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A DIFFERENT KIND OF PRISONER'S DILEMMA: THE RIGHT TO THE FREE EXERCISE OF RELIGION FOR INCARCERATED PERSONS

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Introduction

Properly understood, the right to freedom of religion should encompass broad protections for a prisoner's free exercise to teach, practice, worship, and observe his or her faith. Scholars typically analyze the right to freedom of religion in two distinct ways—either as a constitutional right or as a fundamental human right. And yet, the former should be understood as a positivized protection of the latter. This Note will analyze a prisoner's right to the free exercise of religion in the context of a prisoner's right to a preacher and a place to worship. In doing so, it will separately analyze the constitutionally protected right in the United States and the internationally protected human right in the context of the European Court of Human Rights. However, in concluding, this Note will demonstrate that the constitutional right and the international human right are fundamentally one and the same. And, of even greater importance, it will show that the underlying protections owed to incarcerated persons are the same, regardless of the analytical framework.

Part I will lay the foundation for the constitutional right to freedom of religion in the United States. It will explain how the Framers understood the right in the lead up to, and at the time of, the ratification of the Free Exercise Clause as part of the Bill of Rights. Part I will also address more modern advances in religious liberty protections for prisoners before discussing two recent milestones: the Religious Land Use and Institutionalized Persons Act and the Supreme Court's decision in *Holt v. Hobbs*. Part II addresses the right to freedom of religion internationally. It begins by considering the international right to religious freedom under the Universal Declaration of Human Rights and the European Convention on Human Rights and then discusses

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recent case precedents in the European Court of Human Rights. Finally, Part III offers conclusions and recommendations regarding how the right ought to be interpreted and applied both domestically and internationally for the better protection of a prisoner's right to a preacher and a place to worship. This includes both jurisprudentially in emerging cases such as *Holt v. Hobbs II* and in the context of international policy through means such as the U.S. State Department's new Commission on Unalienable Rights.

I. The Constitutional (and Statutory) Right to Freedom of Religion

A. Constitutional Background: The Framers' Understanding of the Free Exercise Clause

The text of the First Amendment is clear: "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof*."[1] Since its ratification, the Free Exercise Clause has been applied to protect "the right to believe and profess whatever religious doctrine one desires."[2] However, in the lead up to ratification, the need for an express constitutional protection was far from obvious.[3]

Prior to the First Amendment's ratification in 1791, American states had experienced 150 years of religious diversity.[4] Furthermore, at the time of ratification, twelve of the thirteen states already had free exercise or freedom of conscience provisions in place.[5] These laws were frequently used to protect the free exercise of religion and conscience *even when* they conflicted with otherwise generally applicable laws.[6] Thus, the ratification debates were steeped in the core belief of religious freedom. This context is necessary to properly understand the Free Exercise Clause as it was *originally* enacted—with a *broad* interpretation.

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1 U.S. Const. amend. I (emphasis added).

2 Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 877 (1990).

3 *See* City of Boerne v. Flores, 521 U.S. 507, 549–50 (1997) (O'Connor, J., dissenting). Of note, the ratification debates disputed the necessity of both the Free Exercise Clause and the Establishment Clause. *Id.* However, this Note will only discuss the debates as they pertain to the Free Exercise Clause.

4 Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1421 (1990) [hereinafter McConnell, *Origins and Historical Understanding*].

5 Michael W. McConnell, *Should Congress Pass Legislation Restoring the Broader Interpretation of Free Exercise of Religion?*, 15 Harv. J.L. & Pub. Pol'y 181, 185–86 (1992) [hereinafter McConnell, *Should Congress Pass Legislation*]. Connecticut was the lone exception only because it had not updated its constitution and was operating under its royal charter. *Id.* at 186 n.17 (citing Gordon S. Wood, The Creation of the American Republic 1776–1787, at 276–78 (1969)). While the state constitutions in place did have some limitations on the free exercise of religion, nearly all—if not all—began with the concept of conscience with the most common limiting factor being the government's right to protect public peace and safety. *See* McConnell, *Origins and Historical Understanding*, *supra* note 4, at 1459–60, 1464.

6 McConnell, *Should Congress Pass Legislation*, *supra* note 5, at 186 (citing McConnell, *Origins and Historical Understanding*, *supra* note 4, at 1466–73).

One of the key differences in opinion at the time the Free Exercise Clause was proposed and ratified was between the Federalists and the Antifederalists. On the one hand, the Federalists famously argued that the Free Exercise Clause was an unnecessary addition to the Constitution.[7] Any amendment explicitly protecting religious freedom would not only be superfluous, but it would also run the risk of implying that a nonexpressed personal liberty was not protected.[8] On the other hand, Antifederalists argued that an express protection was both desirable and necessary. These arguments were largely promulgated by Protestant and Baptist believers who feared that the federal government would have the ability to overpower states and individuals without an explicit mandate not to.[9] While the Antifederalists would ultimately carry the day,[10] the Federalists' arguments reveal deep insights into the original public meaning of the Free Exercise Clause.

Professor Michael McConnell breaks the Federalists' argument into two distinct strands. The first strand is the argument that the government had *no* place and *no* right to restrict the free exercise of religion.[11] James Madison himself made this argument at the Virginia Ratifying Convention.[12] His June 12, 1788, paper used an observation of the current state of religious liberty as a defense for the sufficiency of then-existing religious protections as well as an argument against the necessity for an express provision. He commented that "[h]appily for the states, they enjoy the utmost freedom of religion. This freedom arises from that multiplicity of sects, which pervades America, and which is the best and only security for religious liberty in any society."[13] Thus, the Federalists argued that a free exercise clause was unnecessary, not because they lacked a commitment to freedom of religion as a fundamental human right, but rather because the protection of religious liberty already existed in its premier form.

In these same comments, Madison argued that "[t]here is not a shadow of right in the general government to intermeddle with religion. Its least

7 *See* McConnell, *Origins and Historical Understanding*, *supra* note 4, at 1475–76.

8 *See City of Boerne*, 521 U.S. at 549–50.

9 *Id.*

10 Madison would later recognize that "many respectable Citizens" were "alarmed" by the lack of a protection of conscience in the Constitution and thus (perhaps with a few underlying political motivations intermixed) decided to work toward including the protection in the Bill of Rights. McConnell, *Origins and Historical Understanding*, *supra* note 4, at 1480 (quoting Letter from James Madison to George Eve (Jan. 2, 1789), *in* 11 THE PAPERS OF JAMES MADISON 404, 404–05 (Robert A. Rutland & Charles F. Hobson eds., 1977)).

11 *Id.* at 1477.

12 *Id.*

13 James Madison Speech at the Virginia Ratifying Convention (June 12, 1788), *in* 11 THE PAPERS OF JAMES MADISON 130–31 (William T. Hutchinson et al. eds., 1977), http://press-pubs.uchicago.edu/founders/documents/amendI_religions49.html; *see also* James J. Musial, *Free Exercise in the 90s: In the Wake of* Employment Div., Dep't of Human Resources v. Smith, 4 TEMP. POL. & C.R. L. REV. 15, 15–16 & n.4 (1994) (commenting on the diversity of religious sects in various states at the time of the Founding).

interference with it would be a most flagrant usurpation."[14] For his part, Alexander Hamilton warned of the danger that a bill of rights could impose, predicting it would "afford a colorable pretext to claim more than [was] granted."[15] In other words, Hamilton argued, why declare that the freedom of religion shall not be restrained "when no power is given by which restrictions may be imposed?"[16] Once again, Hamilton, Madison, and the Federalists used this first strand of their argument to promote an essential understanding of the government as it was originally framed, intended, and understood by the public. At bottom, the government had no right to impede the free exercise of religion. Therefore, when the protection was eventually ratified as part of the Bill of Rights, it was seen as a positivized safeguard for a preexisting human right, rather than as a newly established legal right.

The second strand of the Federalists' argument is again best summarized by the Father of the Constitution, who wrote:

> [I]n the federal republic of the United States . . . all authority . . . will be derived from and dependent on the society, [and] the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority.[17]

Here, Madison and the Federalists believed that the *structural* reality of the Constitution would prevail. A free exercise clause was unnecessary because the nation was already so diverse and the structure of the federal government so restrained that the personal liberties of minorities would be protected.

Today, this argument may seem unpersuasive for several reasons. First, why wouldn't the Federalists simply add an explicit provision, even if society was as diverse and the Constitution as structurally restrained as they claim? Second, religious minorities at the time still had legitimate reasons to fear the influence of an outsized and unrestrained government. Third, a plethora or plurality of parts does not inherently protect the rights of each individual part from infringement by those in power. In fact, it would seem more

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14 *See* McConnell, *Origins and Historical Understanding*, *supra* note 4, at 1477 (quoting James Madison, Address at the Virginia Ratifying Convention (June 12, 1788), *in* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 330 (Jonathan Elliot ed., 2d ed. 1881)). For his part, James Iredell offered similar sentiments at the North Carolina ratification debates, going so far as to state:

> Had Congress undertaken to guaranty religious freedom, or any particular species of it, they would then have had a pretence to interfere in a subject they have nothing to do with. Each state, so far as the clause in question does not interfere, must be left to the operation of its own principles.

Debate in North Carolina Ratifying Convention (July 30, 1788), *in* 5 THE FOUNDERS' CONSTITUTION 89, 90 (Philip B. Kurland & Ralph Lerner eds., 1987) (statement of James Iredell); *see also* Kurt T. Lash, *Power and the Subject of Religion*, 59 OHIO ST. L.J. 1069, 1086 & n.66 (1998) (quoting the same).

15 THE FEDERALIST NO. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

16 *Id.* at 513–14.

17 THE FEDERALIST NO. 51, at 324 (James Madison) (Clinton Rossiter ed., 1961).

likely to lead to the undetected or unnoticed infringement of a vulnerable minority. However, here, it is crucial to remember that up until this point Americans had historically believed that the area of religious exercise "should be reserved to the individual conscience" and there was no place or role for the government in that reserved space.[18] The idea of free religious exercise as a fundamental human right was the baseline understanding that informed the ratification debates, the framing of the Constitution, and the subsequent proposal and ratification of the First Amendment.

The nature of the right to religious freedom at the time of ratification is perhaps best revealed by contrasting the subtleties of the Federalists' argument with the views of the influential John Locke. At the Founding, the idea of religious freedom expanded beyond Locke's notion of religious toleration and legislative primacy.[19] John Locke wrote "that all the Power of Civil Government relates only to Mens [sic] Civil Interests; is confined to the care of the things of this World; and hath nothing to do with the World to come."[20] Locke viewed the role of government as distinct from religion. However, Locke further stated that "Churches have neither any Jurisdiction in worldly Matters, nor are Fire and Sword any proper Instruments wherewith to convince mens [sic] Minds of Error, and inform them of the Truth."[21] Here, Locke asserts his notion of legislative primacy. While government and church are separate, government comes first in worldly matters; an idea wholly at odds with the Framers' vision.

Professor McConnell differentiates between the Lockean view and the American view by stating that "the former takes the perspective of government and the latter the perspective of the believer."[22] McConnell further notes that the "paradox" of these religious freedom debates as a whole is that "one side employed essentially secular arguments based on the needs of civil society for the support of religion, while the other side employed essentially religious arguments based on the primacy of duties to God over duties to the state."[23] Therefore, the Framers expanded the idea of religious freedom beyond Locke's notion of religious toleration and legislative primacy.[24]

The underlying understanding of religious freedom in the United States is revealed from the perspective of the believer, as opposed to that of the government. The Federalists' argument against the inclusion of a free exercise clause in the Constitution, the ratification debates, and this broad pivot in political philosophy all serve to demonstrate that the right to the free exercise of religion in the United States is properly understood as a general and

18 *See* McConnell, *Should Congress Pass Legislation*, *supra* note 5, at 185.

19 McConnell, *Origins and Historical Understanding*, *supra* note 4, at 1444.

20 John Locke, *A Letter Concerning Toleration*, *in* JOHN LOCKE: A LETTER CONCERNING TOLERATION AND OTHER WRITINGS 1, 15 (Mark Goldie ed., 2010).

21 *Id.* at 22.

22 McConnell, *Origins and Historical Understanding*, *supra* note 4, at 1449.

23 *Id.* at 1442.

24 *See id.* at 1444.

fundamental human right.[25] This understanding is not only what the Framers intended but also the original public meaning of the Free Exercise Clause.

B. An Additional Constitutional Protection: The Fourteenth Amendment

The Fourteenth Amendment provides another constitutional protection of the right to the free exercise of religion. In 1833, the Supreme Court held in *Barron v. City of Baltimore* that the Bill of Rights restrained the federal government, but not state governments.[26] Subsequently, the Fourteenth Amendment passed both houses of the Thirty-Ninth Congress and was ratified in 1868.[27] The Fourteenth Amendment has two relevant provisions. The first section of the Amendment lays out the general protections:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[28]

The fifth section provides the Amendment's enforcement power: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[29]

In 1940, the Supreme Court first applied the Free Exercise Clause to the states in *Cantwell v. Connecticut*.[30] It did this through the process of selective incorporation, whereby the Free Exercise Clause was incorporated by the Fourteenth Amendment and applied to the states.[31] Specifically, the Court held that the statute in question violated the Fourteenth Amendment's Due

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25 Much of the Framers' intent is best understood in terms of natural law theory. Natural law theory only serves to further the idea that the right to free exercise of religion should be protected as a general human right. It is with a heavy heart that this Note has neither the time nor the space to delve into the application of natural law theory. For more on natural law, see generally JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (2d ed. 2011). *See also* Christopher Hammons, *State Constitutions, Religious Protection, and Federalism*, 7 U. ST. THOMAS J.L. & PUB. POL'Y 226, 232 (2013) (discussing the prevalence and significance of natural law theory at the Founding).

26 Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250–51 (1833) ("We are of opinion, that the provision in the fifth amendment to the constitution . . . is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states.").

27 *See* City of Boerne v. Flores, 521 U.S. 507, 522–23 (1997).

28 U.S. CONST. amend XIV, § 1.

29 *Id.* § 5.

30 Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

31 *Id.*; *see also* McConnell, *Origins and Historical Understanding*, *supra* note 4, at 1484–85, 1485 n.383 (citing *Cantwell*, 310 U.S. at 303) (describing selective incorporation of the First Amendment).

Process Clause.[32] The Court then held in favor of selective incorporation, stating that "[t]he fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment."[33] Since this decision, the Fourteenth Amendment has been used to protect the right to the free exercise of religion in both judicial decisions and legislation.[34] Practically speaking, the Fourteenth Amendment's incorporation of the right to the free exercise of religion has gradually become part of the greater constitutional framework.

C. *Advancing Religious Liberty Protections for Prisoners: The Religious Land Use and Institutionalized Persons Act and* Holt v. Hobbs

In more recent years, Congress and the Supreme Court have largely worked to expand the protections for the right to freedom of religion of incarcerated persons. In the last two decades, two milestones stand apart: the Religious Land Use and Institutionalized Persons Act (RLUIPA)[35] and the Supreme Court's decision in *Holt v. Hobbs*. This Section will address each milestone in turn, but will first begin with a survey of the ways in which the Free Exercise Clause has been construed by federal courts to protect the rights to the freedom of religion for incarcerated persons. Ultimately, these developments are used to protect the fundamental human right as it was intended and as the public understood it at the time of the Founding. As such, the expansion of domestic protections aligns with the expansion of the international right, both of which are to be properly understood as a broad fundamental human right.[36]

In 1974, the U.S. Supreme Court held in *Pell v. Procunier* that "a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system."[37] In this case, four California prison inmates and three professional journalists filed a claim challenging the constitutionality of a regulation that prevented members of the media from interviewing specific inmates.[38] While the Court ultimately held that the regulation was constitutional under both the First and Fourteenth Amendments, it took care to establish significant First Amendment protections for prisoners.[39] The case itself dealt specifically with a freedom of speech challenge,[40] but parts of the holding established a broad protection under which the right to freedom of religion has found refuge. The Court additionally held that "challenges to

32 *Cantwell*, 310 U.S. at 303.

33 *Id.* (citing Schneider v. State, 308 U.S. 147, 160 (1939)).

34 *See infra* Section I.C & Part II (providing examples of this protection).

35 Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. § 2000cc (2012)).

36 *See infra* Parts II–III.

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

38 *Id.* at 819.

39 *See id.* at 822–28, 835.

40 *Id.* at 821.

prison restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of the legitimate policies and goals of the corrections system, to whose custody and care the prisoner has been committed in accordance with due process of law."[41]

In 1972, the Supreme Court took one of its biggest steps in expanding the protection of the free exercise rights of prisoners.[42] In *Cruz v. Beto*, the Court held that a Buddhist prisoner could be granted relief pursuant to the Fourteenth Amendment "if he was denied a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts."[43] Of particular import, the Court added a footnote stating that, while not every religious sect or group must have identical facilities or personnel afforded for the exercise of their religion, "reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendments without fear of penalty."[44] For the first fifteen years following this decision, prisoners enjoyed some of the highest levels "of protection for their First Amendment religious exercise rights in the nation's history."[45] However, the Supreme Court's decision in *O'Lone v. Estate of Shabazz* tapered this protection by rejecting "strict and heightened scrutiny for prisoner free exercise claims,"[46] and instead imposing a "reasonableness" standard in relation to "legitimate penological objectives."[47] This, in many ways, served as a precursor to the Court's decision in *Employment Division v. Smith*, which "announced a new rule applying mere rational basis scrutiny in the usual case where religious exercise was burdened as a result of a neutral and generally applicable law."[48]

Of course, the *Smith* decision itself is the most divisive Free Exercise Clause issue of the day. As Professor Lund states, "[w]ith the Free Exercise Clause, the persistently recurring issue has been whether the government should provide religious exemptions from generally applicable laws."[49] At bottom, this controversy is one of constitutional interpretation.[50] Under a narrow interpretation, only deliberate discrimination against religion is prohibited.[51] In contrast, a broad interpretation "would provide maximum free-

41 *Id.* at 822.

42 *See generally* Cruz v. Beto, 405 U.S. 319 (1972) (per curiam).

43 *Id.* at 322–23.

44 *Id.* at 322 n.2.

45 Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501, 507 (2005).

46 *Id.* at 507–08.

47 O'Lone v. Estate of Shabazz, 482 U.S. 342, 349, 353 (1987); Gaubatz, *supra* note 45, at 507–08.

48 Gaubatz, *supra* note 45, at 508–09; *see also* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990).

49 Christopher C. Lund, *Religion Is Special Enough*, 103 VA. L. REV. 481, 482 (2017).

50 Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990) [hereinafter McConnell, *Free Exercise Revisionism*].

51 *See id.*

dom for religious practice consistent with demands of public order."[52] As discussed in Section I.A, the Free Exercise Clause is properly understood using a broad interpretation, which is consistent with the Clause's original public meaning.[53]

The *Smith* decision has been widely criticized for its poor use of legal sources as well as its weak underlying theoretical argument, which many scholars have regarded as "contrary to the deep logic of the First Amendment."[54] This ever-persisting controversy led to the creation of the Religious Freedom Restoration Act (RFRA)[55] and RLUIPA. It continues to stand at the forefront of nearly every Free Exercise Clause debate and lurks beneath every post-1990 development discussed in this Note.[56]

Two other noteworthy developments in the ever-flowing current of the religious liberty rights of incarcerated persons came in the cases of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* and *Young v. Coughlin*. In *Church of the Lukumi*, the Supreme Court stated that "[t]he Free Exercise Clause 'protect[s] religious observers against unequal treatment.'"[57] The *Church of the Lukumi* Court did not parse words as it voided ordinances that prevented the ritualistic killing of animals.[58] It concluded that

> [t]he Free Exercise Clause commits [the] government . . . to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures.[59]

Although not directly a prisoner rights case, *Church of the Lukumi* establishes that officials—which logically includes prison officials—cannot intervene with the free exercise of religion merely because they distrust the practice.

Young v. Coughlin, on the other hand, is an example of a U.S. court of appeals establishing specific protections for prisoners' rights to the freedom of religion. There, a prisoner claimed that he had been prevented from attending religious services while being held in a correctional facility.[60]

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52 *Id.*

53 *See* McConnell, *Should Congress Pass Legislation*, *supra* note 5, at 184–87; *supra* Section I.A.

54 McConnell, *Free Exercise Revisionism*, *supra* note 50, at 1111.

55 Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488.

56 The magnitude of the *Smith* decision makes it necessary to discuss in a Note on this topic, but impossible to explore in a Note of this size. For varying perspectives on the Supreme Court's ruling and its aftermath, see generally Richard W. Garnett, *The Political (and Other) Safeguards of Religious Freedom*, 32 CARDOZO L. REV. 1815 (2011); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; and McConnell, *Free Exercise Revisionism*, *supra* note 50, among others.

57 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542 (1993) (second alteration in original) (quoting Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 148 (1987) (Stevens, J., concurring)).

58 *Id.* at 524, 526–28.

59 *Id.* at 547.

60 Young v. Coughlin, 866 F.2d 567, 568 (2d Cir. 1989).

Among other things, the Second Circuit held that the government must show that the restrictions for attending services or practices were "reasonably adapted to achieving a legitimate penological objective."[61] Furthermore, it is "error to assume that prison officials [are] justified in limiting [a prisoner's] free exercise rights simply because [he or she is] in disciplinary confinement."[62] This case is just one example of the many lower court decisions providing specified protections for inmates and thereby expanding the overall free exercise protection. Both of these federal court decisions represent the larger trend toward increasing religious liberty protections for prisoners.

All of these decisions laid the groundwork leading up to one of the most significant protections for the religious liberty of prisoners, which came in the form of a federal statute. RLUIPA was enacted by Congress in 2000 as a response to the Supreme Court's decision in *City of Boerne v. Flores*.[63] There, the Supreme Court held that RFRA exceeded Congress's powers under the provision and struck down RFRA as it applied to states.[64] In the lead up to RLUIPA, Congress documented the "frivolous or arbitrary" barriers that impeded the free exercise of religion for incarcerated persons.[65] Congress's enactment was a response both to the current legal landscape and to the increasing number of empirical studies showing the extent of religious practice in prisons.[66] RLUIPA was considered "a way to remove state-imposed barriers from those seeking to minister to prisoners."[67] Given all this lead up to its enactment, the law was viewed as an expansive protection of religious liberty interests.

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61 *Id.* at 570.

62 *Id.* (citing LaReau v. MacDougall, 473 F.2d 974, 979 n.9 (2d Cir. 1972) ("[N]ot . . . every prisoner in segregation lawfully can be prevented from attending church services in the chapel . . . [because] [n]ot all segregated prisoners are potential troublemakers . . . .")).

63 *See* Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. § 2000cc (2012)); Holt v. Hobbs (*Holt I*), 574 U.S. 352, 356–57 (2015) (explaining the history of RLUIPA); *see also* City of Boerne v. Flores, 521 U.S. 507, 512–13 (1997) (explaining RFRA as a congressional response to the *Smith* decision).

64 *City of Boerne*, 521 U.S. at 534, 536 ("Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.").

65 *See* 146 CONG. REC. 16,698–99 (2000) (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA) ("Whether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways."); *see also* Cutter v. Wilkinson, 544 U.S. 709, 716 (2005) (noting congressional motivation for RLUPIA).

66 Gaubatz, *supra* note 45, at 506–10, 506 & n.9 (referencing a study that found "[r]eligious practice in prison can be very extensive with about 50% of inmates attending religious services an average of six times per month" (alteration in original) (quoting Thomas P. O'Connor & Michael Perreyclear, *Prison Religion in Action and Its Influence on Offender Rehabilitation*, 35 J. OFFENDER REHABILITATION 11, 27 (2002)).

67 *Id.* at 511.

Two RLUIPA provisions are of *particular* importance for the free exercise protections of prisoners. In the first of these provisions, RLUIPA states:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.[68]

The second provision defines an "institution" as "any facility or institution . . . (A) which is owned, operated, or managed by, or provides services on behalf of any State or political subdivision of a State; and (B) which is . . . a jail, prison, or other correctional facility."[69]

By its plain language, RLUIPA is a general and broad protection of the right to the free exercise of religion of incarcerated persons. Congress included broad provisions to protect this right, even at the expense of the government. In 42 U.S.C. § 2000cc-3(c), Congress stated that RLUIPA "may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise."[70] This provision is an example of how Congress's intent aligned with the Framers' intent. The Framers sought to create the Free Exercise Clause from the perspective of the believer, not the government.[71] Thus, at times, the government would have to subjugate its own interests in order to better protect this fundamental human right.

RLUIPA, however, cannot fully be understood without also understanding the Supreme Court's decision in *Cutter v. Wilkinson*.[72] In *Cutter*, a group of current and former inmates at the Ohio Department of Rehabilitation and Correction filed suit claiming RLUIPA violations.[73] The petitioners alleged that as members of nontraditional faiths they were denied access to religious literature, group worship, dress, and other opportunities that mainstream practitioners were afforded.[74] The Court emphasized that in properly applying RLUIPA "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries and they must be satisfied that the Act's prescriptions are and will be administered neutrally among different faiths."[75] It then held that a facility is free to resist a religious accommodation *if* the "inmate requests for religious accommodations

68 42 U.S.C. § 2000cc-1(a).

69 *Id.* § 1997(1).

70 *Id.* § 2000cc-3(c).

71 *See* McConnell, *Origins and Historical Understanding*, *supra* note 4, at 1449; *see also supra* notes 22–25 and accompanying text.

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

73 *Id.* at 712.

74 *Id.* at 712–13.

75 *Id.* at 720 (citation omitted) (citing Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985)).

become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution."[76]

Ultimately, the *Cutter* Court affirmed the constitutionality of RLUIPA while also stating that it did not read the Act "to elevate accommodation of religious observances over an institution's need to maintain order and safety."[77] However, in the earlier case of *United States v. Playboy Entertainment Group, Inc.*, the Supreme Court stated that courts may not "*assume* [that] a plausible, less restrictive alternative would be ineffective."[78] Therefore, RLUIPA provides additional protections for the free exercise rights of prisoners by requiring that the state incur a burden in order to ensure the protection of religious freedom, insofar as it does not conflict with the facility's legitimate safety needs.

RLUIPA continues to evolve in federal district courts and courts of appeals across the United States. For example, in *Greene v. Solano County Jail*, the Ninth Circuit held that the jail's policy prohibiting a maximum-security prisoner "from attending group religious worship services substantially burdened his ability to exercise his religion," as prohibited under RLUIPA.[79] Once again, the court was clear that prison officials *cannot* "justify restrictions on religious exercise by simply citing to the need to maintain order and security in a prison. RLUIPA requires more. Prison officials must show that they 'actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice.'"[80] Similarly, the Fifth Circuit has applied RLUIPA protections to separate collective worship for minority religions and accommodations for the wearing of religious garb.[81] These cases are just a few examples of the overwhelming trend toward expanding the protections of religious freedom rights of incarcerated persons under RLUIPA.

One of the other significant advancements in the protection of religious liberty rights of incarcerated persons came from the Supreme Court's decision in *Holt v. Hobbs* (*Holt I*).[82] In that case, petitioner Gregory Holt, an Arkansas inmate, brought a suit challenging the Arkansas Department of Correction's grooming policy.[83] Holt argued that his sincerely held religious beliefs prevented him from shaving his beard.[84] However, the Arkansas Department of Correction's grooming policy prohibited inmates from growing beards unless they had a dermatological condition.[85]

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76 *Id.* at 726.

77 *Id.* at 714, 722.

78 United States v. Playboy Entm't Grp., 529 U.S. 803, 824 (2000) (emphasis added).

79 Greene v. Solano Cty. Jail, 513 F.3d 982, 988 (9th Cir. 2008).

80 *Id.* at 989–90 (quoting Warsoldier v. Woodford, 418 F.3d 989, 999 (9th Cir. 2005)).

81 *See* Tucker v. Collier, 906 F.3d 295, 301, 303–06 (5th Cir. 2018); Ali v. Stephens, 822 F.3d 776, 794–97 (5th Cir. 2016).

82 *See* Holt v. Hobbs (*Holt I*), 574 U.S. 352 (2015).

83 *Id.* at 355–56.

84 *Id.*

85 *Id.* at 356.

Before filing suit, Holt initially requested an exception from the Department of Corrections.[86] After his request was denied, Holt proceeded to challenge the grooming policy in federal district court on RLUIPA grounds.[87] He represented himself pro se.[88] The district court initially granted a preliminary injunction.[89] However, later, "the Magistrate Judge recommended that the preliminary injunction be vacated and [the petition] be dismissed," despite stating that it was "almost preposterous to think that [Holt] could hide contraband in [his] beard."[90] The district court judge adopted the recommendation in full, agreeing with the deference the magistrate judge gave to the prison officials.[91] On appeal, the Eighth Circuit affirmed that the Department of Corrections "had satisfied its burden of showing that the grooming policy was the least restrictive means of furthering its compelling security interests."[92] It held that there was not substantial evidence to outweigh the "deference owed to [the] expert judgment of prison officials who are more familiar with their own institutions."[93]

Then, on September 27, 2013, Holt filed a handwritten petition for a writ of certiorari.[94] The Supreme Court entered an injunction pending the resolution of the petition before later granting certiorari.[95] Gregory Holt had finally made it before the Supreme Court. Furthermore, for the first time Holt had legal counsel to argue on his behalf—renowned religious liberty scholar, Douglas Laycock.[96] Holt and Professor Laycock ultimately prevailed by arguing that the state agency's policy violated RLUIPA.[97] This victory established significant, although ambiguous, precedent for the defense of a prisoner's right to the free exercise of religion.

In its decision, the Supreme Court stated that RLUIPA "prohibits a state or local government from taking any action that substantially burdens the religious exercise of an institutionalized person unless the government demonstrates that the action constitutes the least restrictive means of furthering a compelling governmental interest."[98] In applying RLUIPA, the Court held "that the Department's grooming policy violate[d] RLUIPA insofar as it pre-

86 *Id.* at 359.

87 *Id.*

88 *Id.*

89 *Id.*

90 *Id.* at 359–60.

91 *Id.*

92 *Id.* at 360 (citing Holt v. Hobbs, 509 F. App'x 561, 562 (8th Cir. 2013)).

93 *Id.* (alteration in original) (quoting *Holt*, 509 F. App'x at 562).

94 *See* Petition for Writ of Certiorari, *Holt I*, 574 U.S. 352 (No. 13-6827).

95 *Holt I*, 574 U.S. at 360.

96 *See id.* at 354; *see also Douglas Laycock*, U. VA. SCH. L., https://www.law.virginia.edu/faculty/profile/hdl5c/2210483 (last visited Feb. 26, 2020) (describing Professor Laycock's religious liberty scholarship).

97 *See Holt I*, 574 U.S. at 369–70.

98 *Id.* at 356.

vent[ed Holt] from growing a [half]-inch beard in accordance with his religious beliefs."[99] This was an intentionally narrow holding.

Still, *Holt I* represents an expansion in how the right to religious freedom of incarcerated persons is understood and protected. It was a significant step in religious liberty protections for several reasons. First, *Holt I* was a successful challenge to a prison policy under RLUIPA. While the decision has, at times, been criticized for its narrow holding, it is still progress. In fact, Justice Scalia even voiced this criticism at oral argument when he famously quipped that he did not "want to do these cases half inch by half inch."[100] Instead, he suggested that the Court "take a case that involves a full beard" and settle the issue once and for all.[101] Nevertheless, the Supreme Court established precedent protecting a sincerely held belief under RLUIPA and further cabined the deference owed to the security interests of prison officials.

However, Scalia's barb did speak to a second significance of *Holt I*—that is, the Court declined to define a degree of deference owed to prison officials under RLUIPA.[102] *Holt I* "outlined an upper bound on the deference to be applied under RLUIPA by rejecting the Eighth Circuit's" application of "unquestioning" or "absolute" deference.[103] But the Court stopped short of providing any additional clarity. In so doing, it "left open the door to inconsistent and unpredictable judicial application of *Cutter* deference."[104] This ambiguity enables federal district courts and courts of appeals to apply varying levels of deference across the United States. Circuit splits on this issue are not only possible, but probable. Thus, the fight for a consistent and universal standard is even more likely to find itself in need of authoritative clarification.

Third, *Holt I* was significant because it raised awareness of the religious liberty interests of incarcerated persons. While this final point is not legal per se, it is important for the protection of the fundamental human right of the freedom of religion and the free exercise thereof. *Holt I* garnered support in the court of public opinion. The case was widely reported and informed Supreme Court watchers and the general public alike of the need for basic protections of incarcerated persons.[105] It informed the public of

99 *Id.* at 369–70.

100 Transcript of Oral Argument at 7, *Holt I*, 574 U.S. 352 (No. 13-6827).

101 *Id.*

102 *See Religious Land Use and Institutionalized Persons Act—Religious Liberty*—Holt v. Hobbs, 129 HARV. L. REV. 351, 356 (2015) [hereinafter *Religious Land Use*].

103 *Id.* at 360.

104 *Id.* at 359–60. As the reader may recall, *Cutter* deference is the general concept "that accommodations of religious practice should not be 'elevate[d] . . . over an institution's need to maintain order and safety,'" and warns that RLUIPA "should be applied 'with particular sensitivity to security concerns.'" *Id.* at 358 (alteration and omission in original) (quoting Cutter v. Wilkinson, 544 U.S. 709, 722 (2005)).

105 *See, e.g.*, Adam Liptak, *Ban on Prison Beards Violates Muslim Rights, Supreme Court Says*, N.Y. TIMES (Jan. 20, 2015), https://www.nytimes.com/2015/01/21/us/prison-beard-ban-gregory-holt-ruling.html; Eugene Volokh, Opinion, Holt v. Hobbs*: Unanimous Victory for*

the dire need that many prisoners have for the free exercise of their fundamental human right to freedom of religion. In the long run, it is reasonable to hypothesize that this will lead to an increase in similar litigation in favor of greater prisoner protections and may even inspire future legislation safeguarding the right.

D. A New Development: Holt II

On March 1, 2019, Gregory Holt and Professor Laycock returned to federal court.[106] Holt claims in *Holt v. Kelley* (*Holt II*) that the Arkansas Department of Corrections failed to accommodate his Islamic religious practices by unlawfully preventing its Muslim inmates from observing individual prayer services and instead forcing them to hold combined religious services with other religious faith groups.[107] Specifically, these other religious faith groups are the Nation of Islam and the Five-Percent Nation/Nation of Gods and Earths.[108] Each of these groups has a distinct set of sincerely held beliefs. As a result, the prison is effectively forcing inmates to choose between practicing their sincerely held religious beliefs with other religious groups or altogether abstaining from attending religious services.[109]

This case has the potential—if successful—to directly address several issues regarding prisoner protections. First, the complaint claims the prison violated RLUIPA, the First Amendment, and the Fourteenth Amendment by prohibiting separate Jumu'ah services for inmates.[110] Second, the complaint claims the prison violated these same laws by prohibiting inmates from wearing kufis outside of religious worship.[111] Among other things, the Court will need to declare whether Islam, the Nation of Islam, and the Nation of Gods and Earths are distinct faiths. If it decides that they are separate faiths, the Court will then need to weigh the interests and burdens imposed by each of the two claims. Therefore, this case has the potential to decide prisoner protections regarding the sincerity of the beliefs as well as the free exercise rights to a separate place to worship and the wearing of religious garb.

The outcome of this case will likely be determined in large part by the type of deference the Court gives to the prison officials. While *Holt I* cabined this deference somewhere below "absolute" deference, it was careful not to provide any further definition.[112] This case demonstrates the need for a

Muslim Prisoner in Religious Rights Case, WASH. POST (Jan. 20, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/20/holt-v-hobbs-unanimous-victory-for-prisoner-in-religious-rights-case/.

106 *See* Complaint, Holt v. Kelley (*Holt II*), No. 5:19-cv-00081 (E.D. Ark. filed Mar. 1, 2019).

107 *Id.* ¶ 3.

108 *Id.*

109 *See id.* ¶ 6.

110 *Id.* ¶¶ 102–23.

111 *Id.* ¶¶ 124–42.

112 *See Religious Land Use*, *supra* note 102, at 359–60.

clear standard of deference and at the same time offers a vehicle by which the Court may establish such a standard.

II. The International Human Right to Freedom of Religion

A. *Understanding the International Right to Freedom of Religion: The Universal Declaration of Human Rights and the European Convention on Human Rights*

The Universal Declaration of Human Rights (the Declaration) is largely regarded as the most important document concerning human freedom and dignity in the world today.[113] Ratified in 1948, the Declaration's principal innovation is the idea "that human rights are *universal*, belonging to 'all members of the human family.'"[114] The Declaration used dignity-based principles to lay the foundation for regional and local legal systems to positivize fundamental human rights throughout the world.[115] At the time, this was a particularly momentous shift in thinking because it "repudiate[d] the "long-standing view that the relation between a sovereign state and its own citizens is that nation's own business."[116]

The significance of this global agreement in the post–World War II era cannot be understated. In fact, despite the tense international relations of the time, there was not a single dissenting vote when the General Assembly voted in favor of the Declaration on December 10, 1948.[117] This international unanimity provided the momentum needed to legitimize the Declaration in the eyes of the international community both then and for generations to come. Nevertheless, in more recent years, and "[e]ven within the international human rights movement, the Declaration has come to be treated more like a monument to be venerated from a distance than a living document to be reappropriated by each generation."[118]

On its face, the Declaration lists a wide range of individual rights and liberties that ought to be protected in order to protect the broader concept of human dignity. However, as Professor Mary Ann Glendon argues, the integrity of the Declaration is best preserved when read as a whole rather than as a list of distinctive liberties.[119] This reading protects the interrelated nature of *all* the fundamental human rights contained therein. Still, the Declaration does protect individual rights in intentional and specific ways.

113 *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter Declaration]; Mary Ann Glendon, *Knowing the Universal Declaration of Human Rights*, 73 Notre Dame L. Rev. 1153, 1153 (1998).

114 Glendon, *supra* note 113, at 1162–63 (quoting Declaration, *supra* note 113, pmbl.).

115 *See id.* at 1156, 1163.

116 *Id.* at 1163.

117 *See id.* at 1155, 1162.

118 Mary Ann Glendon, A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights, at xvii (2001).

119 *See* Glendon, *supra* note 113, at 1163.

The combined specificity and generality of the Declaration enables it to protect individual religious liberty interests in a variety of ways.

Article 18 of the Declaration states that "[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and 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."[120] Here, Article 18's drafting history helps illuminate the importance of the religious protections intended by the Human Rights Commission and the voting member states. The Commission "had been on the verge of going forward with a draft that spoke only of conscience and belief" until Eleanor Roosevelt, the chair of the Commission, "interjected that a text protecting religious freedom ought to use the word 'religion.'"[121] Roosevelt's view eventually prevailed within the Commission and was voted in favor of by the United Nations General Assembly. Thus, the United Nations approved, among other things, the Declaration's specific protection to an individual's right to teach, practice, worship, and observe his or her religion "either alone or in community with others."[122]

This express protection of an individual's right to freedom of religion is universally accepted in the Declaration but is often positivized in different forms between regional and local systems. Jacques Maritain, one of the authors of the Declaration, summarized this type of legal diversity best when, in reference to the drafting of the Declaration, he said: "Yes, we agree about the rights but on condition no one asks us why."[123] Maritain's view is that of a realist. While it is possible for the full spectrum of legal and cultural traditions to agree on the general form of the most fundamental rights, the philosophical, religious, or moral underpinning of each right remains highly disputed. Consequently, so too is its specific legal form. Thus, universal, regional, and local systems are developed with varying degrees of specificity or generality, which is reflected in their founding texts.

In a similar vein, Sir Hersch Lauterpacht later critiqued the Declaration's moral authority by stating that the fundamental problem is that the Declaration's "authority is a function of the degree to which States commit themselves to an effective recognition of these rights guaranteed by a will and an agency other than and superior to their own."[124] In other words, the Declaration's failure to apply remedies to individuals and impose duties on states creates a space for regional and local diversity in the implementation and protection of the right to the freedom of religion.

The generality of the Universal Declaration of Human Rights creates a legal diversity that cuts both ways. On the one hand, by enabling a diversity of legal protections, the Declaration empowers local and regional systems to

120 Declaration, *supra* note 113, art. 18.

121 *See* Glendon, *supra* note 113, at 1157, 1166.

122 Declaration, *supra* note 113, art. 18.

123 David Luban, *The Inevitability of Conscience: A Response to My Critics*, 93 Cornell L. Rev. 1437, 1454 (2008) (quoting Glendon, *supra* note 118, at 77).

124 Hersch Lauterpacht, International Law and Human Rights 61 (1950).

find effective ways to protect the freedom of religion. Local and regional systems are more able to achieve success than their universal counterparts because they can implement legal rules that better fit the culture they seek to influence and are typically accompanied by stronger enforcement mechanisms. However, on the other hand, these regional systems introduce variables and consequently increase the probability that some systems will fall short of protecting the right to freedom of religion to the fullest extent possible. As such, both universal and regional systems are necessary to protect the freedom of religion, but neither is sufficient by itself.

Established two years after the Declaration, the European Convention on Human Rights (the Convention) serves as an example of a regional system positivizing the fundamental universal principles established in the Declaration. In fact, the preamble to the Convention states that the Declaration "aims at securing the universal and effective recognition and observance" of human rights.[125] It also directly acknowledges that the Convention is one of "the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration."[126] Therefore, by its own admission, the Convention is a regional system by which the Declaration's more general fundamental rights are specified and protected with the enforcement power of a more localized system.[127]

Article 9 of the Convention protects the freedoms of "thought, conscience[,] and religion."[128] There are two sections that specify these fundamental protections. First, section 1 mirrors the protections provided in Article 18 of the Declaration.[129] As such, the Convention also establishes its religious freedom protection from the perspective of the believer. In this way, the Convention parallels the original public meaning of the First Amendment.[130]

Second, Article 9, section 2 of the Convention cabins individual protection by specifying instances where a government has a legitimate mandate to limit the protection of the fundamental human right. Section 2 provides that

> [f]reedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.[131]

125 Convention for the Protection of Human Rights and Fundamental Freedoms pmbl., Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter Convention].

126 *Id.*

127 Section 2 of the European Convention on Human Rights established the European Court of Human Rights. *See id.* art. 19. Article 19 of the Convention states, "To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as 'the Court.' It shall function on a permanent basis." *Id.* Section II.B of this Note discusses several prisoner cases decided by this court.

128 *Id.* art. 9.

129 *Compare id.* art. 9, § 1, *with* Declaration, *supra* note 113, art. 18.

130 *See supra* notes 22–25 and accompanying text.

131 Convention, *supra* note 125, art. 9, § 2.

But once again, the plain language of the Convention provides a perspective from the believer's point of view instead of the government's, even though the Article provides an avenue for the government to place limits on this fundamental human right. In fact, by specifying the circumstances in which a governmental body may interfere with the free exercise of religion, the Convention is actually constraining the government's ability to do so.

Given the international framework created by the universally oriented Declaration and the regionally oriented Convention, the next question is how these protections are practically applied to the rights of prisoners. Here, the European Court of Human Rights has explained a prisoner's right to freedom of religion in express terms. In its "Guide on Article 9," the court stated that "national authorities are required to respect prisoners' freedom of religion by refraining from any unjustified interference with the exercise of the rights laid down" therein.[132] The court further stated that "if necessary," national authorities must also take "positive action to facilitate the free exercise of those rights, having regard to the particular requirements of the prison environment."[133] Yet again, this fundamental right to freedom of religion is framed from the perspective of the believer. Furthermore, the European Court of Human Rights recognizes that civil governments may need to protect the right even at their own expense, similar to the protection provided under RLUIPA and the larger U.S. statutory framework.[134]

Regional systems of law typically mirror one another in their *theoretical* understanding of the protection of a prisoner's right to freedom of religion. This consistency is true regardless of whether the regional system predated the Universal Declaration of Human Rights, or alternatively, was adopted as a response. As such, both local and international bodies of governance recognize the right to freedom of religion as a fundamental human right. Furthermore, all of these governing bodies recognize the prevalence and importance of the right specifically for incarcerated persons.

In the case of the European Court of Human Rights, the regional system uses a relatively mechanical step-by-step analysis to determine the validity of an action that interferes with the right to freedom of religion.[135] First, the court asks "whether there is an interference with religion, thought or conscience by the state."[136] If the court finds that such interference exists, it

132 EUROPEAN COURT OF HUMAN RIGHTS, GUIDE ON ARTICLE 9 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: FREEDOM OF THOUGHT, CONSCIENCE, AND RELIGION ¶ 251 (2019), https://www.echr.coe.int/Documents/Guide_Art_9_ENG.pdf.

133 *Id.*

134 *See* 42 U.S.C. § 2000cc-3(c) (2012); *supra* Section I.C.

135 Of note, a previous work in the *Notre Dame Law Review Online* opined as to how the European Court of Human Rights would analyze *Holt v. Hobbs*. *See* Francesca M. Genova, *How Would the European Court of Human Rights Decide* Holt v. Hobbs*?*, 93 NOTRE DAME L. REV. ONLINE 44 (2017). It concluded that the court would be likely to hold that "the prison's grooming policy implicates the prisoner's Article 9 rights." *Id.* at 55.

136 Brett G. Scharffs, *The Freedom of Religion and Belief Jurisprudence of the European Court of Human Rights: Legal, Moral, Political and Religious Perspectives*, 26 J.L. & RELIGION 249, 258 (2010).

proceeds to ask "whether the interference was prescribed by law."[137] Here, the court is effectively determining whether the state has followed "the rule of law" in its infringement of the right.[138] The law prohibiting the exercise of religion "must be accessible, sufficiently precise, and sufficiently foreseeable in order for people to plan their activities."[139] The answer to the second step of the inquiry "is almost always" yes.[140] Next, the court considers the state's interest and purpose for enacting the legal prohibition. It asks "whether the limitation adopted by the state was enacted to pursue and protect a legitimate aim."[141] Examples of legitimate aims include public safety, the protection of rights of others, and other public order interests.[142]

Finally, the court asks whether the legal prohibition limiting the right to freedom of religion is "necessary in a democratic society."[143] Within this inquiry, the court considers the "margin of appreciation" and the concept of "necessity."[144] The margin of appreciation is the "recognition that there may be permissible cultural and legal variations with respect to human rights issues," appurtenant to any specific country.[145] The necessity inquiry involves an additional two-step examination. First, the court considers if "the limitation is justified in principle" and therefore "correspond[s] to a pressing social need."[146] Second, the court considers the proportionality of the action in relation to a "legitimate aim pursued."[147]

The European Court of Human Rights's test is similar to that "used by the United States Supreme Court for protection of fundamental rights or suspect classifications."[148] Essentially, both tests boil down to a balancing of interests. On the one hand, the believer has a fundamental human right to freedom of religion and the free exercise thereof. On the other hand, a government body has a right to limit this interest for certain legitimate aims when using proportional and necessary means to further the legitimate aim. Furthermore, both the United States Constitution and the European Convention on Human Rights establish broad principles protecting the freedom of religion *from the perspective of the believer.* The subsequent application of the principle within each system involves a more nuanced protection, which incorporates a greater extent of government-based perspectives.

137 *Id.*
138 *Id.*
139 *Id.*
140 *Id.* at 258 n.40.
141 *Id.* at 258.
142 *See id.*
143 *Id.* at 259.
144 *Id.*
145 *Id.*
146 *Id.*
147 *Id.*
148 Paul L. McKaskle, *The European Court of Human Rights: What It Is, How It Works, and Its Future*, 40 U.S.F. L. REV. 1, 45–46 (2005) (citing Grutter v. Bollinger, 539 U.S. 306, 308 (2003)).

The similarities between these two systems is further evidence of the fundamental nature of the right to freedom of religion, but the differences between the two systems are equally as noteworthy. For example, the European Court of Human Rights uses the concept of the "margin of appreciation" because of its role as a regional system that must account for a variety of differing cultures and local legal systems.[149] As a regional system, Europe is relatively homogenous, but this flexibility in application is nevertheless necessary. Conversely, the U.S. judiciary need not account for this *variegation* because it is itself a local system. This is not to be confused with the *variation* of court of appeals opinions, which are always subject to Supreme Court review. While the systems differ in many other ways, the basic balancing test between them is the same. This is because the fundamental human right protected by each test is the same.

B. Religious Liberty Protections for Prisoners in the European Court of Human Rights

The remainder of this Part provides a brief outline of several cases involving religious liberty protections for incarcerated persons in the European Court of Human Rights. Even the briefest of forays into the court's history demonstrates that the European system has weaker judicial protections for prisoners' rights to the freedom of religion as compared to the United States. This is despite having similar judicial tests and standards.

First, in direct comparison to the aforementioned *Holt I*, the European Court of Human Rights has found that there is no violation of the Convention's Article 9 protection in cases such as *X. v. Austria*.[150] There, a prison prohibited one of its Buddhist prisoners from growing a goatee.[151] The court upheld the prohibition in favor of the prison's cited need to protect the identification of the prisoner and thereby ensure public order.[152] Similarly, in *X. v. United Kingdom*, the court offered no Article 9 protection to a Taoist prisoner who was prevented from possessing a religious book he ordered because parts of the book contained illustrations of martial arts.[153] In this case, the court upheld the prohibition on the grounds that it was *necessary* to protect the rights and liberties of others.[154] In both of these cases, the European Court of Human Rights demonstrated that it gives substantial weight to the interests of prison officials when balancing competing interests as part of its analytical framework.

149 Scharffs, *supra* note 136, at 259.

150 *See* X. v. Austria, App. No. 1753/63, 1965 Y.B. Eur. Conv. on H.R. 174 (Eur. Comm'n on H.R.).

151 *Id.* at 175.

152 *Id.* at 178, 184, 188.

153 *See* X. v. United Kingdom, App. No. 6886/75, 5 Eur. Comm'n H.R. Dec. & Rep. 100, 100–01 (1976).

154 *Id.*

Another pertinent case from the Court's recent history is *Kovalkovs v. Latvia*.[155] There, the applicant, Gatis Kovalkovs, alleged that "he was prevented from adequately performing the fundamental rituals of Vaishnavism (the Hare Krishna movement)."[156] Kovalkovs complained that he was not placed in a single cell or given access to a room that he could use to pray, read religious literature, and meditate.[157] The court made two bold declarations in its opinion. First, it stated that it was "prepared to accept that there ha[d] been an interference with the applicant's rights under Article 9."[158] Second, the court stated that it was also prepared to accept that the "financial implications for a custodial institution which can have an indirect impact on the quality of treatment of other inmates can serve as a legitimate aim, namely, the protection of the rights and freedoms of others."[159] In this second declaration, the court revealed its tentativeness to rule that an institution may need to absorb some of the cost in order to provide its prisoners an ample opportunity to freely exercise their faith. While this does not necessarily contradict the doctrine articulated by the U.S. Supreme Court, it is at the very least rhetorically divergent.

The court ultimately held that Kovalkovs's claims were "manifestly ill-founded and must be rejected," despite having just stated that it was prepared to find an Article 9 violation.[160] In rejecting the prisoner's claims, the court stated that when prison officials offer the use of a separate premises for performing religious rituals on at least one occasion "and the applicant refused that offer without any apparent reason, the balance between the legitimate aims sought to be achieved and the minor interference with the applicant's freedom to manifest his religion has clearly been achieved."[161] Thus, the court determined that the prison's offer of a residential area for Kovalkovs's religious practice was sufficient, even if Kovalkovs found the space inadequate and refused it the first and only time it was offered.[162]

This decision lays a precedential trap for the incarcerated believer. If the prisoner denies an opportunity for a space to worship, even just once, he is no longer entitled to an accommodation for that specific practice. And yet, if he accepts the accommodation in the first instance, the court will say he has been accommodated and therefore is not entitled to any additional accommodation as it relates to that practice.

Kovalkovs v. Latvia, alongside *X. v. Austria*, *X. v. the United Kingdom*, and many other cases, reveals that the European Court of Human Rights provides a limited protection of the right to the freedom of religion for incarcerated

155 *See* Kovalkovs v. Latvia, App. No. 35021/05, (Eur. Ct. H.R. Jan. 31, 2012), https://hudoc.echr.coe.int/eng?i=001-109099.

156 *Id.* ¶¶ 1, 9.

157 *Id.* ¶ 60.

158 *Id.* ¶ 63.

159 *Id.* ¶ 64.

160 *Id.* ¶ 69.

161 *Id.* ¶ 67.

162 *Id.* ¶ 15.

persons. There are, of course, instances in which the court has found Article 9 violations for prisoners. A common—and relevant—example of Article 9 violations is when prisoners are denied access to a priest or preacher of their faith. For example, in *Poltoratskiy v. Ukraine*, the court held that there was an Article 9 violation after a death row inmate was denied from participating in weekly religious services and was prevented from visiting with a priest for at least a period of several months.[163] The court has a strong precedential history of defending the right to a preacher or priest under Article 9.[164] However, as evidenced above, the court has many other troubling precedents that restrict the free exercise of religion for prisoners.

Compared to the U.S. judicial system, the European Court of Human Rights generally gives greater deference to the interests of its sovereign members. This is likely due to its status as a regional system. Still, the Universal Declaration of Human Rights, the U.S. Constitution, and the European Convention on Human Rights all recognize the right to freedom of religion as a fundamental human right. Consequently, in application, these systems *should* protect the right to the same extent, or at the least should be more closely aligned.

III. Applying Freedom of Religion to Prisoners: Recommendations for How Courts and Political Bodies Should Correctly Understand and Apply Religious Liberty Rights to Prisoners

Political bodies and courts alike should seek to provide broad protections for a prisoner's right to the free exercise to teach, practice, worship, and observe his or her faith. This Part will provide a series of brief recommendations for how the U.S. judicial system, the European Court of Human Rights, and the Commission on Unalienable Human Rights should protect the right of freedom of religion for incarcerated persons.

The United States Judicial System. First, courts in the United States should continue to interpret and apply the First Amendment broadly, as it was originally intended and is consistent with its original public meaning.[165] A broad understanding of the Free Exercise Clause is necessarily from the perspective of the believer, not the government.[166] Furthermore, the First Amendment must be read with the general understanding of the right to freedom of religion at the time the Amendment was conceived, as a broad and fundamental human right.[167] This human right equally applies to incarcerated persons. The government must satisfy the same burdens before it infringes on the fundamental human rights of prisoners as it would for any other group of

163 *See* Poltoratskiy v. Ukraine, 2003-V Eur. Ct. H.R. 89, 128–30.

164 *See* Mozer v. Moldova, App. No. 11138/10, Eur. Ct. H.R. ¶¶ 197–99 (2016), http://hudoc.echr.coe.int/eng?i=001-161055; Kuznetsov v. Ukraine, App. No. 39042/97, Eur. Ct. H.R. ¶¶ 143–51 (2003), http://hudoc.echr.coe.int/eng?i=001-61060.

165 *See supra* Section I.A.

166 *See supra* notes 19–25 and accompanying text.

167 *See supra* Section I.A.

people. The only difference in the context of incarcerated persons is the nature of *some* of the competing interests.

Second, and similarly, RLUIPA should be interpreted and applied broadly, just as its plain language requires and as it was intended at the time of enactment. This should include fundamental protections within the right to freedom of religion and the free exercise thereof. For example, properly understood the protections should include the right to a preacher as well as the right to a place to worship. While prison officials should receive deference for prison security concerns, these must be legitimate aims accomplished by the least restrictive means. Cases like *Holt v. Hobbs* have helped to properly interpret and expand the protections under RLUIPA, but they have not gone far enough. The question of deference owed to security concerns is likely to continue to split courts of appeals until it inevitably boils to the surface of the Supreme Court's docket. When that day comes, the Supreme Court should make its decision with an emphasis on the perspective of the believer, just as the Framers envisioned when drafting the First Amendment protection.

The European Court of Human Rights. The European Court of Human Rights offers substantive protections for the right to freedom of religion, similar to those provided in the U.S. system. However, the court has often fallen short in application. Even a cursory glance at the court's precedents show that the European system has frequently interpreted Article 9 of the Convention narrowly when applying it to incarcerated persons. Consequently, the court has curtailed the rights of prisoners to teach, practice, worship, and observe his or her faith throughout the regional system.

The court should interpret Article 9 consistent with its original intent. In so doing, it must look to the Universal Declaration of Human Rights, its preamble, and the drafting history of the Declaration's Article 18 to supplement the plain text of the Convention. Furthermore, a proper understanding of the right to freedom of religion involves understanding the Convention as an instrument that uses its specificity to bolster the protection of the rights listed therein rather than as a limitation or constraint.[168] By detailing the limitations of each right, the Convention effectively cabins the limitations for each right. Thus, a government cannot invoke a limiting principle that is not expressly mentioned.

The Convention, like the United States Constitution, RLUIPA, and the Declaration, generally seeks to broaden the scope of the free exercise of religion. This underlying intent should be applied to prisoners equally. The analytical framework used by the European Court of Human Rights is akin to that used by U.S. courts under RLUIPA and the First Amendment. In order to preserve the intent of the drafters and the ratifying countries, the court should construe Article 9 to include comparable protections for prisoners. Mainly, the court should analyze issues with greater deference to the believer

168 *See supra* note 119 and accompanying text.

and less deference to the stated interests of prison officials. This proper balance will help restore prisoner rights to a preacher and a place to worship.

The Commission on Unalienable Human Rights. On July 8, 2019, U.S. Secretary of State Mike Pompeo announced the establishment of a new advisory commission.[169] The Commission on Unalienable Human Rights was created to provide "advice and recommendations on human rights to the Secretary of State, grounded in our nation's founding principles and the 1948 Universal Declaration of Human Rights."[170] Furthermore, the Commission's charter states that it is not charged with discovering new principles, but rather with providing "advice to the Secretary for the promotion of individual liberty, human equality, and democracy through U.S. foreign policy."[171] The State Department's official notice also stated that the Commission is expected to "provide fresh thinking about human rights discourse where such discourse has departed from our nation's founding principles of natural law and natural rights."[172]

The Commission provides a unique opportunity to bridge the gap between domestic and international understandings. These two understandings of the right to freedom of religion ultimately converge because they each view the free exercise of religion as a fundamental human right, regardless of any differences in their analytical frameworks. The Commission's mandate explicitly cites the nation's founding documents and Universal Declaration of Human Rights as the grounds for the human rights it is to consider. In the context of the right to freedom of religion, this encompasses a broad, believer-focused right.

The Commission should understand the right to freedom of religion in this way, and thereby recommend that the rights to a preacher and a space to worship be expressly protected as part of the fundamental human right. By making this type of recommendation, the Commission will increase the religious liberty protections of prisoners in several ways. First, if adopted by the Secretary of State and the President of the United States, these fundamental protections will become part of U.S. foreign policy. Consequently, the protections will be more likely to be adopted by allies and negotiating partners and thus more likely to receive consideration from international bodies such as the United Nations.

Second, if these policies are recommended by the Commission and subsequently adopted as part of U.S. foreign policy, prisoner rights to a preacher and a space to worship will be significantly more likely to become part of U.S. domestic policy as well. This, of course, will not change the legal interpreta-

169 Michael R. Pompeo, Sec'y of State, Remarks to the Press (July 8, 2019), https://www.state.gov/secretary-of-state-michael-r-pompeo-remarks-to-the-press-3/.

170 U.S. DEP'T OF STATE, CHARTER OF THE DEPARTMENT OF STATE COMMISSION ON UNALIENABLE RIGHTS ¶ 3 (2019), https://www.state.gov/wp-content/uploads/2019/10/Charter-Commission-on-Unalienable-Rights.pdf.

171 *Id.*

172 Public Notice of Department of State Commission on Unalienable Rights, 84 Fed. Reg. 25,109 (May 30, 2019).

tion of the First Amendment or RLUIPA, but it will focus popular opinion on the issue while simultaneously reeducating the public on the Framers' intent and the original public meaning of the right to freedom of religion.

At bottom, the Commission has been given the objective to advise the Secretary of State on matters concerning unalienable human rights. A prisoner's right to freedom of religion encompasses a cross section between the international and domestic understandings of the right as a fundamental human right while also involving one of the world's most vulnerable populations. The Commission has the unique opportunity to further establish the free exercise of religion as a fundamental human right, just as it is properly understood.

CONCLUSION

The right to the free exercise of religion is properly understood as a fundamental human right. In the context of the United States, the Framers recognized the relative importance of this protection in the hierarchy of human rights and drafted the First Amendment accordingly. Since then, courts and legislatures have sought to protect the free exercise of religion by interpreting and applying the First Amendment broadly as well as by enacting legislation such as RLUIPA. Internationally, the Universal Declaration of Human Rights established a similar understanding of the right to freedom of religion in 1948. Subsequently, regional systems like the European Court of Human Rights have applied this right in a variety of different ways. At their core, these legal instruments and judicial bodies are intended to protect the same fundamental human right. International courts, U.S. courts, and well-positioned political and legislative bodies should continue to advance the proper understanding of the right to the free exercise of religion and apply it to at least one of the world's most vulnerable populations—prisoners.