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Protecting the Weak: Religious Liberty in the Twenty-First Century

*Senator Gordon Smith**

I. INTRODUCTION

After I was elected to represent Oregon in the United States Senate, I sought membership on the Senate Foreign Relations Committee. From that moment until now, I have received visitors from every corner of the earth seeking the favor of the United States Government. Some seek foreign aid or improved trade relations. Others seek military alliance or political defense against those who prey upon basic human rights. All too often, persecuted religionists around the world are forced to seek assistance in protecting the basic freedoms of conscience, including the right to worship God according to the dictates of conscience. Why do persecuted religionists look to Washington for hope and help? Should the United States help and, if so, how?

I believe the United States would not be true to its Constitutional creed if it did not hold out sanctuary and succor to people of faith everywhere. This country has provided international leadership on issues of religious freedom throughout most of its history. In the aftermath of World War II, the United States played a pivotal role in the creation of the Universal Declaration of Human Rights (“Universal Declaration”) and other international agreements that today form the international legal framework that protects religious freedom.

The Fiftieth Anniversary of the Universal Declaration is an appropriate time to reflect upon the advances in human rights

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that have occurred since its adoption on December 10, 1948. Article 18 of the Universal Declaration declares 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.”¹ These important words have contributed heavily to the spread of religious freedom in the latter part of this century. Since the adoption of the Universal Declaration, other significant declarations and covenants have been adopted which have expanded the scope of religious liberty protections around the world. These include the International Covenant on Civil and Political Rights;² the Helsinki Final Act;³ the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief;⁴ and the Vienna Concluding Document.⁵ All of these important documents reiterate and expand upon the basic language expressed in Article 18 of the Universal Declaration.

In 1966, the United Nations General Assembly adopted the International Covenant on Civil and Political Rights (“ICCPR”). Today, the ICCPR is the “only global human rights treaty dealing with religion that contains measures of implementation.”⁶ Since 1966, 125 countries have ratified and become parties to this important covenant.⁷ The ICCPR expands upon the language of the Universal Declaration in important ways. It requires “equal treatment of all persons before the law and prohibits discrimination based, among other

1. U.N. G.A. Res. 217 A (III), art. 18 (1948) [hereinafter *Universal Declaration*].

2. U.N. G.A. Res. 2200A (XXI) (1966).

3. *Conference on Security Cooperation in Europe: Final Act*, 1(A) Conference on Security and Cooperation in Europe (1975).

4. U.N. G.A. Res. 36/55 (1981).

5. *Concluding Document of the Vienna Meeting of Representatives of the Participating States of the Conference on Security and Cooperation in Europe*, Conference on Security and Cooperation in Europe (1989).

6. Natan Lerner, *Religious Human? Rights Under the United Nations*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVE 79, 98 (Johan D. van der Vyver & John Witte, Jr. eds., 1996).

7. See BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW: SELECTED DOCUMENTS 387 (1991). The United States ratified the covenant on June 8, 1992. See *id.*

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things, on religion.”⁸ The Human Rights Committee of the United Nations has further clarified the anti-discriminatory language of the ICCPR in its General Comment to allow religious groups more freedom in basic affairs, such as “the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.”⁹

The General Assembly’s adoption of the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (“1981 Declaration”) has clarified and expanded upon the broad principles outlined in the Universal Declaration and in the ICCPR. The 1981 Declaration is considered by many to be the most important international instrument regarding religious rights and prohibition of intolerance based on religion or belief.¹⁰ The important legal components of the declaration include “(1) prescriptions of religious rights for individuals and institutions; (2) proscriptions on religious discrimination, intolerance, or abuse; (3) provisions specific to the religious rights of parents and children; and (4) explicit principles of implementation.”¹¹ Among the more important freedoms specifically protected by the 1981 Declaration are the right to assemble and maintain places of worship; to write, publish, and disseminate religious materials; to teach a religion or belief; and “to observe days of rest” or “celebrate holy days.”¹²

The adoption of the Vienna Concluding Document in 1989 has also contributed to the creation of a legal framework for the protection of religious freedom. It declares specific implementation actions to be taken by States including taking “effective measures to prevent and eliminate discrimination; . . . foster[ing] a climate of mutual tolerance and respect between believers of different communities,” and granting official

8. John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 435 (1996).

9. *Id.* at 436 (quoting U.N. GAOR Hum. Rts. Comm., General Comment No. 22(48) concerning Article 18, U.N. Doc. CCPR/C/21/Rev.1/Add. 4 (1993)).

10. See Lerner, *supra* note 6, at 114.

11. Witte, Jr., *supra* note 8, at 436.

12. *Id.*

recognition upon request to communities of believers under the constitutional framework of the state.¹³

Despite the expanding scope of religious protections in these important documents, abuses of religious liberty continue at an alarming rate around the world. The most recent report by the U.N. Special Rapporteur on Religious Intolerance cited serious abuses of religious liberty in thirty-three nations.¹⁴ This article looks at religious liberty in the fifty years since the adoption of the Universal Declaration. Part II discusses the United States' commitment to religious liberty. Part III considers the impact of the Universal Declaration. Part IV addresses areas of current concern regarding religious liberty, and Part V concludes that as a global community, we are clearly not living up to the high standard embodied in the Universal Declaration and other bodies of international law. The words expressed therein are merely unfulfilled declarations if signatory nations fail to vigilantly safeguard the fundamental rights that form the basis of these documents.

II. THE U.S. COMMITMENT TO RELIGIOUS LIBERTY

Over the past decade, the United States has embarked on a course to strengthen protections for religious liberty both within the United States and abroad. During this period, many significant pieces of legislation have been passed by overwhelming majorities in the Senate. In a climate where political partisanship is the norm, these legislative achievements stand out as having achieved strong bipartisan support. These include the Religious Freedom Restoration Act of 1993¹⁵ (RFRA), which the Senate passed by a margin of ninety-seven to three. This act required the government to prove that it had a "compelling interest" before taking any action that would abridge religious freedom.¹⁶ Unfortunately, this legislation was later struck down by the Supreme Court on grounds that Congress had usurped the interpretive power of

13. *Id.* at 437.

14. *See Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, U.N. GAOR, 53rd sess., U.N. Doc. A/53/279 (1998) [hereinafter *Implementation*].

15. 42 U.S.C. §§ 2000bb-000bb-4 (1994).

16. *Id.* at § 2000bb-1(b)(1).

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the judiciary by defining the extent of protections under the First Amendment.¹⁷

Significant strides were also taken for the improvement of religious liberty with the unanimous passage of the Religious Liberty and Charitable Donation Protection Act of 1998,¹⁸ which allowed for tax deductions of religious contributions. Another clear legislative majority was reached in a resolution I introduced to condemn the newly passed Russian anti-religion law.¹⁹ This resolution was passed in 1997 by a margin of ninety-five to four and called on President Yeltsin to certify

that the Government of the Russian Federation has implemented no statute, executive order, regulation or similar government action that would discriminate, or would have as its principal effect discrimination, against religious groups or religious communities in the Russian Federation in violation of accepted international agreements on human rights and religious freedoms to which the Russian Federation is a party.²⁰

In addition, the recent ninety-eight to zero passage of the International Religious Freedom Act of 1998,²¹ has manifested a similar sentiment. The act requires the State Department to monitor and annually report violations of religious liberty on a country-by-country basis. International violations of religious liberty will result in the President of the United States taking appropriate measures under circumstances which include tying

17. See *City of Boerne v. Flores*, 521 U.S. 507, 535–36 (1997). However, in dissent, Justice O'Connor ratified the ultimate purposes of RFRA and held out the possibility of revisiting the issue in a judicial context: "If the Court were to correct the misinterpretation of the Free Exercise Clause set forth in *Smith*, it would simultaneously put our First Amendment jurisprudence back on course and allay the legitimate concerns of a majority in Congress who believed that *Smith* improperly restricted religious liberty." *Id.* at 545 (O'Connor, J., dissenting).

18. Pub. L. No. 105-183, 112 Stat. 517 (1998).

19. For an overview of the provisions of the Russian anti-religion law, see W. Cole Durham, Jr. & Lauren B. Homer, *Russia's 1997 Law on Freedom of Conscience and Religious Associations: An Analytical Appraisal*, 12 EMORY INT'L L. REV. 101 (1998).

20. Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998 § 577(a), Pub. L. No. 105-118, 111 Stat. 2386, 2433–34 (1997).

21. Pub. L. No. 105-292, 112 Stat. 2787 (1998).

improvements in religious tolerance to foreign aid, international loan approval, and preferential trade status.²²

To an observer unfamiliar with the religious history of the United States it may be difficult to understand the depth of the commitment to religious liberty manifested in these recent legislative acts both within the United States and abroad. Only by understanding the religiously pluralistic nature of American society and the historical struggle to gain religious freedom within the United States is it possible to understand why the United States would go so far as to monitor and take diplomatic action against religious abuses in other nations.

A. *Religious Pluralism*

The United States is a land of immigrants. Throughout its long history, many major religious groups, including Protestants, Catholics, Jews, Muslims, and Buddhists, have immigrated here to escape persecution in their home countries.²³ Where immigration has occurred for reasons not associated with religious persecution, immigrant groups are nonetheless very concerned about the protection of fundamental religious rights in their home countries. Because these immigrants brought their religion with them, the United States is one of the most religiously pluralistic countries in the world. Currently, the largest religious denominations in the United States are Roman Catholics (60.3 million), Baptists (33.8 million),²⁴ Methodists (8.5 million), Lutherans (7.8 million),²⁵ Jews (5.9 million),²⁶ The Church of God in Christ (5.5 million),

22. *See id.* at § 405(a).

23. This is one of the major themes in American history. *See, e.g.*, ROGER DANIELS, *COMING TO AMERICA: A HISTORY OF IMMIGRATION AND ETHNICITY IN AMERICAN LIFE* (1990); LEONARD DINNERSTEIN ET AL., *NATIVES AND STRANGERS: A MULTICULTURAL HISTORY OF AMERICANS* (1996); MILTON GORDON, *ASSIMILATION IN AMERICAN LIFE* (1964); ANDREW M. GREELEY, *ETHNICITY IN THE UNITED STATES: A PRELIMINARY RECONNAISSANCE* (1974); PATRICK MOYNIHAN, *BEYOND THE MELTING POT* (2d ed. 1970); and DAVID M. REIMERS, *STILL THE GOLDEN DOOR: THE THIRD WORLD COMES TO AMERICA* (2d ed. 1992).

24. Includes six different Baptist denominations: the Southern Baptist Convention, Progressive National Baptist Convention, The Baptist Bible Fellowship International, National Baptist Convention of America, National Baptist Convention U.S.A., Inc., and the National Missionary Baptist Convention of America.

25. Includes the Evangelical Lutheran Church in America and the Lutheran Church—Missouri Synod.

26. This number includes Jews who define themselves as Jewish in religious

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Mormons (4.7 million), and Presbyterians (3.8 million).²⁷ By 2050, it is projected that Protestant denominations will account for 49% of the population, Catholics 33%, Muslims 5%, and Jews 1%.²⁸ Given the number of adherents to these and other religions in the United States, it is understandable that these groups wield political influence and are concerned about protecting religious rights around the globe, especially when it concerns the freedom of members of their own religion in foreign countries. As a result of this kind of religious pluralism, nearly every United States Senator has a large constituency for whom international religious liberty is a very important matter.

In my home state of Oregon, this kind of religious pluralism is particularly evident. The example of Dan Pollard, a Baptist minister from Oregon, is illustrative of the concern many Americans have for international religious liberty. Pollard arrived in Vanino, Russia, in 1992, shortly after Russia promised to extend religious freedom to its people. By April 1996, Pollard had completed the process of obtaining official accreditation by the regional government to operate as a missionary and to get his church registered according to regional laws. However, after Russia passed its anti-religion law in 1997, Pollard was told by a local official that he no longer had the right to preach or conduct services and that his accreditation as a minister would probably not be renewed. In March 1998, the official made good on his threat and refused to extend Pollard's accreditation. At my request, the U.S. State

terms as well as Jewish in cultural terms. See U.S. Department of Commerce, STATISTICAL ABSTRACT OF THE UNITED STATES, 1997: THE NATIONAL DATA BOOK 70 (1997).

27. *Id.* at 69-70. Statistics include

self-reported membership of religious bodies with 60,000 or more as reported to the Yearbook of American and Canadian Churches. Groups may be excluded if they do not supply information. The data are not standardized so comparisons between groups are difficult. The definition of 'church member' is determined by the religious body.

Id. at 69. For a more complex treatment of religious demographics in the United States, see, for example, BARRY A. KOSMIN & SEYMOUR P. LACHMAN, ONE NATION UNDER GOD: RELIGION IN CONTEMPORARY AMERICAN SOCIETY (1993).

28. See VINCENT N. PARRILLO, DIVERSITY IN AMERICA 188 (1996) (citing U.S. Bureau of the Census, *Current Population Reports*, Series P25-1092 (1992), in STATISTICAL ABSTRACT OF THE UNITED STATES (1994)).

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Department and the Consul General in Vladivostok worked with Pollard and regional authorities who had the authority to approve or deny registration and accreditation. To date, Pollard has received only a temporary extension from Russian authorities, but he has refused to surrender. He writes:

Anyone who begins to investigate will learn that the same tactics are being used now that were used in the past: isolate and eliminate secretly. And, for those who try to oppose, publicly drum up false accusations to make them look like extremist troublemakers. That's exactly what is being done to us.

Pollard's experience on the front lines of religious intolerance in Russia resonates not only with Baptists but with every other American who has ever experienced religious persecution.

B. The Historical Struggle for Religious Freedom

The U.S. commitment to religious freedom must also be understood within the context of the historical struggle for religious freedom in America, which began with the settlement of the colonies by the British in the seventeenth century. Several of the original colonies were established as havens for specific sects and denominations. The plurality of different denominations helped to establish the foundations for religious freedom within the United States.

1. The religious founding of the American colonies

The Massachusetts Bay and New Haven (Connecticut) colonies were established by Puritans who favored reform of the Anglican church along Congregationalist (Independent) lines. The Congregationalist break from the Anglican church was not prompted so much by theological differences as the geographic impossibility of administering ecclesiastical affairs from England.²⁹ Thus, it was only natural that by the 1760s, Congregationalists strongly objected to the presence of a Parliament-appointed Anglican bishop in the colonies, a fact which strongly influenced the growing colonial independence

29. See WILLARD L. SPERRY, RELIGION IN AMERICA 32-33 (1946).

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movement.³⁰ By that time, Congregationalists had also become ardent supporters of the natural rights philosophy that all men are endowed with inalienable rights which may not be violated by any ruler.³¹

Despite their ardent support of political freedom, the New England Congregationalists and Puritans in general did not have an outstanding record with respect to religious tolerance.³² In all too many cases, once the Puritans had established their own religious liberty in the colonies, they reverted to the same forms of religious intolerance they had fled England to escape.³³ Religious nonconformists like Roger Williams, Anne Hutchinson, and others were expelled from the colony and forced to settle elsewhere. "Baptists were banished from the colony by statute in 1644, and four Quakers, who insisted on returning after being expelled, were hanged."³⁴ Roger Williams settled some forty miles to the south of the Massachusetts Bay Colony, where he founded the colony of Rhode Island in the 1630s upon the principles of freedom of conscience and complete separation of church and state.³⁵ Rhode Island was not an irreligious colony, but rather a colony without any official religious charter.³⁶ As such, it became a haven for religious dissenters, including many Baptists.³⁷

Later in the colonial era, Baptists and other evangelicals became strong proponents of the ideal of separation of church and state first espoused by Williams.³⁸ They held that

[e]very religious body was . . . to be free from state control of their assembly and worship, state regulations of their property and polity, state incorporation of their society and clergy, [and]

30. See WILLIAM WARREN SWEET, *RELIGION IN THE DEVELOPMENT OF AMERICAN CULTURE: 1765-1840*, at 7-8 (1952).

31. See *id.* at 8.

32. See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1422 (1990).

33. See *id.*; see also SPERRY, *supra* note 29, at 33-34.

34. McConnell, *supra* note 32, at 1423 (citing T. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* 12-13, 22 (1986)).

35. See WILLIAM WARREN SWEET, *RELIGION IN COLONIAL AMERICA* 326 (1942).

36. See McConnell, *supra* note 32, at 1425-26 ("Rhode Island's Charter of 1663 was the first to use the formulation 'liberty of conscience.'").

37. See SWEET, *supra* note 35, at 122-27.

38. See Witte, Jr., *supra* note 8, at 382.

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state interference in their discipline and government. Every religious body was also to be free from state emoluments like tax exemptions, civil immunities, property donations, and other forms of state support for the church. . . . The evangelicals feared state benevolence towards religion and religious bodies almost as much as they feared state repression. For those religious bodies that received state benefits would invariably become beholden to the state, and distracted from their divine mandates.³⁹

In addition to Rhode Island, the doctrine of free exercise of religion emerged as an articulated legal principle in the colonization of states such as Maryland and Pennsylvania.⁴⁰ George Calvert and his son Cecil founded the Maryland colony as a sanctuary for Catholics from Protestant England in 1625. The elder Calvert, a Protestant convert to Catholicism, was determined to create a colony where the religious intolerance then present in England would not be replicated. "The term 'free exercise' first appeared in an American legal document in 1648, when [Calvert] required his new Protestant governor and councilors in Maryland to promise not to disturb Christians ('and in particular no Roman Catholic') in the 'free exercise' of their religion."⁴¹ The colonization of Maryland holds a unique position in the colonization effort of America as the only explicit attempt at Protestants and Catholics living together on terms of equality.⁴²

Another experiment in religious tolerance was conducted by William Penn, who founded Pennsylvania as a Quaker refuge in 1681. Penn, like George Calvert, was sincerely committed to providing a religious sanctuary for religious minorities from Europe.⁴³ At the end of the colonial period, there was a greater diversity of religious tolerance in Pennsylvania than in any other colony, as witnessed by the variety of religious groups found there. "In 1776 there were in Pennsylvania 403 different congregations. Of these 106 were German Reformed; 68 were Presbyterian, 63 Lutheran, 61 Quaker; 33 Episcopalian; 27

39. *Id.*

40. See McConnell, *supra* note 32, at 1424–25.

41. *Id.* at 1425 (citing W. RUSSELL, MARYLAND: THE LAND OF SANCTUARY 130 (2d ed. 1908)).

42. See Witte, Jr., *supra* note 8, at 176–77.

43. See *id.* at 330.

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Baptist; 14 Moravian; 13 Mennonite; 13 Dunker or German Baptist Brethren; 9 Catholic and 1 Dutch Reformed.”⁴⁴

As the colonial era progressed, New York, New Jersey, and Pennsylvania became strongholds for Presbyterians who came to “numerical prominence through the great Scotch-Irish immigration of the eighteenth century.”⁴⁵ The Scotch-Irish Presbyterians emigrated principally from Ulster, and bore the resentment of economic injustice and religious laws passed by the Irish Parliament and supported by the Anglican Church, which restricted their clergy in the performance of religious duties.⁴⁶ Presbyterianism in the American colonies bore a strong resemblance to Congregationalism, and the two groups often merged together.⁴⁷ This happened, in part, because the Presbyterians held the same natural rights ideals as the Congregationalists.⁴⁸ The natural rights philosophy, preached so strongly by Congregationalist and Presbyterian ministers, formed the principle foundation for the guarantees of religious rights in the Constitution. Thomas Jefferson later stated in his first message as president, “Can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that their liberties are the gift of God.”⁴⁹

2. *Religious guarantees*

The religious character of the American colonization had a profound impact upon the establishment of guarantees of religious liberty in the Constitution. The adoption of the First Amendment required that Congress would “make no law respecting an establishment of religion” or “prohibit[] the free exercise thereof.”⁵⁰ These two phrases, which have come to be known as the Establishment Clause and Free Exercise Clause, are closely connected in genesis and find their roots in

44. *Id.* at 163.

45. SWEET, *supra* note 35, at 9.

46. *See id.*

47. *See id.* at 4.

48. *See id.* at 8–9.

49. ISAAC A. CORNELISON, *THE RELATION OF RELIGION TO CIVIL GOVERNMENT IN THE UNITED STATES OF AMERICA* 93 (1970).

50. U.S. CONST. amend. I.

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competing branches of free exercise thought present during the American colonization.⁵¹

a. Free exercise. The ideas of Thomas Jefferson represent an Enlightenment rationalist branch of free exercise thought. Jefferson sought to build “a wall of separation”⁵² between church and state and thereby free both institutions from the corrupting influence of the other.⁵³ For Jefferson, the establishment of freedom of conscience was essential to free the human mind from all forms of outside bondage⁵⁴ and establish the moral republicanism that “was the basis of a well-ordered society.”⁵⁵ Jefferson favored protection of religion and conscience as prerequisites for the protection of morality, “the thing that Jefferson considered most important.”⁵⁶ As a result, “Jefferson’s ideas concerning religious liberty were unmistakably flavored with more concern for freedom *from* religion than freedom of the individual *to be* religious, or freedom *for* religion.”⁵⁷

The views of James Madison, Roger Williams, and evangelicals⁵⁸ represent a more religious branch of free exercise thought. “The religious freedom envisioned by Madison was, like Williams’s, a freedom at least in significant part *for* religion rather than a Jeffersonian freedom *from* religion.”⁵⁹ “Consistent with this more affirmative stance toward religion, Madison advocated a jurisdictional division between religion and government based on the demands of religion rather than

51. See McConnell, *supra* note 32, at 1446–51.

52. Timothy L. Hall, *Roger Williams and the Foundations of Religious Liberty*, 71 B.U. L. REV. 455, 495 (1991) (quoting *Letter from Thomas Jefferson to Messrs. Nehemiah Dodge and Other, a Committee of the Danbury Baptist Association in the State of Connecticut* (Jan. 1, 1802), in THOMAS JEFFERSON: WRITINGS 510 (Library of Am. ed. 1984)).

53. See *id.* at 496–97; Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1583 (1989).

54. See Hall, *supra* note 52, at 498–99.

55. *Id.* at 504.

56. *Id.* at 505.

57. *Id.* 503.

58. See McConnell, *supra* note 32 and accompanying text (discussing evangelical beliefs in Rhode Island). See also Adams & Emmerich, *supra* note 53, at 1591–94. Leading “pietistic separatists” of the colonial era included the Baptist minister Isaac Backus, who worked to “disestablish Congregationalism in New England,” John Witherspoon of New Jersey, and Roger Sherman of Connecticut. *Id.*

59. Hall, *supra* note 52, at 510.

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solely on the interests of society.”⁶⁰ In *Memorial and Remonstrance*, he wrote:

The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. . . . It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him.⁶¹

Accordingly, Madison, Williams, and evangelicals emphasized a brand of free exercise thinking that sought to protect religious belief and action from State interference.

b. Separation of church and state. These two competing branches of free exercise thought converged to support the idea of the separation of church and state in the United States Constitution. The Enlightenment rationalists desired to erect a wall to protect the State from the Church,⁶² and religious believers (particularly those in minority religious groups, like evangelicals) advocated the construction of the same wall at the federal level to protect their religious freedoms. Practical considerations relating to religious pluralism also played an important role in the disestablishment of religion at the federal level. Since so many different religious sects existed in America at the end of the colonial era, it was unacceptable that any particular church be established as a federal state church. “[N]o one sect was numerous and strong enough” to accomplish this feat.⁶³ In the absence of such a majority church, the nonreligious state became the ideal around which the colonies could unite and protect religious liberty.⁶⁴ James Madison gave voice to this practical sentiment at the Constitutional Convention when he said, “In a free government the security for religious rights consists in a multiplicity of sects.”⁶⁵

60. McConnell, *supra* note 32, at 1453.

61. *Id.* (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments*, in 2 THE WRITINGS OF JAMES MADISON 183, 184 (Hunt ed. 1901)).

62. See Adams & Emmerich, *supra* note 53, at 1583 (“Those deeply influenced by the Enlightenment, such as Thomas Paine, Jefferson, and to a lesser extent Madison, approached the issue of church and state suspicious of institutional religion and its potential for corrupting government.”).

63. HERBERT MULLER, RELIGION AND FREEDOM IN THE MODERN WORLD 69 (1963).

64. See *id.* at 68–69.

65. SPERRY, *supra* note 29, at 54. See also James Madison, *Debates* (June 12, 1788), in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF

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Accordingly, religious pluralism at the founding of the United States strongly contributed to the separation of church and state and the guarantees of religious freedom in the Constitution.

3. *Religious persecution*

Despite the efforts made to establish freedom of religion in the United States, there are many religious groups that have experienced forms of persecution subsequent to the adoption of the guarantees of religious freedom in the Constitution.

a. Immigrant groups. Even after the founding of the new nation, Catholics, Jews, African Americans,⁶⁶ and other religious immigrant groups experienced persecution from nativist groups such as the Know-Nothings, the American Protective Association (A.P.A.), and the Ku Klux Klan.⁶⁷ The Know-Nothings were organized to “resist the insidious policy of the Church of Rome, and other foreign influence against the institutions of [the United States] by placing in all offices . . . nothing but native-born Protestant citizens.”⁶⁸ The A.P.A. was an organization dedicated to curbing the immigration of foreigners and Catholics in particular.⁶⁹ The Ku Klux Klan’s purpose was to antagonize and dominate “Jews, Catholics, foreign-born and Negroes.”⁷⁰ It is estimated that at the height of its popularity, in 1922, the Ku Klux Klan had a membership of approximately five million.⁷¹ The campaigns led against religious and ethnic groups by these and other hate organizations resulted in employment, education, housing, and

THE FEDERAL CONSTITUTION 330 (Elliot ed., 2d ed. 1836).

66. See George Dargo, *Religious Toleration and its Limits in Early America*, 16 N. ILL. U. L. REV. 341, 356 (1996) (“Traditional African religions did not survive the Atlantic crossing. Nevertheless, conversion to Christianity was a slow process since owners were reluctant to convert their slaves.”).

67. See, e.g., RAY ALLEN BILLINGTON, *THE PROTESTANT CRUSADE 1800-1860: A STUDY OF THE ORIGINS OF AMERICAN NATIVISM* (1938) (discussing pre-Civil War nativism); JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925* (1968) (discussing post-Civil War nativism); GUSTAVUS MYERS, *HISTORY OF BIGOTRY IN THE UNITED STATES* (1943) (a seminal work that details the oppressive actions of nativist groups directed against immigrants).

68. MYERS, *supra* note 67, at 187.

69. See *id.* at 219.

70. *Id.* at 278.

71. See *id.* at 282.

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other insidious forms of discrimination that have continued well into the twentieth century.

b. American originals. The tradition of religious liberty in America helped make room for the emergence of a number of American religious movements including the Christian Scientists, Jehovah's Witnesses, Mormons, Pentecostals, Seventh-Day Adventists, Unitarians, and Universalists.⁷² Initially, almost all of these religious movements were met with resistance and experienced discrimination.⁷³ However, with the passage of time they have grown into respected religious traditions. For example, the Mormons, founded by Joseph Smith in the 1830s, were subjected to persecution early in their history "because their ideas and ways differed so greatly from the customary."⁷⁴ The Mormons were anti-slavery in Missouri at a time before the Civil War, when tensions on this issue ran to the extreme.⁷⁵ This created severe problems for the group, which was forced to leave Missouri under attack from serious mob violence and an "extermination order" from the governor of the state.⁷⁶ Smith was subsequently murdered by a mob in 1844; in order to escape their enemies, the Mormons fled westward across the great plains to present-day Utah, where they have prospered to the present day.⁷⁷

c. Summary. The challenge to live up to the guarantees of religious freedom established in the Constitution has been a long struggle. Virtually every religious group in the United States has experienced religious persecution at some point in its history. Because of their struggle against this legacy of persecution, members of religious traditions in the United States are particularly sensitive to religious discrimination issues. This is especially true in light of the growth of secularism and bias against religious institutions that has occurred in the post-war world. Above all, religious individuals

72. See, e.g., PAUL K. CONKIN, *AMERICAN ORIGINALS: HOMEMADE VARIETIES OF CHRISTIANITY* (1997).

73. See, e.g., *id.*

74. MYERS, *supra* note 67, at 173.

75. See JAMES B. ALLEN & GLEN M. LEONARD, *THE STORY OF THE LATTER-DAY SAINTS* 81-93, 104-10, 120-30 (2d ed. 1992).

76. See *id.* at 127; LEONARD J. ARRINGTON & DAVIS BITTON, *THE MORMON EXPERIENCE: A HISTORY OF THE LATTER-DAY SAINTS* 44-45 (1979); STEPHEN C. LESEUR, *THE 1838 MORMON WAR IN MISSOURI* (1987).

77. See MYERS, *supra* note 67, at 174.

are committed to speaking out and preventing such abuses in the future. This, along with the increasingly pluralistic nature of American society, helps to explain the United States' commitment to religious liberty in both domestic and international contexts.

III. FIFTIETH ANNIVERSARY OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

With this history in mind, the Fiftieth Anniversary of the Universal Declaration is an appropriate time to consider the beneficial impact that increased awareness and respect for human rights can render in our world community.

A. *Tolerance and Non-Aggression*

In the post-Cold War world there has been an increased tendency for conflicts to emerge along religious, ethnic, and civilizational lines. The "clash of civilizations" is a real threat in the vacuum of U.S.-Soviet hegemony.⁷⁸ While there are many factors that might precipitate such a clash,⁷⁹ one of the major factors in the escalation of international aggression is a resurgence of nationalism. Unbridled nationalism was a principal cause of the great world wars⁸⁰ and many of the conflicts we see today in places such as Kosovo, Sudan, and Sri Lanka. In its most extreme form, nationalism advocates not only the view that a particular nation "is superior to other nations[,] but that . . . the only function of the government of each country is to provide for the safety and welfare of that country, without regard to what may happen in other countries."⁸¹ According to one Nobel Peace Prize Laureate, nationalism "leads to an exaggeration of the authority and dignity of the state to an extent which practically destroys individual action and individual responsibility."⁸²

78. See generally SAMUEL HUNTINGTON, *THE CLASH OF CIVILIZATIONS* (1995).

79. For a general discussion of the causes of war, see SEYOM BROWN, *THE CAUSES AND PREVENTION OF WAR* (1987).

80. See Viscount Cecil of Chelwood, *League of Nations in Crisis, in PEACE! BY THE NOBEL PEACE PRIZE LAUREATES: AN ANTHOLOGY* 120 (3d ed. 1995).

81. *Id.*

82. *Id.* at 121.

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One positive way to check the emergence of nationalism in its worst form is the establishment of a climate of tolerance. Nationalism feeds upon feelings of inferiority and converts them into an ideology of superiority. On the other hand, tolerance teaches that all human beings are created equal and that no race, religion, or nation is greater than another. The stable implementation of civil, political, and religious rights is an important element in the cultivation of a climate of tolerance. Most important, these rights are essential to create a climate in which nonmajority groups may speak out without fear of reprisal.⁸³

The Preamble of the Universal Declaration states that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”⁸⁴ This is not mere rhetoric. Societies which can tolerate internal differences have proven to be more peaceful with their neighbors.⁸⁵ As David Forsythe has explained, “The stable implementation of civil and political rights within a territorial state over time leads to the absence of overt war among similar polities.”⁸⁶ As the world enters the twenty-first century, there is a need for greater tolerance of all religious beliefs if we desire to build a more peaceful world community.

B. Universality

There is a perception on the part of some foreign governments that religious liberty and human rights are an imposition by Western nations. In my view, this is not an accurate representation. The standards announced in the Universal Declaration and other treaties on religious liberty are international standards;⁸⁷ they do not belong to the West or to

83. See James E. Wood, Jr., *The Relationship of Religious Liberty to Civil Liberty and a Democratic State*, 1998 BYU L. REV. 479, 483.

84. *Universal Declaration*, *supra* note 1, at Preamble.

85. See DAVID P. FORSYTHE, HUMAN RIGHTS AND PEACE: INTERNATIONAL AND NATIONAL DIMENSIONS 152–53 (1993).

86. *Id.* See also Michael W. Doyle, *Liberalism and World Politics*, 80 AM. POL. SCI. REV. 1151 (1986); Nils Petter Gleditsch, *Democracy and Peace*, 29 J. OF PEACE RES. 369 (1992).

87. For a discussion of the development of religious rights in Islamic society, see Abdullahi A. An-Na'im, *Islamic Foundations of Religious Human Rights*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: RELIGIOUS PERSPECTIVES 337 (John Witte, Jr.

any particular polity or nation. The United States is committed to principles of religious liberty and human rights out of a desire to establish a more peaceful world community and out of the belief that these rights are worthy of protection because they are real. As I have noted, this conviction is shaped by the religiously pluralistic nature of U.S. society and the historical struggle to establish these rights.

However, it must be absolutely clear that it is not the intent of the United States to remake every nation in its own image. We understand that different nations possess different cultural standards. We also understand that no one, including the United States, is perfect in the areas of religious liberty and human rights. We still struggle with a historical legacy that includes religious discrimination, slavery, and racial segregation. Because of the painful lessons learned from our history, we are committed to defending religious liberty and human rights at home and abroad.

C. Minimum Standards

There is a minimum standard of respect and tolerance for religious beliefs embodied in documents such as the Universal Declaration. The global community cannot turn a blind eye to violations of these standards when they occur. It is a fact that not all religious and ethnic groups are popular at all times. Further, it is not uncommon that national politicians may feel electoral pressure to sanction certain groups. In other instances, national politicians may consciously turn unpopular groups into scapegoats for purposes of economic and political blame-shifting. When such incidents occur, it is appropriate that international attention be used to counterbalance the shortsighted interests of domestic politics. The adoption of the Universal Declaration in the aftermath of the Nazi holocaust and the horrors of World War II should serve as an apt reminder that it is in the interest of all nations to speak out against religious and human rights abuses when they occur.

& Johan D. van der Vyver eds., 1996). For a discussion of religious rights in other Western and non-Western traditions, see James E. Wood, Jr., *An Apologia For Religious Human Rights*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: RELIGIOUS PERSPECTIVES, *supra*, at 455.

IV. AREAS OF CONCERN

Many recent developments in the area of religious intolerance give cause for concern. Areas of concern can be broadly classified into four distinct classes of religious liberty violations: (A) persecutions resulting in death, grievous injury, or disappearance; (B) state policies which discriminate against particular religious groups; (C) passage of laws that inadequately protect religious freedom; and (D) a general climate of intolerance.

A. Religious Persecutions Resulting in Death, Violence, or Disappearance

The worst form of religious human rights abuses result in disappearance, violence, and death. Often these actions are carried out as State activity in regimes undergoing transition. For example, "in Sudan, a bloody civil war fueled by the regime's intolerance of Animists, Christians, and some Muslims continue[s] unabated."⁸⁸ War, famine, and "innumerable violations of human rights" have claimed the lives of nearly two million Sudanese in the last sixteen years.⁸⁹ In the past year in Angola, the "army reportedly massacred 21 Christians, including one deacon."⁹⁰

However, in 1998, these abuses also occurred in more stable countries. "In Egypt, approximately six million Coptic Christians face both occasional violent assaults by extremists and legal and societal discrimination. In 1998, extremists killed at least eight Christians, and there were credible reports of violence against Coptic businesses and churches and government laxity in preventing attacks on Christians."⁹¹ In Iran, "the government executed at least 1 Baha'i for the practice of his faith and at year's end continued to detain 14 others, including 6 on death row."⁹² In Turkey,

88. *Overview to Country Report on Human Rights for 1998*, § 2 (visited Feb. 27, 1999) <http://www.state.gov/www/global/human_rights/1998_hr_report/overview.html> [hereinafter *Country Reports*].

89. *Id.*

90. *Implementation*, *supra* note 14, at ¶ 41.

91. *Country Reports*, *supra* note 88, at § 2.

92. *Id.*

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religious leaders and property (churches, cemeteries) of Christian communities, particularly those of the Greek Catholic Church, are said to be the targets of acts of violence, including bombings . . . and the murder of a priest. The police and security services have reportedly failed to identify and arrest the persons responsible for those acts.⁹³

In Pakistan, "Ahmadis are reported to have been sentenced to life imprisonment for blasphemy because they had preached their faith, an act which Muslims reportedly saw as an attack on their religious beliefs."⁹⁴

B. Discriminatory State Policies

Discriminatory state policies violate the principles of "freedom of thought, conscience and religion" articulated in Article 18 of the Universal Declaration.⁹⁵ State policies of this nature most commonly deny the ability of an individual to change religion, grant preferential status to some religions, or outlaw the existence of particular religions.

In Bhutan, "Buddhism is said to enjoy preferential status. In the schools, the practice of this religion is reportedly compulsory for all, on pain of sanctions."⁹⁶ In China, "the Government attempted to restrict religious practice to officially sanctioned organizations and registered places of worship. Unapproved religious groups, including Protestants, Catholics, Tibetan Buddhists, and Muslims, continued to experience degrees of official interference and repression that varied from region to region and locality to locality."⁹⁷ In Malaysia, "individuals have reportedly been arrested for preaching Shiite teachings which the authorities consider a threat to national security and to Islam."⁹⁸ In Myanmar,

the State is said to practice a policy of intolerance and discrimination against religious minorities: Muslims in the states of Arakan and Karen (destruction of mosques and

93. *Implementation, supra* note 14, at ¶ 71.

94. *Id.* at ¶ 65.

95. *Universal Declaration, supra* note 1, art. 18.

96. *Implementation, supra* note 14, at ¶ 43.

97. *Country Reports, supra* note 88, at § 2.

98. *Implementation, supra* note 14, at ¶ 58.

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schools, revocation of citizenship, admission of refugees along the border with Thailand in exchange for their conversion to Buddhism, denial of access to health care, education and civil service employment), and Christians in the states of Chin and Karen and in the Sagaing Division (destruction of churches, conversion of children to Buddhism). Buddhist clergy are also reportedly obliged to submit to Government monitoring.⁹⁹

In North Korea, “authorities are reported to discourage all religious activities except those which serve State interests.”¹⁰⁰ In Uzbekistan, “the authorities are said to have ordered Christian leaders to cease all religious activity, including proselytism, except in churches.”¹⁰¹ In Vietnam, “the Government severely restricted religious activities other than those by officially sanctioned groups.”¹⁰²

C. Passage of Laws that Inadequately Protect Religious Freedom

The passage of laws that inadequately protect religious freedom naturally lead to State policies of discrimination. In 1997, the Russian Federation adopted a law that imposes severe restrictions on minority religions, including some offshoot Orthodox groups. Some of these religious communities may be forced to wait up to fifteen years before attaining full legal status, which is a requirement for owning property, publishing literature, inviting foreign guests, operating schools, and conducting charitable activities.¹⁰³ “Over the past year, Russia’s [new law] was cited by some local officials as they limited citizens’ religious freedom.”¹⁰⁴

D. Climate of Intolerance

A climate of intolerance is the starting point for more serious religious human rights abuses. If left unchecked, a climate of intolerance may result in passage of laws that

99. *Id.* at ¶ 61.

100. *Id.* at ¶ 56.

101. *Id.* at ¶ 63.

102. *Country Reports*, *supra* note 88, at § 2.

103. *See* Durham, Jr. & Homer, *supra* note 19, at 195–208.

104. *Country Reports*, *supra* note 88, at § 2.

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inadequately protect religious freedom, state policies of religious discrimination, and overt acts of violence, disappearance, and death. Obviously, a climate of intolerance exists in all the countries mentioned under different categories in this section. However, the following countries exhibit a level of intolerance that could lead to state policies of discrimination in the future.

1. India

In India, “controversy between Hindus and Muslims continued with regard to three mosques built centuries ago on sites where temples are believed to have stood previously. In addition, violence against Christians increased significantly, linked to extremist groups with ties to the governing Bharatiya Janata Party.”¹⁰⁵

2. Europe

Recently, many European nations have opened enquiry commissions to investigate the spread of “cults” and “sects.”¹⁰⁶ The emergence of the enquiry commissions represents a dangerous rising tide of xenophobia and hostility directed against new religious movements. In France, an enquiry commission issued a report in 1996 that

identified 172 groups as sects, including Jehovah’s Witnesses and the Church of Scientology. The report was prepared without the benefit of full and complete hearings regarding the groups identified on the list. The ensuing publicity contributed to an atmosphere of intolerance and bias against minority religions. Some religious groups reported that their members suffered increased intolerance after having been identified on the list. According to the International Helsinki Federation, in its November report to the OSCE Human Dimension Implementation Meeting in Warsaw, the identification of the 172 groups resulted in media reports libeling minority religions, the circulation of rumors and false information, and incitement of religious intolerance.’ The Commission’s findings also led to calls for legislative action to restrict the activities of sects, which the Government rejected on freedom of religion

105. *Id.*

106. *See id.*

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grounds. Instead, the Justice Ministry issued a directive to all government entities to be vigilant against possible abuses by sects, and government offices were instructed to monitor potentially abusive sect activities.¹⁰⁷

In Germany, “the commission established in 1996 to investigate ‘so-called sects and psycho-groups,’ presented its final report to Parliament.”¹⁰⁸ The report concluded that new religious movements “did not pose a threat to society and state and underlined the constitutional principle of religious freedom and the state’s obligation to observe strict neutrality in these matters.”¹⁰⁹ However, the report also called on the Government to “introduce legislation for consumer protection in the ‘psychomarket’ and highlighted the need for the Government to inform the public about dangers to health and property posed by psycho-cults and groups.”¹¹⁰ The report particularly emphasized the dangers of Scientology and failed to classify Scientology as a religion.¹¹¹

In Belgium, the report of the parliamentary enquiry commission prompted the passage of legislation to create a “Center for Information and Advice on Harmful Sectarian Organizations.”¹¹² “The Center is to collect open source information on a wide range of religious and philosophical groups and to provide information and advice to the public regarding the legal rights of freedom of association, freedom of privacy, and freedom of religion.”¹¹³

The enquiry commission trend is particularly troubling in Europe because these nations are viewed by the rest of the world as having a firm commitment to religious liberty. There is a danger that the actions of European nations may give

107. *France Country Report on Human Rights Practices for 1998*, § 2 (visited Mar. 3, 1999) <http://www.state.gov/www/global/human_rights/1998_hrp_report/france.html>.

108. *Germany Country Report on Human Rights Practices for 1998*, § 2 (visited Mar. 3, 1999) <http://www.state.gov/www/global/human_rights/1998_hrp_report/germany.html>.

109. *Id.*

110. *Id.*

111. *See id.*

112. *Belgium Country Report on Human Rights Practices for 1998*, § 2 (visited Mar. 3, 1999) <http://www.state.gov/www/global/human_rights/1998_hrp_report/belgium.html>.

113. *Id.*

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credibility to State-sponsored intolerance and set a poor precedent for Eastern European and other nations with less established traditions of religious tolerance. If the unsubstantiated accounts published in the enquiry commission reports are picked up and used by other nations, there is also a danger that the work of these commissions may lay the groundwork for persecution of new religious movements in other nations. In short, the work of these commissions may significantly set back the cause of religious liberty in Europe and the rest of the world.

V. CONCLUSION

With the passage of the International Religious Freedom Act, the United States is committed to upholding the principles of religious liberty embodied in Article 18 of the Universal Declaration. Under the provisions of the act, abuses of religious liberty will be monitored and reported where they have occurred. Violations of religious liberty will result in the United States taking the "action or actions that most appropriately respond to the nature and severity of the violations of religious freedom."¹¹⁴ Where deemed appropriate, this includes measures such as tying improvements in religious tolerance to foreign aid, international loan approval, and trade status.¹¹⁵

The act also permits the President of the United States to decline to take action where doing so would promote the cause of religious freedom.¹¹⁶ One of the most significant features of the act is its attempt to build upon areas of shared concern with other nations by emphasizing the importance of education and diplomacy as preferred means of addressing religious disputes.¹¹⁷ I am confident that this new legislation will be implemented in a spirit of goodwill and cooperation and will substantially help to strengthen religious liberty around the world.

As we move forward, we must be careful to remember that laws alone cannot solve the religious liberty challenges we will face in the twenty-first century. The Universal Declaration and

114. Pub. L. No. 105-292, 112 Stat. 2787, § 401(c)(1)(A).

115. *See id.* at § 405(a)(9)-(15).

116. *See id.* at § 407(a).

117. *See id.* § 501.

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other canons of human rights law are merely abstract ideals if signatory nations fail to safeguard the rights found therein. To successfully build a world where tolerance is the norm and not the exception will require the help of all nations, communities, institutions, and individuals. Religious institutions, in particular, have an important role to play as the providers of values by which many individuals and communities govern themselves.¹¹⁸ By working together, we can create a climate of tolerance that approaches the ideals set forth in the Universal Declaration.

118. See John Witte, Jr., *Law, Religion, and Human Rights*, 28 COLUM. HUM. RTS. L. REV. 1, 2-3 (1996) ("Religions must thus be seen as indispensable allies in the modern struggle for human rights. Their faith and works must be adduced to give meaning and measure to the abstract claims of human rights norms, to give spirit and sanctity to the legal ideas and institutions of a human rights regime.").