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## Religious Liberty at Home and Abroad: Reflections on Protecting this Fundamental Freedom

*Senator Orrin G. Hatch\**

### I. INTRODUCTION

I am a Utahn and a United States Senator. I am also a Christian man and a devout member of the Church of Jesus Christ of Latter-day Saints. As a Christian, I appreciate the virtue of humility, a virtue which teaches us the imperfection of man, and, by inference, man's society. As a member of the Church of Jesus Christ, I know of the failures of the state to protect the faithful. I am a member of a faith that, in this Republic's short history, was brutally, murderously persecuted.<sup>1</sup> Joseph Smith, the first prophet of our faith, never saw Utah, having been martyred in 1844 in the state of Illinois.<sup>2</sup> In our relatively short modern history, Mormons have known persecution.

As we exchange ideas during this Symposium about religious freedom in our various countries, I recognize that we in the United States are still working to advance these protections. Respect for the

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\* Senator Hatch has served in the United States Senate since 1976 and is Chairman of the Senate Judiciary Committee. He has authored and sponsored major legislation protecting religious liberty, including the Religious Freedom Restoration Act of 1993 and the Religious Land Use and Institutionalized Persons Act of 2000.

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1. See generally B.H. ROBERTS, 1 A COMPREHENSIVE HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 1-6 (1930). For example, in 1838, Governor L.W. Boggs of Missouri issued an executive order to General John B. Clark, head of the Missouri state militia, mandating that "[t]he Mormons must be treated as enemies, and must be exterminated or driven from the state if necessary for the public peace." Order from L.W. Boggs, Missouri governor, to John B. Clark, general of Missouri militia (Oct. 27, 1838), *reprinted in* 1 ROBERTS, *supra*, at 479. Similarly, when the leaders of the Church of Jesus Christ of Latter-day Saints asked for redress from United States President Martin van Buren for their persecutions, the President remarked: "Gentlemen, your cause is just, but I can do nothing for you. If I take up for you, I shall lose the vote of Missouri." 2 ROBERTS, *supra*, at 30 n.17.

2. For a detailed account of the circumstances leading up to, and the actual murder of, Joseph Smith in 1844, see 2 ROBERTS, *supra* note 1, at 254-87.

exercise of conscience and religion is a fundamental aspect of a universal understanding of human rights.

## II. THE U.S. CONSTITUTIONAL APPROACH: THE POLITICAL PHILOSOPHY OF THE FIRST AMENDMENT AND FREEDOM OF RELIGION

The First Amendment to the United States Constitution explicitly prohibits Congress from making laws “respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>3</sup> The First Amendment encompasses the view that there is a distinction between society and the state and that the state with its legal monopoly of police power must be limited to ensure the liberty of its citizenry. This liberty encompasses the right of the people to a certain degree of autonomy, which, in essence, means to be free from coercive interference in private matters, such as the family, work, social life, and matters of belief and conscience.

We should not forget that the Founders of the Republic believed that there was a direct relationship between liberty and religion.<sup>4</sup> It was believed—and I strongly believe this to be true today as well—that a Republic could only survive if its citizenry had the capacity to engage in civic virtue.<sup>5</sup> In other words, a republic would flourish

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3. U.S. CONST. amend. I.

4. See DONALD LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 140–42 (1988) (noting that the book most frequently cited in the literature surrounding the drafting and ratifying of the U.S. Constitution was the Bible); see also DEREK H. DAVIS, *RELIGION AND THE CONTINENTAL CONGRESS, 1774–1789: CONTRIBUTIONS TO ORIGINAL INTENT* 40 (2000) (“So powerful were the religious influences on the independence movement that . . . those in the Continental Congress who made the political decision to separate from Great Britain did so only because they fully believed with the majority of the American people that such a monumental act was their religious duty.”); JAMES K. FITZPATRICK, *GOD, COUNTRY, AND THE SUPREME COURT* 3 (1984) (“The Founding Fathers understood the Christian religion—at the very least the natural virtues and inner restraints it encouraged—to be necessary for the well-being of any government by discussion in North America.”); TIMOTHY L. HALL, *SEPARATING CHURCH AND STATE: ROGER WILLIAMS AND RELIGIOUS LIBERTY* 116–66 (1998) (discussing Roger Williams’s philosophy of equating religion with freedom and the impact his views had on the drafting of the Constitution).

5. See DAVIS, *supra* note 4, at 175–98 (noting that the founding fathers regarded the necessity of virtue as axiomatic, without which the Constitution and Union could not prosper); see also FITZPATRICK, *supra* note 4, at 21–44 (discussing Thomas Jefferson’s view of the vital role that civic virtue and participation played in the functioning of a republic); Jeffrey James Poelvoorde, *The American Civil Religion and the American Constitution*, in *HOW DOES THE CONSTITUTION PROTECT RELIGIOUS FREEDOM?* 141–68 (Robert A. Goldwin & Art Kauf-

only when its people were moral. And, to the Founders, it was religion that established morality.<sup>6</sup> As such, the government was prohibited from—in the words of the Constitution—“prohibiting the free exercise of religion.”<sup>7</sup>

All of this is certainly not to suggest that the Framers invented these ideas. As practical men, the Framers were aware of history.<sup>8</sup> Indeed, one cannot understand the Constitution without an appreciation that many of the rights contained therein—such as the First Amendment’s freedoms—are the result of historical prescription. The Framers saw in Britain and in the states of Europe the establishment of state religions and the suppression of competing beliefs.<sup>9</sup> This coercion appalled them.<sup>10</sup>

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man eds., 1987) (describing the existence of an American “civil religion”). See generally THE CONTENT OF AMERICA’S CHARACTER: RECOVERING CIVIC VIRTUE (Don E. Eberly ed., 1995).

6. See FITZPATRICK, *supra* note 4, at 1–20 (arguing that the Founding Fathers expected the American people to enact public policy reflective of their religious convictions and that they did not resent the “legislation of morality”).

7. U.S. CONST. amend. I.

8. See, e.g., KENNETH R. CRAYCRAFT, JR., THE AMERICAN MYTH OF RELIGIOUS FREEDOM 35–101 (1999) (describing the influence of John Locke on the political ideas of American Founders Thomas Jefferson and James Madison). It is well known that the Framers relied on great political theorists such as Aristotle, Plutarch, Cicero, Montesquieu, Rousseau, Hobbes, Adam Smith, and Blackstone, as well as the *Magna Carta* (1215), *Petition of Rights* (1628), *English Bill of Rights* (1689), and *Mayflower Compact* (1620), to help shape the Constitution. For a good overview of the variety of historical and philosophical influences on the authors of the Constitution, including excerpted readings, see LYNN D. WARDLE, READINGS ON THE ORIGINS OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA: FOUNDATIONS OF AMERICAN CONSTITUTIONAL LAW (2001).

9. For a glimpse at the religious climate in Western Europe leading up to, and at the time of, the drafting of the Constitution, see generally PAUL KLÉBER MONOD, THE POWER OF KINGS: MONARCHY AND RELIGION IN EUROPE, 1589–1715 (1999), and RELIGION AND SOCIETY IN EARLY MODERN EUROPE, 1500–1800 (Kaspar Von Greyerz ed., 1984).

10. For example, James Madison declared that, in some instances, ecclesiastical establishments

have been seen to erect a spiritual tyranny on the ruins of Civil authority; in many instances they have been seen upholding the thrones of political tyranny: in no instance have they been seen the guardians of the liberties of the people. . . . Torrents of blood have been spilt in the old world, by vain attempts of the secular arm, to extinguish Religious discord, by proscribing all difference in Religious opinion.

James Madison, *Memorial and Remonstrance Against Religious Assessments*, in JAMES MADISON: WRITINGS (Jack N. Rakove ed., 1999). Speaking of the same subject, John Adams wrote:

[The clergy] even persuaded mankind to believe, faithfully and undoubtingly, that God Almighty had entrusted them with the keys of heaven, whose gates they might open and close at pleasure; with a power of dispensation over all the rules and obli-

Indeed, many members of dissenting religions, such as the Puritans from Anglican England, fled to America to escape religious persecution.<sup>11</sup> The new Americans argued initially for toleration of the differing Christian sects, and finally for legal protection of all faiths.<sup>12</sup> As such, freedom of conscience was protected in what we refer to as the Free Exercise Clause, and a state religion supported by tax revenue was prohibited by the Establishment Clause.<sup>13</sup>

Exactly how the free exercise of religion and the prohibition against establishment of an official religion were defined and enforced has become part and parcel of America's constitutional, cultural, and legal debate.<sup>14</sup> Each generation of Americans has fought

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gations of morality; with authority to license all sorts of sins and crimes; with a power of deposing princes and absolving subjects from allegiance; with a power of procuring or withholding rain of heaven and the beams of the sun; with the management of earthquakes, pestilence, and famine. . . . All these opinions they were enabled to spread and rivet among the people by reducing their minds to a state of sordid ignorance and staring timidity, and by infusing into them a religious horror of letters and knowledge.

John Adams, *Dissertation on the Canon and the Feudal Law*, in THE SELECTED WRITINGS OF JOHN AND JOHN QUINCY ADAMS 12–13 (Adrienne Koch & William Peden eds., 1946). Speaking of religious coercion, Thomas Jefferson wrote that “[m]illions of innocent men, women, and children, since the introduction of Christianity, have been burnt, tortured, fined, imprisoned; yet we have not advanced one inch towards uniformity.” Thomas Jefferson, *Query XVII*, in THOMAS JEFFERSON: WRITINGS 286 (Merrill D. Peterson ed., 1984). Similarly, Jefferson condemned civil and ecclesiastical rulers

who, being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavoring to impose them on others, hath established and maintained false religions over the greatest part of the world and through all time.

Thomas Jefferson, *A Bill for Establishing Religious Freedom*, in THOMAS JEFFERSON: WRITINGS, *supra*, at 346.

11. See MARVIN E. FRANKEL, FAITH AND FREEDOM: RELIGIOUS LIBERTY IN AMERICA 22–31 (1994) (describing the genesis of the religion clauses and the “centuries of religious persecution and bloodshed that had preceded the American colonial experience”); DAVIS, *supra* note 4, at 25–55 (discussing the political status of religion among the various denominations that had fled Europe and settled in colonial America). For a detailed account of the Puritan experience, see JOHN ERIC ADAIR, FOUNDING FATHERS: THE PURITANS IN ENGLAND AND AMERICA (1982).

12. See generally THE ROLE OF GOVERNMENT IN MONITORING AND REGULATING RELIGION IN PUBLIC LIFE (James E. Woods, Jr. & Derek Davis eds., 1993).

13. See U.S. CONST. amend. I.

14. The majority view of the history of the religion clauses has been one of voluntarism and separatism. First explored in Justice Black's majority opinion in *Everson v. Board of Education*, 330 U.S. 1 (1947), this view posits that both the principle of voluntarism—that churches are supported by the voluntary efforts of faithful supporters rather than by the state—and the principle of separatism—that religion and government operate most efficiently if kept sepa-

over these values, and our courts, in particular, have struggled to apply eighteenth-century language and precepts of liberty to modern problems.<sup>15</sup>

### III. AMERICANS' VIEW OF RELIGIOUS LIBERTY ABROAD

For the historical reasons just described, Americans have a deep interest in the protection of religious freedom around the world. As Americans, we appreciate and celebrate our Constitution's core commitment to religious liberty. But we recognize that sometimes people in other parts of the world think we are trying to impose upon them the United States' values in this area.<sup>16</sup> That is not our objective. We understand that different countries have different histories and have considerable flexibility in implementing these ideas in their constitutions and laws.

As many of you are aware, just two years ago, the United States Congress passed the International Religious Freedom Act of 1998.<sup>17</sup> It is a sign of the strength of American consensus on this issue that this Act was passed unanimously<sup>18</sup> at a time that was in other respects highly polarized politically—the House of Representatives was de-

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rate—underlie and give life to the First Amendment. *See Everson*, 330 U.S. at 15–16; *see also* William Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on Lynch v. Donnelly*, 1984 DUKE L.J. 770 (“Voluntarism [was] the principle of personal choice. Separatism was the principle of non-entanglement.”). Other Justices and scholars have adopted a competing view that suggests that the inclusion of the religion clauses in the First Amendment was meant to prevent the preferential treatment of any religion by the state. Justice Rehnquist's dissenting opinion in *Wallace v. Jaffree*, 472 U.S. 38 (1985), advocated this revisionist perspective. *See also* GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 1462–66 (13th ed. 1997) (discussing the two competing views); ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982).

15. *See, e.g.*, *Rosenberger v. Rector*, 515 U.S. 819 (1995); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Lee v. Weisman*, 505 U.S. 577 (1992); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

16. *See, e.g.*, Larry Witham, *U.S. Details Oppression of Religious Worldwide: China, Germany and Islamic States Cited*, WASH. TIMES, Sept. 10, 1999, at A1 (noting that after the State Department issued its first report on global religious liberty as mandated under the International Religious Freedom Act, Chinese government officials “decried the report as interference in China's internal affairs” because of China's inclusion on the list as an offending nation).

17. 22 U.S.C. §§ 6401–6481 (Supp. IV 1999).

18. *See* Julia Duin, *Senate Passes Bill To Target Nations Abusing Religious Liberty*, WASH. TIMES, Oct. 10, 1998, at A2 (noting that the Act was passed 98-0 by the Senate).

termining whether to go forward with impeachment proceedings against President Bill Clinton.<sup>19</sup> The point of this legislation is not to impose U.S. values on other nations, but to make certain that U.S. foreign policy does what it can to uphold international standards in the field of religious freedom.<sup>20</sup>

In essence, the new International Religious Freedom Act of 1998 established that it is the policy of the United States to condemn religious persecution and “to promote, and to assist other governments in the promotion of, the fundamental right to freedom of religion.”<sup>21</sup> The legislation established the position of an Ambassador at Large on International Religious Freedom and created a Commission on International Religious Persecution, both of whom advise the President and the Secretary of State on religious persecution issues.<sup>22</sup> The Act also established an Office on International Religious Freedom within the State Department.<sup>23</sup>

The Act requires the Ambassador at Large to submit an Annual Report on Religious Persecution<sup>24</sup> and includes various other measures to encourage better tracking of religious persecution.<sup>25</sup> Two such reports have now been published, and they provide a rich store of information about implementation of the ideal of religious freedom around the world.<sup>26</sup> Great care is taken in the Act to ensure that

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19. See IMPEACHMENT OF PRESIDENT WILLIAM JEFFERSON CLINTON, S. DOC. NO. 106-3 (1999).

20. See Duin, *supra* note 18, at A2 (quoting Senate Assistant Majority Leader Don Nickles, an Oklahoma Republican, as calling the Act “one of the most significant foreign policy votes this year” because it will help combat “[t]he tragic reality . . . that literally millions of religious believers elsewhere in the world live under constant, oppressive fear at the prospect of being arrested, imprisoned, tortured or even killed, simply for their religious faith”). Also consider the explicit policies adopted by the United States under the Act to “use and implement appropriate tools in the United States foreign policy apparatus, including diplomatic, political, commercial, charitable, educational, and cultural channels, to promote respect for religious freedom by all governments and peoples.” 22 U.S.C. § 6401(b)(5) (Supp. IV 1999).

21. *Id.* § 6401(b)(1).

22. See *id.* § 6411.

23. See *id.*

24. See *id.* § 6412.

25. These measures include the establishment of a religious freedom Internet site, *id.* § 6413, a provision for the facilitation of high-level contacts with NGOs, *id.* § 6414, provisions for United States missions abroad, *id.* § 6415, and the establishment of the United States Commission on International Religious Freedom, *id.* § 6431.

26. The State Department’s Annual Reports on International Religious Freedom for 1999 and 2000 are available at the State Department’s Website, <[http://www.state.gov/www/global/human\\_rights/drl\\_religion.html](http://www.state.gov/www/global/human_rights/drl_religion.html)> (visited Apr. 30, 2001).

reports, lists, and other information are classified and withheld from general release if they could aggravate the situation of those suffering from religious persecution.<sup>27</sup>

The President is directed to take action to address problems identified in the annual report.<sup>28</sup> Where a determination is made that a country has “engage[d] in or tolerate[d] violations of religious freedom,” and various procedural safeguards are complied with, the President is given the flexibility to choose from a variety of sanctions.<sup>29</sup> The Act lists less severe actions, such as a private *demarche* or a public condemnation, to deal with less egregious religious freedom violations.<sup>30</sup>

It should be emphasized—because this is often misunderstood—that this law does not seek to give U.S. law extraterritorial effect,<sup>31</sup> nor does it aim at imposing an American model of religious freedom on the world.<sup>32</sup> We understand that the ideals of religious freedom

27. Section 6412(b)(2) provides that if “necessary for the safety of individuals to be identified in the Annual Report . . . any information . . . may be summarized . . . and submitted in more detail in a classified addendum to the Annual Report.”

28. Sections 6441, 6442, and 6445 outline the actions the President should take in response to violations of religious freedom. The President is counseled to “take the action or actions that most appropriately respond to the nature and severity of the violations” while seeking “to target action as narrowly as practicable.” *Id.* § 6441(c)(1)(A)–(B).

29. *Id.* § 6441(a)(1)(B).

30. *Id.* § 6441(b). With regard to more severe violations, these actions include limitation of development and security assistance, voting against international loans, limitations on issuing various licenses, prohibiting U.S. financial institutions from making loans, and prohibiting the U.S. government from contracting with the offending nation’s government. *Id.* § 6445(a)(9)–(15).

31. At a press release for the 2000 International Religious Freedom Report, Secretary of State Madeline Albright recognized that “[e]very country has its own unique political and legal system. In our report, we do our utmost to be fair and respectful of other cultures. But no country’s history or culture can exempt it from it [sic] the need to respect principles of religious freedom enshrined in the Universal Declaration.” Madeleine K. Albright, *Remarks: Release of the 2000 Annual Report on International Religious Freedom* (last modified Sept. 5, 2000) <<http://secretary.state.gov/www/statements/2000/000905.html>>. In continuing to explain why the report was released, Ms. Albright remarked that

religious freedom carries with it the responsibility to permit the free exercise of the same right by others. For where the rights of persons of any faith are not secure, no one’s rights are secure. . . . [This] is why, as the most powerful nation in the world, we will continue to fight for the rights of the world’s most persecuted individuals.

*Id.*

32. In the same press release, Harold Hongju Koh, Assistant Secretary of State For Democracy, Human Rights, and Labor, declared that the purpose of the International Religious Freedom Act is “emphatically not to impose American values on the world or to defend any particular religion but, rather, to promote and defend the right of every individual on this

will be implemented in different ways in different cultures. However, the Act does recognize that nations around the world have entered into a variety of agreements under international law that recognize the right to freedom of religion or belief.<sup>33</sup>

International norms in this area are articulated in many instruments familiar to those attending this conference and include:

- Article 18 of the Universal Declaration of Human Rights,<sup>34</sup>
- Article 18 of the International Covenant on Civil and Political Rights,<sup>35</sup>
- Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>36</sup>
- Article 12 of the American Convention on Human Rights,<sup>37</sup>
- Article 8 of the African Charter on Human and Peoples Rights,<sup>38</sup> and
- a variety of commitments in the Helsinki Process.<sup>39</sup>

The aim of the International Religious Freedom Act is to make sure that the U.S. Government, in carrying out its foreign policy, does all it can to encourage compliance with international standards.<sup>40</sup>

We are, of course, concerned with reports of violations of religious freedom wherever they occur, and pay close attention to the State Department's reports on these matters. As a Senator, I hear

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planet to honor his or her own chosen beliefs." Harold Hongju Koh & Robert A. Seiple, *On-the-Record Briefing: Release of the 2000 Annual Report on International Religious Freedom* (last modified Sept. 5, 2000) <[http://www.state.gov/www/policy\\_remarks/2000/000905\\_koh\\_2000irf.html](http://www.state.gov/www/policy_remarks/2000/000905_koh_2000irf.html)>.

33. See 22 U.S.C. § 6401(a)(2), (3) (Supp. IV 1999) (identifying numerous international instruments created for the protection of religious freedom).

34. See *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., Supp. No. 1, at 71, U.N. Doc. A/810 (1948).

35. See *International Covenant on Civil and Political Rights*, *opened for signature* Dec. 16, 1966, art. 18, 999 U.N.T.S. 171.

36. See *European Convention for the Protection of Human Rights and Fundamental Freedoms*, *opened for signature* Nov. 4, 1950, art. 9, 213 U.N.T.S. 221.

37. *American Convention on Human Rights*, *opened for signature* Nov. 22, 1969, art. 12, 1144 U.N.T.S. 123.

38. *African Charter on Human and Peoples' Rights*, June 26, 1981, art. 8, O.A.U. Doc. CAB/LEG/67/3/Rev.5 (1981), 21 I.L.M. 58 (1982).

39. *Conference on Security and Cooperation in Europe: Final Act (Helsinki Accord)*, *signed* Aug. 1, 1975, 73 DEP'T OF STATE BULL. (1975), at 323, 14 I.L.M. 1292 (1975).

40. 22 U.S.C. §§ 6401–6481 (Supp. IV 1999).

regularly from constituents and other experts about these developments and the extent to which they result in unfair treatment of religious groups in other countries. At times, there is great pressure to take action. Let me mention just a few specific issues that deserve particular attention.

First, there are several countries that are either in the process of drafting new legislation on religious affairs or are considering such legislation.<sup>41</sup> Some of these countries are represented here. Most participants will be familiar with the 1997 Russian Law on Freedom of Conscience and on Religious Associations.<sup>42</sup> While some problems of implementation are still being encountered in local areas,<sup>43</sup> I recognize that there are efforts by officials at the highest levels to strive to implement these laws fairly.<sup>44</sup>

New draft legislation is being considered in several of the countries represented here: Albania, the Czech Republic,<sup>45</sup> Slovakia,<sup>46</sup> Ukraine,<sup>47</sup> Romania,<sup>48</sup> Bulgaria,<sup>49</sup> Mexico, and Peru.<sup>50</sup> We would hope that as such legislation moves forward, it will protect, rather than restrict, religious freedom. The purpose of this conference is to provide one more intellectual setting to advance this goal we all share.

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41. See *infra* notes 45–50.

42. See RF Law No. 125-FZ, *Ross. Gazeta*, Oct. 1, 1997; see also *Russian Federation Federal Law: "On Freedom of Conscience and on Religious Associations"* (visited Apr. 30, 2001) <<http://serv5.law.emory.edu/EILR/Special/97law.html>> (Lawrence A. Uzzell, Keston Institute, trans.).

43. See, e.g., Irina G. Basova, Comment, *Freedom Under Fire: The New Russian Religious Law*, 14 *TEMP. INT'L & COMP. L.J.* 181, 202–06 (2000); Senator Gordon Smith, *Protecting the Weak: Religious Liberty in the Twenty-First Century*, 1999 *BYU L. REV.* 479, 498.

44. See Basova, *supra* note 43, at 207–08.

45. *Among the Believers*, *PRAGUE POST*, Dec. 22, 1999, available in LEXIS, World News Library.

46. *Slovak Republic: Country Reports on Human Rights Practices for 2000* (visited Feb. 26, 2001) <<http://www.state.gov/g/drl/rls/hrrpt/2000/eur/index.cfm?docid=868>>.

47. *Prepared Testimony of Stuart E. Eizenstat Deputy Treasury Secretary Before the House Banking Committee Subject—On Holocaust Related Issues*, *FEDERAL NEWS SERVICE*, Sept. 14, 1999, available in LEXIS, World News Library.

48. *Helsinki Commission Releases Letter to Secretary Albright on Romania*, *PR Newswire*, Nov. 22, 1999, available in LEXIS, World News Library.

49. See generally Atanas Krussteff, *An Attempt at Modernization: The New Bulgarian Legislation in the Field of Religious Freedom*, 2001 *BYU L. REV.* 575.

50. *Peru: Country Reports on Human Rights Practices for 2000* (visited Feb. 26, 2001) <<http://www.state.gov/g/drl/rls/hrrpt/2000/wha/index.cfm?docid=827>> (discussing this legislation, which was enacted in December 2000).

Second, there has been growing concern in this country about the proliferation of inquiry commissions and other types of state action aimed at monitoring and often harassing smaller religious groups.<sup>51</sup> Developments in France have been particularly troubling, because one would expect France to be one of the leaders on a human rights issue.<sup>52</sup> In fact, however, there have been a series of troubling developments in France.

In June 1995, the French National Assembly established a Parliamentary Inquiry Commission tasked with studying the “sect phenomenon” and with proposing, if necessary, the adaptation of existing laws.<sup>53</sup> In January of 1996, this Commission issued a report that, among other things, blacklisted 172 religious groups.<sup>54</sup> The next year, the Prime Minister established an inter-ministerial working group known as the Observatory on Sects, which was subsequently replaced by the Inter-ministerial Mission to Fight Against Sects.<sup>55</sup> Anti-sect fervor was fanned further in 1998 by a circular issued by the French Minister of Justice urging state prosecutors to cooperate with this inter-ministerial mission in bringing more suits against sects and by the appointment of a new parliamentary inquiry commission charged with investigating the finances of new religious movements.<sup>56</sup>

The latest action began with a proposed bill in the French Senate that would create a dangerously broad weapon for fighting unpopular religious groups.<sup>57</sup> A version of this bill<sup>58</sup> was passed unanimously

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51. See, e.g., Hannah Clayson Smith, Comment, *Liberté, Égalité, et Fraternité at Risk for New Religious Movements in France*, 2000 BYU L. REV. 1099; Smith, *supra* note 43, at 499–500.

52. See, e.g., Clayson Smith, *supra* note 51, at 1101.

53. See Assemblée Nationale, Report No. 2468, Dec. 22, 1995, “Rapport fait au nom de la commission d’enquête sur les sectes” [“Report by the Inquiry Commission on Sects”] (visited Apr. 6, 2001) <<http://www.assemblee-nationale.fr/rap-eng/r2468.asp>>.

54. See *id.*

55. See Clayson Smith, *supra* note 51, at 1114–15.

56. See *id.* at 1115 nn.89–90 and accompanying text.

57. See Sénat, Proposed Law No. 131, Dec. 14, 1999, “Proposition de loi tendant à renforcer le dispositif pénal à l’encontre des associations ou groupements constituant, par leurs agissements délictueux, un trouble à l’ordre public ou un péril majeur pour la personne humaine” [“A Law Proposal Aimed at Reinforcing the Criminal System Against Associations or Groups which Constitute, by their Criminal Schemes, a Threat to the Public Order or a Major Danger to Human Dignity”] (visited Feb. 23, 2001) <<http://senat.fr/leg/tas99-52.html>>.

58. See Assemblée Nationale, Proposed Law No. 2435, May 30, 2000, “Proposition de loi tendant à renforcer la prévention et la répression à l’encontre des groupements à caractère sectaire” [“A Law Proposal Aimed at Reinforcing the Prevention and the Repression Against

by the National Assembly on June 22, 2000, and will be considered again in the Senate in coming months.

In Germany, an Inquiry Commission raised questions about a variety of religious groups, but ultimately concluded that, for the most part, sects constituted no danger.<sup>59</sup> Nonetheless, it released a report with 602 pages of propaganda against smaller groups.<sup>60</sup>

Sect Information Centers are proliferating, in part as a response to Recommendation 1412 of the Parliamentary Assembly of the Council of Europe, adopted on June 22, 1999.<sup>61</sup> Information Centers have been created in Austria, Belgium, France, Lithuania, Switzerland, and elsewhere.<sup>62</sup> These raise concerns because there has been some indication in some countries that such centers are operated in ways that disparage smaller and less popular groups; in other cases, these centers appear to be set up using a fair and evenhanded approach.<sup>63</sup>

We remain concerned about such centers because of a variety of hazards they pose, but hope that if they are going to be established, they will be fair, will give smaller religious groups opportunities to tell their own stories, and will in general strive to contribute to a culture of tolerance and mutual respect.

#### IV. CONTEMPORARY U.S. CONSTITUTIONAL INTERPRETATION OF RELIGIOUS LIBERTY CONTINUES TO EVOLVE

Earlier in this presentation I emphasized that, while Americans increasingly focus on the treatment of religious freedom abroad, our own system is not perfect, and is still evolving.<sup>64</sup> I have been an author and sponsor of most of the major legislation that is evolving our own legal protections of religion.<sup>65</sup> The Supreme Court and the

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Groups with a Sectarian Character"] (visited Feb. 23, 2001) <<http://www.assemblee-nationale.fr/2/2dossiers.html>>; see also Clayson Smith, *supra* note 51, 1118–20 (describing the various provisions of the proposed law).

59. See Smith, *supra* note 43, at 500.

60. See Clayson Smith, *supra* note 51, at 1142 n.214.

61. See *Illegal Activities of Sects*, Eur. Consult. Ass., 18th Sess., Recommendation No. 1412 (1999) (visited Feb. 23, 2001) <<http://stars.coe.fr/ta/ta99/erec1412.htm>>; see also Clayson Smith, *supra* note 51, at 1142 n.214 (discussing the German response to this recommendation).

62. See Clayson Smith, *supra* note 51, at 1142 nn.212–15.

63. See *id.* at 1141 n.211 (discussing concerns over information centers).

64. See *supra* Part I.

65. See, e.g., Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No.

Congress have been engaged in a decade-long debate about the constitutional protections that should be afforded to religious practices that conflict with generally applicable laws.<sup>66</sup>

As I mentioned earlier, the First Amendment of the Constitution provides that “Congress shall make no law . . . prohibiting the free exercise [of religion].”<sup>67</sup> The question that has been debated is to what extent religious practice can receive exemptions from generally applicable laws. In American society, many reasonable accommodations are made for religious practice. For instance, there are no prosecutions of the Catholic Church for giving sacramental wine to minors. The recent debate over the First Amendment has concerned how far we can take this principle. In short, when must religious practice give way to generally applicable laws, notwithstanding the protections of the Free Exercise Clause of the Constitution?

The first interpretive salvo was fired by the Court in 1990 when it issued *Employment Division v. Smith*.<sup>68</sup> In *Smith*, two Native Americans had been fired from their jobs as drug counselors after they were discovered to have ingested peyote as part of a ritual of the Native American Church.<sup>69</sup> Because they were fired for drug use, the state denied the Native Americans unemployment benefits.<sup>70</sup> The Court ruled 6-3 that the state could deny them these benefits even though the drug use was part of a religious ritual.<sup>71</sup>

In *Smith*, the Court altered the pre-existing standard of review for Free Exercise cases. Previously, the Court had applied a strict scrutiny test, asking whether a government action that burdened religion served a compelling public interest and was the least restrictive course of action; if the government could not pass strict scrutiny,

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106-274, 114 Stat. 803 (2000); Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (1994).

66. *See, e.g.*, *Employment Div. v. Smith*, 494 U.S. 872 (1990) (abandoning the strict scrutiny test in examining a government action affecting religious practice); Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-4 (restoring the strict scrutiny test); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (invalidating the Religious Freedom Restoration Act as unconstitutional).

67. U.S. CONST. amend. I.

68. 494 U.S. 872 (1990).

69. *See id.* at 874.

70. *See id.*

71. Justices Scalia, Rehnquist, White, Stevens, and Kennedy formed the majority, and Justice O'Connor concurred in the judgment. Justices Blackmun, Brennan, and Marshall dissented.

then the religious practice was to be exempted from the government regulation.<sup>72</sup> But the Court in *Smith* did not apply strict scrutiny; rather, it held that religiously neutral laws may be uniformly applied to all persons without regard to any burden or prohibition placed on the exercise of religion.<sup>73</sup>

The Court recognized that previous decisions “consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”<sup>74</sup> Under this standard, the Free Exercise Clause did not mandate a religious exemption from Oregon’s drug laws for Native American use of peyote in a sacramental ceremony.<sup>75</sup>

In *Smith*, the Court emphasized that the question of whether religious practices ought to be accommodated by government was best resolved through the political process and not by the courts.<sup>76</sup> Of course, leaving the resolution of these issues to the political process might mean that religious minorities would have difficulty finding accommodation.<sup>77</sup>

The abandonment of the strict scrutiny standard resulted in dismay among the religious community.<sup>78</sup> In response to their concerns, we proposed and passed into law the Religious Freedom Restoration Act of 1993 (“RFRA”).<sup>79</sup> In this Act, we restored the strict scrutiny test that had been abandoned by the Supreme Court in

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72. *Id.* at 907 (Blackmun, J., dissenting).

73. *See id.* at 884–85.

74. *Id.* at 879 (citing *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

75. *See id.* at 890.

76. *See id.*

77. *See id.*; see also Michael W. McConnell, *Religious Freedom, Separation of Powers, and the Reversal of Roles*, 2001 BYU L. Rev. 611.

78. *See, e.g.*, S. REP. NO. 103–111, at 8 (1992), reprinted in 1993 U.S.C.C.A.N. 1892, 1897 (“At the Committee’s hearings, the Rev. Oliver S. Thomas, appearing on behalf of the Baptist Joint Committee on Public Affairs and the American Jewish Committee, testified, ‘Since *Smith* was decided, governments throughout the U.S. have run roughshod over religious conviction. Churches have been zoned even out of commercial areas. Jews have been subjected to autopsies in violation of their families’ faith . . . . In time, every religion in America will suffer.’”); *Religious Freedom Restoration Act: Hearing on S. 2969 Before the Senate Judiciary Comm.*, 102d Cong. 5–28 (1992) (testifying of infringement on the religious freedom of a Laotian Hmong family).

79. 42 U.S.C. § 2000bb (1994).

*Smith*.<sup>80</sup> The Act declared that a statute or regulation of general applicability could lawfully burden a person's free exercise of religion only if it could be shown to be in "furtherance of a compelling governmental interest . . . [and] the least restrictive means of furthering that compelling governmental interest."<sup>81</sup> The Act applied to government action at the federal and state level.<sup>82</sup> Those who believed their exercise of religion had been unlawfully restricted could bring suit.<sup>83</sup>

Just a few years later, in *City of Boerne v. Flores*,<sup>84</sup> the Supreme Court invalidated RFRA, holding it unconstitutional as applied to the states.<sup>85</sup> The Court held that the Act exceeded Congress's enforcement power.<sup>86</sup> The *Boerne* case arose out of a conflict between a local Catholic church and the City of Boerne's historic preservation ordinance.<sup>87</sup> The church wanted to tear down significant portions of its existing structure in order to build a larger space for its growing congregation.<sup>88</sup> The city refused permission because it considered the church an historic structure that should be preserved.<sup>89</sup> The church sued, arguing that the city's action violated RFRA.<sup>90</sup>

In *Boerne*, the Court found RFRA unconstitutional.<sup>91</sup> Congress has a remedial power under Section 5 of the Fourteenth Amendment to address violations of civil liberties such as those protected under the Free Exercise Clause.<sup>92</sup> However, there must "be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."<sup>93</sup> The Court argued that, in enacting RFRA, Congress had failed to develop an adequate legislative record that showed denials of religious liberties.<sup>94</sup>

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80. *See id.* § 2000bb(b)(1)-(2).

81. *Id.* § 2000bb-1(1)-(2).

82. *See id.* §§ 2000bb-2(1), 2000bb-3(a).

83. *See id.* § 2000bb-1(c).

84. 521 U.S. 507 (1997).

85. *See id.* at 536.

86. *See id.* at 511.

87. *See id.* at 511-12.

88. *See id.* at 512.

89. *See id.*

90. *See id.*

91. *See id.* at 536.

92. *See id.* at 519.

93. *Id.* at 520.

94. *See id.* at 530.

I was personally very disappointed when the Supreme Court declared RFRA unconstitutional because when we passed the Act, we considered it an important means of protecting religious practices, especially for religious minorities.<sup>95</sup> Our system of laws cannot be weakened by an endless series of exemptions, but we must address the value of religious practice in our constitutional system. This nation was founded upon religious principles and with great concern that all religious practices be tolerated.<sup>96</sup> For many minority religions in this country, receiving exemptions through the political process may be extremely difficult. Courts may well be required to guard this important diversity of religious practice that is protected by the First Amendment.

However, the *Boerne* decision did not foreclose all avenues for congressional action. First, RFRA continues to apply to federal action. Moreover, we recently passed the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”), which the President signed into law on September 22.<sup>97</sup> RLUIPA reestablishes the strict scrutiny standard for land use regulations that impose a substantial burden on the religious exercise of a person, religious assembly, or religious institution.<sup>98</sup> It also reestablishes strict scrutiny on the religious exercise of a person residing in or confined to an institution, which includes prisons and mental health facilities.<sup>99</sup> To avoid liability, the government must show that the burden on religion furthers a compelling governmental interest and that it is the least restrictive means of furthering that interest.<sup>100</sup>

## V. CONCLUSION

I am a lawyer and legislator by profession, but I am also a man who knows from personal history, some international experience, and deep spiritual conviction that man is not completely free unless he can freely commune with his God. I consider myself blessed to be

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95. See S. REP. NO. 103-111, at 8, *reprinted in* 1993 U.S.C.C.A.N. 1892, 1897.

96. See *id.* at 4.

97. Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (2000).

98. See *id.* § 2(a)(1).

99. See *id.* § 3.

100. See *id.* § 2(a)(1)(A)–(B).

an American, but I know that the search for a state's protection of religious freedom is a universal pursuit.

I have gone into some detail for the purpose of illuminating relevant and contemporary legal issues in this country, but also to emphasize the point that here, in the United States, we continue to wrestle with these issues. We certainly do not have all the answers, and the ones we achieve are a function of our own unique history and culture.

Americans are sometimes accused of a certain international egocentrism, which is a charge that I reject. Americans, I believe, hold a benevolent and charitable view toward the rest of the world. James Madison, who is rightly termed the "Father of the Constitution" said that one religion results in theocracy, two in civil war, and many in civil peace. In fact, it is quite likely that he took this line from a Frenchman speaking of the English. The French philosopher Voltaire said, "If there were only one religion in England, there would be a danger of despotism; if there were two, they would cut each other's throats. But there are thirty, and they live happily in peace." This embodies a universal principle recognized by all freedom-loving people. Let us work together to build societies of peace and faith.