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A PRISONER'S RIGHT TO RELIGIOUS DIET BEYOND THE FREE EXERCISE CLAUSE

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Are religious prisoners entitled to dietary accommodations consistent with their religious beliefs? The current answer for this question derives from two 1987 cases, Turner v. Safley *and* O'Lone v. Estate of Shabazz, *in which the U.S. Supreme Court articulated a factor-driven balancing test. Under this test, a prison regulation may burden an inmate's rights only if, on balance, the regulation reasonably serves a penological interest. However, the application of the* Turner *test often leads to conflicting results in the lower courts.*

The conflicting legal decisions stem from ambiguities in the concept of "reasonableness." In this Comment, I argue that the solution lies in portions of the Bill of Rights beyond the Free Exercise Clause. The Equal Protection Clause, the Cruel and Unusual Punishment Clause, and the Establishment Clause can inform the Turner *analysis under the Free Exercise Clause or even serve as separate bases for a religious dietary accommodation claim. This multirights approach requires judges to heed the Constitution as a whole when conducting an analysis of one of its provisions, and ultimately moves the "standard of review" analysis beyond debates regarding the levels of scrutiny.*

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> *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 of the charter 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.*
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> —Justice William Brennan, *O'Lone v. Estate of Shabazz*[1]

1. 482 U.S. 342, 355 (1987) (Brennan, J., dissenting).

INTRODUCTION

Many religions regulate their followers' daily meals, through which the faithful assert their relationship to the spiritual realm.[2] Religious commandments may also require or prohibit consumption of specific food on festive or ritualistic occasions.[3] So fundamental are these dietary restrictions that the availability of religious diet can foster religious communities.[4] What if adherents lost the ability to control their menus? Such is the problem religious inmates face in the American penal system.[5]

American prisons appear to accommodate religious inmates' diets. Federal prisons offer "the religious diet menu" to accommodate inmates with religious dietary restrictions to the extent permitted by budgetary, security, and administrative constraints.[6] By one author's account, the food

2. Jews and Muslims affirm their covenant with God by practicing kosher and halal diets, respectively. Most practitioners avoid the meat of animals with split hooves (pork), but believers of the Orthodox branches of both religions further exclude any food that is prepared without adhering to a particular set of procedures. Buddhism also contains several traditions of dietary restriction. The first precept of Buddhism (there are five) is a vow to refrain from killing creatures. Buddhists are also instructed to achieve four sublime states of mind when dealing with fellow creatures: love, compassion, sympathetic joy, and equanimity. While the Mahayana Buddhists in China practice the first precept and the state of compassion through a strict vegetarian diet, other Buddhists only avoid meats that are slaughtered for their specific consumption. BUDDHISM AND VEGETARIANISM, *at* http://www.urbandharma.org/udharma3/vegi.html. Every Friday, devout Roman Catholics limit their animal protein to fish. The Hindus shun beef, the meat of the sacred animal, and some sects espouse strict vegetarianism. For a history of the Hindu attitude towards cows and beef that touched off a recent political storm in India, see DWIJENDRA N. JHA, THE MYTH OF THE HOLY COW (2003) (surveying early Hindus' carnivorous attitude and later prohibition against eating beef). Rastafarians practice the *Ital* diet, according to Biblical passages mandating a diet of "herb." *See Genesis* 3:18 ("[T]hou shall eat the herb of the field."); *Exodus* 10:12 ("[E]at every herb of the land."); *Proverbs* 15:17 ("Better is a dinner of herb where love is, than a stalled ox and hatred therewith."). *See generally* RASTA NICK, THE RASTAFARIAN RELIGION, *at* http://www.rasta-man.co.uk/religion.htm.

3. Basic foodstuffs may form part of a religious ritual. An example is the use of bread and wine during a Catholic mass. Food may be an essential part of religious festivals, such as the eating of matzo during Passover for Jews, or dates at the end of the Muslim Ramadan fast. A religion may require fasting or mandate special meals during certain hours or days. For example, during the forty-day period prior to Easter (Lent), many Catholics maintain a diet without meat.

4. *See, e.g.*, BARRY M. LEVENSON, HABEAS CODFISH: REFLECTIONS ON FOOD AND THE LAW 191 (2001) (noting that New York's former kosher food fraud laws enacted in the 1920s ensured a supply of kosher food, which was important to Jewish immigrants recently arrived from Eastern Europe).

5. For example, the usual source of protein for inmates is slaughtered animals. Unfortunately, Hindu inmates cannot eat beef, Jewish and Muslim inmates cannot eat pork, and Rastafarians cannot eat meat at all. These inmates would have to forgo part or all of their meals in order to continue their religious exercise.

6. *See, e.g.*, 28 C.F.R. § 548.20(a) ("The Bureau [of Prisons] provides inmates requesting a religious diet reasonable and equitable opportunity to observe their religious dietary practice within the constraints of budget limitations and the security and orderly running of the institution

program in federal prisons began with one main menu for all inmates and a separate kosher diet for Jewish prisoners, until a more comprehensive arrangement became necessary to accommodate increasing requests from inmates of other religions.[7] Thus, the religious diet was introduced, in which all meats served were both Jewish kosher and acceptable to Muslims, and served with utensils and plates reserved for the religious diet. Meat was offered three times a week, and a salad bar provided an alternative to those who wished to avoid the meat entrees.[8]

However, the religious diet described above is the best-case scenario. Behind this rosy picture lies a great deal of variation across the federal and state prison systems.[9] When must prisons provide special meals to accommodate religious inmates? Judicial opinions in this area represent a forty-year tug-of-war between religious inmates' and correctional facilities' competing interests.[10] The current answer is based on a pair of 1987 cases, *Turner v. Safley*[11] and *O'Lone v. Estate of Shabazz*,[12] in which the U.S. Supreme Court articulated a factor-driven balancing test that weighs a prisoner's constitutional right to the free exercise of religion against a prison administration's equally valid penological interest in running an orderly prison. Under this test, a prison regulation may burden an inmate's rights only if, on balance, the regulation reasonably serves a penological interest.

Today, *Turner* and *O'Lone* have become the standard for judging whether prison officials have violated an inmate's religious dietary rights. Curiously, courts often reach contradictory decisions under similar fact patterns, even though they purport to apply the same *Turner* test. The picture is further complicated by the Supreme Court's 1990 free exercise decision in *Employment*

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and the Bureau through a common fare menu."). The name for religious diet programs prior to December 9, 2002 was the "common fare" program. Regulatory Agenda, 67 Fed. Reg. 74657, 74673 (Dec. 9, 2002) (codified at 28 C.F.R. § 541).

7. JAMES A. BECKFORD & SOPHIE GILLIAT, RELIGION IN PRISON: EQUAL RITES IN A MULTI-FAITH SOCIETY 188 (1998).

8. *Id.* at 188–89.

9. *See Developments in the Law—The Law of Prisons*, 115 HARV. L. REV. 1838, 1906–07 (2002) [hereinafter *The Law of Prisons*] ("On the farthest end of the spectrum . . . as one administrator put it, inmates 'can choose to take the pork off their plate.'").

10. Religious dietary accommodation cases emerged during the 1960s, when Black Muslim inmates demanded accommodation of their religious practices. *See, e.g.*, Abernathy v. Cunningham, 393 F.2d 775, 778 (4th Cir. 1968) (denying a special pork-free diet to a prisoner when the prisoner could obtain a balanced meal by voluntarily avoiding pork or food cooked in grease or lard); Barnett v. Rodgers, 410 F.2d 995 (D.C. Cir. 1969) (finding that the district court improperly dismissed Muslim inmates' complaint against prison administrators' denial of their requests to be fed at least a full-course pork-free diet once a day).

11. 482 U.S. 78 (1987).

12. 482 U.S. 342 (1987).

Division v. Smith[13] and the tortured history of religious legislation such as the 1993 Religious Freedom Restoration Act (RFRA) and the 2000 Religious Land Use and Institutionalized Persons Act (RLUIPA).[14]

This Comment argues that the conflicting legal decisions stem from ambiguities in the concept of "reasonableness." However, I do not propose a wholesale shift away from the reasonableness test in favor of a stricter test. Instead, I suggest that the *Turner* test needs more substance, which can be found in portions of the Bill of Rights beyond the Free Exercise Clause. The simultaneous consideration of multiple constitutional principles could better guide judicial decisions in prison religious diet cases and ultimately would foster a more "constitutional" jurisprudence.

Part I of this Comment describes the *Turner/O'Lone* test and surveys the legal disarray among the prison religious diet cases. Part II urges judges to analyze the facts using other constitutional frameworks in addition to the free exercise *Turner/O'Lone* test. For example, the Cruel and Unusual Punishment Clause would require courts to incorporate the hidden cost of physical deprivation and subsequent medical treatment into the free exercise *Turner/O'Lone* analysis when devout inmates forgo offending meals.[15] The Equal Protection Clause would provide courts with a method of evaluating evidence of disparate treatment in cases in which prisons provide a religious diet that satisfies religion A but not religion B.[16] The Establishment Clause also disfavors disparate accommodation. In addition, it prohibits courts and administrators from making theology-based distinctions.[17]

Part III argues that the jurisdictional boundary of the prison wall is a necessary fiction, while answering two sets of crosscutting objections to the multirights approach. The first argues that the *Turner/O'Lone* test was created to conserve judicial resources and pay deference to prison administrations, and that the multirights approach is not consistent with these objectives. The second argues that the *Turner/O'Lone* test is no longer relevant in light of subsequent changes in free exercise jurisprudence and prison legislation. Both objections assume that constitutional prison jurisprudence and the penological interest of the prison administration can and should be confined to prisons.

13. 494 U.S. 872 (1990) (changing the general standard of assessing free exercise violations from strict scrutiny to rational basis). The *Smith* decision arguably undermines the rationale of the *Turner* test. *See infra* Part III.

14. Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (2000) (held unconstitutional as against the states in *City of Boerne v. Flores*, 521 U.S. 507 (1997)); Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, § 2000cc-1 (2000).

15. *See infra* Part II.A.

16. *See infra* Part II.B.

17. *See infra* Part II.C.

In reality, constitutional tests developed in prison, if not scrutinized, can become the law of the land.[18]

The Conclusion explores the danger of "one-dimensional law." The prison religious diet cases have become inexplicably bound with free exercise jurisprudence to the exclusion of other constitutional principles. The resulting one-dimensional analysis offers little guidance, and judges are forced to rely on their own discretion. In contrast, the multirights approach can better guide the judicial analysis, better inform prison administrators, and ultimately better respect the document that underlies all civil rights on both sides of the prison wall.

I. THE CURRENT LEGAL FRAMEWORK

In 1987, the Supreme Court ushered in an era of judicial deference to prison administration in a pair of decisions: *Turner v. Safley* and *O'Lone v. Estate of Shabazz*. Each decision featured an ambiguous analysis from a divided Court, foreshadowing the ensuing confusion among circuit courts.

A. Prisoners' Rights Meet Penological Interest: The Four-Factor Reasonableness Test in *Turner v. Safley*

In *Turner*, inmates housed in the Renz Correctional Institution in Cedar City, Missouri filed a class action suit challenging the constitutionality of two Missouri prison regulations.[19] The first regulation prohibited correspondence between inmates at different prisons, and the second regulation enforced a de facto ban on inmate marriage unless the prison superintendent found compelling interest for the marriage to take place.[20] Writing for the majority, Justice O'Connor first acknowledged that prisoners retain constitutional rights in prison.[21] Therefore the regulations restricting inmate correspondence and marriage impinged on inmates' constitutionally protected freedom of expression and the privacy right of marriage.[22] Nevertheless, the Court deferred to the prison administration's perceived need for regulation and determined that the inmates' constitutional rights should be balanced against the prison's regulatory concerns. The Court declared, "[W]hen

18. *See* the Conclusion, *infra*.
19. Turner v. Safley, 482 U.S. 78, 78 (1987).
20. *Id.* at 81–83.
21. *Id.* at 85.
22. *See id.* at 82.

a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[23]

Justice O'Connor introduced four fact-intensive factors to determine whether a regulation is reasonable: (1) The regulation is rationally connected to the legitimate government interests offered to justify the regulation (rational connection);[24] (2) alternative means of exercising the right remain open to prisoners under the regulation (alternative means);[25] (3) providing accommodation or exceptions for inmates to exercise the asserted rights impermissibly burdens prison staff, other inmates, or prison resources (impact of accommodation);[26] (4) the regulation is not an exaggerated response to prison concerns (exaggerated response).[27] A regulation is an exaggerated response if a ready alternative exists that fully accommodates the prisoners at de minimis cost to valid penological interests.[28] Applying these factors, the Court upheld the mail regulation but declared the marriage regulation unconstitutional.[29]

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23. *Id.* at 89. The *Turner* standard of reasonableness is better understood as a test based on the totality of four factors, rather than a traditional rational basis test used to analyze substantive due process claims.

24. *Id.* at 89–90.

25. *Id.* at 90.

26. *Id.*

27. *Id.* at 90–91.

28. As a further clarification, Justice O'Connor explained that the last factor

> is not a "least restrictive alternative" test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint. But 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.

29. *Id.* at 91. The mail regulation satisfied the "rational connection factor." Prison officials testified that mail between prisons could be used to communicate escape plans, to arrange violent acts, and to foster prison gang activity. Therefore, accommodating inmates' mail exchanges endangered the liberty and safety of other prisoners and of prison personnel. *Id.* at 91–92. It also passed the "alternative means" factor because the regulation only barred those communications with other inmates. Prisoners retained the alternative means of exercising their freedom of expression by communicating with nonprisoners. *Id.* at 92. Although inmates urged an alternative case-by-case censorship, as practiced in other state prisons, its burden on prison operation was deemed too great under the "impact of accommodation" factor. *Id.* The lack of an obvious, easy alternative to the regulation indicated that the regulation itself was not an "exaggerated response." *Id.* at 93. In contrast, Justice O'Connor found no rational connection between marriage and the purported penological interest of avoiding love triangles because "inmate rivalries are as likely to develop without a formal marriage ceremony as with one." *Id.* at 98. Neither did the goal of nurturing self-reliance justify the regulation, since there was no evidence that it had been a problem. *Id.* An obvious alternative existed in federal prisons, under which inmates may marry unless supervisors detect potential security danger, and this alternative rendered the marriage regulation an "exaggerated response." *Id.* at 97–98. After considering the totality of the four

The *Turner* opinion is best known for the reasonableness test. Despite its universal application as a four-factor test, the different treatment of the marriage regulation and the mail regulation betrayed two additional considerations. First, *Turner* demonstrates Justice O'Connor's focus on "fairness" between gender classes. She felt compelled to discuss the gendered outcome of the marriage regulation in the following passage:

> [T]he rehabilitative objective asserted to support the regulation itself is suspect. . . . [T]he Missouri prison system operated on the basis of excessive paternalism in that the proposed marriages of *all* female inmates were scrutinized carefully even before adoption of the current regulation . . . whereas the marriages of male inmates during the same period were routinely approved. That kind of lopsided rehabilitation concern cannot provide a justification for the . . . marriage rule."[30]

The evidentiary effect of the disparate treatment is that "the rehabilitative objective [of fostering self-reliance] asserted to support the regulation itself is suspect."[31] Although this analysis was "not necessary to the disposition of this case," Justice O'Connor felt that this information discredited the justifications offered by the administration and rendered the penological interest itself suspect.[32]

Another aspect of the decision is Justice O'Connor's effort to elevate the importance of the privacy right to marriage but not the right to send or receive mail. Apart from the potentially rehabilitative psychological comfort and commitment, she discussed the connection of marriage to other aspects of law. The religious connotation of marriage amounts to an exercise of religion; therefore, prohibition of marriage would undermine inmates' religious rights. She also mentioned the existing government programs and laws that give additional benefits and rights to those who are married, including government benefit programs, property interests, and custodial rights. Because marriage triggers more legal rights, its deprivation is more suspect.[33]

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factors, all of which weighed against the prison administrators' argument, Justice O'Connor invalidated the marriage regulation. *Id.* at 99.

30. *Id.* at 99.
31. *Id.*
32. *Id.*
33. *Id.* at 95–96.

B. The Right to Worship Meets the *Turner* Test: Inmates' Free Exercise Rights in *O'Lone v. Estate of Shabazz*

In *O'Lone v. Estate of Shabazz*,[34] the Court applied the factors announced in *Turner* to questions arising under the Free Exercise Clause.[35] A prison regulation requiring inmates to remain in their work area during work hours prohibited Muslim inmates from returning to the main building to attend the weekly *Jumu'ah* ceremony.[36] These inmates alleged that the regulation violated their right to practice their religion. Justice Rehnquist applied the *Turner* test and found that the regulation was "reasonably related to legitimate penological objectives."[37]

The Court first identified several rational connections between the regulation and legitimate penological interests under the first "rational connection" factor. The interest in easing overcrowding and tension during the day justified the requirement that all minimum-level prisoners work outside the main facility. The interest in preventing congestion and delay at the high-risk main gate area and reducing guards' supervisory burden justified the prohibition on inmates returning to the main building. Finally, the requirement that inmates stay in the work area all day was deemed rationally connected to the rehabilitative goal of nurturing good work ethics.[38] The "alternative means" factor was also satisfied. Although there were no alternative ways of practicing *Jumu'ah*, many venues remained open for Muslim inmates' religious exercise: They could congregate for prayer and discussion during nonwork hours, access a state-provided *imam*, receive a nonpork diet, and participate in a special scheduling arrangement during the month-long Ramadan observance.[39] Although inmates offered to work on weekends in place of Friday, the day of the *Jumu'ah* service, their scheduling accommodation would adversely impact the prison operation. Specifically, a schedule change would require extra staff time and would drain supervisory resources. Also, allowing the same inmates to work together would promote the formation

34. 482 U.S. 342 (1987).

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

36. *O'Lone*, 482 U.S. at 345–46. "Jumu'ah is the central religious ceremony of Muslims, 'comparable to the Saturday service of the Jewish faith and the Sunday service of the various Christian sects.'" *Id.* at 360 (Brennan, J., dissenting) (citation omitted).

37. *Id.* at 353.

38. *Id.* at 350–51.

39. *Id.* at 351–52. An *imam* is a teacher of the Islamic religion analogous to a rabbi in Judaism and a priest in Christianity. Ramadan marks the sacred ninth month of the Muslim year (usually corresponding to a period around November and December of the Gregorian Calendar) observed with daily fasting from dawn to sunset. *See id.* at 354.

of potentially dangerous gangs and power groups. Finally, a schedule adjustment would appear as a form of institutional favoritism in the eyes of non-Muslim inmates, creating a potential source of violence. The institutional difficulties of adopting the inmates' proposal further demonstrated that the regulation was not an "exaggerated response" because no obvious easy alternative to the regulation existed.[40] The regulation was easily upheld under the *Turner* test.

The *Turner* test resolved the validity of three regulations against three different constitutional challenges in quick succession and supplanted the various tests used among circuits. However, the trailblazing performance masked the underlying tension within the Court. *Turner* and *O'Lone* were both decided by a one-vote margin.[41] Justice Stevens, writing for the four dissenting Justices in *Turner*, worried that the new standard would subject inmates to the mercy of prison officials without adequate constitutional protection.[42] Justice Brennan, writing in *O'Lone* for the same dissenting Justices, lamented the demise of prisoners' religious rights.[43]

The inconsistent application of the *Turner* test, Justice Stevens observed, was more problematic than its excessive deference to prison policies. *Turner* itself seems to embody two standards of review, a lenient one for the mail regulation and a strict one for the marriage regulation.[44] Applying the "lenient" *Turner* test, the majority upheld the mail regulation even though it

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40. *Id.* at 353.

41. In both cases, the majority consisted of Justices O'Connor, Rehnquist, White, Powell, and Scalia. The dissent consisted of Justices Brennan, Marshall, Blackmun, and Stevens. In *Turner*, these four Justices dissented from the mail regulation portion of the opinion and concurred with the disposition of the marriage regulation.

42. *See* Turner v. Safley, 482 U.S. 78, 100–01 (1987) (Stevens, J., dissenting). Justice Stevens notes:

> Application of the standard would seem to permit disregard for inmates' constitutional rights . . . . Indeed, there is a logical connection between prison discipline and the use of bullwhips on prisoners; and security is logically furthered by a total ban on inmate communication, not only with other inmates but also with outsiders who conceivably might be interested in arranging an attack within the prison or an escape from it.

Id.

43. *See O'Lone*, 482 U.S. at 356 (Brennan, J., dissenting). Justice Brennan notes:

> In my view, adoption of "reasonableness" as a standard of review for *all* constitutional challenges by inmates is inadequate to this task. . . . [T]he message to prison officials is clear: merely act "reasonably" and your actions will be upheld. If a directive that officials act "reasonably" were deemed sufficient to check all exercises of power, the Constitution would hardly be necessary. Yet the Court deems this single standard adequate to restrain *any* type of conduct in which prison officials might engage.

Id.

44. *See also* Matthew P. Blischak, O'Lone v. Estate of Shabazz: *The State of Prisoners' Religious Free Exercise Rights*, 37 AM. U. L. REV. 453 (1988) (arguing that the Supreme Court misapplied the *Turner* standard to *O'Lone* and unjustifiably limited prisoners' religious freedom).

was more restrictive than the rule at other Missouri prisons, allowed all mail between inmates to be banned even though most letters did not implicate security problems, ignored a valuable rehabilitative interest in letter writing, and overturned the lower court's finding of fact in favor of prison administrators' testimony.[45] Applying the "strict" *Turner* test, the majority invalidated the marriage prohibition on the basis that it was more restrictive than the rule at other Missouri prisons; it was overbroad for its stated security and rehabilitative purposes; marriage embodied important virtues; and higher courts must defer to lower courts' fact-based conclusions.[46] Justice Stevens believed that both regulations should be invalidated and could not fathom how the majority reached different conclusions for the two regulations.[47] His criticism of the *Turner* test portends the confusion that has ensued whenever the lower courts have applied *Turner* and *O'Lone* to free exercise issues. Cases involving a prisoner's religious dietary requests are no exception to this confusion, as is described in the next subpart.

C. The Confusing Application of the *Turner/O'Lone* Test: Circuit Disagreement Over the Kosher Diet

When presented with the question of whether a prison's failure to provide a religiously appropriate diet violates an inmate's rights, most lower courts have turned to the *Turner* test as applied through *O'Lone*.[48] Nonetheless, as cases involving Jewish inmates' requests for a kosher diet demonstrate, the application of this test to similar facts and situations has led to divergent outcomes.[49]

In April 2002, the Court of Appeals for the Tenth Circuit, applying the *Turner* test, joined the Eighth and Ninth Circuits in holding that prisons were required to provide a strict kosher diet.[50] However, other courts of appeals have rejected similar claims under the *Turner* standard. In 1988, the Court of Appeals for the Fifth Circuit held that refusal to provide a kosher diet "fully

45. *See* Turner v. Safley, 482 U.S. 78, 113–14 (1987) (Stevens, J., dissenting).

46. *Id.*

47. *See id.* at 115 (Stevens, J., dissenting).

48. This is what I refer to as the *Turner/O'Lone* test.

49. *See* Jamie Aron Forman, Note, *Jewish Prisoners and Their First Amendment Right to a Kosher Meal: An Examination of the Relationship Between Prison Dietary Policy and Correctional Goals*, 65 BROOK. L. REV. 477 (1999) (describing the various and contrary holdings circuit courts have reached regarding Jewish inmates' entitlement to kosher diet accommodations).

50. Beerheide v. Suthers, 286 F.3d 1179 (10th Cir. 2002); *see* Love v. Reed, 216 F.3d 682 (8th Cir. 2000); Ashelman v. Wawrzaszek, 111 F.3d 674 (9th Cir. 1997). *But cf.* Ben-Avraham v. Moses, No. 92-35604, 1993 WL 269611, at *1 (9th Cir. July 19, 1993) (denying a Jewish inmate's request for a kosher diet due to the cost of accommodation).

accords with the result and reasoning of *Turner* and *O'Lone*."[51] The Fourth Circuit adopted the same position.[52] Interestingly, two circuit courts have confronted requests for kosher provisions without the help of *Turner*. The Eleventh Circuit relied on its own pre-*Turner* precedents to uphold a prison's action denying Jewish inmates kosher meals.[53] In contrast, the Court of Appeals for the Second Circuit relied on its own pre-*Turner* decision to grant inmates' requests for a kosher diet.[54]

In light of these contrary decisions, even judges acknowledge, "The Court of Appeals cases dealing with inmate requests for religious diets do not reach a uniform result."[55] The *Turner/O'Lone* test has so far failed to achieve its stated goal of "formulat[ing] a standard of review for prisoners' constitutional claims that is responsive both to the 'policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional

51. Kahey v. Jones, 836 F.2d 948 at 951 (5th Cir. 1988).

52. *See* Cooper v. Rogers, 788 F. Supp. 255 (D. Md. 1991), *aff'd*, Cooper v. Rogers, No. 91-7735, 1992 WL 60240, at *1 (4th Cir. Mar. 30, 1992).

53. In *Harris v. Ostrout*, 65 F.3d 912 (11th Cir. 1995), the Eleventh Circuit relied on its precedent, *Martinelli v. Dugger*, 817 F.2d 1499 (11th Cir. 1987) without mentioning *Turner*. In *Martinelli*, the Eleventh Circuit vacated the district court's order to provide one daily kosher meal to a Jewish inmate. 817 F.2d at 1507 n.29. The court did permit the plaintiff to eat in the pork-free line and to choose nonpork items when available. Although it was a pre-*Turner* decision, the court deferred to the budgetary concerns of the prison administration, thus anticipating religious diet cases after *Turner*. The *Harris* court suggested in dicta that the residual right to a religious diet after *Martinelli* might not have survived the Supreme Court's *Smith* decision. *Harris*, 65 F.3d at 918.

54. Bass v. Coughlin, 976 F.2d 98 (2d Cir. 1992) (per curiam) ("[P]rison officials must provide a prisoner a diet that is consistent with his religious scruples."). As early as 1975, the Second Circuit recognized prisoners' right to kosher food in *Kahane v. Carlson*, 527 F.2d 492 (2d Cir. 1975). Subsequently in *Bass*, 976 F.2d at 99, a 1992 challenge to a prison's failure to provide kosher meals, the Second Circuit flatly asserted that *Turner* and *O'Lone* did not call *Kahane* into question because *Turner* and *O'Lone* addressed the right to mail, marriage, and worship, but not the right to a religious diet. *Id.* at 99. The court was content with its pre-*Turner* analysis and granted the inmate accommodation without analyzing the facts under the four-factor test. *See also* Jackson v. Mann, 196 F.3d 316 (2d Cir. 1999) (relying on *Kahane* and *Bass* without mentioning *Turner* as late as 1999).

55. DeHart v. Horn, 227 F.3d 47, 59 n.8 (3d Cir. 2000) (en banc). In one long footnote, the *DeHart* court surveyed various prison dietary accommodation cases, featuring roughly equal numbers of cases granting accommodation, cases denying accommodation, and cases with insufficient facts. *Id.* The Third Circuit attributed the perceived lack of uniformity to courts' recognition "that the issue in such cases requires a contextual, record-sensitive analysis." *Id.* Because different religious dietary restrictions and meal service programs generate different factual patterns, the argument goes, the various results of applying the *Turner/O'Lone* test could reflect a healthy sensitivity to the underlying circumstances. For example, all else being equal, it is much easier to accommodate those who are prohibited from eating pork, than it is to accommodate those who can only eat ritually slaughtered meat. But this explains only part of the variance. As the example of kosher meals indicates, factually similar dietary requests met different results between circuits, suggesting that some variance is due to the underlying legal standards.

rights.'"[56] One can only imagine the complexity of meeting the requests of Buddhist, Rastafarian, Seventh Day Adventist, and Muslim inmates.

Admittedly, the same accommodation can impose different burdens on different prison facilities, which can lead to different legal outcomes under the *Turner* calculus. However, a closer reading of the various opinions suggests that courts in different circuits have adopted different legal interpretations of the *Turner* test. To some courts, a religious diet is one facet of a religious practice comparable to other forms of religious expression. Thus, when analyzing the "alternative means" factor, the Third Circuit examines "whether an inmate has alternative means of practicing his or her religion generally, not whether an inmate has alternative means of engaging in the particular practice in question."[57] In contrast, the Ninth and Tenth Circuits offer two tests under this factor, one for a "required" religious diet and one for a "recommended" religious diet.[58]

Under the "impact of accommodation" factor, courts are instructed to give deference to prison regulations if the cost of accommodation is impermissibly high. Different courts review the evidence of cost differently and set different standards for measuring what level of cost is impermissible.[59] Similarly, courts disagree on how to treat evidence of existing accommodation available to members of other religions or to inmates of other facilities.[60] In short, the existing splits among circuit courts echo the double standard Justice Stevens criticized in his *Turner* dissent.[61] It has also been difficult to extrapolate the permissible "impact of accommodation" or the scope of the "alternative means" test from the Free Exercise Clause. Commentators have tried to locate a brighter line.[62] Unfortunately, their brighter line generally presumes a particular vision of the proper balance, which begs the very purpose of a test—if the proper balance is known in advance, there is no need for any test.

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56. Turner v. Safley, 482 U.S. 78, 85 (1987) (quoting Procunier v. Martinez, 416 U.S. 396, 406 (1974)).

57. *DeHart*, 227 F.3d at 54.

58. *See* Beerheide v. Suthers, 286 F.3d 1179, 1187 (10th Cir. 2002); Ward v. Walsh, 1 F.3d 873, 877 (9th Cir. 1993).

59. *See infra* notes 100–101 and accompanying text.

60. *See infra* note 119 and accompanying text.

61. *See supra* notes 50–53 and accompanying text.

62. Previous scholarship examining this question often relies on a particular vision of the proper balance between prisoners' rights and prisons' penological interest. *See, e.g.*, Abraham Abramovsky, *First Amendment Rights of Jewish Prisoners: Kosher Food, Skullcaps, and Beards*, 21 AM. J. CRIM. L. 241 (1994); Eric J. Zogry, Note, *Orthodox Jewish Prisoners and the* Turner *Effect*, 56 LA. L. REV. 905 (1996). The multirights analysis espoused in this Comment attempts to avoid the debate regarding the level of scrutiny; instead it assumes the reasonableness standard and suggests a mode of analysis capable of complementing any level of constitutional scrutiny.

II. THE INTERSECTION BETWEEN PRISON RELIGIOUS DIETARY ACCOMMODATION AND NON–FREE EXERCISE CONSTITUTIONAL RIGHTS

Prison religious diet issues need not stay within the confines of the Free Exercise Clause.[63] Nothing in *Turner* or *O'Lone* prohibits courts from looking to other sections of the Bill of Rights.[64] Of course, religious dietary accommodation issues are properly analyzed under the Free Exercise Clause of the Constitution. However, the lack of accommodation can also create a condition of deprivation that violates the prohibition against cruel and unusual punishment. Similarly, accommodation to one religion but not another may deprive religious inmates of the equal protection of law. Finally, denying accommodation on the basis of theological arguments can violate the Establishment Clause prohibition against government entanglement in religious affairs. Even when there is no blatant constitutional violation, these additional constitutional principles can provide additional instruction to courts' analysis of prison religious diet issues, thereby resolving existing circuit splits under the free exercise *Turner/O'Lone* test.

While the idea that judges should consider all relevant legal rights is not new, I call this method the "multirights approach" to contrast it with the current single (free exercise) right regime. This multirights approach can add substance to the balancing test, constrain the variation among courts, and guide them to a better constitutional analysis of religious dietary accommodation questions. When facts of physical deprivation, discriminatory accommodation, or church-state entanglement are apparent, courts should not hesitate to initiate constitutional inquiries under the non–free exercise provisions. When these facts are absent, the multirights approach can still guide the current *Turner/O'Lone* test to ensure that the legal analysis under the *Turner* factors remains consistent with constitutional commitments beyond the Free Exercise Clause.

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63. A small number of commentators make an ingenious move in the area of prisoners' rights. Jeffrey Welty argues that the restriction on prisoners' religious freedom is a type of unconstitutional condition of confinement under the Eighth Amendment. Jeffrey Welty, Note, *Restrictions on Prisoners' Religious Freedom as Unconstitutional Conditions of Confinement: An Eighth Amendment Argument*, 48 DUKE L.J. 601 (1998). Robert Tsai argues that prisoners' constitutional litigation can be viewed as a type of antigovernment speech subject to First Amendment analysis. *See* Robert Tsai, *Conceptualizing Constitutional Litigation as Anti-Government Expression: A Speech-Centered Theory of Court Access*, 51 AM. U. L. REV. 835 (2002).

64. *Turner* merely provides courts with a four-factor test to analyze prisoners' civil rights, and *O'Lone* does not limit the analysis of religious diet issues to the Free Exercise Clause alone.

A. The Cruel and Unusual Punishment Perspective

Without special accommodation, religious inmates face a dilemma between physical health and spiritual existence. For those inmates who choose to forgo a noncompliant diet in favor of religious practice, the resultant physical deprivation may create a valid claim under the Cruel and Unusual Punishment Clause of the Eighth Amendment.[65]

The Eighth Amendment prohibits the prison administration from imposing inhumane conditions of confinement on inmates, including deficient medical treatment,[66] overcrowding,[67] physical brutality,[68] and dietary deprivation.[69] The "condition-of-confinement" claim under the Eighth Amendment evolved from these types of cases. In order to successfully challenge inhumane conditions, inmates must show that they suffered "deprivations denying 'the minimal civilized measure of life's necessities,'" including "deprivation of a single, identifiable human need such as food,"[70] and that the deprivation is the result of "deliberate indifference" on the part of prison officials.[71]

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65. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); *see also* Hutto v. Finney, 437 U.S. 678, 685 (1978) ("Confinement in a prison . . . is a form of punishment subject to scrutiny under Eighth Amendment standards."). For a general discussion on the intersection between religious exercise and the Eighth Amendment in prison, see Welty, *supra* note 63 (arguing that a refusal to accommodate inmates' religious needs can trigger an Eighth Amendment deprivation in theory). Whether or not inmates successfully state an Eighth Amendment violation, the case law corroborates the type of deprivations that a devout inmate could potentially suffer. *See, e.g.*, Wong v. Beebe, No. CV-01-718-ST, 2002 WL 31548486, at *6 (D. Or. Apr. 5, 2002) (addressing how a matron of a Taoist sect, who took a lifetime vow of vegetarianism, lived on bread and water during her five-day detention when the immigration administration refused to provide her a vegetarian diet); United States v. Awadallah, 202 F. Supp. 2d 55, 61 (S.D.N.Y. 2002) (concerning how a devout Muslim, who eats only halal meat, ate little or nothing during a day of detention in order to avoid possibly non-halal food); Lawson v. Liburdi, 114 F. Supp. 2d 31, 34–35 (D.R.I. 2000) (involving a Rastafarian inmate who was denied an *Ital* diet and resorted to bread and water as his only meal for months, leading to stomach discomfort, vomiting, diarrhea, and headaches requiring medical attention).

66. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97, 101–08 (1976) (applying the Eighth Amendment to a condition-of-confinement case).

67. *See* Rhodes v. Chapman, 452 U.S. 337 (1981).

68. *See* Hudson v. McMillian, 503 U.S. 1 (1992).

69. *See Hutto*, 437 U.S. at 683 (finding that the condition of solitary confinement, including a prolonged diet of bread and water or of calorie-deficient "grue" constitutes an Eighth Amendment violation); Cooper v. Sheriff, Lubbock County, Tex., 929 F.2d 1078 (5th Cir. 1991) (holding that withholding food for twelve consecutive days as a disciplinary measure constitutes cruel and unusual punishment).

70. Wilson v. Seiter, 501 U.S. 294, 304 (1991).

71. *Id.* at 301–05 (quoting *Rhodes*, 452 U.S. at 347, and *Estelle*, 429 U.S. at 106). *See* Jolly v. Coughlin, 76 F.3d 468, 481 (2d Cir. 1996) (observing that deliberate indifference does not require "conduct undertaken for the very purpose of causing harm"); Hathaway v. Coughlin, 37 F.3d 63, 66 (2d Cir. 1994) (holding that it is enough to show that a prison official "knows that

Because a number of judicial decisions recognize diet deprivation as cruel and unusual punishment, many prisons now provide hearty meals designed by nutritionists.[72] Ironically, even though the prison diet jurisprudence developed from a line of Eighth Amendment challenge redressing the plight of Muslim inmates in the 1960s,[73] the typical religious diet analysis under the *Turner/O'Lone* test is devoid of any Eighth Amendment inquiry.[74] Against this background, the D.C. Circuit's Eighth Amendment analysis of prison religious diet issues in *Caldwell v. Caesar*[75] is an exception.

1. Religion-Based Dietary Deprivation as a Condition-of-Confinement Claim

In *Caldwell*, a member of the Liberal Catholic Church who requested a vegetarian diet for religious reasons argued that his meals violated the prohibition against cruel and unusual punishment because the so-called "vegetarian meals" were merely regular meals without meat and no protein substituted for the meat. Also, at least one meal was not edible because the entire plate was contaminated with meat gelatin. The prison administrators argued, and the court agreed, that the Liberal Catholic Church did not mandate vegetarianism, and that the plaintiff's alleged deprivation was therefore the result of a personal choice.[76] Nevertheless, the court held that "whether the

inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it"); Farmer v. Brennan, 511 U.S. 825, 839 (1994).

72. *See, e.g., Hutto*, 437 U.S. at 678; Jenkins v. Werger, 564 F. Supp. 806 (D. Wyo. 1983). In addition, quasi-agricultural subsidy programs, unlimited labor to process raw ingredients, the economy-of-scale saving in bulk purchases, and the concern of food-related riot encourage (read: require) prisons to provide handcrafted hearty meals. *See* LEVENSON, *supra* note 4, at 203, 208–16.

73. More specifically, these inmates were Black Muslims. *See, e.g.*, Barnett v. Rogers, 410 F.2d 995 (D.C. Cir. 1969).

74. *See, e.g.*, Wesley v. Kalos, No. 97 CIV. 1598(RWS), 1997 WL 767557, at *1, *4 (S.D.N.Y. Dec. 11, 1997). In *Wesley*, the District Court for the Southern District of New York refused to recognize an Eighth Amendment violation when the prison refused to provide dietary accommodation for Muslim inmates because the inmates had not "provided any authority for the proposition that denial of *halal* food in prison would rise to the level necessary to be deemed cruel and unusual under the Eighth Amendment." *Id.*

75. 150 F. Supp. 2d 50 (2001).

76. *Id.* at 65. The Court notes:

> Rev. Delahunt testified that each member of the Liberal Catholic Church should determine his "own level of vegetarian practice after carefully considering his physiological and hygienic status so that the health is maintained and enhanced and not imperished [*sic*]." Thus, Defendants suggest, it was plaintiff's own choice to decline to eat if a non-vegetarian meal was served, a choice not mandated by his religious beliefs.

Id. Interestingly, in a separate section addressing the plaintiff's free exercise claim, the court noted that a vegetarian diet is "strongly encouraged by the Liberal Catholic Church" and therefore there is "a genuine issue as to the nature of Plaintiff's religious beliefs and the extent to which

meals actually served Plaintiff were so lacking in nutrition on sufficient occasions as to deprive him of adequate food necessary to maintain his health" was a question of fact that precluded the defendant's motion for summary judgment.[77]

Caldwell shows that dietary deprivation arising out of religious dietary issues is a condition-of-confinement claim cognizable under the Eighth Amendment. A makeshift religious diet would violate the Constitution if it substantially failed to meet an inmate's nutritional needs.[78] This is not surprising in itself—a nutritionally deficient diet would violate the Eighth Amendment even without the religious aspect.[79] The nutritionally poor accommodation in *Caldwell* is actually unusual in the religious diet context. The typical deprivation stems from the *lack* of religious diet. Thus, deprivations usually result when a prisoner refuses to eat part of a nutritious, but religiously prohibited, meal. The administrator may argue that the inmate "chooses" to forgo the food. The prisoner may counter that he or she has no choice but to avoid the food and that the administrator acts with deliberate indifference by giving him or her food prohibited by his or her religion.

Does a prison official's decision not to accommodate constitute "deliberate indifference" when the official is aware of the inmate's refusal to eat noncompliant food? A Second Circuit prison case involving tuberculosis testing suggests that the answer is "yes."[80] In *Jolly v. Coughlin*,[81] a Rastafarian inmate alleged violation of the Eighth Amendment when New York state prison administrators confined him in a "medical keeplock area" for three years, and he was only allowed to leave the cell for one ten-minute shower per week.

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adherence to a vegetarian diet is essential to his religion," which needs to be resolved by a jury. *Id.* at 58.

77. *Id.* at 65.

78. Along this line of reasoning, the court noted that the inmate was able to purchase tuna fish when his nonvegetarian meal was inadequate. *Id.* The court did not specify the importance of the tuna purchase. It could show that even if a prohibited protein source is served on the plate, an inmate who refuses to ingest the forbidden protein could avoid protein deprivation by supplementing his or her diet with canteen purchases.

79. *Cf.* LaFevers v. Saffle, 936 F.2d 1117 (10th Cir. 1991). In *LaFevers*, administrators denied a Seventh Day Adventist inmate's request for a special vegetarian diet. The Court of Appeals for the Tenth Circuit concluded, "'the mere denial of a requested vegetarian diet [was] insufficient to establish a cognizable Eighth Amendment claim,'" *id.* at 1120 (quoting LaFevers v. Saffle, Order at 5 (D. Colo. Dec. 5, 1990)), when the inmate was "given extra servings of vegetables when they [were] available, [was] provided with food when the prison menu [did] not include vegetables, and [was] given three meals each day," *id.*

80. The following analysis of the role of prisoners' choice and prisons' control in a religion-based condition-of-confinement claim are derived from Welty, *supra* note 63, at 611–12, 623.

81. 76 F.3d 468 (2d Cir. 1996).

The prisoner was confined to the area because he refused to take the annual tuberculosis test, which involved injecting a small amount of purified protein into the skin.[82] The prisoner refused the test on the grounds that "accepting artificial substances into the body is a sin under the tenets of Rastafarianism."[83]

Prison administrators argued that they did not act with deliberate indifference: The plaintiff "held the keys to his cell" because "he would have been permitted exercise had he simply submitted." The administrators cited earlier cases in which inmates who lost benefits because of their choice to refuse a strip search or their reclassification as an escape risk were left without remedy.[84] The Second Circuit noted that the previous litigants "were not motivated by their sincere religious beliefs."[85] In contrast, the defendants in *Jolly* placed the plaintiff "in the position of choosing to follow his religious beliefs or to improve his conditions of confinement"—a choice that "is not meaningful, much less constitutional."[86] The court held that the administrators' awareness of the condition of deprivation was sufficient to show that they had acted with deliberate indifference.[87]

The Second Circuit's analysis is theoretically sound, and the Rastafarian inmate's dilemma is directly applicable to the religious inmate who refuses to eat noncompliant food. U.S. prisons are not like Australia during Victorian England, where ostracized criminals were left to seek their own food in the wilderness away from civilization.[88] The U.S. prisons are environments of "total control,"[89] and religious prisoners cannot, in any real sense,

82. *Id.* at 476. Regulations limiting the period of exercise in the extreme have been found to violate the Eighth Amendment in the past. *See, e.g.*, Hutto v. Finney, 437 U.S. 678, 686 (1978).

83. *Jolly*, 76 F.3d at 472.

84. *Id.* at 480 (citing Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), and Rivera v. Senkowski, 62 F.3d 80 (2d Cir. 1995)).

85. *Id.* at 481.

86. *Id.*

87. *Id.*

88. *See generally* ROBERT HUGHES, THE FATAL SHORE (1988).

89. *See* Morales v. Schmidt, 340 F. Supp. 544, 550 (W.D. Wis. 1972). The court notes:

> [P]rison is a complex of physical arrangements and of measures, all wholly governmental, all wholly performed by agents of government, which determine the total existence of certain human beings (except perhaps in the realm of the spirit, and inevitably there as well) from sundown to sundown, sleeping, waking, speaking, silent, working, playing, viewing, eating, voiding, reading, alone, with others . . . . State governments have not undertaken to require members of the general adult population to rise at a certain hour, retire at a certain hour, eat at certain hours, live for periods with no companionship whatever, wear certain clothing, or submit to oral and anal searches after visiting hours, nor have state governments undertaken to prohibit members of the general adult population from

"choose" what they eat. In contrast, an administrator's decision to provide or not to provide an accommodation is surely intentional. Thus, an administrator who continues to deny accommodation, despite his awareness that devout inmates are suffering from hunger, must be acting with deliberate indifference.

The Eighth Amendment analysis outlined through the combination of *Caldwell* and *Jolly* mends one fault line underlying the *Turner* test. In the *Turner* dissent, Justice Stevens announced rhetorically, "[T]here is a logical connection between prison discipline and the use of bullwhips on prisoners."[90] His concern was that courts can trace many regulations to a reasonable penological interest, and draconian rules may meet the *Turner* requirement too easily. A well-analyzed Eighth Amendment claim can mitigate this defect. In the religious diet context, both the condition-of-confinement analysis and the *Turner/O'Lone* test should be required—the *Turner/O'Lone* test guards the positive religious interest, and the Eighth Amendment defends an inmate's "minimal civilized measure of life's necessities" such as food.[91] These two tests complement each other doctrinally. Just as bullwhips will not pass muster under the Eighth Amendment, neither will a religiously unacceptable diet.[92]

The condition-of-confinement analysis should be extended to provide relief for devout inmates who suffer prolonged deprivation from nonaccommodation. Courts could apply an Eighth Amendment analysis following *Caldwell* with a showing of sufficient physical deprivation. Religious choice to avoid certain food should not insulate the food policy from challenge. Instead, the fact that a religious inmate is forced to choose between food and religion should by itself suggest that the administrators acted with deliberate indifference.

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speaking to one another, wearing beards, embracing their spouses, or corresponding with their lovers.

O'Lone v. Estate of Shabazz, 482 U.S. 342, 354 (1987) (Brennan, J., dissenting) (quoting *Morales*, 340 F. Supp. at 550); *see also* Welty, *supra* note 63, at 612.

90. Turner v. Safley, 482 U.S. 78, 101 (1987) (Stevens, J., dissenting).

91. Wilson v. Seiter, 501 U.S. 294, 304 (1991); *see supra* note 70 and accompanying text.

92. It is only in the last twenty years that courts have limited the religious diet claim to the First Amendment, offering no rationale for the change. Earlier prison religious diet cases regularly intertwined the free exercise rights with cruel and unusual punishment concerns. *See supra* notes 66, 73, and accompanying text.

2. The Medical Cost of Nonaccommodation as a *Turner/O'Lone* Consideration

For all the problems a condition-of-confinement claim could solve, however, it is not completely satisfying on its own. The Eighth Amendment prohibits dietary deprivation but does not require religious accommodation per se. One potentially constitutional "solution" to an inmate's refusal to eat is forced feeding. Applying the *Turner* test in conjunction with the Eighth Amendment would prevent forced feeding because the possibility of final outcome should reshape the "impact of accommodation" factor of *Turner*'s reasonableness analysis. The following hypothetical extension of *Caldwell* illustrates the interconnectedness between the Eighth Amendment and the *Turner/O'Lone* analysis.

Suppose prisoner Jones, a Seventh Day Adventist, requests a vegetarian diet. The administration denies the request in order to avoid excessive costs, the burden on the staff, and the appearance of favoritism. Jones can give up the dietary practice and eat the regular prison diet; alternatively, he can continue the dietary practice and eat only the nonmeat portion of the regular meal.[93] The constitutional inquiry ends if the partial meal can satisfy Jones' physical needs. But if the nonmeat portion were inadequate, then Jones would suffer physical deprivation deserving of attention. The prison may ignore it, or it may provide food in the form of a medically prescribed meal or medical forced feeding. There are four administrative moments in this chain of events: the original decision to deny accommodation, the decision to ignore dietary deprivation, the decision to provide a medical meal, and the decision to order a medical forced feeding.[94]

The decision to deny accommodation is the proper subject of the *Turner/O'Lone* test. Indifference to religious inmates' dietary deprivation creates

93. This scenario also could include an instance when the prison tried to accommodate the inmate by removing the offending item.

94. It is interesting to note that the highly invasive medical feeding procedure probably will not satisfy the free exercise *Turner/O'Lone* test. Under the "rational connection" factor, cost control and administrative ease will no longer justify the decision to medically force feed our Adventist. If keeping Jones alive is the penological interest, then a vegetarian diet during regular meal hours can achieve the same result. Under the "alternative means" factor, the physical restraint would deprive all means of religious exercise save private prayer. However, if private prayer constitutes sufficient alternative means of exercising religion, then the prison would no longer need to accommodate anyone under any religion. *See* Ward v. Walsh, 1 F.3d 873, 878 (9th Cir. 1993). Under the third *Turner* factor, the impact of accommodating Jones through a vegetarian diet pales in comparison to the personnel disruption and medical expense. Finally, it is also probably an exaggerated response to prison concerns if giving Jones a vegetarian diet would solve the problem at de minimis cost.

an Eighth Amendment violation.[95] Short of the Adventist giving up his dietary practice or the prison providing a religious dietary accommodation in some form, the analysis necessarily proceeds to the medically prescribed vegetarian diet and forced feeding. If the vegetarian diet comports with his religion, Jones can finally consume a complete diet. If it is not, then he continues to deteriorate, to the point that he requires medical forced feeding.[96]

This hypothetical situation reveals what has been heretofore omitted from the existing *Turner/O'Lone* analysis: that the Eighth Amendment requires the prison to feed those inmates who want food.[97] The current "impact of accommodation" factor under the *Turner/O'Lone* test assumes that religious inmates' dietary needs can be met even when there is no accommodation. In reality, there are only two options in the final analysis when the inmate refuses religiously objectionable food. Either the inmate has to surrender the dietary commitment, or else the prison has to force pureed spaghetti and meatball through his nose.[98] An Eighth Amendment–conscious *Turner* analysis requires courts to realize that the prison administration does not face a choice between religious accommodation and nonaccommodation, but rather a choice between religious accommodation and medical intervention.[99] Accordingly, the real impact of accommodation

95. *See supra* Part II.A.1.

96. Medical feeding in prison usually involves strapping the unwilling inmate to a bed or chair. A plastic tube is inserted into the stomach through the nose; this sometimes causes irritation and triggers the gag reflex. Food puree is pumped through the tube into the inmate's stomach. To prevent the inmate from pulling out the tube, the inmate is often left strapped to the chair for the next meal. *See, e.g.*, Walker v. Horn, 286 F.3d 705, 708 (3d Cir. 2002).

97. This Comment does not endorse or reject forced feeding; it only acknowledges that the prison will probably be allowed to force feed starving inmates in the United States. For decisions upholding administrators' decisions to force feed inmates, see *In re* Soliman, 134 F. Supp. 2d 1238 (N.D. Ala. 2001); *In re* Sanchez, 577 F. Supp. 7 (S.D.N.Y. 1983); *In re* Caulk, 480 A.2d 93 (N.H. 1984); Laurie v. Senecal, 666 A.2d 806 (R.I. 1995). *But see* Bouvia v. Super. Ct., 179 Cal. App. 3d 1127 (Ct. App. 1986); Zant v. Prevatte, 286 S.E.2d 715, 716 (1982).

98. No hyperbole is intended. The food puree often contains ingredients from the dinner line. *See, e.g.*, *Walker*, 286 F.3d at 708. The court notes:

> Walker informed medical personnel that he did not eat meat or milk products as both foods caused his stomach to be upset. Notwithstanding that warning, and acknowledging that Walker's medical records verified that he was a vegetarian, Dr. Lasky told Walker that he would be force-fed the foods that were being served to the general prison population. Walker was then force fed liquefied liver and mashed potatoes containing milk.

Id.

99. The analysis assumes that religious inmates would choose hunger over objectionable food. This is a fair assumption. Most prisons test inmates' religious sincerity prior to granting special-diet status. These sincere inmates deserve the presumption that they would choose hunger over food that does not comport with their religion. Moreover, by the time their cases reach trial,

is the difference between the tangible and intangible cost of religious accommodation and those of medical forced feeding.

Knowing the real cost of nonaccommodation makes the *Turner* test easier to apply. Currently, different circuits have very different ideas of what is de minimis or what impact is acceptable, even when all the costs of accommodation are translated into comparable dollar terms. Some courts claim that any cost in addition to the regular diet is more than de minimis, which effectively rejects all dietary requests.[100] On the other hand, other courts understand that accommodation necessarily entails a spending leeway.[101] The cost of medical forced feeding would provide a reasonable standard against which the institutional impact of accommodation or cost of alternative food service can be compared. The administration would be justified to deny the religious diet if the cost and disruption of accommodation exceeded the cost of the medical procedure.[102] On the other hand, when the medical procedure costs more than the dietary accommodation, dietary accommodation may be the most economic and administratively feasible route. Another reason favoring the use of medical cost as a yardstick is that, unlike the ambiguity inherent in the phrase de minimis, the cost and burden of medical intervention is readily available to the court.

3. Answers to Counterarguments

Prison officials worry that they would lose the ability to control defiant prisoners should they give in to threats of self-destructive starvation by meeting religious inmates' dietary demands. This has often been the winning defense justifying the administration's decision to force feed inmates instead

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inmates would probably have ample opportunity to display their willingness to suffer hunger, and courts can use this information in the *Turner* analysis.

100. In *Kahey v. Jones*, the Fifth Circuit thought it "obvious that purchasing, storing and preparing food for one prisoner out of hundreds . . . would impose more than *de minimis* cost on the prison." 836 F.2d 948, 951 (5th Cir. 1988).

101. The Tenth Circuit declared that an additional expense of $13,000 a year to accommodate an inmate's kosher request is de minimis in light of the $8.5 million annual budget for food procurement. Beerheide v. Suther, 286 F.3d 1179, 1186 (10th Cir. 2002). Similarly, the Ninth Circuit found that the cost of accommodating seventy Jewish inmates out of 12,000 inmates with frozen kosher meals at $5.00 a day instead of the regular meals at $0.84 a day was de minimis. Ashelman v. Wawrzaszek, 111 F.3d 674, 676 (9th Cir. 1997).

102. If the administration included the cost of medically feeding the inmate in the initial *Turner* calculation, but still decided against accommodation because the cost of the religious diet would be too high, then inmates cannot later claim that prison officials deliberately imposed a condition that is cruel and unusual. Thus an Eighth Amendment–sensitive *Turner/O'Lone* analysis can fend off later liability.

of giving in to hunger strikes or political fasting.[103] By extension, the prison officials must be permitted to force feed inmates without accommodating their dietary needs.

This argument does not apply to those inmates who refuse nonaccommodating meals. To a religious inmate, refusing forbidden food is a religious end in itself, not a vehicle to carry on a political battle or power struggle with the prison administrators. Nor is it used as a tool to grab media attention or manipulate the popular sentiment. The religious inmates are not threatening self-destruction but seeking self-preservation in maintaining their religious purity. If the administration wishes to avoid the appearance of cruelty, the legitimate penological purpose of avoiding the appearance of hostility or weakness during a standoff situation should tip the *Turner* analysis in favor of accommodation in the first place, and there should be even less reason to refuse an accommodation. When medical intervention costs more than the impact of accommodation, hubris alone should not support forced feeding if the only reason to maintain the intervention is to avoid the appearance of weakness.

4. Summary

A concurrent application of the *Turner/O'Lone* test and the condition of confinement analysis would give due credit to both "religion" and "diet." Courts should conduct an independent Eighth Amendment condition-of-confinement analysis on whether inmates receive proper diets. To further comply with the Eighth Amendment mandate within the *Turner/O'Lone* test, courts should assess the "impact of accommodation" factor against the price and burden of the medical forced-feeding program. This guideline provided by the Eighth Amendment is logical, constitutional, and determinable, and would hopefully alleviate some of the ambiguities now existing under the *Turner/O'Lone* test.

B. The Equal Protection Perspective

Modern litigation of religious diet issues often involves adherents of minority religions against a backdrop of different levels of accommodation at different correctional facilities. When a makeshift, arbitrary religious meal plan fulfills some inmates' religious dietary needs but not others, the

103. *See, e.g.*, *In re* Soliman, 134 F. Supp. 2d 1238 (N.D. Ala. 2001); *In re* Sanchez, 577 F. Supp. 7 (S.D.N.Y. 1983); Laurie v. Senecal, 666 A.2d 806 (R.I. 1995).

disparate treatment may violate the Equal Protection Clause of the Fourteenth Amendment. However, most courts currently analyze religious dietary accommodation cases only under the Free Exercise Clause, applying the *Turner/O'Lone* test, even when the cases contain a possible equal protection violation. At least one commentator has suggested that prison halal accommodation should be analyzed under the Equal Protection Clause and not the First Amendment.[104]

The Equal Protection Clause requires the state to treat similarly situated people alike.[105] In a free society, regulations purposefully discriminating against individuals are subject to different levels of judicial scrutiny depending the basis of the discriminatory treatment.[106] Religious discrimination entails the strict scrutiny standard, under which a law must be necessary to serve a compelling government interest to be found constitutional.[107] This principle has been previously extended to the prison setting in a more dilute form.[108] The Court of Appeals for the Third Circuit provides a contemporary application of the equal protection analysis of religious dietary accommodation issues in *DeHart v. Horn*.[109]

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104. *See* Rain Levy Minns, *Note: Food Fights: Redefining the Current Boundaries of the Government's Positive Obligation to Provide Halal*, 17 J.L. & POL. 713, 733–37 (2001) (arguing that the government should legislate halal consumer protection laws and provide halal food in schools and prisons). I sympathize with Minns' objection to disparate treatment of Muslim and Jewish inmates and her desire to invoke the Fourteenth Amendment. Unlike Minns, I believe the First Amendment and Fourteenth Amendment values can mutually support each other, and I identify case law supporting the Fourteenth Amendment approach. However, Minns cannot be faulted for not conducting a full analysis of the issue because the goal of her note was to promote halal food in different contexts.

105. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985).

106. Outside the prison, discrimination based on a "suspect class" is subjected to heightened judicial scrutiny. For example, strict scrutiny is applied to laws that discriminate on the basis of race. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) ("Classifications based solely upon race must be scrutinized with particular care."). Sex discrimination is reviewed under an intermediate level of scrutiny. *See* Craig v. Boren, 429 U.S. 190, 197 (1976). Laws discriminating on other grounds will be upheld if they reasonably relate to legitimate government interest. *See* Ry. Express Agency, Inc. v. New York, 336 U.S. 106 (1949).

107. *See, e.g.*, Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 339 (1987) ("[L]aws discriminating *among* religions are subject to strict scrutiny."); Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 324 (1995) ("[W]hen the Court discovered a religious classification, it treated it as 'suspect' and demanded a high level of justification.")

108. *See, e.g.*, Cruz v. Beto, 405 U.S. 319, 322 (1972) ("If Cruz was a Buddhist and if he was denied a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts, then there was palpable discrimination by the State against the Buddhist religion."); Patel v. Wooten, 15 Fed. Appx. 647 (10th Cir. 2001) (unpub.).

109. 227 F.3d 47 (3d Cir. 2000) (en banc).

1. Religion-Based Dietary Discrimination as an Equal Protection Violation

DeHart was an inmate at the Pennsylvania State Correctional Institute (PSC) at Greene (the Greene facility) who discovered Buddhism while serving a life sentence. DeHart requested a vegetarian diet consistent with his Buddhist beliefs, including a cup of soymilk and increased portions of the nonmeat and nondairy items from the regular menu to replace the meat items. The administration denied the request, and DeHart sought relief in federal court under both the Free Exercise Clause and the Equal Protection Clause of the Constitution. Although all inmates at the Greene facility received the same meal,[110] the PSC provided Jewish inmates with a kosher diet at another facility.[111] DeHart argued that the decision to provide Jewish inmates with kosher meals but not to provide Buddhist inmates with lower-cost vegetarian meals was a form of religious discrimination violating the Equal Protection Clause.

The Third Circuit acknowledged a possible equal protection violation: "A fair inference can be drawn . . . that the relevant disparity in treatment was the result of deliberate choice."[112] The court applied the *Turner* test to DeHart's equal protection claim and asked whether the distinction between Buddhist inmates and Jewish inmates was reasonably related to a legitimate penological interest. The administration distinguished the two scenarios, reasoning that the kosher diet is "a commandment of the Orthodox Jewish faith," while the vegetarian diet is an "expression of faith" rather than "a commandment of Buddhism."[113] This answer did not satisfy the Third Circuit: "[H]ow this distinction is reasonably grounded in legitimate penological concerns, and any nexus between the two[,] is not self-evident."[114] The court remanded the case for findings on whether the disparate treatment was justified by any legitimate reason.[115]

110. The only exception was the therapeutic diet. The therapeutic meal consisted of the same food served in a regular meal, but in different proportions according to the medical needs of individual inmates. *DeHart*, 227 F.3d at 49.

111. The defending administration in *DeHart* had been the defendant in a prior religious dietary accommodation case, *Johnson v. Horn*, 150 F.3d 276 (3d Cir. 1998). In *Johnson*, the administration was voluntarily providing a kosher diet including milk, uncut fruit, vegetables, and a nutritional supplement to Jewish inmates. *Id.* at 280.

112. *DeHart*, 227 F.3d at 61 n.10.

113. *Id.* at 61.

114. *Id.*

115. *Id.* The Third Circuit noted that, even though both *Johnson* and *DeHart* occurred under the same administration, the plaintiffs in the two cases stayed in different prison facilities. *Id.* at 59. The court was aware that the disparate treatment might have been due to the difference

When the state circumscribes a religious practice in the context of one religion but not another, the Constitution surely gives the injured party a right to raise both a free exercise claim and an equal protection claim. An equal protection claim is a claim independent from free exercise and cannot be reduced to merely a free exercise claim—even if both claims invoke the *Turner* test.[116] The *Turner/O'Lone* test asks whether a particular nonaccommodating food regulation may nonetheless serve legitimate penological goals. The equal protection analysis in *DeHart*, riding on a *Turner* framework, asks instead whether a particular *discrimination* may nonetheless serve legitimate penological goals. Thus the focus of an equal protection *Turner* claim is not the treatment per se, but the difference in treatment. Another way of delineating the differences is to look at the relevant penological interests. Budgetary concern is a legitimate reason to deny accommodation under the free exercise *Turner/O'Lone* test, and the vegetarian meal entails purchase of the special soy milk. However, budgetary concern cannot be a legitimate reason for the discriminatory treatment because it does not explain why the prison would provide the more expensive kosher meat and not the cheaper soy milk.[117] A concomitant equal protection analysis here is wholly consistent with the constitutional scheme and not redundant after applying the free exercise analysis.

Courts should adopt *DeHart*'s equal protection analysis when prison regulations accommodate one religion but not another. The proper inquiry, following the *DeHart* approach, is whether the difference in accommodation can be justified by a legitimate penological interest, judged under the original *Turner* factors. Interestingly, the *DeHart* court did not only contemplate an equal protection claim for prison dietary accommodation, but

in the facilities between the two prison sites and not due to the religious difference. *Id.* at 61. The case was remanded for finding on the difference in religion on penological interest. *Id.* Meanwhile, the fact that Jewish inmates were accommodated without problems suggests that the administration had found a special diet practicable in the past. *Id.* at 58–59.

116. The *DeHart* opinion is misleading when it states "*Turner* is equally applicable [to the equal protection claim], and the appropriate analysis for this claim is the same as that for DeHart's Free Exercise claim." *Id.* at 61. Subsequent discussion in the opinion suggests that the standard of analysis is the same in the abstract, but the actual *Turner* inquiry varied according to the underlying right. *Id.*

117. On the other hand, a penological interest justifying discriminatory treatment probably justifies nonaccommodation under the free exercise *Turner/O'Lone* test as well. For example, a prison may justify the discrimination on the basis of administrative ease if kosher meat is readily available, while soy milk needs to be airlifted to the prison. Administrative ease would also justify a denial of accommodation under the *Turner/O'Lone* test.

also envisioned a free exercise *Turner/O'Lone* test tempered with equal protection concerns, as we will see in the next subpart.[118]

2. Evidence of Unequal Accommodation as a *Turner/O'Lone* Consideration

The *DeHart* court discussed the effect of disparate treatment between Jewish inmates and Buddhist inmates when analyzing an inmate's free exercise claim under the *Turner/O'Lone* test, in addition to discussing this treatment in the equal protection context. When providing the guideline for remand, the *DeHart* court highlighted the discriminatory treatment as "[o]ne piece of evidence regarding the impact of DeHart's request . . . [that was] particularly worthy of mention."[119] The court cited two reasons. First, discriminatory treatment affects how courts assess the extent of which an accommodation would burden the prison resource and staff (the "impact of accommodation" factor). Because "the dietary needs of Jewish inmates are apparently accommodated without substantial negative consequences in terms of efficiency and security," the *DeHart* court explained, "treatment of Jewish inmates . . . casts substantial doubt on [the] assertion that accommodating DeHart's request would result in significant problems for the prison community."[120] Second, it affects how courts assess whether the problematic regulation is an exaggerated response to prison concerns (the "exaggerated response" factor). The court opined: "[I]t is difficult to see how one can determine under the ["exaggerated response"] factor whether DeHart's requested diet places more than a de minimis burden on prison resources without taking the treatment of Jewish inmates into account."[121]

DeHart illustrates that the presence of discriminatory accommodation limits what the administration can argue under the *Turner/O'Lone* test. Under the "impact of accommodation" factor, the prison administrators argued that the financial and personnel impact of the vegetarian accommodation were unacceptable. However, the inconsistent accommodation of Jewish inmates and the Buddhist inmate undermined the scope and credibility of the cost argument. Similarly, the existence of accommodation to some group casts doubt on the propriety of a rule barring accommodation to

118. *See infra* Part II.B.2.
119. *DeHart*, 227 F.3d at 58.
120. *Id.*
121. *Id.* at 58–59.

Buddhist inmates on efficiency and security grounds.[122] Moreover, these individual determinations reveal the court's willingness to receive discriminatory practice as evidence for its *Turner/O'Lone* test calculus. The *Turner* factors, when applied to free exercise issues through *O'Lone*, say nothing about how courts should evaluate discriminatory practices. Courts' evaluation of facially discriminatory practices or inconsistent accommodations can engender policy disagreements regarding the proper amount of deference.[123] By appealing to the equal protection jurisprudence, the *DeHart* court found a constitutional warrant to incorporate evidence of discriminatory treatment into the *Turner/O'Lone* analysis without becoming embroiled in the normative policy debate.

This strategy should sound familiar because it mirrors Justice O'Connor's analysis of gender inequality and institutional variation in the original *Turner* opinion.[124] In both cases, discriminatory treatment may take the form of disparate treatment of people in discrete classes across lines of gender or religion. Alternatively, it may arise out of unexplained regulatory differences between different correctional facilities. In either case, equal protection analysis can limit a prison administration's universe of explanatory possibilities or reveal illegitimate considerations. To the extent that the application of the equal protection analysis removes inconsistency and discrimination and ensures that reasoning under the *Turner/O'Lone* test complies with the Equal Protection Clause of the Constitution, it enhances the methodological exactitude and constitutional legitimacy of the *Turner/O'Lone* test. Several courts have infused their *Turner/O'Lone* dietary analysis with similar reasoning.[125]

122. In addition, prison administrations often justify the lack of special diet in terms of reducing the appearance of favoritism. A system of discriminatory accommodation would undermine, even contradict, this apparent penological interest.

123. Deferential courts allow each prison to craft local rules that discriminate among different prison populations while more searching judges view discriminatory treatment with suspicion. The opposing views between the *Turner* majority and Justice Stevens in a footnote of the original *Turner* decision clearly reflect the two standards of assessing discriminatory practice. *See* Turner v. Safley, 482 U.S. 78, at 93 n.* (1987).

124. *See supra* notes 30–32 and accompanying text.

125. *See, e.g.*, Ashelman v. Wawrzaszek, 111 F.3d 674 (9th Cir. 1997). The equal protection analysis is even more decisive for the Ninth Circuit's analysis. In *Ashelman*, an Orthodox Jewish inmate sought strict kosher food when the prison accommodated the dietary requirements of groups including Muslims, Sikhs, and Seventh Day Adventists without disruption. *Id.* at 678. Under these circumstances, the court did not find the difficulties envisioned by the prison insurmountable. On the contrary it helped demonstrate the existence of "obvious, easy alternatives" that "tip[ ] the balance in favor of Ashelman's free exercise right." *Id.* at 678.

3. Answers to Counterarguments

A number of courts currently ignore allegations of unequal accommodation under a free exercise analysis and an equal protection analysis out of deference to prison administration. Courts should give some deference to prison administrations because penal institutions are necessarily restrictive environments, and imprisonment by definition limits an individual's freedom. Furthermore, the officers possess special knowledge about how to manage the day-to-day operation of a complex system. Therefore, prison regulations should not be subjected to a barrage of tests.[126]

The deference argument is more convincing, appropriate, and necessary in the free exercise context than it is in the equal protection context. Unlike the Free Exercise Clause, the Equal Protection Clause does not protect any particular substantive right. Rather, it underscores a fundamental notion of equity and justice by erecting a procedural safeguard against unfair treatment. Penological goals and prison environment may justify constraints on inmates' religious freedom as required by the prison setting, but they do not justify unequal constraints on individual rights. Insofar as retribution and rehabilitation are valid penological interests, the notions of just desert and moral character development should require the prison administration to treat the inmates equally whenever possible. Whether the claimant is a prisoner does not matter for the equal protection analysis. Moreover, prisons may be experts at determining within the prison the boundary between legitimate penological interest and specific First Amendment rights, but an ambiguous boundary applicable to some but not others calls that expertise into question. Prison administrations should be required to put courts at ease that their apparent discriminatory treatment is itself rooted in legitimate penological interests. Courts should guard the equal protection claim at least as stringently as they guard the free exercise claim.

Furthermore, asking the equal protection question does not actually vary the degree of deference. Courts may still conduct a cursory equal protection *Turner* analysis and defer to prisons' explanations. Nonetheless, such an analysis would momentarily focus the courts' attention on a question of fairness which may otherwise never have been asked during a purely free exercise application of the *Turner/O'Lone* test, especially when the same court would conduct the *Turner/O'Lone* test in a deferential manner.

An equal protection analysis is actually consistent with *Turner*'s notion of judicial deference. In *Turner* the Court paid deference to the mail

126. *See, e.g.*, Kahey v. Jones, 836 F.2d 948, 950 (5th Cir. 1988).

regulation even though it was applied differently in different prisons because different security ratings between prisons permitted the administration to adopt a stricter mail regulation in some prisons. Nowhere did the opinion equate deference with a blind acceptance that does not question the basis of the discriminating policy. Asking constitutional questions is the essence of judicial review and should not be viewed as impermissible judicial meddling with prison operations. Deference does not prevent courts from asking equal protection–related questions in the first place; it merely means that courts ought to accept the prison's reasonable answers and explanations. Therefore the equal protection analysis is consistent with the standard of deference in *Turner* and *O'Lone*.

At the other end of the spectrum, prisoners' rights advocates may worry that an equal protection claim for disparate religious diet or an equal protection–conscious *Turner/O'Lone* test would make religious dietary accommodation impossibly difficult to implement. Reasonable administrators who are willing to provide some accommodation may fear that a strong Equal Protection Clause will force the prison to choose between the burden of accommodating all requests and the burden of liability for granting discriminatory accommodations.[127] To shut the lid of the accommodation Pandora's box, administrators may impose a plan of blanket nonaccommodation—with the result that no one may receive religious dietary accommodation.

A strong Equal Protection Clause will impose more restrictions on the implementation of dietary accommodation program. This is a benefit, not a drawback: It will ensure that dietary programs comply with the Constitution. The administration should not resort to blanket nonaccommodation to avoid possible equal protection liability, because the zero-accommodation policy will incur liability under Bureau of Prison regulations, the Free Exercise Clause, and the Eighth Amendment.[128] Neither should prison administrators fear that total accommodation would bankrupt prison budgets: The *Turner* test already internalizes the impact of accommodation, and

127. For an example of nonaccommodation motivated by the desire to avoid litigation, see *id.* at 948. The court states:

> [I]f one such dietary request is granted, similar demands will proliferate, with two possible results: either accommodation of such demands will place an undue burden on the prison system, or the prisons would become entangled with religion while drawing fine and searching distinctions among various free exercise claimants. . . . The second alternative could result in troubling discrimination against prisoners practicing uncommon religions, as majority religions are accommodated.

Id. at 950 n.1.

128. *See supra* Part II.A.

administrators are allowed to deny dietary requests based on budgetary concerns. These are all reasons why the Equal Protection Clause need not interfere with existing accommodation.

A recent *Harvard Law Review* article surveying religious practice in prison outlines different modes of religious accommodations.[129] Under the neutral-accommodating approach, the food service operates multiple food lines or salad bar containing food items such as beans and peanut butter that satisfy many inmates across the religious spectrum at a low cost.[130] In the past, most dietary accommodations followed a targeted-accommodating approach, granting accommodation on a case-by-case, religion-by-religion basis. A neutral-accommodating paradigm meets the requirements of the Equal Protection Clause.[131] With the proliferation of minority religions and ever changing composition of the prison population, the targeted-accommodating approach risks violating the Equal Protection Clause. Because the neutral-accommodation approach opens the food options to all inmates, not just to followers of a particular faith, it fully satisfies the Equal Protection Clause. In terms of cost, the targeted-accommodating approach is cheap when the population of religious inmates remains small and homogenous. However the neutral-accommodating approach becomes more cost effective in the long run as population and religious diversity increase. The Equal Protection Clause will not eliminate access to religious accommodation. To the contrary, equal protection litigation can signal the presence of a diverse prison population that is ready for the switch from a targeted-accommodating approach to a neutral-accommodating approach.

4. Summary

When inmates allege a religious diet program that discriminates on the basis of religion, courts should commence an equal protection analysis to ascertain if the different treatments serve a legitimate penological interest. Even when the inequality does not rise to the level of an equal protection violation, the suggestion of unequal treatment between facilities or faith groups has a role in the free exercise *Turner/O'Lone* test. Courts can use evidence of

129. *See The Law of Prisons*, *supra* note 9, at 1906–09; *see also* BECKFORD & GILLIAT, *supra* note 7, at 188.

130. Ironically, Texas, the state that opted for the zero-accommodation policy in *Kahey*, has now adopted the neutral-accommodating approach. *See The Law of Prisons*, *supra* note 9, at 1907 n.81. Perhaps an administration concerned with the ripple effect (where special accommodation for one group encourages other groups to seek special treatments) and the Equal Protection Clause is the one most capable of devising the neutral-accommodating approach.

131. *See id.* at 1906–08.

inequality as a litmus test for assessing the validity of an administration's asserted penological interests, the potential impact of accommodation, or the availability of an alternative food plan. Ultimately, by requiring a court to consider the evidence of discriminatory treatment, the Equal Protection Clause implicitly demands a more attentive judicial review based on the facts of the particular accommodation.

C. The Establishment Clause Perspective

The Establishment Clause prohibits state actors from making laws "respecting an establishment of religion."[132] Even when the government must provide religious accommodation to fulfill its free exercise duties, it must take care not to effect the establishment of religion in the process.[133] Therefore, prison administrators and courts should heed the Establishment Clause when confronting the religious dietary accommodation issues.

The Establishment Clause prohibits the government from promoting or inhibiting one religion over another.[134] This prohibition against state-sponsored preferential treatment adds force to the prohibition against discriminatory dietary accommodation.[135] Beyond mandating religious neutrality, the Establishment Clause also forbids the government from participating in religious activities even when the participation is nondiscriminatory. Thus, to survive an Establishment Clause challenge, a law must reflect a clearly secular purpose, have a primary effect that neither advances nor inhibits religion, and avoid excessive government entanglement with religion (the *Lemon* test).[136]

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132. U.S. CONST. amend. I.

133. Although government-sponsored religious accommodation may violate the Establishment Clause, it was said that in prison, "a niche has necessarily been carved into the establishment clause to require the government to afford opportunities for worship" to satisfy "the affirmative demands of the free exercise clause." United States v. Kahane, 396 F. Supp. 687, 698 (E.D.N.Y. 1975), *modified*, 527 F.2d 492 (2d Cir. 1975).

134. *See* Wallace v. Jaffree, 472 U.S. 38, 75 (1985) (Rehnquist, J., dissenting). *See generally* ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982). I use the expression "at the minimum" because this is the only type of behavior all nine Supreme Court Justices condemn under the Establishment Clause.

135. *See supra* Part II.B.

136. This three-part test was first announced in *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971), and is commonly referred to as the *Lemon* test. Recently several Justices on the Supreme Court have applied alternative tests to analyze Establishment Clause problems, most notably the noncoercion test attributed to Justice Kennedy, *see* County of Allegheny v. ACLU, 492 U.S. 573, 659 (1989) (Kennedy J., dissenting) (arguing that noncoercive government accommodation or acknowledgement of religion does not violate the Establishment Clause); Lee v. Weisman, 505 U.S. 577, 592 (1992); Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986), and the endorsement test attributed to Justices O'Connor and

Unlike the rights discussed in the previous sections, the Supreme Court has said nothing regarding the application of the Establishment Clause in prison. Moreover, the majority of Establishment Clause cases have revolved around issues far removed from prison religious diets.[137] Consequently, the analysis of prison dietary issues under the Establishment Clause will trace lower court decisions.

1. Kosher Food Fraud Laws

Since 1920, numerous states have passed kosher fraud statutes, making it a fraud to sell nonkosher food as kosher with an intention to defraud consumers.[138] In addition, these statutes often contain an enforcement mechanism by which state officials may inspect the kosher products and bring noncompliant vendors to court. These statutes have recently come under attack.[139] For example, in *Commack Self-Service Kosher Meats, Inc. v. Weiss*, the Second Circuit applied the *Lemon* test to invalidate New York State's kosher fraud law. The court acknowledged: "[A] state has 'a valid interest in preventing fraud

Blackmun, *see County of Allegheny*, 492 U.S. at 600 (arguing that the Establishment Clause forbids the government from endorsing religion). Justice Stevens consistently espouses a "high and impregnable wall" between church and state forbidding the government from "pass[ing] laws which aid one religion, aid all religions, or prefer one religion over another." Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947) (cited in *Jaffree*, 472 U.S. at 53 n.37); *see also* Comm. for Pub. Ed. & Religious Liberty v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting). And finally, Justices Rehnquist and Scalia would limit the prohibition of the Establishment Clause to laws that discriminate among the religions. *See, e.g.*, *Jaffree*, 472 U.S. at 75 (Rehnquist, J., dissenting); Employment Div. v. Smith, 494 U.S. 872, 878–84 (1990). This Comment will use the *Lemon* test because the Supreme Court has yet to overrule *Lemon v. Kurtzman*, the Supreme Court still mentions the *Lemon* test on occasion, and, most importantly, the lower courts still apply the *Lemon* test regularly in the absence of any coherent alternative from the Supreme Court. The doctrinal analysis may change under the other tests. However, the larger point is that prison religious diet issues implicate the Establishment Clause, whatever the underlying test is.

137. Most Establishment Clause challenges in the Supreme Court fall into four areas: religious exercise in public schools, government financial aid to parochial schools, state-sponsored quasi-religious rituals and display, and tax exemptions for religious organizations/factories.

138. *See, e.g.*, N.Y. AGRIC. & MKTS. LAW §§ 26-a, 201-a to -i (McKinney Supp. 2003).

139. *See generally* Stephen F. Rosenthal, *Food for Thought: Kosher Fraud Laws and the Religion Clauses of the First Amendment*, 65 GEO. WASH. L. REV. 951 (1997). Rosenthal presented a comprehensive analysis of the intersection between kosher fraud laws and the Constitution and ultimately concluded that courts underanalyzed the issue when striking down the statutes. *Id.* at 1013. However, he conceded that government involvement in doctrinal differences would violate the Establishment Clause. *Id.* at 890. To date, these provisions are now valid in the Second Circuit, the Fourth Circuit, and the State of New Jersey. *See* Commack Self-Service Kosher Meats, Inc. v. Weiss, 294 F.3d 415, 419 (2d Cir. 2002); Barghout v. Bureau of Kosher Meat & Food Control, 66 F.3d 1337 (4th Cir. 1995); Ran-Dav's County Kosher, Inc. v. State, 608 A.2d 1353 (N.J. 1992). *See generally* LEVENSON, *supra* note 4 (presenting a humorous history of kosher food laws).

in the sale of any foods, including kosher foods.'"[140] Therefore, the statute contained a secular purpose. However, kosher fraud laws excessively entangled government and religion: "[B]ecause the challenged laws interpret 'kosher' as synonymous with the views . . . of Orthodox Judaism, the State has effectively aligned itself with one side of an internal debate within Judaism. This it may not do."[141] Further entanglement occurred when the statute "require[d] New York to adopt an official State position on a point of religious doctrine."[142] In order to adopt the official position, the state must impermissibly "weigh[ ] the significance and the meaning of disputed religious doctrine"[143] or "employ[ ] religious organizations as an arm of the civil [government] to perform the function of interpreting and applying state standards."[144] These same observations also supported a finding that the fraud statutes had the primary effect of advancing Orthodox Judaism, inhibiting other branches of Judaism by depriving them the utility of the kosher label and discouraging butchers from adopting non-Orthodox kosher standards, and creating a joint venture between the state and religion that advanced one religion under the state's sponsorship.[145]

The Establishment Clause, applied through the kosher fraud statutes cases, can guide government action in the area of religious diets. It prohibits states from taking a part in food-related sectarian disputes and from conducting excessive searches into doctrinal gray areas in which different adherents adopt different rules. Moreover, it also frowns upon laws that protect the food of one sect without benefiting, and even harming, the interests of other sects. These forbidden behaviors frequently arise in the prison religious diet cases.

2. The Religious Requirement Test

Loyd LaFevers, a Seventh Day Adventist, requested a vegetarian diet while incarcerated in the Oklahoma State Penitentiary.[146] The request was

140. *Commack*, 294 F.3d at 431 (quoting *Ran-Dav's*, 608 A.2d at 1366).

141. *Id.* at 426.

142. *Id.*

143. *Id.* at 427.

144. *Id.* (alteration in original) (quoting Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 451–52 (1969) (Harlan, J., concurring)).

145. *Id.* at 430–31. It is significant that these statutes will probably fail the endorsement test because they endorse Orthodox Judaism, the neutrality test because they favor one branch of Judaism (or favor Judaism over Islam for the lack of a halal fraud law), and the noncoercion test because they force the butchers to adopt one kosher standard.

146. LaFevers v. Saffle, 936 F.2d 1117, 1118 (10th Cir. 1991). Incidentally, the plaintiff's claims parallel the arguments of this Comment:

> Plaintiff's complaint stated that the prison policy denies him his right to the free exercise of religion under the First Amendment because it impermissibly infringes on his religious beliefs and practices as a Seventh Day Adventist. He also contends that denying him a

rejected, and he file suit alleging the rejection deprived him the free exercise of his religion and the equal protection of the law.[147] The prison administration argued that a vegetarian diet was nutritionally deficient and that the decision to deny the diet was related to the legitimate interest of avoiding medical liability. The district court agreed and decided, in addition, that the equal protection and free exercise arguments lacked merit because a vegetarian diet was *recommended* but *not required* by the Seventh Day Adventist Church. Because the diet was not a religious mandate, denial of the diet did not raise constitutional issues.[148]

The Tenth Circuit Court of Appeals rejected the lower court's reliance on the distinction between what is religiously required and what is merely a recommendation. Instead, the appellate court was willing to commence the free exercise *Turner/O'Lone* analysis as long as the inmate could show that he was a sincere believer and that the requested diet was religious. *LaFevers* demonstrated that many Seventh Day Adventists are vegetarians because the Church encourages vegetarianism. Based on this information, the court decided that the plaintiff's vegetarianism was sufficiently religious to warrant protection under the Free Exercise Clause.[149]

Although *LaFevers* did not mention the Establishment Clause, it raised issues analogous to kosher food fraud statutes. The appellate court rejected the district court's "requirement test" and limited the threshold inquiry to religiosity and sincerity. The determination of what is required or not required would entangle courts and prison administrators in a debate of religious orthodoxy and doctrinal hermeneutics, not unlike the situation of New York State under the kosher fraud law.[150] Although couched in a discussion of the Free Exercise Clause, the appellate court's admonition implied an entanglement concern: "'[I]t is no business of courts to say that what is a religious

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vegetarian diet constitutes cruel and unusual punishment under the Eighth Amendment. Plaintiff's final argument is that appellees' policy denies him equal protection of the laws because the Oklahoma Department of Corrections permits special religious diets for members of other religions.

Id.

147. *Id.* Special meals were provided to followers of other religions. *Id.*

148. *Id.* In contrast, the "policy of offering a non pork diet for Muslim inmates was based on the fact that such a diet is a necessary and fundamental part of the Muslim faith." *Id.*

149. *Id.* at 1119. Similarly, the requirement test was an insufficient basis for treating a Seventh Day Adventist differently than a Muslim inmate. *Id.*

150. Nevertheless, unlike Judaism, in which dietary differences constitute a point of contention among splinter groups, the Seventh Day Adventists do not appear to treat vegetarianism as an issue that divides the religion. Nonetheless, the fact that some adherents follow a vegetarian diet while others do not suggests that individual Adventists attribute different importance to the religious diet.

practice or activity for one group is not religion under the protection of the First Amendment.'"[151] Even when a religion has reached a consensus on the nature and importance of a dietary scheme, the requirement test would favor those religions driven by a set of mandates over those religions without any explicit requirements.[152] Out of respect for the antidiscrimination aspect of the Establishment Clause, courts and administrations would do well to stay away from arbitrating the centrality of a dietary plan in order to avoid the impermissible business of espousing one sect over another and further entangling itself in sectarian conflicts.

Courts need a method to assess whether a set of facts triggers the protection of the Free Exercise Clause, and the Establishment Clause constrains the type assessment a court may choose. Courts should not inquire if a practice is required, but instead should limit the inquiry to whether the request is religious and whether the inmate is sincere.[153] Once an inmate satisfies these two criteria, the judge should commence the *Turner/O'Lone* test. The next subpart explains how courts should conduct the free exercise *Turner/O'Lone* analysis to resolve prison religious diet issues without offending the Establishment Clause.

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151. *Id.* at 1119 (quoting Fowler v. Rhode Island, 345 U.S. 67 (1953)) (alteration in original). *Cf.* Widmar v. Vincent, 454 U.S. 263, 272 n.11 (1981). *Widmar* suggested that the University of Missouri should not close its facilities to religious student groups because doing so

> would risk greater "entanglement" by attempting to enforce its exclusion of "religious worship" and "religious speech." Initially, the University would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove "an impossible task in an age where many and various beliefs meet the constitutional definition of religion."

Id. (citation omitted).

152. Levitan v. Ashcroft, 281 F.3d 1313, 1320 (D.C. Cir. 2002). The D.C. Circuit observed that such a test would leave religions "that lack the concepts of commandments necessary for the salvation of the soul . . . outside the scope of First Amendment protection altogether." *Id.* Although it reasoned that "[n]othing in the free exercise clause suggests that it only protects religions that incorporate mandatory tenets," a more robust analysis would be to recognize that the Establishment Clause would forbid the lopsided protection. *Id.*

153. *See, e.g.*, Patrick v. LeFevre, 745 F.2d 153, 157 (2d Cir. 1984) ("[I]n determining whether beliefs are to be accorded first amendment protection . . . [the judicial] competence properly extends to determining 'whether the beliefs professed by a [claimant] are sincerely held and whether they are, in his own scheme of things, religious.'" (citing United States v. Seeger, 380 U.S. 163, 185 (1965))). These two questions are by no means easy to answer, and how courts answer these two questions also raises Establishment Clause issues. An Establishment Clause analysis of these two interesting but vast issues is beyond the scope of this Comment. Fortunately, there are numerous works of scholarship on these two topics. Two of the current leading cases in this area actually are prison accommodation cases, *Africa v. Pennsylvania*, 662 F.2d 1025 (3d Cir. 1981), and *Patrick*, 745 F.2d 153. For a list of academic discussions of these topics, see Val D. Ricks, *To God God's, to Ceasar Ceasar's, and to Both the Defining of Religion*, 26 CREIGHTON L. REV. 1053, 1053 n.1 (1993).

3. The Establishment Clause as a *Turner/O'Lone* Consideration

Because all determinations regarding religious diet in prison, including the *Turner/O'Lone* test, produce religious effects and require state intervention in religious affairs, the application of the *Turner* test must be guarded against Establishment Clause violations. The "alternative means" factor under the *Turner/O'Lone* test is especially susceptible to Establishment Clause violation. The "alternative means" factor of the *Turner/O'Lone* test asks courts to consider whether alternative means of exercising religion remain open to prisoners under the regulation and gives administrators leeway to burden *some* religious exercise if other venues of religious exercise remain open. This factor requires courts to probe the relationship between specific religious exercises and religion, and some judges and administrators have used this factor to determine the necessity of a particular diet or assess the theological equivalency between two dietary schemes. Both practices violate the Establishment Clause.

a. The Religious Requirement Test Revisited

The Ninth Circuit granted special treatment to mandatory religious diets under the "alternative means" factor in *Ward v. Walsh*.[154] In *Ward*, a Nevada prison denied the kosher diet request of an Orthodox Jewish inmate. The Ninth Circuit found that the lower court applied the incorrect legal standard and remanded the case for a *Turner* analysis. The Ninth Circuit opined:

> [R]elevant to the evaluation of the second factor is a distinction *O'Lone* had no occasion to make: the distinction between a religious practice which is a positive expression of belief and a religious commandment which the believer may not violate at peril of his soul. . . . In order to determine what alternatives are open to Ward, findings must be made as to what is or is not forbidden by his religion. The district court made no such findings; we must remand so that the court can do so.[155]

Courts are split into two camps on the recommended/required distinction. The Tenth Circuit in *Beerheide v. Suther*[156] joined the Ninth Circuit in holding that courts should distinguish between required and recom-

154. 1 F.3d 873, 877 (9th Cir. 1993).
155. *Id.* at 878.
156. 286 F.3d 1179 (10th Cir. 2002).

mended religious diets.[157] In contrast, the Third Circuit in *DeHart* withdrew the special protection it had previously afforded to mandatory diets[158] and explicitly overruled precedent that had recognized the distinction.[159] Perhaps the Ninth Circuit correctly noticed a lacuna in the *Turner/O'Lone* test.[160] However, the *Ward* solution would still fail as an Establishment Clause violation for the same reasons as the requirement test.[161] In *DeHart*, the administration denied vegetarian meals to a Buddhist inmate in part because vegetarianism was an expression of faith and not a mandate. The *DeHart* court rejected the *Ward* approach because "'[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith.'"[162] The Free Exercise Clause does allow the prison to decide whether the vegetarian diet is religious and whether the prisoner is sincere in his religious beliefs. However, once the vegetarian meal is deemed religious, reliance on doctrinal distinction within a *Turner* factor would entangle the state action with theology. Although the Establishment Clause was not explicitly mentioned in the analysis, the *DeHart* court's refusal to entangle itself with doctrinal determinations or religious favoritism was identical to the concerns voiced in the kosher fraud law cases. In contrast, the Ninth Circuit would

157. *Beerheide*, 286 F.3d at 1192.

158. DeHart v. Horn, 227 F.3d 47, 55 (3d Cir. 2000) (en banc).

159. Johnson v. Horn, 150 F.3d 276 (3d Cir. 1998).

160. The Supreme Court in *O'Lone* made clear that the proper inquiry is whether inmates have alternative means of exercising their religion, not whether inmates have alternative means of exercising a particular religious practice. O'Lone v. Estate of Shabazz, 482 U.S. 342, 352 (1987) ("In *Turner*, we did not look to see whether prisoners had other means of communicating with fellow inmates, but instead examined whether the inmates were deprived of 'all means of expression.'" (quoting *Turner*, 482 U.S. at 92)); *see also* Thornburgh v. Abbott, 490 U.S. 401, 417–18 (D.C. Cir. 1989). The *Thornburgh* Court notes:

> The Court in *Turner* did not require that prisoners be afforded other means of communicating with inmates at other institutions . . . . It held in *Turner* that it was sufficient if other means of expression (not necessarily other means of communicating with inmates in other prisons) remained available, and in *O'Lone* if prisoners were permitted to participate in other Muslim religious ceremonies.

Id. Although the Ninth Circuit claimed that the *O'Lone* analysis made no pronouncement on this issue, *Jumu'ah* is, nonetheless, a "religious commandment." *O'Lone*, 482 U.S. at 345 ("Jumu'ah is commanded by the Koran and must be held every Friday after the sun reaches its zenith and before the Asr, or afternoon prayer.").

161. The requirement test denies the *Turner/O'Lone* analysis to nonmandatory practices. The *Ward* "alternative means" analysis gives heightened protection to mandatory practices. For a discussion discrediting the requirement test, see Part II.C.2.

162. *DeHart*, 227 F.3d at 56 (quoting Employment Div. v. Smith, 494 U.S. 872, 886–87 (1990)); *see also DeHart*, 227 F.3d at 56 ("Judges are not oracles of theological verity, and the Founders did not intend for them to be declarants of religious orthodoxy." (citing African v. Pennsylvania, 662 F.2d 1025 (3d Cir. 1981)). For a brief review of vegetarianism in Buddhist practice, see BUDDHISM AND VEGETARIANISM, *supra* note 2, *at* http://www.urbandharma.org/udharma3/vegi.html.

require courts to conduct a theological survey and make religious pronouncements that excessively entangle the court with religion. Perhaps the Ninth and Tenth Circuits were sympathetic to prisoners' dietary claims and wanted to extend additional protection to those practices that are not fungible; unfortunately they employed constitutionally impermissible means.[163] Therefore, the circuit split should be resolved against providing special analysis for required religious practices.

b. Judicial and Administrative Foray Into Comparative Religious Study

Another type of Establishment Clause violation arises from the question of religious equivalents. This type of error appears in the Tenth Circuit case *Beerheide v. Suthers*, decided in 2002. In *Beerheide*, Orthodox Jewish inmates claimed that their First Amendment right to free exercise of their religion was violated when the Colorado prison system refused to supply them kosher meals. Kosher food, for these inmates, includes all non-animal products, meats from animals without cloven hooves (beef and lamb) or from poultry, slaughtered and prepared in a set manner, and fishes with fins and scales. In addition to specific items, the kosher law also prohibits foods from coming in contact with nonkosher containers, utensils, or nonkosher foods.[164]

The Tenth Circuit Court of Appeals applied the *Turner/O'Lone* test and found that the prison violated the inmates' right to the free exercise of their religion. While discussing the "alternative means" factor, the administrators argued that alternative means exist for these inmates to exercise their religious rights under this factor. They contended that "inmates could obtain an 'alternative religious diet' . . . through the prison's 'common fare' program. . . . Meals in this program are prepared with no pork or pork by-products, or are vegetarian."[165] The administration acknowledged that this diet did not meet the "strictest orthodox standards," but that it met "the basic

163. Even as a tool to protect prisoners' rights, the mandate/expression dichotomy is a double-edged sword. It enhances the protection afforded to religious mandates. However, this distinction has the potential of eliminating protection for the "lesser" exercises. In *DeHart*, the lower court found that a vegetarian meal is an expression, and therefore there are many alternative means of practicing Buddhism besides a vegetarian meal. *DeHart*, 227 F.3d at 55. In *Spies v. Voinovich*, 173 F.3d 398 (6th Cir. 1999), a finding that vegetarianism is only an expression of Buddhism barred an inmate's free exercise claim all together. A better way to afford religious diet more protection would be to declare it a protected liberty interest under the Due Process Clause—in which case the *Turner* question under the second factor becomes whether inmates have alternative means of practicing the right to a religious diet.

164. Beerheide v. Suthers, 286 F.3d 1179, 1183 (10th Cir. 2002).

165. *Id.* at 1186–87.

tenants [*sic*] of a kosher diet."[166] The court disagreed with the administration's characterization, declaring that a person either keeps kosher or not under the Orthodox kosher law, and that the options within the common program failed to provide an Orthodox kosher meal.[167]

What is remarkable about this exchange is that the court and the administration were trying to pin down what type of diet could satisfy the kosher requirement, and, in the process, both the court and the administration veered dangerously close to pronouncing what each saw as sufficient accommodation of religious diet.[168] To say that one religious diet is an alternative to another religious diet is treading on dangerous ground not unlike the government's activity in equating various understandings of the kosher standard to that maintained by Orthodox Jews. The administration, and even the courts, breached the establishment prohibition of state entanglement with religion by arguing that the common fare was kosher enough for Orthodox inmates.[169]

The better approach, from the Establishment Clause point of view, is to avoid elevating mandatory diets above religious exercise or substituting one diet for another under the "alternative means" factor.[170] Courts and administrators should analyze the "alternative means" test by counting the alternative venues that remain for inmates to exercise their particular religion, as was implied in *Turner* and *O'Lone*.

4. Answers to Potential Counterarguments

A believer in judicial economy may wonder if an Establishment Clause claim accomplishes anything that is not already covered by the Free Exercise or the Equal Protection Clauses. After all, the focus of the litigation is a matter of one's personal right to practice religion and one's freedom from disparate

166. *Id.* at 1187.

167. *Id.*

168. *See* Joseph C. Hutchison, *Analyzing the Religious Free Exercise Rights of Inmates: The Significance of* Pell, Jones, *and* Wolfish, 11 N.Y.U. REV. L. & SOC. CHANGE 413, 435 (1983) (arguing that courts are not competent to determine adequate alternatives to religious exercise).

169. *See, e.g.*, *Spies*, 173 F.3d at 407 (declaring that vegetarianism is an alternative means of practicing veganism within Buddhism).

170. This is not to say that the characteristics of the existing dietary program are irrelevant. If the diet meets Jewish inmates' need, then their request for an alternative diet is not based on religious need. It will fail the religiosity test and fail to trigger the protection of the Free Exercise Clause. *See* Johnson v. Horn, 150 F.3d 276, 283 (3d Cir. 1998) (holding that the Free Exercise Clause does not require prisons to provide hot kosher food, when cold kosher meals are available). On the other hand, if it does not satisfy the kosher standard, then inmates have a legitimate claim. What is not legitimate is for the administrators to take a meal known to be nonkosher and characterize it as an alternative to a kosher diet within the *Turner/O'Lone* test.

treatment. The claimant's liberty concerns under a classical Establishment Clause claim are identical to the concerns under the Free Exercise or Equal Protection Clauses.

The theoretical response is that the Establishment Clause analysis concerns state actors, not the litigant's liberty interest. Dietary accommodation cases affect the delicate relationship between the church and the state. Neither the Free Exercise Clause nor the Equal Protection Clause adequately answers the various forms of this institutional question. First, the establishment concern by its nature posits institutional questions unrelated to penal incarceration. Surely the administration cannot convert a prison into a sectarian church, even if doing so may serve the valid penological interest of rehabilitation.[171] Second, because the Establishment Clause operates apart from inmates' individual situations, legal formulations of the church-state relationship easily escape the prison confine and spill over into free society. Prison Establishment Clause cases have been cited to support decisions in the free world.[172] If the Establishment Clause were not guarded in prison, then such a spillover application would inject a weaker Establishment Clause into the traditional Establishment Clause jurisprudence. Third, the religious dietary accommodation issue is rife with Establishment Clause issues: prison administration may impermissibly base the nature of accommodation on personal views regarding specific religions; food service regulations may impermissibility distinguish prisoners based on their religious affiliations; a prison may invoke impermissible religious distinctions to justify its food policy; and courts may offend the Establishment Clause during the *Turner/O'Lone* analysis. The opportunity for constitutional violation, together with the institutional focus and the spillover effect, demands a meaningful Establishment Clause analysis.

The elimination of the requirement test may be perceived as a detriment. To those who are weary of prison litigation criteria of this type can eliminate false or frivolous claims from the start, so courts need not waste

171. *See* Warburton v. Underwood, 2 F. Supp. 2d 306, 318 (W.D.N.Y. 1998) (invalidating a prison-sponsored Alcoholics Anonymous program because government sponsorship of quasi-religious rehabilitation violates the Establishment Clause).

172. Establishment Clause challenges to the constitutionality of state-sponsored Alcoholics Anonymous programs do not distinguish between prison and nonprison cases. *See, e.g.*, DeStefano v. Emergency Hous. Group, Inc., 247 F.3d 397 (2d Cir. 2001). *DeStefano* questioned the constitutionality of state programs funding private Alcoholics Anonymous programs on Establishment Clause grounds. It cited *Warburton*, 2 F. Supp. 2d at 306, without making any special reference or qualification based on the prison context. *DeStefano*, 247 F.3d at 407. For an account of the Alcoholics Anonymous program and the Establishment Clause, see generally Rachel F. Calabro, Comment, *Correction Through Coercion: Do State Mandated Alcoholic and Drug Treatment Programs in Prisons Violate the Establishment Clause?*, 47 DEPAUL L. REV. 565 (1998).

valuable judicial resources conducting the fact-intensive *Turner/O'Lone* test. Denying accommodation to nonessential dietary prescriptions also appeals to the intuition that accommodation should only be supplied to those who *need* it. To prisoners weary of administrative insensitivity, this distinction has been a boon in a hostile environment, promising protection of essential religious rights as was done in *Ward* and *Beerheide*.[173]

The benefit of the requirement test is probably overrated. Even if it can secure some procedural efficiency or substantive rights at the margin, it leaves a trail of conflicting precedents and a tattered church-state relationship without producing a logically consistent resolution of religious diet issues in prisons. As we have already seen, this distinction can work to the benefit of the prisoner or of the prison administration, depending on the court that wields it. The practical effect of removing this distinction is that prison cases will increase slightly—"slightly" because inmates already have to cope with the threshold question of religiosity and sincerity, and because religious accommodation claims only constitute a small fraction of all prison litigation.[174] This slight increase will be offset by the change in *Turner* because courts are prohibited from carving out a special "mandatory" diet analysis under the "alternative means" test. Overall, the elimination of the requirement test will not change the frequency of prison diet litigation, but it will improve the logic and constitutionality of the free exercise analysis.

The need to control possible abuse remains. For example, an inmate could attribute a request of steak and ice cream to a fictitious form of pagan bull worship. On a less dramatic note, nonreligious inmates may wish to adopt a religion in order to receive a diet of their choice: ethical vegetarians may pretend to be Buddhists, and those who perceive kosher food as better than the regular fare may assert a counterfeit belief in Judaism. Worse yet, religious inmates may demand extravagant dietary accommodation.

While the concern of abuse is well founded, the administration still retains the necessary tools to control unreasonable requests. Both the sincerity test and the religiosity test should counter inmates' demand for exotic foods. The sincerity test should block nonreligious inmates' access to religious diet. When religious inmates demand special accommodations, the request itself must pass muster under the religiosity test.[175] Finally, all sincere

173. *See supra* notes 154–157.

174. *See* 139 CONG. REC. S14,462 (daily ed. Oct. 27, 1993) (statement of Sen. Lieberman) (disputing arguments that the effect of legislation expanding inmates' rights will burden judicial resources by noting that free exercise cases only account for 2 percent of all prisoner litigation).

175. Courts can test the sincerity of inmates' convictions and credibility to eliminate opportunists during this stage.

dietary requests must still proceed under the *Turner/O'Lone* test, which gives the administration an opportunity to eliminate requests that are impracticable. Apart from the legal tools, prison administrators also retain full control of actual food. They can ensure that the religious diet program appear as (un)appetizing as the regular diets to remove incentives for nonreligious inmates to feign religious interest.[176]

This discussion of implementation brings up the most fundamental challenge to the Establishment Clause analysis. If the government cannot use religious information to decide what the religion needs nor rely on members of the religious community to prescribe a religious diet, how can it decide what to provide in the actual accommodation?

The apparent impossibility is eased by the nature of dietary accommodation. Unlike the kosher food fraud law, religious dietary accommodation does not require administrators to determine the religious status of every single food item. Religious diets are usually characterized by abstinence—Hindus cannot eat beef, Muslims and Jews cannot eat pork, and Rastafarians cannot eat meat. As long as the food service provides "consensus items" that meet the requirement of all religions or sects, it will not advance, inhibit, or endorse any particular religion. As long as the administrators operate within a list of common denominators under the previously mentioned neutral-accommodating approach, they can steer clear of doctrinal debates and avoid excessive entanglement with religion.[177] The self-help idea implemented through a salad bar further enables inmates to maintain their own diets.[178]

5. Summary

A robust Establishment Clause analysis can lead to a more simplified and uniform application of the *Turner/O'Lone* test to prison religious diet issues. Prison administrators and courts should avoid theological debates regarding whether a particular diet is required or optional. As long as the request is religious, and the inmate is sincere in his or her beliefs, courts should commence the free exercise *Turner/O'Lone* test. Administrative decisions

176. *See The Law of Prisons*, *supra* note 9, at 1908 n.90. One prison official notes:
> The monotony of the same three TV dinner-like options serves as an easy proxy for sincerity, without much added cost and without the need for the state to disqualify any inmate from choosing a religious diet. The same is true for vegetarian diets: "[I]nmates have visions of a variety of fresh fruits and what you get are veggie patties. You have to be a committed vegetarian to stick with it."

Id. (citations omitted).

177. *See supra* notes 130–131 and accompanying text.

178. *See supra* note 8 and accompanying text.

and judicial reasoning under the "alternative means" factor of the free exercise *Turner/O'Lone* test should also avoid the questions of whether a particular diet is required and whether two dietary schemes are religious alternatives to each other. Ultimately, prison administrators and courts should rest their analysis on legitimate penological purposes, not impermissible religious determinations, in order to satisfy the requirements of the Establishment Clause.

III. THE CROSSCUTTING OBJECTION: ARE THE *TURNER/O'LONE* TEST AND THE MULTIRIGHTS ANALYSIS RELEVANT TODAY?

The *Turner* and *O'Lone* opinions are each seventeen years old. During this period, constitutional law governing religious exercise witnessed dramatic change outside the prison walls. In light of subsequent case law and legislation that seems to supersede *Turner*, one must wonder whether the *Turner/O'Lone* free exercise analysis and the multirights approach outlined in this Comment retain any relevance in inmates' dietary accommodation cases. Before addressing this general concern, it is necessary to briefly review the changes in free exercise law.[179]

A. The Right to Religious Exercise Outside the Prison Walls: A Brief History

Prior to 1990, the protection of the Free Exercise Clause exempted individuals from laws burdening their sincerely held belief and its exercise unless such laws furthered compelling governmental ends by means that were the least restrictive to religious exercise (the "strict scrutiny" test).[180] But in *Employment Division v. Smith*,[181] the Supreme Court ruled that a facially neutral state drug law burdening a Native American's use of peyote during ceremonies is facially valid as long as it was generally applicable and rationally related to legitimate state interests (the "rational basis" test). Only those laws targeting religious exercise specifically or burdening a "hybrid" of free exercise rights and other constitutional liberties deserve the protection

179. For a more complete history of prisoner's rights until 1998, see Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229 (1998), and *The Law of Prisons*, *supra* note 9.

180. Sherbert v. Verner, 374 U.S. 398 (1963). The history of the Free Exercise Clause litigation reveals that even before 1990, the Court had not consistently applied the compelling interest standard. *See* Greenawalt, *supra* note 107, at 329–33.

181. 494 U.S. 872 (1990).

of the "strict scrutiny test."[182] Amid outcries from religious organizations, Congress struck back in 1993 with RFRA, which required courts to scrutinize laws burdening religious exercise using the pre-*Smith* strict scrutiny standard.[183] Four years later the Supreme Court declared RFRA unconstitutional as applied to the state governments and state agencies in *City of Boerne v. Flores*.[184] Congress tried to legislate religious protection again and unanimously passed RLUIPA.[185] RLUIPA limits its scope to residents of institutions receiving Federal funding and imposes the pre-*Smith* standard on laws burdening the religious exercise of such individuals.[186]

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182. *Id.* at 881–82, 881 n.1.

183. Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb–2000bb-4 (2000) (held unconstitutional as against the states in City of Boerne v. Flores, 521 U.S. 507 (1997)). The act provides:

> (a) In general Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

Id. § 2000bb-1.

184. 521 U.S. 507 (1997).

185. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc–2000cc-5 (2003). The statute provides:

> Protection of religious exercise of institutionalized persons
>
> (a) General rule
>
> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, 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.
>
> (b) Scope of application
>
> This section applies in any case in which—
>
> (1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or
>
> (2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

Id. § 2000cc-1.

186. Muslim inmates in California State Prison have already invoked RLUIPA to protect their free exercise rights, and so far, RLUIPA has withstood constitutional challenge. *See* Mayweathers v. Terhune, No. S961582LKKGGHP, 2001 WL 804140, at *1, *8 (E.D. Cal. July 2, 2001).

B. The *Turner/O'Lone* Test Versus *Smith*

The legal interaction of this tumultuous history and inmates' access to religious diet is unclear at best. First, the *Turner/O'Lone* test and the *Smith* decision seem to be in conflict.[187] The most self-conscious discussion of the conflict between *Turner/O'Lone* and *Smith* appeared in *Levitan v. Ashcroft*,[188] a 2002 case involving Catholic inmates' protest against a new prison regulation barring the use of wine during Mass. There the D.C. Circuit observed:

> 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*. One possibility is that *Smith* supplanted the *Turner* analysis, because *Smith* can be read to say that religious inmates should never be entitled to exemptions from generally applicable, religion-neutral prison regulations. Another possibility is that *Smith* simply has no application in the unique and highly regulated prison context, so *Turner* and *O'Lone* continue to govern. A third possibility is that . . . *Smith* is relevant in determining the scope of a person's free exercise right . . . while *Turner* and *O'Lone* are employed in determining how that right may be circumscribed in the specialized prison context. . . . Most Courts of Appeals have taken the second approach, simply continuing to apply *Turner* and *O'Lone* in analyzing prisoners' constitutional rights.[189]

Courts avoid the effects of *Smith* in one of two ways: Some courts hold that *Smith* does not apply to prison because it was not a prison case,[190] while other courts avoid the issue because the government defendants and administrators do not raise *Smith* as an alternative to *Turner*.[191] It is clear that after

187. *See* Hunafa v. Murphy, 907 F.2d 46, 48 (7th Cir. 1990) ("*Smith* cut back, possibly to minute dimensions, the doctrine that requires government to accommodate, at some cost, minority religious preferences: the doctrine on which all the prison religion cases are founded."); Harris v. Ostrout, 65 F.3d 912, 918 (11th Cir. 1995) (suggesting in dicta that the residual right to a religious diet might not have survived the Supreme Court's *Smith* decision).

188. 281 F.3d 1313 (D.C. Cir. 2002).

189. *Id.* at 1318–19.

190. Flagner v. Wilkinson, 241 F.3d 475, 481–87 (6th Cir. 2001) (applying *Turner* to a prison grooming regulation and declining to apply *Smith*); Green v. Polunsky, 229 F.3d 486, 489–91 (5th Cir. 2000) (applying *Turner* and *O'Lone* to a prisoner's free exercise claim); DeHart v. Horn, 227 F.3d 47, 51–60 (3d Cir. 2000) (en banc) (applying the *Turner* factors to a prisoner's religious right to have a special diet in prison); Sasnett v. Litscher, 197 F.3d 290, 292 (7th Cir. 1999); Ward v. Walsh, 1 F.3d 873, 876–77 (9th Cir. 1993) (distinguishing prison diet cases from *Smith*).

191. *See, e.g.*, *Levitan*, 281 F.3d at 1318; Hakim v. Hicks, 223 F.3d 1244, 1247–49, 1247 n.3 (11th Cir. 2000) (applying *Turner* and *O'Lone* because the government had not argued that *Smith* required a different standard). It is a unclear why the government did not raise *Smith* in defense, because the rational basis test is more favorable to defending administrators. Under *Smith*, the administrators only need to show that the regulation is rational, rather than having to justify their

fourteen years *Smith* has not gained a following in the context of prisoners' free exercise rights, and the *Turner/O'Lone* test remains the status quo.[192]

But even if in the future *Smith* should scale the prison wall and supplant the *Turner/O'Lone* test, the multirights analysis advanced in this Comment would still play a special role under *Smith*. *Smith* reserves the protection of the strict scrutiny test to "hybrid claims": those claims involving a government action that burdens multiple constitutional rights including the right to the free exercise of religion. Through the lens of the multirights approach, a prison religious dietary accommodation claim becomes the paradigmatic hybrid claim involving First Amendment religious rights, the Eighth Amendment condition-of-confinement analysis, and the Fourteenth Amendment equal protection guarantee.[193] Thus the adaptation of *Smith* will only increase the importance of the multirights approach, not diminish it.

C. The *Turner/O'Lone* Test Meets RFRA and RLUIPA

In contrast to *Smith*, RFRA and the new RLUIPA suggest that courts must always use the strict scrutiny test when assessing the legitimacy of prison regulations that burden inmates' religious exercise. Unlike *Smith*, these acts were drafted with the intent of enabling religious exercise in prison, and courts

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decision under the four *Turner* factors. Moreover, because the choice of standard is a question of law, it is legitimate for courts to analyze the proper standard sua sponte. It is very puzzling for the court to say that it took notice of the potential applicability of *Smith*, and then to proceed under *Turner*.

192. The interaction between *Smith* and *Turner/O'Lone* probably deserves additional discussion. In *Smith*, Justice Scalia cited *O'Lone* to support the proposition that neutral laws have been held to a reasonableness standard in the past. Employment Div. v. Smith, 494 U.S. 872, 884 (1990). Thus it is possible, in the eyes of the Supreme Court, that *Smith* and *O'Lone* are actually two manifestations of the same test. *See* Salaam v. Lockhart, 905 F.2d 1168, 1171 n.7 (8th Cir. 1990) (holding that *Smith* does not disturb the *Turner/O'Lone* analysis).

193. Scholars and justices have criticized the "hybrid claims" as a make-weight argument to explain away precedents and as bordering on the incomprehensible. *See* Greenawalt, *supra* note 107, at 335; Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring in part and concurring in the judgment). Justice Souter notes:

> If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would . . . swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith*, since free speech and associational rights are certainly implicated in the peyote ritual. But if a hybrid claim is one in which a litigant would actually obtain an exemption . . . under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.

Id. Perhaps the prison is one place where the hybrid approach makes sense—in prison, nearly all regulations burdening inmates' constitutional rights are evaluated under the reasonableness standard. *Smith* could propel regulations that burden multiple constitutional rights into the strict scrutiny test.

are not free to ignore them.[194] However, *Turner* and *O'Lone* remained the basic test to adjudicate inmates' religious dietary accommodation claims prior to 1993, before RFRA was passed, and between 1997 and 2000, after RFRA's application to the states was invalidated and before RLUIPA was passed. The *Turner/O'Lone* test will remain the default test if the Supreme Court should declare RLUIPA unconstitutional. This is not yet the time to move our focus away from the *Turner/O'Lone* test.

Even in the presence of religious legislation it is important to understand how the constitutional *Turner/O'Lone* test operates. According to Ira Lupu, there were 148 RFRA cases in the federal courts prior to RFRA's invalidation, of which 94 involved prisons.[195] Inmates found relief in only nine cases.[196] Meanwhile, courts continued to conduct the *Turner/O'Lone* test for constitutional violation in addition to RFRA. RFRA had failed to deliver its promise of protecting inmates' religious exercise rights.[197] Lupu attributes the failure to judges' unwillingness to exempt individuals from generally applicable laws.[198] In addition, he hypothesizes:

> [J]udges . . . may be skeptical about intensely held religious commitments[,] . . . sensitive to the possibility of religious fraud, . . . perceive a danger of Establishment Clause violations hanging over the project of religious exemptions[,] . . . [and] sense the dangers of bias . . . about various religious traditions and movements . . . . Better no exemptions, they might well say, than a pattern of exemptions riddled by religious favoritism.[199]

In order to avoid the application of RFRA to prison cases, judges limited the strict scrutiny test to only those practices required by the religion,[200] "excluded cases of sectarian discrimination from RFRA" when accommodation was provided to one sect but not the other,[201] made judgments about the

194. *See* Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 583 (1998); Daniel J. Solove, Note, *Faith Profaned: The Religious Freedom Restoration Act and Religion in the Prisons*, 106 YALE L.J. 459, 471–72 (1996).

195. Lupu, *supra* note 194, at 590.

196. *Id.*

197. *See generally* Solove, *supra* note 194 (arguing that RFRA has failed to protect prisoners' religious rights); Lupu, *supra* note 194, at 585 (dismissing the effect of RFRA on protecting religious rights, even in prison where "RFRA probably did not create any dramatic alteration in the climate of relations between inmates and administrators on matters of religious liberty"); *The Law of Prisons*, *supra* note 9, at 1894 ("Heightened scrutiny during the RFRA period did not produce any particular inmate-friendly trend in the courts—judges continued generally to defer to the asserted penological interests of correctional administrators.").

198. Lupu, *supra* note 194, at 591.

199. *Id.* at 593.

200. *Id.* at 594.

201. *Id.* at 595–96.

nature of prisoners' religious experiences,[202] "accepted without question the theological conceptions of prison officials,"[203] and ignored other prisons' permissive regulations.[204]

None of these evasive maneuvers is unique to RFRA—these same approaches have plagued the *Turner/O'Lone* test. A court that refused to protect inmates' rights under *Turner* probably would use the same logic to avoid the application of RFRA, and a court that embraced RFRA probably would have extended *Turner* and *O'Lone* to enable prison religious exercise without the help of RFRA. Given RFRA's lackluster performance, it is doubtful whether RLUIPA can offer any protection beyond what courts are willing to grant under the *Turner/O'Lone* test. Therefore, a study of the *Turner/O'Lone* test is a study of the same fundamental mindset that underlies the failure of RFRA and possibly RLUIPA.

D. The Multirights Approach Versus the Free Exercise Analysis

This last rebuttal is also a summary of what the multirights analysis is attempting to accomplish, in light of the shifting free exercise jurisprudence. The subject of this Comment is properly religious diet in prison, and not free exercise rights. When prisoners complain, they complain about the lack of religious food, but what courts need to hear is the lack of constitutional rights. Consequently, there is a step of translation from inmates' physical deprivation into a legally cognizant claim. The multirights approach is an exercise in translating one event—the lack of religious diet—into as many constitutional dialects as possible, and this Comment urges courts to hear the less common tongues of the Equal Protection Clause, the Establishment Clause, and the Eighth Amendment.[205] Only when the translation is accomplished can courts apply the *Smith* test, the *Turner/O'Lone* test, or RFRA/RLUIPA. Therefore, the changing religious freedom standards in prisons do not undermine the idea that prison diet issues trigger multiple constitutional provisions.

The interaction between the multirights analysis and the Free Exercise Clause does affect the details of the *Turner/O'Lone* factors: Judges should evaluate evidence of discriminatory treatment between religions and between

202. Solove, *supra* note 194, at 478.
203. *Id.* at 484.
204. *Id.* at 483.
205. The linguistic metaphor is apt, as most of the cases discussed in this Comment involve pro se litigation in which religious inmates drafted their complaints and pursued the litigation without the help of an attorney.

institutions, calculate the impact of accommodation in light of the potential cost of medical service to starving inmates, and renounce legal analysis based on whether a religion requires a diet or merely recommends it. These details provide judges with constitutional reasons to choose one concrete method of analyzing the *Turner* factors over another method. But far from being bound to the *Turner/O'Lone* analysis, these specific recommendations can transcend the four-factor test and address identical problems arising under RFRA and RLUIPA.[206] Questions regarding the legitimacy of the requirement test and the evidentiary weight of discriminatory accommodation will arise during inmates' religious diet claims, and no amount of tampering with the free exercise standard of review can resolve these questions because the Free Exercise Clause simply does not compel an answer. However, other provisions of the Constitution can answer these questions, whether the basic analysis traces *Smith* (the rational basis test), *Turner/O'Lone* (the four-factors balancing test), or RLUIPA (the strict scrutiny test). Stated in the broadest terms, the multirights approach requires judges to heed the Constitution as a whole when conducting an analysis of one of its provisions. Doing otherwise—that is, contradicting one portion of the Constitution (equal protection) during the service of another (free exercise)—defeats the very purpose of conducting a constitutional analysis. The changing standards governing prison religious exercise in no way undermine the idea that judges should respect the Constitution in its entirety when analyzing specific constitutional claims.

CONCLUSION

The prison is a remote place.[207] Like an alien moon, it revolves near the "real world," houses shadowy denizens, follows different rules, and never intersects our lives. It has been difficult, as a free humanist citizen with unlimited access to food, to ponder prison religious diet issues. Even judges and Justices, the very gatekeepers between the two worlds, share similar sentiments when they warn: "[C]ourts are ill equipped to deal with the increasingly urgent problems of prison administration and reform."[208]

Justice Brennan, in the epigraph that began this Comment, told us that the two worlds and two bodies of law are not so far apart. He urged the Court to adopt a uniform standard for reviewing religious questions instead of

206. *See supra* notes 199–204.

207. *See* Herman, *supra* note 179, at 1299.

208. Turner v. Safley, 482 U.S. 78, 84 (1987) (quoting Procunier v. Martinez, 416 U.S. 396, 405 (1974)).

creating the reasonableness standard in prison and a standard of strict scrutiny in free society. As if to mock his entreaty, the Supreme Court lowered the standard of review for free citizens' free exercise claims three years later in *Smith*. The majority opinion observed that the Free Exercise Clause has always been analyzed under the reasonableness standard and cited *O'Lone* to support its view without addressing its unique prison context.[209]

This Comment was written not with prisoners' rights in mind, but the rights of *free* citizens. Prisoners' rights define the de facto constitutional minimum for the entire citizenry, and prison administration is an obscure arm of the government. Interactions between the courts, the prison, and the prisoners represent a quiet modification of the constitutional floor. Far from being irrelevant, the prison is a laboratory of constitutional jurisprudence, where basics rights are contested, deprived, or gained on a daily basis. These changes do escape the prison confines, influencing constitutional jurisprudence and the relationship between government and free citizens as it had occurred between *O'Lone* and *Smith*. Despite Justice Brennan's lament, the change in the standard of review between *O'Lone* and *Smith* is but one saga in the diminution of civil rights, and this is the less important saga; as the observers of RFRA noticed, the difference in protection between reasonableness and strict scrutiny is often cosmetic. The prison religion dietary cases tells another saga of how an action like consuming a religious diet—an action laden with meaning and nuance—has been straitjacketed into the protection of a single constitutional writ. Here the loss is total, amendment by amendment. The goal of this Comment is to minimize the danger of "creeping constitutionality" and to reinvigorate legal protection by weaving a constitutional skein. It is not yet complete, without considering the expressive aspects of a religious diet and possible fundamental rights in a religious dietary choice. But the point of the multirights methodology is made. If courts would adjudicate the constitutional rights of free citizens based on precedents set in prison, surely it is not too much for free citizens to ask for a more robust constitutional analysis in prison cases.

209. Employment Div. v. Smith, 494 U.S. 872, 883–84 (1990).

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