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# INTERNATIONAL LAW, RELIGIOUS LIMITATIONS, AND CULTURAL SENSITIVITY: THE PARK51 MOSQUE AT GROUND ZERO

## INTRODUCTION

In the summer of 2010, a controversy erupted after news surfaced of a planned mosque two blocks from New York City's Ground Zero.<sup>1</sup> The proposed location of the mosque, now named Park51,<sup>2</sup> inflamed the passions of many Americans who believed that the Muslim institution would threaten both the memories of September 11, 2001, and the respect for those killed by the terrorist attacks.<sup>3</sup> The Park51 mosque quickly attracted international attention,<sup>4</sup> and the question of whether the state<sup>5</sup> could restrict the mosque became entangled in a web of legal and "cultural sensitivity" arguments.<sup>6</sup>

This Comment advocates an international human rights framework to address the issue of whether the state can regulate religious land use, such as Park51.<sup>7</sup> In confronting these religious freedom issues, the United States would be wise to look to international human rights norms on permissible limitations, as it already does to evaluate the religious activities of other countries.<sup>8</sup> An international framework not only ensures a high barrier to any government

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<sup>1</sup> Jonathan Mann, *Manhattan Mosque Plan Stokes Controversy*, CNN (Aug. 6, 2010), [http://articles.cnn.com/2010-08-06/politics/mann.mosque.ground.zero\\_1\\_new-mosque-cordoba-house-state-religion](http://articles.cnn.com/2010-08-06/politics/mann.mosque.ground.zero_1_new-mosque-cordoba-house-state-religion); Cristian Salazar, *Building Damaged in 9/11 To Be Mosque for NYC Muslims*, USA TODAY (May 5, 2010), [http://www.usatoday.com/news/religion/2010-05-07-mosque-ground-zero\\_N.htm](http://www.usatoday.com/news/religion/2010-05-07-mosque-ground-zero_N.htm).

<sup>2</sup> PARK51 COMMUNITY CENTER, <http://blog.park51.org/> (last visited Mar. 2, 2011) [hereinafter PARK51 OFFICIAL WEBSITE].

<sup>3</sup> Michael Gormley & Verena Dobnik, *Giuliani Supports Moving Mosque Away from WTC*, MSNBC (Aug. 19, 2010), [http://www.msnbc.msn.com/id/38776009/ns/us\\_news-life](http://www.msnbc.msn.com/id/38776009/ns/us_news-life).

<sup>4</sup> See *infra* text accompanying notes 46–51.

<sup>5</sup> This Comment uses the term "state" in a broad sense to refer to the United States as well as local and state governments. The international framework advanced in this Comment can be applied to all religious land-use controversies. Here, the issue is whether New York may regulate the construction of Park51, but these limitations are through the obligations of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), the Supreme Court decisions, the Constitution, and arguably international human rights norms. Thus, in the case of Park51, New York would be the relevant state for these permissible limitations, but the United States as a whole should look to international human rights norms in the challenges to religious controversies and to refine its own jurisprudence on religious limitations.

<sup>6</sup> See *infra* Part I.A. This Comment addresses "cultural sensitivity" arguments in Part IV.

<sup>7</sup> See *infra* Part II.

<sup>8</sup> See *infra* Part I.B.

restriction on the Muslim community's right to build a house of worship, but also fills in gaps in current U.S. domestic law and land-use statutes.<sup>9</sup>

This Comment is a limitations analysis on religious land use in the United States. An examination of the legal scope of religious freedom requires looking at two aspects of religious liberty: first, the language that provides for the right itself, and second, the language that identifies the circumstances when the state may properly restrict the right.<sup>10</sup> President Barack Obama identified the language that provides for the right of religion and the initial inquiry into Park51 when he said that "Muslims have the . . . right to practice their religion . . . [including] to build a place of worship."<sup>11</sup> Indeed, most written constitutions in the world, including the U.S. Constitution,<sup>12</sup> and international human rights instruments, such as the International Covenant on Civil and Political Rights ("ICCPR"),<sup>13</sup> contain a clause for freedom of religion or belief and recognize that religious freedom is both an individual and a group right.

However, international instruments such as the ICCPR also include a "limitations clause" that provides for limitations on religious freedom "to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."<sup>14</sup> The scope of the right of religion receives "disproportionate attention" in the two-stage religion analysis.<sup>15</sup> While scholars and commentators have addressed Park51 through the constitutional guarantee of religion, this Comment focuses on the legal scope of this right through the lens of the second stage: the permissible limitations on exercising the right to build Park51. Indeed, amidst the controversy, the real inquiry is whether the state can properly limit the right of the group to construct its mosque in this location.

This Comment embraces an international law framework and argues that the state may restrict religious land uses under certain permissible limitations

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<sup>9</sup> See *infra* Part III.B.

<sup>10</sup> T. Jeremy Gunn, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief: A Comparative Perspective*, 19 EMORY INT'L L. REV. vii, viii (2005) [hereinafter Gunn, *Permissible Scope*].

<sup>11</sup> David Batty, *Barack Obama Defends Plans for Ground Zero Mosque*, GUARDIAN (Aug. 14, 2010), <http://www.guardian.co.uk/world/2010/aug/14/barack-obama-ground-zero-mosque>.

<sup>12</sup> U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.").

<sup>13</sup> As this Comment discusses later, the ICCPR also provides that "[everyone] shall have the right to freedom of thought, conscience, and religion." International Covenant on Civil and Political Rights art. 18.1, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

<sup>14</sup> *Id.* art. 18.3.

<sup>15</sup> Gunn, *Permissible Scope*, *supra* note 10, at viii.

that serve a public interest (what international human rights law calls the “public safety, order, health, or morals or the fundamental rights and freedoms of others”).<sup>16</sup> However, because any permissible limitation on religious activities must be proportional and must not discriminate against a particular religion,<sup>17</sup> this Comment argues that government restriction of Park51 is illegal under international human rights norms, as accepted by the United States. Further, this Comment illustrates that the “cultural sensitivity” argument adopted by the media and politicians,<sup>18</sup> while a valuable part of the analysis of permissible limitations on religious freedom, ultimately fails with respect to Park51.<sup>19</sup>

In Part I, this Comment presents background information on the current controversy surrounding the construction of Park51 and explains how and why international human rights norms are useful for analyzing this controversy. Part II delineates the general grounds for permissible limitations of religious activities under international human rights norms and presents an international law framework. Next, Part III analyzes the U.S. interpretation of religious protections and limitations against the backdrop of international human rights standards, especially the ICCPR, and argues that international standards should inform and reinforce U.S. law on religious liberty. Part IV addresses the lingering sensitivity issue surrounding Park51, argues that the concept of “cultural sensitivity” is an implicit component of this limitations process, and provides comparison to other disputes involving cultural sensitivity. Lastly, Part V applies this analysis to the Park51 mosque, determines that the state cannot restrict the construction of Park51, and recommends that the state maintain this view as construction of the Park51 mosque moves forward.

## I. BACKGROUND

### A. *The Controversy: The Park51 Mosque Near Ground Zero*

Ten years after the attacks of September 11, 2001, the proposed construction of a mosque near the World Trade Center site has sparked international controversy.<sup>20</sup> In December 2009, reports first surfaced of the

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<sup>16</sup> ICCPR, *supra* note 13, art. 18.3.

<sup>17</sup> *Id.* arts. 26, 27.

<sup>18</sup> *Supra* Parts I.A, IV.

<sup>19</sup> *Supra* Parts IV, V.B.

<sup>20</sup> Mann, *supra* note 1; Salazar, *supra* note 1.

planned construction of the “Cordoba House”<sup>21</sup> to replace the building that formerly housed a Burlington Coat Factory, located two blocks from the site of the World Trade Center.<sup>22</sup> In fact, the location of the proposed mosque is so close to the World Trade Center site that debris from the September 11 airliners had damaged the building.<sup>23</sup> A local community board, Community Board 1, reviewed the plans for the Cordoba House and passed a resolution in support of the project, although the chairman emphasized “that the board had no authority to approve or disapprove of a house of worship, per se.”<sup>24</sup> Further, on August 3, 2010, the New York City Landmark Preservation Commission approved plans to tear down the building that currently occupies 45–47 Park Place to clear the space for the construction of Park51.<sup>25</sup> With the approval of the Landmark Preservation Commission, no obstacles remained with respect to local zoning laws.<sup>26</sup>

The name “Cordoba House” was the source of one level of controversy.<sup>27</sup> Some commentators believe that the name referenced the Muslim victory over the Christian Spaniards and the subsequent conversion of the Cordoba church into the third largest mosque in the world.<sup>28</sup> Perhaps in response to the backlash of the name “Cordoba House,” the planners of the mosque changed the name to Park51,<sup>29</sup> the name of the street and its principal address.

Many Americans, such as former democratic New York City Mayor Ed Koch, concluded that “there is no room for discussion” on the legal right to build a mosque near Ground Zero.<sup>30</sup> Senator Orrin Hatch noted that it may not be a “good idea” to build the mosque given “inflamed passions of the community,” but conceded that “[c]learly . . . the proponents of the mosque have a legal and a constitutional right to build.”<sup>31</sup> On August 13, 2010, President Obama endorsed “the right to build a place of worship and a

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<sup>21</sup> Ralph Blumenthal, *Muslim Prayers and Renewal Near Ground Zero*, N.Y. TIMES, Dec. 8, 2009, at A1.

<sup>22</sup> Salazar, *supra* note 1.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Bobby Ghosh, *The Moderate Imam Behind the ‘Ground Zero Mosque,’* TIME (Aug. 3, 2010), <http://www.time.com/time/nation/article/0,8599,2008432,00.html>.

<sup>26</sup> *Id.*

<sup>27</sup> Raymond Ibrahim, *The Two Faces of the Ground Zero Mosque*, MIDDLE E. F. (June 22, 2010), <http://www.meforum.org/2678/ground-zero-mosque>.

<sup>28</sup> *Id.*

<sup>29</sup> PARK 51 OFFICIAL WEBSITE, *supra* note 2.

<sup>30</sup> Daniel Halper, *Ed Koch: Ground Zero Mosque ‘Insensitive,’* WKLY. STANDARD (Aug. 4, 2010, 4:45 PM), <http://www.weeklystandard.com/blogs/ed-koch-ground-zero-mosque-insensitive>.

<sup>31</sup> John Schwartz, *Zoning Law Aside, Mosque Projects Face Battles*, N.Y. TIMES, Sept. 4, 2010, at A11.

community center on private property in lower Manhattan.”<sup>32</sup> Polls have shown that Americans, including fifty-two percent of New Yorkers, oppose the construction of the site,<sup>33</sup> but one poll found that eighty percent of New Yorkers believe that there is a legal right to build the mosque.<sup>34</sup>

While most scholars and commentators, even if opposed to the construction of Park51, believe there is a “legal right” to build the mosque,<sup>35</sup> few have commented on whether there may be a permissible limitation on this right. In the context of an international debate regarding whether the state may restrict Park51, the permissible limitation angle provides important clarification regarding potential state interference with construction of the mosque. An international framework is useful for a limitations analysis because it is a model that the United States has actively embraced.

Further, the issue of cultural sensitivity is an important one within this international law analysis of Park51. Many of the mosque’s opponents have embraced a sensitivity argument.<sup>36</sup> Former New York City Mayor Rudy Giuliani supports moving the proposed Islamic center to land away from the Ground Zero site.<sup>37</sup> Giuliani said, “[T]he question here is a question of sensitivity.”<sup>38</sup> Other commentators have echoed and exceeded Giuliani’s sensitivity sentiment. Charles Krauthammer wrote in *The Washington Post* that “putting up a monument to Islam in this place is not just insensitive but provocative.”<sup>39</sup> Another writer said that in the case of Park51, “good taste and common sense should prevail, or what Mayor Bloomberg . . . calls ‘special

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<sup>32</sup> Romesh Ratnesar, *Ground Zero: Exaggerating the Jihadist Threat*, TIME (Aug. 18, 2010), available at <http://www.time.com/time/nation/article/0,8599,2011400,00.html>.

<sup>33</sup> Jillian Schar, *Most New Yorkers Oppose Ground Zero Mosque: Poll*, NBC NEW YORK (Aug. 17, 2010), <http://www.nbcnewyork.com/news/local/New-Yorkers-Oppose-Ground-Zero-Mosque-Poll-97602569.html>; Michael Barbaro & Marjorie Connelly, *New York Poll Finds Wariness for Muslim Site*, N.Y. TIMES, Sept. 31, 2010, at A1 (“Two-Thirds of New York City residents want a planned Muslim community center and mosque to be relocated to a less controversial site farther away from ground zero in Lower Manhattan, including many who describe themselves as supporters of the project, according to a New York Times poll.”).

<sup>34</sup> Tom Topousis, *Two-Thirds of New York Residents Think Ground Zero Mosque Should Be Moved*, N.Y. POST, [http://www.nypost.com/p/news/local/manhattan/two\\_thirds\\_moved\\_new\\_york\\_residents\\_QDFQfkK7POSf8FJHxLKBnL](http://www.nypost.com/p/news/local/manhattan/two_thirds_moved_new_york_residents_QDFQfkK7POSf8FJHxLKBnL) (last updated Sept. 24, 2010, 11:34 AM); see, e.g., *Mosque-Building and Its Discontents*, ECONOMIST (Aug. 19, 2010), [http://www.economist.com/blogs/democracyinamerica/2010/08/islamic\\_cultural\\_centre\\_sorta\\_near\\_ground\\_zero](http://www.economist.com/blogs/democracyinamerica/2010/08/islamic_cultural_centre_sorta_near_ground_zero).

<sup>35</sup> Topousis, *supra* note 34.

<sup>36</sup> William Saletan, *Sensitive Conservatism: Is a Mosque Near Ground Zero “Insensitive”?*, SLATE (Aug. 23, 2010), <http://www.slate.com/id/2264754>.

<sup>37</sup> Gormley & Dobnik, *supra* note 3.

<sup>38</sup> Saletan, *supra* note 36.

<sup>39</sup> Charles Krauthammer, *Moral Myopia at Ground Zero*, WASH. POST, Aug. 20, 2010, at A23.

sensitivity.”<sup>40</sup> Jonah Goldberg invoked “appropriateness,” arguably a synonym of sensitivity: “the analogies all work fine in this sense: they all illuminate the fact that the relevant question here is appropriateness, decency.”<sup>41</sup> Mark Radulich wrote that it “is in fact sensitivity that lies at the heart of this issue.”<sup>42</sup> Finally, one publication reported that the majority of politicians have invoked a sensitivity argument, conceding that while the mosque might be legally defensible, it is “insensitive.”<sup>43</sup>

Thus, the discussion surrounding the Park51 controversy involves both legal and cultural sensitivity arguments, invoked by the mass media and politicians. An international religious framework would respond to international issues of religious liberty, provide a human rights standard to judge religious liberty controversies, and address the “cultural sensitivity” argument. The next Subpart explains the reasons why an international law analysis provides compelling insight into this unique religious land-use controversy.

### *B. International Law and Religious Liberty*

As discussed above, the Park51 mosque has become an international controversy. Before an analysis of an international framework in Part II, it is necessary to explain why the United States should embrace international human rights norms when dealing with religious issues such as Park51. The United States should look toward international human rights ideals as a guiding light to the Park51 controversy. The aversion of many scholars to international legal norms in the application of U.S. law cannot be justified in the category of religious liberty. Indeed, international law holds particular importance in the area of religious liberty in the United States.<sup>44</sup> A review of religious expression

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<sup>40</sup> Rich Lowry, *The Ground Zero Mosque: Not the Place*, NAT'L REV. ONLINE (Aug. 10, 2010, 12:00 AM), <http://www.nationalreview.com/articles/243643/ground-zero-mosque-not-place-rich-lowry>.

<sup>41</sup> Jonah Goldberg, *What the Mosque Debate Is, and Isn't, About*, AMERICAN (Aug. 17, 2010, 8:56 AM), <http://blog.american.com/?p=18318>.

<sup>42</sup> Mark Radulich, *On the Ground Zero Mosque and Sensitivity*, BLOGGER NEWS NETWORK (Aug. 3, 2010), <http://www.bloggernews.net/125015>.

<sup>43</sup> *Sense and Sensitivity*, ECONOMIST (Aug. 17, 2010), [http://www.economist.com/blogs/democracyinamerica/2010/08/mosque\\_near\\_ground\\_zero](http://www.economist.com/blogs/democracyinamerica/2010/08/mosque_near_ground_zero) (“Harry Reid, the leader of the Democrats in the Senate, stood shoulder-to-shoulder with Sarah Palin—an unusual position for them both—when he took this stance yesterday. Barack Obama also seems to have arrived in much the same place, first saying on Friday that he supported the construction of the mosque and then explaining over the weekend that he was talking about constitutional rights, rather than tact.”).

<sup>44</sup> JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE CONSTITUTIONAL EXPERIMENT 271 (3d ed. 2011).

in the context of international human rights law is an important one for three main reasons, discussed below.

First, the eyes of the world are upon the United States as it deals with this sensitive and important issue. The Park51 mosque was one of the most followed news stories of 2010.<sup>45</sup> Newspapers and leaders around the world have covered and opined on the events and issues surrounding the proposed construction of Park51. A U.K. newspaper reported on the support for and opposition to the mosque.<sup>46</sup> An Israeli newspaper commented on the legal arguments protecting freedom of religion,<sup>47</sup> and a Russian news show reported on “freedom of faith versus freedom of speech” in the United States with respect to a “Why there?” ad.<sup>48</sup> In Lebanon, *The Daily Star* reported that the Cordoba Initiative has every right to build a mosque by Ground Zero, but that it might be better served as a cultural tourist center.<sup>49</sup> An article from the United Arab Emirates expressed concern over religious persecution and “Islamaphobia” at the hands of U.S. politicians.<sup>50</sup> In Hong Kong’s *South China Morning Post*, Michael Chugani insinuated that the United States has no right to “try to deny Muslims their right to build a mosque” in Manhattan because the United States accuses China of religious persecution.<sup>51</sup> It is apparent that the international community is watching. The importance of international norms cannot be underestimated given the international attention to this controversy.

Second, to apply international human rights norms to the Park51 controversy would only be to hold the United States to the same standards it uses to evaluate religious liberty issues in other countries.<sup>52</sup> Reviewing Park51

<sup>45</sup> *See No Comment? Not Here: Our Most Talkative Posts of 2010*, N.Y. TIMES (Dec. 30, 2010), <http://cityroom.blogs.nytimes.com/2010/12/30/most-commented-posts-of-2010/>.

<sup>46</sup> Philip Sherwell, *Barack Obama Backs Ground Zero Mosque*, TELEGRAPH (Aug. 13, 2010), <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/barackobama/7945558/Barack-Obama-backs-Ground-Zero-mosque.html>.

<sup>47</sup> *See* Hal Goodman, *What If They Opposed a Synagogue?*, JERUSALEM POST (Aug. 22, 2010, 8:42 PM), <http://www.jpost.com/Opinion/Op-EdContributors/Article.aspx?id=185619>.

<sup>48</sup> Russia Today, *‘Ground Zero Mosque’ Ad: Why There?*, WEEK (Aug. 23, 2010), <http://theweek.com/article/index/206397/ground-zero-mosque-ad-why-there>.

<sup>49</sup> Jamil K. Mroue, *Fathom the Faith at Ground Zero*, DAILY STAR (Aug. 17, 2010), [http://www.dailystar.com.lb/article.asp?edition\\_ID=10&article\\_ID=118249&categ\\_id=17#axzz0xT71I3q4](http://www.dailystar.com.lb/article.asp?edition_ID=10&article_ID=118249&categ_id=17#axzz0xT71I3q4).

<sup>50</sup> Tony Karon, *Islam Is the New Bogeyman in a Time of US Uncertainty*, NAT’L (Aug. 22, 2010, 11:45 AM), <http://www.alarabiya.net/views/2010/08/22/117345.html>.

<sup>51</sup> Michael Chugani, Editorial, *Public Eye*, S. CHINA MORNING POST (Aug. 18, 2010), <http://www.scmp.com> (subscription required). Specifically, the United States accused China of “suppress[ing] its Christians, mistreat[ing] Tibetan monks, and rough[ing] up Muslims in Xinjiang.” *Id.*

<sup>52</sup> WITTE & NICHOLS, *supra* note 44, at 270.

in light of international law would integrate U.S. foreign policy with U.S. domestic law, and allow the United States to deal with internal religious liberty issues in a way that is consistent with its outward actions. The United States uses international standards on religious expression “on a regular basis with respect to other countries.”<sup>53</sup> The executive and legislative branches already accept international law on religious freedom to make decisions abroad. For example, the U.S. State Department is an executive branch agency that issues reports every year on religious liberty.<sup>54</sup> These reports use international norms to evaluate the laws and activities dealing with religion in other nations. The introduction to the 2010 report illustrates the degree to which the United States embraces international human rights:

The values of religious freedom are universal, enshrined in the Universal Declaration of Human Rights. This report is an important tool in the effort to ensure respect for these values. The United States takes seriously its international commitments and, in the President’s words, “Our nation’s enduring commitment to the universal human right of religious freedom extends beyond our borders as we advocate for all who are denied the ability to choose and live their faith.”<sup>55</sup>

The purpose of these reports is to shape U.S. foreign policy.<sup>56</sup> Both the executive and the legislative branches are involved; these bodies make recommendations directly to Congress and the executive branch, which may impose economic sanctions to countries that neglect to meet international norms on religious freedom.<sup>57</sup>

Further, in 1998, Congress passed the International Religious Freedom Act (“IRFA”) to “condemn violations of religious freedom, and to promote, and to assist other governments in the promotion of, the fundamental right to freedom of religion.”<sup>58</sup> When a country violates international protections on religious liberty, the IRFA authorizes the President to condition foreign aid, loan

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> U.S. DEP’T. OF STATE BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2010, intro., available at <http://www.state.gov/g/drl/rls/irf/2010/148658.htm> (“[The Obama] Administration will continue to oppose growing trends in many parts of the world to restrict religious expression. Faith can bring us closer to one another, and our freedom to practice our faith and follow our conscience is central to our ability to live in harmony.”).

<sup>56</sup> WITTE & NICHOLS, *supra* note 44, at 270.

<sup>57</sup> *Id.*

<sup>58</sup> International Religious Freedom Act of 1998, Pub. L. No. 105-292, 112 Stat. 2789 (1998); WITTE & NICHOLS, *supra* note 44, at 270–71; Gordon Smith, *Protecting the Weak: Religious Liberty in the Twenty-First Century*, 1999 BYU L. REV. 479, 483 (1999) (noting that the IRFA passed ninety-eight to zero).

approval, and trade status on religious tolerance if a country violates international protections on religious liberty.<sup>59</sup> In addition, the United States has actively denounced laws that discriminate against religious groups. For example, when Russia implemented an anti-religion law, the United States passed a resolution that condemned the Russian law.<sup>60</sup> The U.S. resolution called on President Yeltsin to certify that the Russian Federation had implemented no statute or regulation that would discriminate against religious groups in the community in violation of international instruments to which the Russian Federation was a party, including the ICCPR.<sup>61</sup> Thus, given that the United States uses international human rights standards to evaluate religious liberty controversies in other nations, it should at a minimum meet these standards when analyzing its own religion limitations issues.

Third, modern human rights instruments capture the core of the U.S. Constitution.<sup>62</sup> As John Witte, Jr. has written, “the international norms on religious liberty are—in many ways—the very norms of the American experiment itself.”<sup>63</sup> Modern human rights instruments echo the standards of American constitutional freedoms, as influenced by U.S. leaders. Eleanor Roosevelt was involved in the creation of the Universal Declaration of Human Rights of 1948 (“Universal Declaration”).<sup>64</sup> Further, the ICCPR and the Universal Declaration include President Franklin Roosevelt’s famous “four freedoms”:

[W]e look forward to a world founded upon four essential human freedoms. The first is freedom of speech and expression—everywhere in the world. The second is freedom of every person to worship God in his own way—everywhere in the world. The third is freedom from want [ . . . ] —everywhere in the world. The fourth is freedom from fear [ . . . ] anywhere in the world.<sup>65</sup>

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<sup>59</sup> Smith, *supra* note 58, at 495.

<sup>60</sup> *Id.* at 483; *see also* W. Cole Durham, Jr. & Lauren B. Homer, *Russia’s 1997 Law on Freedom of Conscience and Religious Associations: An Analytical Approach*, 12 EMORY INT’L L. REV. 101, 102 (1998).

<sup>61</sup> Smith, *supra* note 58, at 483.

<sup>62</sup> WITTE & NICHOLS, *supra* note 44, at 269–70.

<sup>63</sup> *Id.* at 269.

<sup>64</sup> Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter Universal Declaration]; DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 99 (3d ed. 2010).

<sup>65</sup> Franklin D. Roosevelt, Message to Congress (Jan. 6, 1941), *available at* [http://www.archives.gov/exhibits/powers\\_of\\_persuasion/four\\_freedoms/four\\_freedoms.html](http://www.archives.gov/exhibits/powers_of_persuasion/four_freedoms/four_freedoms.html); WITTE & NICHOLS, *supra* note 44, at 270.

First Amendment jurisprudence and prevailing U.S. law, especially the Religious Land Use and Institutionalized Persons Act (“RLUIPA”),<sup>66</sup> are shaped, confirmed, refined, and bolstered by U.S. participation in international human rights instruments. The U.S. State Department has even submitted a report to the United Nations that links RLUIPA to international religious norms expressed in the ICCPR.<sup>67</sup> RLUIPA, discussed further in Part III, represents for the United States the same firm standard of religious freedom protections for individuals and groups that are contemplated by the ICCPR.<sup>68</sup> Even if not dispositive, the international jurisprudence is probative regarding questions under RLUIPA. Thus, an application of international norms to Park51 would “judge American law by an international standard that it helped shape.”<sup>69</sup>

Thus, while an international law inquiry into the religious freedom questions in the United States is not formally binding in some respects, these human rights standards should be at the forefront of the analysis of Park51. To summarize: (1) Park51 is an international controversy, (2) the United States uses international norms to evaluate the activities of other nations regarding religious liberty, and (3) human rights instruments both represent and integrate the core of the U.S. Constitution with international norms. For these reasons, the United States should look to these international standards when it evaluates religious liberty controversies such as Park51. Part II presents a framework of these international human rights standards.

## II. INTERNATIONAL LAW FRAMEWORK: RELIGIOUS LIBERTY

International law consists of a body of international rules, obligations, instruments, and institutions.<sup>70</sup> These international rules of conduct bind “international actors in relations, transactions and problems that transcend national frontiers.”<sup>71</sup> This Part first identifies the right to build a religious worship center as a religious right under prevailing international human rights law. Second, this Part addresses four international human rights instruments

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<sup>66</sup> 42 U.S.C. §§ 2000cc–2000cc-5 (2006).

<sup>67</sup> U.S. DEP’T OF STATE, SECOND AND THIRD PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE U.N. COMMITTEE ON HUMAN RIGHTS CONCERNING THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (2005) [hereinafter STATE DEPARTMENT REPORT], available at <http://www.state.gov/g/drl/rls/55504.htm#imple>.

<sup>68</sup> *Id.*

<sup>69</sup> WITTE & NICHOLS, *supra* note 44, at 270.

<sup>70</sup> BEDERMAN, *supra* note 64, at 1.

<sup>71</sup> *Id.*

that provide for circumstances when a state may legally impose a limitation on religious expression. In particular, the ICCPR, of which the United States is a signatory, is at the center of the analysis of whether international law provides for permissible limitations on religious freedom in the case of Park51. Third, this Part argues that the limitations on religious activities that discriminate against only one religious group are not legal under international law, and specifically under the ICCPR and subsequent international human rights norms. As part of the international law analysis under the ICCPR and the other international instruments, this Comment later argues that cultural sensitivity may, in some cases, influence these permissible limitations on religious freedom.

### A. *The Right To Build a Religious Worship Center*

This analysis hinges on whether worship centers, such as Park51, are part of the protected rights under freedom of religion.<sup>72</sup> International law and the United States have long recognized a right to build a religious worship center as part of the right of religious freedom. As later sections will illustrate, the text of international human rights instruments themselves often provide a direct right to build a religious worship center. For example, the 1981 UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (“1981 Declaration”) provides specific types of religious activities protected under “freedom of thought, conscience and religion.”<sup>73</sup> One protected category of religious liberty is the right “to worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes.”<sup>74</sup> Further, the 1989 Vienna Concluding Document is an international instrument that also contains the basic religious rights provisions relevant for the Park51 analysis: the “right of religious communities to establish and maintain freely accessible places of worship or assembly.”<sup>75</sup>

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<sup>72</sup> Professor Gunn explains that first the right must be identified, and then the limitations analysis can proceed. T. Jeremy Gunn, *Permissible Limitations on the Freedom of Religion or Belief*, in RELIGION AND HUMAN RIGHTS: AN INTRODUCTION 254, 255 (John Witte, Jr. & M. Christian Green eds., 2012) [hereinafter Gunn, *Permissible Limitations*].

<sup>73</sup> Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. GAOR, 36th Sess., Supp. No. 51, U.N. Doc. A/36/684 (Nov. 25, 1981) [hereinafter 1981 Declaration].

<sup>74</sup> *Id.*

<sup>75</sup> Concluding Document of the Vienna Meeting 1986 of Representatives of the Participating States of the Conference on Security and Cooperation in Europe, Jan. 17, 1989, 28 I.L.M. 527, princ. 16c. [hereinafter 1989 Vienna Concluding Document].

The UN Special Rapporteur for Religious Freedom,<sup>76</sup> operating with the provisions of the ICCPR and the 1981 Declaration as a guide, has reinforced the right to build a place of worship in several cases, recommending to Turkish authorities that “[t]he Government should guarantee minorities the right to establish and maintain their own places of worship, and should allow them to build such facilities in places where new communities have taken root.”<sup>77</sup> Further, the Special Rapporteur has identified violations of freedom of religion or belief that include “targeting of places of worship and other religious buildings,” including “attacks” and “restriction of places of worship.”<sup>78</sup> More specifically, one report to the Commission on Human Rights that outlined activities threatening civil and political rights, including religious intolerance, noted that “religious minorities [in Slovenia] have recently complained about restrictions on the exercise of their freedom of religion, including Muslims, who are experiencing great difficulty in their efforts to build a mosque.”<sup>79</sup> All of these statements identify the right to build a religious worship center as a right of religious freedom, and conversely, recognize denial of the right to build a worship center to be a *prima facie* violation of religious freedom. Thus, under the text and subsequent application of international law, the religious land use of Park51 falls in the relevant zone of a religious right.

The United States also identifies religious worship centers as part of the right to religious liberty. Most notably, as discussed above, the U.S. State

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<sup>76</sup> A Special Rapporteur is an individual working on behalf of the United Nations with a specific mandate from the Commission on Human Rights. *Special Procedures of the Human Rights Council*, OFFICE U.N. HIGH COMMISSIONER FOR HUM. RTS., <http://www2.ohchr.org/english/bodies/chr/special/index.htm#code> (last visited Jan. 13, 2012). The mandate is within the scope of “special procedures,” which allows the Human Rights Council to address specific issues in countries or overarching issues. The Special Rapporteur investigates these human rights and releases a mission report that contains findings and recommendations. *Id.*

<sup>77</sup> Special Rapporteur of the Comm’n on Human Rights, *Interim Report of the Special Rapporteur of the Commission on Human Rights on the Elimination of All Forms of Intolerance Based on Religion or Belief, Situation in Turkey*, U.N. Doc. A/55/280/Add. 1 (Aug. 11, 2000) (by Abdelfatta Amor). This report found that the government should guarantee minorities not only the right to build a worship center, but also “to teach their religion, in places suitable for this purpose, and to train their clergy.” It is “indispensable” that the right to religion includes the right to religious seminaries as well as including, under Article 6 of the 1981 Declaration and the General Commentary No. 22 of the Commission of Human Rights, “the practice and teaching of religion and belief includes acts integral to the conduct by religious groups of their basic affairs, such as . . . the freedom to establish seminars or religious schools.” *Id.*

<sup>78</sup> U.N. High Comm’r for Human Rights, *Report of the U.N. Commissioner for Human Rights on the Implementation of Human Rights Council Resolution 10/22 Entitled “Combating Defamation of Religions,”* U.N. Doc. A/HRC/13/57, No. 81 (Jan. 11, 2010).

<sup>79</sup> Special Rapporteur on Freedom of Religion or Belief, *Civil and Political Rights, Including Religious Intolerance*, ESCOR Comm’n on Human Rights, U.N. Doc. E/CN.4/2004/63, No. 92 (Jan. 16, 2004) (by Abdelfattah Amor).

Department annually submits the International Religious Freedom report to Congress in compliance with Section 102(b) of IRFA of 1998.<sup>80</sup> This report covers the status of international religious freedom. The most recent report identified restrictions on freedom of religion within many countries where communities have been unable to build a worship center.<sup>81</sup> In addition to the U.S. State Department, the United States Commission on International Religious Freedom (“USCIRF”) is charged with evaluating violations of religious freedom internationally and making recommendations to both the President and to Congress.<sup>82</sup> In its 2010 report, the USCIRF identified “Watch List Countries” that violate religious freedom in part by such acts that deny both “permission to build new churches” and to “rebuild[] premises for worship.”<sup>83</sup>

The UN Human Rights Committee, the UN Special Rapporteur reports, the U.S. State Department, and the USCIRF all identify the right to build a worship center as part of the right to religious freedom. These statements and reports fully support the proposition that building the Park51 mosque falls within a protected category of religious liberty. Thus, the core issue is whether the state may limit the right to build Park51.

### *B. The International Instruments, Guarantees of Religion, and Permissible Limitations*

As discussed earlier, the analysis of the legal scope of a religious right involves a two-step process: first, an examination of the text that provides the right, and second, an analysis of whether the language identifies circumstances under which there may be a permissive limitation on that right.<sup>84</sup> While this Comment focuses on permissive limitations, any analysis of the permissible scope of legal limitations on the right to religion necessarily involves a discussion of the major human rights instruments and the initial guarantees therein. Accordingly, both the right and the limitation will be addressed. The second step in analyzing the scope of a religious right involves whether a state

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<sup>80</sup> U.S. DEP’T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM, available at <http://www.state.gov/g/drl/rls/irf/index.htm>.

<sup>81</sup> U.S. DEP’T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2010, available at <http://www.state.gov/g/drl/rls/irf/2010/148659.htm>.

<sup>82</sup> *About the Commission*, U.S. COMMISSION ON INT’L RELIGIOUS FREEDOM, <http://www.uscirf.gov/about-uscirf.html> (last visited Oct. 7, 2011).

<sup>83</sup> U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, ANNUAL REPORT 2010, at 214 (2010) (targeting both Iran and Afghanistan as denying the religious right to build a worship center).

<sup>84</sup> See Gunn, *Permissible Scope*, *supra* note 10, at viii.

may properly restrict a religious guarantee under certain circumstances or in specific contexts. While the religious believers and actors are more likely to focus on the right they wish to exercise, states are more concerned with the potential harms caused by extreme or inappropriate manifestations of religion.<sup>85</sup>

### *1. Development of International Religious Liberties and Limitations*

The modern formulation of international religious liberties began in the mid-twentieth century.<sup>86</sup> The horrors of World War II prompted a new recognition of human rights norms and, in particular, the development of the Universal Declaration.<sup>87</sup> Led by Eleanor Roosevelt and other international delegates, the creation of the Universal Declaration enunciates freedoms for individuals, including rights of worship and expression, and provides the international standard of freedom of religion.<sup>88</sup> Article 18 of the Universal Declaration states: “Everyone has the right to freedom of thought, conscience and religion; this right includes . . . freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”<sup>89</sup> While countries initially adopted the Universal Declaration as “soft” law, or a nonbinding legal instrument, the provisions have now been recognized as human rights norms either as part of customary international law or in other multilateral international instruments.<sup>90</sup>

The Universal Declaration identifies both the right to believe and the right to manifest religion or belief.<sup>91</sup> While the right to believe is absolute, the right to manifest one’s religion is not.<sup>92</sup> The “limitations clauses” in international human right instruments and written constitutions stipulate the circumstances under which a right to freedom or belief may be legally restricted. Permissible limitations on religion or belief apply only to one’s outward manifestation and expression; in other words, the right to manifest one’s religion is not

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<sup>85</sup> Gunn, *Permissible Limitations*, *supra* note 72, at 254 (analyzing the issues that arise under the limitations clause with respect to freedom of religion).

<sup>86</sup> WITTE & NICHOLS, *supra* note 44, at 271.

<sup>87</sup> Universal Declaration, *supra* note 64; BEDERMAN, *supra* note 64, at 99.

<sup>88</sup> Universal Declaration, *supra* note 64, arts. 18, 19.

<sup>89</sup> *Id.* art. 18.

<sup>90</sup> BEDERMAN, *supra* note 64, at 100.

<sup>91</sup> Universal Declaration, *supra* note 64, art. 18.

<sup>92</sup> Johan D. van der Vyver, *Limitations of Freedom of Religion or Belief: International Law Perspectives*, 19 EMORY INT’L L. REV. 499, 501 (2005).

absolute.<sup>93</sup> Article 29 of the Universal Declaration subjects all of the rights and freedoms to specific limitations:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.<sup>94</sup>

The Universal Declaration represented the advent of human rights norms, and the instruments that followed both elaborate and formalize the Universal Declaration. John Witte, Jr. and M. Christian Green aptly identify the four major international human rights instruments that contain protections for religious rights: (1) the ICCPR, (2) the 1981 Declaration, (3) the 1989 Concluding Document of the Vienna Follow-up Meeting of Representatives of the Participating States of the Conference on Security and Cooperation in Europe (“Vienna Concluding Document”), and (4) the 1992 United Nations Declaration on the Rights of the Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities (“Minorities Declaration”).<sup>95</sup>

## 2. *The ICCPR*

First, the United Nations adopted the ICCPR in 1966.<sup>96</sup> Like the Universal Declaration, the ICCPR identifies a religious right.<sup>97</sup> Article 18 of the ICCPR states:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship.<sup>98</sup>

Thus, the ICCPR repeats the religious protections set forth in the Universal Declaration and also identifies limitations that may be imposed on the freedom

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<sup>93</sup> See *id.* at 500–01.

<sup>94</sup> Universal Declaration, *supra* note 64, art. 29.

<sup>95</sup> John Witte, Jr. & M. Christian Green, *Religious Freedom, Democracy, and International Human Rights*, 23 EMORY INT’L L. REV. 583, 590 (2009). “As the international human rights instruments would predict, religious sanctuaries . . . are sites of the most frequent and violent contests over religious liberty, and these hotspots have long occupied courts and legislatures.” John Witte, Jr., Introduction, *The Foundations and Frontiers of Religious Liberty*, 21 EMORY INT’L L. REV. 1, 11 (2007).

<sup>96</sup> BEDERMAN, *supra* note 64, at 101.

<sup>97</sup> ICCPR, *supra* note 13, art. 18.

<sup>98</sup> *Id.*

to manifest one's belief or religion. Unlike the "soft law" of the Universal Declaration, the ICCPR is a binding international instrument,<sup>99</sup> which the United States ratified in 1992.<sup>100</sup>

It is important to note that Article 18 distinguishes between the "right to freedom of thought" and the "[f]reedom to manifest one's religion or beliefs."<sup>101</sup> Freedom of thought is absolute; a state may not derogate, impair, or restrict this right. In contrast, the freedom to manifest one's religion, including the right to build worship centers, is subject to certain limitations.<sup>102</sup> While the Universal Declaration recognizes limitations that protect "morality, public order and the general welfare,"<sup>103</sup> the ICCPR expands on these limitations. More specifically, the ICCPR includes a limitations clause within the same article as the clause that grants freedom of religion. Article 18 subjects freedom to manifest one's religion or belief to limitations "prescribed by law and . . . necessary to protect public safety, order, health, or morals or the fundamental rights and freedom of others."<sup>104</sup> The necessity requirement, in theory, ensures that any state limitation must be proportional to the interest the state seeks to protect. The ICCPR thus authorizes states to limit freedom of religion or belief only if the limitation upholds morality, public order, general welfare, public safety, or health.<sup>105</sup> Other relevant articles of the ICCPR include Articles 2 and 26, which prohibit discrimination based on certain characteristics, including religion.<sup>106</sup> Lastly, Article 27 of the ICCPR guarantees that religious minorities have the right to "practise their own religion."<sup>107</sup>

In 1984, a committee of experts in Siracusa, Italy sought to clarify the limitations on principles expressed in the ICCPR.<sup>108</sup> The conference resulted in the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights ("Siracusa Principles"),<sup>109</sup>

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<sup>99</sup> BEDERMAN, *supra* note 64, at 101.

<sup>100</sup> *Id.*

<sup>101</sup> ICCPR, *supra* note 13, arts. 18(1), 18(3).

<sup>102</sup> Gunn, *Permissible Limitations*, *supra* note 72, at 255.

<sup>103</sup> Universal Declaration, *supra* note 64, art. 29.

<sup>104</sup> ICCPR, *supra* note 13, art. 18(3).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* arts. 2, 26.

<sup>107</sup> *Id.* art. 27.

<sup>108</sup> U.N. Sub-Comm'n on the Prevention of Discrimination and Prot. of Minorities, Siracusa Principles on the Limitation and Derogation Provisions in the Int'l Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4 (Sept. 28, 1984) [hereinafter Siracusa Principles].

<sup>109</sup> *Id.*

which further articulated these limitations. According to the Siracusa Principles, any limitation on the rights and freedoms in the ICCPR must serve the purpose of the instrument, may not be discriminatory against a certain group, must be a necessary response to the public need, and must be proportional.<sup>110</sup> The Siracusa Principles also define terms from the ICCPR. For example, the document defines “public safety” as “protection against danger to the safety of persons, to their life or physical integrity, or serious damage to their property.”<sup>111</sup> Further, “public order” includes a “sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded”; this definition includes respect for human rights.<sup>112</sup> The limitations justified by public health must involve a serious threat to the health of the population, including injury. Additionally, the Siracusa Principles recognize that “public morals” vary across cultures and throughout time; the document grants national authorities discretion so long as the limitation “is essential to the maintenance of respect for fundamental values of the community.”<sup>113</sup> This means that the freedom to manifest one’s religion may be restricted when the limitations are required in the interest of public safety, public order, health, morals, or the fundamental rights of others.<sup>114</sup>

Importantly, however, any permissible limitation to protect public safety, order, health, or morals or fundamental rights of others must also be “proportional” to the restriction imposed on the religious group.<sup>115</sup> The proportionality requirement is essential to determining a religious limitation. Professor Jeremy Gunn explained that this requirement in limitations jurisprudence assumes that there should be a “proportionate” correlation between the interest the state seeks to protect and the right that it regulates.<sup>116</sup> Similar to the major international human rights instruments, the European Commission of Human Rights (“ECHR”) has explained that similar limitations principles must be subject to “the nature of the right involved, the degree of interference, i.e. whether it was proportionate to the legitimate aim pursued, the nature of the public interest and the degree to which it requires protection in the circumstances of the case.”<sup>117</sup> That regional human rights instruments

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> Van der Vyver, *supra* note 92, at 511.

<sup>115</sup> *Id.*; Gunn, *Permissible Limitations*, *supra* note 72, at 262.

<sup>116</sup> Gunn, *Permissible Limitations*, *supra* note 72, at 262.

<sup>117</sup> X & Church of Scientology v. Sweden, App. No. 7805/77, 16 Eur. Comm’n H.R. 68, 73 (1997).

have adopted this standard is a testament to its legitimacy and authority in the international community.

The ICCPR also provides for derogation from certain rights and freedoms when political authorities determine that there is a public emergency that threatens the life of a nation.<sup>118</sup> However, the measures taken to cope with the “public emergency” must not discriminate on the ground of religion, among other factors.<sup>119</sup> Thus, as one scholar notes, “[e]mergency regulations applicable to, for example, only the Muslim community would, therefore, violate the norm enunciated in this provision [of the ICCPR].”<sup>120</sup> One commentator has noted that “[l]imitations clauses have . . . largely swallowed the remaining guarantees of religious liberty in international human rights instruments.”<sup>121</sup> A government may invoke the limitations clauses in the ICCPR and the Universal Declaration to restrict the religious acts of a minority group by characterizing the activities as harming the “general welfare” or disrupting “public order.”<sup>122</sup> While state officials are likely to be concerned about the political dangers of religious radicalism or extremism, a government might nonetheless restrict religion absent such real harm by focusing on perceived dangers.<sup>123</sup>

### 3. *The Subsequent International Human Rights Instruments*

This Subpart addresses the human rights instruments that followed the Universal Declaration and the ICCPR. The 1981 Declaration<sup>124</sup> parallels the ICCPR, but provides more specific guidance into the types of religious activities protected under “freedom of thought, conscience and religion.”<sup>125</sup> One of the concrete guarantees enumerated in Article 6 of the 1981

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<sup>118</sup> Van der Vyver, *supra* note 92, at 512–13.

<sup>119</sup> *Id.* at 513.

<sup>120</sup> *Id.*

<sup>121</sup> Nathan A. Adams, IV, *A Human Rights Imperative: Extending Religious Liberty Beyond the Border*, 33 CORNELL INT’L L.J. 1, 45 (2000).

<sup>122</sup> *Id.* at 45–46.

<sup>123</sup> Gunn, *Permissible Limitations*, *supra* note 72, at 255–56. The U.S. government’s attack at the Mount Carmel Center near Waco, Texas is an extreme instance of the limitation of religion for the “general welfare.” While the factors may be broadly interpreted to allow state authorities wide discretion to limit religious manifestations and activities, discrimination and proportionality may prevent such limitations from being a permissible exercise of a state’s power. *Id.*

<sup>124</sup> WITTE & NICHOLS, *supra* note 44, at 271.

<sup>125</sup> 1981 Declaration, *supra* note 73, art. 1. For a detailed analysis of the 1981 Declaration, see Carolyn Evans, *Time for a Treaty? The Legal Sufficiency of the Declaration on the Elimination of All Forms of Intolerance and Discrimination*, 2007 BYU L. REV. 617.

Declaration provides relevant guidance for the current Park51 controversy: the right “[t]o worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes.”<sup>126</sup> The 1981 Declaration, similar to the ICCPR and the earlier Universal Declaration, also contains a limitations clause for manifestation of religion.<sup>127</sup> Under the 1981 Declaration, states may restrict and regulate religious activities to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.<sup>128</sup> While Articles 2 and 26 of the ICCPR prohibit discrimination based on religion, the 1981 Declaration contains more restrictive and elaborate provisions against discrimination. In fact, the 1981 Declaration broadly defines discrimination as “any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.”<sup>129</sup> These antidiscrimination provisions prohibit “discrimination by any State, institution, group of persons, or person”<sup>130</sup> and calls upon states to “take effective measures to prevent and eliminate discrimination.”<sup>131</sup> Effective measures include laws that forbid discrimination.<sup>132</sup> As Natan Lerner writes, “[The 1981 Declaration] was an important breakthrough in the prolonged struggle to achieve for religious groups at least some of the protection granted in present human rights law to racial and ethnic groups.”<sup>133</sup>

The Vienna Concluding Document is the third international instrument that contains the basic religious rights provisions relevant to the Park51 analysis. Similar to the 1981 Declaration, the Concluding Document contains concrete guarantees of religious liberty and expression.<sup>134</sup> Of particular relevance to the Park51 debate is the “[r]ight of religious communities to establish and maintain freely accessible places of worship or assembly.”<sup>135</sup> Further, the Concluding Document protects against discrimination and calls upon states to “take

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<sup>126</sup> 1981 Declaration, *supra* note 73, art. 6.

<sup>127</sup> *Id.* art. 1.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* art. 2.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* art. 4.

<sup>132</sup> *Id.*

<sup>133</sup> NATAN LERNER, GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW 96 (2d ed. 2003).

<sup>134</sup> 1989 Vienna Concluding Document, *supra* note 75, princ. 16c.

<sup>135</sup> *Id.*

effective measures to prevent and eliminate discrimination against individuals or communities.”<sup>136</sup>

Lastly, the 1992 Minorities Declaration contains the most specific protections for religious minorities and the right to self-determination. The right to self-determination “guarantees a religious community the right to practice its religion, an ethnic community the right to promote its culture . . . without undue state interference or unnecessary legal restrictions.”<sup>137</sup> This has specific relevance in the religious context, especially the Muslim community and Park51.

### C. *Discrimination*

While international law allows for specific limitations on freedom of religion, it also imposes an additional legal layer on these restrictions: any limitation imposed on freedom of religion or belief must not discriminate against a particular religious group.<sup>138</sup> Because of this restriction, state policies that purport to serve the “general welfare,” “public order,” or “public health” might nonetheless be discriminatory if they target a specific religious group.

Article 26 of the ICCPR prohibits discrimination in the context of religion: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law . . . [T]he law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as . . . religion.”<sup>139</sup> The 1981 Declaration explained and expanded on the religious principles articulated in the ICCPR, and included prohibitions on religious discrimination.<sup>140</sup> The adoption of the 1981 Declaration and international documents that followed therefore reinforced the international community’s firm prohibition of intolerance based on religion.

Thus, states that are parties to the ICCPR are under an international obligation to promulgate policies that do not discriminate against a particular religious group. If there had been any doubt regarding the strong

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<sup>136</sup> *Id.*

<sup>137</sup> United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, G.A. Res. 47/135, U.N. GAOR, 47th Sess. Supp. No. 49 (Vol. I), U.N. Doc. A/RES/47/135 (1992) [hereinafter 1992 Minorities Declaration].

<sup>138</sup> ICCPR, *supra* note 13, art. 26.

<sup>139</sup> *Id.*

<sup>140</sup> 1981 Declaration, *supra* note 73, arts. 2, 4.

antidiscrimination stance in the ICCPR, the 1981 Declaration and subsequent instruments discussed above clarified that any limitation on religious activities must not discriminate against a particular religious entity. This has particular relevance for the Park51 controversy because only the Muslim religious community is at the center of the dispute. As this Comment later shows, these discrimination clauses prevent the state from targeting a specific religion, and thus make limitations on Park51 impermissible.

The next Part analyzes the permissible limitations of religion in the United States, as informed by the Universal Declaration, the ICCPR, and other human rights instruments and jurisprudence. Because the controversy surrounding Park51 is centered in the United States, the next Part links the discussion of international human rights law to U.S. law.

### III. THE UNITED STATES AND INTERNATIONAL LAW: PERMISSIBLE LIMITATIONS ON RELIGIOUS EXPRESSION AND LAND USE

Religious liberty in the United States is intertwined with international human rights instruments. The United States, of course, has its own religious liberty under the First Amendment's Free Exercise and Establishment Clauses, sundry state constitutions, and all manner of federal and state statutes.<sup>141</sup> These instruments have given the United States a strong tradition of religious liberty protection.<sup>142</sup> In this modern post-9/11 era, however, the United States would do well to look to international human rights norms to refine its own principles and application of religious liberty. In particular, the treatment of religious minorities in the United States can use substantial fleshing out against the backdrop of international law.

This Part first discusses the role of international law, and specifically the ICCPR, in a religious liberty and limitations analysis in the United States. Second, this Comment analyzes Supreme Court jurisprudence and portions of RLUIPA<sup>143</sup> that are relevant to limitations a state may impose on religious rights. The Supreme Court cases and RLUIPA are important because they define the implicit limitations through their strict scrutiny or heightened rational review regimes.<sup>144</sup> In U.S. constitutional law, there are no explicit

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<sup>141</sup> U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.").

<sup>142</sup> WITTE & NICHOLS, *supra* note 44, at 265–66.

<sup>143</sup> 42 U.S.C. § 2000cc(a)(1).

<sup>144</sup> *See infra* Part III.B.

limitations, but “limitations” language is viewed through the mirror image of what is considered to be a sufficiently “compelling state interest” to meet strict scrutiny or a sufficiently “important state interest” to meet a heightened rational review.<sup>145</sup> This Part argues that while RLUIPA’s strict scrutiny standard comes closer to the ICCPR norms, the United States should embrace international human rights norms to both close the gaps in and maintain a strict scrutiny regime against potential discriminatory treatment.

A. *Religious Rights and Limitations, the ICCPR, and the United States*

In many ways, the United States has embraced the religious protections and limitations embodied in the Universal Declaration and the ICCPR. The Constitution itself echoes many of these international norms, and “[t]hese international human rights instruments both confirm and prioritize several of the founding principles of religious liberty in America—liberty of conscience, freedom of exercise, religious equality, religious pluralism, separation of church and state, and no establishment of religion.”<sup>146</sup> These principles form the backbone of international law, and the state may restrict the exercise of religion only by a proportional regulation that protects a state interest.<sup>147</sup> These state interests, as a reminder, include limitations “[p]rescribed by law and . . . necessary to protect public safety, order, health, or morals or the fundamental rights and freedom of others.”<sup>148</sup> As this Part discusses below, the compelling interest test used in the United States comports with the permissive limitations clause in the ICCPR. However, first it is necessary to explain the obligations of the United States under the ICCPR.

The United States ratified the ICCPR in 1992.<sup>149</sup> When the U.S. Senate ratified the ICCPR, however, it did not give unlimited consent to the international treaty; rather, it accepted the obligations of the ICCPR with several reservations, understandings, and declarations (“RUDs”).<sup>150</sup>

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<sup>145</sup> See *id.* for a discussion on the strict scrutiny regime in the United States that serves as limitations language for religious rights.

<sup>146</sup> WITTE & NICHOLS, *supra* note 44, at 277.

<sup>147</sup> *Id.*

<sup>148</sup> ICCPR, *supra* note 13, art. 18.3.

<sup>149</sup> BEDERMAN, *supra* note 64, at 100.

<sup>150</sup> See David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations*, 42 DEPAUL L. REV. 1183, 1183 (1993). For a discussion of treaty-making power and the role of RUDs, see BEDERMAN, *supra* note 64, at 168 (“The Senate can condition its advice and consent on the attachment of various reservations, understandings, and declarations (“RUDs”) of the treaty. Although only reservations purport to change the legal effect of a treaty.”).

Importantly, none of these fourteen RUDs entirely relieves the United States of its duties under the religious liberty clauses in the instrument.<sup>151</sup> Yet, the obligations of the United States under the ICCPR involve two important nuances relevant to this Comment.

First, the United States accepted the ICCPR with an “understanding” in regards to its requirements, which are set forth in Articles 2(1) and 26.<sup>152</sup> When the United States ratified the ICCPR, it clarified its position through a state “understanding” that it may make distinctions based on categories such as religion and race that are at least rationally related to a legitimate government interest.<sup>153</sup> Because “understandings” are statements only of interpretation assumed to be consistent with the treaty, the nondiscrimination understanding does not block U.S. obligations to comply with the ICCPR.<sup>154</sup> Understandings do not purport to change the legal effect of a treaty.<sup>155</sup> Therefore, while it is important to explain the understanding discussed above, it does not diminish the obligations of the United States under the religious exercise and limitations clause of the ICCPR.<sup>156</sup> Further, most commentators, including the American Bar Association, have concluded that the understanding dealing with nondiscrimination is unnecessary because U.S. law generally complies with the nondiscrimination clauses in the ICCPR.<sup>157</sup> The American Civil Liberties Union also opined that “[t]his understanding is . . . at best superfluous, [and] at worst a misstatement of our jurisprudence.”<sup>158</sup>

Second, the ICCPR is not self-executing.<sup>159</sup> Treaties that are not self-executing require implementing legislation to make them enforceable in U.S. courts.<sup>160</sup> Congress can regulate the right to manifest one’s religion or belief by implementing the ICCPR. In fact, the ICCPR directs state parties “to take necessary steps . . . to adopt such legislative [and] other measures as may be necessary to give effect to the rights recognized in the [ICCPR].”<sup>161</sup> Although

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<sup>151</sup> *Id.*

<sup>152</sup> Stewart, *supra* note 150, at 1196.

<sup>153</sup> *Id.* at 1183; Jeri Nazary Sute, *Reviving RFRA: Congressional Use of Treaty-Implementing Powers To Protect Religious Exercise Rights*, 12 EMORY INT’L L. REV. 1535, 1565 (1998).

<sup>154</sup> Stewart, *supra* note 150, at 1183.

<sup>155</sup> BEDERMAN, *supra* note 64, at 168.

<sup>156</sup> Sute, *supra* note 153, at 1565.

<sup>157</sup> Stewart, *supra* note 150, at 1197.

<sup>158</sup> *International Covenant on Civil and Political Rights: Hearing Before the S. Comm. on Foreign Relations*, 102d Cong. 171 (1991).

<sup>159</sup> BEDERMAN, *supra* note 64, at 101.

<sup>160</sup> *Id.*

<sup>161</sup> 42 U.S.C. § 2000cc-1.

the United States has not formally implemented the ICCPR through legislation, it has captured its principles in the Religious Freedom Restoration Act of 1993 (“RFRA”) and RLUIPA.<sup>162</sup> While neither RFRA nor RLUIPA is explicitly based on the ICCPR, the statutes effectively, if not formally, implement Articles 18 and 26 of the ICCPR. In fact, as discussed in Part I, the U.S. State Department emphasized the relationship between these statutes and the ICCPR when it submitted a report, entitled “Implementation of Specific Provisions of the Covenant,” to the United Nations in 2005.<sup>163</sup> The report linked Article 18 of the ICCPR to the RFRA and RLUIPA legislation in the United States,<sup>164</sup> reflecting the government’s belief that these instruments fulfill the aim of the religious liberty in the ICCPR. RFRA and RLUIPA, in fact, adopt for the United States the same firm standard of religious freedom protections for individuals and groups mandated by the ICCPR.<sup>165</sup> The international jurisprudence on proper limitations on religious freedom is thus useful not only for foreign policy, but also for questions arising under RLUIPA and in the Park51 controversy. The next Subpart discusses Supreme Court jurisprudence that reads limitations on freedom of religion into the First Amendment and explains RLUIPA in fuller detail.

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<sup>162</sup> RLUIPA, 42 U.S.C. § 2000cc(a)(1); RFRA, 42 U.S.C. § 2000bb(a) (1993). This Comment focuses on RLUIPA, the predecessor of RFRA.

<sup>163</sup> STATE DEPARTMENT REPORT, *supra* note 67.

<sup>164</sup> *Id.*

<sup>165</sup> After the decision in *Boerne* that declared RFRA unconstitutional as to state and local governments, some scholars indeed suggested that the treaty-implementing powers of Congress could provide a compelling basis for a new statute to protect religious exercise and activities with respect to land use. In 1920, the Supreme Court’s *Missouri v. Holland*, 252 U.S. 416 (1920), holding allowed the federal government nearly boundless power to implement treaties, including those regarding matters usually reserved to the states. The text of the U.S. Constitution provides Congress the power to implement legislation to fulfill the goals of the treaty: first, the President “shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur,” second, “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land,” and third, Congress has the power to make all laws “necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States.” U.S. CONST. art. II, § 2, art. VI, cl. 2, art. I, § 8; *Holland*, 252 U.S. 416; Jeffrey L. Friesen, *The Distribution of Treaty-Implementing Powers in Constitutional Federations: Thoughts on the American and Canadian Models*, 94 COLUM. L. REV. 1415, 1418 (1994); Patricia E. Salkin & Amy Lavine, *God and the Land: A Holy War Between Religious Exercise and Community Planning and Development*, 2 ALB. GOV’T L. REV. viii, viii (2009).

## B. *The Supreme Court and RLUIPA on Permissible Limitations*

### 1. *The Supreme Court*

The U.S. Constitution does not have an explicit limitations clause akin to Article 18 of the ICCPR.<sup>166</sup> But the U.S. Supreme Court has read certain limitations into the First Amendment guarantee that Congress shall make no law prohibiting the free exercise of religion.<sup>167</sup> As discussed earlier, the ICCPR requires a proportionality and necessity standard for any government restriction on religious expression; this would be a permissive limitation on a manifestation of religion.<sup>168</sup> The U.S. Supreme Court developed the “strict scrutiny” test in the Supreme Court cases of *Sherbert v. Verner* and *Wisconsin v. Yoder*,<sup>169</sup> and later Congress embraced the test in RFRA and in the more recent RLUIPA.<sup>170</sup> The strict scrutiny test, calling for a “compelling state interest” and the “least restrictive alternative” for achieving that interest,<sup>171</sup> largely parallels the necessity and proportionality requirements set out in the ICCPR.<sup>172</sup>

However, later U.S. Supreme Court cases,<sup>173</sup> culminating in *Employment Division v. Smith*, lowered the threshold from strict scrutiny to a heightened rational basis, and this runs afoul of the ICCPR’s requirements of necessity and proportionality as the standard used in free exercise cases.<sup>174</sup> The ICCPR would still mandate the use of strict scrutiny to fulfill the requirements of necessity and proportionality.<sup>175</sup> Fortunately, as discussed next, RLUIPA replaced the heightened rational basis with a strict scrutiny regime, but there remain some significant gaps.

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<sup>166</sup> Gunn, *Permissible Limitations*, *supra* note 72, at 257.

<sup>167</sup> See *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

<sup>168</sup> Gunn, *Permissible Limitations*, *supra* note 72 at 261.

<sup>169</sup> See *Sherbert*, 374 U.S. at 398; *Yoder*, 406 U.S. at 205.

<sup>170</sup> See *infra* Part B.2.

<sup>171</sup> See *Sherbert*, 374 U.S. at 398; *Yoder*, 406 U.S. at 205.

<sup>172</sup> Gunn, *Permissible Limitations*, *supra* note 72, at 261–62.

<sup>173</sup> See *Emp’t Div. v. Smith*, 494 U.S. 872 (1990); *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988); *Bowen v. Roy*, 476 U.S. 693 (1986).

<sup>174</sup> For a discussion on proportionality and necessity, see Gunn, *Permissible Limitations*, *supra* note 72, at 262.

<sup>175</sup> *Id.* at 261–62.

## 2. RLUIPA

Particularly relevant to this controversy is RLUIPA,<sup>176</sup> passed by Congress and signed into law in 2000.<sup>177</sup> While RLUIPA was not predicated on the treaty powers of Congress, it attempts to adopt for the United States the same standard contemplated by the ICCPR. Congress limited RLUIPA to land-use laws and regulations governing prisoners and other institutionalized persons,<sup>178</sup> in part because Congressional findings determined that “covert” religious discrimination was prevalent in these contexts.<sup>179</sup> Here, this discussion is concerned only with religious land use, the very heart of the Park51 controversy.

RLUIPA uses a strict scrutiny regime and sets a high bar for any government action that would impose zoning or other restrictions on a religious institution.<sup>180</sup> The land-use provisions of RLUIPA include a requirement of equal treatment: “No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.”<sup>181</sup> Any such action must serve a “compelling government interest” while also being “the least restrictive means” of furthering that interest.<sup>182</sup> Further, the requirements set forth in RLUIPA ensure that local governments do not discriminate against a religious group that desires to build a house of worship unless the government has “cogent reasons,” or permissible limitations, for imposing restrictions.<sup>183</sup> Indeed, this “strict scrutiny” test for religious exercise claims is in line with the international human rights instruments. Thus, RLUIPA offers a statutory substitute to the Free Exercise Clause for religious land users who are subject to burdensome or discriminatory land-use regulations, and this federal statute uses the same strict scrutiny review that the ICCPR mandates and that pre-*Smith* free exercise law mandated.<sup>184</sup> RLUIPA imposes a federal standard

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<sup>176</sup> RLUIPA was enacted more recently than RFRA.

<sup>177</sup> 42 U.S.C. §§ 2000cc; Salkin & Lavine, *supra* note 165, at viii.

<sup>178</sup> Salkin & Lavine, *supra* note 165, at viii.

<sup>179</sup> *Id.* (citing 146 CONG. REC. S7774, S7775 (daily ed. July 27, 2000) (joint statement of Sens. Hatch, Kennedy, and Reid)).

<sup>180</sup> 42 U.S.C. § 2000cc(a)(1).

<sup>181</sup> *Id.* § 2000cc(b)(1).

<sup>182</sup> See U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., A GUIDE TO FEDERAL RELIGIOUS LAND USE PROTECTIONS, available at [http://www.justice.gov/crt/spec\\_topics/religiousdiscrimination/rluipa\\_guide.pdf](http://www.justice.gov/crt/spec_topics/religiousdiscrimination/rluipa_guide.pdf).

<sup>183</sup> Salkin & Lavine, *supra* note 165, at ix.

<sup>184</sup> See *Emp’t Div. v. Smith*, 494 U.S. 872 (1990).

that compels local governments to balance government interests properly when imposing limitations.<sup>185</sup>

Further, as discussed in the international framework in Part I, the international human rights norms also explicitly require that any limitation on religious expression does not discriminate against a particular religious group.<sup>186</sup> RLUIPA additionally embodies international norms through its antidiscrimination mandate embodied in the strict scrutiny regime. Because freedom of religion is much more of an equality right than a liberty right in the United States, government action that restricts one religious group's exercise of rights, while excluding others that may be similarly situated, violates the Equal Protection, Establishment, and Free Exercise Clauses. Thus, the limitation on a religious group is permissible under the Constitution as long as all other religious groups in the same context share the restriction.<sup>187</sup> This distinction is important: restricting a mosque but allowing a church or a synagogue in the same location, for example, might be an impermissible limitation. However, a restriction that serves a government interest and restricts all religious groups and activities might be permissible.

While RLUIPA echoes some of the same standards set forth in the ICCPR, it is important to note that, in the United States, a mere statutory right to build and maintain a worship center is not universally automatic. Religious worship centers, such as churches, mosques, and synagogues, can be restricted for traffic concerns, foreclosed in certain neighborhoods, and regulated for other zoning and landmark preservation issues.<sup>188</sup> These restrictions are considered conditions of the right of religious freedom and not limitations that must satisfy proportionality and necessity requirements. RLUIPA's legislative history, by sponsors Senators Orrin Hatch and Ted Kennedy, makes clear that the "[A]ct does not provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations, where available without discrimination or unfair delay."<sup>189</sup>

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<sup>185</sup> Salkin & Lavine, *supra* note 165, at ix.

<sup>186</sup> *See supra* Part II.C.

<sup>187</sup> Frederick Mark Gedicks, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the United States*, 19 EMORY INT'L L. REV. 1187, 1211 (2005).

<sup>188</sup> For a discussion on RLUIPA fact patterns, see Karla L. Chaffee & Dwight H. Merriam, *Conflicts over Land-Use and Religious Freedom: Six Fact Patterns of Substantial Burden on RLUIPA: Lessons for Potential Litigants*, 2 ALB. GOV'T L. REV. 437 (2009).

<sup>189</sup> 146 CONG. REC., *supra* note 179, at S7774, S7775 (2000).

Some commentators have suggested that RLUIPA should apply to building codes and land-use regulations.<sup>190</sup> While building codes and aesthetic regulations appear to be facially neutral, the implementation of these regulations requires individual determinations that are subject to discriminatory action.<sup>191</sup> Facially neutral regulations that purport to serve safety, public health, and historic and aesthetic regulation can mask discrimination, and thus the courts should scrutinize building codes and other regulations. Strengthening the strict scrutiny regime would bring RLUIPA more fully in line with the ICCPR and prevent discrimination under otherwise facially neutral laws.

Despite some gaps, statutes such as RLUIPA bring the United States closer to international religious freedom norms and permissible limitations on religious freedom. Like the ICCPR, U.S. domestic law should not allow a government to restrict religious activities if the limitation targets and applies to only one specific religious entity. In dealing with the international *cause célèbre* surrounding the Park51 mosque, however, the United States would be wise to embrace the strict scrutiny regime that is in line with the requirements of the ICCPR to help eradicate the religious discrimination that minorities can and have faced under the rational review regime introduced by *Smith*.<sup>192</sup> RLUIPA is a step in the right direction, but we should encourage courts to remember the importance of this strict scrutiny regime by pointing to the international human rights instruments. While some commentators disagree with this approach,<sup>193</sup> there is a clear bridge that connects these international treaty obligations to current U.S. domestic law.

#### IV. CULTURAL SENSITIVITY AND LIMITATIONS ON RELIGIOUS LIBERTY

As discussed in Part I, one of the core popular and political arguments surrounding the construction of Park51 is the notion of “cultural sensitivity.”<sup>194</sup> Because this sensitivity argument is at the forefront of the political debate regarding the location of Park51, it requires careful consideration in this analysis. While cultural sensitivity may invoke a moral and emotional

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<sup>190</sup> See generally Shelley Ross Saxe, *Assessing RLUIPA's Application to Building Codes and Aesthetic Land Use Regulation*, 2 ALB. GOV'T L. REV. 623 (2009).

<sup>191</sup> *Id.* at 629.

<sup>192</sup> See *Emp't Div. v. Smith*, 494 U.S. 872 (1990).

<sup>193</sup> See, e.g., Douglas Laylock, *Religious Freedom and International Human Rights in the United States Today*, 12 EMORY INT'L L. REV. 951 (1998).

<sup>194</sup> See *supra* text accompanying notes 36–43.

rationale, this concept is not divorced from the law. This Comment argues that cultural sensitivity is diffused into broad categories of public interest, which factor into the permissible limitations analysis set forth by the ICCPR and other international human rights instruments. By calling it “cultural sensitivity,” this Comment argues that the term encompasses religious land use, symbols, and expression that cause certain conflict because of the content, location, or other context. Cultural sensitivity is not considered fully for its legal presence in a limitations analysis, but this Part argues that cultural sensitivity is indeed a factor in the limitations analysis. However, Part V later illustrates that while cultural sensitivity is helpful to understand the Park51 controversy, it is not dispositive. But cultural sensitivity has its place in the permissible limitations analysis on religious expression.

This Part defines and locates “cultural sensitivity” by first identifying its application in the permissible religious limitations framework. Second, this Part illustrates the role of cultural sensitivity in First Amendment jurisprudence of freedom of speech and analogizes the concept to the right of religious expression invoked in international human rights instruments and in the U.S. Constitution. Third, this Part presents an incident of religious land use and cultural sensitivity.

#### A. *What Is “Cultural Sensitivity”?*

International human rights norms have reflected the idea of cultural sensitivity. Cultural sensitivity is often infused in incidents and issues that inflame human passions, such as freedom of religion and other protected liberties. While the law does not often recognize sensitivity directly, this analysis illustrates how cultural sensitivity is either masked by other terminology in the law or contained as undertones within the law. The most effective way to explain sensitivity issues is through analogy and examples. This discussion should provide a backdrop for a comparable inquiry into Park51’s construction. First, it is necessary to locate cultural sensitivity within the international framework for permissible limitations.

##### 1. *Cultural Sensitivity and Religion*

The idea that different religious and ethnic groups can cause public outrage that rises to legal action is not novel. Clashes between religious groups, or between a religious group and the greater society, can create discomfort and inflame passions of individuals who might be offended by such practices.

Cultural sensitivity has been discussed in the context of tribal groups in the United States.<sup>195</sup> Sensitivity to cultural contexts has also been discussed with respect to balancing commitments to international human rights instruments with practices of other groups.<sup>196</sup>

International instruments that protect freedom of religion or belief, such as the ICCPR, recognize a broad protection for religious diversities.<sup>197</sup> When these rights are translated into religious manifestation and action, however, the state must ensure that the practices remain within boundaries “sensitive to the rights and freedoms of others, and consideration of public safety, order within the body politic, health of members of the community, and moral perceptions of a given time and place.”<sup>198</sup> While sensitivity is not an explicit factor, the concept is a tangible element of the ICCPR analysis for a proper state limitation. Cultural sensitivity is one factor to be considered in the general limitations of religious freedom. While there is no language of “cultural sensitivity” in the limitations clauses, this Comment argues that the factor falls in as an implicit quality of the analysis, especially in both “public order” and “proportionality.”<sup>199</sup> Indeed, the power of the U.S. Congress to limit religious freedom is implicit in itself.<sup>200</sup> This Comment locates cultural sensitivity legally within two categories.

First, cultural sensitivity factors into the public interest categories that justify state restriction on religious exercise. As discussed in Part II, international human rights instruments have identified public order and other grounds as legitimate state interests that can limit a manifestation of a religion. The grounds outlined in the ICCPR<sup>201</sup> are broad categories that have not been subject to strict interpretation,<sup>202</sup> and they contain a malleability that embraces sensitivity arguments. For example, Professor Gunn notes that even though “national security” is excluded as one of the grounds upon which a state may restrict religious expression, it would be easy for a state to characterize

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<sup>195</sup> See generally Marcia Yablon, *Property Rights and Sacred Sites: Federal Regulatory Responses to American Indian Religious Claims on Public Land*, 113 YALE L.J. 1623 (2004).

<sup>196</sup> See Tracy Ulltveit-Moe, *Amnesty International and Indigenous Rights: Congruence of Conflict?*, 31 AM. INDIAN L. REV. 717, 740 (2006–2007).

<sup>197</sup> See *supra* Part II.B.2.

<sup>198</sup> Van der Vyver, *supra* note 92, at 536.

<sup>199</sup> Gunn, *Permissible Limitations*, *supra* note 72, at 262–66.

<sup>200</sup> *Id.*

<sup>201</sup> The categories for permissible limitations are (1) public safety, (2) public order, (3) public health, (4) public morals, or (5) the rights and freedoms of others. ICCPR, *supra* note 13, art. 18.

<sup>202</sup> *Id.*

national security as “public order” or even “public safety.”<sup>203</sup> He explains that a state could take “extreme measures” in restricting a religious right with any plausible justification that is consistent with one of the interests.<sup>204</sup> In this sense, a state could prohibit an offensive religious practice on the grounds that it seeks to protect the public health or public order. Cultural sensitivity is implicit in the analysis of the grounds outlined, especially “public order.”<sup>205</sup> In addition, cultural sensitivity is an element that can threaten both public safety and public order, and sensitivity is infused in these categories.

Second, cultural sensitivity has a role in the requirements that the limitation must be necessary or proportional.<sup>206</sup> Proportionality analysis in the limitations clause jurisprudence assumes that the above interests the state seeks to prevent when imposing a restriction on religion are proportionate to the severity of the restriction.<sup>207</sup> Assessing the degree of religious controversies necessarily involves cultural sensitivity, and this sensitivity is an implicit consideration in whether the religious expression will influence factors such as public order. In acknowledging the difficulty of assessing proportionality in religious disputes, Professor Gunn notes examples of tough proportionality issues:

The more difficult cases are those where there are strongly competing interests of the state and of people seeking to manifest their religion. Should pacifists be permitted to distribute anti-war literature at the entrance to a military base when a country is at war? Should a state official be permitted to proselytize his employees during non-working hours? Should Hindus be permitted to hold a religious celebration in the city of Ayodhya, India, near the site where Hindu nationalists had earlier destroyed the Babri mosque if the celebration might provoke a communal clash? . . . Should state prison authorities in the United States and Canada be required to allow the building of ritual sweat lodges inside prisons for Native Americans? Should women wearing the face-covering *burqa* be required to remove it for state identification photos? May women wearing the *burqa* be prohibited from driving automobiles or testifying in court in [sic] against a criminal or before a jury?<sup>208</sup>

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<sup>203</sup> Gunn, *Permissible Limitations*, *supra* note 72, at 262–66. Professor Gunn analyzes the issues that arise under the limitations clause with respect to freedom of religion.

<sup>204</sup> *Id.* at 260.

<sup>205</sup> ICCPR, *supra* note 13, art. 18; Gunn, *Permissible Limitations*, *supra* note 72, at 262–66.

<sup>206</sup> See Gunn, *Permissible Limitations*, *supra* note 72, at 262–63.

<sup>207</sup> *Id.* at 263.

<sup>208</sup> *Id.*

These examples illustrate the infusion of cultural sensitivity into the proportionality analysis. For example, taking a conflict from above, whether Hindus should be permitted to hold a religious event near a site where Hindu nationalists had destroyed a mosque is a cultural sensitivity issue that factors into public order; the controversy involved inflamed passions over a sensitive land-use location that might threaten a public interest. Issues of public safety and public order are legitimate, but they are also propelled by heightened passions over temporal locations of religious expression.

## 2. *Freedom of Speech Analogy*

One reason why freedom of speech analogies are helpful for religious land-use controversies is that the permissible limitations analysis explained by Professor Gunn would also apply to freedom of speech. A freedom of speech analogy is also relevant to limitations on religious rights for several reasons. First, both freedom of speech and freedom of religion are First Amendment rights recognized under the ICCPR.<sup>209</sup> Article 18 of the ICCPR, which identifies the right of religion and allows for permissible limitations, uses comparable language to Article 19, which identifies freedom of speech and likewise allows for limitations.<sup>210</sup> Thus, freedom of speech joins nicely with a discussion on cultural sensitivity because the permissible limitations religious calculus is the same as the one on expression. However, this Comment analogizes with freedom of speech limitations because there is greater comparative jurisprudence on freedom of speech controversies. These freedom of speech limitations provide further traction for and elaboration on cultural sensitivity as a factor infused into permissible limitations. Second, freedom of speech is subject to even less regulation than freedom of religion, and thus the notion that cultural sensitivity may play a role in freedom of speech regulations means that it is even more likely to influence freedom of religion restrictions.

The First Amendment, in addition to protecting freedom of religion, also protects freedom of speech.<sup>211</sup> In fact, many scholars argue that the freedom of speech is the strongest protection afforded to any individual right under the

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<sup>209</sup> ICCPR, *supra* note 13, arts. 18, 19.

<sup>210</sup> Indeed, international regional human rights regimes have also placed limitations on freedom of speech. For example, the European Court of Human Rights upheld an Austrian Penal Code permitting government seizure of a film intended to offend Roman Catholics. *Otto-Preminger-Inst. v. Austria*, 19 Eur. Ct. H.R. 34, 57–58 (1995).

<sup>211</sup> U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

U.S. Constitution.<sup>212</sup> Freedom of speech serves a more integral role in the United States than in the rest of the world and in international human rights instruments. For example, Germany does not tolerate any form of “hate speech,” especially those related to Nazi symbols or the Holocaust,<sup>213</sup> while the United States is more averse to prohibiting hate speech. Although Article 19 of the ICCPR recognizes a protection for freedom of speech, similar to Article 18, there is also a limitation “[f]or the protection of national security or of public order, or of public health or morals.”<sup>214</sup> Article 20 of the same document requires a restriction on freedom of speech under circumstances that “constitute incitement to discrimination, hostility, or violence.”<sup>215</sup> When the U.S. Senate ratified the ICCPR, it did so with a reservation stating: “Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States.”<sup>216</sup>

Although the United States regulates freedom of speech in only a few instances, First Amendment law contains several categories of speech that are subject to ban or regulation.<sup>217</sup> Additionally, hate speech has been regulated in specific contexts, including on college campuses.<sup>218</sup> These prohibitions on hate speech provide further traction for a cultural sensitivity argument. The principles of protection of offensive speech and content neutrality explain why it is that in the United States “hate speech” receives constitutional protection, but the idea that speech can harm or inflict intentional emotional distress

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<sup>212</sup> See generally Robert E. Sedler, *An Essay on Freedom of Speech: The United States Versus the Rest of the World*, 2006 MICH. ST. L. REV. 377.

<sup>213</sup> *Id.*

<sup>214</sup> ICCPR, *supra* note 13, art. 19.

<sup>215</sup> *Id.* art. 20.

<sup>216</sup> Sedler, *supra* note 212, at 379.

<sup>217</sup> See Catharine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.U. L. REV. 793, 793 (1991).

<sup>218</sup> For a discussion of hate speech codes on college campuses, see Thomas A. Schweitzer, *Hate Speech on Campus and the First Amendment: Can They Be Reconciled?*, 27 CONN. L. REV. 493 (1995); Azhar Majeed, *Defying the Constitution: The Rise, Persistence, and Prevalence of Campus Speech Codes*, 7 GEO. J.L. & PUB. POL’Y 481, 484 (2009) (“Currently, however, speech codes are commonplace on college campuses, and they severely restrict the ability of students to participate in, and contribute to, a true marketplace of ideas. Johns Hopkins University, for instance, maintains a speech code prohibiting all ‘[r]ude, disrespectful behavior.’ Texas A&M University prohibits its students from violating others’ rights to ‘respect for personal feelings’ and ‘freedom from indignity of any type.’ Lewis-Clark State College defines ‘harassment’ to include any speech that ‘detains, embarrasses, or degrades’ another individual. Ohio State University maintains a housing policy which instructs students, ‘Do not joke about differences related to race, ethnicity, sexual orientation, gender, ability, socioeconomic background, etc.’ Rhode Island College states that it ‘will not tolerate actions or attitudes that threaten the welfare’ of other students.”).

suggests that there is an infusion of sensitivity in the law. Catharine MacKinnon, writing about group defamation and pornography, explained situations that create traumas:

I have come to think, [] that real atrocities provide the vocabulary of experience that animate the concept of group defamation, and some of the situations referred to are real to people, and some are not. Some are seen as threatening as well as offensive; others are regarded as perhaps insulting but comparatively harmless. The comparatively more real situations are the Holocaust against the Jews under Germany's Third Reich, the genocide of Native Americans, the slavery and segregation of Blacks in the United States and South Africa, and the internment and atomic bombing of the Japanese during World War II. The verbal and visual terms of vilification and denigration that mark these peak episodes, when reiterated, keep their specific traumas alive . . . .<sup>219</sup>

MacKinnon additionally expressed that pornography was defamation and discrimination, and, given the link to sexual violence and subordination, these sensitive images should not survive free speech protections.<sup>220</sup> Pornography is a First Amendment right that the state restricts in certain settings and across different environments.<sup>221</sup> Society keeps pornographic images away from schools, churches, and synagogues despite a First Amendment right to freedom of speech and expression. While international instruments seek to regulate the dissemination of these images more explicitly,<sup>222</sup> the United States does contain certain restrictions on freedom of speech.

Cultural sensitivity has a role in other current lawmaking and controversy. On January 8, 2011, a gunman shot U.S. Representative Gabrielle Giffords and eighteen other people outside a supermarket in Tuscon, Arizona.<sup>223</sup> Six of the victims died.<sup>224</sup> In the wake of the Arizona shooting, news surfaced that members of the Westboro Baptist Church agreed with the motives behind the

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<sup>219</sup> MacKinnon, *supra* note 217, at 793.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *See, e.g.*, 1981 Declaration, *supra* note 73 ("State parties . . . shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred.").

<sup>223</sup> Marc Lacey & David M. Herszenhom, *In Attack's Wake, Political Repercussions*, N.Y. TIMES, Jan. 9, 2011, at A1.

<sup>224</sup> *Id.*

gunfire and planned to protest outside the funerals of the victims.<sup>225</sup> Arizona legislators passed an emergency law that would ban picketing within 300 feet of the funeral or burial service.<sup>226</sup> The Arizona House of Representatives and Arizona State Senate passed the bill unanimously, and Governor Jan Brewer signed the legislation.<sup>227</sup> Governor Brewer explained that the purpose of the emergency law was to “assure that the victims of Saturday’s tragic shooting in Tucson will be laid to rest in peace with the full dignity and respect that they deserve.”<sup>228</sup> Other states have passed similar protest bans.<sup>229</sup> This legislation is a clear cultural sensitivity response and limitation on the First Amendment right of free speech.

The Westboro Baptist Church recently argued before the Supreme Court that the First Amendment protected the funeral demonstrations.<sup>230</sup> Attorneys for plaintiff argued that the Supreme Court should prohibit these funeral protests because “[w]e are talking about a funeral . . . . If context was ever going to matter, it has to matter for a funeral.”<sup>231</sup> On March 2, 2011, the Supreme Court held that the First Amendment protects protests at military funerals.<sup>232</sup> However, Chief Justice Roberts, writing for the majority, also noted that a proper response to hurtful protests is general laws creating buffer zones around funerals.<sup>233</sup> For example, forty-three states, including Maryland, where the protest took place, and the federal government, have laws creating buffer zones, which the Court indicated are legal.<sup>234</sup> Therefore, there are still instances where the state can impose distance regulations for rights that disrupt public order, highlighted by cultural sensitivity issues.

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<sup>225</sup> Naimah Jabali-Nash, *Westboro Baptist Church Target of New Law Banning Protest at Ariz. Shooting Victims’ Funerals*, CBS NEWS (Jan. 12, 2011), [http://www.cbsnews.com/8301-504083\\_162-20028271-504083.html](http://www.cbsnews.com/8301-504083_162-20028271-504083.html).

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*; see also, e.g., Jimmy Myers, *House Committee Advances 3 Funeral-Picketing Bills*, NEWS-PRESS (Feb. 15, 2011), <http://www.newspressnow.com/localnews/26881491/detail.html> (“The bills seek to protect the privacy of grieving families from disturbances like those caused by the Westboro protesters. The bill would also make it a class B misdemeanor to picket one hour before or as much as two hours after a funeral or memorial service, and within 300 feet of the service.”).

<sup>230</sup> Ariane De Vogue, *Westboro Baptist Church Comes to the Supreme Court: Are Military Protesters Protected by the First Amendment?*, ABC NEWS (Oct. 6, 2010), <http://abcnews.go.com/Politics/supreme-court-hears-arguments-protests-military-funerals-members/story?id=11812444>.

<sup>231</sup> *Id.*

<sup>232</sup> Adam Liptak, *Justices Rule for Protesters at Military Funerals*, N.Y. TIMES, Mar. 3, 2011, at A1.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

It was the protestors' proximity to the funeral as they exercised their right of free speech that elicited public feelings of disrespect, discomfort, and insensitivity regarding the dead. The State of Arizona chose to limit and regulate the First Amendment rights of the protestors in light of a prevailing state interest.<sup>235</sup> While there might be a constitutional issue with this type of regulation, the example of funeral regulations sheds light on the role that cultural sensitivity may have on the law. While a state may mask the sensitivity with labels such as "public order" or "safety," it is easy to discern that there are issues of cultural sensitivity that compel the state to regulate these rights.

Thus, the above free speech examples illustrate the legal restrictions and responses that may arise when words and images threaten respect and human dignity. These examples reveal that limitations infused with cultural sensitivity involve specific settings or contexts: hate speech, sexual images, and the right to protest outside of a funeral. Indeed, these limitations on freedom of speech provide support for cultural sensitivity restrictions on religious liberty. Additionally, these examples illustrate that cultural sensitivity is an implicit factor in the limitations analysis and represent difficult proportionality issues. In the Arizona shooting example above, the governor sought to ban the protestors under the veil of safety and public order, but it was also a response to the outrage over the presence of protestors at an event that was intended to respect the dead.<sup>236</sup> In the United States, claims of intentional infliction of emotional distress have restricted free speech;<sup>237</sup> this is a sensitivity argument that goes to safety. In Germany and elsewhere, hate speech and symbols that cause harm are likewise restricted,<sup>238</sup> partially due to a sensitivity argument. Now, this Comment turns to a religious cultural sensitivity example.

*B. Example of Religious Cultural Sensitivity: The Auschwitz Convent Example*

While the free speech analogies are invaluable to understanding how cultural sensitivity is part of the limitations process, an example of cultural sensitivity and religious land use provides a guide to understanding the difficult issues surrounding Park51. Many commentators and scholars have compared the current controversy of Park51 to the Auschwitz convent controversy. Both incidents highlight the issues surrounding limitations on

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<sup>235</sup> See Jabali-Nash, *supra* note 225.

<sup>236</sup> See *supra* Part IV.A.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

religious freedom in the context of land use and cultural sensitivity. This Subpart will argue that, while the Auschwitz convent provides some parallel issues, the differences between the Carmelite convent and Park51 undermine a strong analogy.

In 1984, Carmelite nuns, with approval from Polish authorities and Catholic Church officials, opened a convent at the site of Auschwitz.<sup>239</sup> The building that housed the nunnery had originally been a theater but was utilized during World War II to store the poison gas used in the Auschwitz–Birkenau crematoria.<sup>240</sup> The Auschwitz convent intersected with international law in important ways. There were international meetings in Geneva to resolve the issue.<sup>241</sup> Two top-level meetings in Geneva in 1986 and 1987, attended on the Catholic side by four cardinals and on the Jewish side by Western European leaders, led Catholics to create a new “center of information, education, meeting, and prayer outside the area of the Auschwitz-Birkenau camps.”<sup>242</sup> Cardinal Franciszek Macharski, who participated in the meetings, agreed that the nuns would be transferred to the new site within two years.<sup>243</sup> Primary sources surrounding the incident reveal the hostility and attempts at peace in the declaration adopted at the 1987 meeting of representatives from the Catholic Church and Jewish leaders in Geneva.<sup>244</sup> The declaration stated that there will be an establishment of an “information center” open to all faiths, but that there will be “no permanent Catholic place of worship on the site of the Auschwitz and Birkenau camps.”<sup>245</sup> The declaration’s rationale is particularly interesting in the context of religious sensitivity: the purpose of the document was “to ensure respect for the memory of the dead in the places where Nazi crimes were perpetrated.”<sup>246</sup>

The convent additionally intersected with international law because it violated the 1972 United Nations Convention Concerning the Protection of World Cultural and National Heritage, designed to preserve sites of

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<sup>239</sup> Carol Rittner & John K. Roth, *Introduction: Memory Offended*, in *MEMORY OFFENDED: THE AUSCHWITZ CONVENT CONTROVERSY 5* (Carol Rittner & John K. Roth eds., 1991).

<sup>240</sup> *Auschwitz Convent*, JEWISH VIRTUAL LIBR., [http://jewishvirtuallibrary.org/jsource/judaica/ejud\\_0002\\_0002\\_0\\_01611.html](http://jewishvirtuallibrary.org/jsource/judaica/ejud_0002_0002_0_01611.html) (last visited Oct. 7, 2011).

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> See *id.* For an English translation of the declaration, see *The Carmelite Convent at Auschwitz: Statements February 1987 to December 1989*, in *MEMORY OFFENDED*, *supra* note 239, at 211.

<sup>245</sup> See *The Carmelite Convent at Auschwitz*, *supra* note 244, at 211.

<sup>246</sup> *Id.*

outstanding cultural and national importance.<sup>247</sup> Auschwitz, including the church at Birkenau, was designated as such a site in 1979. As the July 22, 1989 deadline for the removal of the convent approached, tensions continued to rise. The Board of Deputies of British Jews asked for prayers to be recited in all synagogues in Britain for the removal of the convent.<sup>248</sup> The situation continued to escalate. American Rabbi Avraham Weiss and six others dressed in concentration camp clothes protested outside the convent, blew the shofar,<sup>249</sup> and screamed “Nazi antisemites.”<sup>250</sup> Polish workmen responded by pouring paint and water on the protesters and physically removing them from the former concentration camp.<sup>251</sup> Later, 300 European Jewish students protested to the sound of the shofar.<sup>252</sup> Cardinal Macharski then announced both that the Geneva agreement was canceled and that the nuns would remain at the Auschwitz site.<sup>253</sup> The nuns refused to leave the building, and departed only in the summer of 1993 following a letter from the Pope and pressure from the Polish Bishops’ Conference.<sup>254</sup>

For Jewish people, the Carmelite convent and tall cross in the garden, although well intentioned, had been “wrong-minded, insensitive, and an intrusive offense.”<sup>255</sup> Although the Carmelite nuns were not responsible for the Holocaust, the limitation of their religious land use on the site of Auschwitz stemmed from a brand of “cultural sensitivity” that involved a “respect for the dead” and desire to quell hostility for public order in Poland. Further, it did not matter that some of the Holocaust victims included members of the Catholic Church, the very group that experienced limitations on their religious freedom to build a convent on Auschwitz.<sup>256</sup>

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<sup>247</sup> See Avi Weiss, *The Future of Auschwitz: Raising a Voice of Moral Conscience Against the Christianization of Auschwitz-Birkenau*, 20 CARDOZO L. REV. 671, 672 (1998).

<sup>248</sup> *Auschwitz Convent*, *supra* note 240.

<sup>249</sup> “[T]he shofar is featured most prominently in the Rosh Hashanah morning services. It is considered a commandment to hear the shofar blown.” *Shofar*, JEWISH VIRTUAL LIBR., <http://www.jewishvirtuallibrary.org/jsource/Judaism/shofar.html>. (last visited Oct. 7, 2011).

<sup>250</sup> *Auschwitz Convent*, *supra* note 240.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* Further, the 1987 Geneva Agreement and the 1972 UN Convention are violated not only by the Birkenau church, but also by the twenty-four-foot cross still standing alongside the old convent building at Auschwitz. See Weiss, *supra* note 247, at 672.

<sup>255</sup> See Rittner & Roth, *supra* note 239, at 5.

<sup>256</sup> *Id.*

Here, the common issue of permissible limitations on freedom with respect to land use in certain settings or circumstances (cultural sensitivity) is clear. The Auschwitz convent controversy is a compelling example of high-pressure diplomacy leading to the abandonment of a religious building that inflamed the public. The controversy can be tied more directly to the formal limitations on religious freedom recognized in the ICCPR and other international human rights instruments, as well as the Siracusa Principles that elaborated on the ICCPR. As discussed earlier, the ICCPR provides that “[e]veryone shall have the right to freedom of thought, conscience, and religion.”<sup>257</sup> The ICCPR also contains language that identifies the circumstances under which the state may properly restrict the right:<sup>258</sup> “when necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”<sup>259</sup> The proportionality and necessity must be weighed to determine if one of the categories of limitation will allow any regulation.<sup>260</sup> Here, there is little doubt that the placement of the Auschwitz convent engendered feelings of outrage, highlighted by cultural sensitivity. The convent was housed on the actual site of the concentration camp and in the actual building that stored the gas used in the genocide. Although there was diplomatic intervention before any state action, it is plausible that the convent could have been weighed as an issue of public order or public safety, especially considering the subsequent protests and clashes.<sup>261</sup>

The next Part addresses the Park51 controversy and a comparison to cultural sensitivity conflicts.

## V. THE PARK51 MOSQUE

The above discussion has traced the limitations analysis on religious freedom through an international human rights framework,<sup>262</sup> explained the relationship between the international norms and U.S. domestic law,<sup>263</sup> and addressed the key “cultural sensitivity” arguments surrounding the Park51 mosque.<sup>264</sup> This Part applies that detailed examination to Park51. While the

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<sup>257</sup> ICCPR, *supra* note 13, art. 18.

<sup>258</sup> Gunn, *Permissible Scope*, *supra* note 10, at xi.

<sup>259</sup> ICCPR, *supra* note 13, art. 18.

<sup>260</sup> Gunn, *Permissible Limitations*, *supra* note 72, at 254.

<sup>261</sup> *See* ICCPR, *supra* note 13, art. 18. Article 18 of the ICCPR allows restrictions in the name of public safety and order. *Id.*

<sup>262</sup> *See supra* Part II.

<sup>263</sup> *See supra* Part III.

<sup>264</sup> *See supra* Part IV.

mosque will be constructed in New York, Park51 has both attracted the international eye and triggered issues of international human rights. Although the United States has enforced these religious rights and boundaries of permissible limitations through land-use statutes such as RLUIPA,<sup>265</sup> international law provides a helpful lens through which to refine, understand, and expand the treatment of religious conflicts in the United States.<sup>266</sup>

The issue of the legal scope of Park51 is whether the state may properly limit the right of a Muslim community to build a worship center near Ground Zero. The permissible limitations on religious exercise go to the heart of the Park51 mosque. Park51 may not be restricted under an international human rights framework, especially in light of the antidiscrimination mandates that prevent the state from targeting a specific religious group, such as the Muslim population.<sup>267</sup> Importantly, because the mosque is in New York, the United States may not place limitations on Park51 because of RLUIPA, which reflects the mandates of the ICCPR and other international human rights instruments.<sup>268</sup> The United States, however, should use international human rights to maintain a strict scrutiny regime as construction on the mosque begins this year. Further, the delicate nature of Park51, a phenomenon this Comment has termed “cultural sensitivity,” is a factor diffused into the broad categories of public interest, such as public order or morals, and proportionality.<sup>269</sup> While it is clear that the mosque engenders the cultural sensitivity that is an implicit part of the limitations analysis, the cultural sensitivity aimed at the Park51 mosque does not rise to the level that justifies a permissible limitation.<sup>270</sup>

Thus, the short answer is that state restriction against Park51 is *impermissible*, but that answer is riddled with complexities that shed light into the general grounds for permissible limitations of religious expression.

#### A. *Permissible Limitations on Park51*

International human rights norms, as outlined earlier,<sup>271</sup> are helpful for a review of the permissible limitations on religious expression.<sup>272</sup> International

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<sup>265</sup> See *supra* Part III.A.

<sup>266</sup> WITTE & NICHOLS, *supra* note 44, at 270.

<sup>267</sup> See *supra* Parts II.C, III.B.

<sup>268</sup> See *supra* Part III.A.

<sup>269</sup> See *supra* Part IV.A.1.

<sup>270</sup> See *supra* Part IV.

<sup>271</sup> See *supra* Part II.B.

<sup>272</sup> See *supra* Part I.B.

norms are also important to ensure that the United States maintains a high barrier to limitations and regulations on religious liberties, especially in light of widespread discrimination against Muslim communities.<sup>273</sup> The United States should look to these international standards in evaluating religious liberty controversies such as Park51 to prevent discrimination and to ensure that the law sets a high bar for any government action that would impose restrictions on religious liberty.

### *1. Right To Build a Worship Center*

A limitations analysis for religious liberties, such as the right to build Park51, is necessary only if there is a protected right. Prior to an analysis of permissible limitations on Park51, it is necessary to establish that the right to build and maintain a mosque as a religious house of worship is a protected religious liberty.<sup>274</sup> The first step in the process involves identifying the right. The second step asks whether the state may permissibly restrict or regulate that right.<sup>275</sup>

Under international law, the proposed construction of Park51 is part of a protected right under freedom of religion: the right to build a religious worship center.<sup>276</sup> International human rights instruments explicitly identify the right to build and maintain a place of worship as a religious right.<sup>277</sup> As discussed in Part II, for example, the 1981 Declaration provides enumerated categories of religious activities protected under “freedom of thought, conscience, and religion,” including the right “to worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes.”<sup>278</sup> Further, the reports of the Special Rapporteur to the United Nations, and the

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<sup>273</sup> See, e.g., Robbie Brown, *Arson Cases at Mosque in Tennessee Spreads Fear*, N.Y. TIMES, Aug. 31, 2010, at A10 (“After a suspected arson and reports of gunshots at an Islamic center in Tennessee over the weekend, nearby mosques have hired security guards, installed surveillance cameras and requested the presence of federal agents at prayer services.”); Steven Greenhouse, *Offended Muslims Speak Up*, N.Y. TIMES, Sept. 24, 2010, at B1 (“At a time of growing tensions involving Muslims in the United States, a record number of Muslim workers are complaining of employment discrimination, from co-workers calling them ‘terrorist’ or ‘Osama’ to employers barring them from wearing head scarves or taking prayer breaks.”).

<sup>274</sup> See *supra* Part II.A.

<sup>275</sup> Gunn, *Permissible Limitations*, *supra* note 72, at 254–56; Gunn, *Permissible Scope*, *supra* note 10, at x.

<sup>276</sup> See *supra* Part II.A.

<sup>277</sup> International human rights instruments often provide a direct right to build a religious worship center. The 1989 Vienna Concluding Document is an international instrument that also contains the basic religious rights provisions relevant for the Park51 analysis: the “right of religious communities to establish and maintain freely accessible places of worship or assembly.” Vienna Concluding Document, *supra* note 75, princ. 16.

<sup>278</sup> 1981 Declaration, *supra* note 73, art. 6.

U.S. State Department's International Religious Freedom reports all identify religious worship centers as a religious right.<sup>279</sup> For example, one report by the Special Rapporteur identified the limitation on the right to build a mosque as a violation of freedom of religion when the Muslim religious minority in Slovenia faced illegal restrictions on its right to build a mosque.<sup>280</sup> Thus, the right to build a place of worship is clearly recognized as part of freedom of religion under international law.

There is no doubt that Park51 is a place of worship. A community of "downtown Muslim Americans," a religious minority in the United States, has come together to build Park51 as a "sanctuary that celebrates the best qualities of [the Muslim] faith."<sup>281</sup> Park51 will clearly be a worship center because the proposal includes a prayer space that will accommodate approximately 2,000 people and "will offer a range of services and religious programming, including Qur'an classes, Qur'anic recitation [tajwid], Islamic sciences, Arabic, and others."<sup>282</sup> Additionally, the prayer space will be open for daily prayers.<sup>283</sup> Thus Park51, in its capacity as a worship center, falls within the boundaries of protected religious liberties. The next discussion addresses the permissible limitations on the Park51 mosque.

## 2. *The Park51 Mosque and the ICCPR*

Using the international framework discussed in Part II,<sup>284</sup> it is clear that limitations on the construction of Park51 would violate international human rights law. First, and most importantly because the United States ratified the ICCPR,<sup>285</sup> limitations on the construction of Park51 are illegal under the ICCPR. As previously stated, the ICCPR provides for the circumstances under which a state may restrict a religious activity,<sup>286</sup> such as in the case of the Park51 controversy. Essentially, Park51 may be restricted when the limitations are necessary to protect public safety, public order, health, morals, or the fundamental rights of others,<sup>287</sup> but there is also a proportionality requirement

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<sup>279</sup> See *supra* Part II.A.

<sup>280</sup> Special Rapporteur on Freedom of Religion or Belief, *supra* note 79.

<sup>281</sup> *Our Story*, PARK51 COMMUNITY CENTER, <http://park51.org/our-story/> (last visited Feb. 25, 2011).

<sup>282</sup> *About*, PRAYERSPACE, <http://www.prayerspacenyc.org> (last visited Feb. 25, 2011).

<sup>283</sup> *Id.*

<sup>284</sup> See *supra* Part II.B.

<sup>285</sup> BEDERMAN, *supra* note 64, at 101.

<sup>286</sup> See *supra* Part II.B.3; ICCPR, *supra* note 13, art. 18.

<sup>287</sup> Van der Vyver, *supra* note 92, at 511.

that ensures a high threshold to such restrictions on the mosque.<sup>288</sup> Any permissible limitation to protect public safety or order, health, or morals or fundamental rights of others must also be proportional to the limitation imposed on the religious group,<sup>289</sup> in this case, the Muslim community of Park51.

Thus, if New York seeks to limit or regulate the construction of Park51, it must first identify the permissible interest served by restricting the construction of the mosque. Secondly, any restriction on Park51 must fulfill the proportionality and necessity requirements outlined by the Siracusa Principles.<sup>290</sup> The public interest fulfilled by regulating Park51 must be at least equal to the usurped right of the New York Muslim community to build and maintain a house of worship. The potential restriction of Park51 is, of course, one of the tougher proportionality issues outlined by Professor Gunn, and is similar to his example of a Hindu religious celebration on the site where Hindu nationalists had previously burned a mosque.<sup>291</sup> The sponsors of Park51 plan to begin construction on private property, in a space that formerly served as a retail store, the Burlington Coat Factory.<sup>292</sup> The proposed construction does not conflict with zoning regulations and neighborhood codes that serve to uphold broad interests of public order, nor does it violate any historic preservation guidelines.<sup>293</sup> In fact, a community board and the National Preservation Society support the colossal demolition and construction project that will ultimately culminate in Park51.<sup>294</sup> Given that the mosque has already survived codes and regulations that help maintain public order and safety, it is difficult to imagine the proportionality analysis weighing in favor of a permissible limitation.

As construction begins on the Park51 mosque, however, additional codes will follow with respect to building ordinances. It is imperative that Park51 prevail against any religious discrimination masked as a regulation. One commentator noted that “[o]pponents of new mosque construction often cite factors other than religion, like parking and traffic, when houses of worship

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<sup>288</sup> Gunn, *Permissible Limitations*, *supra* note 72, at 261–62.

<sup>289</sup> Van der Vyver, *supra* note 92, at 511–12; Gunn, *Permissible Limitations*, *supra* note 72, at 262.

<sup>290</sup> Siracusa Principles, *supra* note 108.

<sup>291</sup> *See supra* Part IV.A.1.

<sup>292</sup> *See supra* Part I.A. It is relevant that the proposed mosque is on private property because secular private religious expression and speech enjoy a greater protection than displays in a public forum or property. *See, e.g.*, *Capitol Sq. Review Bd. v. Pinette*, 515 U.S. 753 (1995).

<sup>293</sup> *See supra* Part I.A.

<sup>294</sup> *See id.*; Salazar, *supra* note 1.

expand . . . [b]ut religion often remains part of the mix.”<sup>295</sup> For example, William Rench, a pastor of a Calvary Baptist Church in Temecula, California, cited land-use issues in a statement on a mosque protest in California.<sup>296</sup> He said his “primary concern” was that the “property is wholly inadequate and unsuited for the proposed 25,000-square-foot Islamic worship center.”<sup>297</sup> While land-use concerns are valid issues of public order, Rench infused religious discrimination with his land-use arguments: “It seems logical to me that we would be opposed to Islam based on its fundamental teachings and on documented stories of the terror that radical Islam promotes.”<sup>298</sup> A limitation rooted in religious discrimination is illegal under the ICCPR, and as further issues arise surrounding the construction of Park51, the state would be wise to view facially neutral regulations with skepticism.

Indeed, the grounds for excluding the mosque appear to stem from both its proximity to the location of Ground Zero and its function as a house of worship for the Muslim community.<sup>299</sup> The ICCPR explicitly forbids state limitations aimed at only one group of individuals.<sup>300</sup> It is highly doubtful that there would be such controversy if Park51 were a church or a synagogue. Additionally, while the ICCPR allows for restriction of religion in times of national security or “public emergency,” such as terrorism threats, the measures taken cannot discriminate against only the Muslim community.<sup>301</sup> Thus, the state cannot restrict Park51 merely because a group of radical Muslim terrorists were responsible for the attacks on the World Trade Center in 2001, especially because the sponsors of Park51 are not connected with al Qaeda.

### 3. *The Park51 Mosque and Subsequent Human Rights Instruments*

While the above discussion reveals that the ICCPR clearly prohibits a restriction of Park51, the support for the mosque does not stop there. Later human rights instruments further support the continued construction of Park51 and shield the mosque from impermissible state limitations.<sup>302</sup> The

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<sup>295</sup> Schwartz, *supra* note 31.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> *See supra* Part I.A.

<sup>300</sup> *See supra* Part II.B.2.

<sup>301</sup> Van der Vyver, *supra* note 92, at 513 (“Emergency regulations applicable to, for example, only the Muslim community would, therefore, violate the norm enunciated in this provision [of the ICCPR].”).

<sup>302</sup> *See supra* Part II.B.3.

international human rights instruments following the ICCPR also mandate that states actively prevent discrimination; mere omission is not sufficient. The 1981 Declaration is relevant to the Park51 mosque because it recognizes a right “to establish and maintain places” for worship; this is a specifically enumerated guarantee that shields Park51 as a matter of international human rights law.<sup>303</sup> While the 1981 Declaration also allows states to impose limitations in the interest of factors such as health, safety, or public order, the more elaborate antidiscrimination clauses would prohibit any restriction on the Park51 mosque.<sup>304</sup> The 1981 Declaration would mandate that the United States not only refrain from “any distinction, exclusion, [or] restriction” of the Muslim community’s right to build Park51, but also affirmatively “take effective measures” to prevent discrimination that might interfere with the construction of the mosque.<sup>305</sup> Although the Park51 mosque has a long road ahead, New York’s approval of preliminary barriers, such as zoning laws, building codes, and historical preservation regulations are in line with the 1981 Declaration.<sup>306</sup>

Park51 has survived some of the initial state barriers and restrictions, but it is imperative that the state embrace and utilize “measures” to prevent future obstacles and discrimination as construction begins on the mosque. The reach of the 1981 Declaration should not be underestimated. The 1981 Declaration mandates that these measures effectively prevent potential barriers aimed at subverting the proposed mosque “in all fields of civil, economic, political, social and cultural life.”<sup>307</sup> These antidiscrimination mandates apply to discrimination by “any State, institution, group of persons, or person on grounds of religion or other beliefs.”<sup>308</sup> This is an incredibly broad protection.

For example, Park51 has applied for a federal grant called the Lower Manhattan Development Corporation (“LMDC”) for “community or cultural facilities.”<sup>309</sup> The text of the 1981 Declaration arguably covers discriminatory treatment in government grants because it covers fields of civil, economic, and cultural life.<sup>310</sup> Clearly the federal government would qualify as a “[s]tate,

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<sup>303</sup> See *supra* Part II.B.3; 1981 Declaration, *supra* note 73, art. 6.

<sup>304</sup> See *supra* Part II.B.3.

<sup>305</sup> See *supra* Part II.B.3.

<sup>306</sup> See *supra* Part II.B.3.

<sup>307</sup> 1981 Declaration, *supra* note 73, art. 4.1.

<sup>308</sup> *Id.* art. 2.

<sup>309</sup> Katrina Trinko, *Park51 Asks for Federal Funding*, NAT’L REV. ONLINE (Nov. 23, 2010, 2:52 PM), <http://www.nationalreview.com/comer/253836/park51-asks-federal-funding-katrina-trinko>.

<sup>310</sup> 1981 Declaration, *supra* note 73, art. 4.1.

institution, group of persons, or person.”<sup>311</sup> Because LMDC was founded to revitalize the community after the attacks on the World Trade Center, Park51’s application for federal funding has been controversial.<sup>312</sup> However, Park51 will have a “community center, which will include a gym, a pool, a day care center, a pre-K, a culinary institute, tech classes, an amphitheater, and a 9/11 Memorial.”<sup>313</sup> Despite sensitivity issues, the community center is within the zone of eligibility for the grant and should receive fair consideration, unless no religious entity is eligible for the grant. At the time of this writing, the decisions on the grant have not been completed, but the 1981 Declaration would prohibit any discrimination with respect to Park51’s application because the sponsors are part of the Muslim community, especially given the grant’s “cultural” purpose.<sup>314</sup> While the LMDC grant is not a state limitation per se, it is relevant to the idea that unfairly denying the approval of regulations and building codes for Park51 is similarly an impermissible limitation under the 1981 Declaration. It is also relevant because the 1981 Declaration instructs states to take affirmative measures to combat intolerance<sup>315</sup>—even with respect to government decisions that might unfairly consider an application for federal money.

The last two international agreements discussed in conjunction with the international framework are the Vienna Concluding Document and the 1992 Minorities Declaration.<sup>316</sup> These two sets of international human rights norms crystallize the above discussion of Park51 under the ICCPR and the 1981 Declaration. The Vienna Concluding Document also includes religious rights that directly protect the right of religious communities to assemble and build a place of worship.<sup>317</sup> The Vienna Concluding Document echoes all of the requirements of the 1981 Declaration and similarly carves out a right to build and maintain a house of worship, such as the mosque within Park51.<sup>318</sup> Accordingly, the Vienna Concluding Document lends further support to the analysis of Park51 under the 1981 Declaration. Lastly, the 1992 Minorities Declaration refines the international framework by addressing the issue of self-

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<sup>311</sup> See *id.* at art. 2.

<sup>312</sup> Trinko, *supra* note 309.

<sup>313</sup> *Park51 LMDC Funding Request*, PARK51 COMMUNITY CENTER, <http://park51.org/2010/11/park51-lmdc-funding-request/> (last visited Feb. 25, 2011).

<sup>314</sup> See *id.*

<sup>315</sup> 1981 Declaration, *supra* note 73, art. 4.

<sup>316</sup> See *supra* Part II.B.3.

<sup>317</sup> See *supra* Part II.B.3.

<sup>318</sup> See *supra* Part II.B.3.

determination.<sup>319</sup> A religious community, such as the Muslim community of Park51, should be able to practice its religion without limitations imposed by the state.<sup>320</sup> The 1992 Minorities Declaration is particularly relevant because the Muslim community is a marginalized, minority religion within the United States.

#### 4. *International Law and U.S. Domestic Law*

Additionally, U.S. domestic law embraces international human rights norms through RLUIPA, which parallels the proportionality and necessity requirements of the ICCPR.<sup>321</sup> As discussed above, RLUIPA has become a substitute for the strict scrutiny regime, which was replaced by an insufficient heightened rational review after the *Smith* decision in 1990.<sup>322</sup> Yet, there are still concerns about widespread religious discrimination in the United States, such as masking prejudice under the guise of zoning laws or traffic safety codes.<sup>323</sup> In reference to the high bar set by RLUIPA for any government restriction on a religious institution, one commentator noted that “[d]espite the clear advantage that [RLUIPA] gives to religious institutions, disputes over the construction of mosques have emerged around the country.”<sup>324</sup> For this reason, it is imperative that the United States fully embrace a strict scrutiny regime contemplated by the proportionality and necessity requirements in the ICCPR, the Siracusa Principles, and related international human rights documents when dealing with potential regulations of Park51.

Potential restrictions on Park51 appear to be aimed at the fact that this particular house of worship is a mosque located two blocks from the location of the World Trade Center site. However, as contemplated by ICCPR and the subsequent human rights instruments, a limitation that prevents the sponsors of Park51 from going forward with construction would be discriminatory. This is the type of limitation that is expressly prohibited. Amidst apparent discrimination of mosques all over the country,<sup>325</sup> Park51 has survived zoning laws. As discussed above, a community board passed a resolution in favor of the project<sup>326</sup> and the Park51 sponsors have received approval to demolish the

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<sup>319</sup> See *supra* Part II.B.3.

<sup>320</sup> See *supra* Part II.B.3.

<sup>321</sup> See *supra* Part III.A.

<sup>322</sup> See *supra* Part III.A.

<sup>323</sup> See Schwartz, *supra* note 31.

<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> Salazar, *supra* note 1.

building to clear the space for the construction of Park51.<sup>327</sup> When asked about his opinion on the Park51 center, New York City Mayor Michael Bloomberg said that “[w]e in New York are Jews and Christians and Muslims . . . each with an equal right to worship and pray where we choose,” and that “[t]here is nowhere in the five boroughs that is off limits to any religion.”<sup>328</sup> International human rights instruments would commend these decisions. As the Park51 construction begins and the issue evolves, it is necessary that the state maintain this view despite potential backlash and protest, and especially amidst facially neutral laws that are beyond RLUIPA’s scope.

### *B. Cultural Sensitivity and Park51*

As discussed above, this Comment has addressed a cultural sensitivity argument in part because politicians and commentators described this controversy as a “sensitivity” issue.<sup>329</sup> Cultural sensitivity is often overlooked as a mere emotional argument as opposed to being viewed as a relevant legal factor. Indeed, cultural sensitivity both needs to be and is part of the limitations analysis, as also reflected in First Amendment jurisprudence. This type of cultural sensitivity is often embedded within broad categories of public interest and public order and is part of the international legal framework for religious limitations.<sup>330</sup> Ultimately, while cultural sensitivity is helpful in determining permissible limitations on religious expression, it is not dispositive in the case of Park51.

The Carmelite convent controversy is a striking example of pervasive cultural sensitivity that resulted in international, high-pressure diplomacy to remove the convent.<sup>331</sup> Similarities between the proposed location of the Park51 mosque and the location of the convent have led commentators to call for the removal of the mosque.<sup>332</sup> Indeed, both the convent and the mosque involve religious land use on or near the site where a horrific tragedy caused mass death.<sup>333</sup> The link between the historical example of the Auschwitz controversy and the current Park51 controversy reveals the infusion of cultural sensitivity in religious land use. Cultural sensitivity factors into broad

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<sup>327</sup> Ghosh, *supra* note 25.

<sup>328</sup> ‘Ground Zero Mosque’: *Who’s For and Against*, WEEK (Sept. 1, 2010, 9:18 AM), <http://theweek.com/article/index/205661/ground-zero-mosque-whos-for-and-against>.

<sup>329</sup> *See supra* Part I.B.

<sup>330</sup> *See supra* Parts II.B, IV.A.

<sup>331</sup> *See supra* Part IV.B.

<sup>332</sup> *See supra* Part IV.B.

<sup>333</sup> *See supra* Part IV.B.

categories that justify government limitations and is a force in the law that deserves attention, especially when the key opposition to religious right involves a “sensitivity” argument.<sup>334</sup> However, there are also important differences between Park51 and the Carmelite convent. These distinctions ultimately account for the reasons why a cultural sensitivity argument can prevail under the Auschwitz controversy but fail under the current mosque construction in New York.

First, there is a difference between the locations of the religious buildings in relation to the sensitive site. In the convent controversy, the building the nuns used was actually part of the Auschwitz concentration camp and utilized for storage of poisonous gas.<sup>335</sup> By contrast, the proposed construction of Park51 is located two blocks from the location of Ground Zero, on private property in a building formerly occupied by the Burlington Coat Factory, and within “a highly congested urban neighborhood where its presence will be barely noticeable.”<sup>336</sup> In the Auschwitz example, the Jewish community was outraged because the convent was located on the actual grounds of the concentration camp. Yet Park51 will not be on the site of Ground Zero.

A mosque, however, could likewise detract from the memory of the dead and the message of the World Trade Center site. Ground Zero is also “a sacred place . . . a mass grave, the site of a terrible atrocity.”<sup>337</sup> One writer notes that “even those who favor this new Islamic Center surely can appreciate why some American feelings are rubbed raw by the idea of a mosque at a place where Islamic terrorists killed more than 2,700 innocent people.”<sup>338</sup> However, after the Pope, pursuant to the Geneva meetings, removed the convent to only 600 yards away from Auschwitz, the Jewish community accepted that move;<sup>339</sup> 600 yards away from the concentration camp is a similar distance to two blocks away from Ground Zero. The issue for the Jewish community was that the convent was located on the actual concentration camp.<sup>340</sup> In the case of Park51, the founders never intended for the mosque to be on the Ground Zero site.

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<sup>334</sup> See *supra* Part IV.

<sup>335</sup> Hendrick Hertzberg, *Cordoba and the Carmelites*, NEW YORKER (Aug. 13, 2010), <http://www.newyorker.com/online/blogs/hendrikhertzberg/2010/08/cordoba-and-the-carmelites.html>.

<sup>336</sup> Eric H. Yoffie, *Auschwitz and the Mosque Near Ground Zero: The Problems with This Analogy*, HUFFINGTON POST (Sept. 28, 2010), [http://www.huffingtonpost.com/rabbi-eric-h-yoffie/the-mosque-auschwitz-and-\\_b\\_739756.html](http://www.huffingtonpost.com/rabbi-eric-h-yoffie/the-mosque-auschwitz-and-_b_739756.html).

<sup>337</sup> *Id.*

<sup>338</sup> William McGurn, *WTC Mosque, Meet the Auschwitz Nuns*, WALL ST. J., Aug. 3, 2010, at A15.

<sup>339</sup> Yoffie, *supra* note 336.

<sup>340</sup> *Id.*

While two and a half blocks is still an uncomfortable distance, the physical location weighs against a cultural sensitivity application to the Park51 mosque.

Further, there have been cases in other countries where the location has been more severe, but the plans have been allowed to proceed. For example, the Simon Wiesenthal Center has been accused of intolerance itself for building its Jerusalem Museum of Tolerance on land that was once a Muslim cemetery.<sup>341</sup> The Wiesenthal Center's right to build there has been upheld in Israeli courts.<sup>342</sup> The Wiesenthal Center announced its plan for a large museum in 2004, prompting Palestinians to take the issue to the Israeli high court. In October 2008, the court ruled that the project could proceed. There are currently petitions to the UN Security Council on the issue.<sup>343</sup>

Second, the ideology behind the placement of the convent at Auschwitz and the planned location of the Park51 mosque diverge in important ways. The Carmelite nunnery was solely a Catholic institution, which included none of the interfaith aspects and community activities planned for the mosque. In fact, part of the agreement reached at Geneva concerning the Auschwitz controversy resulted in a new "center of information, education, meeting, and prayer outside the area of the Auschwitz-Birkenau camps."<sup>344</sup> Thus, the international agreement resulted in a building that resonates with some of the proposed purposes behind the Park51 project. Additionally, the founders of the Carmelite convent explained that the convent would serve as "a spiritual fortress and a guarantee of the conversion of strayed brothers from our countries as well as proof of our desire to erase outrages so often done to the Vicar of Christ."<sup>345</sup> The papacy that failed to condemn Nazi Germany and the genocide at Auschwitz is the same papacy that exercised control over the Carmelite convent.<sup>346</sup> There is no similar or institutional connection between the sponsors of the Park51 mosque and the al Qaeda terrorists responsible for the attacks on the World Trade Center.

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<sup>341</sup> Adam Dickter, *Wiesenthal Center Opposes Ground Zero Mosque*, JEWISH WK. (Aug. 6, 2010), [http://www.thejewishweek.com/news/breaking\\_news/wiesenthal\\_center\\_opposes\\_ground\\_zero\\_mosque](http://www.thejewishweek.com/news/breaking_news/wiesenthal_center_opposes_ground_zero_mosque); see also *Mamilla Cemetery in Jerusalem*, CENTER FOR CONST. RTS., <http://ccrjustice.org/ourcases/current-cases/mamilla> (last visited Oct. 7, 2011).

<sup>342</sup> Dickter, *supra* note 341.

<sup>343</sup> *Mamilla Cemetery in Jerusalem*, *supra* note 341.

<sup>344</sup> *Auschwitz*, *supra* note 240.

<sup>345</sup> Hertzberg, *supra* note 335.

<sup>346</sup> *Id.*

The relatively short lapse of time between the terrorist attacks on the World Trade Center and the proposed construction of the Park51 mosque also involves cultural sensitivity. When the Catholic Church authorized the Carmelite nunnery, it was nearly forty years after the Holocaust.<sup>347</sup> The attacks of September 11, 2001, were only ten years ago and the memory is still painfully fresh in the minds of many Americans who live in New York and around the world. One commentator noted, “[i]f feelings in Auschwitz were raw after nearly half a century, it’s not hard to see why they would remain raw at Ground Zero after less than a decade.”<sup>348</sup>

It is difficult to reconcile the severity of the Auschwitz convent with the location of Park51. However, the sensitivity might be equally strong for many Americans. While the Pope ultimately removed the convent under diplomatic pressure, the convent faced similar issues involving public order, protests, and potential regulation by Poland. The example illustrates how sensitivity is an implicit consideration in whether a religious act might threaten public order and public safety, such that a government can justify a restriction on such an act.<sup>349</sup> However, in the case of Park51, the sensitivity is present, but does not rise to the level that justifies government restriction based on the limitations analysis.

#### CONCLUSION

The thrust of this Comment is a review of religious land-use issues through an international framework that includes cultural sensitivity. This Comment presents an international framework on permissible limitations on religious freedom, applies this discussion to U.S. domestic law, and argues that cultural sensitivity is part of the limitations analysis. In this regard, this review argues two unique angles: (1) that the United States should look to international human rights norms, which some domestic land-use statutes already embody, when dealing with questions of religious rights and limitations; and (2) that the cultural sensitivity arguments have not been considered fully as part of a legal framework, and this brand of sensitivity is indeed a factor in the limitations analysis under international human rights law. Part V of this Comment applies this methodology to the current controversy surrounding the construction of the Park51 mosque near Ground Zero. Given the inflamed passions that arose

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<sup>347</sup> See *supra* Part IV.B.

<sup>348</sup> McGum, *supra* note 338.

<sup>349</sup> See *supra* Part IV.B.

both in support and opposition when news of Park51 became public,<sup>350</sup> this particular mosque controversy became the perfect test case for the international law and cultural sensitivity framework outlined in Parts II–IV.

The result of this analysis is that state limitations of the Park51 mosque are illegal under international human rights law.<sup>351</sup> After presenting background information on the controversy, this Comment proceeds through four dominant sections that articulate how international human rights law is important in this controversy and why a restriction on Park51 is illegal. First, the international framework section reveals that the ICCPR and subsequent human rights documents allow for limitations to protect broad interests such as public order. The proportionality requirement, however, weighs against restricting Park51. Indeed, Park51 has already survived some of the initial barriers, such as zoning laws and building codes,<sup>352</sup> which serve public order. Even for the purpose of a national emergency or national security, as some commentators have argued in relation to Park51, the state cannot restrict or discriminate against only one religious institution, such as the Muslim community.<sup>353</sup>

Second, this Comment explains that the ICCPR and related international instruments also provide guidance and elaboration into RLUIPA's strict scrutiny standard. As discussed earlier, RLUIPA is a step in the right direction toward these international norms, especially after the *Smith* decision lowered the threshold from a strict scrutiny regime to a type of heightened rational review.<sup>354</sup> Yet, RLUIPA itself contains some gaps because the state can use facially neutral statutes in a discriminatory way. Thus, any zoning or traffic concerns should be viewed with skepticism. The ICCPR and the subsequent documents would align the United States more fully with international human rights norms.

Third, a type of sensitivity argument, which this Comment labels as cultural sensitivity,<sup>355</sup> has dominated the discussion surrounding the construction of Park51. This Comment argues that cultural sensitivity is part of the international framework on religious limitations, explains how it is used in the realm of free speech by way of analogy, and compares Park51 to the

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<sup>350</sup> See *supra* Part I.A.

<sup>351</sup> See *supra* Parts V.A.2, V.A.3.

<sup>352</sup> See *supra* Part I.A.

<sup>353</sup> Van der Vyver, *supra* note 92, at 513.

<sup>354</sup> See *supra* Part III.B.1.

<sup>355</sup> See *supra* Part IV.

Auschwitz Convent controversy.<sup>356</sup> This Comment concludes that the Park51 mosque's level of cultural sensitivity is not at a sufficient threshold to influence the factors of public order and proportionality that drive the limitations analysis.<sup>357</sup> However, the idea of cultural sensitivity, although not sufficient for Park51, does not end here. Cultural sensitivity is part of the limitations analysis, and while not dispositive, it is helpful in dealing with religious expression issues.<sup>358</sup>

Fourth, in Part V, the application of the framework reveals that the state cannot restrict Park51. As construction begins, there will be more codes, zoning regulations, and issues that arise. The initial barriers to construction of Park51 were just the tip of the iceberg, and the United States would be wise to look to these international human rights norms as significant issues as potential clashes ebb and flow throughout the long-term construction of this mosque. As it stands now, potential state limitations on the Park51 center are impermissible.

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<sup>356</sup> See *supra* Part IV.

<sup>357</sup> See *supra* Part IV.A.1.

<sup>358</sup> See *supra* Part IV.A.2.

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