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***“The Devil is in the Details”: A Continued Dissection of the
Constitutionality of Faith-Based Prison Units***

Lynn S. Branham

St. Louis University School of Law

Visiting Professor College of Law, University of Iowa
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“THE DEVIL IS IN THE DETAILS”: A CONTINUED
DISSECTION OF THE CONSTITUTIONALITY OF
FAITH-BASED PRISON UNITS

Lynn S. Branham[†]

To protect his privacy, I'll call him “Bob.” Bob had reached what, for him, was a low point in his life. Diagnosed with a brain tumor and suffering from epilepsy, he was struggling to cope with the physical debilitation and the uncertainty that attend serious medical problems. To compound his troubles, he was facing daunting financial bills, and he had been denied a promised job promotion for which he had long worked.

Then Bob attended the “Walk to Emmaus,” a three-day spiritual retreat. Although Bob had been attending worship services at his church each week for years and led a small group from his church that met every other week, the “Walk to Emmaus” was a spiritual experience for him like none other. With its nonstop, God-centered focus, he was able to step back from his life's travails, see those travails from a new perspective, and gain the strength to endure and surmount the challenges he currently was confronting.

Then there is “Bethany.” Bethany recognized that her spiritual life had reached a plateau, but the ways commonly employed by others to reignite that spiritual spark for which she yearned—such as weekly communal worship, praying, or reading the Bible, Torah, Koran, or other religious works—had just not worked for her. So she did something that was unconventional but, for her, spiritually needed. She stayed at a convent where she could focus her attention exclusively on God. And though not a Catholic herself, she found there the spiritual renewal and peace that she had not been able to find elsewhere.

[†] Visiting Professor of Law, Saint Louis University School of Law and University of Iowa College of Law; B.A., University of Illinois; J.D., University of Chicago Law School. I would like to extend my thanks to my colleague John Dunsford for reviewing an earlier draft of this Article.

Both Bob and Bethany opted to experience what I have called an “immersion approach” to spirituality.¹ They and others who have chosen to live for varying lengths of time in a communal environment in which a spiritual focus predominates have found that they need immersion-like experiences to charge or recharge their depleted or defunct spiritual batteries. Bob and Bethany also have said that they benefited not just spiritually, but physically, mentally, emotionally, and relationally, from what for them was a profound religious experience.

But what about prisoners, who lack the freedom to leave prison and go to a place where they can obtain, along with others, the concentrated and sustained spiritual nourishment that they believe they need to grow spiritually or in other ways? Can governmental officials afford prisoners these kinds of immersion-like experiences without abridging the First Amendment’s Establishment Clause?² And, if they can, are governmentally funded faith-based prison units, which exemplify this immersion approach and are sometimes referred to as “God pods,”³ still inherently unconstitutional?

In an article that I wrote several years ago, I contended that faith-based prison units subsidized by the government could be operated in conformance with the Establishment Clause.⁴ Although, since then, a federal district court has declared a faith-based unit in an Iowa prison to be unconstitutional,⁵ the Court of Appeals for the Eighth Circuit has upheld that decision,⁶ and other challenges to faith-based units have been mounted across the country,⁷ I adhere to that conclusion.

1. Lynn S. Branham, “Go and Sin No More”: *The Constitutionality of Governmentally Funded Faith-Based Prison Units*, 37 U. MICH. J.L. REFORM 291, 316 (2004).

2. The First Amendment directs that “Congress shall make no law respecting an establishment of religion.” U.S. CONST. amend. I. This constitutional restriction also applies to the states through the Fourteenth Amendment’s Due Process Clause. *Wallace v. Jaffree*, 472 U.S. 38, 49 (1985); *see* U.S. CONST. amend. XIV.

3. *E.g.*, *Wilson v. Moore*, 270 F. Supp. 2d 1328, 1340–41 (N.D. Fla. 2003).

4. Branham, *supra* note 1, at 306–43.

5. *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 432 F. Supp. 2d 862, 934 (S.D. Iowa 2006), *aff’d in part, rev’d in part*, 509 F.3d 406 (8th Cir. 2007).

6. *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 509 F.3d 406, 425–26 (8th Cir. 2007). In this case, the Eighth Circuit, with Justice Sandra Day O’Connor sitting by designation, affirmed in part, reversed in part, and remanded the case to the lower court. While the court of appeals held that the way in which the faith-based unit at issue in that case had been operated and funded violated the Establishment Clause, the court emphasized that the district court’s injunction did not foreclose the state from contracting with providers of religious services and programs for prisoners, including organizations that operate faith-based units. *Id.* at 428.

7. The Freedom From Religion Foundation (“FFRF”), for example, has filed lawsuits challenging faith-based units in the federal prisons and in a women’s prison run by the Corrections Corporation of America (“CCA”) under a contract with the state of New Mexico. *See* Freedom From Religion

In Part I of this Article, I explore the potential significance of several Supreme Court cases decided since I first wrote on this topic. In Part II, I discuss why conventional tests applied to Establishment Clause claims and the test generally applied to prisoners' constitutional claims seem inapposite when examining the constitutionality of faith-based prison units. Then, in Parts III and IV, I delve more fully into two key arguments, ones that I believe are red herrings, which have been asserted by those who clamor against the constitutionality of faith-based prison units: that prisoners' participation in faith-based units inevitably is coerced and that these units invariably manifest a lack of governmental neutrality on religious matters in contravention of the Establishment Clause. I conclude, as I have before, that if structured properly, faith-based units can pass constitutional muster.

I. RECENT SUPREME COURT DEVELOPMENTS

Several recent Supreme Court cases potentially have some bearing on the question of the constitutionality of faith-based prison units. Two cases that arose in the prison context—*Cutter v. Wilkinson*⁸ and *Johnson v. California*⁹—are particularly germane. After demonstrating how the Supreme Court remains deeply split about the Establishment Clause's meaning and import, I discuss the Supreme Court's rulings and analyses in those two cases.

A. *A Court Divided*

If the adage that “a house divided cannot stand” were applied to the Supreme Court's ruminations on the Establishment Clause, the Court would be in a state of collapse. Fifteen years ago, a well-known First Amendment expert, now a federal appellate judge, succinctly described the Supreme Court's Establishment Clause jurisprudence: “It is a mess.”¹⁰ It remains so.

Like a Creole chef continually tinkering with his recipe for jambalaya and periodically returning to his original recipe, the Supreme Court continues

Foundation, *Recent Court Cases*, <http://ffrf.org/legal/legal2.php> (last visited Jan. 24, 2008). FFRF abandoned the latter lawsuit in 2007 after the federal district judge to whom the case was assigned indicated that he probably was going to dismiss the case on the grounds that the plaintiff lacked standing to contest the faith-based program at the CCA facility. See Clare Hughes, *Lawsuit Targeting Faith-Based Prison Program Becomes “Hein FATALITY,”* ROUNDTABLE ON RELIGION & SOC. WELFARE POL'Y, July 10, 2007, <http://www.religionandsocialpolicy.org/news/article.cfm?id=6740>.

8. 544 U.S. 709 (2005).

9. 543 U.S. 499 (2005).

10. Michael W. McConnell, Exchange, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 120 (1992).

to vacillate as to how to assess whether an Establishment Clause violation has occurred. One Establishment Clause test the Supreme Court has applied is known as the “*Lemon* test.” The Court first articulated this test in 1971 in *Lemon v. Kurtzman*, in which it held that the dissemination of certain state funds to parochial schools abridged the Establishment Clause.¹¹ To pass muster under the three-pronged *Lemon* test as it was originally formulated, a statute or governmental program must have a secular purpose, have a “principal or primary effect” other than advancing or curtailing religion, and avoid “excessive governmental entanglement with religion.”¹²

The Court sporadically applies the *Lemon* test in Establishment Clause cases, inciting Justice Scalia to charge that the Court selectively applies or disregards the test depending on the outcome it wishes to reach in a case: “When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely.”¹³ In 2005, a majority of the Supreme Court appeared to apply this test in *McCreary County v. ACLU of Kentucky*, concluding that the posting of the Ten Commandments in two county courthouses failed the test’s first prong and consequently violated the Establishment Clause.¹⁴ But while stating that she joined the majority opinion, Justice O’Connor seemed to apply a different test in her concurring opinion, one that the Court had applied in the past.¹⁵ This test, known as the “endorsement test,” essentially asks whether a “reasonable observer” would perceive that the government is endorsing religion or a religious practice.¹⁶

A hodgepodge of other Establishment Clause tests were enunciated in *McCreary County* and *Van Orden v. Perry*, a case decided the same day as

11. *Lemon v. Kurtzman*, 403 U.S. 602, 607 (1971).

12. *Id.* at 612–13.

13. *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring in the judgment) (citations omitted). In *Lamb’s Chapel*, Justice Scalia likened the *Lemon* test to a “ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried.” *Id.* at 398.

14. *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 870–71 (2005). In his dissenting opinion in *McCreary County*, Justice Scalia charged that the Court had skewed the *Lemon* test in a way that made it even more objectionable. *Id.* at 900–03 (Scalia, J., dissenting). He pointed out, for example, that while the *Lemon* test requires that governmental actions have a secular purpose, the Court now was demanding that the secular purpose be predominant. *Id.* at 901–02.

15. *Id.* at 881–85 (O’Connor, J., concurring) (discussing governmental endorsement of religion or a religious practice). The Court previously had applied the endorsement test in, for example, *County of Allegheny v. ACLU*, 492 U.S. 573, 592–93 (1989).

16. *Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002). Courts are to ascribe to this hypothetical “reasonable observer” an understanding of the “history and context” of the governmental action or program being challenged under the Establishment Clause. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001) (quoting *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O’Connor, J., concurring in part and concurring in the judgment)).

McCreary County in which the Supreme Court this time upheld the constitutionality of a display of the Ten Commandments on public property.¹⁷ Perhaps most notably, the majority in *McCreary County* acknowledged that there are “special instances” when the Establishment Clause condones governmental actions whose evident purpose is “presumably religious.”¹⁸ In *Van Orden*, Justice Thomas advocated that coercion should be “the touchstone” for Establishment Clause analyses,¹⁹ while Justice Scalia, in *McCreary County*, insisted that the Establishment Clause only prohibits the government from favoring one religious sect over another in certain circumstances, and not religion over irreligion.²⁰ And Justice Breyer essentially threw up his hands, stating in *Van Orden*, “I see no test-related substitute for the exercise of legal judgment.”²¹

One need go no further into this jurisprudential thicket to understand that Establishment Clause law is in flux. And to add to the uncertainty about how the Supreme Court will interpret this constitutional provision in the future, the composition of the Court has changed since *McCreary County* and *Van Orden* were decided.²² This has led one preeminent scholar to predict that we are about to witness “a radical change in the law of the Establishment Clause.”²³

B. Two Pertinent Prison-Related Cases

1. Cutter v. Wilkinson

The Supreme Court decided another Establishment Clause case in 2005, one of import to the question of the constitutionality of faith-based prison units. The issue before the Court in that case, *Cutter v. Wilkinson*, was whether Congress had transgressed the boundaries of the Establishment

17. *Van Orden v. Perry*, 545 U.S. 677, 692 (2005).

18. *McCreary County*, 545 U.S. at 859 n.10.

19. *Van Orden*, 545 U.S. at 697 (Thomas, J., concurring).

20. *McCreary County*, 545 U.S. at 885–94 (Scalia, J., dissenting). While Justice Scalia agreed that the government cannot show favoritism towards any religious sect when dispensing funds or other assistance to religion, he opined that public references by the government to a “Creator” could be monotheistic without violating the Establishment Clause. *Id.* at 893–94.

21. *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring in the judgment).

22. Chief Justice Roberts and Justice Alito have now joined the Court, replacing former Chief Justice Rehnquist and Justice O’Connor.

23. Erwin Chemerinsky, Essay, *Why Separate Church and State?*, 85 OR. L. REV. 351, 352 (2006).

Clause by enacting the Religious Land Use and Institutionalized Persons Act (“RLUIPA”).²⁴

The section of RLUIPA at issue in *Cutter* provides enhanced protections to prisoners’ religious liberty, greater than those afforded by the Constitution. According to the Supreme Court, the First Amendment’s Free Exercise Clause, which generally prohibits governmental incursions on religious freedom,²⁵ permits prison officials to take actions that inhibit prisoners’ exercise of their religion as long as the actions are “reasonably related” to a “legitimate penological interest[.]”²⁶ But RLUIPA goes much further than this constitutional minimum in accommodating prisoners’ exercise of their religion, prohibiting governments from imposing any “substantial burden” on prisoners’ or other institutionalized persons’ exercise of their religion unless the burden is justified by a “compelling governmental interest” that is being furthered through the “least restrictive means.”²⁷

The Supreme Court unanimously held in *Cutter* that RLUIPA was constitutional on its face.²⁸ The Court cited the fact that RLUIPA relieves what the Court considered “exceptional government-created burdens on private religious exercise” as the “[f]oremost” factor underlying its conclusion.²⁹ The Court also emphasized that RLUIPA does not accord preferential treatment to any sect.³⁰ Finally, the Court underscored that RLUIPA neither permits nor requires courts to ignore the burdens that a requested accommodation would place on others.³¹

While the Supreme Court said in *Cutter* that the burdens on others ensuing from a religious accommodation provided to a prisoner must factor into a court’s assessment of whether RLUIPA, as applied, contravenes the Establishment Clause, the Court took care to distinguish between the imposition of burdens on others and the extension of benefits to them. Significantly, the Court said that just because the government has afforded some prisoners a religious accommodation does not mean that parallel

24. *Cutter v. Wilkinson*, 544 U.S. 709, 712–13 (2005) (citing Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-1(a) (2000)).

25. The First Amendment provides in part that “Congress shall make no law . . . prohibiting the free exercise [of religion].” U.S. CONST. amend. I. Because this constitutional provision implicitly is part of the due process afforded by the Fourteenth Amendment, it operates as a constraint on the states as well. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); see U.S. CONST. amend. XIV.

26. *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987) (internal quotation marks omitted).

27. 42 U.S.C. § 2000cc-1(a).

28. *Cutter*, 544 U.S. at 714, 725.

29. *Id.* at 720.

30. *Id.* at 720, 723–24.

31. *Id.* at 720, 722–23.

secular benefits have to be extended to other prisoners.³² The Court recognized that, otherwise, most religious accommodations would flout the Establishment Clause.³³ To illustrate its point, the Court noted that prison officials permit inmates to engage in congregate worship, but not to meet together for political rallies.³⁴ In addition, the government pays for prison chaplains but not for other individuals, like political consultants, who could help inmates develop and express their nonreligious First Amendment-related interests and views.³⁵

The Supreme Court also rebuffed the argument that RLUIPA unconstitutionally promotes religion by encouraging prisoners to “get religion” in order to enjoy the “benefits” of a religious accommodation.³⁶ The Court observed that it was dubious that inmates necessarily would perceive a religious accommodation as a “benefit.”³⁷ In citing, as an example, the very bland kosher diet that one prison system provided certain prisoners at each meal day after day,³⁸ the Court acknowledged the sacrifices and drawbacks that can attend the receipt of a religious accommodation.

In an important caveat, the Court added that even if certain religious accommodations are indeed “benefits,” prisoners often receive such accommodations in any event, separate and apart from RLUIPA’s dictates.³⁹ The Free Exercise Clause, for example, mandates certain religious accommodations. Thus, RLUIPA itself does not inexorably promote religion in a way that violates the Establishment Clause. And as *Cutter* makes clear, there is nothing untoward or inherently unconstitutional in the government taking steps to meet prisoners’ religious needs even if those steps would be forbidden by the Establishment Clause if taken in the outside world. The Supreme Court indicated, for example, that a state can constitutionally provide prisoners with a chaplain to help meet their spiritual needs.⁴⁰ Yet it would be a palpable violation of the Establishment Clause if the government were to employ chaplains to provide religious services to the everyday populace.

32. *Id.* at 724–25. Specifically, the Court affirmed that “[r]eligious accommodations . . . need not ‘come packaged with benefits to secular entities.’” *Id.* at 724 (quoting *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 338 (1987)).

33. *Id.*

34. *Id.* at 724–25.

35. *Id.* at 724.

36. *Id.* at 721 n.10.

37. *Id.*

38. *Id.*

39. *Id.*

40. *See id.* at 724.

2. Johnson v. California

The reasonable relationship test alluded to earlier, under which a restriction on a prisoner's exercise of religion must be "reasonably related" to a "legitimate penological interest" to comport with the First Amendment's Free Exercise Clause, is known as the "*Turner* test."⁴¹ The Supreme Court has applied this test to an array of other constitutional claims of prisoners, including those invoking the constitutional rights to have access to the courts,⁴² to marry,⁴³ and to associate with others,⁴⁴ the First Amendment right to freedom of speech,⁴⁵ and the due process right not to be forced to take antipsychotic medication.⁴⁶ In fact, the Court once said that the *Turner* test, a test under which it is exceedingly difficult for prisoners to prevail on a constitutional claim, is to be applied to "*all* circumstances in which the needs of prison administration implicate constitutional rights."⁴⁷

In *Johnson v. California*,⁴⁸ another case decided in 2005, the Supreme Court confronted the implications of this all-encompassing statement and, some might argue, blinked. In that case, the California Department of Corrections ("CDC") had instituted a policy, though unwritten, of segregating prisoners by race for up to sixty days while they were being processed into a new prison.⁴⁹ The CDC had adopted this policy in an effort to quell the violence between racial gangs that had plagued the prison system.⁵⁰ While prison officials were obtaining information about new prisoners and determining which prisoners were threats to whom, prisoners would not be housed with other prisoners who posed what the prison officials believed to be an undue risk of harm to them.

The Supreme Court did not decide whether this temporary segregation of prisoners based on their race violated their constitutional right to be afforded the equal protection of the law. Instead, the Court addressed what test should be applied, on remand, by the district court. Asserting that the *Turner* test was inapposite, the Court held that the traditional test applied to racial

41. The Supreme Court first articulated this test in *Turner v. Safley*, 482 U.S. 78, 89 (1987).

42. *Lewis v. Casey*, 518 U.S. 343, 346–47, 361–62 (1996).

43. *Turner*, 482 U.S. at 97–99.

44. *Overton v. Bazzetta*, 539 U.S. 126, 132–35 (2003).

45. *Beard v. Banks*, 126 S. Ct. 2572, 2575–78 (2006); *Shaw v. Murphy*, 532 U.S. 223, 228–31 (2001); *Thornburgh v. Abbott*, 490 U.S. 401, 403–04 (1989); *Turner*, 482 U.S. at 91–93.

46. *Washington v. Harper*, 494 U.S. 210, 224–27 (1990).

47. *Id.* at 224 (emphasis added).

48. 543 U.S. 499 (2005).

49. *See id.* at 502.

50. *Id.*

classifications should apply in the prison context as well.⁵¹ Under this strict scrutiny test, a racial classification both must further a compelling governmental interest and be “narrowly tailored” to meet that objective.⁵²

In an effort to explain why the *Turner* test did not apply to the equal protection claim before it, the Supreme Court stated: “[W]e have applied *Turner*’s reasonable-relationship test *only* to rights that are ‘inconsistent with proper incarceration.’”⁵³ But that statement is a classic non sequitur. In the past, the Supreme Court has examined whether the recognition of an asserted constitutional right in the prison context would conflict with legitimate penological objectives, and to what extent, as part of its analysis of whether the right exists. For example, the *Turner* test itself requires that there be a “valid, rational connection” between a restriction on a constitutional right and the legitimate governmental interest that purportedly justifies the restriction.⁵⁴ The test then requires a court to incorporate three other factors into its constitutional analysis, including the impact that accommodation of the right will have on other inmates, correctional staff, and prison resources.⁵⁵

The essential point is that a right’s relationship to the legitimate governmental interests that undergird “proper incarceration” has had a significant bearing on whether a court will find that the right survives incarceration. As the Supreme Court said in *Pell v. Procunier*, “[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.”⁵⁶ But the asserted right’s relationship to legitimate governmental interests, or what the Court referred to in *Johnson* as “proper incarceration,”⁵⁷ has not governed what test is to be applied to a prisoner’s constitutional claim. In other words, the demands of “proper incarceration” have affected the rights prisoners have, not the selection of the test employed in assessing the scope of those rights.

This is not to say that the Supreme Court was incorrect in holding that a strict scrutiny test should apply to the segregation policy being challenged on equal protection grounds. But it does mean that the Court’s rationale for

51. *Id.* at 509.

52. *Id.*

53. *Id.* at 510 (quoting *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003)).

54. *Turner v. Safley*, 482 U.S. 78, 89 (1987) (internal quotation marks omitted).

55. *Id.* at 90–91. The two other factors weighed under the *Turner* test are, first, the extent to which prisoners have alternative ways of exercising the right in question and, second, whether alternative means exist to further the legitimate penological interest to which the challenged restriction is linked. *Id.*

56. *Pell v. Procunier*, 417 U.S. 817, 822 (1974).

57. *Johnson*, 543 U.S. at 510.

deeming the *Turner* test inapplicable in *Johnson* was, in my opinion, unfounded.⁵⁸

The reason why *Johnson* has warranted mentioning in this Article is that it confirms that, despite the Court's earlier pronouncement to the contrary, the *Turner* test does not apply to "all circumstances in which the needs of prison administration implicate constitutional rights."⁵⁹ Although the Supreme Court has not yet announced, in my opinion, a principled basis for determining when the *Turner* test will apply and when it will not, it is evident from *Johnson* that the Court will not always apply this watered-down constitutional test to prisoners' claims. The question, then, is whether a traditional Establishment Clause test, the *Turner* test, or some other test applies when assessing the constitutionality of faith-based prison units, a question to which this Article now turns.

II. ASSESSING THE CONSTITUTIONALITY OF FAITH-BASED PRISON UNITS: THE INAPPLICABILITY OF CONVENTIONAL TESTS

A. Traditional Establishment Clause Tests

In determining whether faith-based prison units can be constitutional and, if so, whether a particular unit is being operated in conformance with the Establishment Clause, the threshold question is which test to apply when making that assessment. It is evident, in my opinion, that the *Lemon* test is inapposite in this context, even if it somehow endures in the future. In *Cutter v. Wilkinson*, the Supreme Court notably failed to apply the *Lemon* test when considering whether RLUIPA violated the Establishment Clause.⁶⁰ This decision made inimitable sense because the *Lemon* test, which proscribes

58. In his dissenting opinion in *Johnson*, Justice Thomas, joined by Justice Scalia, castigated the "inconsistency-with-proper-prison-administration test" for another reason. *Id.* at 541 (Thomas, J., dissenting). Justice Thomas noted that allowing the demands of "proper incarceration" to determine whether the *Turner* test applies to a prisoner's constitutional claim will require a court to decide what "proper" incarceration is, a task for which it is ill-equipped and one that is at odds with the traditional deference courts accord correctional officials' assessments of penological needs. *Id.* at 541–42.

59. *Washington v. Harper*, 494 U.S. 210, 224 (1990). The Supreme Court also has not applied the *Turner* test to prisoners' Eighth Amendment claims and those invoking the right to procedural due process. *See, e.g., Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (holding that a prisoner, who alleged that he was subjected to cruel and unusual punishment when prison officials failed to protect him from being attacked by another inmate, must prove that the officials acted with "deliberate indifference" to a "substantial risk of serious harm," with no reference to the *Turner* test); *Harper*, 494 U.S. at 225, 228–35 (applying the *Turner* test to a prisoner's substantive, but not his procedural, due process claim).

60. *See Cutter v. Wilkinson*, 544 U.S. 709, 726 n.1 (2005) (Thomas, J., concurring) (noting that the Court correctly had refrained from applying the "discredited" *Lemon* test).

governmental actions whose principal effect is to advance religion,⁶¹ would bar prison officials from taking the sundry steps they commonly take to accommodate prisoners' religious preferences and needs, including the hiring of prison chaplains and the provision of meals to prisoners that accord with their religious precepts.

It is likewise questionable that the Supreme Court would apply the endorsement test when analyzing the constitutionality of faith-based prison units, although I believe that these units can be operated in a way that meets this test if it were deemed applicable.⁶² With the new composition of the Court, the circumstances under which, if at all, this test will be applied, even outside the prison setting, are less than clear. But in any event, *Cutter* did not even allude to this test, likely because the Court recognized that when the government incarcerates a person, it imposes "exceptional government-created burdens on private religious exercise."⁶³ In other words, the Court in *Cutter* in effect may have been acknowledging that governmental actions taken to meet prisoners' religious needs and preferences represent one of those "special instances" when the construct for interpreting the Establishment Clause departs from the norm.⁶⁴

B. *The Turner Test*

The question, then, is what the appropriately tailored Establishment Clause test is that reflects the reality that the government can, and sometimes must, take steps to eradicate or limit the heavy burdens it has placed on prisoners' exercise of their religion—steps that it could not take constitutionally in the free world. The test that courts typically, though not always, apply to prisoners' constitutional claims is the *Turner* test, which often allows for the evisceration of what, in the outside world, would be a constitutional right.⁶⁵

61. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

62. As mentioned earlier in this Article, the pertinent query under the endorsement test is whether a "reasonable observer" would construe the government's actions as an endorsement of religion or a religious practice. Courts attribute to the "reasonable observer" an understanding of the "history and context" of the governmental actions being challenged. *See supra* note 16 and accompanying text. Since a "reasonable observer" would be aware of the obstacles incarcerated individuals face in practicing their religion, the observer would not, in my opinion, interpret the government's efforts to mitigate the adverse effects of its own decisions to deprive people of their liberty as placing the government's imprimatur on religion.

63. *Cutter*, 544 U.S. at 720.

64. *See McCreary County v. ACLU of Ky.*, 545 U.S. 844, 859 n.10 (2005); *supra* text accompanying note 18.

65. *See supra* text accompanying notes 41–47.

As mentioned earlier, the Supreme Court observed in *Johnson* that the *Turner* test applies only to rights that are “inconsistent with proper incarceration.”⁶⁶ While this statement, as noted previously, seems to confuse the constitutional test to be applied in a case with the outcome of that test’s application, it suggests that when determining whether the *Turner* test applies to prisoners’ Establishment Clause claims, the Supreme Court would examine or attempt to examine whether the right to not be subjected to an “establishment” of religion conflicts with “proper incarceration.”

The Supreme Court indicated in *Johnson* that a right is “inconsistent with proper incarceration,” triggering application of the *Turner* test, if the right “need necessarily be compromised for the sake of proper prison administration.”⁶⁷ So the question is whether the constitutional right protected by the Establishment Clause must, in the words of the Court, “necessarily be compromised for the sake of proper prison administration.”⁶⁸ If, by “proper prison administration,” the Court is referring to institutional security needs, the answer to this question is no. In my opinion, there is no inherent discord between, on the one hand, protecting the safety of prisoners, staff, and the public and the general security of a correctional institution and, on the other hand, refraining from promoting religion in a way that, outside the confines of a prison, would constitute governmental “establishment” of a religion. To the contrary, one can envision how a failure to enforce the Establishment Clause in a prison could imperil institutional security. Simply imagine the havoc that would ensue if prison officials were to mandate that all prisoners must participate in Christian worship services, Muslim services, or the services of some other religious sect.

There is another reason, though, why “proper prison administration” necessitates the contraction of the Establishment Clause’s scope in the prison setting. After stating in *Johnson* that a right’s incompatibility with “proper incarceration” is the criterion for divining the *Turner* test’s applicability, the Supreme Court recited a quotation from an earlier case: “[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.”⁶⁹

One certainly could argue that the undiluted application of the Establishment Clause in the prison context is “inconsistent” with an inmate’s

66. *Johnson v. California*, 543 U.S. 499, 510 (2005) (quoting *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003)).

67. *Id.* at 510. An example of such a right is the right to freedom of association.

68. *Id.*

69. *Id.* (quoting *Pell v. Procunier*, 417 U.S. 817, 822 (1974)) (alteration in original) (internal quotation marks omitted).

“status as a prisoner,” making the *Turner* test the litmus test for prisoners’ Establishment Clause claims.⁷⁰ As the Supreme Court has acknowledged, the government appropriately can, and sometimes must, take steps to alleviate the “exceptional government-created burdens on private religious exercise” suffered by prisoners.⁷¹ But if the Establishment Clause, at least as the Supreme Court often has construed it, were applied with full force in prisons, prisoners’ constitutional right and ability to exercise their religion would or could be vapid indeed, as the Supreme Court seemed to recognize in *Cutter*.⁷² Prison officials, for example, certainly would not be able to expend government funds to build chapels in which prisoners congregate for worship, and government officials would be barred from taking many other steps commonly undertaken in prisons, steps that admittedly “advance religion.”⁷³

Even though an argument can be crafted, based on the proper-incarceration standard enunciated in *Johnson*, that the *Turner* test should govern prisoners’ Establishment Clause claims, the *Turner* test is, at most, the “starting point” for a court’s constitutional analysis.⁷⁴ I say “at most”

70. The fact that courts apply the *Turner* test to prisoners’ religious claims under the Free Exercise Clause provides additional support, at least at first glance, for applying the same test to their Establishment Clause claims. As I have noted before, “Since the Free Exercise Clause and the Establishment Clause share a commonality of purpose—to protect religious liberty—assigning preeminent value to the Establishment Clause seems discordant, not in keeping with the overarching goal of what one would assume should be complimentary, not conflicting, constitutional provisions.” Branham, *supra* note 1, at 305. I previously have concluded though, and reaffirm in this Article, that the *Turner* test could be, at most, the “starting point” for a court’s constitutional analysis. *See id.* at 322 (noting that compulsory assignments of prisoners to faith-based units clearly would violate the Establishment Clause even if they pass muster under the *Turner* test); *infra* text following note 78 (underscoring that if the *Turner* test is applied when assessing the constitutionality of faith-based units, “it will not and cannot be the end-all of the Court’s analysis”).

71. *See Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005). The government must take those steps when mandated to do so by the Free Exercise Clause. *See Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972) (noting that prison officials must afford prisoners “reasonable opportunities” to practice their religion). But the Supreme Court has made it crystal clear that correctional officials can take actions to accommodate prisoners’ religious interests and practices even when they are not constitutionally entitled to such an accommodation. As the Court observed in *Cutter*, “there is room for play in the joints” between the Free Exercise Clause and the Establishment Clause, allowing correctional officials to take steps beyond those required by the Free Exercise Clause to facilitate inmates’ exercise of their religion without encroaching on other inmates’ right not to be subjected to a governmental establishment of religion. *Cutter*, 544 U.S. at 713 (internal quotation marks omitted).

72. *Cutter*, 544 U.S. at 713–14.

73. For the results of a survey on the different kinds of faith-based programs available in each state’s prisons and the facilities utilized to offer those programs, see *Survey Summary: Faith-Based Programming*, CORRECTIONS COMPENDIUM, Aug. 2003, at 8, 10–15 tbls.1 & 2.

74. Branham, *supra* note 1, at 306, 321–22. In my previous article on faith-based prison units, I concluded that faith-based units, if properly planned, could meet the *Turner* test if it were the governing

because, for several reasons, it is entirely possible that the Supreme Court will not apply the *Turner* test as even the threshold part of its analysis of the constitutionality of faith-based prison units. First, as noted earlier, the Court's explication of when it will and will not apply the *Turner* test, in my opinion, confuses two questions: when should the *Turner* test apply and what should be the result when the test is applied in a particular case?⁷⁵ Consequently, it now is much more difficult to predict with confidence when the Supreme Court will apply the *Turner* test.

Second, as discussed earlier in this Article, the Supreme Court's Establishment Clause jurisprudence currently is, to put it charitably, in disarray.⁷⁶ It therefore is difficult to gauge which Establishment Clause test the Court will apply in any given case.

Finally, in *Cutter*, the Supreme Court did not even allude to, much less apply, the *Turner* test when assessing whether RLUIPA violates the Establishment Clause. Instead, the Court simply highlighted three factors underlying its conclusion that RLUIPA is constitutional on its face: one, that it relieves "exceptional government-created burdens on private religious exercise"; two, that courts applying RLUIPA must consider the burdens that a religious accommodation has on other prisoners who are not recipients of the accommodation; and three, that the benefits accorded prisoners by RLUIPA extend to prisoners of all faiths.⁷⁷ Since RLUIPA extends protections to prisoners and has an impact on prison operations, it is possible that the Supreme Court would replicate the somewhat diffuse Establishment Clause analysis seen in *Cutter* in a case challenging the constitutionality of faith-based prison units on Establishment Clause grounds. But if the Court were to do so, my conclusion that faith-based units can comport with the Establishment Clause would not vary.⁷⁸

Regardless of what role, if any, the *Turner* test would play in the Supreme Court's analysis of the constitutionality of faith-based prison units, it will not and cannot be the end-all of the Court's analysis. Otherwise, even involuntary transfers to such units would be constitutional as long as compelled participation in the activities of the units had the requisite reasonable relationship to a legitimate governmental interest, such as

test. In other words, the units are "reasonably related" to multiple "legitimate" penological interests. *Id.* at 322.

75. See *supra* text accompanying notes 53–57.

76. See *supra* Part I.A.

77. *Cutter*, 544 U.S. at 720–24.

78. See *infra* Part IV.B.2 for a discussion of the "burdens" accompanying the operation of these units, and *infra* Part IV.C for a discussion of the requirement that the government manifest neutrality between religious sects when establishing faith-based units.

recidivism reduction. But such coerced participation in worship and other religious practices is a paradigmatic violation of the Establishment Clause, as even those who most narrowly interpret the Establishment Clause's scope would concede.

Because prisoners' unforced participation in faith-based units is an elementary prerequisite to their constitutionality, this Article will now flesh out further the import of this constitutional requirement. The specific question addressed below is whether inmates' participation in faith-based prison units is inevitably coerced, as some opponents of these units contend.

III. COERCION IN THE PRISON SETTING: AN AMPLIFICATION

Requiring prisoners, against their free will, to pray to Allah five times a day, take communion, or read the Torah would patently violate the Establishment Clause, as most everyone would agree. Some critics of faith-based prison units have suggested that the units, particularly those whose operations are subsidized by government funds, similarly coerce prisoners to participate in religious activities. I profoundly disagree.

At the heart of these critics' arguments is skepticism that prisoners can exercise "true private choice"⁷⁹ in the "inherently coercive" environment of a prison.⁸⁰ But this sentiment flies in the face of both the law and logic.

A. *The Law*

The Establishment Clause is not the only constitutional provision that places limits on governmental coercion of individuals. The Due Process Clauses, for example, prohibit governmental officials from extracting involuntary confessions from suspected criminals.⁸¹ Yet the Supreme Court has long held, and other courts have concurred, that confinement does not abnegate the voluntariness of a confession.⁸² In other words, a person can be

79. *Zelman v. Simmons-Harris*, 536 U.S. 639, 653 (2002) ("[We] have never found a program of true private choice to offend the Establishment Clause.").

80. See *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 432 F. Supp. 2d 862, 922 (S.D. Iowa 2006) *aff'd in part, rev'd in part*, 509 F.3d 406 (8th Cir. 2007) (finding that prisons are "inherently coercive environments"); Katerina Semyonova, Note, *In the Big House with the Good Book: An Examination of the Constitutionality of Faith-Based Prisons*, 8 N.Y. CITY L. REV. 209, 232 (2005) (concluding that "no true choice can be made by prisoners in this context").

81. *Colorado v. Connelly*, 479 U.S. 157, 167 (1986) (construing U.S. CONST. amend. XIV).

82. *Bram v. United States*, 168 U.S. 532, 558 (1897) ("[I]t has been settled that the mere fact that the confession is made to a police officer, while the accused was under arrest in or out of prison, or was drawn out by his questions, does not necessarily render the confession involuntary . . ."); *United States v. Larry*, 126 F.3d 1077, 1079 (8th Cir. 1997) (finding a statement to the police made after police promised to release the defendant from jail to be voluntary); *Dallio v. Spitzer*, 170 F. Supp. 2d 327, 339–40

incarcerated and yet make a confession considered a product of his or her “free and unconstrained choice.”⁸³ In addition, whether confined or not confined, individuals can be subjected to significant pressures to confess without necessarily vitiating the voluntariness of the confession.⁸⁴

The contention that the pressures of confinement annihilate free will also is belied by the frequency with which courts accept guilty pleas from incarcerated individuals. One of the prerequisites to the entry of a valid guilty plea is that it be voluntary.⁸⁵ Yet the Supreme Court never has hinted that incarceration produces “actual or threatened physical harm” or “mental coercion overbearing the will of the defendant,” rendering a guilty plea involuntary.⁸⁶ In fact, the Supreme Court has held that even a guilty plea entered to avoid the death penalty can be voluntary.⁸⁷ Thus, incarceration does not negate the free will of individuals to make decisions that preserve their lives, limit the length of prison sentences, or enable them to avoid further incarceration entirely if a guilty plea leads to the imposition of a community-based sanction. It would seem discordant, then, to conclude that incarceration per se makes it much more likely or even somewhat likely that a decision to be confined in a particular part of a prison—a faith-based unit—is “coerced and invalid as an involuntary act.”⁸⁸

The Supreme Court’s decision in *McKune v. Lile* confirms that a prisoner’s choice to live in a particular prison or unit of a prison can be uncoerced from a constitutional standpoint.⁸⁹ That case concerned the constitutionality of requiring a prisoner, a convicted sex offender, to make some potentially inculpatory admissions and disclosures as a precondition to being admitted into a Sexual Abuse Treatment Program (“SATP”). Specifically, the prisoner had to admit that he had committed the sex crime of which he had been convicted.⁹⁰ In addition, the prisoner had to recount

(E.D.N.Y. 2001), *aff’d on other grounds*, 343 F.3d 553, 564 (2d Cir. 2003) (holding that confession of prisoner interrogated by two police officers was voluntary).

83. *Arizona v. Fulminante*, 499 U.S. 279, 303 (1991) (Rehnquist, J., dissenting) (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961)).

84. *See, e.g., Frazier v. Cupp*, 394 U.S. 731, 737, 739 (1969) (finding defendant’s confession voluntary even though police officer falsely told defendant that the person with whom he had committed the murder already had confessed).

85. *Brady v. United States*, 397 U.S. 742, 747 (1970).

86. *See id.* at 750 (describing the coercion necessary to render a guilty plea involuntary).

87. *Id.* at 755.

88. *See id.* at 750.

89. *McKune v. Lile*, 536 U.S. 24 (2002).

90. *Id.* at 30.

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his sexual history, including sex crimes with which he had not been charged.⁹¹

The plaintiff in *McKune*, a convicted sex offender, contended that these admission requirements compelled prisoners like him to incriminate themselves, in violation of the Fifth Amendment.⁹² An admission that a prisoner had committed the crime for which he was serving time in prison, for example, could lead to a prosecution for perjury if he had denied committing the crime at trial.⁹³ And the revelation that the prisoner had committed sex crimes with which he had never been charged might lead to the filing of criminal charges for those crimes.⁹⁴

The Supreme Court rebuffed this Fifth Amendment claim even though prison officials were exerting considerable pressure on the plaintiff to comply with the SATP's entry requirements. The officials had told the plaintiff that if he failed to fill out the "Admission of Responsibility" and sexual-history forms, they would transfer him from a medium-security unit to a maximum-security unit.⁹⁵ There he would be confined in a cell with three other people rather than one, would be unable to leave his cell as much as he could in the medium-security unit, and would be living in what the Court recognized was a "potentially more dangerous environment."⁹⁶ In addition, he would suffer a considerable diminution of privileges, including curtailed job opportunities and visitation rights, reduced pay for prison work, and restrictions on what he could buy in the prison commissary and keep in his cell.⁹⁷

It would be odd, in my opinion, to conclude that exerting such great pressures on a prisoner to make inculpatory admissions does not constitute compulsion but that a prisoner's decision to live in a faith-based unit invariably must be considered unconstitutionally coerced. And such an unfounded conclusion would be particularly paradoxical since the differences between conditions in a medium- and maximum-security unit, as in *McKune*, typically will be much greater than the differences between the conditions in a faith-based unit and a prison's general-population unit.⁹⁸

91. *Id.*

92. *Id.* at 29.

93. *Id.* at 55 & n.1 (Stevens, J., dissenting).

94. *Id.*

95. *Id.* at 30–31 (plurality opinion).

96. *Id.* at 31.

97. *Id.*

98. *Compare id.* (listing the differences in confinement conditions between maximum- and medium-security units), with *infra* Part IV.B (describing the differences in conditions between faith-based units and other prison units).

B. *Logic*

I stated earlier that the contention that prisoners cannot make a “true private choice” whether to live in a faith-based unit is also illogical. Here is why.

Government-paid chaplains are commonplace in prisons (as well as in the military), but employing them to compensate for the burdens incarceration (or military service) imposes on the exercise of religion clearly is constitutional.⁹⁹ If a chaplain teaches a Bible-study class to prisoners, the Establishment Clause is not impinged, because it is constitutional to alleviate these burdens and because, as the Supreme Court has observed, “the link between government funds and religious training is broken by the independent and private choice of recipients.”¹⁰⁰ Likewise, the “independent and private choice” of prisoners obviates any Establishment Clause problems when a chaplain prays with them, administers sacraments to them, or provides them with counseling services with a religious perspective.

In addition to chaplains, prisons commonly have chapels as well as other places whose primary purpose is to enable inmates to worship and engage in other religious practices.¹⁰¹ Some prisons, for example, have erected sweat lodges to accommodate the religious practices of Native American inmates.¹⁰² None of these places of meditation and worship, which often are built and operated with government funds, abridge the Establishment Clause, in part because only prisoners exercising their “independent and private choice” frequent them.

If the pressures that attend incarceration do not disable prisoners from freely and voluntarily deciding to avail themselves of the religious services provided by prison chaplains or to spend some time in a religious setting, it is difficult to comprehend how freedom of choice is not “tenable” when prisoners are deciding whether to apply for admission into a faith-based unit.¹⁰³ To aver that prisoners are incapacitated from making a “true private

99. *E.g.*, *Katcoff v. Marsh*, 755 F.2d 223, 234 (2d Cir. 1985) (military chaplains); *Therault v. Silber*, 547 F.2d 1279, 1280 (5th Cir. 1977) (prison chaplains); *cf.* *Cutter v. Wilkinson*, 544 U.S. 709, 724–25 (2005) (observing that under the Sixth Circuit’s approach to religious accommodations, an approach with which the Supreme Court disagreed, even the employment of prison chaplains would be unconstitutional).

100. *Locke v. Davey*, 540 U.S. 712, 719 (2004).

101. *Survey Summary: Faith-Based Programming*, *supra* note 73, at 10–13 tbl.1.

102. See Susan Montoya Bryan, *Sweating Out the Demons in Prison: Native Americans Allowed to Participate in Religious Rites*, WASH. POST, June 17, 2007, at A7; Jana Hollingsworth, *Imprisoned Religion*, DULUTH NEWS-TRIB., Jan. 12, 2008, 2008 WLNR 682679.

103. *But see* Semyonova, *supra* note 80, at 220 (criticizing courts for failing to consider whether free choice is “truly tenable” in prisons).

choice” whether to reside in such a unit betrays, in my opinion, what Justice Scalia has lamented as a “trendy disdain for deep religious conviction”.¹⁰⁴ as long as a prisoner opts for what, for him, may be “religion lite,” there is no Establishment Clause problem. But if he seeks to deepen his faith by living in a faith-based unit, unconstitutional coercion appears.

Opponents of faith-based prison units still might claim that they are distinguishable from other religious programs and services, like prison chaplains. The crux of their argument likely would be that the benefits of living in faith-based units, unlike the benefits of other faith-based programs, are so great that the pressures to live in them are overwhelming and irresistible.

The fact that many prisoners eligible to live in faith-based units choose not to belies this contention,¹⁰⁵ as does the reality that many inmates who live in the units decide to withdraw from these faith-based residential programs.¹⁰⁶ But in addition to these indicators of the fallacy that prisoners inexorably are compelled to live in faith-based prison units, *McKune*, as mentioned earlier, stands as a powerful rebuttal to the argument that the differences in the living conditions in a faith-based unit unconstitutionally skew prisoners’ decisions to live in such a unit.¹⁰⁷

C. *School Prayers and Faith-Based Prison Units: A False Analogy*

Some opponents of faith-based prison units claim that a line of Supreme Court cases condemning, on Establishment Clause grounds, certain collective prayers at schools and school events points to the unconstitutionality of faith-based prison units.¹⁰⁸ The analogy is a false one.

*Lee v. Weisman*¹⁰⁹ is the case these opponents most frequently cite. In that case, the Supreme Court held that the recitation of nonsectarian prayers by a rabbi at a high school graduation contravened the Establishment Clause.¹¹⁰ The Court evinced a concern about the impressionability of youth

104. *Locke*, 540 U.S. at 733 (Scalia, J., dissenting).

105. See, e.g., CRIMINAL JUSTICE POLICY COUNCIL, INITIAL PROCESS AND OUTCOME EVALUATION OF THE INNERCHANGE FREEDOM INITIATIVE: THE FAITH-BASED PRISON PROGRAM IN TDCJ 9 tbl. (2003) (reporting that of 866 eligible inmates interviewed to live in a faith-based unit, 624 volunteered to do so).

106. A survey of prisoners who participated in the Federal Bureau of Prisons’ residential faith-based program found that six percent of them began the program but later withdrew from it voluntarily. Scott D. Camp et al., *An Exploration into Participation in a Faith-Based Program*, 5 CRIMINOLOGY & PUB. POL’Y 529, 541 tbl.1 (2006).

107. See *supra* text accompanying notes 89–98.

108. E.g., Semyonova, *supra* note 80, at 229.

109. 505 U.S. 577 (1992).

110. *Id.* at 599.

who, because of their age, might interpret the prayer as “an attempt to employ the machinery of the State to enforce a religious orthodoxy.”¹¹¹ The Court concluded that by including these prayers in the graduation ceremony, school officials were coercing students unconstitutionally to express their assent to these prayers by standing or at least remaining quiet during their recitation.¹¹² And since graduation from high school is such a highlight of people’s lives, the Court was not persuaded that teenage graduates who were nonbelievers had a “real choice” to avoid participating in a religious practice that was antithetical to their own views by not attending graduation.¹¹³

For a number of reasons, faith-based prison units are unlike prayers publicly uttered at high school graduation ceremonies. Three are most significant.

First, the reason why the Supreme Court has been “particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools”¹¹⁴ does not apply to prisoners. They are not children. They are adults, or they are considered mature enough to be punished as adults. That does not mean that prison officials have the prerogative to pipe prayers, sectarian or otherwise, through a public-address system to prisoners, the quintessential “captive audience.” But it does mean that the Supreme Court’s asserted rationale for its heightened vigilance in the Establishment Clause school cases is inapplicable.

Second, residence in a faith-based unit is unlike attendance at a high school graduation. A graduation is the capstone of four years of (one hopes) hard work and is celebrated as a milestone—a send-off of sorts for youth as they leave their parents’ nests. Many people may not agree with the Supreme Court’s conclusion in *Lee* that graduation prayers force students to engage in a religious practice. But the Supreme Court’s additional observation that students effectively are compelled to attend graduation ceremonies seems understandable, even though still debatable, due to the burdens that would ensue if the students stayed home—the loss of enjoying one of life’s major milestones with family members and friends.

Living in a faith-based unit, by contrast, has none of the marks of such a milestone. It is difficult then to comprehend how a prisoner’s application for a transfer to such a unit, analogous in some, though not all, ways to an application for a transfer to a prison closer to his home, is presumptively coerced, no matter what the facts. While graduation may be, as the Supreme

111. *Id.* at 592.

112. *Id.* at 593.

113. *Id.* at 595.

114. *Van Orden v. Perry*, 545 U.S. 677, 691 (2005) (plurality opinion) (quoting *Edwards v. Aguillard*, 482 U.S. 578, 583–84 (1987)).

Court observed in *Lee*, “an event of singular importance to every student,”¹¹⁵ it cannot be said that living in a faith-based unit is of “singular importance” to every prisoner. Some prisoners will want to live in such a unit, and others will not.

A third factor distinguishes the prayers spoken at high school graduations and residence in a faith-based prison unit: the government does not subject students to the “exceptional” burdens on the exercise of their religion to which prisoners are subject.¹¹⁶ Thus, faith-based prison units and graduation prayers are not analogs, because some prisoners may want and need to overcome these unique burdens, to the extent possible, by living in faith-based units. Some of these prisoners may decide that they need to live with other prisoners who are “seekers” or “believers” in order to effectively commence what is often described as a “spiritual journey.” Others may conclude that they need to live in an environment with an intense spiritual focus in order to deepen an already existing relationship with God. Still others may believe that the only or best way that they can come to terms with their criminal pasts or realize their future potential is to examine and discuss with others, throughout each day and from a religious perspective, their errant pasts, their current thoughts and actions, and their hopes for the future.

In sum, saying that the Supreme Court’s conclusion that high school students have “no real alternative” to avoid graduation prayers¹¹⁷ means that prisoners have “no real alternative” to avoid faith-based units is an unfounded syllogism. In addition, the cases discussing students’ rights under the Establishment Clause are inapposite in the prison context, because as mentioned before in this Article, government officials can, and sometimes must, take steps to accommodate prisoners’ religious practices that they would be barred from taking elsewhere, including in schools.

IV. FAITH-BASED PRISON UNITS AND GOVERNMENTAL NEUTRALITY

Faith-based prison units raise another question to which this Article will now turn: whether they reflect governmental favoritism towards religion barred by the Establishment Clause. The Establishment Clause obviously prohibits the government from preferring one religious sect over another, decreeing, for example, that everyone should adhere to the tenets of Judaism, Islam, or Christianity. But Justices on the Supreme Court as well as First Amendment scholars have sparred about the extent to which the

115. *Lee*, 505 U.S. at 598.

116. *See Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005).

117. *Lee*, 505 U.S. at 598.

Establishment Clause also prohibits government officials from taking actions that favor, or appear to favor, religion over irreligion. One commonly espoused view is that such a prohibition is embedded in the Establishment Clause.¹¹⁸ But Justice Scalia and others have castigated this view, arguing that it flouts the Establishment Clause by elevating a bland secularity over religiosity.¹¹⁹

The crux of this debate is whether broadly defined “governmental neutrality” on religious matters is even possible.¹²⁰ This Article refrains from entering into this imbroglio, nor need it to ascertain that faith-based prison units can be planned and implemented in a way that meets the neutrality requirement, whether broadly or narrowly defined.

A. *The Establishment of Faith-Based Prison Units*

The Establishment Clause is not the only First Amendment provision that requires the government to be neutral on certain matters. A content-neutrality requirement, for example, is subsumed within the First Amendment right to freedom of speech.¹²¹ This requirement places constraints on the government’s restriction of speech based on its content.

The Supreme Court has held that withholding certain publications from prisoners can be “neutral” in the constitutional sense even though censorship decisions are based “to some extent, on content.”¹²² According to the Court, prison officials still act with the requisite “neutrality” when censoring communications with prisoners as long as their actions “further an important or substantial governmental interest unrelated to the suppression of expression.”¹²³

118. See, e.g., *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (reiterating that the “First Amendment mandates governmental neutrality . . . between religion and nonreligion” (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968))); Chemerinsky, *supra* note 23, at 361–62 (arguing that a core purpose of the Establishment Clause is to ensure that people who are irreligious, in addition to the adherents of all religions, feel included in society).

119. E.g., *McCreary County*, 545 U.S. at 885–94 (Scalia, J., dissenting). In *McCreary County*, Justice Scalia debunked what he termed the “demonstrably false principle” that government cannot favor religion over irreligion. *Id.* at 893; see also Richard M. Esenberg, *You Cannot Lose If You Choose Not to Play: Toward a More Modest Establishment Clause*, 12 ROGER WILLIAMS U. L. REV. 1, 5–6 (2006) (noting that courts’ efforts to avoid offending the irreligious are not “religiously neutral,” appearing instead to be a “judicial mandate of public secularism”).

120. See Esenberg, *supra* note 119, at 6–7 (arguing that “[c]omplete neutrality” between religion and irreligion is unobtainable because “a jurisprudence that defines government neutrality on religion as acting as if it did not exist will cause its religious citizens to feel excluded”).

121. *Davenport v. Wash. Educ. Ass’n*, 127 S. Ct. 2372, 2381 (2007) (affirming that a governmental restriction on speech based on its content is “presumptively invalid”).

122. *Thornburgh v. Abbott*, 490 U.S. 401, 415 (1989).

123. *Id.* (quoting *Procunier v. Martinez*, 416 U.S. 396, 413 (1974)).

Similarly, because faith-based prison units further significant governmental interests unrelated to a partisan support for religion, their use does not necessarily, or even usually, reflect the lack of neutrality on religious matters that raises Establishment Clause concerns. Some of these more significant interests are highlighted below.

1. *Reducing Recidivism*

One of the substantial governmental interests to which faith-based prison units are rationally linked is the interest in curbing recidivism. This interest is of primal importance because the recidivism rates of released prisoners are currently so high. Within three years after their release from prison, approximately two-thirds of ex-prisoners are rearrested, usually for a felony or serious misdemeanor.¹²⁴ During this same time period, more than half of the former prisoners end up back in prison, whether for new crimes or for violations of their release conditions.¹²⁵

A number of studies have examined the impact religiousness has on crime and delinquency. Different data-collection methods can be used to measure a person's religiousness, such as monitoring the frequency with which people attend group worship services.¹²⁶ But whatever method employed, most studies have found a negative correlation between religiousness and criminal or delinquent actions.¹²⁷ In other words, it appears that religiousness inhibits the inclination or propensity of many people to commit crimes or delinquent acts.¹²⁸

Some studies on faith-based prison units have concluded that they show promise in their potential to reduce recidivism.¹²⁹ But the specific effects

124. PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP'T OF JUSTICE, NCJ 193427, RECIDIVISM OF PRISONERS RELEASED IN 1994, at 1, 3–4 tbls.2 & 3 (2002).

125. *Id.* at 1.

126. Colin J. Baier & Bradley R.E. Wright, "If You Love Me, Keep My Commandments": A Meta-Analysis of the Effect of Religion on Crime, 38 J. RES. CRIME & DELINQ. 3, 13 (2001). Another common way to measure religiousness is to ask people about their religious beliefs and the extent to which they perceive themselves as religious. *Id.*

127. See BYRON R. JOHNSON ET AL., CTR. FOR RES. ON RELIGION & URB. CIV. SOC'Y, OBJECTIVE HOPE: ASSESSING THE EFFECTIVENESS OF FAITH-BASED ORGANIZATIONS: A REVIEW OF THE LITERATURE 7, 12–13 (2002), available at http://www.manhattan-institute.org/pdf/crrucs_objective_hope.pdf; Baier & Wright, *supra* note 126, at 16.

128. Studies on drug and alcohol abuse, often a prelude to criminal activity, have yielded similar results. For example, the National Center on Addiction and Substance Abuse has reported that individuals who do not attend religious services are much more likely to binge drink and to use illicit drugs. THE NAT'L CTR. ON ADDICTION & SUBSTANCE ABUSE, SO HELP ME GOD: SUBSTANCE ABUSE, RELIGION AND SPIRITUALITY 2, 7–9 (2001).

129. E.g., CRIMINAL JUSTICE POLICY COUNCIL, *supra* note 105, at 23–24 (reporting that offenders who "graduated" from Prison Fellowship Ministries' InnerChange Freedom Initiative ("IFI") recidivated

that faith-based prison units have on recidivism rates are, at this point, less than clear. These faith-based programs still are in their infancy, so the data that have been collected about them are preliminary in nature. In addition, concerns have been raised that the reported data have been skewed to show that the units are effective in reducing recidivism.¹³⁰

For several reasons, however, the lack of definitive proof that faith-based prison units reduce recidivism does not undercut the validity of the point that prison officials can act with the requisite neutrality in establishing faith-based prison units. In other words, the officials' preeminent motive in establishing these units still can be the strictly secular ones of reducing recidivism and finding more effective ways to do so.

First, conclusive evidence of the efficacy of an innovative prison program never exists at its beginning. Therefore, demanding that prison officials produce such evidence before or even soon after initiating a new program is to require the impossible, dooming prison officials' efforts to potentially reduce recidivism through a cutting-edge faith-based program.

Second, even if there were a consensus that the data collected thus far on faith-based prison units do not show that they have had the hoped-for impact on recidivism, that does not mean that these disappointing results would be replicated in the future. It must be remembered that prison officials and the persons or entities with which they may contract to operate these units are still on the learning curve in designing these units' operations to maximize their effectiveness. So even if it were concluded that the first generation of faith-based prison units has not precipitated a decline in the commission of crimes by released prisoners, it is possible that these units may be reconfigured, based on what is learned about them, so that the next generation of faith-based units achieves or better achieves the goal of reducing recidivism.

There is a third reason why the lack of unequivocal proof that faith-based prison units curb recidivism does not foreclose the interest in recidivism reduction from serving as an indicator of the government's neutrality in establishing these units. The mass of studies showing an inverse relationship between religiousness and crime already provides the empirical foundation,

at a significantly lower rate than comparison groups of inmates, including those who had volunteered for, but did not participate in, IFI and those who met IFI's selection criteria but did not participate in the program).

130. E.g., Mark A.R. Kleiman, *Faith-Based Fudging: How a Bush-Promoted Christian Program Fakes Success by Massaging Data*, SLATE, Aug. 5, 2003, <http://www.slate.com/id/2086617> (criticizing the statistics purportedly showing IFI's success in reducing recidivism as misleading, since to be considered a "graduate" of the program, participants had to have completed successfully both the in-prison and post-release portions of the program, including the requirement of securing employment upon release).

if one were needed, for concluding that in opening these units, prison officials are striving to advance the substantial, and indeed compelling, interest in averting future crimes.¹³¹ During the formative years in which these units are being created and calibrated, the results of these studies should be considered quantitative evidence of a neutral, nonsectarian reason for instituting these faith-based programs.

2. *Protecting Institutional Security*

Another interest of overriding importance that prison officials can cite when instituting faith-based prison units is the interest in protecting institutional security. Prison officials are entrusted with the responsibilities of keeping inmates and staff safe and maintaining order and discipline in places where convicted felons, many of whom have committed murder, rape, robbery, and other violent crimes, reside. In meeting the daunting challenges that attend these responsibilities, prison officials could rationally conclude that faith-based prison units may be effective tools to protect institutional security. Much, though not all, of the inmate misconduct that can jeopardize institutional security is criminal in nature. When prisoners kill, rape, assault, or steal from other inmates or correctional staff, intentionally damage others' property, or use illegal drugs, they are committing crimes, as well as disciplinary infractions. Consequently, the panoply of studies finding that religion is a "persistent . . . inhibitor of adult crime"¹³² provides empirical support for the augmentation of faith-based programming opportunities for prisoners for the purely secular reason of attempting to make prisons safer and more secure.

Although there has been little research focusing specifically on the impact of religion on prisoners' violation of prison rules, one of the more comprehensive analyses of this subject reported a statistically significant inverse relationship between confinement for disciplinary infractions and prisoners' religiousness.¹³³ Another study found that religiosity directly reduces the likelihood of arguments between prisoners and indirectly diminishes the likelihood that they will engage in physical fights.¹³⁴

131. See *supra* notes 127–28 and accompanying text.

132. E.g., Byron R. Johnson et al., *Religious Programs, Institutional Adjustment, and Recidivism Among Former Inmates in Prison Fellowship Programs*, 14 JUST. Q. 145, 163 (1997).

133. Todd R. Clear & Melvina T. Sumter, *Prisoners, Prison, and Religion: Religion and Adjustment to Prison*, in RELIGION, THE COMMUNITY, AND THE REHABILITATION OF CRIMINAL OFFENDERS 127, 143–44 (Thomas P. O'Connor & Nathaniel J. Pallone eds., 2002).

134. Kent R. Kerley et al., *Religiosity, Religious Participation, and Negative Prison Behaviors*, 44 J. FOR SCI. STUDY RELIGION 443, 450, 453 (2005).

Research studies like these may provide independent empirical support for the nonsectarian goal of enhancing institutional security by affording inmates additional opportunities to develop spiritually, whether in faith-based units or through other faith-based programming.

3. *Accommodating Prisoners' Exercise of Their Religion*

Even if studies were to determine definitively some day, after enough time has elapsed for the operations of faith-based prison units to be calibrated and refined based on research and experience, that faith-based prison units are ineffective in reducing recidivism or protecting institutional security, those research findings would not mean that, by continuing to operate these units, government officials are acting without the neutrality the Establishment Clause commands. That is because government officials can take steps to accommodate prisoners' religious needs and interests that they would be barred from taking in the outside world. In other words, faith-based prison units can be a legitimate means of meeting a third significant governmental interest—that of relieving or diminishing burdens the government itself has imposed on inmates' ability to develop spiritually while they are incarcerated.

Justice O'Connor has said, "It is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden."¹³⁵ In my opinion, it is not disingenuous to undertake this kind of inquiry when prison officials open faith-based units in an effort to reduce recidivism, enhance institutional security, or realize other secular ends. But if, on the other hand, the units are opened to compensate for government-created obstacles to spiritual development and growth, prison officials do not need to scurry around and try to find secular goals to which they can point as rationales for this particular kind of faith-based program. In fact, such feigning regarding the purpose for which a faith-based unit is added to the mix of programming options at a prison demeans the legitimacy and importance of the governmental interest in palliating the harm ensuing from the "exceptional government-created burdens on private religious exercise" in prisons, the same interest that underlay the Supreme Court's holding in *Cutter* that RLUIPA is not facially unconstitutional.¹³⁶

135. *Wallace v. Jaffree*, 472 U.S. 38, 83 (1985) (O'Connor, J., concurring in the judgment).

136. *See Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005).

B. *Conditions in Faith-Based Prison Units*

Although including a faith-based unit in a prison, in and of itself, does not evidence the lack of neutrality that contravenes the Establishment Clause, it is possible that conditions in the unit, compared to conditions in the prison's general population, or some other unit used as a benchmark for comparison, might show that the government is favoring religion in a way that the Establishment Clause forbids. To give an extreme example to illustrate this point, if prisoners in a faith-based unit were served sumptuous meals of steak, lobster, and wine, slept in posh rooms with large brass beds, and could take private bubble baths each night, while prisoners in the general population were fed the standard and often unpalatable prison fare, slept in spartanly furnished rooms, and bathed in large shower rooms with a dozen other inmates, the differences in the prisoners' conditions of confinement would be tantamount to an unofficial decree that prisoners should become more religious or join a particular religious sect.

Some individuals who are highly critical of faith-based prison units have argued or intimated that inmates would have to be afforded an "equally attractive alternative" to confinement in a faith-based unit in order for it to be constitutional.¹³⁷ For several reasons, I disagree.

1. *"Equal" Living Conditions—An Unworkable Standard*

First, requiring equality in conditions as the litmus test for neutrality would be to require the impossible. For an array of legitimate and often unavoidable reasons, conditions in a faith-based unit might not mirror those in the general-population unit or some other unit with which the faith-based unit is being compared. For example, the design and construction of a prison's units may foreclose such identical conditions. Housing units frequently vary in the size of their cells or dormitory rooms, the amount of dayroom space, access to natural light, the location and number of toilets, sinks, and showers, age, and other significant and insignificant ways. If faith-based units' physical appearance must mimic that of other units, they rarely will get out of the programming gates at many prisons.

Even if there are no differences in the units' physical configuration, the units may house a different number of inmates, which in turn may have an impact on their day-to-day lives. For example, a faith-based unit may house fewer prisoners than its general-population counterpart when inmates still are becoming aware of this faith-based program or demand for the program has

137. Semyonova, *supra* note 80, at 232.

shifted downwards, even though perhaps temporarily, due to natural fluctuations in the prison population. And it bears noting that to require an absolute equivalence in the number of prisoners in both units might spawn, ironically, overly aggressive efforts to recruit prisoners to live in the faith-based unit, efforts that could generate Establishment Clause concerns.

A faith-based unit and the unit with which it is being compared also may, and likely will, differ in the number of volunteers providing services to prisoners. Prisons typically are unable to attract enough volunteers to visit or mentor all of the inmates confined in the prison or to help them in other ways. People often are afraid of prisoners and, in any event, are skeptical that their service work will bear much fruit with persons whom they perceive as incorrigible. Individuals who are religious, however, may be more inclined to avail themselves of service opportunities in a faith-based unit, believing that their time with inmates who have manifested an interest in deep and sustained spiritual development likely will have a more positive, profound, and permanent effect on them. In addition, prospective volunteers may feel safer with such inmates.

There are myriad other ways in which a faith-based unit and a comparative unit may not be, for quite legitimate reasons, “equally attractive” in their conditions and operations. Which brings me to the second reason why I disagree with those who espouse a constitutional need for such equivalence: such identity between units is not only impossible, it is unnecessary.

2. “Equal” Living Conditions—A Rejected Standard

In *Cutter*, the Supreme Court rejected the proposition that each step the government takes to compensate for the burdens that incarceration imposes on the exercise of religion must be matched by some parallel step to allay restrictions on secular interests.¹³⁸ “Religious accommodations,” the Court observed, “need not ‘come packaged with benefits to secular entities.’”¹³⁹ Thus, it is not inherently unconstitutional for Congress, through RLUIPA, to have required that a compelling interest test be met to justify incursions on prisoners’ religious practices, while restraints on most other constitutional rights asserted by prisoners only need pass *Turner*’s lax reasonable relationship test. Similarly, just because government officials open a faith-based prison unit does not mean that they must creatively engineer some out-

138. *Cutter*, 544 U.S. at 724–25.

139. *Id.* at 724 (quoting *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 338 (1987)).

of-the-ordinary secular unit or programming in order to avoid abridging the Establishment Clause.

Cutter itself confirms, though, that even though a faith-based unit may not inexorably or even usually abridge the Establishment Clause, it may be structured or operated in a way that transgresses that constitutional line. While the Supreme Court held in that case that RLUIPA is not unconstitutional on its face, the Court cautioned that it might be applied in a way that violates the Establishment Clause.¹⁴⁰ In assessing the merit of a claim that a particular religious accommodation afforded under RLUIPA is unconstitutional, the Court noted that the effect that the accommodation has on other prisoners and on the maintenance of order and security within the prison must be considered.¹⁴¹ If the religious accommodation inflicts “unjustified burdens” on other inmates or compromises institutional security, a court appropriately may find that RLUIPA, as it is being applied in the case before it, violates the Establishment Clause.¹⁴²

Similarly, if a faith-based unit imposes unwarranted burdens on prisoners not living in that unit or jeopardizes institutional security, the unit may violate the Establishment Clause’s strictures. Those who evince what is often open hostility towards religion may be quick to argue that a faith-based prison unit unduly burdens other prisoners because it consumes resources that could be used to provide them with more or better programming or other benefits. But courts should be wary of arguments that interlace absence of a “benefit” with the imposition of a “burden.”

Whenever government funds are expended to accommodate prisoners’ religious needs or interests, whether for chaplains, chapels, or other nonresidential religious services or programs, that money could be used elsewhere, often to the benefit of other prisoners.¹⁴³ The transposition by opponents of faith-based units of a benefit that has not accrued into a burden would mean that many, if not most, governmental actions taken to accommodate prisoners’ religious practices, needs, and interests are unconstitutional, a result palpably at odds with the language and tenor of the Supreme Court’s decision in *Cutter*.

It also bears noting that specialized housing units, which consume resources that could be used for prisoners outside those units, are not at all uncommon in prisons. Therapeutic units for inmates who need intensive and

140. *Id.* at 725–26.

141. *Id.* at 720–23.

142. *Id.* at 726.

143. For a capsulization of the amount of money budgeted for faith-based programming in each state’s prisons in 2003, see *Survey Summary: Faith-Based Programming*, *supra* note 73, at 14–15 tbl.2. In some states, several million dollars were reserved for this kind of programming. *Id.*

holistic substance-abuse treatment, sex-offender units, mental-health units, youthful-offender units, and other special units are common features of many prisons.¹⁴⁴ Yet few would describe these units, which are designed to meet the special needs of certain categories of prisoners, as burdens on other prisoners. Nor should faith-based units be perceived as burdensome to others simply because they are designed to meet what for some prisoners is another kind of unmet special need—a spiritual need.

Finally, those who would hasten to describe every difference in the conditions or treatment of prisoners living in faith-based units as the infliction of a burden on other prisoners that gives rise to Establishment Clause concerns would be mindful to heed the Supreme Court's cautionary note in *Cutter*. The Court in that case correctly recognized that the so-called "benefits" of a religious accommodation actually may result in the imposition of burdens on the person receiving the accommodation, burdens to which other prisoners are not subject.¹⁴⁵ The Court cited the kosher diet consisting of a fruit, vegetable, granola bar, and liquid nutritional supplement fed an inmate at every single meal, day in and day out, as an example of a benefit that might equally be considered a burden.¹⁴⁶

The murky and often indecipherable line between burdens and benefits also may be apparent when examining conditions in faith-based units, where inmates typically have much less freedom than other prisoners. These inmates may be required to get up at dawn, denied the amount of free time that other prisoners enjoy to play cards, socialize, or otherwise do what they want, and be subjected to other variant conditions that some or many prisoners would perceive as burdens, not benefits.¹⁴⁷ Thus, the answer to the question whether prisoners incarcerated in faith-based units are reaping benefits not shared by other prisoners or are enduring burdens from which other prisoners are exempt often will depend, largely or sometimes completely, on the "eye of the beholder." For this reason and others discussed above, courts should be alert for, and prepared to rebuff, reflexive and pedantic arguments that differences in the treatment of prisoners in a

144. See HARRY E. ALLEN & CLIFFORD E. SIMONSEN, *CORRECTIONS IN AMERICA* 485 (7th ed. 1995); FRANK SCHMALLEGGER & JOHN ORTIZ SMYKLA, *CORRECTIONS IN THE 21ST CENTURY* 260–61, 435, 442 (2d ed. 2005); Barry C. Feld, *Juvenile and Criminal Justice Systems' Responses to Youth Violence*, 24 *CRIME & JUST.* 189, 220 (1998); Jon Nordheimer, *New Look at Jail Unit Housing Sex Offenders*, N.Y. *TIMES*, Nov. 2, 1994, at B6.

145. *Cutter*, 544 U.S. at 721 n.10.

146. *Id.*

147. For a description of the highly structured regimen in one faith-based unit, see *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 432 F. Supp. 2d 862, 901–03 (S.D. Iowa 2006), *aff'd in part, rev'd in part*, 509 F.3d 406 (8th Cir. 2007).

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faith-based unit are tantamount to the disadvantageous treatment of other prisoners that reflects governmental favoritism towards religion.

C. *Neutrality Among Religious Sects*

While many of the arguments that faith-based units evince unconstitutional governmental favoritism towards religion founder upon close examination, there still are some shoals through which prison officials must navigate in order for the units to meet any neutrality requirement subsumed within the Establishment Clause. As mentioned earlier, the meaning of that requirement has sparked great debate, particularly on the question whether strict neutrality between religion and irreligion is even possible.¹⁴⁸ But whatever the outcome of that debate, one thing is clear: the Establishment Clause generally precludes the government from singling out a particular religion for preferential or disadvantageous treatment.

In *Cutter*, the Supreme Court underscored that one of the factors underlying its conclusion was that RLUIPA was administered neutrally among religious sects.¹⁴⁹ But acting neutrally with respect to religious sects does not mean that there must be, or could be, absolute equivalence in governmental actions impacting them. If prison officials, for example, hire a prison chaplain who happens to be a Protestant minister, that does not mean that they also must hire a prison chaplain who is an imam, one who is a rabbi, another who is a Catholic priest, and an assortment of other chaplains to match the denominational preferences and identities of the inmate population.

Ironically, if the government were to strive to achieve a kind of egalitarian ideal its efforts not only would inevitably fail, they in fact would create different kinds of disparities between inmates of different religious faiths. For example, if there were only a handful of Jewish inmates in the prison, the chaplain who is a rabbi could provide them with a greater array of religious services than could a chaplain of a different faith ministering to several hundred inmates. One judge noted the similar dilemmatic choices confronting prison officials trying to afford equal programming options to female inmates, who comprise a smaller percentage of the prison population than men, observing that “[e]quality of one variable forces inequality of the other. Equality is an arithmetic impossibility.”¹⁵⁰

148. See *supra* notes 118–20 and accompanying text.

149. *Cutter*, 544 U.S. at 720, 723–24.

150. *Jeldness v. Pearce*, 30 F.3d 1220, 1235 (9th Cir. 1994) (Kleinfeld, J., dissenting).

Observations that the Supreme Court made in *Cruz v. Beto* buttress the conclusion that the First Amendment does not command that religious accommodations be identical for all religious sects.¹⁵¹ The prisoner who brought suit in *Cruz* was a Buddhist who claimed that prison officials were providing Jewish, Catholic, and Protestant inmates with an array of opportunities to practice their religion with which he was not being afforded, some of which were being subsidized by the government.¹⁵² While the Supreme Court held that the plaintiff must be afforded a “reasonable opportunity” that was “comparable” to that afforded other prisoners to practice his religion,¹⁵³ the Court added the following, and important, addendum:

We do not suggest, of course, that every religious sect or group within a prison—however few in number—must have identical facilities or personnel. A special chapel or place of worship need not be provided for every faith regardless of size; nor must a chaplain, priest, or minister be provided without regard to the extent of the demand. But reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendments without fear of penalty.¹⁵⁴

According to this passage in *Cruz*, it appears that a touchstone for deciding if apparent differences in the religious accommodations provided to religious sects in a prison impinge on the First Amendment is whether a prisoner not receiving a particular religious accommodation, such as the services of a state-paid chaplain from the same religious sect as his, has “reasonable opportunities” to practice his religion. And prison officials also must not punish the prisoner or cause him to fear being punished for availing or not availing himself of these opportunities.

Cruz admittedly was a case assessing the scope of protection afforded by the First Amendment’s Free Exercise Clause, not the Establishment Clause.¹⁵⁵ But it is difficult to envision that the outcome of the case would have been different had the prisoner brought his claim under the Establishment Clause—that the Court would have concluded that the Establishment Clause requires identical facilities, personnel, and other

151. *Cruz v. Beto*, 405 U.S. 319 (1972).

152. *Id.* at 319–20.

153. *Id.* at 322.

154. *Id.* at 322 n.2.

155. The plaintiff in *Cruz* also averred that he was being denied the equal protection of the law guaranteed by the Fourteenth Amendment. *Id.* at 320 n.1.

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accommodations for each and every religious sect, regardless of the extent of the demand for a particular accommodation or other circumstances.

The way in which the Court ultimately couches the test for ensuring that there is the requisite neutrality between religious sects when accommodating prisoners' religious needs and interests may not necessarily track the language in *Cruz*. But however the test is worded, it would seem that it would need to encompass the idea that seems to pervade the Court's opinion in that case—that the government acts without the requisite “neutrality” when it “creates a ‘substantial risk’ of suppressing religious differences.”¹⁵⁶

CONCLUSION

This Article refutes three of the misperceptions that undergird conclusions that faith-based prison units are inherently and inevitably unconstitutional: first, that the Establishment Clause applies the same way in prisons as it does outside prisons; second, that prisons are so coercive in nature that prisoners are incapable of making a “true private choice” to live in a faith-based unit; and third, that the government betrays an unconstitutional lack of neutrality on religious matters when it establishes or subsidizes a faith-based prison unit.

That does not mean, of course, that all faith-based units necessarily are constitutional. Just as RLUIPA can be applied in a way that violates the Establishment Clause, so can faith-based units be operated in a way that contravenes that constitutional provision. But it is important to at least attempt to ensure that broad-brush and at times reflexive arguments asserted against them do not discourage these innovative efforts to augment and modulate religious programming to better meet the varied religious needs and interests of prisoners and further important penological objectives. As prison officials strive to realize these goals in conformance with the Constitution, it would behoove them and others to remember that “the devil is in the details.”

156. See Esenberg, *supra* note 119, at 64–65.