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The Big Man in the Big House: Prisoner Free Exercise in Light of Employment Division v. Smith

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INTRODUCTION: FIRST AMENDMENT FREE-EXERCISE CLAIMS ON THE INSIDE AND OUTSIDE

Shocking as it might seem, prisoners possess more free-exercise protections than private citizens.[1] As proof of this proposition, consider the following hypothetical. A Rastafarian man is arrested for smoking marijuana. Outraged, he files a First Amendment claim alleging that the state's categorical ban on marijuana use violates his right to religious free exercise.[2] While his claim is pending, another man—a Rastafarian *prisoner*—brings a First Amendment free-exercise suit challenging a similar *prison* ban on marijuana use. When presented with the private citizen's free-exercise claim, the judge applies the rule set forth in *Employment Division v. Smith* and immediately dismisses the claim.[3] When evaluating the prisoner's free-exercise claim, however, the judge applies the rule set out in *Turner v. Safley* and only dismisses the claim after conducting a more intensive judicial analysis.[4] While the judge's rulings on both claims were the same, the methods by which the judge adjudicated the claims were not.

Currently, prisoner and nonprisoner free-exercise claims are evaluated under different standards of review, and the standard applied to prisoner claims appears to embody a stricter form of judicial scrutiny than the standard applied to nonprisoner claims.[5] Outside the prison context, First Amendment free-exercise claims are subject to the rule set forth in *Smith*.[6] Under *Smith*, a constitutional violation does not exist if an alleged burden on religious free exercise is the result of a neutral law of general

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1. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof* . . . ." (emphasis added)).

2. *See id.*

3. *See generally* Employment Div., Dep't of Human Res. of Ore. v. Smith, 494 U.S. 872 (1990).

4. *See generally* 482 U.S. 78 (1987).

5. *See* discussion *infra* Parts I–II.

6. Michael Keegan, *The Supreme Court's Prisoner Dilemma: How* Johnson*, RLUIPA, and* Cutter *Re-Defined Inmate Constitutional Claims*, 86 NEB. L. REV. 279, 281 (2007) ("[In] *Employment Division v. Smith* . . . the Court abandoned strict scrutiny for non-inmate free exercise claims (i.e., cases outside the prison context) in favor of a deferential facial review." (citations omitted)). *See also* Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2978, 2995 n.27 (2010) (applying *Smith* to a state university's neutral and generally applicable policy).

applicability.[7] Therefore, under *Smith*, the judge in the above hypothetical was able to dismiss summarily the nonprisoner's claim because any alleged free-exercise violation was the result of a neutral and generally applicable law banning *all* marijuana use. Prisoner free-exercise claims, on the other hand, are subject to the rule set out in *Turner*.[8] Under *Turner*, a prison regulation is unconstitutional if it is not "reasonably related to legitimate penological interests."[9] To determine the reasonableness of a prison regulation, a court must balance four factors—factors that are not addressed under the bright-line rule set forth in *Smith*.[10] *Turner* thus appears to require a judge to examine free-exercise claims with greater scrutiny than *Smith* requires. Surely, there must be some justification for this seemingly backward state of affairs. Unfortunately, this is not the case.

This Comment posits that no valid justification exists for the continued use of *Turner* in prisoner free-exercise cases. *Turner* creates a conundrum whereby courts apply a higher level of scrutiny to prisoner free-exercise claims than to nonprisoner free-exercise claims. In effect, the continued application of *Turner* provides comparatively greater protection to prisoner free-exercise rights. Such a result lacks precedential support and is antithetical to the well-established constitutional principles underlying the *Turner* standard. Instead of applying *Turner*, courts should apply *Smith* to all First Amendment free-exercise claims regardless of their origins.

In reaching this conclusion, Part I of this Comment presents the development of the *Turner* and *Smith* standards. Part II demonstrates how *Turner* embodies a higher level of scrutiny than *Smith*. Part III then argues that *Turner*'s continued application to prisoner free-exercise claims is contrary to Supreme Court jurisprudence, as well as the foundational principles of the *Turner* standard. Part IV presents the circuit courts' primary justifications

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7. *See Smith*, 494 U.S. at 878 ("[I]f prohibiting the exercise of religion . . . is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."); *see also* Flagner v. Wilkinson, 241 F.3d 475, 490 (6th Cir. 2001) (Nelson, J., dissenting).

8. *See* O'Lone v. Estate of Shabazz, 482 U.S. 342, 349–50 (1987).

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

10. The four *Turner* factors include: (1) whether there was a "valid, rational connection" between the prison regulation and the government interest justifying it; (2) whether there was an alternative means available to the prison inmates to exercise the right at issue; (3) "the impact [that] accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally;" and (4) the existence of ready alternatives to the challenged regulation. *Id.* at 89–91.

for *Turner*'s continued viability and explains why these justifications are unpersuasive. Finally, Part V of this Comment illustrates how *Smith* is equally capable of protecting prisoner, as well as nonprisoner, free-exercise rights. As a result, this Comment concludes that *Smith* should be the standard of review for both prisoner and nonprisoner free-exercise claims.

I. RECENT HISTORY OF FREE EXERCISE: PRISONER AND NONPRISONER STANDARDS OF REVIEW

The First Amendment protects the free exercise of religion by guaranteeing that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . ."[11] Interpretations of the First Amendment's Free Exercise Clause have changed significantly over the past forty-plus years.[12] In particular, the United States Supreme Court has struggled to determine which standard of review should govern free-exercise cases.[13] Between 1963 and 1990, the Court made two notable shifts in the free-exercise standard of review.[14] One shift involved prisoner free-exercise cases, while the other involved free-exercise cases generally.[15]

A. Strict Scrutiny of the Sherbert *Analysis*

The recent history of free-exercise jurisprudence began in 1963 with *Sherbert v. Verner*.[16] In *Sherbert*, the United States Supreme Court addressed the constitutionality of a South Carolina unemployment compensation law.[17] The South Carolina statute prevented a Seventh-day Adventist from receiving unemployment payments because she was unwilling to work on Saturday, her

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11. U.S. CONST. amend. I.

12. *See generally* Patricia E. Salkin & Amy Lavine, *The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and Its Impact on Local Government*, 40 URB. LAW. 195, 196–208 (2008) (illustrating the changes in constitutional and statutory free-exercise standards from 1963 onward).

13. *Id*. *See also* James D. Nelson, *Incarceration, Accommodation, and Strict Scrutiny*, 95 VA. L. REV. 2053, 2057–59 (2009) (explaining the multiple shifts in standards of review in free-exercise cases).

14. *See* Nelson, *supra* note 13, at 2057–59; *see also* discussion *infra* Parts I.B–C.

15. *See* Nelson, *supra* note 13, at 2057–59; *see also* discussion *infra* Parts I.B–C.

16. 374 U.S. 389 (1963); *see also* Nelson, *supra* note 13, at 2057.

17. *Sherbert*, 374 U.S. at 399–401.

religion's Sabbath Day.[18] The *Sherbert* Court applied a strict scrutiny standard that required the state to prove that a "compelling state interest" justified the burden on the free exercise of religion that the unemployment compensation law created.[19] South Carolina failed to meet this demanding standard and thus the Court found the unemployment compensation law unconstitutional.[20] For nearly three decades, *Sherbert* remained the primary standard of review for free-exercise claims involving private citizens.[21] Twenty-four years after the *Sherbert* decision, however, the Court began evaluating *prisoner* free-exercise claims under a more deferential standard.

B. Prisoner Free Exercise

As a result of two 1987 United States Supreme Court decisions, *Turner v. Safley* and *O'Lone v. Estate of Shabazz*, lower courts began applying a deferential "reasonableness" test, not strict scrutiny, to prisoner free-exercise claims.[22] Quite simply, the Court found strict scrutiny unworkable in the prison setting.[23] In *Turner* and *O'Lone*, the Court provided numerous justifications for this new standard.

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18. *Id.* at 399.

19. *See id.* at 406. The Court further reasoned that "[i]t is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation.'" *Id.* at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)). The Court eventually began to interpret the *Sherbert* "compelling state interest" test as possessing a "least restrictive means" element whereby "[t]he state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest." Thomas v. Review Bd., 450 U.S. 707, 718 (1981). However, the *Thomas v. Review Board* Court qualified this statement by declaring, "[I]t is still true that '[t]he essence of all that has been said and written on the subject is that only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion.'" *Id.* at 718 (quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)). Subsequent courts have referred to the *Sherbert* test as the "compelling government interest" test. *See* Employment Div., Dep't of Human Res. of Ore. v. Smith, 494 U.S. 872, 883–84 (1990). As such, this Comment refers to the *Sherbert* test under both names.

20. *Sherbert*, 374 U.S. at 407–09.

21. *See* 63 AM. JUR. 3D *Proof of Facts* § 2 (2001).

22. *See* Nelson, *supra* note 13, at 2057–59.

23. *See* Turner v. Safley, 482 U.S. 78, 89 (1987).

1. Turner v. Safley *and the "Reasonableness" Test*

Surprisingly, the catalyst for change in the prisoner free-exercise standard, *Turner v. Safley*, was not a free-exercise case.[24] In *Turner*, the Court addressed the constitutionality of two regulations promulgated by the Missouri Division of Corrections.[25] The first regulation permitted communication between inmates at different institutions only if the inmates were immediate family members or if the communication involved a legal matter.[26] The second regulation forbade inmates from marrying without supervisor approval, which normally required an inmate to produce compelling reasons supporting the marriage, such as pregnancy or the birth of a child.[27] The Supreme Court overruled the Eighth Circuit by refusing to apply strict scrutiny to the challenged regulations.[28] Instead, the *Turner* Court sought to establish a more deferential standard of review that would apply to all constitutional claims brought by prisoners.[29]

The Court based its standard of review on two overarching principles gleaned from prior prisoner rights cases.[30] First, the Court established that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution," and, therefore, courts must be cognizant of constitutional claims brought by prisoners.[31] Second, however, the Court also recognized that running a prison requires tremendous expertise, and "'courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform.'"[32] The Court created the following standard to reconcile the need to provide redress for prisoners' constitutional grievances with the need for judicial restraint: "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[33]

To determine whether a challenged regulation is reasonably related to a legitimate penological interest, the Court developed a four-part balancing test.[34] The four factors include: (1) whether there

24. *See* Keegan, *supra* note 6, at 283.
25. *Id.*; *Turner*, 482 U.S. at 81.
26. *Turner*, 482 U.S. at 82. *See also* Keegan, *supra* note 6, at 283.
27. *See* Keegan, *supra* note 6, at 283; *Turner*, 482 U.S. at 81–82.
28. *Turner*, 482 U.S. at 81.
29. *Id.* at 85.
30. *See id.* at 84–85.
31. *Id.* at 84.
32. *Id.* at 84–85 (quoting Procunier v. Martinez, 416 U.S. 396, 405 (1974)).
33. *Id.* at 89.
34. *Id.* at 89–91.

was a "valid, rational connection" between the prison regulation and the government interest justifying it;[35] (2) whether there was an alternative means available to the prison inmates to exercise the right at issue;[36] (3) "the impact [that] accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally;"[37] and (4) the existence of ready alternatives to the challenged regulation.[38] Applying these factors, the *Turner* Court upheld the communication ban but invalidated the marriage regulation.[39] Within days of *Turner*, the Court would apply this "reasonableness" test to prisoner free-exercise claims in *O'Lone v. Estate of Shabazz*.[40]

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35. *Id.* at 89 (quoting Block v. Rutherford, 468 U.S. 576, 586 (1984)). The *Turner* Court elaborated further on this factor by declaring that "a regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." *Id*. at 89–90. Furthermore, the Court noted that "the governmental objective must be a legitimate and neutral one." *Id.*

36. *Id.* at 90. The Court noted that the amount of judicial deference shown to prison officials is affected by the existence of alternative means of exercising the right in question. *See id.*

37. *Id.* The Court continued: "When accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials." *Id.*

38. *Id*. at 90–91. The Court noted that "the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns." *Id.* The Court further noted that this test is not a "least restrictive alternative" test. However, "if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." *Id.*

39. *Id.* at 91–100. Prison officials cited security concerns as the basis for their communication ban. According to the Court, communication between inmates could be used as a means of planning escapes or conspiring to commit other illegal acts. *Id*. at 91. The Court held that this ban was logically related to the prison's purported security concerns. In fact, as the Court noted, such communication limitations even exist for parolees, who, after being released from prison, are often not allowed to communicate with known criminals. *Id.* at 91–92. Furthermore, no ready alternatives to the communications ban existed; prison officials could monitor all inmate-to-inmate correspondence, but such monitoring procedures would be very costly and likely ineffective because prisoners often communicate in code. *Id.* at 93. According to the Court, however, the marriage regulation was not reasonably related to penological objectives. *Id.* at 99–100. While prison officials created the marriage regulation to prevent violent "love triangles" and to teach women prisoners "skills of self-reliance," the Court held that the marriage regulation was an "exaggerated response" to security concerns and, therefore, unreasonable. *Id.* at 97–98. Moreover, the Court held that the marriage regulation "[swept] much more broadly than can be explained by petitioners' penological objectives." *Id.* at 98.

40. *See* O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987).

2. O'Lone v. Estate of Shabazz*: Its Guiding Principles and Description of the* Turner *Test*

In *O'Lone*, two inmates in a New Jersey state prison challenged prison regulations that prevented them from leaving outside work detail to attend Jumu'ah, a weekly Muslim service that the Quran commands.[41] The prisoners claimed that these regulations violated their free-exercise rights, while prison officials argued that the regulations were necessary security measures that prevented excess foot traffic in a "high security risk area."[42] Before addressing the constitutionality of the challenged regulation, the *O'Lone* Court set forth several principles that would guide its analysis.[43] These principles underscore the limited nature of the free-exercise rights that inmates retain.

The *O'Lone* Court made clear that a prisoner's free-exercise rights are more limited than those of noninmates.[44] The Court emphasized that "'[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.'"[45] According to the Court, these "limitations on the exercise of constitutional rights arise both from the fact of incarceration and from valid penological objectives—including deterrence of crime, rehabilitation of prisoners, and institutional security."[46] With these principles in mind, the Court sought to apply a standard of review that would provide appropriate deference to prison officials—the *Turner* "reasonableness" test.[47]

Before applying the *Turner* "reasonableness" test, however, the *O'Lone* Court provided its own description of the *Turner* test as well as the objectives the test sought to achieve.[48] The Court posited that the *Turner* test was "less restrictive than [the test] ordinarily applied to alleged infringements of fundamental constitutional rights."[49] Furthermore, the Court reasoned that the *Turner* test granted prison officials sufficient latitude to anticipate and respond to security and prison administration problems while avoiding "unnecessary intrusion of the judiciary into problems

41. *Id.* at 345.
42. *Id.* at 346.
43. *See id.* at 348–49.
44. *See id.*
45. *Id.* at 348 (quoting Price v. Johnston*,* 334 U.S. 266, 285 (1948)).
46. *Id.* (citing Pell v. Procunier, 417 U.S. 817, 822–23 (1974); Procunier v. Martinez, 416 U.S. 396, 412 (1974)).
47. *See id.* at 349.
48. *Id.* at 349–50.
49. *Id.*

particularly ill suited to 'resolution by decree.'"[50] Applying *Turner* to the New Jersey prison regulations at issue, the *O'Lone* Court held that the regulations were reasonably related to institutional order, safety, and rehabilitation interests and were therefore constitutional.[51]

C. Nonprisoner Free Exercise

Three years after *Turner* and *O'Lone*, a Supreme Court decision involving a nonprisoner free-exercise claim would cast doubt on *Turner*'s continued validity as applied to prisoner free-exercise cases.[52] In *Employment Division v. Smith*, the State of Oregon refused to pay unemployment benefits to two members of the Native American Church who were fired because of their religious use of peyote.[53] The plaintiffs argued that this denial of benefits violated their free-exercise rights.[54] To succeed on this claim, however, the plaintiffs essentially had to prove that an Oregon drug law banning *all* uses of peyote was unconstitutional under the Free Exercise Clause.[55] The plaintiffs argued that the drug law was unconstitutional because it did not make an exception for the religious use of peyote.[56] Furthermore, the plaintiffs argued that *Sherbert* provided the proper standard of review.[57] The Court, however, declined to apply *Sherbert* and instead adopted a standard of review radically different from the

50. *Id.* at 349–50 (quoting *Martinez*, 416 U.S. at 405).

51. *See id.* at 350–53. The Court found the prison officials' security concerns compelling. Excess movement of prisoners from outside work detail created congestion at the prison's main gate and placed added pressures on security officers. *Id.* at 351. With regard to rehabilitation interests, the prison officials argued that the regulation prepared prisoners for their reentry into the workforce, where ex-prisoners would be required to maintain a steady work schedule and put in a full day's work. *Id.* The Court also found this rehabilitation argument compelling. *See id.* Finally, the Court reasoned that, while certain Muslim prisoners would be denied Jumu'ah services, denial of these services did not prevent these prisoners from practicing their Muslim faith in other ways. *Id.* at 351–52. For instance, prison officials provided Muslim prisoners with a pork-free diet and made special arrangements for Muslim prisoners during the month of Ramadan. *Id*. at 352.

52. *See* Levitan v. Ashcroft, 281 F.3d 1313, 1318–19 (D.C. Cir. 2002).

53. *See* 494 U.S. 872, 874 (1990).

54. *See id.*

55. *See id.* at 875–76.

56. *See id.*

57. *Id.* at 876.

strict scrutiny analysis that had previously been applied in nonprisoner free-exercise cases.[58]

The *Smith* Court held that a person's religious beliefs do not alleviate his obligation to abide by neutral laws of general applicability, such as the drug law in question.[59] According to the Court, such a broad-based, categorical rule was necessary in free-exercise cases.[60] The Court reasoned that applying *Sherbert*'s "compelling government interest" test to neutral, generally applicable laws would allow every man "to become a law unto himself."[61] In other words, under the "compelling government interest" test, a person could refuse to abide by any generally applicable law by claiming that his religious beliefs command him to do so.[62] And according to the Court, such an anomaly "contradicts both constitutional tradition and common sense."[63]

While the *Smith* Court largely removed free-exercise claims from judicial review, it reasoned that free-exercise rights would find a new source of protection through the political process.[64]

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58. *See* Michael W. McConnell, *Institutions and Interpretations: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 153 ("Under [*Smith*], 'neutral, generally applicable law[s]' are categorically exempt from constitutional scrutiny, even when they prohibit or substantially burden religious exercise." (quoting *Smith*, 494 U.S. at 881)).

59. *See Smith*, 494 U.S. at 883–85.

60. *Id*.

61. *Id.* at 884–85 (quoting Reynolds v. United States, 98 U.S. 145, 167 (1878)).

62. *Id.*

63. *Id.* at 885 (explaining that past courts had never used the *Sherbert* "compelling government interest" test to invalidate a criminal law of general applicability, and reasoning that the "sounder approach" is to hold *Sherbert* inapplicable to challenges of such laws).

64. *Id.* at 890. Of course, to be constitutionally valid, any law must be at least rationally related to a legitimate state interest. *See* Robert W. Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 CALIF. L. REV. 1049, 1049 (1979). But above and beyond this mere rationality requirement, courts applying *Smith* will only examine a law to make sure that it is neutral and generally applicable. If a law is neutral and generally applicable, i.e., if it does not speak of religion and its objective is not to burden free exercise, then it has not offended the Free Exercise Clause under *Smith*. *See* Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 559–62 (1993) (Souter, J., concurring); Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 424 (2006) ("[In *Smith*, we] held that the Constitution does not require judges to engage in a case-by-case assessment of the religious burdens imposed by facially constitutional laws."); Locke v. Davey, 540 U.S. 712, 731 (2004) (Scalia, J., dissenting) ("[We are no longer] in the business of reviewing facially neutral laws that merely happen to burden some individual's religious exercise . . . ."); Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210, 1213 (5th Cir. 1991) ("We need not review the court's analysis because the Supreme Court's decision in [*Employment Division*

According to the *Smith* majority, "Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process."[65] Therefore, if society is dissatisfied with the Constitution's lack of free-exercise protections, the legislature can pass laws providing greater free-exercise rights.[66] The Court recognized, however, "that leaving accommodation [of religious free exercise] to the political process will place at a relative disadvantage those religious practices that are not widely engaged in . . . ."[67] But according to the *Smith* majority, such an "unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself . . . ."[68] Since the *Smith* decision, this bright-line rule remains the standard for evaluating nonprisoners' free-exercise claims.[69] Crucially, however, the Court did not address *Smith*'s applicability to prison regulations.

Since the *Smith* decision, circuit courts have continued to apply *Turner* to prisoner free-exercise claims,[70] but this application of *Turner* may be misguided. While few courts or scholars have compared the two standards, *Smith* appears to require less judicial scrutiny than *Turner*.[71] If so, then courts are essentially providing greater free-exercise protection to prisoners than to free persons. These disparate standards contradict commonsense as well as the Supreme Court's reasoning behind the *Turner* standard. In *Turner*, the Supreme Court recognized the simple fact that free persons, unencumbered by incarceration, possess greater constitutional rights than prisoners.[72] But the Supreme Court's underlying assumption no longer holds if *Turner* requires greater judicial scrutiny than *Smith*. Before such a determination can be made, however, an in-depth comparison of the *Smith* and *Turner* standards is necessary.

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v. Smith] eviscerates judicial scrutiny of generally applicable criminal statutes in response to free exercise challenges." (citations omitted)).

65. *Smith*, 494 U.S. at 890.

66. *Id.*

67. *Id.*

68. *Id.*

69. *See Hialeah*, 508 U.S. at 531 ("In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." (citing *Smith*, 494 U.S. 872)).

70. *See, e.g.*, cases cited *infra* notes 133–34.

71. *See* discussion *infra* Part II; *see also infra* notes 133–35.

72. *See* discussion *infra* Part IV.

II. THE *SMITH–TURNER* PARADOX

A comparison of *Smith* and *Turner* reveals the actual amount of judicial scrutiny that each standard requires. While both standards are deferential to the state, *Turner* ultimately requires courts to examine free-exercise claims with greater solicitude than the standard articulated in *Smith*. In other words, justifying a regulation under *Turner* is more difficult for the state than under *Smith*. In reaching this conclusion, this Part compares the structure and plain language of *Smith* and *Turner*, as well as circuit court applications of the two standards.[73]

A. Comparison of the Structure and Plain Language of Smith *and* Turner

While the *Smith* and *Turner* standards are not completely different, the structural and plain language differences between the standards are significant. As with any constitutional standard, *Smith* and *Turner* require that, at a minimum, regulations withstand rational basis scrutiny.[74] In other words, to be valid under *Smith* or *Turner*—or any other constitutional standard of review—a regulation must be rationally related to a legitimate government interest.[75] But above this baseline rationality requirement, *Smith* only requires that a regulation be neutral and generally applicable.[76] Therefore, if a law survives a rational basis review and is neutral and generally applicable, it does not violate the First Amendment under *Smith*.[77] Under *Turner*, however, the analysis is more nuanced.

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73. At least one scholar has presented the possibility that, in reality, *Smith* and *Turner* embody the same standard. *See* Benjamin Pi-wei Liu, *A Prisoner's Right to Religious Diet Beyond the Free Exercise Clause*, 51 UCLA L. REV. 1151, 1197 n.192 (2004). For instance, the *Smith* majority cites *O'Lone* as an example of the Court's past deviations from the *Sherbert* standard. *Id*. Perhaps the Court was trying to apply the same "reasonableness" standard in *Smith*. *Id*. This fleeting reference to *O'Lone* in *Smith*, however, provides little ground upon which to form a solid conclusion. A more reasoned determination of the standards' relative levels of scrutiny comes from a comparison of their structure and plain language, as well as the circuit courts' interpretations of the standards.

74. *See* Bennett, *supra* note 64, at 1049 ("The United States Supreme Court has long insisted, as a matter of constitutional doctrine, that legislative action must be rationally related to the accomplishment of some legitimate state purpose.").

75. *Id*.

76. *See supra* note 64 and accompanying text.

77. *See supra* note 64 and accompanying text.

Turner ultimately requires courts to evaluate free-exercise claims under a higher level of scrutiny than *Smith* requires. To be valid under *Turner*—as is the case under *Smith*—a regulation must be neutral, and it must also withstand a rational basis review.[78] But under *Turner*, unlike *Smith*, a court must engage in a four-part balancing test that assesses a regulation's reasonableness.[79] This "reasonableness test" requires a court to weigh interests that are effectively ignored under *Smith*. For instance, a court applying the second prong of *Turner*'s balancing test must examine whether the plaintiff has other means of exercising the religious right in question.[80] Additionally, *Turner*'s fourth prong requires courts to explore the existence of ready alternatives to the challenged regulation.[81] While these added strictures of the *Turner* balancing test may seem minor, they can have a significant practical effect.[82]

B. Practical Effect of the Differences Between Smith *and* Turner *and a Comparison of Circuit Court Applications of the Two Standards*

The practical effect of the structural and plain language differences between *Smith* and *Turner* is quite simple: *Turner*'s four-part balancing test allows courts to subject prison regulations to a case-by-case review, while *Smith*'s neutrality rule forces courts to address a regulation's constitutionality in a categorical fashion. The former type of review provides courts with a degree of judicial flexibility that is unavailable under the latter. As such,

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78. *See* Turner v. Safley, 482 U.S. 78, 89 (1987). Regarding the neutrality requirement, the *Turner* Court noted: "We have found it important to inquire whether prison regulations restricting inmates' First Amendment rights operated in a neutral fashion, without regard to the content of the expression." *Id.* at 90. Furthermore, the first factor of the *Turner* analysis determines whether a rational basis standard has been met. The first factor asks whether a "valid, rational connection" exists between the prison regulation and the government interest justifying it. *Id*. at 89.

79. *Id.* at 89–91.

80. *Id.* at 90.

81. *Id.* at 90–91. Furthermore, the *Turner* Court stated that "the existence of obvious, easy alternatives [to the challenged regulation] may be evidence that the regulation is not reasonable, but is an '*exaggerated response*' to prison concerns." *Id*. at 90 (emphasis added). This "exaggerated response" language of *Turner* further evidences the *Turner* standard's added restrictiveness. Under a mere rational basis test, such as *Smith*, "exaggerated responses" are perfectly permissible. Under a rational basis test, the government need only show that its means of achieving its goal were not arbitrary or irrational, and "[t]he fact that [a] policy was a 'response' at all—even an exaggerated one—would refute the contention that it was arbitrary or irrational." Keegan, *supra* note 6, at 332–33.

82. *See* discussion *infra* Part II.B.

two courts applying *Turner* can reach different conclusions when analyzing the same regulation—a result significantly less likely under *Smith*.[83] A comparison of circuit court applications of *Turner* and *Smith* further illustrates this practical effect of the standards' structural and plain language differences.

In *Scott v. Mississippi Department of Corrections*, the Fifth Circuit applied *Turner* and held that a Rastafarian prisoner was not exempt from a prison regulation banning long hair, sideburns, and beards.[84] In *Scott*, the prison officials argued that the regulation was reasonably related to prison safety concerns because it precluded prisoners from radically altering their hairstyles as a means of preventing identification after an escape.[85] Balancing the *Turner* factors, the *Scott* court agreed with the prison officials' argument and upheld the regulation as facially reasonable.[86] In its *Turner* analysis, the *Scott* court sought to determine whether the regulation was reasonable as applied to the general prison population.[87] The court did not address whether, or how, the particular facts of the plaintiff's case affected the regulation's reasonableness.[88]

In *Flagner v. Wilkinson*, however, the Sixth Circuit took a different approach to the *Turner* analysis and declined to uphold an identical grooming regulation.[89] In *Flagner*, a Hasidic Jewish prisoner challenged an Ohio prisoner grooming regulation that prohibited growing long sidelocks.[90] Just as prison officials argued in *Scott*, prison officials in *Flagner* defended the grooming regulation by claiming that it aided in escape prevention.[91] In *Flagner*, however, the court found this argument unpersuasive.[92] Unlike the *Scott* court, the *Flagner* court examined the regulation's reasonableness in light of the particular facts of the plaintiff's

83. *See* discussion *infra* Part II.B.
84. Scott v. Miss. Dep't of Corr., 961 F.2d 77, 78–81 (5th Cir. 1992).
85. *See* Brief of Defendants-Appellees at 15, Scott v. Miss. Dep't of Corr., 961 F.2d 77 (5th Cir. 1992) (No. 91-1538).
86. *Scott*, 961 F.2d at 80–82.
87. *Id.* at 80 ("[P]enal authorities may need a hard and fast rule in dealing with certain continuing or recurring situations, even when that rule could be better tailored to the rights of individual prisoners through a court's flexible, case-by-case analysis.").
88. *See id.*
89. *See* Flagner v. Wilkinson, 241 F.3d 475, 477–88 (6th Cir. 2001).
90. *Id.* at 477–78.
91. *Id.* at 485–86.
92. *Id.* at 486.

case.[93] While the *Flagner* court recognized that the grooming regulation might be reasonable when applied to the general prison population, the court found that the regulation was potentially unreasonable when applied to the particular facts of the plaintiff's case.[94] As proof of the regulation's unreasonableness, the *Flagner* court pointed to the fact that the plaintiff had never attempted to escape from prison in the past.[95] Therefore, the *Flagner* court—unlike the *Scott* court—held that the State's escape prevention argument did little to justify the free-exercise burdens that the grooming regulation placed on the plaintiff.[96]

Scott and *Flagner* illustrate how the *Turner* factors can lead to disparate results when applied to the same nucleus of operative facts. This disparity in judicial outcomes is unlikely under *Smith*. If the Fifth and Sixth Circuits had applied *Smith* to the prisoner grooming regulations at issue in *Scott* and *Flagner*, both courts would have almost certainly reached the same conclusion and validated the regulations. The grooming regulations in *Scott* and *Flagner* forbade all prisoners from maintaining hair longer than three inches from the scalp and required all prisoners to keep their beards and sideburns neatly trimmed.[97] These grooming regulations are neutral and generally applicable and therefore do not present a First Amendment violation under *Smith*.[98]

However, the *Scott* and *Flagner* courts applied *Turner*'s balancing test—not *Smith*'s categorical rule. Under *Turner*, the *Scott* and *Flagner* courts enjoyed a degree of judicial flexibility that is unavailable under *Smith*. As such, the *Scott* and *Flagner* courts were able to reach different conclusions when evaluating

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93. *See id.* at 484–88 (explaining that the plaintiff did not have disciplinary problems in the past—a fact that tended to show the unreasonableness of the prison's grooming regulation as applied to the plaintiff).

94. *See id.* at 477–88. The *Flagner* court held that the plaintiff had presented a valid issue of fact concerning whether the State had violated his constitutional free-exercise rights. Therefore, the case was remanded for further proceedings on the issue. *Id.* The district court's review—if any—of the issue is unpublished.

95. *See id.* at 485–86 ("In addition to a photograph of Flagner, the defendants also have on file four professionally-made sketches of him bearing various beard and sidelock lengths and one sketch of Flagner with no facial hair at all. In the event that Flagner ever escaped from prison, these sketches would help to identify him because they show a range of his possible appearances.").

96. *See id.*

97. Scott v. Miss. Dep't of Corr., 961 F.2d 77, 78 (5th Cir. 1992) (presenting the Mississippi prison grooming regulation); *Flagner*, 241 F.3d at 977–78 n.1 (presenting the Ohio prison grooming regulation).

98. Neither the Mississippi grooming regulation at issue in *Scott* nor the Ohio prison grooming regulation at issue in *Flagner* mentions religion, and both are applicable to all prisoners. *See supra* note 97 and accompanying text.

essentially the same regulation. This practical effect of the differences between *Turner* and *Smith*—namely, that *Turner* provides greater judicial latitude than *Smith*—is further illustrated in the Seventh Circuit case of *Sasnett v. Litscher*.[99]

In *Sasnett*, Judge Posner undertook a thorough comparison of *Turner* and *Smith*.[100] Judge Posner noted that "*Turner* and *O'Lone* can . . . be interpreted to require prison authorities to make a reasonable accommodation to the inmates' religious desires, but *Smith* cannot be."[101] Judge Posner highlighted the practical implications of *Turner*'s reasonableness requirement by applying *Smith* and *Turner* to a hypothetical prisoner jewelry ban.[102] Posner stated:

> If the Wisconsin prison system forbade inmates to have any jewelry, it would be difficult under *Smith* for inmates to claim that the Constitution entitled them to an exemption for religious jewelry, whereas under the regime of *Turner–O'Lone* we would have to uphold the claim because of the feebleness of the state's safety argument . . . .[103]

As Posner's hypothetical demonstrates, the added judicial flexibility of the *Turner* analysis allows a court to strike down a prison regulation that would be otherwise valid under *Smith*. In essence then, the state's task of proving a prison regulation's constitutionality is more onerous under *Turner* than it would be under *Smith*.[104]

Smith is currently the constitutional standard of review for nonprisoner free-exercise claims, while *Turner* is the standard for prisoner claims.[105] Unlike *Smith*, the *Turner* balancing test invites greater judicial scrutiny of prison regulations and imposes a

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99. 197 F.3d 290, 292 (7th Cir. 1999) (writing in dicta), *abrogated by* Braden v. Gilbert, 557 F.3d 541 (7th Cir. 2009).

100. *See id.*

101. *Id*.

102. *Id*.

103. *Id*.

104. Judge Posner echoed this sentiment in the recent case of *Grayson v. Schuler*, 666 F.3d 450 (7th Cir. 2012). In *Grayson*, the court addressed the constitutionality of a prison regulation that forbade all prisoners, except Rastafarians, from maintaining long hair. Although Judge Posner's discussion of *Smith* and *Turner* was relegated to dicta, he emphatically maintained that under *Smith*, prisons could "authorize any ban on long hair as long as it is not motivated by religious prejudices or opinions." *Id.* at 452. Under *Turner*, however, "prison authorities [must] 'accommodate' an inmate's religious preferences if consistent with security and other legitimate penological concerns." *Id.* at 453.

105. Levitan v. Ashcroft, 281 F.3d 1313, 1318–19 (D.C. Cir. 2002).

heightened burden on the state in defending these regulations. Therefore, by making it more difficult for the state to defend against prisoners' free-exercise claims, courts are essentially providing more protection to prisoner free-exercise rights than to nonprisoner free-exercise rights.[106] This result is odd considering the Supreme Court's motives behind the creation of the *Turner* standard.

III. *TURNER*: AN ANOMALY OF CONSTITUTIONAL PROPORTIONS

In both the *Turner* and *O'Lone* opinions, the Supreme Court presented a number of principles that guided its application of the *Turner* "reasonableness" test.[107] First, the Court acknowledged that prisoners retain the right to free exercise.[108] According to the Court, however, incarceration brings about this right's necessary withdrawal or limitation.[109] Second, the Court recognized that the judiciary is ill-equipped to deal with the urgent problems of prison administration.[110] Third, the Court reasoned that prison administration is a task that should be relegated to the other branches of government.[111] With these principles in mind, the Court sought to apply a standard of review that would protect prisoners' free-exercise rights while providing sufficient deference to prison officials.[112] At first, the application of *Turner* to prisoner free-exercise claims may have advanced these principles and objectives. In light of *Smith*, however, the continued application of *Turner* is antithetical to its own foundational purposes for three reasons.

First, *Turner* unnecessarily expands, rather than limits, prisoner rights. Other than free exercise, no constitutional right receives more protection inside a prison than without.[113] Such a result not

106. *See* discussion *infra* Part IV.B.

107. *Compare* Turner v. Safley, 482 U.S. 78, 84–85 (1987), *with* O'Lone v. Estate of Shabazz, 482 U.S. 342, 348–50 (1987).

108. *O'Lone,* 482 U.S. at 349.

109. *Id.* at 349–50.

110. *Turner*, 482 U.S. at 84.

111. *Id.*

112. *O'Lone*, 482 U.S. at 349.

113. In fact, very few constitutional rights even receive the *same* protection within prison walls as they do in free society. In the few situations where the Supreme Court has held that a particular right is not limited in a prison setting, the Court has had good reasons for doing so. For example, the Supreme Court has held that a prisoner's Fourteenth Amendment right to equal protection is evaluated under strict scrutiny, as is the case with nonprisoners' equal protection rights. Johnson v. California, 543 U.S. 499, 510–11 (2005). However, the *Johnson* Court held that "compliance with the Fourteenth Amendment's ban on

only violates commonsense, but it also violates an unbroken chain of Supreme Court reasoning. In *O'Lone*, and in a number of other cases, the Supreme Court held that prisoners' rights are necessarily limited by reason of their incarceration.[114] According to *O'Lone*, "[L]imitations on the exercise of constitutional rights arise both from the fact of incarceration and from valid penological objectives—including deterrence of crime, rehabilitation of prisoners, and institutional security."[115] Therefore, the Court originally applied *Turner* to prisoner free-exercise claims as a means of limiting free-exercise rights.[116] Since *Smith*, however, the Court has examined the free-exercise claims of private citizens under a lower level of scrutiny than is demanded by *Turner*.[117] *Turner* no longer acts as a necessary limitation of rights "aris[ing] from the fact of incarceration and from valid penological objectives."[118] Instead, *Turner* acts as an unintended expansion of rights that defies the fact of incarceration.

Second, the continued application of *Turner* inhibits penological objectives. The Court created the *Turner* standard as a relief from strict scrutiny that would allow prison officials to

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racial discrimination is not only consistent with proper prison administration, but also bolsters the legitimacy of the entire criminal justice system. Race discrimination is especially pernicious in the administration of justice. And public respect for our system of justice is undermined when the system discriminates based on race." *Id*. (citations omitted) (internal quotation marks omitted). As a general proposition, however, prisoners' rights are limited in the prison context. *See, e.g.*, Procunier v. Martinez, 416 U.S. 396 (1974) (restricting the contents of incoming and outgoing prisoner mail); Pell v. Procunier, 417 U.S. 817 (1974) (restricting face-to-face media interviews with individual inmates); Jones v. N.C. Prisoners' Union, Inc., 433 U.S. 119 (1977) (prohibiting meetings, solicitations, and bulk mailings related to a prison union); Bell v. Wolfish, 441 U.S. 520 (1979) (restricting inmates' receipt of hardcover books not mailed directly from publishers, book clubs, or book stores); Block v. Rutherford, 468 U.S. 576 (1984) (banning contact visits); Thornburgh v. Abbott, 490 U.S. 401 (1989) (restricting inmates' receipt of subscription publications); Washington v. Harper, 494 U.S. 210 (1990) (limiting a prisoner's due process rights); Lewis v. Casey, 518 U.S. 343 (1996) (restricting inmates' access to courts); Shaw v. Murphy, 532 U.S. 223 (2001) (limiting an inmate's right to correspondence); Overton v. Bazzetta, 539 U.S. 126 (2003) (limiting a prisoners' freedom of association).

114. *See, e.g.*, O'Lone v. Estate of Shabazz, 482 U.S. 342, 348–50 (1987); Johnson v. California, 543 U.S. 499, 510 ("[C]ertain privileges and rights must necessarily be limited in the prison context.").

115. *O'Lone*, 482 U.S. at 348.

116. *See id.* at 348 (citing *Pell*, 417 U.S. at 822–23; *Martinez*, 416 U.S. at 412).

117. *See* discussion *supra* Part.II.A–B.

118. *See O'Lone*, 482 U.S. at 348.

account for the prison environment's exigencies and hostilities.[119] Since *Smith*, however, the strict scrutiny of nonprisoner free-exercise claims has disappeared, while the exigencies and hostilities of prisons have worsened.[120] While *Turner* is still a deferential standard, it is needlessly restrictive in light of *Smith*. *Turner* ultimately subjects neutral and generally applicable prison regulations to a higher level of scrutiny than comparable regulations outside the prison context.

Third, *Turner* creates unnecessary judicial intrusion into the other branches of government. The *Turner* Court recognized that prison administration is a task relegated to the legislative and executive branches.[121] As such, the Court sought to grant much deference to prison officials' decisions to avoid unnecessarily violating separation of powers principles.[122] Undoubtedly, *Turner* did grant significant deference to prison officials compared to the *Sherbert* standard.[123] *Smith*, on the other hand, gave nearly complete deference to the state in nonprisoner cases and evaluated nonprisoner claims in a categorical fashion.[124] Meanwhile, *Turner* still allows courts to subject prisoner free-exercise claims to a case-by-case review.[125] This simple difference between the *Turner* and *Smith* standards makes it possible for prisoners—but not private citizens—to continually challenge prison regulations already ruled constitutional.[126] Considering the need for judicial restraint in the

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119. Turner v. Safley, 482 U.S. 78, 84–85 (1987).

120. In the 1990s alone, the number of prisoners affiliated with gangs more than doubled. Johnson v. California, 543 U.S. 499, 533 (2005) (Thomas, J., dissenting). With names like the "Aryan Brotherhood," the "Black Guerrilla Family," and the "Mexican Mafia," many of these prison gangs are formed along racial lines and perpetuate bigotry and violence in America's prisons. *Id.* Prison gangs can be highly regimented groups committing crimes such as drug trafficking, theft, and murder. *Id.*

121. *See Turner*, 482 U.S. at 85.

122. *See id.*

123. *See* Keegan, *supra* note 6, at 300–01 (stating that both *Turner* and *Smith* are deferential compared to *Sherbert* but are different nonetheless).

124. *See* McConnell, *supra* note 58, at 153 ("Under [*Smith*], 'neutral, generally applicable law[s]' are categorically exempt from constitutional scrutiny, even when they prohibit or substantially burden religious exercise." (quoting Employment Div., Dep't of Human Res. of Ore. v. Smith, 494 U.S. 872, 881 (1990))).

125. *See* discussion *supra* Part II.B.

126. Under *Turner*, courts can invalidate a previously upheld regulation if a subsequent application of that regulation is deemed unreasonable. For example, the Sixth Circuit held that an Ohio prisoner grooming policy—despite having survived numerous *Turner* challenges—was potentially unreasonable *as applied* to the particular facts of the case. *See* Flagner v. Wilkinson, 241 F.3d 475, 484–88 (6th Cir. 2001); *id.* at 488 (Nelson, J., dissenting) (explaining that the Ohio regulation had been previously upheld on multiple occasions). Not all courts

realm of prison administration, it makes no sense for courts to adjudicate claims that would be meritless had they not originated in prisons.[127] Doing so creates needless judicial intrusion into the other branches of government and violates separation of powers principles.

The assumptions and objectives behind the Supreme Court's creation of the *Turner* standard are as true and applicable today as in 1987. Since the *Smith* decision, however, the continued application of *Turner* contradicts the Supreme Court's reasoning underlying the standard's creation. Now, *Turner* expands prisoners' rights, inhibits penological objectives, and violates separation of powers principles. For various reasons, however, *Turner* has remained the status quo in the circuit courts.[128] Unfortunately, the circuit courts' justifications for *Turner*'s continued application do little to rectify the logical inconsistencies that *Turner* now creates.

IV. A SQUARE PEG IN A ROUND HOLE: THE POST-*SMITH* APPLICATION OF *TURNER*

While the Supreme Court has not weighed in on the interplay between *Smith* and *Turner*,[129] a number of circuit courts have acknowledged the issue.[130] More often than not, circuit courts continue to evaluate prisoner free-exercise claims under *Turner*.[131] But of the circuits that continue to apply *Turner* to prisoner free-exercise claims, only three—the Sixth, Eighth, and Ninth Circuits—have explicitly held that *Smith* did not displace

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agree that a previously validated regulation is subject to subsequent, case-by-case review. *See* Hicks v. Garner, 69 F.3d 22, 25 (5th Cir. 1995) (explaining that a Rastafarian is not entitled to a particular case-by-case analysis of a previously upheld grooming policy simply because he was not in the general prison population). The Supreme Court declined to address the issue, so courts are still free to apply *Turner* to previously upheld prison regulations. Wilkinson v. Flagner, 534 U.S. 1071 (2001) (denying state petitioner's writ of certiorari).

127. *Flagner*, 241 F.3d at 489–91 (Nelson, J., dissenting) (explaining how the need for judicial restraint in the realm of prison administration warrants a categorical approach to prisoner free-exercise claims).

128. *See* discussion *infra* Part IV.

129. The Supreme Court has not decided a prisoner free-exercise claim since *O'Lone*, which was decided three years before *Smith*.

130. *See* cases cited *infra* notes 133–34.

131. *See* Pi-wei Liu, *supra* note 73, at 1196–97.

Turner.[132] The Second, Third, Tenth, and Eleventh Circuits have all recognized the tension between *Smith* and *Turner* but have refused to decide the issue and have continued to apply *Turner* by default.[133] Only the Fourth, Seventh, and, arguably, the D.C. Circuit have ever applied the *Smith* neutrality principle to prisoner free-exercise claims.[134]

The circuit courts that continue to apply *Turner* have presented a number of justifications for doing so. Of them, three primary justifications have emerged. The first, and most common, of these justifications advances *Turner* as the *de facto* standard of review that should govern when the state fails to raise *Smith*.[135] However, this justification does not advance *Turner* as a reasonable—or even preferable—alternative to *Smith*. The second justification for *Turner* maintains that no conflict exists between *Smith* and *Turner* because "*Smith* does not alter the rights of prisoners; it simply brings the free exercise rights of private citizens closer to those of prisoners."[136] The third and most ardent justification argues that

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132. *See* Flagner v. Wilkinson, 241 F.3d 475, 481 (6th Cir. 2001); Salaam v. Lockhart, 905 F.2d 1168, 1171 n.7 (8th Cir. 1990); Ward v. Walsh, 1 F.3d 873, 877 (9th Cir. 1993).

133. *See* Levitan v. Ashcroft, 281 F.3d 1313, 1318–19 (D.C. Cir. 2002) (examining in great depth the potential effects that *Smith* could have on the *Turner* analysis and noting that "many courts have grappled with the question of how the Court's decision in *Smith* interacts with the prisoner-specific test set forth in *Turner* and *O'Lone*," but applying *Turner* because neither party raised the issue); Salahuddin v. Goord, 467 F.3d 263, 274 n.3 (2d Cir. 2006) (declining to explore "what effect the Supreme Court's decision in [*Smith*] has on the *O'Lone* standards for judging prisoner free-exercise claims because neither party argues that *Smith* changes the analysis"); Kay v. Bemis, 500 F.3d 1214, 1219 n.3 (10th Cir. 2007) (noting "unresolved tension" between *Turner* and *Smith* but declining to address the issue because the government did not raise it); Boles v. Neet, 486 F.3d 1177, 1181 (10th Cir. 2007) (suggesting *Turner* is "sharply at odds with the test formulated three years later in [*Smith*]" but declining to address the issue for the same reason).

134. *See* Hines v. S.C. Dep't of Corr., 148 F.3d 353, 357–58 (4th Cir. 1998) (applying both *Smith* and *Turner* to a prisoner grooming policy and validating the policy under both standards); Smith v. Ozmint, 578 F.3d 246, 251 (4th Cir. 2009) (exclusively applying the *Smith* neutrality principle); Borzych v. Frank, 439 F.3d 388, 390 (7th Cir. 2006) (explaining that the First Amendment "does not require the accommodation of religious practice: states may enforce neutral rules" (citing Employment Div., Dep't of Human Res. of Ore. v. Smith, 494 U.S 872 (1990); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987))). The standard in the D.C. Circuit is somewhat unclear. *See* Kaemmerling v. Lappin, 553 F.3d 669, 677 (D.C. Cir. 2008) (upholding a federal prisoner DNA harvesting *statute*—not a prison regulation per se—under *Smith*). *But see Levitan*, 281 F.3d at 1318–19 (applying *Turner* to a prisoner free-exercise claim because neither party raised the *Smith* issue).

135. *See* cases cited *supra* note 133.

136. *Salaam*, 905 F.2d at 1171 n.7.

courts cannot realistically apply *Smith*—a nonprisoner case—in the hyper-regulated prison environment.[137]

The circuit courts' three primary justifications for the continued application of *Turner* are unpersuasive. These justifications avoid the conflict between *Smith* and *Turner*, erroneously compare the two standards, or misinterpret *Smith*'s practical ramifications. This Part presents in greater detail the primary arguments for *Turner*'s continued viability and further explains why these arguments are unconvincing.

A. If It's Not Broken, Don't Fix It: Applying Turner *by Default*

A surprising number of circuit courts have examined in depth the potential conflicts between *Smith* and *Turner*, yet they have continued to apply *Turner* simply because the states have failed to argue that *Smith* should govern.[138] This Comment refers to this application of *Turner* as an "application by default." While this kind of judicial inaction is not without historical and jurisprudential support, it does little to provide a logical basis for the continued use of *Turner*.

A circuit court's unwillingness to decide the *Smith–Turner* issue *sua sponte* is likely rooted in legal philosophy. One of the basic features of the American adversarial legal system is party control over case presentation.[139] Typically, an adversarial system is defined as one in which the parties present the facts and legal arguments to a passive decision-maker who then decides the case on the parties' terms.[140] In this adversarial system, judges are strongly discouraged from engaging in "issue creation"—the act of raising legal claims and arguments that the parties overlooked.[141] Therefore, if the government fails to argue that *Smith* should govern a prisoner free-exercise case, a judge will likely maintain the status quo and resolve the dispute by applying *Turner*. This "hands-off" approach allows a judge to avoid overturning precedent.

Moreover, *Turner*, as applied in *O'Lone*, is still technically "good" law because the Supreme Court has never explicitly overruled *Turner*.[142] Thus, no constitutional limitation impedes lower courts from applying *Turner* to prisoner free-exercise

137. Ward v. Walsh, 1 F.3d 873, 877 (9th Cir. 1993).
138. *See* cases cited *supra* note 133.
139. Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 449 (2009).
140. *Id.*
141. *Id.*
142. Sasnett v. Litscher, 197 F.3d 290, 293 (7th Cir. 1999).

cases.[143] In fact, some circuit courts have implied that they have a constitutional *duty* to uphold *Turner* until the Supreme Court holds otherwise.[144] For example, Judge Posner stated that "*Smith* . . . did not purport to overrule or limit *Turner* and *O'Lone*; and the Supreme Court has instructed us to leave the overruling of its decisions to it."[145] Judge Posner's assertion is not without merit.

The Supreme Court has described *stare decisis* as reflecting "a policy judgment that 'in most matters it is more important that the applicable rule of law be settled than that it be settled right.'"[146] Furthermore, the Supreme Court has stated: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."[147] Against this backdrop of *stare decisis*, nothing prevents courts from applying *Turner* by default when the parties fail to raise *Smith*. But applying *Turner* by default is clearly a decision based on expediency rather than merit.

When courts apply *Turner* simply because *Smith* was not raised, they are essentially choosing *Turner* because it is the "settled" standard, as opposed to the "right" standard. Thus, the application of *Turner* by default says very little, if anything, about the standard's inherent merits. This type of application provides only tangential support for *Turner*'s continued validity and avoids the conflict between *Turner* and *Smith* altogether. Therefore, courts should provide more compelling justifications for *Turner*'s continued use when forced to address the *Turner–Smith* conflict head-on.

B. Second Justification: Smith *Did Not Surpass* Turner

In *Salaam v. Lockhart*, the Eighth Circuit held that *Smith* does not affect the *Turner* analysis because *Smith* "simply brings the free exercise rights of private citizens closer to those of prisoners."[148] Essentially, this argument claims that noninmates' free-exercise rights under *Smith* are still greater than, or at least

143. *See* Keegan, *supra* note 6, at 301.
144. *See Sasnett*, 197 F.3d at 293; Grayson v. Schuler, 666 F.3d 450, 452–53 (7th Cir. 2012).
145. *Sasnett*, 197 F.3d at 292.
146. State Oil Co. v. Kahn, 522 U.S. 3, 20 (1997) (quoting Agostini v. Felton, 521 U.S. 203, 235 (1997)).
147. Rodriguez de Quijas v. Shearson–Am. Express, Inc., 490 U.S. 477, 484 (1989).
148. Salaam v. Lockhart, 905 F.2d 1168, 1171 n.7 (8th Cir. 1990).

equal to, prisoners' free-exercise rights under *Turner*. Therefore, if noninmates have more free-exercise rights than prisoners, no conflict exists between *Smith* and *Turner*, and nothing prevents a court from applying *Turner*. This argument is flawed because it compares the two standards according to the wrong criterion and, by doing so, fails to recognize the actual conflict between *Smith* and *Turner*.

To determine which test is applicable to prisoner free-exercise claims, the Eighth Circuit compared *Smith* and *Turner* according to the amount of religious freedom a person typically enjoys under each standard. As the *Salaam* court correctly pointed out, prison regulations commonly subject prisoners to a strict daily routine that is foreign to free society.[149] Unlike prisoners, private citizens are generally not required to wake, eat, and sleep at predetermined times.[150] Furthermore, free persons are unlikely to be governed by strict grooming and uniform policies.[151] Whereas an unyielding prison regimen can often prevent a prisoner from exercising his religious rights on his own terms, a private citizen is generally free to engage in religious expression any way he sees fit. Therefore, a typical prisoner whose free-exercise rights are evaluated under *Turner* will have less religious freedom than a nonprisoner whose rights are evaluated under *Smith*. Based on this comparison of *Smith* and *Turner*, the Eighth Circuit held that *Smith* "[brought] the free exercise rights of private citizens closer to those of prisoners" but did not affect the *Turner* analysis.[152] In reality, however, *Smith* did affect the *Turner* analysis, and the *Salaam* court failed to notice this because it based its comparison of the two standards on the wrong criterion. Instead of comparing the amount of religious freedom that prisoners and nonprisoners typically enjoy, the court should have compared the amount of constitutional protection that the *Smith* and *Turner* tests mandate.

The *Smith* and *Turner* Courts sought to protect free-exercise rights by creating standards of review under which future courts must examine alleged First Amendment violations. The strictness of a standard of review is directly proportional to the amount of judicial oversight a court must undertake to protect the constitutional right at stake.[153] For instance, courts applying strict

149. *Id.* at 1169.
150. *Id.*
151. *Id.*
152. *Id.* at 1171 n.7.
153. In his dissenting opinion in *O'Lone*, Justice Brennan explained how rights are protected by the courts according to the varying degree of scrutiny applied:

scrutiny to a challenged regulation will delve into the motives and purposes behind the regulation to ensure that the state possesses a "compelling government interest" and that the chosen regulation is the "least restrictive means" of achieving that interest.[154] Alternatively, courts applying minimal scrutiny are unwilling to engage in any extensive exegesis and instead validate laws that are only rationally related to some legitimate government end.[155] Because separation of powers principles generally prevent courts from directly overseeing legislative or executive actions, courts can only protect a right by guaranteeing that alleged infringements of that right will be examined under a particular level of scrutiny. The actual amount of rights that a particular group enjoys is not within the court's direct control, and the Eighth Circuit erred when it compared *Smith* and *Turner* based on this criterion.

A more accurate comparison of *Smith* and *Turner* focuses on the level of scrutiny that each test requires. As the foregoing has demonstrated, *Turner* requires a higher level of scrutiny than *Smith*.[156] Therefore, *Turner* guarantees more constitutional protection of free-exercise rights than *Smith*. In order to make an informed decision between *Smith* and *Turner*, a court must determine whether it is willing to afford more constitutional protection to prisoners' free-exercise rights than to nonprisoners' free-exercise rights. By comparing *Smith* and *Turner* according to the wrong criterion, the Eighth Circuit failed to make this decision.

> A standard of review frames the terms in which justification may be offered, and thus delineates the boundaries within which argument may take place. The use of differing levels of scrutiny proclaims that on some occasions, official power must justify itself in a way that otherwise it need not. A relatively strict standard of review is a signal that a decree prohibiting a political demonstration on the basis of the participants' political beliefs is of more serious concern, and therefore will be scrutinized more closely, than a rule limiting the number of demonstrations that may take place downtown at noon.

O'Lone v. Estate of Shabazz, 482 U.S. 342, 357 (1987) (Brennan, J., dissenting) (citations omitted). *Cf.* City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440–42 (1985) (explaining how the courts protect various Fourteenth Amendment rights according to the varying degree of scrutiny applied).

154. *See* Thomas v. Review Bd., 450 U.S. 707, 718–19 (1981) (illustrating the extensive exegesis a court will undertake in applying strict scrutiny to a regulation).

155. KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 641 (17th ed. 2010) ("[Rational basis] review does not demand anything approaching a perfect fit to an actual purpose; any conceivable rational basis is enough.").

156. *See* discussion *supra* Part II.

C. Third Justification: Smith *Was Not a Prison Case*

Only the Ninth Circuit has explicitly acknowledged its intention to apply *Turner* over *Smith* as a means of providing greater free-exercise protection to prisoners than to nonprisoners.[157] The Ninth Circuit's primary argument against the application of *Smith* to prisoner free-exercise claims is rather straightforward: *Smith* was not a prison case and is not applicable in the prison setting.[158] As Judge Diarmuid O'Scannlain stated in *Ward v. Walsh*, "[i]nmates must rely on the prison system to provide them with the necessities of life. Determining to what extent prison officials must accommodate a prisoner's right to free exercise in fulfilling this obligation is wholly different from determining whether free citizens must obey criminal laws of general applicability."[159] Judge O'Scannlain is essentially arguing that prisoners are at the complete mercy of the government and only possess the free-exercise rights that the government is willing to provide them. He therefore posits that prisoner free-exercise rights need *Turner*'s built-in protections to avoid being obliterated under *Smith*.[160] This argument, while facially plausible, lacks jurisprudential and historical support.

The Court created *Turner* as a necessary limitation of prisoners' rights.[161] Only after *Smith*, which was a rather unpopular decision, have courts presented the idea that *Turner* is a necessary expansion of free-exercise rights.[162] While the Supreme Court recognized that prisoners still retain free-exercise protection within prison walls, the Court has never held or insinuated that prisoners should receive more free-exercise protection than nonprisoners. Furthermore, history has disproved the argument that *Smith* is incapable of protecting prisoners' rights.[163] Under *Smith*, prisoners have received significant political protections, and, thus, Judge O'Scannlain's fears have not materialized.

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157. Ward v. Walsh, 1 F.3d 873, 877 (9th Cir. 1993).
158. *Id.*
159. *Id.*
160. Geoffrey S. Frankel, *Untangling First Amendment Values: The Prisoners' Dilemma*, 59 GEO. WASH. L. REV. 1614, 1644–45 (1991) ("The Court's reliance on legislatures was premised, in part, on its belief that the political process would work to provide appropriate religious accommodations, although it recognized the limitations of the political process. Prisons are not run on democratic principles, however, and prisoners have no political control. Thus, reliance on prison administrators to provide appropriate religious accommodations may be misplaced." (citations omitted)).
161. *See* discussion *supra* Part IV.
162. *See* McConnell, *supra* note 58, at 153.
163. *See* discussion *infra* Part V.A.

V. THE POLITICAL PROTECTION OF PRISONER FREE-EXERCISE RIGHTS

For better or worse, *Smith* eliminated nearly all judicial review of free-exercise claims and left free-exercise protection in the hands of the democratic process.[164] Since *Smith*, free-exercise rights are only protected insofar as society is willing to protect them.[165] In other words, if a society believes that free-exercise rights of a certain kind should be protected, then its laws will reflect that belief.[166] Prisoners should not be immune from this rationale.

As with nonprisoners' rights, the protection of prisoners' free-exercise rights should depend not on the courts but rather on the political process. Like any religious minorities who lack political clout, prisoners may be disadvantaged under a system that relegates nearly all free-exercise protections to the legislative process. But, according to the reasoning of *Smith*, such an "unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself . . . ."[167] The simple fact of incarceration should not insulate a prisoner from the "unavoidable" democratic risks that he shares with nonprisoners who are likewise politically disadvantaged. Ultimately, however, a prisoner's lack of political power is unlikely to diminish the amount of political protection that his free-exercise rights receive.

A. RLUIPA and the Added Protections of Prisoner Free-Exercise Rights

The political process has not neglected prisoners' free-exercise rights. Even under the *Smith* regime, prisoners have proven quite capable of influencing the legislative agenda and gaining adequate political protection for their free-exercise rights. For instance, in 2000, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA), which restored strict

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164. *See* McConnell, *supra* note 58, at 153 ("Under [*Smith*], 'neutral, generally applicable law[s]' are categorically exempt from constitutional scrutiny, even when they prohibit or substantially burden religious exercise." (quoting Employment Div., Dep't of Human Res. of Ore. v. Smith, 494 U.S. 872, 881 (1990))); *see also Smith*, 494 U.S. at 890.

165. *See Smith*, 494 U.S. at 490.

166. *See id.*

167. *Id.*

scrutiny to prisoner free-exercise claims.[168] The legislative history of RLUIPA provides proof of Congress' commitment to protect prisoner free-exercise rights.[169] Furthermore, RLUIPA's legislative history shows the powerful effect that interest groups—working on behalf of prisoners—had on the statute's passage.[170]

Soon after *Smith*, Congress passed the Religious Freedom Restoration Act (RFRA), which sought to restore *Sherbert*'s "compelling interest" test as the standard of review for all free-exercise claims, including prisoner claims.[171] RFRA was enormously popular in Congress.[172] However, in the 1997 case *City of Boerne v. Flores*, the Court held RFRA unconstitutional as applied to the states.[173] Following the *City of Boerne* decision, the House Subcommittee on the Constitution held three separate hearings in which a number of interest groups presented testimony advocating for new legislation to protect prisoners' free-exercise rights.[174] The House Subcommittee heard testimony from Catholic, Christian, Jewish, Mormon, and Muslim organizations.[175] In particular, the Subcommittee heard accounts of the severe burdens prison administrators that had placed on religious inmates.[176]

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168. *See* 42 U.S.C. § 2000cc-1 (2006). More specifically, RLUIPA restored the "compelling governmental interest" test to claims of prisoners that represent a "substantial burden" on a prisoner's religious free exercise. *See id.*

169. *See* discussion *infra* Part V.A.

170. *See* discussion *infra* Part V.A. These interest groups testified before Congress and lobbied legislators in an effort to drum up support for the statute. Their efforts paid off, and RLUIPA was a resounding success.

171. Matthew D. Kreuger, *Respecting Religious Liberty: Why RLUIPA Does Not Violate the Establishment Clause*, 89 MINN. L. REV. 1179, 1185 (2008).

172. *See* McConnell, *supra* note 58, at 160 ("After due consideration, the House of Representatives passed RFRA unanimously and the Senate did so by a vote of 97–3.").

173. *See* 521 U.S. 507 (1997); Kreuger, *supra* note 171, at 1186.

174. *See generally Protecting Religious Freedom after* Boerne v. Flores*: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. (1997); *Protecting Religious Freedom after* Boerne v. Flores *(Part II): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. (1998); *Protecting Religious Freedom after* Boerne v. Flores *(Part III): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. (1998).

175. *See Protecting Religious Freedom after* Boerne v. Flores*: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 4–5 (1997); *Protecting Religious Freedom after* Boerne v. Flores *(Part II): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 4–6 (1998); *Protecting Religious Freedom after* Boerne v. Flores *(Part III): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 5–6 (1998).

176. *See* Kreuger, *supra* note 171, at 1186–87.

Inspired by this testimony, Senators Orrin Hatch and Ted Kennedy drafted the Senate version of RLUIPA.[177]

To ensure RLUIPA's passage, Congress limited the bill's scope to two areas of concern: land use restrictions and institutional regulations.[178] The testimony before the Senate Judiciary Committee and the House Subcommittee on the Constitution convinced RLUIPA's redactors that these two areas were particularly susceptible to free-exercise burdens and were therefore especially deserving of increased political protection.[179] With regard to institutional regulations, RLUIPA reads:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, [which includes any "jail, prison, or other correctional facility,"][180] even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.[181]

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177. 146 Cong. Rec. 14,284 (2000) (statement of Sen. Kennedy).

178. *Compare* Kreuger, *supra* note 171, at 1186 ("Fearing that such an expansive provision would suffer the same fate as RFRA, Congress limited RLUIPA to two areas in which it heard significant testimony documenting religious discrimination: land use and institutions such as prisons."), *with* Keegan, *supra* note 6, at 304–05 ("It is likely that the Senate version was limited in scope in order to allay the fears of those people and organizations who believed that an act of sweeping applicability would have adverse effects on other civil rights laws.").

179. *See* 146 Cong. Rec. 16,698 (2000) (joint statement of Sens. Hatch and Kennedy).

180. *See* 42 U.S.C. § 1997(1)(B)(ii) (2006) (defining "institution").

181. 42 U.S.C. § 2000cc-1 (2006). This language effectively restores a strict scrutiny analysis to prisoner free-exercise claims. There is, however, room for debate that RLUIPA may in fact be a *deferential* form of strict scrutiny. *See* SARAH E. RICKS & EVELYN M. TENENBAUM, CURRENT ISSUES IN CONSTITUTIONAL LITIGATION: A CONTEXT AND PRACTICE CASEBOOK 641 (2011). This debate exists in large part due to the Supreme Court's description of RLUIPA in *Cutter v. Wilkinson*. In *Cutter*, the Supreme Court noted: "Lawmakers supporting RLUIPA were mindful of the urgency of discipline, order, safety, and security in penal institutions and anticipated that courts would apply the Act's standard with due deference to prison administrators' experience and expertise." 544 U.S. 709, 723 (2005) (quoting 146 Cong. Rec. 16,699 (2000) (joint statement of Sens. Hatch and Kennedy)). But regardless of this deferential language in Senators Hatch and Kennedy's joint statement,

Senators Hatch and Kennedy championed RLUIPA vigorously on the Senate floor.[182] Eventually, over 50 diverse and well-respected interest groups supported the Senate version of the bill.[183] RLUIPA's popularity among senators was equally overwhelming. The bill received bipartisan support and was passed unanimously in the Senate without objection.[184]

RLUIPA's legislative journey proves that the democratic process is equally capable of protecting prisoners' and nonprisoners' free-exercise rights. Congress passed RLUIPA just as it would any other law. Committed lobbyists and concerned legislators banded together and convinced Congress to support them.[185] The only difference between RLUIPA and most other laws is the amount of bipartisan support it received.[186] While it may seem as if RLUIPA should have solved the *Smith–Turner* debate, in actuality, it has not. The conflict between *Smith* and *Turner* still exists, and the resolution of the conflict remains a worthwhile endeavor.

B. The Lasting Effects of Turner*'s Continued Application*

From the standpoint of a casual observer, it would seem redundant for a prisoner to assert a free-exercise claim under the Constitution if he could find similar relief under RLUIPA.[187] Despite RLUIPA, prisoners still possess a cause of action under

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RLUIPA's plain language shows that the standard is clearly more restrictive on the state than *Smith* or *Turner*.

182. *See* 146 Cong. Rec. 14,283–84 (2000) (statement of Sen. Hatch); 146 Cong. Rec. 14,284–86 (2000) (statement of Sen. Kennedy); 146 Cong. Rec. 16,698–700 (2000) (joint statement of Sens. Hatch and Kennedy).

183. 146 Cong. Rec. 16,701 (2000) (statement of Sen. Kennedy). These groups included: the Christian Legal Society, American Civil Liberties Union, People for the American Way, and the Leadership Conference for Civil Rights. *Id.*

184. 146 Cong. Rec. 16,703 (2000) (statement of Sen. Reid) (illustrating the bipartisan support RLUIPA received and showing RLUIPA's unanimous passage).

185. *See Interest Groups*, USHISTORY.ORG, http://www.ushistory.org/gov/5c.asp (last visited Nov. 7, 2011) (explaining how interest groups operate in America).

186. *Partisanship: America's Second Civil War?*, NPR.ORG (Nov. 16, 2007), http://www.npr.org/templates/story/story.php?storyId=16349093 (noting that the level of party-line voting in Congress is at its highest level in over a century).

187. Under RLUIPA and *Turner*, victorious prisoners are entitled to injunctive relief and attorney's fees. While *Turner* offers the potential for monetary awards, these awards are limited to nominal awards due to the Prison Litigation Reform Act (PLRA).

Turner.[188] Therefore, a great number of prisoners bringing free-exercise claims continue to seek relief under *Turner*.[189] While the exact motivations for filing a First Amendment *Turner* claim in tandem with an RLUIPA claim are uncertain, the practical effects of *Turner*'s continued application are significant.

One possible motivation for filing a free-exercise claim is the prospect of monetary damages. *Turner* allows prisoners to recover monetary damages, while RLUIPA generally does not.[190] However, judges rarely award monetary relief for prisoners' First Amendment free-exercise claims.[191] In order to receive a monetary award under *Turner*, a prisoner must show that the alleged violation of his First Amendment rights resulted in a physical injury—a highly unlikely scenario.[192] Therefore, prisoners probably have a separate motivation for filing a First Amendment *Turner* claim in tandem with an RLUIPA claim.

More likely than not, prisoners continue to argue *Turner* in free-exercise cases simply out of adherence—albeit a misguided adherence—to precedent. Despite RLUIPA, *Turner* remains the analytical starting-point upon which courts generally begin their analyses in prisoner free-exercise cases.[193] Even though the strict scrutiny of RLUIPA is more stringent than *Turner*'s "reasonableness" standard, courts will still expend great energy

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188. *See* RICKS & TENENBAUM, *supra* note 181, at 642 (noting that many RLUIPA claims are brought in tandem with a First Amendment claim).

189. In January 2012 alone, the federal court system addressed at least six cases involving dual *Turner*–RLUIPA claims. *See, e.g.*, Wilkins v. Walker, No. 09-cv-0457-MJR-SCW, 2012 WL 253442, at *1 (S.D. Ill. Jan. 26, 2012) (raising an RLUIPA claim and a *Turner* claim under 42 U.S.C. § 1983); Monts v. Arpaio, No. CV 10-0532-PHX-FJM (ECV), 2012 WL 160246, at *1 (D. Ariz. Jan. 19, 2012) (same); Bland v. Aviles, No. 11-1742 (ES), 2012 WL 137783, at *6 n.3 (D.N.J. Jan. 18, 2012) (addressing both RLUIPA and *Turner* standards but failing to decide the free-exercise issue and instead allowing plaintiff leave to amend pleading).

190. States do not waive their sovereign immunity to private suits seeking monetary damages under RLUIPA. Sossamon v. Texas, 131 S. Ct. 1651, 1663 (2011). Whether a plaintiff can recover monetary damages from state officials sued in their private capacity is less settled. *See* Fields v. Voss, No. 1:07-cv-00595-AWI-GSA (PC), 2010 WL 476040, at *3–5 (E.D. Calif. Feb. 4, 2010) (explaining the varying schools of thought as to whether prison officials can be sued in their individual capacities under RLUIPA).

191. *See, e.g.*, Leonard v. Louisiana, No. 07-0813, 2010 WL 3780793, at *1–2 (W.D. La. Sept 20, 2010) ("Nominal damages are the proper award for a constitutional violation unaccompanied by a compensable injury or damage.").

192. The Prisoner Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(e) (2003), states: "No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury."

193. *See, e.g.,* cases cited *supra* note 189.

analyzing alleged free-exercise violations under *Turner*'s four-part balancing test before deferring to RLUIPA.[194] Therefore, prisoners, often litigating in a *pro se* capacity, will mirror prior courts' analytical patterns and claim relief under *Turner* even when doing so is futile or unnecessarily duplicative in light of RLUIPA.[195] Yet these dual *Turner*–RLUIPA claims are not confined to the pleadings of inexperienced prisoner litigants. Well-trained counsel, representing prisoners on a *pro bono* basis, often file claims seeking relief on both constitutional and statutory grounds.[196] This continued application of *Turner* can have a substantial effect on state resources.

In a large number of prisoner free-exercise cases, the state must prepare for and defend against a *Turner* claim that should—for all intents and purposes—no longer exist. In effect, *Turner* needlessly increases the state's litigation expenses. Whereas in nonprisoner cases the state can defeat most constitutional free-exercise claims by asserting the *Smith* neutrality principle, the state's burden is much more onerous when *Turner* is raised in a prisoner free-exercise case. To successfully defend against a *Turner* claim, the state must spend time researching the issue and applying the relevant facts of the case to the *Turner* balancing test.[197] While a single *Turner* claim may not place an undue hardship on a state's defense team, all *Turner* claims—in the aggregate—can account for considerable litigation costs.[198] Ultimately, the taxpayers, who

194. *See, e.g.,* Cotton v. Cate, No. C 09-0385 WHA (PR), 2011 WL 3877074 (W.D. Cal. Sept. 1, 2011).

195. Many prisoner free-exercise cases are brought by *pro se* prisoner litigants. *See, e.g.*, Wilkins v. Walker, No. 09-cv-0457-MJR-SCW, 2012 WL 253442 (S.D. Ill. Jan. 26, 2012); Monts v. Arpaio, No. CV 10-0532-PHX-FJM (ECV), 2012 WL 160246 (D. Ariz. Jan. 19, 2012); Bland v. Aviles, No. 11-1742 (ES), 2012 WL 137783 (D.N.J. Jan. 18, 2012).

196. *See, e.g.*, Sharp v. Johnson, 669 F.3d 144 (3rd Cir. 2012) (listing private counsel for plaintiff in a case presenting a tandem *Turner*–RLUIPA claim); Leonard v. Louisiana, No. 07-0813, 2010 WL 1285447 (W.D. La. Mar. 31, 2010) (same).

197. Because the state is not awarded attorney's fees for successfully defending against a *Turner* or RLUIPA claim, state attorneys need not submit billing records to the court. Therefore, it is difficult to ascertain the exact amount of time or money spent by the state in defending any one particular *Turner* claim. But assuming that any competent state counsel must adequately defend against a *Turner* claim or face a default judgment against the state, a state attorney must, at a minimum, expend the necessary effort to research and brief the issue. Both of these activities require time *and* money.

198. While it is difficult to place an exact monetary value on the cost of defending *Turner* claims, each claim comes at *some* cost to the state. And considering that tandem *Turner*–RLUIPA claims are continuously raised in

finance the state's attorneys, bear the financial burden of *Turner*'s unnecessary application. But even assuming that RLUIPA *has* nullified many of the practical ramifications of the *Smith–Turner* paradox, RLUIPA has not addressed the fundamental conflict between the *Smith* and *Turner* standards.

CONCLUSION

As a matter of constitutional interpretation, resolution of the *Smith–Turner* debate is critical. The First Amendment has been, and will continue to be, the basis of religious protection in America.[199] With the Constitution being of such signal importance, any blatant inconsistency in the interpretation of its core provisions creates a crack in the bedrock of American law. And *Turner* is a blatant inconsistency.

Regardless of RLUIPA's mitigating effects, *Turner*'s continued application in free-exercise cases is patently illogical. The Court never intended *Turner* to place free-exercise claims of prisoners at a distinct advantage over similar claims by private citizens.[200] In fact, the Court has consistently held that incarceration limits prisoner rights.[201] Only in exceptional cases has the Court held that prisoners' constitutional rights should be evaluated under the same standard as nonprisoners' rights, and the Court has never held that prisoners should receive *more* constitutional protection than nonprisoners.[202] Under *Turner*, however, prisoners' free-exercise rights *do* receive more constitutional protection than those of noninmates. This result is not only unprecedented, but also unsettling, considering the Court's recognized need for judicial restraint in prisoner free-exercise cases.[203]

This Comment has not argued that prisoners' free-exercise rights should remain unprotected. Rather, this Comment only holds that prisoners' free-exercise rights should not receive more constitutional protection than those of private citizens. *Smith* relegated protection of noninmates' free-exercise rights to the democratic process, and the same should be done for inmates' free-

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federal courts throughout the country, it is logical to assume that the combined effect of these claims on state resources is significant.

199. In nearly every prisoner and nonprisoner case, the First Amendment's Free Exercise Clause is cited as the starting point of legal analysis.

200. *See* discussion *supra* Part III.

201. *See* discussion *supra* Part III.

202. *See supra* note 113 and accompanying text.

203. *See* discussion *supra* Part III.

exercise rights. The popularity of RLUIPA proves that the political process is equally capable of protecting prisoners' and nonprisoners' free-exercise rights alike, and therefore, *Turner*'s added protections are entirely unnecessary. *Turner* only serves to perpetuate a constitutional anomaly and burdens the states with defending against a cause of action that should no longer exist.

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