative is reasonable, and it is even more rare for the court to determine that the regulation is unreasonable simply because a reasonable alternative exists. *Id*.

89. Daniel J. Solove, Faith Profaned: The Religious Freedom Restoration Act and Religion in the Prisons, 106 YALE L.J. 459, 470 (1996).

90. Turner v. Safley, 482 U.S. 78, 84 (1987).

91. *See Kirsch*, 2000 WL 730379 at *8 (stating that an inmate must find an alternative to the regulation that fully accommodates the prisoner's rights at de minimis cost to penological interests). Prison officials, not inmates, are in control of the evidence that is essential to show the superiority of a given deprivation over other alternatives. O'Lone v. Estate of Shabazz, 482 U.S. 342, 359 (1987) (Brennan, J., dissenting).

92. Dei, *supra* note 12, at 431. Inmates "have little chance of suggesting an alternative that could withstand the presumption of validity that accompanies a court's deference to prison officials' professional determination that the alternative would impose more than a de minimis cost." *Id*. at 431. Virtually any accommodation of an inmate's constitutional rights will have some effect upon the liberty and safety of other inmates and prison officials. *Id*. Once the change is shown to be at

A major problem with the fourth factor is that it undermines the little constitutional protection that the Turner Court likely intended. Presumably, the Court developed the standard as a method of determining when the exercise of a right is inconsistent with penological interests.[93] However, the fourth factor unnecessarily undermines prisoners' constitutional rights because it often denies rights even when they *are* consistent with the institution's objectives.[94] Even when prisoners can show that alternatives are available, the fourth factor simply states that this "may" be evidence that the regulation is overbroad.[95]

Moreover, the Court failed to clarify what evidence the prisoners must produce in order to establish the existence of a de minimus alternative.[96] Prisoners' challenges are almost destined to fail because the Court has provided little guidance on what evidence the prisoners must provide. Consequently, courts are given too much latitude to uphold prison regulations that severely restrict prisoners' Free Exercise rights—even when there are viable, less intrusive alternatives available.[97] Without sufficient guidance, courts fail to seriously consider the proposed alternatives. Instead, courts merely defer to the judgment of prison officials as to whether the alternative poses more than a de minimis cost.[98] The fourth factor denies prisoners meaningful review.

This fourth factor presented a barrier for the inmates in *Kirsch*.[99] The regulation permitted an inmate to possess only one religious book

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some cost, in staff time, for example, it will defeat the de minimis requirement. *See id.* at 436 n.187.

93. *See* Giles, *supra* note 87, at 230. The Court stated that prison regulations will be upheld as long as they are reasonably related to legitimate penological interests. *Turner*, 482 U.S. at 89.

94. *See* Giles, *supra* note 87, at 230. "The discrepancy between the Court's broad formulation [of prisoners' constitutional rights] and the extent to which those retained rights may be exercised under the *Turner* test results from an incorrect formulation of the fourth prong of that test." *Id*.

95. *Turner*, 482 U.S. at 90. Prison officials do not have to "set up and then shoot down" all conceivable alternatives. *Id*. Rather the inmate must provide an alternative that fully accommodates his or her rights at a de minimis cost to penological interests. *Id*. at 91.

96. Matthew P. Blischak, O'Lone v. Estate of Shabazz: *The State of Prisoners' Religious Free Exercise Rights*, 37 AM. U. L. REV. 453, 482 (1988).

97. Giles, *supra* note 87, at 230.

98. Blischak, *supra* note 96, at 482 (discussing how the *O'Lone* Court failed to probe into or assess the validity of the prison officials' concerns about the prisoners' proposed alternatives). Blischak argues that the *O'Lone* Court eliminated the requirement for any substantive scrutiny of prison officials' purported concerns in response to inmates' proposed alternatives. *Id.* Furthermore, the Court has provided unclear guidance for the lower courts regarding the appropriate degree of review of prison officials' opinions. *Id*.

99. *Kirsch*, 2000 WL 730379, at *8 (holding that the alternative of permitting three paperbacks from an inmate's personal collection would not be a de minimis cost).

from his personal collection.[100] The inmates argued that they should be permitted to possess three additional books from their personal collection rather than from the AC's limited library.[101] The prison administration already searches the personal Bibles and Koran of the inmates, so a search of just three more books (such as religious study guides) would pose a relatively small additional cost.[102] Moreover, the prison could reduce the risk of contraband by performing daily searches of the inmates' living areas. Although the request seemed to pose a very low risk to the penological interest of preventing contraband, the court of appeals deferred to the prison administration's judgment that the request posed a greater than de minimis cost.[103]

The inmates cannot argue that their alternative will have no effect on the current system. There would be no reason for inmates to challenge any regulation if they did not want some form of change to occur as a result of that challenge.[104] However, when an inmate's challenge attempts to change a regulation, officials are confident that the prison can proffer some reason for the regulation and it will qualify as a "legitimate penological objective."[105]

Under the *Turner* Standard, inmates continue to be separated from the protections of the Constitution unless the requested right is so

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100. *Id.* at *1. Property officers search this "Bible, Koran, or equivalent religious book" for contraband before it is allowed in the AC. *Id.*

101. *Id.* (showing that the regulation allowed the AC inmate to possess four total books, only one of which could be from the inmate's personal possession).

102. During the hands-off era, the Seventh Circuit dismissed a prisoner's petition to receive Bible study guides. Kelly v. Dowd, 140 F.2d 81, 82 (7th Cir. 1944). The *Kelly* Court stated that prison officials were "vested with a rather wide discretion in safekeeping and securing prisoners committed to their custody." *Id.* at 83.

103. *Kirsch*, 2000 WL 730379, at *7. Prison officials argued that an increase in personal possessions would lead to an increase in contraband. *Id.* Larry Fuchs, supervisor of the AC, testified that he knew of three occasions when matches were smuggled into the AC. *Id.* The court of appeals deferred to Fuchs' belief that increasing personal property into the AC leads to an increased risk of contraband. *Id.* at *8. This type of deference has placed almost insurmountable obstacles in the way of Jewish inmates, for example, whose religious items are repeatedly confiscated by prison staff as "contraband." Isaac M. Jaroslawicz, *How the Grinch Stole Chanukah*, 21 CARDOZO L. REV. 707, 709-10 (1999).

104. Dei, *supra* note 12, at 431. A change in a prison regulation necessarily has an impact on the inmates and prison officials alike. *Id.* These changes will have an impact on staff time, inmates' liberty, and even the safety of inmates and officers. *Id.*

105. Jaroslawicz, *supra* note 103, at 720. This confidence may be well grounded, because of the "categorically deferential" approach taken by the courts. O'Lone v. Estate of Shabazz, 482 U.S. 342, 356 (1987) (Brennan, J., dissenting). The *Turner* Court's open-ended "reasonableness" standard makes it too easy to uphold regulations that restrict inmates' First Amendment rights on the basis of administrative concerns and mere speculation about security risks; rather than on the basis of evidence showing that the restrictions are needed to further an important governmental interest. Turner v. Safley, 482 U.S. 78, 101 (1987) (Stevens, J., dissenting).

insignificant that it poses only a de minimis cost.[106] If prisoners truly do have rights to the Free Exercise of religion in prison,[107] then a less deferential, less hands-off approach by the courts is required.[108] A better standard would obligate prison administrators to consider alternatives that are "less restrictive" than outright deprivations of constitutional rights, while still meeting institutional needs for safety and security.[109]

C. The "New RFRA"- It's back, but for how long?

A "better standard" arrived in the form of the Religious Land Use and Institutionalized Persons Act of 2000.[110] Congress may have lost a battle in *City of Boerne*,[111] but it is still waging war over which standard to use in analyzing prisoners' Free Exercise challenges.[112] The

106. *See supra* note 32 (discussing the de minimus element).

107. *Turner*, 482 U.S. at 84 (quoting Procunier v. Martinez, 416 U.S. 396, 405-406 (1974)).

108. Haden, *supra* note 74, at 484 (arguing that a strong deferential approach allows the Court to "cleanse neatly its hands of the difficult task before it"). Haden argued that *Bell v. Wolfish*, which, like *Turner*, applied a rational relationship standard and a deferential approach, resurrected the discredited hands-off doctrine and effectively ignored prisoners' grievances. *Id*. Another problem with the deferential approach is that, in reality, the discretionary authority is not given to expert prison officials; rather, the true discretion rests in the hands of the cellblock guards who deal with the inmates on a personal, day-to-day basis. *Id*. at 485. "When the courts defer to administrative discretion, it is this guard to whom they delegate the final word on reasonable prison practices." Philip J. Hirschkop & Michael A. Millemann, *The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795, 811-12 (1969).

109. Jaroslawicz, *supra* note 103, at 720 (describing the effectiveness of the RFRA "compelling interest" standard). If nothing else, a "least restrictive alternative" test would force "prison officials to stop and think before simply denying requests for religious accommodation." *Id*. "Bureaucratic inconvenience" is not sufficient to sustain a denial under the least restrictive test. *Id*. Requiring prison officials to explore alternative means of providing religious accommodations (such as investigating how other prison systems have dealt with the situation) would not impose an undue burden on the state. Boothby, *supra* note 42, at 584.

110. 146 CONG. REC. S7774 (July 27, 2000).

111. City of Boerne v. Flores, 521 U.S. 507, 507 (1997).

112. 146 CONG. REC. S7774, at S7775-76 (July 27, 2000) (stating that the new bill applies the standard of the Religious Freedom Restoration Act (RFRA): If government substantially burdens the exercise of religion, it must demonstrate that imposing that burden on the claimant serves a compelling interest by the least restrictive means). 146 CONG. REC. S7774, at S7775-76 (July 27, 2000). Congress cited several examples of prison regulations that discriminated against an inmate's Free Exercise of religion. 146 CONG. REC. S7774, at S7775 (July 27, 2000).

A wide array of support has been displayed for the signing of the bill. Teresa Malcolm, *Bill Increases Protection for Religious Practice*, NAT'L CATH. REP., Oct. 6, 2000, at 8. The bill gained support from a vast coalition of religious groups, including evangelical Christians, Jews and Muslims. *Id*. Moreover, in a rare display of agreement with religious groups, the American Civil Liberties Union also praised the passage and signing of the bill. *Id*. Terri Schroeder, of the ACLU, stated that religion has been unfairly targeted by government regulation across the country and that this bill will help to restore the balance between the needs of religion and the needs of the larger community. *Id*.

But see Juan Otero, *Congress Moves to Federalize Local Land Use Control; Measure*

Religious Land Use and Institutionalized Persons Act (RLUIPA) reinstates the RFRA's compelling interest test[113] in place of the "reasonableness" standard of *Turner*.[114]

In contrast to the *Turner* Standard's fourth factor, the RLUIPA requires the *prison administration* to show that the regulation is the *least restrictive means* of furthering the compelling penological interest.[115] In *Kirsch*, the court of appeals declared that the prisoners have the burden of proving an "easy and obvious alternative" at de minimis cost to the institution.[116] While it is difficult for prisoners to propose "easy and obvious alternatives" at de minimis cost, prisoners' challenges will have a much better chance for success under the RLUIPA's scrutiny.

Under the RLUIPA, courts cannot simply defer to the prison officials' judgment without scrutiny. Prisoners' Free Exercise claims will once again receive a meaningful review. The prisoners, in *Kirsch*, likely would have succeeded under the RLUIPA, because there are less restrictive means of controlling the amount of contraband in prison.[117]

Unfortunately, the RLUIPA, like its predecessor the RFRA, may

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Passes Under Guise of 'Religious Liberty,' NATION'S CITIES WKLY., Aug. 7, 2000, Vol. 23, Issue 31 (arguing that the law is too much of a federal interference with local governments' authority in the areas of land use decision-making and jail operations). Otero argued that imposing a tougher standard than the *Turner* reasonableness standard will greatly disturb the local authority's autonomy. *Id.*

113. Pub. L. No. 106-274, § 3, 114 Stat. 803 (2000) (hereinafter RLUIPA). The Act states that no government shall impose a substantial burden on the religious exercise of persons residing in or confined to an institution, even if the burden results from a rule of general applicability unless the government meets the burden of demonstrating: 1) that the imposition of the burden is in furtherance of a compelling governmental interest; and 2) that the imposition of the burden is the least restrictive means of furthering that compelling governmental interest. *Id.*

If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause and shows that the government has substantially burdened the exercise of religion, the government will then bear the burden of persuasion on any element of the claim. *Id.* at § 4. However, at least one commentator has stated that this same "substantial burden" threshold resulted in an ineffective RFRA. Lupu, *supra* note 45, at 570 (reporting that the state prevailed in eighty-five percent of all reported decisions under RFRA claims, and half of the RFRA defeats occurred at the threshold as a result of narrow judicial constructions of the "substantial burden" requirement).

114. Turner v. Safley, 482 U.S. 78, 89 (1987).

115. RLUIPA at § 3.

116. *Kirsch*, 2000 WL 730379, at *8. Courts applying Turner's fourth factor recognize that it does not require prison officials to prove that their policies are the least restrictive means of achieving their objectives. Geoffrey S. Frankel, *Untangling First Amendment Values: The Prisoners' Dilemma*, 59 GEO. WASH. L. REV. 1614, 1633-34 (1991).

117. Prison officials could spend the extra time searching the three additional books for contraband. Moreover, prison officials could conduct daily or weekly searches of the AC inmates' living quarters. At the very least, the prison officials will have the difficult burden of proving that no less restrictive alternative exists.

not last long.[118] Congress used its Spending Power and Commerce Power in an attempt to enact a constitutional version of the former RFRA. The Spending Power is quite solid,[119] but the RLUIPA will not have as broad a coverage as the original RFRA when using the Spending Power alone.[120] Following the Court's decision in *U.S. v. Lopez*,[121]

118. In enacting the RLUIPA, Congress needed to find some power, other than the Section Five power which was not enough in *City of Boerne*, that would allow it to set a new standard for reviewing prisoners' Free Exercise challenges. *See supra* notes 46-48 and accompanying text (explaining the Court's rationale for finding the RFRA unconstitutional). In the RLUIPA, Congress hopes that their Commerce and Spending Powers will provide sufficient authority to enact this new version of the RFRA. *See* 146 CONG. REC. S7774, at S7775 (July 27, 2000).

Through the Spending Power, Congress is attempting to enact the compelling interest test indirectly, by requiring that state agencies that receive federal funds not burden religion without a compelling reason. *See* Thomas C. Berg, *The Constitutional Future of Religious Freedom Legislation*, 20 U. ARK. LITTLE ROCK L.J. 715, 727 (1998). Under the Spending Clause of the Constitution, Congress is authorized "to pay the Debts and provide for the common Defense and general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1. This power to spend implicitly includes the power to restrict the use of its appropriations and to impose conditions that recipients must honor if they choose to accept the federal funding. Daniel O. Conkle, *Congressional Alternatives in the Wake of* City of Boerne v. Flores: *The (Limited) Role of Congress in Protecting Religious Freedom From State and Local Infringement*, 20 U. ARK. LITTLE ROCK L.J. 633, 668 (1998).

The application of the RLUIPA extends to any case in which the substantial burden on religious exercise is imposed in a program or activity that receives Federal financial assistance. RLUIPA at § 3. The bill's protections are confined to each federally assisted "program or activity," which in most cases means the department that administers the institution in which the claimant is housed. 146 CONG. REC. S7774, at S7780 (July 27, 2000).

119. Thomas C. Berg, *Religious Freedom After* Boerne, NEXUS, Fall 1997, Op. 91 at 96, *available at* LEXIS 2 NEXUS J. Op. 91, at *96 [hereinafter *Religious Freedom*]. The Supreme Court is unlikely to want to call into question what has been a central component of civil rights enforcement for many years. *Id.* at *97. There are only two significant limitations on the Spending Power: 1) the conditions on federal grants must be *related* to the federal interest in particular national projects or programs; and 2) the financial inducement by Congress can not be so coercive that a point is reached where pressure on the states turns into compulsion to accept. South Dakota v. Dole, 483 U.S. 203, 207-11 (1987).

The Court, in *Dole*, showed that they will not forego all scrutiny of conditional spending, but the holding implies that this scrutiny will lead to invalidation, if at all, only in the most extreme cases. Conkle, *supra* note 118, at 672. However, the Court's renewed concern for constitutional federalism may arise again in the form of a more inflexible "relatedness" requirement. *Id*. at 675-676 (noting that this may affect the Court's willingness to accept a broad congressional definition of the scope of a state "program or activity" that would be subject to the conditions of the federal funding).

120. Conkle, *supra* note 118, at 673-80. The Spending Power can only protect religious exercise when the burdensome state program is a recipient of federal funds. *Id.* Some states may specifically refuse federal funding in particular *programs or activities* in order to avoid the assumption of RLUIPA duties. *Id*. at 682.

121. U.S. v. Lopez, 514 U.S. 549 (1995). *Lopez* involved the Gun-Free School Zones Act of 1990, in which Congress made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." *Id.* at 551. A twelfth grade student in San Antonio, Texas, arrived at school carrying a concealed,

many commentators believe that the Court would find RLUIPA-like legislation to be an unconstitutional use of the Commerce Power.[122]

Real religious liberty for prisoners may depend on the Supreme Court's own reexamination of the *Turner* standard.[123] The dissenting opinions in *City of Boerne* indicated that while Congress may have exceeded its authority in enacting the RFRA, the current standards used by the Court still need to be reexamined.[124]

V. CONCLUSION

Through *Kirsch*, we see how deferential the *Turner* standard has become.[125] The Supreme Court declared that prison walls will not separate inmates from their rights of Free Exercise.[126] In practice,

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unloaded handgun and five bullets. *Id*. Federal agents charged the student with violating the Gun-Free School Zones Act. *Id*. The Court held that the Act was an unconstitutional use of Congress's Commerce Power, because Congress failed to demonstrate that the possession of guns in schools substantially affected interstate commerce. *Id*. at 567. The Court refused to "pile inference upon inference" in order to find a substantial affect. *Id*. at 567. This decision marked the first time in nearly sixty years that the Court invalidated congressional regulation under the Commerce Power. *See, e.g.*, Molly E. Homan, United States v. Lopez*: The Supreme Court Guns Down the Commerce Clause*, 73 DENV. U. L. REV. 237, 237 (1995).

122. Conkle, *supra* note 118, at 660. The *Lopez* decision would invalidate such a law (as the RLUIPA) in many or most of its applications. *Id*. at 658. Moreover, such a law would probably violate state sovereignty as protected by the Supreme Court's decision in *New York v. United States*. *Id*. *See* New York v. U.S., 505 U.S. 144, 160-61, 177-78 (1992) (finding that it is constitutionally troubling for Congress to address its legislation to state government alone, effectively requiring state and local bodies to govern in a particular manner).

123. Lupu, *supra* note 45, at 568. Lupu suggests that legislation may actually hinder the religious liberty movement, because it will once again divert the Court's attention away from Free Exercise adjudication. *Id*. at 580. The possibilities for new and creative approaches to Free Exercise adjudication are likely to shrink over time, because the sole focus will be on the controversial legislation (the RLUIPA). *Id*. at 580. Lupu believes that the better approach is to wait for attractive test cases and to make incremental gains through judicial results and well-crafted judicial opinions. *Id*. at 593. As the *Boerne* Court warned, "The power to interpret the Constitution in a case or controversy remains in the Judiciary." City of Boerne v. Flores, 521 U.S. 507, 524 (1997).

124. *Boerne*, 521 U.S. 507 (1997). Justice O'Connor maintained that "it is essential for the Court to reconsider its holding in *Smith*" because that holding did not "faithfully serve the purpose of the Constitution" in light of the historical record and the precedent of the Free Exercise Clause. *Id*. at 564-65 (O'Connor, J., dissenting). Justice Souter also had doubts about the precedent set by *Smith* and wanted a full adversarial re-argument on the issue. *Id*. at 565 (Souter, J., dissenting). Justice Breyer agreed that the case should have been set for re-argument to decide whether the *Smith* decision was correct. *Id*. at 566 (Breyer, J., dissenting).

Moreover, given the prevalent use of the *Turner/O'Lone* standards by the courts, the precedential value of these cases must also be reevaluated to ensure the premise that prisoners do possess Free Exercise rights. Mayu Miyashita, City of Boerne v. Flores *and its Impact on Prisoners' Religious Freedom*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 519, 542 (1999).

125. *See supra* notes 74-78 and accompanying text.

126. *See supra* note 86 and accompanying text.

however, the Court's extremely deferential approach creates a very sturdy wall- one that separates too many inmates from their rights of Free Exercise. Congress recently raised the level of tension and controversy when it enacted the RLUIPA.[127] When the dust settles, the ultimate decision will once again be in the hands of the Supreme Court. Decisions concerning prisoners' constitutional rights should always be in the hands of the courts . . . not the prison guards. Therefore, the Court must overrule *Turner* and the modern-day hands-off doctrine.

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127. *See supra* notes 98-101 and accompanying text.

NEW DELHI â€” Indiaâ€™s Supreme Court on Monday handed down a symbolic sentence â€” a fine of about 1 cent â€” to a prominent lawyer who posted tweets critical of the court and its chief justice. The case against the lawyer, Prashant Bhushan, effectively put Indiaâ€™s highest court on trial, with many lawyers and activists claiming that the conviction alone of Mr. Bhushan was emblematic of the courtâ€™s eroding independence and relevance.Â Had the court sentenced Mr. Bhushan to prison, lawyers said it would have been seen as a clear sign of the courtâ€™s turn from independent arbiter to political tool. Lalit Bhasin, the president of the Bar Association of India, an umbrella organization that represents thousands of lawyers, called the fine â€œunfortunate.â€ Although all 50 states have certified their election results and the Supreme Court swiftly rejected an emergency request from Pennsylvania Republicans to block election results in the commonwealth, the justices are now grappling with a new controversial bid from Texas, supported by President Donald Trump and 17 other Republican-led states. The US Supreme Court has ruled that President Trump's financial records can be examined by prosecutors in New York. In a related case, the court ruled that this information did not have to be shared with Congress. Mr Trump has come under fire for not making his tax returns public like his predecessors. His lawyers had argued that he enjoyed total immunity while in office and that Congress had no valid justification to seek the records.