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Religious Monopolies and the Commodification of Religion

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In recent years, the number of countries in which a dominant church receives state aid and other forms of preferential treatment has increased. Dominant religions and their supporters in the former Soviet bloc and elsewhere often argue that special benefits and protection are warranted based upon the unique history and contribution of the dominant church to the identity, history, and culture of the country, and the interests of the state and its citizens. Because of the distinctive status of religion and its importance to national and cultural identity, special protection, especially against foreign and other outside influence, is deemed necessary. Although the spiritual realm is putatively treated as being a special situation requiring special protection, the arguments in favor of religious protection bear a curious resemblance to arguments in favor of protection made by monopolists and other protected industries in the economic sphere. This article compares the arguments in favor of protection made by dominant religious groups with arguments in favor of protection by monopolists and protected industries, and concludes that in their pleas for special treatment, religious monopolists make arguments that closely parallel the arguments made by their economic counterparts. Rather than resulting in religion being treated as unique and different, protectionist arguments result in religion being treated much like any other market commodity. We conclude that because religious freedom is a fundamental human right, arguments promoting state protection of dominant religions should be viewed with suspicion.

I. INTRODUCTION

Religious monopolies in various countries have claimed that they should receive state protections,¹ often citing their unique cultural and historical importance. As appealing as these arguments may be, upon inspection the arguments these groups make to secure and support their financial and legal privileges closely parallel the arguments used by industrial monopolies.

States protect religious monopolies through elevated status in the public realm,² constitutional protection,³ financial assistance,⁴ and by enacting unfriendly laws towards minority religions.⁵ In fact, some data suggests that

1. The term “religious monopoly” and “industrial monopoly” used throughout this article refer to dominant religions or industries that receive state protection provided to such industry or religion that limits foreign and domestic competition through financial aid, subsidies, tariffs, quotas, non-tariff barriers, and legislative provisions that discourage competition (i.e. religious registration laws, anti-cult legislation, criminal punishment for minority religious speech, and anti-proselytizing provisions in the religious arena).

2. Robert Schött, *State and Church in Sweden*, in STATE AND CHURCH IN THE EUROPEAN UNION 295, 301 (Gerhard Robbers ed., 1996) [hereinafter STATE AND CHURCH] (pointing out that the government of Sweden has allowed the Church of Sweden to levy a “parochial tax” through the state tax system); see generally STATE AND CHURCH (describing heightened privileges for dominant religions in, among others, Spain, Italy, Germany, the United Kingdom, Greece, Denmark, Austria, Portugal, and Finland).

3. The Greek Orthodox Church is recognized in the 1975 Greek Constitution as being “the prevailing religion in Greece.” GREECE CONST. art. 3, ¶ 1 (1975). Islam is recognized as the state religion in Algeria, Bahrain, Djibouti, Egypt, Iran, Kuwait, Malaysia, Mauritania, Morocco, Qatar, and Tunisia. U.S. Dep’t of State, *International Religious Freedom Report* (2003), available at <http://www.state.gov/g/drl/rls/irf/2003/> (last visited Jan. 24, 2005).

4. Many states provide large subsidies and indirect aid for dominant religions. John T.S. Madeley, *European Liberal Democracy and the Principle of State Religious Neutrality*, in CHURCH AND STATE IN CONTEMPORARY EUROPE: THE CHIMERA OF NEUTRALITY 13 T.2 (John T.S. Madeley & Zsolt Enyedi eds., 2003) [hereinafter CHURCH AND STATE] (noting that, in 1980, Belgium, Denmark, Finland, Germany, Greece, Iceland, Liechtenstein, Luxemburg, Monaco, Norway, Spain, Sweden, and Switzerland received large state subsidies and that Andorra, Portugal, the United Kingdom, Italy, and Malta received indirect state aid for religious organizations).

5. Bill Kissane, *The Illusion of State Neutrality in a Secularizing Ireland*, in CHURCH AND STATE, *supra* note 4, at 73, 76 (describing that Irish “legislation on divorce, contraception and freedom of expression had already been brought into line with Catholic teaching” as well as that “the state’s Censorship of Publications Board was usually chaired by a priest”); see also George Th. Mavrogordatos, *Orthodoxy and Nationalism in the Greek Case*, in CHURCH AND STATE, *supra* note 4, at 117, 120 (describing the rejection by the Greek Parliament to separate church and state in the 2001 constitutional revision); John Anderson, *Catholicism and Democratic Consolidation in Spain and Poland*, in CHURCH AND STATE, *supra* note 4, at 137, 140 (describing the assertion of the Catholic church that “phrasing on issues such as religious education, divorce, and abortion” should not give “offence to the religious sensibilities of the Catholic population”).

In addition, dominant religions receive special privileges and influence legislation controlling whether competing religions can build worship houses or proselyte in a certain state. Mavrogordatos, *supra*, at 121 (explaining that Greek Orthodox clergy now obtain “productivity bonus[es]” from the state emphasizing the “unquestioned acceptance of the church’s status as a special branch of the state and of its civil service”) (internal quotations omitted). Mavrogordatos

the number of European states providing state aid to religious groups has increased in recent years.⁶ Typically, religious monopolies argue that state protection serves three distinct sets of interests: the religion itself, the state and society, and citizens.⁷ Religious monopolies argue that protection is necessary to preserve a church because the church is in its infancy, or in a stage of recovery, and needs financial assistance to maintain its presence and to compete with heavily funded foreign churches.⁸ The claimed benefits to the state include that the religion is fundamental to state culture, creates social stability, preserves national identity and national security, and prevents domestic dependence on foreign churches.⁹ Religious monopolies also argue that state protection benefits the citizens who retain access to their historical church of preference and avoid exploitation by new religions through fraud and manipulation.¹⁰ Religious monopolies in numerous countries receive state protection, including financial aid and protectionist legislation against competing religions, by relying on such rationales.¹¹

Arguments by monopolists in justification of their favored treatment and protection are even more familiar in the economic realm. Industrial monopolists make remarkably similar arguments about benefits that accrue to the state, industry, and citizens in order to obtain subsidies and legislation to protect their industries against domestic and foreign competition.¹²

Varying degrees of state protectionism exist ranging from state-regulated industries to protection of infant and recovering industries.¹³ This

also describes that currently "construction of *any* religious building still requires the permission of the local Orthodox bishop," resulting in a lack of Muslim mosques anywhere in Greece except Thrace and Attica. *Id.* The Greek Orthodox Church brought about legislation to prohibit "proselytism and blasphemy" as "criminal offences with respect to any recognised religion." *Id.* at 122.

Even dominant religions that do not explicitly admit that they seek privileges from the state may insist that the state "bear in mind and respect the real life of the people [and not] ignore the fact that a large majority" of citizens belong to their church. Anderson, *supra*, at 140 (quoting a 1975 statement by a Catholic cardinal in Spain).

6. Madeley, *supra* note 4, at 16 T.3 (pointing out that Monaco, Belgium, Denmark, Finland, Greece, Iceland, Liechtenstein, Luxemburg, Norway, Spain, Switzerland, Andorra, Portugal, Britain, Italy, Malta, Armenia, and Poland now provide limited state subsidies to churches).

7. Of course, protectionist arguments also affect would-be competitors of religions, but these arguments are beyond the scope of this article. In addition, sometimes politicians and other state figures, rather than the dominant religion, make the arguments in favor of protection of a dominant religion.

8. See generally *infra* Part II-A-2.

9. See generally *infra* Part III.

10. See generally *infra* Part IV-B.

11. See generally *infra* Part IV-B-2. Of course, we do not argue that these are the sole justifications or explanations for state protection of religion. There are clearly deeper dynamics at play with dominant religions, such as the fact that dominant religions are spiritually appalled by the doctrines of proselytizing religions. In addition, in this discussion we do not explore the possible explanations for the close relationship between dominant religions and their state, such as political and financial corruption.

12. *Id.*

13. The most extreme form of state-regulated industry results in a public monopoly. A legal (or public) monopoly is defined as "[t]he exclusive right granted by government to business to provide

article discusses a variety of protectionist practices including subsidies, tariffs, and legislation limiting foreign and domestic competition. These practices result in various levels of state protectionism (whether consisting of a combination of protectionist practices or an individual protectionist practice in an extreme form) which may be harmful to industry, the state and society, and citizens. As with industrial protection, religious protection exists along a spectrum, with some religious monopolies benefiting from many forms of state protection as a “virtual ‘territorial monopoly[,]’”¹⁴ while in other states, despite protection, minority religions survive. While several commentators have explored the state of dominant religions in various countries and the challenges facing minority religions, no commentator has documented the remarkable similarity of the rationales for protection of religious and industrial monopolies. A few scholars have applied economic theories to questions of religious belief or government regulation of religion,¹⁵ but none has explored the relationship of religious protectionism and economic protectionism. This article examines the similarities in protectionist arguments made in the industrial and religious arenas and

utility services that are, in turn, regulated by the government.” BLACK’S LAW DICTIONARY 1023 (7th ed. 1999). An example of a public monopoly is the AT&T monopoly.

14. See Ralph Della Cava, *Transnational Religions: The Roman Catholic Church in Brazil & the Orthodox Church in Russia*, 62 SOC. RELIG. 535 (2001), available at 2001 WL 20525099 (referring to the Russian Orthodox Church as a monopoly enabled by foreign registration law enacted by the state and the cooperation of local officials); see also W. Cole Durham, Jr. & Lauren B. Homer, *Russia’s 1997 Law on Freedom of Conscience and Religious Associations: An Analytical Appraisal* 3, available at <http://www.law.emory.edu/EILR/volumes/win98/durhom.html> (last visited Jan. 24, 2005) (noting that the “proponents of the [1997] Law” claim that the legislation was a “practical concern” with laws that made it “all and sundry to establish a religion in Russia and then claim tax exemptions”). However, legislation that “requires all organizations to re-register, and that will operate in many cases to impose a retroactive fifteen-year limitation on the right of many religious associations to maintain or attain full legal entity status, is obviously an overreaction to the reality that some groups may have abused tax exempt status.” Durham & Homer, *supra*.

Iran, unlike many of the other countries discussed, protects Islam as “the official religion of [the country]” in its constitution. 2004 Annual Report of the United States Commission on International Religious Freedom 85, May 2004, available at <http://www.uscirf.gov/reports/12May04/finalReport.php3> (last visited Feb. 24, 2005). Not only is Iran virtually a religious monopoly, but the government upholds only its own interpretation of Islam. *Id.*

The establishment of dominant religions comes “about as an evolution, rather than through a revolution.” E. Kenneth Stegeby, *An Analysis of the Impending Disestablishment of the Church of Sweden*, 1999 BYU L. REV. 703, 767. Establishing protection of a dominant religion is a process requiring several elements discussed above, including: state financial aid and protective legislation from domestic and foreign competition. RAVI BATRA, *THE MYTH OF FREE TRADE* 5, 187–90 (1993).

15. See, e.g., Eli Berman, *Hamas, Taliban, and the Jewish Underground: An Economist’s View of Radical Religious Militias*, NBER Working Paper No. w10004 (Sept. 2003), available at <http://www.nber.org/papers/w10004> (last visited Jan. 24, 2005); Eric A. Posner, *The Legal Regulation of Religious Groups*, 2 LEGAL THEORY 33 (1996); Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1 (1989); see also Susan Rose-Ackerman, *Altruism, Nonprofits, and Economic Theory*, 34 J. ECON. LIT. 701 (June 1996).

asserts that when protectionist arguments are made to protect religious monopolies, religion is treated as a market commodity.¹⁶

Modern protectionist arguments in the industrial field often rely solely on economic efficiency theories, which seem to have no relevance to arguments for religious policy. Indeed, United States industries seeking to defend state protectionism must legally rely on market efficiency arguments since current antitrust law relies solely on an efficiency-based economic rationale rather than on social and political principles.

In spite of these contemporary trends and practices, we suggest that there is a significant correlation between economic and religious protectionist arguments. We also contend that protectionist arguments in the field of religion ultimately treat religion as no more than an economic commodity. For example, early defenders of U.S. antitrust laws argued that monopolies, which benefit from extreme state protection,¹⁷ permit concentrations of power that decrease democracy and individual liberty. Since religious freedom is a vital human right, arguments promoting state protection of religion should be viewed with suspicion. This article asserts that despite arguments by both industries and religions that they benefit from state protection, lessons from industry and religion suggest that protection rarely creates the advantages sought. In fact, the interests of the state, industry, and citizens may actually be harmed, rather than served, by protection.¹⁸

Our argument will proceed as follows. In Part II, this article summarizes the asserted benefits to an industry of state protection. It then notes the remarkable resemblance of arguments in favor of protection of religion with arguments to protect industry. Part III explores the claimed benefits to the state and to society of protecting industry and compares these with the asserted benefits to the state and to society of protecting a favored religious group. Part IV explains the claimed benefits of protection of industry to citizens, marking the resemblance between the claimed benefits to citizens of protecting religion with the claimed benefits of protecting industry. Part V recognizes that the stakes in religious protectionism are particularly high, which results in additional claimed benefits to citizens. Part V also casts doubt on the benefits of state protection and points out that protection does not in the final analysis serve the interests of the industry or

16. Although the concern with competition is usually associated with industry, it is also a concern shared by religious leaders vying for state protection and adds further cause for this comparison. See *infra* Part II-B for further discussion.

17. Extreme state protection may result in a monopoly. Internal enterprises may assert pressure on a state to allow it to achieve a monopoly. One example is a public monopoly, which is a state-regulated and sanctioned monopoly. See *supra* note 13 for definition. Public monopolies are justified under a "natural monopoly" rationale that asserts that in some industries the cost and barriers of entry are just too high for there to be free competition which allows more than one entity to compete. These types of monopolies more successfully gain state protection through financial aid and legislation.

18. In examining the similarities between industrial and religious arguments in favor of protection, we are not concerned with economic efficiency arguments, but point out that the social and political motivations to oppose state protection apply equally to religion.

religion, the state and society, or citizens. This section emphasizes that state protection may actually harm an industry or religion by creating inefficiency and poor service in the industrial arena and possibly creating oppressive religions; harm society by increasing the concentration of power and decreasing democracy and possibly inciting violence among religious minorities; and harm citizens through decreasing individual liberty and human rights. Part VI considers the acute interests religious monopolies assert in order to gain state protection. Part VII provides a brief conclusion.

II. ASSERTED BENEFITS OF STATE PROTECTION TO AN INDUSTRY OR RELIGION

There are a variety of reasons why a particular industry claims it needs special protection. The basic concern is usually with domestic and especially foreign competition. The first type of argument is the “infant” and “dying” industries argument, which insists that a fledgling or struggling industry needs state protection to grow until it is competitive. Dominant religions also rely on this argument to obtain state financial aid and protectionist legislation for fledgling or struggling churches. A second argument is that protection against foreign and domestic competition, including tariffs, subsidies, and non-tariff barriers, is necessary to prevent foreign domination and control. Powerful religious groups similarly insist upon protection against foreign competition through non-tariff barriers (including foreign religious registration laws) and protectionist legislation (including anti-proselytism laws).

A. Infant Industry and Dying Industry Arguments

Both industries and religions benefiting from protection often assert infant industry arguments to obtain state financial aid and protectionist legislation for a fledgling or struggling church or industry.

1. Industry

Infant industry protection¹⁹ has been used by various countries, in international conventions, and even to justify outcomes in certain cases.²⁰

19. In referring to “infant industry” protection this term also encompasses “dying industry” or “recovering industry” protection since the three arguments are similar enough for the purposes of this article.

20. The Warsaw Convention (officially called the “Convention for the Unification of Certain Rules Relating to International Transportation by Air”) “emerged due to differences among the world’s countries as to liability rules governing air transportation accidents.” Tory A. Weigand, *Accident, Exclusivity, and Passenger Disturbances Under the Warsaw Convention*, 16 AM. U. INT’L L. REV. 891, 892 (2001). The parties felt that a carrier’s liability should be limited since liability

Infant industries “are those that are unable to withstand foreign competition without some form of protection by the government, but that with time could grow and compete successfully in the global market.”²¹ Infant industries are protected through government increases in the “domestic prices of imported goods to enable domestic producers which are uncompetitive . . . in the short-run to stay in business”²²

In the United States, infant industry protection was supported by some influential founding fathers as well as recently through congressional legislation. Alexander Hamilton supported tariffs and subsidies to protect infant industries of the early colonies.²³ After World War I, tariffs were imposed on imports because Congress “believed that American businesses, which had expanded into new markets as a result of the war, needed protection as infant industries from foreign competition.”²⁴ Some of these tariffs are still in place today against certain nations.²⁵ During difficult economic times, President Reagan proposed that Congress amend the Clayton Act to “exempt[] import-injured industries from the anti-merger law for up to five years.”²⁶ Even more recently, “[t]he Communications Decency Act of 1996 was . . . enacted to protect the infant industry of Internet service providers.”²⁷

may “threaten the financial security of the infant industry.” *Id.* The “infant industry” was the “fledgling international transportation business.” *Id.*; see also Warsaw Convention, 49 U.S.C. § 40105 (1994); *United States v. Jerrold Elecs. Corp.*, 187 F. Supp. 545, 556 (E.D. Pa. 1960) (taking into account that the television equipment manufacturer was an infant industry in deciding that manufacturer did not violate antitrust laws).

21. Ruth L. Okediji, *Trading Posts in Cyberspace: Information Markets and the Construction of Proprietary Rights*, 44 B.C. L. REV. 545, 567–68 (2003).

22. Jeffrey K.D. Au, Note, *The Hopes and Fears of Foreign Direct Investment: A Comparative Evaluation of FDI Regulation in the People’s Republic of China and Taiwan*, 2 J. CHINESE L. 359, 380 n.121 (1988) (noting that “import substitution” strategies like “infant industry” protection are one way of gaining monopoly profits). Infant industry protection also aims to “encourag[e] other domestic producers to enter the [particular] market.” *Id.* at 380 n.121.

23. See generally ALEXANDER HAMILTON, *Report on the Subject of Manufactures*, in 10 THE PAPERS OF ALEXANDER HAMILTON 230–340 (Harold C. Syrett ed., 1966). However, there is some indication that Alexander Hamilton preferred subsidies to tariffs. *Id.*

24. Melissa Ann Miller, Note, *Will the Circle Be Unbroken? Chile’s Accession to the NAFTA and the Fast-Track Debate*, 31 VAL. U. L. REV. 153, 158 n.37 (1996) (noting that after the war tariffs were increased on “more than one-thousand articles in trade” including “minerals, chemicals, dyes and textiles”).

25. *Id.* Nations that do not have “Most Favored Nation” status with the United States are still subject to the Smoot-Hawley Tariff Act, which applied tariffs on most imported articles after World War I. *Id.* Congress has shown some regret after public condemnation for passing the Smoot-Hawley Act, which some commentators say helped cause the Great Depression. *Id.* at 158; see also Edmund W. Sim, *Derailing the Fast-Track for International Trade Agreements*, 5 FLA. INT’L L.J. 471, 475 (1990) (discussing Congress’s embarrassment due to the Smoot-Hawley Act).

26. William F. Shughart II et al., *Antitrust Enforcement and Foreign Competition*, in THE CAUSES AND CONSEQUENCES OF ANTITRUST 179 (Fred S. McChesney & William F. Shughart II eds., 1995) (citing Nadine Cohodas, *Reagan Seeks Relaxation of Antitrust Laws*, 44 CONG. Q. WKLY. REP. 187 (1986)).

27. Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1, 97 (2002) (also noting that America Online, CompuServe and Prodigy were three Internet service providers intended to be protected by the Communications Decency Act of 1996).

Western European countries have been known to limit antitrust enforcement and even encourage formation of cartels with “dying” industries in times of slow economic growth and rising unemployment.²⁸ For instance, many European state-run airlines have been supported by government subsidies.²⁹ In 1994, France proposed \$3.7 billion in subsidies to Air France, Greece proposed \$1 billion to forgive Olympic Airways’ debt, and Portugal approved \$1.1 billion in government aid to TAP Air Portugal.³⁰ These proposals were intended to save dying industries and, as an American Airlines’ government affairs director commented, “will have made it impossible for an [EU] carrier to go out of business.”³¹ In the United States after World War I, shipping was considered a “sick” industry and subsidies were maintained despite government investigations that subsidy money was used to fund excessive salaries and lobbying fees rather than to “stimulate new construction or modernization.”³² Despite “scandals, though, President Franklin Roosevelt insisted that . . . [s]ubsidization” would continue.³³

Despite the claimed benefits of infant industry protection, which arguably include increased domestic employment and industry,³⁴ it is an anticompetitive practice that favors a certain domestic industry.

2. Religious Analogues

State protectionism often occurs with former religious monopolies that are now struggling.³⁵ Those advocating protection argue that certain

In addition, the Federal Communications Commission, although maintaining jurisdiction to regulate the internet, has “consistently declined to regulate” internet services under the same “infant industry rationale.” Timothy D. Casey & Jeff Magenau, *A Hybrid Model of Self-Regulation and Governmental Regulation of Electronic Commerce*, 19 SANTA CLARA COMPUTER & HIGH TECH. L.J. 1, 8 n.27 (2002) (internal quotations omitted).

28. *Trustbusters Busted*, THE ECONOMIST, Apr. 18, 1981, at 17 (noting that “[t]he EEC commission’s competition office, which during the first half of the 1970s looked like growing into a fierce watchdog, has become a chihuahua” allowing European governments to support “lame industries” and allowing the EEC’s industrial commissioner Viscount Etienne Davignon to encourage national steel industries “to form a classic cartel that plots to reduce production to prop up prices”).

29. Patrick Oster, *EU Considers Subsidies to European Airlines*, WASH. POST, July 23, 1994, at F8.

30. *Id.*

31. *Id.* (internal quotations omitted).

32. ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE 236 (1966).

33. *Id.* In 1935, Roosevelt told Congress that subsidies “would have to continue.” *Id.* As World War II approached, the U.S. government funded a “large-scale” investment to expand merchant ships. *Id.* at 238. The aviation industry went from enjoying “a blend of subsidies, cartelization, and public controls” to becoming a “publicly regulated monopoly” like “railroads, motor carriers, and shipping companies.” *Id.* at 244.

34. Okediji, *supra* note 21, at 568.

religions struggling financially and lacking members need time to recover before foreign religions should be allowed to compete with them.³⁶ Official state religions and formerly dominant churches³⁷ have been supported by the state through financial grants and protectionist legislation under this rationale. Implicitly expressing a desire for protectionism as a struggling industry, one Russian Orthodox leader exclaimed that after the fall of Communism the Church has been faced with “very severe competition in the missionary field from everyone here, from the Moonies and new charismatic movements to our Catholic brothers.”³⁸

“Struggling religion” arguments are more commonly made by dominant churches; however, infant industry arguments have also been used to protect fledgling churches from competition.³⁹ For example, in late-nineteenth century America, the infant industry argument was made in the religious context, claiming that theological seminaries should be protected from foreign clergymen.⁴⁰

Similar to infant industries in the industrial sector that received protectionist subsidies and tariffs from the state, “infant” or “struggling” religions also receive state financial aid and protective legislation from foreign competition.⁴¹ In both areas, the state relies on the same “infant” or “struggling” industry or religion rationale.⁴² In addition, just as infant industries received government aid to compete in “hard economic times,” struggling religions have also received subsidies and protection during difficult economic as well as moral times.⁴³ Although states protecting infant religions cannot literally raise the price for foreign religions to

35. See, e.g., Schött, *supra* note 2, at 295 (providing Sweden as an example). The argument made to protect struggling industries resembles the infant industries argument. See *supra* notes 19–20 and accompanying text for further discussion.

36. Harold J. Berman, *Religious Rights in Russia at a Time of Tumultuous Transition: A Historical Theory*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 303 (Johan D. van der Vyver & John Witte, Jr. eds., 1996).

37. The Church of Sweden is an example where 88% of the population belongs to the Church but “less than 4% of the population go to church each week, with almost half of these attending Sunday morning service.” Schött, *supra* note 2, at 295.

38. Daniel L. Schafly, Jr., *Roman Catholicism in Today's Russia: The Troubled Heritage*, in RELIGIOUS LIBERTY IN NORTHERN EUROPE IN THE TWENTY-FIRST CENTURY 125, 136 (Derek H. Davis ed., 2000) [hereinafter RELIGIOUS LIBERTY IN NORTHERN EUROPE].

39. See, e.g., *Parsons Need Protection*, N.Y. TIMES, Apr. 24, 1888, at 9 (applying infant industry rationale to protect American theological seminaries from foreign entrants).

40. *Id.* (“[American] theological seminaries, which are infant industries just as much as carding machines or iron mills, are turning out annually enough of this form of labor product to supply the home demand and meet the exigencies of missionary service also.”)

41. See, e.g., Law on Churches and Religious Societies [Czech Republic], tit. 3 sec. 11, in LAWS ON RELIGION AND THE STATE IN POST-COMMUNIST EUROPE 113 (W. Cole Durham Jr. & Silvio Ferrari eds., 2003) [hereinafter POST-COMMUNIST EUROPE] (limiting financial benefits to religions that have been in the country ten years and have over 10,000 members); Schött, *supra* note 2, at 295, 301 (describing state financial support for the Church of Sweden); Zsolt Enyedi, *The Contested Politics of Positive Neutrality in Hungary*, in CHURCH AND STATE, *supra* note 4, at 157–63.

42. See, e.g., Schött, *supra* note 2, at 295, 301.

43. In Eastern Europe this has been referred to as a “moral vacuum” among citizens that the dominant church must help fill. See generally *infra* note 320 and accompanying text.

compete in the country, states have raised the burden of competing in some countries through registration requirements and other legislative limits on minority religions.⁴⁴ For example, laws in some states limit proselytizing, expel or limit foreign missionaries, penalize conversion from a dominant religion, or refuse to recognize minority religions.⁴⁵

B. Domestic and International Unfair Competition

Industrial monopolies benefit from governmental support that takes the form of tariffs, subsidies, and non-tariff barriers. Similarly, states protect religious monopolies from domestic and foreign competition through financial aid subsidies, non-tariff barriers—such as registration requirements—and protective legislation—such as anti-proselytizing laws.

1. Industry

One essential aspect of achieving an industrial monopoly is obtaining protection from the state against domestic and foreign competition.⁴⁶ State protectionism includes tariffs,⁴⁷ subsidies, and other non-tariff barriers “designed to restrict or eliminate foreign competition.”⁴⁸ Government protection can also be more subtle, for example shifting government policies to protect domestic industries.

44. For a thorough discussion of how registration requirements can limit religious minorities, see generally W. Cole Durham, Jr., *Facilitating Freedom of Religion or Belief Through Religious Association Laws*, in *FACILITATING FREEDOM OF RELIGION OR BELIEF: A DESKBOOK* 321 (Tore Lindholm et al. eds., 2004) [hereinafter *FACILITATING FREEDOM*].

45. See Tad Stahnke, *The Right to Engage in Religious Persuasion*, in *FACILITATING FREEDOM*, *supra* note 44, at 619 (describing anti-proselytizing legislation); see also *FREEDOM OF RELIGION AND BELIEF: A WORLD REPORT* 28–33, 73–77 (Kevin Boyle & Juliet Sheen eds., 1997) [hereinafter *FREEDOM OF RELIGION AND BELIEF*] (describing Egyptian discrimination and laws used against religious minorities and expulsion of foreign missionaries in Sudan and discrimination against minorities); U.S. Dep’t of State, *Executive Summary: International Religious Freedom Report* (2003), available at <http://www.state.gov/g/drl/rls/irfr/2003/27185.htm> (last visited Jan. 25, 2005) (describing anti-proselytizing laws, closure of churches, bans on foreign or minority religions, blasphemy laws, discrimination in employment and education, limitations on formation of new religions or registration of foreign religions, and other forms of state hostility towards minority religions in a variety of countries).

46. See generally D.T. ARMENTANO, *THE MYTHS OF ANTITRUST* (1972); WILLIAM F. SHUGHART II, *ANTITRUST POLICY AND INTEREST-GROUP POLITICS* (1990).

47. See, e.g., *Latin America’s Car Industry: Revving Up*, *THE ECONOMIST*, Apr. 27, 1996, at 72 (describing the Brazilian government’s policy of increasing and decreasing tariffs on car imports from 20% to 70% depending on domestic economic health).

48. John White, *Privatization in Eastern and Central Europe*, 13 *INT’L L. PRACTICUM* 19, 20 (Spring 2000) (noting that “protectionism” can be “achieved through high tariff barriers or other measures designed to restrict or eliminate foreign competition”).

Government subsidies allow protected industries to “charge prices below cost-of-production” for their products,⁴⁹ which in turn allows industries to gain a competitive advantage against foreign competitors. European airlines, often run as public monopolies, regularly benefit from government subsidies.⁵⁰

Tariffs and quotas are often used to prevent foreign competitors from succeeding in a domestic market and may be a source of revenue. In the United States, in tough economic times, policy makers have argued that American jobs should be protected by restricting imported goods through quotas and exclusion.⁵¹ One commentator asserts that the Sherman Act of 1890 was actually passed in a “political bargain” between big business and opponents of protective tariffs.⁵² In exchange for the Sherman Act, “protectionist trade legislation (known popularly as the ‘Campaign Contributors’ Tariff Bill’) [was] introduced just three months after the Sherman Act was signed into law.”⁵³ Before World War I, “[t]ariffs were the most important source of [the United States’] federal revenues.”⁵⁴ After World War I, Congress set tariffs at the highest level in history under the Smoot-Hawley Tariff Act to “sustain economic prosperity.”⁵⁵ Throughout the post-World War I period the aviation industry also received special government assistance and protection.⁵⁶

Some countries take advantage of protectionist government policies to protect their industries from foreign competition.⁵⁷ For example, Brazil has

49. *Id.* at 20.

50. See *The War in the Skies: Airline Regulation*, THE ECONOMIST, Aug. 14, 1993, at 66 (noting that “dogged politicians on both sides of the Atlantic will remain the biggest obstacle to free trade in air travel”). Public monopolies have also been defended as a method of achieving “global competitiveness.” Steven Dov Lando, Note, *The European Community’s Road to Telecommunications Deregulation*, 62 FORDHAM L. REV. 2159, 2198 (1994).

51. See Lloyd Bentsen, *Strong Medicine for Trade Deficit*, N.Y. TIMES, Aug. 28, 1985, at A23; H.R. 380, 100th Cong., 1st Sess., 133 CONG. REC. H-154 (daily ed. Jan. 7, 1987); S. 549, 100th Cong., 1st Sess., 133 CONG. REC. S-1053 (daily ed. Jan. 21, 1987).

52. Shughart et al., *supra* note 26, at 179.

53. *Id.*

54. Carolyn C. Jones, *Taxes and Peace: A Case Study of Taxing Women*, 6 S. CAL. REV. L & WOMEN’S STUD. 361, 382 (1997) (noting also that “[t]he Republican party’s high tariff program won support from business leaders protected from foreign competition”).

55. Miller, *supra* note 24, at 158 (noting that the “prevailing attitude of the years immediately preceding World War I was that the United States could sustain and even dramatically increase the effects of the economic boom of the ‘roaring 20’s by sharply raising tariffs’”); see also Smoot-Hawley Tariff Act of 1930, ch. 497, 46 Stat. 590 (1930) *codified as amended* at 19 U.S.C. §§ 1206–1677 (2000).

56. HAWLEY, *supra* note 32, at 240 (noting the assistance provided specifically during the 1920s and 1930s).

57. Chalmers Johnson, *Japan: Who Governs? An Essay on Official Bureaucracy*, 2 J. JAPANESE STUD. 1 (1975) (attributing Japanese economic success to state protectionist practices); CHALMERS JOHNSON, MITI AND THE JAPANESE MIRACLE (1982) (same); STEPHAN HAGGARD, PATHWAYS FROM THE PERIPHERY: THE POLITICS OF GROWTH IN THE NEWLY INDUSTRIALIZING COUNTRIES 15, 126, 151 (1990) (same); ALICE H. AMSDEN, ASIA’S NEXT GIANT: SOUTH KOREA AND LATE INDUSTRIALIZATION 14–18, 72–76 (1989) (same). *But see* Mathew D. McCubbins & Gregory W. Noble, *The Appearance of Power: Legislators, Bureaucrats, and the Budget Process in the United States and Japan*, in STRUCTURE AND POLICY IN THE U.S. AND JAPAN 56 (Peter Cowhey & Mathew

been known to use “a restrictive import licensing system and high tariffs to prevent access to [the U.S.] specialty steel market.”⁵⁸ Japan also has a reputation for using informal non-tariff barriers to protect against foreign competition.⁵⁹ A 1987 World Bank study found that the “industrialized world’s most heavily protected market is Japan,” despite its rejection of formal trade tariffs.⁶⁰ Japan’s goal is to increase exports and “expand the international market share of its producers [so] it views protectionist cartels and monopolies favorably because ‘they strengthen Japanese producers against foreign competition.’”⁶¹ Japan has been accused of restricting imported steel products that it manufactures itself, which largely prevents U.S. companies from selling products to Japanese customers.⁶² Japanese protectionist practices have also been blamed for the downfall of the American “television industry in the 1960s and 1970s.”⁶³

D. McCubbins eds., 1995) (asserting that state power over Japan’s economy has not been the primary cause of Japan’s successful economic growth); Samuel Kernell, *The Primacy of Politics in Economic Policy*, in *PARALLEL POLITICS: ECONOMIC POLICYMAKING IN JAPAN AND THE UNITED STATES* 325, 326 (Samuel Kernell ed., 1991) (“The Japanese miracle has occurred in the sectors of the economy where the government has remained relatively uninvolved.”).

58. *Using American Antitrust Laws to Assure Fair Int’l Competition: Hearing on S. 2610 Before the Subcomm. on Antitrust, Monopolies and Business Rights of the Senate Comm. on the Judiciary*, 102nd Cong. 61 (1992) [hereinafter *Hearings on Antitrust*] (statement of Paul R. Roedel) (noting that “Brazilian authorities would not issue licenses for materials such as specialty steel which were already produced in that country” and that “[e]ven if a license could be obtained, the 50 percent import duty and the additional 25 percent tariff on financial operations would have proven insurmountable obstacles to U.S. exports”).

59. David E. Dreifke, Note, *The Foreign Commerce Clause and the Market Participant Exemption*, 25 *VAND. J. TRANSNAT’L L.* 257, 265 (1992); Michael W. Punke, Comment, *Structural Impediments to United States-Japanese Trade: The Collision of Culture and Law*, 23 *CORNELL INT’L L.J.* 55, 57–58 (1990).

60. Dreifke, *supra* note 59, at 266–67 (noting that while the United States insisted on “free trade, throughout the 1980s, Japan ‘openly restricted imports, subsidized exports, and became the world’s richest per capita industrial nation’”); see also PAT CHOATE, *AGENTS OF INFLUENCE* 24 (1990).

61. Dreifke, *supra* note 59, at 267, 269 (noting also that the “Japanese manipulate their economic power . . . through government-sanctioned cartels to . . . further their overarching national trade goals”); see also James Fallows, *Japan: Playing by Different Rules*, *THE ATLANTIC*, Sept. 1987, at 26.

62. *Hearings on Antitrust*, *supra* note 58, at 61 (statement of Paul R. Roedel) (echoing this claim made by United States steel industry specialists); see also *id.* at 87 (statement of Lloyd Constantine) (noting that the dominance of the Japanese technology industry is due to “coordinated action of the Japanese industry and Government, aided and abetted by the inaction of our own Government and defects in the American law”).

63. *Hearings on Antitrust*, *supra* note 58, at 1 (statement of Senator Metzenbaum). American experts also accuse the Japanese consumer electronics industry price-fixing activities in the United States. *Id.* at 133 (statement of Lloyd Constantine).

Subtle government protections may include offering tax incentives or easing antitrust enforcement against select industries.⁶⁴ In the United States, President George Bush Sr. “publicly supported measures aimed at easing the antitrust treatment of corporate research joint ventures to spur the development of the new technologies necessary for meeting the challenge of foreign competition.”⁶⁵ Some evidence indicates that the level of antitrust enforcement actually corresponds to perceived threats by foreign competitors.⁶⁶

Government protections, including tariffs, subsidies, and non-tariff barriers, all decrease competition in an industry.

2. Religious Analogues

States similarly protect favored religious groups from competition through financial aid, subsidies, non-tariff barriers, such as registration requirements, and protective legislation, such as anti-proselytizing laws. Many churches are largely funded through state financial contributions.⁶⁷ States also protect religious monopolies through non-tariff barriers such as registration requirements that limit foreign churches’ ability to function in the country or prevent them from holding worship services without a license. For example in Russia, the 1997 Freedom of Conscience Law “refus[es] to recognize foreigners’ right to form religious groups or religious organizations . . . unless they permanently reside in the Russian Federation.”⁶⁸ Foreign religions who do not “receive the status of a religious association . . . may not engage in liturgical or other religious activities.”⁶⁹

64. *Party Time: Brazil’s Car Industry*, THE ECONOMIST, Sept. 17, 1994 (noting that in 1992 the Brazilian government “cut taxes on small cars provided the companies [manufacturing these cars] cut the prices . . . to around \$7,350).

65. Shughart et al., *supra* note 26, at 179–81 (noting that some argue that protection of domestic industry results in “public antitrust agencies plac[ing] the protection of selected domestic competitors ahead of the goal of promoting competition); *see also id.* at 187 (noting that when foreign competition increases, antitrust funding actually increases).

66. *Id.* at 179; *see also* Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. REV. 1501 (1998) (describing the self interest of U.S. national enforcement of international antitrust laws). Commentators are divided about whether domestic antitrust enforcement decreases when “foreign producers make greater inroads into the domestic economy.” Shughart et al., *supra* note 26, at 181 (noting that some argue that protection of domestic industry results in “public antitrust agencies plac[ing] the protection of selected domestic competitors ahead of the goal of promoting competition”); *see also id.* at 187 (noting that when foreign competition increases, antitrust funding actually increases).

67. Enyedi, *supra* note 41, at 163 (pointing out that “state finance contributes three quarters of the overall budgets” of Hungarian churches including education and social subsidiaries of these churches). Enyedi also points out that “mainstream churches receive half of their finances from the state and less than a quarter from their members.” *Id.*

68. T. Jeremy Gunn, *Caesar’s Sword: The 1997 Law of the Russian Federation on the Freedom of Conscience and Religious Associations* 7, available at <http://www.law.emory.edu/EILR/volumes/win98/gunn.html> (last visited Jan. 25, 2005). Note also that “[o]rganizations located in Russia” that have “parent or sister organizations with ‘directive centers located abroad’” do not constitute foreign organizations. Durham & Homer, *supra* note 14, at 33.

69. Gunn, *supra* note 68, at 8 (noting that “[u]nder this provision, a group of Roman Catholic priests on an official visit to Russia may not legally pray together”).

Islamic states impose even harsher penalties to avoid competition; some Islamic states protect state religions by criminally punishing blasphemy and conversion.⁷⁰ Other states rely on protective legislation that places dominant religions in favored status. For example in Portugal, the government grants special privileges to the Catholic Church, which is ruled under different laws than other denominations.⁷¹ Similarly, the Orthodox Church in Greece is treated “with special interest and in a favourable manner.”⁷² Other states have separate categories of “recognized and non-recognized” religions, with the dominant religion existing as the “*primus inter pares*” among the recognized.⁷³

Both the Greek and Iranian governments have instituted anti-proselytizing laws to prevent foreign competing churches from gaining support. The Greek laws apply to all churches but are aimed primarily at evangelical Christian churches that are gaining popularity among Greek Orthodox Church members.⁷⁴ The Iranian government recently cracked down on “increasing proselytizing activities by evangelical Christians *whose services are conducted in Persian.*”⁷⁵ Iranian government officials have

70. Donna E. Arzt, *Heroes or Heretics: Religious Dissidents Under Islamic Law*, 14 WIS. INT'L L.J. 349, 396 (1996). For example, “[i]n Yemen, the 1990 Law on the Press and Publications bans any publication which . . . ‘prejudices the Islamic faith and its lofty principles or belittles religions or humanitarian creeds . . . [and which] distort[s] the image of the Yemeni, Arab or Islamic heritage.’” *Id.* In Sudan, “article 126 of the 1991 Sudanese Penal Code officially codifies the death penalty for any non-repenting Muslim who ‘advocates the rejection of Islamic beliefs or announces his own rejection of Islam by word or act.’” *Id.* In a case illustrating the potential reach of this law, Sudan’s justice minister as well as its government-controlled press attacked a human rights investigator reporting to the U.N. Commission on Human Rights. The investigator’s report described Sudan’s slave trade and noted that its criminal code authorizes punishments such as amputation and crucifixion. As a result, the investigator, a Hungarian law professor, was called “satanic” and “an enemy of Islam” guilty of “blasphemy.” *Id.*

Other examples include Indonesian students who were “convicted in 1992 of blasphemy and publicly defaming Muslims because they engaged in a spontaneous word play involving puns on *Quranic* verses during a rock concert”; Saudi Arabian newspaper editors who “facetiously questioned the existence of God” through printing a comic strip were sentenced to prison and a penalty of lashes; and an Iranian cartoonist and editor were also sentenced for “a drawing of a soccer player adjudged to resemble the late Ayatollah Khomeini.” *Id.* at 396–97.

71. Vitalino Canas, *State and Church in Portugal*, in STATE AND CHURCH, *supra* note 2, at 271 (pointing out also that the Catholic Church’s influence is “reinforced by owning a national radio broadcasting channel (*Rádio Renascença*) and a private television channel”).

72. Charalambos Papastathis, *State and Church in Greece*, in STATE AND CHURCH, *supra* note 2, at 77.

73. Rik Torfs, *State and Church in Belgium*, in STATE AND CHURCH, *supra* note 2, at 35 (describing the Belgian state as favoring the Catholic Church among all of the recognized religions).

74. See *infra* notes 194–99 and accompanying text for discussion of Greek anti-proselytism laws.

75. Iran: International Religious Freedom Report, Bureau of Democracy, Human Rights, and Labor, U.S. Dep’t of State, Oct. 26, 2001, at 6 [hereinafter Iran Report 2001], available at <http://www.state.gov/g/drl/rls/irf/2001/5691.htm> (last visited Feb. 24, 2005); see also 2001 Annual Report on International Religious Freedom, U.S. Dep’t of State, at 429, available at www.state.gov/documents/organization/9001.pdf (last visited Mar. 4, 2005) (describing harassment

closed evangelical churches and limited meetings to Sundays only, arrested converts, required evangelical church members “to carry membership cards,” and face “identity checks by authorities posted outside congregation centers.”⁷⁶ The government also ordered church officials to “inform the Ministry of Information and Islamic Guidance before admitting new members to their congregations.”⁷⁷

In both the industrial and religious arena, the goal of subsidies, tariffs and protective legislation is to give favored domestic entities a competitive advantage against foreign and domestic competitors.⁷⁸ Government-imposed tariffs operate in the industrial arena to increase prices and limit the success of foreign competitors in the domestic market.⁷⁹ The closest parallel in the religious arena are outright bans on and registration requirements for foreign religions which limit the number and type of religions that are allowed access to the country.⁸⁰ State subsidies to certain industries are also very similar to state financial aid to dominant religions, since both give the entity a financial advantage and a greater ability to compete.⁸¹ Protectionist legislation, such as anti-proselytism laws,⁸² resembles non-tariff barriers which prohibit imported products that the state manufactures, since anti-proselytism laws also decrease direct competition with a dominant religion.⁸³ The parallel between Japan’s prohibitions on the types of steel that it imports is strikingly similar to the Iranian government’s prohibition on proselytizing in evangelical churches who conduct services in Farsi. With prohibitions only on churches which conduct services for Persians, the government expresses its fear that Persian citizens (who are primarily Muslim) will convert to Christianity, not that foreigners living in the state will convert from one Christian sect to another. Both the Japanese and Iranian governments seem concerned less with general foreign religious or industrial success but only foreign success at the expense of their industry or their dominant faith.

III. ASSERTED BENEFITS OF STATE PROTECTION TO THE STATE AND SOCIETY

Industrial monopolies, religions, and even states often justify protection with four arguments about how protectionism benefits the state and society.

of Jewish and evangelical proselytizing communities for the “printing of materials or delivery of sermons in Persian”).

76. Iran Report 2001, *supra* note 75.

77. *Id.*

78. *See generally supra* Part II-B.

79. *See generally supra* Part II-B-1.

80. *See supra* notes 75–77 and accompanying text for discussion of Iranian registration of Evangelical Christians, and note 14 on Russian registration laws; *see also infra* Part IV-A-2 for discussion of limitations on certain religions.

81. *See supra* Part II-A.

82. *See generally infra* Part IV-B-2 and accompanying text for discussion.

83. *See supra* notes 59–63 and accompanying text for discussion about Japanese non-tariff barriers.

First, they argue that protection of certain industries helps maintain social stability through retaining stable employment and services. Religious monopolies claim that they will maintain social stability by continuing to uphold national traditions and by providing political legitimacy for the state. Second, the state claims that certain industries, such as steel and aviation, are vital to national security and would threaten societal safety if sacrificed to foreign competitors. A dominant church may similarly assert that national security is weakened without tightened state control over the rights of minority religions through criminal punishment, anti-cult legislation, and government investigations. Third, the state may argue that an industry, such as a national airline, defines the national identity and culture and must be preserved. Religious monopolies may similarly assert that the best way to preserve national identity and culture is through allowing the dominant church to educate the people and through recognizing an official state religion. Finally, an industry or religion may argue that the country will become dependent on foreign entities if it does not protect a certain domestic industry or religion.

A. Social Stability

Both industries and religions assert that state protection maintains social stability. Industrial monopolies, especially public monopolies, allegedly maintain social stability through consistent employment, prices and service in an industry. Religious monopolies also allegedly maintain social stability through ideological unity, preserving national traditions and upholding the political legitimacy of the state.

1. Industry

Industry advocates claim that state protected industries⁸⁴ are more stable than private industries since they benefit from government regulation. Private industries vary in the number of people they are able to employ, areas they are able to serve and length of operation, depending on fluctuating market conditions. Along this vein, antitrust suits brought by the Department of Justice have been criticized for causing social instability through “destroying business confidence, retarding recovery, and hampering industrial efficiency and stability.”⁸⁵

84. One example of a public monopoly was AT&T, which controlled “80 percent of the local phone market and . . . more than 90 percent of the long-distance market” and was regulated by the government. Merrill Brown, *AT&T Antitrust Case Opens to Attacks by Government*, WASH. POST, Jan. 16, 1981, at D1.

85. HAWLEY, *supra* note 32, at 444 (providing an argument made in the 1930s).

2. Religious Analogues

Religious monopolies maintain that they are an important ingredient of social stability because they contribute to the political legitimacy for a state. Dominant religions in countries like the former Soviet bloc, where governments struggle to gain “popular legitimacy,” provide such legitimacy in some nations’ establishment of legal and constitutional principles.⁸⁶ Social stability is maintained by the dominant church in Greece, for example, as it “provide[s] for harmony within the Christian polity” while the state “handle[s] the legal and political matters, securing the environment for the flourishing of Orthodox Christianity.”⁸⁷ Bulgaria, Greece, and Moldova have also attempted to secure social stability through trying to force Muslim or Orthodox break-off groups to integrate with the majority faction, attempts that have been struck down by the European Court of Human Rights.⁸⁸ In these cases, states have relied on arguments that “social tension” would result from divided religious loyalties⁸⁹ or that pluralism would negatively affect its relations with a dominant religion.⁹⁰ Recent legislation in Bulgaria was in part designed to resolve a schism in the Bulgarian Orthodox Church, and has in effect made it impossible for the “schismatic” group to be registered.⁹¹

Dominant religions also assert to provide social stability through working with the state to restrict some foreign or minority religions. In some European countries, minority religions, especially foreign religions, are deemed to disrupt social stability.⁹² New minority religions have

86. Enyedi, *supra* note 41, at 157 (noting also that “politicians [in Eastern Europe] see in churches the potential providers” of legitimacy).

87. Daniel P. Payne, *The Clash of Civilizations: The Church of Greece, the European Union and the Question of Human Rights*, 31 RELIG. STATE & SOC. 261, 267 (2003). This symbiotic relationship that provides political legitimacy for the state and preserves the faith-promoting function of the Orthodox church is called “symphonia.” *Id.* In Denmark, the church and government participate in creating a legal framework consisting of secular and “theologically-founded rule[s].” Inger Dübeck, *State and Church in Denmark*, in STATE AND CHURCH, *supra* note 2, at 39 (noting that the Danish National Church and the Danish government create a “double norm-system” of legal rules enforced by the “physical power” of the court system and “church rule[s]” based “upon the confessional books or . . . upon the customs or cultural traditions of the religious community” and enforced by sanctions) (internal quotations omitted). Statesman Edmund Burke of England claimed that the establishment of the Anglican Church in England was “essential” to the state and was “the foundation of [England’s] whole constitution.” Michael W. McConnell, *Edmund Burke’s Tolerant Establishment*, in RELIGIOUS LIBERTY IN WESTERN THOUGHT 243 (Noel B. Reynolds & W. Cole Durham, Jr. eds., 1996) (emphasis added). Burke also noted that the Anglican Church was a “barrier against fanaticism, infidelity, and atheism” and was a “great national benefit” and “a great public blessing.” *Id.* at 242–43 (internal quotations omitted).

88. *Serif v. Greece*, App. No. 38178/97, 31 Eur. Ct. H.R. 20 (1999); *Hasan and Chaush v. Bulgaria*, App. No. 30985/96, 34 Eur. Ct. H.R. 55 (2000); *Case of Metropolitan Church of Bessarabia and Others v. Moldova*, App. No. 45701/99, 35 Eur. Ct. H.R. 13 (2001).

89. *Serif*, 31 Eur. Ct. H.R. 20 (1999).

90. *Metropolitan Church of Bessarabia*, 35 Eur. Ct. H.R. 13 (2001).

91. See Religious Denominations Act [Bulgaria], art. 10, in POST-COMMUNIST EUROPE, *supra* note 41, at 77.

92. For a discussion of stigmatization of minority religions by associating them with “cults” or “sects” in Western Europe, see U.S. Dep’t of State, 2003 INTERNATIONAL RELIGIOUS FREEDOM

particularly been the subject of intense scrutiny in France and Belgium, where government centers and interministerial missions have been created to observe so-called "sects" and combat "deviant sectarian behavior."⁹³ In Germany, the growth of some minority religions is perceived as a threat to the dominant church which deprives Germans of "ideological solidarity" and "political stability."⁹⁴ Placing restrictions on minority religions, including "cult classification," is a tactic used by the German government.⁹⁵ The government denies some churches legal status depriving them of tax exemption and the opportunity to participate in official state duties.⁹⁶ The German government is partly concerned with stability in this classification since a "cult" is granted legal status when "in the light of its statute and the size of its membership, it gives every indication of durability."⁹⁷ In Russia, minority religious organizations, especially foreign organizations, have been deemed suspicious and are viewed as threats to social stability, partly because they challenge "the national customs and tradition, morals of society" and "arouse ethnic, racial and religious discord."⁹⁸

Converting members of a dominant religion and criticizing dominant religious leaders are considered destructive of social stability in Iran. The Iranian government inflicts restrictions and often harsh punishment on minority religious groups who "[attempt] to convert Muslims."⁹⁹ Critics of a dominant church have also been punished for disrupting social stability. For example, a popular Shi'a cleric was sentenced to eighteen months in prison for criticizing the Islamic religious leaders for misusing religion, mistaking themselves with Islam and national interests and believing they should be

REPORT, EXECUTIVE SUMMARY (released Dec. 18, 2003), available at <http://www.state.gov/g/drl/rls/irf/2003/27185.htm> (last visited Jan. 25, 2005).

93. In Belgium, this takes the form of the government-sponsored "Center for Information and Advice on Harmful Sectarian Organizations." See <http://www.ciaosn.be/> (last visited Jan. 25, 2005). In France, a Parliamentary inquiry commission published a report containing a list of 172 so-called "sects." *Rapport fait au nom de la commission d'enquête sur les sectes*, ASSEMBLEE NATIONALE, REPORT NO. 2468 (Dec. 22, 1995), available at <http://www.assemblee-nationale.fr/rap-enq/r2468.asp> (last visited Mar. 18, 2005). An "interministerial mission to fight against deviant sectarian behavior" has also been formed. *Id.*

94. Derek H. Davis, *Religious Persecution in Today's Germany: Old Habits Renewed*, in RELIGIOUS LIBERTY IN NORTHERN EUROPE, *supra* note 38, at 107, 110–12.

95. *Id.*

96. *Id.*

97. *Id.* (citations and internal quotations omitted).

98. Marat S. Shterin & James T. Richardson, *Local Laws Restricting Religion in Russia: Precursors of Russia's New National Law*, in RELIGIOUS LIBERTY IN NORTHERN EUROPE, *supra* note 38, at 141, 148 (citations and internal quotations omitted).

99. Annual Report of the United States Commission on International Religious Freedom 18, 31, May 2003, available at www.uscirf.gov/reports/12May04/finalReport.php3 [hereinafter Annual Report 2003] (last visited Jan. 25, 2005) (noting that Iran "engages in [or tolerates] systematic, ongoing, and egregious violations of religious freedom, including prolonged detention, torture and executions based primarily or entirely upon the religion of the accused").

“immune from criticism.”¹⁰⁰ Due to these statements, the clerk was charged with “violating Islamic principles,” and “disturbing public opinion.”¹⁰¹

Both protected industries and dominant religions assert that they maintain social stability. Just as protected industries boast that they maintain general business confidence, dominant religions claim to uphold national opinion of the state. Similarly, protected industries’ claims that they maintain steady employment and services resemble protected religions claims that they uphold stable national traditions.

B. National Security

Both industrial and religious monopolies have successfully used national security arguments to obtain protection against foreign competition. Industries, including shipping, transportation, steel, farming and telecommunications, have used a pending war as well as the threat of future war to preserve state subsidies and tariffs. Similarly, religions benefit from protection, especially in states like Iran where the dominant religion is highly enmeshed with the state, and any threats to the religious monopoly by minority religions are punished criminally as a threat to national security. Even in Germany and Russia, the state equates some foreign religious organizations as threats to national security.

1. Industry

Throughout history, during wartime industries often “equat[e] business interests with the national interest” and argue for state protection.¹⁰² The United States’ founding father Alexander Hamilton favored protection of industries partly to “provide protection in time of war.”¹⁰³ During World

100. Iran Report 2001, *supra* note 75, at 9–10. The Shi’a cleric, Hojatoleslam Mohsen Kadivar, made statements “criticiz[ing] [religious leaders’] misuse of religion to maintain power.” *Id.* He also “observed [in a newspaper article] that [religious leaders] mistake themselves with Islam, with national interests, or with the interests of the system. . . [believing] that they should be immune from criticism.” *Id.* In April 1999, Kadivar was also charged for “advocat[ing] political reform and greater intellectual freedom.” *Id.*

101. *Id.* at 10. *Salaam*, the daily newspaper in Salaam that published these statements, and its publisher, were also sentenced. *Id.* The three parties were also charged with “endangering national security.” *Id.* In January 2001, the Tehran General Court “ordered the closure” of an independent journal, *Kiyan*, for “publish[ing] lies, disturb[ing] public opinion and insult[ing] sacred religion.” *Id.* Interestingly, the perceived threats by Iran’s Islamic government are not just with minority religions but even Shi’a Muslims who criticize the regime. *Id.* at 9.

102. HAWLEY, *supra* note 32, at 10–11 (documenting that the majority of people believed that “what was good for business, or at least what businessmen thought was good for them, was by definition good for everyone”).

103. Besides the arguments that protection of industries would “encourage domestic manufacture,” Alexander Hamilton argued that protection “would encourage the development of the nation’s resources, promote economic and political independence, and provide protection in time of war.” Mark E. Brandon, *Home on the Range: Family and Constitutionalism in American Continental Settlement*, 52 EMORY L.J. 645, 669 (2003); see generally Alexander Hamilton, *Report Relative to a Provision for the Support of Public Credit*, in 6 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 23, at 51–168.

War II, the “antitrust campaign became a casualty of the war effort” because it was argued that the “conduct of a war . . . called for a carefully planned, highly controlled and well-coordinated economy.”¹⁰⁴ In fact, during the war, industries disapproved of the “national-defense cases” brought by Thurman Arnold, head of the Antitrust Division of the Department of Justice.¹⁰⁵ Industry defenders claimed that these cases caused “unremitting interference” and “cumulative harassment.”¹⁰⁶ Industry arguments led to certain industries receiving “immunity from antitrust action” for “activities as were requisite for the prosecution of the war.”¹⁰⁷

Even in peaceful times, national security arguments have been used to justify protection of industry in preemptive preparation for war. During the 1930s, the U.S. transportation industry benefited from state protection because of the “contention that the nation’s security and prosperity depended upon [it]”¹⁰⁸ In addition farmers, coal operators, and oil industrialists avoided “the agitation against monopoly” using arguments that they were special cases that justified creation of “publicly sponsored cartels” due to “national defense and public safety.”¹⁰⁹ Industry commentators have also argued that “[r]apid development of the [aviation] industry . . . was vital to the national defense”¹¹⁰ Even after World War I, President Roosevelt allowed subsidization of the “merchant marine” industry, claiming it “was necessary for national defense and national security.”¹¹¹ In the 1980’s during the antitrust suit against AT&T, in spite of the Sherman, Clayton and Robinson-Patman Acts, politicians opposed state antitrust suits. President Reagan’s Secretary of Defense, Caspar Weinberger, wrote a letter to Attorney General William French Smith requesting that he dismiss the government’s antitrust suit against AT&T.¹¹² Weinberger argued that “the

104. HAWLEY, *supra* note 32, at 442.

105. *Id.*

106. *Id.*

107. *Id.* (resulting in the Antitrust Division canceling “investigations of the steel, shipbuilding, and aircraft industries and postpone[ing] major suits in the petroleum, electrical manufacturing, chemical, and plumbing industries”).

108. *Id.* at 234–35 (noting also that the transportation industry claimed that it was a natural monopoly where “capital requirements were large, fixed costs were high, and rivalry was wasteful”). From 1817, American ships “enjoyed a legal monopoly of the coastwise and intercoastal trade.” *Id.* at 235.

109. *Id.* at 245–46.

110. *Id.* at 240. Further, the industry argued that “because it was still in the pioneer stage, risky, speculative, and unable to offer assured returns, the industry on its own could never attract the large capital outlays that were necessary for rapid expansion.” *Id.* The government supported the aviation industry through the Acts of 1925, 1926, and 1930 with several aids and subsidies. *Id.* The aviation subsidy program also became the “subject of a number of abuses” like the shipping subsidies. *Id.*

111. *Id.* at 236.

112. *Trustbusters Busted*, *supra* note 28, at 17. Secretary of Defense Caspar Weinberger adopted a “military view of AT&T” and insisted that it was “an integral part of the national defense.” PETER

unity of Ma Bell's communications network is essential to 'national security.'"113 AT&T also argued that the Justice Department's divestiture plan was "not in the country's best interests."¹¹⁴ National security arguments have often proved especially persuasive rationales for state protection of industries.¹¹⁵

2. Religious Analogues

Some religious monopolies, especially those closely tied with the state, make similar claims that national security is compromised without state protection of the favored religion. States respond to perceived national security threats by limiting the rights of minority religions through criminal punishment, anti-cult legislation, and government investigations.

Under early Islamic law, national security included subjugating nonbelievers in the dominant Islamic faith in order to "protect the welfare of the Muslim community against enemies."¹¹⁶ In many modern-day Islamic countries, such as Iran, and other areas, such as Nepal and some provinces in India, it is a crime to convert from the dominant faith.¹¹⁷ In the case of Sudan, Pakistan, and Iran, apostasy from Islam is punishable by death.¹¹⁸ Iran also refuses to officially recognize minority religious groups, especially those who have been accused of "espionage" activities with adversary foreign countries.¹¹⁹ The Iranian government is particularly concerned with

TEMIN & LOUIS GALAMBOS, *THE FALL OF THE BELL SYSTEM: A STUDY IN PRICES AND POLITICS* 223 (1987). The "defense establishment relied on AT&T for its communications, and the department was leery of changing the integrated network—or, at least, of changing it very rapidly." *Id.* (citation omitted). Weinberger felt that AT&T was "the nation's vital telecommunications system." *Id.* at 229.

113. *Trustbusters Busted*, *supra* note 28, at 17. Secretary of Defense Caspar Weinberger testified before the Senate claiming that "the American Telephone & Telegraph network is the most important communication network we have to service our strategic systems in this country . . . it seems to me essential that we keep together this one communications network we now have, and have to rely on." TEMIN & GALAMBOS, *supra* note 112, at 224 (noting also that "AT&T dropped from the third largest prime contractor to the Defense Department in 1971 to the twenty-fourth in 1981") (citations omitted). In addition, the size and credibility of the AT&T network also caused government officials to oppose divestiture. *Id.* *The Economist* goes on to comment that Weinberger's argument was "horse feathers" and questioned "why on earth American military muscle will be weakened if Western Electric is spun off from AT&T and has to compete on an equal footing with others to supply telephone equipment to the clients of this quasi-monopoly?" *Id.*

114. *The Break-up-AT&T Trial Begins*, *BUS. WK.*, Jan. 19, 1981, at 84B.

115. National Security arguments are effective because they "deter many critics from asking pointed questions that ought to be posed." *Trustbusters Busted*, *supra* note 28, at 17.

116. See Arzt, *supra* note 70, at 379; see also Abdullah Saeed, *The Historical Context of the Debate on Apostasy and the Roots of Intolerance*, in *FREEDOM OF RELIGION, APOSTASY, AND ISLAM* 20–34 (Abdullah Saeed and Hassan Saeed eds., 2004).

117. See Nazila Ghanea, *Apostasy and Freedom to Change Religion or Belief*, in *FACILITATING FREEDOM*, *supra* note 44, at 669, 679–81 (citing laws in Bangladesh, Bhutan, Egypt, India, Indonesia, Iran, Kuwait, Malaysia, Maldives, Morocco, Myanmar, Nepal, Qatar, Saudi Arabia, and Sudan); Iran Report 2001, *supra* note 75, at 3 (Iran).

118. Said Amir Arjomand, *Religious Human Rights and the Principle of Legal Pluralism in the Middle East*, in *RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES*, *supra* note 36, at 342–43 (Sudan, Pakistan, and Iran); Iran Report 2001, *supra* note 75, at 3 (Iran).

119. Annual Report 2003, *supra* note 99, at 32.

minority religions, like Baha'i and Jews, which it perceives to threaten national security. When confronted about why the Baha'i organization is not recognized as a religion in Iran, government officials stated that Baha'is "are not a religious minority, but a [counterrevolutionary political organization] which . . . is against the Iranian Revolution and engages in espionage activities."¹²⁰ In addition several prominent Iranian Jewish professors have been charged with acts of "espionage on behalf of Israel."¹²¹

Similar, though less restrictive, practices occur in Europe. Several Western European nations have investigated new religious movements, including the European Parliament,¹²² the Netherlands, Sweden, Belgium, and France.¹²³ Germany created a "Parliamentary Commission of Inquiry" designed to determine whether "the beliefs and practices of religious groups imperil the state."¹²⁴ Russians similarly fear that people join foreign religions to be affiliated with a foreign organization rather than because of their religious beliefs.¹²⁵ In December 2002, a report was leaked in Russia, attributed to numerous federal government officials, that specifically lists Roman Catholicism, Protestantism, militant Islam, and new "foreign" sects as threats to Russia's national security.¹²⁶ The Russian anti-cult movement relies on the premise that foreign religions are "a threat to the Russian

120. Iran Report 2001, *supra* note 75, at 2, 4 (Baha'is are charged with "espionage" when they send monetary contributions to the Baha'i headquarters located in the state of Israel.). They are also associated with former Shah Pahlavi's regime. *Id.* Other broad "restrictions on Baha'is appear to be aimed at destroying them as a community." *Id.* at 4. In 1998, several Baha'i professors "were convicted under Article 498 of the Penal Code and sentenced to prison terms ranging from 3 to 10 years" for establishing a "'secret organization' engaged in attracting youth, teaching against Islam, and teaching against the regime of the Islamic Republic." *Id.* at 7. Baha'i groups claim that the professors "taught general science and Persian literature courses." *Id.*

121. Iran Report 2001, *supra* note 75, at 8 (stating that espionage on behalf of Israel is punishable by death). In 2000, the defendants were "convicted on charges of illegal contact with Israel, conspiracy to form an illegal organization, and recruiting agents." *Id.* The Iranian Jews charged with espionage included "prominent rabbis, teachers of Hebrew, and their students." *Id.*

122. *Rapporteur's Report on Behalf of the Committee on Youth, Culture, Education, Information and Sport on the Activity of Certain New Religious Movements Within the European Community*, European Parliament Doc. 1-47/84 (1984).

123. See Eileen Barker, *Why the Cults?: New Religious Movements and Freedom of Religion or Belief*, in FACILITATING FREEDOM, *supra* note 44, at 571, 584-86 (listing and evaluating various government commissions and reports).

124. Davis, *supra* note 94, at 111. Some leaders demonstrate concern that foreign religions will "[corrupt] . . . the spirit" by teaching non-Christian beliefs. Shterin & Richardson, *supra* note 98, at 148-49 (citation omitted).

125. Shterin & Richardson, *supra* note 98, at 148. Some Russians perceive foreign religions as "infectious" and as "totalitarian sects." *Id.* at 155 (internal quotations omitted).

126. U.S. Commission on International Religious Freedom, *Report on the Russian Federation 2* (May 2003), available at <http://www.uscirf.gov/reports/02May03/russia.php3?scale=1024> (last visited Jan. 25, 2005) [hereinafter *Report on the Russian Federation*].

national security” in its “appeal to the Russian public and the state.”¹²⁷ In addition, some Russians believe that foreign religious organizations “use religion as a cover for espionage.”¹²⁸ The Moldovan government, in refusing to recognize a minority religion, similarly asserted that the church was a “threat to national security and territorial integrity.”¹²⁹

Both industries and religions receive state protections by invoking national security arguments. Just as industries during war claim that protecting their business interest protects the national interest, dominant religions argue that minority religions must be closely controlled to protect the national interest. In addition, as industries claim that forbidding state protection sacrifices national needs to foreign competitors, dominant religions warn governments that without protection foreign influences brought by minority religions will cause societal harm. In both areas where national security is allegedly threatened, some state action is taken: in the industrial arena fewer antitrust suits are brought against monopolies and in the religious arena the government cracks down on minority religions with government investigations or criminal punishment.

C. National Identity, Prestige, and Culture

Both industries and religions claim that national identity and prestige is weaker without state protection. European airlines and the AT&T telecommunications monopoly both argued that they were a source of national prestige and pride, without which an important national industry would fail.¹³⁰ AT&T also connected its successes with the success of the United States.¹³¹ Similarly, both Greece and Sweden claimed that without protection of dominant religions, the nation would lack unity and would be destroyed.¹³² In both areas, dominant religions and industries have been protected from competition through a link with the nation’s well-being, national identity and prestige.

127. Shterin & Richardson, *supra* note 98, at 158. The movement has proven successful with many “bureaucrats and politicians.” *Id.* at 159.

128. Brian Gross, Comment, *Russia’s War on Political and Religious Extremism: An Appraisal of the Law “On Counteracting Extremist Activity,”* 2003 BYU L. REV. 717, 720 (noting that citizens claim that foreign organizations discourage fulfillment of citizens’ responsibility); see also LYNN R. ELIASON, *PERESTROIKA OF THE RUSSIAN SOUL: RELIGIOUS RENAISSANCE IN THE SOVIET UNION* 68 (1991) (describing Russian fear of the “conspiratorial potential” of foreign religions).

129. Metropolitan Church of Bessarabia and Others v. Moldova, App. No. 45701/99, 35 Eur. Ct. H.R. 13, ¶ 124–25 (2001).

130. See *infra* notes 133–35 and accompanying text for further discussion. During congressional debates discussing deregulation, AT&T touted a “grand system” that in “scale and proficiency is unique on the face of the earth.” *Monopolization in the Telecommunications Industry: Hearings before the H.R. Subcomm. on Communications of the Comm. on Interstate and Foreign Commerce*, 94th Cong. 19 (1976) [hereinafter *Hearings on Communications*] (statement of Chairman deButts of AT&T). Chairman deButts also distinguished his industry from the “automobile business, the merchandising business, the chemical business, [and] the steel business” claiming that they only sell a product but that the telecommunications industry is based on vital service. *Id.* at 30–31.

131. See *infra* notes 136–39 and accompanying text.

132. See *infra* notes 140–42 & 147 and accompanying text.

1. Industry

European airlines have been a source of prestige and national identity. In Europe, every major airline has been "at least partly state-owned."¹³³ Several European countries have sustained state protection in the airline industry because of "national prestige."¹³⁴ European governments have been more concerned with "preserv[ing] both jobs and prestige" than with obtaining efficient airline carriers.¹³⁵

In the United States, AT&T invoked the country's pride in industrial progress and a successful telecommunications system to argue that AT&T should not face breakup. When threatened with divestiture, AT&T appealed to national identity and pride. One argument AT&T used to defend against divestiture was that it would destroy "the most advanced, efficient, and successful communications system in the world."¹³⁶ AT&T lawyers also commented that they hoped that "the country" realized that "we can't destroy our successful companies."¹³⁷ A few months before the AT&T settlement with the Department of Justice which divested AT&T's twenty-two local operating company subsidiaries, AT&T Chairman Charles L. Brown commented that it was teaming up two technologies (computer and telecommunication) which would result in the "most promising and most exciting [innovations] in the history of this nation's industrial progress."¹³⁸ Congressmen also opposed regulation of AT&T, claiming that AT&T is a "service system we are particularly proud of in America"¹³⁹

2. Religious Analogues

In a similar manner, states justify protectionist measures by claiming that a religious monopoly preserves national identity and culture. Protectionist measures justified by preserving national identity may include explicitly recognizing an official state church, religious education in the dominant religion or prohibiting foreign competing religions to enter the

133. See *The War in the Skies: Airline Regulation*, *supra* note 50.

134. See *Don't Coddle or Curb Them; The Pain in the World's Airline Industry Can Be Eased by More American-Style Deregulation, Not Less*, THE ECONOMIST, Feb. 23, 1991, at 18; see also Editorial, *Keep those Flags Flying*, WASH. POST, Aug. 5, 1994, at A20 (noting that European countries face trouble deregulating because they have "their own national flag carriers and are desperate, for reasons of prestige and sentiment, to keep them aloft").

135. *The War in the Skies: Airline Regulation*, *supra* note 50.

136. *The Break-up-AT&T Trial Begins*, *supra* note 114, at 84B.

137. *Id.*

138. *Id.*

139. *Hearings on Communications*, *supra* note 130, at 5 (statement of Wyoming State Representative Roncalio).

country. State-protected churches also insist that their religion is inseparable from the national identity and is vital for state “self-preservation.”¹⁴⁰

Defenders of religious protection claim that the culture of a nation is tied to a church and must be preserved. For example in Greece, Orthodox education in school is defended “solely on national grounds—and not on moral grounds” because the church emphasizes that the “endangered nation” will be destroyed by pluralistic education.¹⁴¹ Similarly, in Sweden, people worry that in such a diverse nation; there are “few other ways besides religion” to base “national unity.”¹⁴² In Britain, an Anglican Church Archbishop defended church establishment by claiming that it “was an essential bulwark of British society.”¹⁴³ He insisted that the Anglican Church protected and fortified British society.¹⁴⁴

Often state traditions and national identity are intertwined with a common religious background which defenders argue justifies state religious protection.¹⁴⁵ In Ireland, the preamble to the constitution “suggests that the

140. Mavrogordatos, *supra* note 5, at 122, 134. In Russia, “pluralism is perceived as a problem that needs to be restricted, not as a long term source of stability.” Durham & Homer, *supra* note 14, at 3.

141. Mavrogordatos, *supra* note 5, at 134 (noting that Greece, Ireland and Israel all suffer from the same issue). Other religions have insisted that their members vote for parties that represent “Christian-national values” demonstrating a link between religion and national identity. Enyedi, *supra* note 41, at 166 (quoting the Calvinist Church in a 2002 Hungarian election) (internal quotations omitted); see also Payne, *supra* note 87, at 264–65. Payne notes that “[i]n the East . . . national identity was not separated from religious identity” but “[i]n the West . . . national identity was secularised” and that in Greece, “Orthodox hierarchs . . . are concerned about the loss of Orthodox identity to a homogenous western culture.” *Id.* at 264. He quotes Archbishop Christodoulous who in May 2000 “commented that [f]or Greeks, to be an Orthodox Christian is a defining attribute of their identity.” *Id.* at 265 (internal quotations omitted). Additionally, Payne points out that Greece, Poland, Slovenia and Serbia all have “unique [national] origin myths that involve religious identity.” *Id.* For Greeks, the connection with religion does not end with Greek national identity, as Archbishop Christodoulous also noted that the “European Union is a creation of the spirituality of Christianity.” *Id.* at 266.

142. Jonas Alwall, *Religious Liberty in Sweden: An Overview, in RELIGIOUS LIBERTY IN NORTHERN EUROPE*, *supra* note 38, at 181, 182 (describing the Swedish “effort in trying to impose a Swedish church order” between the seventeenth and nineteenth centuries). In Swedish history, “faith and unity” were “tested and tightened” through external military threats. *Id.* In 1634, the “Instrument of Government” asserted that “[u]nity in religion and the right [to] divine service is the strongest foundation for a rightful, unanimous and lasting government.” *Id.* at 182–83. In 1686, Sweden also linked “a person’s religious status” to “his citizenship.” *Id.* at 183. This concept was reaffirmed by the “Instrument of Government of 1809,” providing “that the state had a responsibility to provide for the citizens’ religious care.” *Id.* at 184–85 (internal quotation omitted). “[I]n 1951, a Religious Liberty Act” recognized a citizen’s right to “practise his religion freely.” *Id.* at 186. In 1974, the “Instrument of Government” held that religious liberty is “the freedom to practice one’s own religion either alone or in company with others.” *Id.* at 186 (internal quotations omitted). It recognized a person’s rights vis-à-vis the government alone. *Id.* Even today, the Church of Sweden is such a dominant part of the culture that all burials in Sweden are “the responsibility of the Church” and the Church’s principles comprise the religious instruction in the Swedish school system. *Id.* at 194–95.

143. Madeley, *supra* note 4, at 4 (quoting Archbishop George Carey).

144. *Id.*

145. Schött, *supra* note 2, at 300.

[The] Church [of Sweden’s] activities over the centuries have played a very important part in the development of Swedish society. Society has been profoundly influenced by

common good should be evaluated by religious criteria and implicitly identifies the Irish nation with the Catholic religion."¹⁴⁶ Sweden defends preferential policies toward the Church of Sweden with claims that "strong historical ties between the Church and the state could not be altogether disregarded."¹⁴⁷ Defenders of the establishment of the Church of England claimed that the church was "part of the time-honored constitutional structure of England" rather than necessarily the right church for the citizens.¹⁴⁸ In addition, national identity in Russia is tied to the Orthodox Church which "believes that the nation . . . is still Holy Russia."¹⁴⁹ The Russian Orthodox Church is believed to be "organically linked with Russia's [ethnic and] national identity"¹⁵⁰ and therefore many argue it "must be legally protected."¹⁵¹ The Russian Orthodox Church also relies on the long-standing culture of the Russian people which includes a thousand years of

Christianity [and] [f]rom the viewpoint of the State today . . . there is still good reason for taking a positive view of religious activities, partly in view of their important societal functions.

Id.

146. Kissane, *supra* note 5, at 77. The preamble to the Irish Constitution states:

In the name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and states must be referred, We, the people of Eire, Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial . . . and seeking to promote the common good . . . Do hereby adopt, enact, and give ourselves this Constitution.

Id. at 76–77. Further, this preamble has been cited "in the [Irish] Supreme Court to justify the prevention of a decision rendering unconstitutional certain nineteenth-century statutes criminalizing homosexual conduct between consenting adult males." *Id.* at 77.

147. Stegeby, *supra* note 14, at 733, 747 (noting that the strong historical ties between the state and Church of Sweden also justified the Church maintaining the responsibility of providing burial grounds and maintaining and preserving historical churches and monuments).

148. McConnell, *supra* note 87, at 209 ("Edmund Burke contended that '[t]he Anglican Church held its position in England by prescription; it was the embodiment of the religious experience of the English people over a long period of time.'). In discussions about disestablishment of the Anglican Church an Archbishop commented that "the church is an essential part of the fabric of the constitution of this country." Madeley, *supra* note 4, at 19 n.11. "[I]t remains the position of the Labour government that it would not contemplate disestablishment of the Church of England unless the Church itself wished it." *Id.* at 4 (internal quotations omitted). Throughout Europe, Christianity is still the dominant religion. *Id.* at 11.

149. Schlafly, *supra* note 38, at 137. The Orthodox Church also takes on "a unique responsibility for the Russian land and the Russian people." *Id.*

150. *Id.* at 138–39.

151. Shterin & Richardson, *supra* note 98, at 148. In addition, church leaders insist the renewal of Russia post-Communism relies on the revival of the Orthodox faith. Schlafly, *supra* note 38, at 137. Aleksii II, patriarch of the Orthodox church claimed that "the revival of Russia . . . is impossible without reviving the Orthodox faith." *Id.* Three years later, "he linked the cultural identity of [the Russian people with] their spiritual orientation." *Id.* (internal quotations omitted). He also insisted that "with the state's failure to protect the spiritual-cultural identity of the people, the whole burden of the struggle is placed upon the [Orthodox] Church." *Id.* (citations omitted).

“worship of God according to the Orthodox way.”¹⁵² Many of the Russian Orthodox holy sites are “linked with physical defense of the motherland against the Latin West” which is a vital part of Russian culture and pride.¹⁵³ In post-Communist Russia, the Orthodox Church has attempted to resurrect the “spiritual and cultural traditions of Holy Russia” through restoring and rebuilding destroyed churches and monasteries.¹⁵⁴

Several states have enacted statutes and constitutional provisions recognizing “traditional” or “official” religions.¹⁵⁵ For example, in Belarus a 1996 constitutional referendum changed the wording of Article 16 of the constitution.¹⁵⁶ The former Article 16 provided that “*establishment of any sort of advantages or restrictions* for a religion or denomination in relation to another religion or denomination is *not* allowed.”¹⁵⁷ However, the new language states that “[r]elations between the State and religious organizations *shall be regulated by the law* with regard to their influence on the formation of the spiritual, cultural, and *state traditions* of the Belarusian people.”¹⁵⁸ The new language no longer prohibits establishment of advantages or restrictions on any religion or denomination but actually allows legal regulation of religious organizations with regard to their influence on the state traditions of the Belarusian people.¹⁵⁹ Under the banner of national identity and “state traditions,” the Belarus government passed a revised religious registration law in 2002 that highlights the “defining role of the Orthodox Church in the historical formation and development of the spiritual, cultural and state traditions of the Belarusian people,” and also mentions the “inseparability from the general history of the Belarusian people of the Lutheran Church, Judaism, and Islam.”¹⁶⁰

152. *Id.* at 138.

153. *Id.* The Orthodox church “reclaim[s], resanctif[ies], and rebuild[s] churches and monasteries closed or destroyed” under Communism to preserve Russian culture. *Id.*

154. *Id.* (internal quotations omitted).

155. Law on the Freedom of Conscience and Religious Organizations, in POST-COMMUNIST EUROPE, *supra* note 41, at 32 (noting in the preamble “Being cognizant of the Armenian Apostolic Church as the national Church of the Armenian people and as an important bulwark for the edification of its spiritual life and national preservation”); see also Religious Denominations Act, in POST-COMMUNIST EUROPE, *supra* note 41, at 77 (recognizing in the preamble “the special and traditional role of the Bulgarian Orthodox Church in the history of Bulgaria to establish and develop its spirituality and culture”); see also Alexander Vashkevich, *The Relationship of Church and State in Belarus: Legal Regulation and Practice*, 2003 BYU L. REV. 681, 708 (noting that Belarus grants the “Russian Orthodox Church advantages and privileged status over other religious denominations”); Dübeck, *supra* note 87, at 37 (pointing out that Article 4 of the Danish Constitution states that “[t]he Evangelical Lutheran Church is the Danish National Church”); Canas, *supra* note 71, at 261 (noting that “consecutive constitutional amendments, from 1935 (Law 1910) to 1971 [recognize] the Roman Catholic religion . . . ‘as the traditional religion of the Portuguese nation’”).

156. Vashkevich, *supra* note 155, at 698.

157. *Id.* (emphasis added).

158. *Id.* at 699 (emphasis added). Both the old and new Article 16 provide that all “religions and faiths shall be equal before the law.” *Id.*

159. *Id.*

160. Law on the Freedom of Religion and Religious Organizations (2002) [Belarus], in POST-COMMUNIST EUROPE, *supra* note 41, at 55; see also Vashkevich, *supra* note 155, at 704. The

Like in Belarus, in Russia religious campaigns against “dangerous cults” have drawn “*national identities* along religious lines,”¹⁶¹ often relying upon the wording of the preamble to the 1997 Law on the Freedom of Conscience and on Religious Associations. While the law follows the Russian constitution in guaranteeing protection for all religious groups, the preamble “recogniz[es] a special contribution made by Orthodoxy to the formation of statehood in Russia and to the development of her spirituality and culture”¹⁶² The Orthodox concept of a “nation-church” and the idea that “the people and the Christian community are identical or indissolubly connected” often means that religious minorities are perceived as “serv[ing] foreign gods in their own land,” which leads some “to a conclusion that there are ‘wicked souls’ amongst the people of God.”¹⁶³ Protection of Russian national identity is a “major source of pressure to impose limitations on foreign-based religious activity.”¹⁶⁴ For example, the U.S. Commission on International Religious Freedom has reported that President Putin’s January 2000 security policy directive highlights the critical national security need to “counteract[.] . . . the negative influence of foreign religious organizations and missionaries.”¹⁶⁵

Both industrial and religious monopolies rely on national identity and prestige to gain protection. Like national airlines which are a source of pride in Europe, official state churches bring a sense of national identity in many countries. Further, just as AT&T insisted that the United States telecommunications industry would fail if it were not protected, dominant religions claim that they must be protected or “dangerous cults” will threaten the moral well-being of the State and its citizens.

biggest concern for Belarus is the missionary work of “Catholic and Protestant organizations” that has allowed “the existing number of Protestant communities [in 2000] to quadruple[] since 1989.” *Id.* at 704; *see infra* note 209–13 and accompanying text for discussion of religious registration laws in Russia and Belarus.

161. Enyedi, *supra* note 41, at 157 (emphasis added). “[T]he influx of religious movements from both the West and the East” exert pressure on Russian nationalism which has added to the “deeper wounds [of] Russian *national identity*.” Durham & Homer, *supra* note 14, at 3 (emphasis added). Wounds to the Russian “psyche” have also resulted from “the collapse of the Soviet Union and the deteriorating economic situation that followed in its wake.” *Id.*

162. Law on the Freedom of Conscience and Religious Associations (1997) [Russia], in POST-COMMUNIST EUROPE, *supra* note 41, at 279; KONST. RF. XIV (1993); *see* Vsevolod Chaplin, *Law and Church-State Relations in Russia: Position of the Orthodox Church, Public Discussion and the Impact of Foreign Experience*, in LAW AND RELIGION IN POST-COMMUNIST EUROPE 281 (Silvio Ferrari & W. Cole Durham, eds. 2003).

163. Chaplin, *supra* note 162, at 286–88.

164. Durham & Homer, *supra* note 14, at 4 (commenting that “[f]rom the perspective of internal nationalism, the proliferation of new religious groups is perceived as exacerbating already intense centripetal forces emanating from religious, ethnic and other inter-regional tensions”). Another pressure causing Russian imposed limits on foreign religious organizations are “anti-foreign attitudes” in Russia. *Id.* at 4.

165. *Report on the Russian Federation*, *supra* note 126, at 10.

D. Foreign Dependence

Religious monopolies and industries both invoke fear of foreign dependence in defending state protection. Industries, like AT&T, threatened that granting contracts to foreign firms might result in a successful national industry being overtaken by foreign competitors. Religions benefiting from state protection similarly express fear that foreign religions invading their territory will capture their followers, causing the state to become morally dependent on foreign churches.

1. Industry

Industry advocates argue that state regulation and protection of industry is the way to “prevent control of the [national] economy by foreign firms.”¹⁶⁶ With the threat of breakup, AT&T relied on “heighten[ed] fears that foreign manufacturers will be able to make new inroads in the U.S. market.”¹⁶⁷ However it was not just AT&T but also government officials who were concerned about foreign dependence.¹⁶⁸ For example, in 1981 AT&T “awarded a \$75 million contract to Fujitsu America Inc., . . . [the California-based] subsidiary of Japan’s Fujitsu Ltd., to create a fiber-optics Long Lines link between Boston and Washington, D.C. [because] Fujitsu had submitted the lowest of 17 bids in open competition.”¹⁶⁹ However, the “contract created a stir in Washington” and “AT&T withdrew the award—citing ‘national interests’—and gave the contract to Western Electric.”¹⁷⁰ One industry commentator believed that AT&T awarded the contract to Fujitsu to “hold the threat over Congress and the FCC that this great new technology is going to the Japanese, just the way autos and steel have done . . . [a]nd they fell for it.”¹⁷¹ Further, he contends that this was a ploy since Western Electric “could easily have submitted the low bid in the first place, aided by subsidies from AT&T.”¹⁷²

Even after the famous U.S. antitrust suit against AT&T, commentators noted that the result of the break off of “local telephone companies rather than Western Electric, the manufacturing arm of the Bell system” may have been influenced by American concern with foreign competitiveness.¹⁷³ AT&T had contended that its breakup would “crush one of the few internationally competitive companies that the U.S. has left . . . [and would cause AT&T to] end up pleading for protection against the very foreign

166. White, *supra* note 48, at 20.

167. *The Break-up-AT&T Trial Begins*, *supra* note 114, at 84B.

168. *Id.*

169. *Id.*

170. *Id.* (regarding this award to Western Electric, Victor Schnee, President of Probe Research Inc., charged that “[t]hey simply reached into the closet and brought out a foreign skeleton”) (internal quotations omitted).

171. *Id.* (regarding comment by Richard Moley, a Vice President at ROLM Corp., Santa Clara a leading manufacturer of digital PBX (private branch exchange) systems).

172. *Id.*

173. *Id.*

competition that the Bell System now trounces.”¹⁷⁴ During the breakup, policy makers feared competition from international competitors like “Canada’s Northern Telecom, Japan’s NEC, Hitachi and Fujitsu.”¹⁷⁵

2. Religious Analogues

Religious monopolies claim that without state protection, foreign churches will invade church territory and society will become dependant on foreign churches. A dominant state church may even assert that it has sole “spiritual rights” to the state.¹⁷⁶ The Russian Orthodox Church has complained that foreign religions proselytize on the “canonical territory” of the Church.¹⁷⁷ In recent years, the Russian government has denied an increasing number of visas to foreign religious workers and expelled foreign-born Catholic bishops, in an attempt to limit the influx of foreign religions and implement the policy of “one city one bishop,” which allows “only one bishop—from the Russian Orthodox Church—in any city.”¹⁷⁸ Domestic religions are often threatened by “[t]he appearance of financially-robust foreign religious groups” threatening “financially-ailing” domestic churches that foreign religions are “‘purchasing souls’ at the expense of [a state’s] culture.”¹⁷⁹ Archpriest Vladimir Kharitonov of Russia said that his “chief anxiety” was “the invasion of Russia by various cults, and new religions.”¹⁸⁰ Church commentators have insisted that domestic churches cannot compete with foreign funded religions.¹⁸¹ Protestant and Catholic groups in Russia have been charged with being foreign spies¹⁸² and using

174. *Id.* After the AT&T “breakup,” Western Electric still enjoyed “roughly two thirds of each year’s telephone equipment sales in America . . . [with even higher shares] of switching apparatus.” *Stripping Ma Bell*, THE ECONOMIST, Jan. 16, 1982, at 13.

175. *Id.*

176. Gross, *supra* note 128, at 720

177. Schlafly, *supra* note 38, at 155.

178. *Report on the Russian Federation*, *supra* note 126, at 9.

179. Gross, *supra* note 128, at 719–20 (demonstrating Russian citizens’ threat from foreign religions as “betrayal of ‘Russian-ness’”).

180. Schlafly, *supra* note 38, at 136.

181. Gross, *supra* note 128, at 720; Cava, *supra* note 14, at 535 (noting that the Orthodox Church is financially unable to compete with well-funded foreign churches). In Poland, Orthodox Church leaders have also argued for “tighter control of the [non-Orthodox] ‘sects.’” Anderson, *supra* note 5, at 147 (noting that in some “rural areas [in Poland, problems arose] where clerical influences sometimes lead to expressions of hostility towards minority groups”).

182. See, e.g., Sergei Kazovsky, *Strangers Among Our Own*, *Russkii Kurier*, Aug. 2, 2004, available at <http://www.stetson.edu/~psteeves/relnews/0408a.html> (last visited Jan. 25, 2005) (describing a local campaign to label Mormon members as American spies); *Russian Jesuits Struggle for Rights*, *Mir Religii*, May 12, 2001, available at <http://www.stetson.edu/~psteeves/relnews/0105b.html> (last visited Jan. 25, 2005) (describing the Russian “popular tradition” of labeling Jesuits as Vatican spies); Pavel Zaiakin, *International Report from Evangelical Lutheran Mission of Khakasia*, Sept. 25, 1998, available at <http://www.stetson.edu/~psteeves/relnews/>

humanitarian aid to entice people away from “the Russian state, national traditions, and culture.”¹⁸³ Foreign religions proselytizing in Latin America have also been accused of being “in the service of foreign powers,”¹⁸⁴ for fear that they are invading not only church territory but the state’s independence. One Latin American Roman Catholic cardinal described the majority of protestants in his country as “here on the initiative of the United States.”¹⁸⁵ In Belarus, the government has tightened controls over entrance of foreign clergy,¹⁸⁶ and in Sweden its limits on religious liberty have extended to the country’s immigration policy.¹⁸⁷ Perhaps the most famous example of concern about foreign influence on religion is the People’s Republic of China, where there are only a handful of recognized religions, all controlled by the Communist Party, which insists they are “free” because they are free from foreign control or influence.¹⁸⁸

From a U.S. perspective, it is useful to remember that fears of the power of foreign-based religions also have some history in the United States. John F. Kennedy faced numerous questions in the 1960 presidential campaign about his loyalty to the Vatican, until he finally made a statement before the Greater Houston Ministerial Association that he would make decisions as president “without regard to outside religious pressure or dictate.”¹⁸⁹

The fear of foreign domination has been used effectively by industries and religions. Like AT&T warning that without protection, the United States would lose another successful industry to the Japanese, Catholic leaders in Latin American countries and Orthodox leaders in Russia warn that without protection their “canonical territory” will be lost to foreign funded proselytizing religions.

9809c.html (last visited Jan. 25, 2005) (quoting local government official as stating that all Lutherans are American spies).

183. *Report on the Russian Federation*, *supra* note 126, at 7.

184. Michael S. Serrill, *What the Pope Will Find: John Paul II Returns to a Region where Catholic Marxism Is Out of Favor: The Big Threat: Evangelicals*, 147 TIME INT’L 7, Feb. 12, 1996, available at 1996 WL 8824716, at *3.

185. Edward L. Cleary, *The Catholic Church*, in RELIGIOUS FREEDOM AND EVANGELIZATION IN LATIN AMERICA 11, 22 (Paul E. Sigmund ed., 1999).

186. Vashkevich, *supra* note 155, at 708 (noting the “tightening control over the invitation of foreign clergy” in Belarus and that the nationalist nature of this legislation is demonstrated when the limits are most severely imposed on foreign religions). Commentators have asserted that the late nineteenth century U.S. legislation, the Alien Contract Labor Act “intentionally [rather than inadvertently] prohibited foreign clergy from coming to the United States to work” by not making an exception for clergy. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2424–25 (2003). A federal prosecutor asserted that “no department of service has competition been more active than in clerical work. Our choicest and most desirable metropolitan pulpits are invaded by the foreign product. Eight of the best-paying and best-attended churches in New York are at the present time served by imported . . . clergymen.” *Parsons Need Protection*, *supra* note 39, at 9.

187. Alwall, *supra* note 142, at 196 (pointing out the interrelation between Sweden’s strongly assimilationist immigration policy and religious climate).

188. Brett G. Scharffs & W. Cole Durham, *Foreword* to KIM-KWONG CHAN & ERIC R. CARLSON, RELIGIOUS FREEDOM IN CHINA: POLICY, ADMINISTRATION, AND REGULATION – A RESEARCH HANDBOOK (Gordon Melton, ed., 2005)

189. The Pew Forum on Religion and Public Life, LIFT EVERY VOICE: A REPORT ON RELIGION IN AMERICAN PUBLIC LIFE 11, available at <http://pewforum.org/publications/reports/lifteveryvoice.pdf> (last visited Feb. 22, 2005).

IV. ASSERTED BENEFITS OF STATE PROTECTION TO CITIZENS

In addition to claiming benefits for the state and society, industry and religious advocates claim that state protection benefits citizens. These arguments take two primary forms. First, industrial monopolies insist that regulation by the state protects consumers from fraud and manipulation by unscrupulous promoters. Religious monopolies similarly argue that protectionist measures, including registration requirements for foreign religions and anti-proselytism legislation protect citizens from fraudulent cults. Second, defenders argue that state protection should continue in industries which provide services, such as farming, that are fundamental to the culture and well-being of the general citizenry. States also insist that fundamental traditions, such as a dominant religion, must be preserved for the benefit of citizens.

A. *Protection from Fraud of Unscrupulous Promoters*

States justify protection of both industries and religions through claiming that citizens need state protection respectively from the fraud of unscrupulous promoters and dangerous cults. In the industrial arena, states may justify protection through a legitimate interest in protecting its consumers from fraud. States also insist on limiting the access of foreign religions to citizens, through foreign registration or anti-proselytism laws. States also closely investigate foreign religions and refuse to grant disfavored religions the same advantages received by favored religions.¹⁹⁰

1. Industry

States often insist that protection of an industry is vital to protecting consumers from fraud. States have traditionally regulated many areas where they uphold "a legitimate interest in the protection of . . . [their] people against fraud and deception."¹⁹¹ While simple state regulation would suffice to protect consumers, states may insist that additional protectionist measures are necessary to protect consumers.

190. See Roman Podoprigrora, *Discretionary State Approval of Religious Activity*, in FACILITATING FREEDOM, *supra* note 44, at 435, 436 (describing Austria's refusal to recognize Jehovah's Witnesses because of "their intolerant attitude towards government . . . and the fact that the church would be led from Brooklyn, New York").

191. Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 144 (1963) (noting that states have traditionally had the right to regulate "sale of food products at retail markets within their borders") (internal quotations omitted).

2. Religious Analogues

States claim that through protection of religious monopolies they are protecting citizens from fraud of so-called dangerous cults.¹⁹² States may pass registration requirements to make it difficult to establish a foreign church or pass anti-proselytism legislation to stop foreign religions from taking advantage of their citizens.¹⁹³ For example, in Greece, the government defends criminal prohibitions against proselytism through claiming that the government retains a right to “protect a person’s religious beliefs and dignity.”¹⁹⁴ The Greek government considers proselytizing by minority religions an attempt to influence citizens “by immoral and deceitful means.”¹⁹⁵ In addition, proselytism has been referred to as an attempt to “brainwash[]” and “violate individual [citizens’] consciences.”¹⁹⁶ The European Court of Human Rights has limited Greek attempts to prevent proselytizing in *Kokkinakis*,¹⁹⁷ but even facially neutral bars to proselytizing may be used discriminatorily against minority religions.¹⁹⁸ In *Kokkinakis*, for example, the applicant claimed that under the Greek law it would surpass “even the wildest academic hypothesis” to imagine, for example, the possibility of a complaint being made by a Catholic priest or by a Protestant clergyman against an Orthodox Christian who had attempted to entice one of his flock away from him. It was even less likely that an Orthodox Christian would be prosecuted for proselytizing on behalf of the “dominant religion.”¹⁹⁹

Another increasingly common method of “protecting” citizens against the supposed harms of new and minority religions is the formation of “cult” or “sect” observatories and the creation of lists of so-called “cults” or “sects.” Belgium has formed a center for information and advice on harmful sectarian movements²⁰⁰ and the Belarusian government formed a government committee to “concentrate its efforts on stopping the activity of

192. Barker, *supra* note 123, at 583 (discussing protection of consumers in the religious marketplace by governments allegedly protecting against fraud and misrepresentation); Willy Fautré et al., *The Sect Issue in the European Francophone Sphere*, in FACILITATING FREEDOM, *supra* note 44, at 602–08 (detailing initiatives in Belgium and Switzerland to protect their citizens from cults).

193. Barker, *supra* note 123, at 586–87.

194. *Kokkinakis v. Greece*, App. No. 14307/88, 17 Eur. Ct. H.R. 397, ¶ 42 (1993).

195. *Id.* See also *Larissis and Others v. Greece*, App. Nos. 23372/94, 26377/94, 26378/94, 27 Eur. H.R. Rep. 329, ¶ 27 (1998). The Greek anti-proselytism law proscribes that:

proselytism . . . is . . . any direct or indirect attempt to intrude on the religious beliefs of a person of a different religious persuasion (*eterodoxos*), with the aim of undermining those beliefs, either by any kind of *inducement* or promise of an inducement or moral support or material assistance, or by *fraudulent means* or by taking advantage of the other person’s inexperience, trust, need, low intellect or naivety.

Id. (emphasis added).

196. *Larissis*, 27 Eur. H.R. Rep. 329 (Valticos, J., dissenting) (noting that proselytism is “incompatible with freedom of opinion, which is a fundamental human right”).

197. *Kokkinakis*, 17 Eur. H.R. Rep. 397.

198. Barker, *supra* note 123, at 586–87.

199. *Kokkinakis*, 17 Eur. H.R. Rep. 397, at ¶ 29.

200. See *supra* note 192.

neomystical, destructive sects.”²⁰¹ This committee categorized Orthodox, Roman Catholic, Jewish, and Islamic faiths as “traditional” faiths and other faiths, including Protestantism, as “non-traditional.”²⁰² Numerous Western European countries and organizations, including Germany, the Netherlands, Sweden, France, Belgium, the Council of Europe, and the European Parliament have had study commissions and have issued reports addressing alleged dangers of new religious movements.²⁰³ The French and Belgian reports concluded with lists of over a hundred so-called “sects.”²⁰⁴

To protect its citizens from the fraud of “psycho cults,” the German government also instituted government investigations of some foreign religious activities. The German government, through “constitutional protection agencies,” “track[s] and sometimes infiltrate[s] movements suspected of working against Germany’s . . . constitution.”²⁰⁵ The German ruling party claims that its “constitution is . . . under attack from the religious minorities and so-called psycho cults that are gaining strength at the expense of the established Lutheran and Catholic state churches.”²⁰⁶

Dominant churches have also initiated anti-cult media campaigns. One tactic of the Russian Orthodox Church in deterring its members from joining new foreign religions is through “using the media to introduce into Russian society . . . characteristically anti-cult concepts, language and images.”²⁰⁷ Although not part of an official anti-cult campaign, in Guatemala, a Catholic

201. Vashkevich, *supra* note 155, at 700. The Committee was called the Belarus State Committee of Religious and National Affairs (SCRNA) and was directed by the Council of Ministers. *Id.* In June 1997, the Council of Ministers also prohibited “organization of summer camps for children and teenagers by “unregistered religious organizations.” *Id.* In addition, only religious associations have the right “to establish their own mass media, invite foreign citizens to conduct religious activities, create religious schools for training priests, divines, and church staff, and establish cloisters and monastic communities.” *Id.* at 705.

202. *Id.* at 700. The SCRNA also considers Asian faiths as nontraditional.

203. Barker, *supra* note 123, at 584–85.

204. *Rapport fait au nom de la commission d'enquête sur les sectes* [France], *supra* note 93; Duquesne & Luc Williams, *Enquête parlementaire visant à élaborer une politique en vue de lutte contre les pratiques illégales des sectes et le danger qu'elles représentent pour la société et pour les personnes particulièrement les mineurs d'âge* (1997) [Belgium], available at <http://users.skynet.be/wihogora/t-sectes.htm> (last visited Mar. 18, 2005).

205. Davis, *supra* note 94, at 110 (noting also that Germany’s constitution “states that the freedom of belief and conscience and the freedom to possess religious and philosophical beliefs are inviolable”).

206. *Id.* at 110. The German “Commission of Inquiry” has been formed to investigate state threats from “sects and psycho-cults.” *Id.* at 122. Many also describe a “climate of intolerance [in Germany] toward religious minorities.” *Id.*

207. Shterin & Richardson, *supra* note 98, at 157. The anti-cult language includes “brainwashing, mind control, destructive cult, totalitarian sect.” *Id.* (internal quotations omitted). Images include “zombies, broken families, [and] crime.” *Id.* The local media (located in the provinces as opposed to the “central media” located in the largest cities) has especially incited horror about “foreign religions.” *Id.* at 159.

Archbishop, resentful of Protestant success in attracting converts, claimed that “evangelical teachings are the opium of the masses.”²⁰⁸

Registration laws are also often used to “protect” against minority religions and limit their access to legal entity status. Registration is required as a prerequisite to any religious activity in much of Central Asia and in China.²⁰⁹ Registration laws also may limit registration of religious organizations to dominant groups through facially neutral requirements such as excessively high numbers of members or the requirement of an extended period of existence in the country.²¹⁰ The Belarus government denied some nontraditional faiths permission to “legally register at the national level,”²¹¹ “endanger[ing]” the “existence” of many faiths.²¹² Russia has also passed legislation requiring foreign religious organizations to register with the government, supporting a widely-held belief that “foreign religious organizations and new religious movements defraud the spiritually feeble [and] brainwash vulnerable youth.”²¹³

In both industrial and religious arenas, those vying for state protection assert that they need protectionist legislation to protect vulnerable citizens from fraud of “psycho cults” and unscrupulous promoters.

208. Serrill, *supra* note 184, at *3.

209. Durham, *supra* note 44, at 321 (describing how religious registration laws are often used as methods of control of minority religions); International Crisis Group, *Central Asia: Islam and the State*, Report No. 59, July 10, 2003, available at <http://www.crisisweb.org/home/index.cfm?id=1442&l=1> (last visited Jan. 25, 2005) (statement of Hon. Christopher H. Smith, Co-Chairman of the Commission on Security and Cooperation in Europe) (noting that he has observed “over the past decade . . . a troubling drift away from a robust and vibrant protection of religious freedom in a growing number of Organization for Security and Cooperation in Europe (OSCE) states”). He also noted that “some OSCE countries [including Western European countries like Austria] have developed new laws and regulations that serve as a roadblock to the free exercise of religious belief.” *Id.* at 2.

210. Durham, *supra* note 44, at 388–92 (giving examples such as Slovakia’s requirement of 20,000 members and Russia’s requirement of 15 years’ presence in the country to establish a centralized religious organization); W. Cole Durham Jr. et al., *A Comparative Analysis of Religious Association Laws in Post-Communist Europe*, in *LAW AND RELIGION IN POST-COMMUNIST EUROPE*, *supra* note 162, at 330 (providing other examples).

211. Vashkevich, *supra* note 155, at 700. The SCNRA regulations have had an impact on limiting the activities of nontraditional religions as Full Gospel Pentecostal churches are “regularly refused registration.” *Id.* at 702. Members of the Krishna Church have been evicted from their homes because they have been using private property to worship without “special permission from the local authorities.” *Id.* at 702–03.

212. *Id.* at 704. The “Union of Evangelical Christian Baptists, the Union of Evangelical Faith Christians, the Association of Communities of Full Gospel Christians, and the Conference of Christian Adventists condemned the bill saying it would favor some religious organizations and limit opportunities for worship.” *Id.* Other limitations include “requiring permission to conduct religious processions outside temples.” *Id.* at 708.

213. Gross, *supra* note 128, at 720. Protectionist measures are often a result of public outcry for legislation to protect them from “dangerous” “sects and cults.” *Id.* at 718. Shterin & Richardson, *supra* note 98, at 157. The anti-cult language includes “brainwashing, mind control, destructive cult, totalitarian sect.” *Id.* (internal quotations omitted). Images include “zombies, broken families, [and] crime.” *Id.* The local media (located in the provinces as opposed to the “central media” located in the largest cities) has especially incited horror about “foreign religions.” *Id.* at 159.

B. Fundamental Nature of Product or Service

Both religious and industrial monopolies rely on the fundamental nature of the industry or religion of a country to justify protectionism. Just as states sometimes insist that protection of key industries, such as steel, telecommunications, and airlines are fundamental to the functioning of their state, states justify protection of religion by claiming that their traditional church-state relationship relies on state protection. The closest analogy to religion in the industrial sector is farming, which like religion has been considered vital to citizens' traditions and "moral character."

1. Industry

State-controlled industries have been justified because of the fundamental nature of certain industrial products and services. In the United States, it was common for states in the 1950s, 1960s, and 1970s to own industries of "industrial and service enterprises in key sectors, such as steel, telecommunications, fertilizers, automobiles, petrochemicals, hotels, airlines and banking."²¹⁴ Often in these areas governments officially created public monopolies to justify state protection.²¹⁵ The U.S. government also supported cartelization in "transportation, natural resource industries, and retail trade," as a means of protection.²¹⁶

States often consider agriculture as one of the most fundamental parts of their economy because of its importance for sustenance but also because of the moral importance of farming to a society. The U.S. government subsidized exports in agriculture and developed "marketing quotas and special penalty taxes" for products such as "tobacco, cotton and potatoes."²¹⁷ The government justified protectionist policies because it claimed that since agriculture was "the fundamental economic activity upon which all others rested," the "balance of market power between agriculture and industry" could not be maintained until agriculture was regulated.²¹⁸ Along with the "fundamental" nature of farming to the U.S. economy, it was also fundamental to the American moral character.²¹⁹ Protectionists relied on the fact that "political symbols of the family farm and the yeoman farmer, the

214. White, *supra* note 48, at 20.

215. See, e.g., Merrill Sheils & William J. Cook, NEWSWEEK, *A Giant Eyes New Vistas*, Feb. 25, 1980 (describing the implications of the breakup of the public monopoly, AT&T).

216. HAWLEY, *supra* note 32, at 15 (also pointing out that in the mid-1930s there were "oligopolistic understandings" or "cartel agreements" which "eliminated price competition" in industries such as "automobiles, chemicals, motion pictures, farm implements, aluminum, cigarettes, newsprint, anthracite coal, glass containers, optics, lead, sulphur and tin plate").

217. *Id.* at 192 (internal quotations omitted).

218. *Id.*

219. *Id.* (internal quotations omitted).

sturdy, honest, independent, morally upright individual” constituted “the very foundation of America’s individualistic and democratic ideals.”²²⁰ Farming as an occupation was deemed to be “somehow purer, cleaner, and morally better than other occupations” and “[t]o many people, farmers and non-farmers alike, it justified the salvation of farming as a way of life.”²²¹ The moral argument to protect farming also spread to “food-processing industries.”²²² This argument has been adopted by industries in serving other “fundamental” services such as telecommunications. AT&T provides a good example of an industry player who insisted that without state protection, it could not make its vital services²²³ available to the general public²²⁴ at an affordable price.²²⁵ Some defenders simply contend that state

220. *Id.*

221. *Id.* (noting also that this support of the moral and fundamental nature of farming “explained in part why agriculture was able to dodge most of the anti-monopoly agitation and find ways of using government powers to fix prices, plan production, and regularize markets”); *see also id.* at 482 (noting that “[t]he country, so it was said, could not be prosperous unless its farmers were prosperous”).

222. *Id.* at 482 (“Monopolistic arrangements in certain food-processing industries could be camouflaged as an essential part of the farm program.”).

223. Industries claim that state protected industries make vital services available to the general citizenry. *See, e.g.,* TEMIN & GALAMBOS, *supra* note 112, at 11 (stating that Congress passed the Communications Act to “make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide, and worldwide wire and radio communication services with adequate facilities at reasonable charges”) (internal quotations omitted).

For example, AT&T Chairman deButts explained that AT&T felt “an unusual obligation to see to it that the service shall at all times be adequate, dependable and satisfactory.” *Id.* at 97 (internal quotations omitted). Chairman deButts claimed that “AT&T also had an obligation . . . to oppose competition and favor regulation . . .” *Id.* He also claimed that “universal service” was the key to the Bell’s “grand system.” *Hearings on Communications, supra* note 130, at 19 (statement of Chairman deButts). DeButts also testified before Congress that he “grew up in the Bell System believing in the company’s obligation to serve all the people and to maintain the ability to provide that service.” Merrill Brown, *Ex-ATT Head: I Tried to be Competitive; Ex-ATT Chief: We Worried About Network, Competition*, WASH. POST, Aug. 28, 1981, at D10 (internal quotations omitted). AT&T also claimed that “the goal of the Bell System was service, subject only to the requirement that it earn a reasonable profit.” TEMIN & GALAMBOS, *supra* note 112, at 98 (stating that Gifford and deButts both made this assertion). DeButts further claimed that threats to breakup AT&T contradicted “the basic aim of the United States telecommunications policy . . . that is the widest availability of high-quality communications service at the lowest cost to the entire public.” *Hearings on Communications, supra* note 130, at 10 (statement of Chairman deButts).

224. DeButts also warned Congress that “[b]y fragmenting responsibility for service, they jeopardize its quality . . . [and] [b]y forcing rates for basic service up, they restrict its availability to the average American.” *Hearings on Communications, supra* note 130, at 10, 11 (statement of Chairman deButts) (claiming also that he appeared in Congress to “protect the interest of our customers” and support the goal of making “telephone service as widely affordable as possible”). Chairman deButts also warned Congressmen that AT&T had “faced competition before and it was very nearly destroyed by it.” *Id.* at 12. He explained that after “Bell’s patents [expired] in the 1890’s, rival telephone companies battled for the same territory . . . [resulting in] [p]rice-cutting [which] produced wretched service and customers [having to] subscribe to two or more companies to reach all the people in the community in which they lived.” *Id.*

225.. Rather than focusing on the harms to the companies, industry defenders often focus on harm to vulnerable consumers. In defending AT&T against competition, Chairman deButts also contended that the “inevitable result of competition would be an increase in the rates which existing carriers would have to charge for residential service.” Brown, *supra* note 223, at D10 (internal quotations omitted). He insisted that the result would be increased costs on the “local ratepayer.” TEMIN & GALAMBOS, *supra* note 112, at 98. In opposition to the Telecommunications Act of 1980

protection serves “the public interest.”²²⁶ Even in recent years, various nations still maintain that fundamental products or services are best provided to the public through “strong government involvement.”²²⁷

2. Religious Analogues

Some countries justify granting advantages to a religious monopoly by relying on the fundamental nature of a religion to citizens. Often states rely on historical importance of a religion to citizens’ tradition and culture to justify protection.²²⁸ Orthodoxy, in particular, has drawn on a theological tradition of a “territorial understanding of faith,” which would exclude other Christian religions from proselytizing in their lands.²²⁹ In 2002, a Belarusian law recognized “the defining role of the Orthodox Church in the historical formation and development of spiritual, cultural, and state traditions of the Belarusian people.”²³⁰ Establishment of the fundamental nature of the

which aimed to deregulate AT&T, a commentator argued that it would result in an “increase in local service charges” of over “\$20 per month for each residential and small business customer.” *Hearings on H.R. 6121 Before the Subcomm. on Monopolies and Commercial Law of the Comm. on the Judiciary*, 96th Cong. 302, 302–03 (1980) [hereinafter *Hearings on Monopolies*] (noting that if the “legislation were to be enacted in its present form, small telephone customers would suffer extremely burdensome increases in basic rates in the future”).

226. Michael Isikoff, *Sprint Suit Against ATT Dismissed*, WASH. POST, June 27, 1984, at C6. In the suit brought by Southern Pacific Communications Corp. against AT&T alleging monopolization of the long-distance telephone market, a lower court judge, Charles R. Richey was accused by the Court of Appeals of expressing “his personal policy view that an AT&T monopoly, and not competition, is in the public interest.” *Id.*

227. Lando, *supra* note 50, at 2184, 2190 (citing France as an example because “the government pioneered the Minitel to provide a two-way text-link in three million homes” and noting that France Telecom retains a strong monopoly in many areas, and has made only minimal allowances of open competition despite a 1991 public law which privatized it). Germany has also relied heavily on government-owned monopoly providers for telecommunications services and still allows voice telephony monopoly in telecommunications services. *Id.* at 2191, 2192. In general, up until 1994 “[s]tate owned monopolies still control[ed] the majority of EC [European Community] telephone services and each EC Member State (except for Britain) still offer[ed] ‘exclusive rights’ to a single telecommunications company.” *Id.* at 2196–97.

228. See *supra* Part III-A-2.

229. Mark Elliott & Sharyl Corrado, *The 1997 Russian Law on Religion: The Impact on Protestants*, 27 RELIGION, STATE & SOC. 109, 120 (1999); see also Vigen Guroian, *Evangelism and Mission in the Orthodox Tradition*, in SHARING THE BOOK: RELIGIOUS PERSPECTIVES ON THE RIGHTS AND WRONGS OF PROSELYTISM 231, 240 (John Witte, Jr. & Richard C. Martin eds., 1999) (describing the “corporate and organic concepts of church and peoplehood embraced by Orthodox theology”).

230. Vashkevich, *supra* note 155, at 704 (emphasis added). The law also recognized the “spiritual, cultural, and historical role of the Roman Catholic Church in the territory of Belarus” as well as the “inseparability from the general history of the Belarusian people of the Lutheran Church, Judaism, and Islam.” *Id.* (citations omitted).

Orthodox Church in Belarus justifies state protectionist policies.²³¹ Russian traditional thinking perceives “the church body, society, and the state as a single whole,” where church-nation takes priority over individuals.²³² Some religions, such as the Church of Sweden, have simply claimed that their traditional church systems are “incompatible with religious liberty.”²³³ Often, religion has been seen as a vital cultural carrier and thus preserving a national religion is associated with retaining a sense of culture, nation, and community. Makau Mutua has described how “religion is often the first point of attack in the process of acculturation” and the destruction of communities, particularly in African history.²³⁴

Both religions and industries rely on the fundamental nature of their particular industry or religion to the state in order to gain protection. Just as state protection of farming was justified because it epitomized the democratic ideals upon which America was founded, Orthodoxy in Russia has been protected because of its historical importance to citizens, tradition and culture.

V. HARMS OF PROTECTIONISM FOR INDUSTRIAL MONOPOLIES AND RELIGIOUS MONOPOLIES, STATE AND SOCIETY, AND CITIZENS

This section suggests that not only are arguments for protection made by religious and industrial monopolies typically of dubious strength, but that protectionism actually often harms the three constituents it purports to benefit.

A. Harms of Protectionist Measures for Industrial Monopolies

While industrial and religious monopolies argue and agitate for their own protection and importance, lessons from industry suggest that protection rarely creates the advantages sought. The asserted advantages often do not transpire and protection of religion and industry may actually

231. See *supra* notes 156–60 and accompanying text for discussion of Belarusian protectionist legislation.

232. Chaplin, *supra* note 162, at 286–87.

233. Göran Gustafsson, *Church-State Separation Swedish-Style*, in *CHURCH AND STATE*, *supra* note 4, at 51, 56 (describing a proposal by four members of the Riksdag in 1956 about the relationship between the Church of Sweden and the state). In 1972 a government-established committee suggested that Sweden should treat “all religious associations” equally and stop “preferential treatment of any denomination, including the Church of Sweden.” Stegeby, *supra* note 14, at 722. However, the government faced with an “impending election” declared in 1973 that “it did not intend to recommend any substantial changes to the existing church-state relationship.” *Id.*

234. Makau Mutua, *Proselytism and Cultural Integrity*, in *FACILITATING FREEDOM*, *supra* note 44, at 651, 666. Mutua states that

[U]nless groups are given protection against invasion and control by others, their cultural and ethnic identities could be quashed by more powerful cultures and political systems. The violent advocacy of proselytizing religions in Africa could be seen as a negation of this right particularly because religion is often the first point of attack in the process of acculturation.

Id.; see also *PROSELYTIZATION AND COMMUNAL SELF-DETERMINATION IN AFRICA* (Abdullahi Ahmed An-Na'im ed., 1999).

lead to less efficient industries, less autonomy for religious organizations, and possibly oppressive dominant religions.

1. Less Efficient Industry

Industrial protection including state control and regulation, quotas, and non-tariff barriers may actually create *less* efficient industries. In passing the Sherman and Clayton Acts, Congress recognized that monopolies create inefficiency and attempted to avoid this through antitrust laws.²³⁵ The current economic consensus also asserts that state ownership, control and regulation of industries is “less efficient than privately held commercial entities.”²³⁶ This has been confirmed by the success of newly privatized state-operated industries in France, Italy, and Spain.²³⁷ The result of state protection is often “little or no funding for research and development to improve efficiencies or services” as well as “over employment and low productivity.”²³⁸ Protectionism also prevents the shielded industry “from building the necessary skills to compete successfully in the global

235. Kenneth G. Elzinga, *The Goals of Antitrust: Other than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191, 1191–92, 1213 (1977) (pointing out that Congress recognized efficiency as a “central goal of antitrust” but concluding that equity is another goal of antitrust).

236. White, *supra* note 48, at 20 (noting that “state-owned enterprises” “are protected from competition through government regulations that grant them monopoly power in key sectors” and that World Bank studies of the “performance changes for a combined sample of two hundred eleven companies, from fifty industries [from both developing and industrialized countries] over a period of more than twenty years” reports “substantial increases in sales, profitability, capital investments and operating efficiency in the privatized companies and industries” as well as a “slight increase, on average in the number of employees after privatization”). In addition, White points out a New York University study of “one hundred twenty-eight privatized firms and ninety” state owned-industries in the Czech Republic, Hungary and Poland where researchers found “immediate increases in revenues and productivity following privatization.” *Id.* at 20. He further points out other benefits to privatization which include: more capital for technology, training and investment, management free of political constraints, fiscal stability, capital market development, more social programs by governments who no longer use state resources to support industry, and increased attraction of foreign investment. *Id.* at 20–21.

In the mid-1930s planners posited that “the antitrust approach of breaking down and destroying concentrated economic power was outmoded, impractical, and undesirable” and would “impair efficiency and lower the standard of living”). HAWLEY, *supra* note 32, at 175.

237. White, *supra* note 48, at 20. White pointed out that in 1997 proceeds from selling state-owned enterprises worldwide hit a record \$162 billion. France, Italy and Spain all launched huge, popular and very successful public share issue privatizations. Telecom Italia’s \$15 billion offering in November 1997 was the largest in European history . . . [and] France Telecom and the multiple Spanish offerings from Telefonica and Argentaria likewise transformed share ownership patterns in their countries.

Id. In the Czech Republic, “twenty thousand small businesses” were sold in public auctions. *Id.* at 23.

238. White, *supra* note 48, at 20.

market.”²³⁹ Further, exclusion of foreign products and quotas “limit the vigor of existing competitors.”²⁴⁰ In addition, the countries with the most successful privatization in Eastern Europe are the countries without any protections from foreign investors.²⁴¹ Even in revealing the harm to U.S. industries caused by foreign protection, rather than urging policymakers to weaken antitrust laws, industry specialists and congresspersons argued that the answer was increased enforcement of U.S. antitrust laws internationally.²⁴² Industry experts insisted that free competition was best for American business.²⁴³

A comparison between the United States airline industry and the European airline industry demonstrates the potential harms of state protection. Since the 1920s, the United States airline industry existed as “[g]overnment-organized cartels.”²⁴⁴ The United States government stopped protection of the U.S. airline industry throughout the 1980s.²⁴⁵ By 1990, after privatization of the airline industry, “the number of passenger-miles” in the U.S. domestic airline industry “had increased by 95%” and “[f]ares had fallen about 20% in real terms.”²⁴⁶ Commentators point out that the growth of the industry had been stunted by state regulation.²⁴⁷ Throughout the 1990s, European airlines faced trouble competing with deregulated American airlines with the surge in international travel since European airlines were “still bloated and inefficient government-owned companies.”²⁴⁸

239. Michael J. Chapman & Paul J. Tauber, *Liberalizing International Trade in Legal Services: A Proposal for an Annex on Legal Services Under the General Agreement on Trade in Services*, 16 MICH. J. INT'L L. 941, 953 (1995).

240. Mark Crane, *The Future Direction of Antitrust*, 56 ANTITRUST L.J. 3, 6-7 (1987) (adding also that “[d]umping decrees exclude low-price products”). Economically, one harm of state protection is “public-sector deficits and foreign-debt burdens” resulting from government subsidization. White, *supra* note 48, at 20 (adding also that “governments in these circumstances borrow heavily or print money to cover these costs, which leads to high inflation, the discouragement of further investment and resultant capital flight” and this may eventually lead to an inability to “compete in the international marketplace”).

241. White, *supra* note 48, at 25 (noting that “[s]ome of the most successful privatizations in Eastern Europe strongly encouraged foreign investors”).

242. *Hearings on Antitrust*, *supra* note 58, at 1 (statement of Senator Metzenbaum) (“For too long, we in the United States have tolerated unfair foreign competition which attacks our industries, robs America of jobs, and undermines our global competitiveness.”). The Act would not allow industries “to take advantage of weak or nonexistent competition law enforcement in their home markets to compete unfairly in markets that do have strong competition laws and effective enforcement.” *Id.* at 136 (Appendix).

243. Industry specialists insisted that American businesses were “most responsive when . . . under the heat of competition, including foreign competition.” *Hearings on Antitrust*, *supra* note 58, at 105 (statement of Eleanor Fox).

244. *Don't Coddle or Curb Them; The Pain in the World's Airline Industry Can Best Be Eased by More American-Style Deregulation, Not Less*, *supra* note 134, at 18.

245. *Id.*

246. *Id.* (also noting that “[p]assengers had saved more than \$100 billion on their tickets and enjoyed far more choice” but also pointing out that American officials failed to enforce antitrust rules in the airline industry allowing, by 1991, “90% of America’s domestic passenger traffic [to be] carried by the eight largest airlines”).

247. *Id.*

248. Richard M. Weintraub, *Flying High Over Europe; U.S. Airlines Gain Ground as*

When European airlines finally privatized throughout the 1990s, many were better able to compete internationally.²⁴⁹ Lufthansa President Juergen Weber commented in 1993 that “[h]ad Europe been deregulated 15 years ago, we would have been [more competitive].”²⁵⁰

While some commentators still tout the benefits of some form of state protectionism, most do not encourage “monopolistic protectionism.”²⁵¹ Many countries have recognized that “excessive protection from foreign competition” and state subsidies are “outdated attitudes” that need to be eliminated to achieve “economic modernization.”²⁵²

2. Lack of Religious Organization Autonomy and Religious Oppression

Two potential harms resulting from state protection of religious monopolies include lack of autonomy of religious groups and religious oppression from the dominant religion.²⁵³ First, when a state grants extra protections to a religion, the religion becomes increasingly dependant on the state and autonomy is often sacrificed.²⁵⁴ A religion may “lose its identity . . . and become merely an agency of the state.”²⁵⁵ In established or

Deregulation Strains International Treaties, WASH. POST, Aug. 1, 1993, at H01 (stating that American airlines were deregulated in the 1980s).

249. *Id.*

250. *Id.* However he also noted that “even then it would not be the same [since] half of all the passengers who fly take off and land in the United States,” giving U.S. airlines an advantage. *Id.*

251. *See, e.g.*, BATRA, *supra* note 14, at 61 (arguing against free trade and for “competitive protectionism” which allows domestic monopolies to be broken up while still allowing them to be protected from foreign competition as opposed to “monopolistic protectionism” which protects a domestic firm from foreign and domestic competition).

252. Gabriel Garcia, Comment, *Economic Development and the Course of Intellectual Property Protection in Mexico*, 27 TEX. INT’L L.J. 701, 723 n.81 (1992) (italics omitted) (quoting Mexican President Salinas’ goals in modernizing Mexican economic policies which include easing restrictions on foreign investment in Mexico). *Id.* at 728. Despite the importance of protecting jobs and maintaining strategic industries for defense purposes, many commentators insist that state protectionist actions harm the economy. Crane, *supra* note 240, at 7, 19.

253. Another harm of state protection of dominant religions may actually be inefficiency of the dominant religion. Just like state protected European airlines that had trouble competing with privatized U.S. airlines, dominant religions receiving state protection may have trouble competing with new religions. A dominant church receiving government aid may be slow to respond to the needs of adherents, meanwhile losing members to new innovative churches. This phenomenon, if it is occurring at all, is of course difficult to pinpoint. In addition, it makes an assumption that an individual’s choice of a religion is like her choice of an airline ticket. This assumption is not one we are willing to make.

254. *See* Brett G. Scharffs, *The Autonomy of Church and State*, 2004 BYU L. REV. 1217–1348 (contrasting three different conceptions of autonomy and their implications for church-state relations).

255. Gustafsson, *supra* note 233, at 54 (documenting a 1929 proposal by bishops that “the church, while retaining its position as an established state-church, should become less dependent on the state”); *Central Asia: Islam and the State*, *supra* note 209 (describing how Central Asian governments “use Islam as a conduit to promote their own ideologies and campaigns, and in general

dominant religious organizations, governments are often involved in the appointment of religious leaders.²⁵⁶ Greece and Bulgaria, for example, have tried to intervene in the selection of the Muslim leadership in their countries, but these attempts have been rejected by the European Court of Human Rights.²⁵⁷ Increased financial support for dominant religions often corresponds with increasing regulation and government interference in decisionmaking, undermining religious autonomy.²⁵⁸ The state may also exert pressure on religious leaders and withhold funds or allow protectionist legislation to coerce the church to do its will.²⁵⁹ The church may lose its ability to guide its members according to independent inspiration but instead be guided by the coercive influence of the state. In the process of disestablishing the Church of Sweden, proponents argued that the vibrancy of a religion is undermined by government control, even if designed for beneficial reasons.²⁶⁰ Control by the state lessens the authenticity of the religious voice and ultimately reduces the effectiveness of both the religious message and the religion's work as a governmental tool: "[t]he more the government controls it, the less authority the religious hierarchy has with believers, and the less impact it has on carrying government ideology to the population."²⁶¹

Second, a religious monopoly may become oppressive and with state aid stifle minority religions.²⁶² Religious persecution may be the final result of a state sanctioned protection of a dominant religion. In Germany, commentators document a cycle of religious persecution beginning with state protection.²⁶³ The first stage includes identifying "unacceptable

as a tool of the state").

256. Roland Minnerath, *Church Autonomy in Europe*, in CHURCH AUTONOMY 381, 391 (Gerhard Robbers ed., 2001) (citing Greece, England, and pre-Vatican II Catholic countries); CORNELIUS D. DE JONG, THE FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION OR BELIEF IN THE UNITED NATIONS (1946-1992) 445-48 (2000) (citing Tunisia, Greece); Felix Corley, *Turkmenistan: Religious Freedom Survey April 2004*, Forum 18 News Service, April 7, 2004, available at http://www.forum18.org/Archive.php?article_id=296 (last visited Jan. 24, 2005) (describing the removal of the Chief Mufti by President Niyazov in January 2003).

257. *Serif v. Greece*, App. No. 38178/97, 31 Eur. Ct. H.R. 20 (1999); *Hasan and Chaush v. Bulgaria*, App. No. 30985/96, 34 Eur. Ct. H.R. 55 (2000).

258. See, e.g., Rik Torfs, *Church Autonomy in Belgium*, in CHURCH AUTONOMY, *supra* note 256, at 607, 621-23 (describing the "important impact" state financial support has on "the organizing [sic] and financing of church activities," recognizing that "ignoring that financial support has a link with church autonomy would be . . . naïve . . .").

259. For example, current regulation in Turkmenistan which requires "imam-hatybs to place the Turkmen flag above mosque entrances, to begin every sermon by praising 'Turkmenbashi', 'Father of the Turkmen', as President Saparmurat Niyazov insists on being called." Igar Rotar, *Turkmenistan: State Interference with Islamic Religious Life in the North-East*, FORUM 18 NEWS SERVICE, available at http://www.forum18.org/archive.php?article_id=268 (last visited Jan. 16, 2005). Also, a copy of Niyazov's book, the *Ruhnama* (Book of the Soul), must be placed at the entrance to every mosque and Muslims must touch it as if it were a sacred object. *Id.* In Algeria, the state appoints imams and removes those who oppose government policies. FREEDOM OF RELIGION AND BELIEF, *supra* note 45, at 23.

260. See Stegeby, *supra* note 14.

261. *Central Asia: Islam and the State*, *supra* note 209.

262. See Davis, *supra* note 94.

263. This cycle has been documented several times throughout German history, with the most

religions . . . through the granting of exclusive license to the official religion or religions."²⁶⁴ Second, a state establishes a "unified position" among "political leaders, clergy, and intellectuals . . . against minority groups."²⁶⁵ Third, minority religions are categorized as "rival societies rather than religions"²⁶⁶ and presented as a threat to the state. Fourth, the government legally restricts minority religions members' "movement, commerce, or the right to bear arms."²⁶⁷ Finally, the dominant religion may participate in the "forced removal" of the minority group in the most extreme cases.²⁶⁸

The stifling of minority religions not only has an impact on the minority religions affected, but also has negative consequences for the majority religions in a society. New religious movements often act as an indicator of what some members of society feel is missing in their lives, and can challenge and invigorate more traditional religions to better meet the needs of its members.²⁶⁹ Christopher Eberle and Christian Smith argue that religious pluralism vivifies religion and thus "politically active religious citizens, and even those willing to support their favored coercive laws on the basis of their parochial religious commitments, have a vested interest in refusing coercively to impose their favored religious orthodoxy on a diverse population."²⁷⁰ Citing numerous other scholars, they note a "convergence of voices, then in support of the claim that religious communities benefit from pluralism and thus from a political regime that protects the religious freedom from which pluralism ensues."²⁷¹ An example of why this works in practice can be seen in the following anecdote: Bolivian Roman Catholic bishops complained to the pope during his visit to Bolivia about the growth of minority religions. He is reported to have responded that "these other religious groups were nourishing the people . . . if [the] Pentecostals are gaining adherents, it is because the bishops and Bolivian Catholics are not

obvious example being Hitler during World War II. *Id.* at 112, 123. Davis quotes Pierre van Paassen who insisted that "Hitler could never have perpetrated the Holocaust" without Germany's "unfriendly attitude toward the Jews . . . and by the anti-Semitic teaching in our churches and schools." *Id.* at 123.

264. *Id.* at 112 (internal quotations omitted).

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. Eileen Barker, *NRMs: Their Incidence and Significance*, in *NEW RELIGIOUS MOVEMENTS: CHALLENGE AND RESPONSE* 26–28 (Bryan R. Wilson & Jamie Cresswell eds., 1999) [*hereinafter* *NEW RELIGIOUS MOVEMENTS*]; see Guroian, *supra* note 229, at 243–44 (suggesting that the Orthodox respond to the challenge of proselytism by reinvigorating itself and focusing on its mission).

270. CHRISTOPHER J. EBERLE, *RELIGIOUS CONVICTION IN LIBERAL POLITICS* 26–27, 44–45 (2002).

271. *Id.* at 45 (citing Roger Finke, Rodney Stark, Joes Casanova, and others).

doing their job.”²⁷² In addition, when a majority church becomes a persecutor of other religions, even if accomplished together with the state, this may over time also undermine the powerful religious claims and the purity and power of a religious mission of a group.²⁷³

B. Harms of Protectionist Measures for State and Society

1. Decrease in Democracy

Historically as well as today, U.S. and international²⁷⁴ commentators reject protection of industry because it decreases democracy through concentrating power in a few corporate hands. Early American colonists opposed state protection and monopolies²⁷⁵ because they were associated with the British monarchy rather than a new American democracy.²⁷⁶ In passing the Sherman Act, a major goal of Congress was to avoid concentration of power,²⁷⁷ which caused antidemocratic harms.²⁷⁸ Similarly,

272. Cleary, *supra* note 185, at 25.

273. See, e.g., Elliott & Corrado, *supra* note 229, at 122 (quoting a leader of the Orthodox Church in America as arguing that suppressive policies towards other religions in Russia would “in the long run . . . have a negative impact also on the mission of the Russian Orthodox Church”).

274. Internationally, experts agree that “an economic system based on private enterprise and free-market competition best serves human goals” and that “[g]overnment intervention—whether by government participation in the market or by direct or indirect regulation—should occur exceptionally and only to the minimum extent necessary to remedy serious market failure.” *Hearings on Antitrust*, *supra* note 58, at 128 (statement of Abott B. Lipsky, Jr., who served as a member of the Special Committee on International Antitrust of the American Bar Association, Section of Antitrust Law).

275. HANS B. THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* 36–37 (1955). Monopoly was opposed even before the Sherman Act in America due to experiences with monopolistic privilege in England. See *id.* “[S]everal colonial statutes are said to have prohibited” monopolistic practices because of “popular antagonism to monopoly.” *Id.*

276. Colonists felt that “monopoly was the antithesis of the very spirit of individualistic pioneering characteristic of life on the new continent” and had been one of the main reasons emigrants had left Great Britain in the first place. *Id.* at 37. Although opposition to monopoly existed even before the Sherman Act, when the Sherman Act was first enacted it was not enforced against “such tight combinations as holding companies and mergers.” HAWLEY, *supra* note 32, at 6 (noting that “[i]t was not until the progressive era in the early twentieth century that major changes in the political and ideological climate began to take place” when people began to be “increasingly dubious . . . about the doctrines of laissez faire and Social Darwinism”). For this reason, many colonists rejected England’s practice of granting “chartered trade monopolies.” THORELLI, *supra* note 275, at 37.

277. One major argument against monopoly from the advent of the Sherman Act and also the consensus for “almost a century” has been the “hostility to the concentration in private hands of power.” See *United States v. Columbia Steel Co.*, 334 U.S. 495, 536 (1948) (noting that “[p]ower that controls the economy should be in the hands of elected representatives of the people, not in the hands of an industrial oligarchy”); see also *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 428 (2d Cir. 1945) (noting that “great industrial consolidations are inherently undesirable, regardless of their economic results”); Fredrick M. Rowe, *The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics*, 72 GEO. L.J. 1511, 1541 (1984) (noting that “antitrust sought to stem a ‘tide of concentration’”); Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051–52 (1979) (noting that “excessive concentration of economic power will breed antidemocratic political pressures”); Harlan M. Blake, *Conglomerate*

when enacting Section 7 of the Clayton Act in 1950, Congress worried that an economy “dominated by a few corporate giants could . . . facilitate overthrow of democratic institutions and the installation of a totalitarian regime.”²⁷⁹ In fact, after World War II, to reconstruct former totalitarian Germany and Japanese economies, the United States rooted out state-controlled and protected industries and “create[d] alternative centers of power that could not readily be marshaled behind authoritarian regimes.”²⁸⁰ Politicians feared not only that citizens would lose power to influence change with increased concentration of power but that there would be a

Mergers and the Antitrust Laws, 73 COLUM. L. REV. 555, 575 (1973) (noting that the Sherman Act was concerned with the “threat to the opportunities of individuals and smaller businessmen to compete on an equal basis in a competitive system” with heavy concentration of economic power); Harlan M. Blake & William K. Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377, 383 (1965) (pointing out that “antitrust operates to forestall concentrations of economic power, which, if allowed to develop unhindered, would call for much more intrusive government supervision of the economy”). Some cases have linked a concentration of power over a product to make “a prima facie case of intent and purpose to exercise illegal restraints and to monopolize.” See *Kobe, Inc. v. Dempsey Pump Co.*, 198 F.2d 416, 423 (10th Cir. 1952).

278. *Columbia Steel Co.*, 334 U.S. at 536 (stating that “[i]ndustrial power should be decentralized . . . [and] should be scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men.”). The Sherman Act also aimed to “improve the free market system” to avoid other solutions such as Marxism or heavy government regulation. Pitofsky, *supra* note 277, at 1057.

279. Pitofsky, *supra* note 277, at 1054, 1055 (pointing out that “it is remarkable that historical and contemporaneous democracies are almost invariably associated with market systems, while totalitarian regimes (fascist and communist) almost always are not”). In addition, during congressional debate over section 7 of the Clayton Act representatives pointed out that Nazi Germany built up a great series of industrial monopolies in steel, rubber, coal and other materials. The monopolies soon got control of Germany, brought Hitler to power and forced virtually the whole world into war. . . . A high degree of concentration throughout industry fosters the formation of cartels and readily enables a war-minded government to mobilize for hostilities . . . [as] the history of war preparations in Germany [demonstrate during] both World War I and World War II.

95 CONG. REC. 11,486 (1949) (statement of Rep. Celler); see also *Brown Shoe Co. v. United States*, 370 U.S. 294, 315 (1961) (“The dominant theme pervading congressional consideration of the 1950 amendments [to the Clayton Act] was a fear of what was considered to be a rising tide of economic concentration in the American economy.”). In passing the Clayton Act senators also worried that monopoly leads to citizens “losing power to direct their own economic welfare . . . [and in turn the] means to direct their political future. 96 CONG. REC. 16, 452 (1950) (statement of Senator Kefauver); see also Derek C. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 234–37 (1960) (stating that Congressmen worried that powerful industries would increase “government control” which would “corrode” freedom). Even in recent cases the rejection of concentrations of power is emphasized. *United States v. Syufy Enter.*, 903 F.2d 659, 663 (9th Cir. 1990) (pointing out that competition is important in avoiding “permanent concentrations of economic power”).

280. Louis B. Schwartz, “Justice” and Other Non-Economic Goals of Antitrust, 127 U. PA. L. REV. 1076, 1078 (1979) (stating that decartelization and imposing antitrust laws to root out monopolies was one way that the United States reconstructed the German and Japanese economies after World War II).

decrease in “local initiative and civic responsibility” and ultimately a loss of democratic values.²⁸¹

In addition, concentration of wealth through state protection decreases democracy since governments may not be able to control industries once they gain too much power. While proponents of protection insist that larger companies provide better service, governments have also come to realize that the larger the size of the company, the more difficult it becomes for the government to “monitor resources to keep the giant in line”²⁸² and deregulate it when necessary.²⁸³

2. Social Reform, Decrease in Democracy, and Hostility

Religious protectionist practices may harm society through decreasing social reform through minority religions and through creating hostility and violence. First, state protectionism may stifle minority religions thereby decreasing social reform movements.²⁸⁴ In the United States, “religious communities were the driving force” behind the Civil Rights Movement which “provide[d] legal protections” to African Americans.²⁸⁵ If “strict religious registration laws” existed during this time, the government could have deterred many in this movement under the “pretext of ‘state security.’”²⁸⁶ Limiting the existence or activities of religious groups may

281. Bok, *supra* note 279, at 236; *see also* Pitofsky, *supra* note 277, at 1071. Several cases have relied partly on the desire not to concentrate power into too few hands. *See* United States v. Phillipsburg Nat’l Bank & Trust Co., 399 U.S. 350, 370–71 (1970) (reciting defendants’ arguments that allowing the challenged merger would increase competition for nationally influential banks and would actually increase competition nationally); *see also* United States v. Philadelphia Nat’l Bank, 374 U.S. 321 (1963).

282. Sheils & Cook, *supra* note 215, at 59. This article discusses the Justice Department’s antitrust suit against AT&T, noting that “smaller companies worry about AT&T’s sheer size” and that the government is “turning loose something with billions of dollars that can do anything it wants . . . [a]nd the FCC won’t be able to do anything about it . . . until the landscape is littered with the corpses of former competitors.” *Id.* (quoting Herbert N. Jasper, Executive Vice President of an industry group fighting the Telecommunications Act of 1980, which was backed by AT&T) (internal quotations omitted). In 1980, commentators did not believe that the Telecommunications Act of 1980 would pass during that year but “almost all observers predict[ed] that when a new law is finally passed, it [would] be one that AT&T approves.” *Id.* AT&T was held liable for restraining trade and using “monopoly power in one market to limit competition in another market, and combin[ing] or conspir[ing] among its units to monopolize the field.” Merrill Brown, *AT&T Loses \$105 Million Scrap Wire Antitrust Suit*, WASH. POST, March 10, 1984, at C1.

283. However, as many governments who allow monopolies find out, the larger the company and more government protection, the bigger the fight the company will put up when threatened with deregulation. *See* Sheils & Cook, *supra* note 215, at 59.

284. *Roadblock to Religious Liberty: Religious Registration, Commission on Security and Cooperation in Europe*, Oct. 11, 2001, 107th Cong. 3 [hereinafter *Roadblock*] (statement of Hon. Christopher H. Smith, Co-Chairman of the Commission on Security and Cooperation in Europe).

285. *Id.* at 3; *see also* JOHN T. NOONAN, JR. & EDWARD MCGLYNN GAFFNEY, JR., RELIGIOUS FREEDOM: HISTORY, CASES, AND OTHER MATERIALS ON THE INTERACTION OF RELIGION AND GOVERNMENT 891–93 (2001) (pointing out that that Southern Christian Leadership Conference “was the force that developed the infrastructure of the civil rights movement” as well as the “moral, material, and organizational support to local protesters, otherwise isolated and at a disadvantage with the white power structure”).

286. *Roadblock*, *supra* note 284, at 3.

decrease democratic social reform.²⁸⁷ A large body of scholarship has been devoted to the role that religions can play as mediating structures in promoting civil society and social reform.²⁸⁸ This role is not limited to dominant religious groups. Indeed, the developments of minority religions are often themselves an attempt to change society. A major scholar of new religious movements, Eileen Barker, has argued that new religious movements “may occasionally function as a barometer of what at least some members of a society feel they need but is not being supplied by other means,” allowing new religious movements “a significant role to play as a dissenting force in society.”²⁸⁹

Ultimately, protectionist arguments for religion, like those for industry, lead to a weakening of democracy itself. The European Court of Human Rights has articulated this concept, explaining that the “social tension” that might arise from allowing religious splinter groups is an unavoidable effect of pluralism, which is inseparable from democracy.²⁹⁰ Robert Audi explains that governmental preferences for a particular religion undermine liberal democracy in three ways. First, preferences based on religion violate the libertarian principle. Government preferences of religion undermine freedom in the choice of a religion by applying direct or indirect pressure on its citizens to adopt the favored religion.²⁹¹ Second, religious protectionism violates equality principles, particularly significant in liberal democracy, with its emphasis on freedom as well as basic political equality.²⁹² “Even if the existence of certain disproportionate powers does not necessarily (or at least does not directly) restrict anyone’s liberty, concentration of power in a religious group as such easily impairs democracy, in which citizens should have equal opportunities to exercise political power on a fair basis.”²⁹³ Recognizing that that many traditional democracies have some form of religious protectionism, he notes that in such a case, even if necessary safeguards against abuses are in place, such a system implies that “the ideal

287. *Id.* (noting that restrictions on religious groups “remove[s] from society forces that operate for the general welfare”).

288. *See, e.g.*, RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* (1984); STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993); MARTIN E. MARTY WITH JONATHAN MOORE, *POLITICS, RELIGION AND THE COMMON GOOD* (2000); J. Philip Wogaman, *The Church as Mediating Institution: Theological and Philosophical Perspective*, in *DEMOCRACY AND MEDIATING STRUCTURES: A THEOLOGICAL INQUIRY* (Michael Novak ed., 1980); PAUL J. WEITHMAN, *RELIGION AND THE OBLIGATIONS OF CITIZENSHIP* (2002); ROBERT AUDI, *RELIGIOUS COMMITMENT AND SECULAR REASON* (2000).

289. *NEW RELIGIOUS MOVEMENTS*, *supra* note 269, at 26–27.

290. *Serif v. Greece*, App. No. 38178/97, 31 Eur. Ct. H.R. 20 (1999).

291. AUDI, *supra* note 288, at 33–35.

292. *Id.* at 36–37.

293. *Id.* at 36.

of liberal democracy has not been fully reached, that protections of liberty and basic political equality must be maintained in relation to the established church, and that a rationale is needed to justify its continuance insofar as a liberal democracy is the nation's political ideal."²⁹⁴ Audi also argues that religious preferences undermine the liberal democratic ideal of neutrality. Neutrality can apply to both liberty concerns—equal freedom to accept or reject all religious views—and to equality concerns—government preference toward a religion may well create a dominant bloc of voters or polarize government along religious lines, which undermines equalitarian participation in government.²⁹⁵ Neutrality in belief can also be undermined by government grants of special benefits upon particular qualifications, which qualifications themselves may shape the action of religious groups.²⁹⁶

Finally, state protection of a religious monopoly may result in aggression or even violence toward minority religious groups.²⁹⁷ Progressive polarization of the state and a minority religion, which may happen with increasing government protections for a dominant religion, has been identified as an important step in leading to violent conflict between a state and a minority religion.²⁹⁸ Governments can escalate the polarization by “cultural opponents of NRMs [new religious movements].”²⁹⁹ Although the state action is not necessarily required to provoke violence,

it should be of considerable concern when cultural opponents are successful in recruiting government agents in campaigns to assail apocalyptic religious movements. With the state's monopoly on the legitimate use of force and its expansive power to regulate social life, minority religions are often at the mercy of the state's social control agents. An overwhelming show of force, or a threat of force, can induce acts of violence in apocalyptic groups³⁰⁰

One commentator has argued that in a state with a virtual religious monopoly, restriction of minority religious rights leads to violence.³⁰¹ In Israel, for example, “separate religious courts for every religious community” and substantive laws that rely solely on Jewish principles draw

294. *Id.* at 37.

295. *Id.* at 37–39.

296. *Id.* at 39–40.

297. See Barker, *supra* note 123, at 579 (indicating violence against Jehovah's Witnesses in Georgia, for example); see also *id.* at 39; MALCOLM D. EVANS, *Historical Analysis of Freedom of Religion or Belief as a Technique for Resolving Religious Conflict*, in FACILITATING FREEDOM, *supra* note 44, at 1; MARK JUERGENSMAYER, TERROR IN THE MIND OF GOD: THE GLOBAL RISE OF RELIGIOUS VIOLENCE (3d ed., 2003).

298. David G. Bromley, *Dramatic Denouements*, in CULTS, RELIGION & VIOLENCE 11, 26–27 (David G. Bromley & J. Gordon Melton eds., 2002) [hereinafter CULTS, RELIGION & VIOLENCE].

299. Stuart A. Wright, *Public Agency Involvement in Government-Religious Movement Confrontations*, in CULTS, RELIGION & VIOLENCE, *supra* note 298, at 102, 108–10.

300. *Id.* at 110–11.

301. S.I. Strong, *Law and Religion in Israel and Iran: How the Integration of Secular and Spiritual Laws Affects Human Rights and the Potential for Violence*, 19 MICH. J. INT'L L. 109, 110–13 (1997) (using Iran and Israel as the prime examples of religious states).

attention to the differences in the community and create inequity between the Jews and Muslims in the country.³⁰² One scholar has suggested that these structural inequities lead to religious minorities “perceiv[ing that] violence [is] the only way to effectuate change in society.”³⁰³ In Iran as well, the violent 1979 Islamic Revolution was partly justified by a religious minority whose rights of worship were constrained under the secular rule of Shah Pahlavi.³⁰⁴ Not only can state protection of dominant religions lead to violence by minority religions but it may accompany violence against minority groups. In Russia, the anti-extremism legislation adopted to allow liquidation of some nontraditional religions, was instituted “shortly after the widespread appearance of booby-trapped anti-Semitic signs.”³⁰⁵ The anti-extremism legislation was spurred by “increasing ranks of nationalist, fascist, and other intolerant groups that attribute Russia’s present economic and social ills to ethnic and national minorities.”³⁰⁶ Just as industrial protection may decrease democracy, religious protection may also decrease democracy and in extreme circumstances create hostility and violence.

C. Harms of Protectionist Measures for Citizens

1. Decreased Individual Liberty

Among industries and religions, harms to citizens result from lack of individual choice due to limits on foreign and domestic competition. Anti-monopoly legislation and bans of other protectionist measures are intended to encourage “individual liberty” for a consumer.³⁰⁷ They also encourage

302. *Id.* at 214–215.

303. *Id.* at 215, 217. Strong concludes that

[i]f the goal is to create more peaceful and rights-oriented societies, one group cannot have total control over the definition of culture and the amount of religio-legal integration in the State; to do so will inspire permanent division in society and perpetuate violent power struggles between groups as repressed minorities attempt to find a way to gain the respect they need and deserve.

Id. The religious minorities may feel that they are justified to use violence to obtain rights “already established under international law,” like “nondiscrimination on the basis of religion.” *Id.* at 203 (pointing out that violent religious minorities may claim that they “are pursuing rights that are not currently recognized in law or theory but are a logical extension thereof and that violence is necessary to force the State to recognize these new types of rights”).

304. *Id.* at 131, 164.

305. Gross, *supra* note 128, at 718. The legislation “gained additional momentum following the June 2002 soccer riots . . . that ended in . . . vandalism of cars and Japanese restaurants, and racial violence, including assaults on five Japanese students.” *Id.* at 719.

306. *Id.* at 718–19.

307. Blake & Jones, *supra* note 277, at 384 (pointing out that an “individual who wants to be an entrepreneur rather than an employee ought not to have his range of opportunities restricted by

diversity of individual choices.³⁰⁸ Likewise, state protection of religion lessens individual liberty, human rights, and liberal democracy.³⁰⁹ In many international and U.S. laws, religious freedom has been declared as a “fundamental right of every individual.”³¹⁰ International norms also protect against state discrimination in the protection of fundamental rights, such as freedom of religion.³¹¹ Not only does state protection violate the fundamental right to freedom of religion, but prohibitions on religious competition may also constrain citizens’ freedom of association or freedom of speech rights.³¹² Both industrial and religious protection results in a lack of individual liberty, which in the religious arena may constitute a violation of a fundamental right.

2. Availability and Service

State protection of industrial monopolies may actually decrease availability of services for citizens. Today, although pressure to “impose protectionist measures” may be intense,³¹³ most industrialized countries agree that “open competition was the best way to achieve greater enhanced

unnecessary barriers to entry or by trade practices designed specifically to eliminate him from the field”).

308. *United States v. Syufy Enters.*, 903 F.2d 659, 663 (9th Cir. 1990) (“Competition . . . promotes diversity, giving consumers choices to fit a wide array of personal preferences.”).

309. For a fuller discussion of the relation between protection of dominant religions and a weakening of liberal democracy, see *supra* text accompanying notes 290–96.

310. See Annual Report 2003, *supra* note 99, at 1; see also International Religious Freedom Act of 1998, 22 U.S.C. § 6401 (2000). In addition, Article 18 of the Universal Declaration of Human Rights holds that “[e]veryone has the right to freedom of thought, conscience and religion. This right shall include 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,” which is reiterated in Article 18 of the International Covenant on Civil and Political Rights and Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, [hereinafter European Convention]. Stahnke also provides a thorough discussion of how limitations on the right to proselyte violate international human rights law. Stahnke, *supra* note 45, at 624–25.

311. International Covenant on Civil and Political Rights, Art. 2(1), 26; European Convention, *supra* note 310, Art. 14. This protection extends against governmental discrimination in “any field regulated and protected by public authorities.” *S.W.M. Broeks v. The Netherlands*, U.N. GAOR, Hum. Rts. Comm., Comm. No. 172/1984, ¶ 12.3 (April 9, 1987), available at <http://wwwserver.law.wits.ac.za/humanrts/undocs/session42/172-1984.htm> (last visited Mar. 17, 2005); U.N. GAOR, Hum. Rts. Comm., Gen. Comment No. 22(48) on Art. 18, ¶ 12 (July 20, 1993), available at <http://www1.umn.edu/humanrts/gencomm/hrcomm22.htm> (last visited Mar. 17, 2005).

312. *Metro. Church of Bessarabia and Others v. Moldova*, App. No. 45701/99, 35 Eur. Ct. H.R. 13 (2001) (finding overlapping rights to freedom of association and freedom of religion in the establishment of a legal entity); *Roadblock*, *supra* note 284, at 3 (statement of Hon. Christopher H. Smith, Co-Chairman of the Commission on Security and Cooperation in Europe); see also *Sidiropoulos v. Greece*, App. No. 57/1997/841/1047, 27 Eur. Ct. H.R. 633, ¶ 40 (1998) (“That citizens should be able to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of association, without which that right would be deprived of any meaning.”).

313. Jeanne Asherman, *The International Monetary Fund: A History of Compromise*, 16 N.Y.U. J. INT’L L. & POL. 235, 304 (1984).

services.”³¹⁴ Most policymakers no longer contend that state-controlled public monopolies benefit consumers.³¹⁵

Less developed countries still claim that they should be entitled to some state protection to provide “basic service” to their residents.³¹⁶ Some commentators agree that developing countries are entitled to protectionist measures such as import barriers and subsidies to be able to compete with industrialized countries.³¹⁷ However, often this same argument is made with countries protecting struggling *religions* arguing that the state should protect former dominant religions that are now struggling. Particularly in post-Communist Europe, leaders of dominant religions argue that their denomination is “in a weakened condition and need[s] time to regain its strength after seventy years of Soviet rule.”³¹⁸

Even if commentators justify industrial protection for less developed countries, they cannot similarly justify protection of religion. Protection of religion cannot be justified in the same sense because religious freedom is not a matter of economic policy that states can differ on, but a human right recognized in most state constitutions and numerous international agreements.³¹⁹ Although commentators may be able to justify state

314. Lando, *supra* note 50, at 2185.

315. *Id.* at 2197 (noting that “monopolistic control by PTTs [Postal Telegraph and Telecommunications Administrations] does not benefit telecommunications users . . .”).

316. *Id.* at 2185. Less developed countries often still insist that a public monopoly is the best way of providing “basic service” to their residents. *Id.* These countries fear the open competition will result in companies “enhancing service on the existing hard-wire lines” and “neglecting the less profitable laying of more wires . . . leaving some residents with no service at all.” *Id.* at 2185. Some commentators have supported developing countries employing protectionist measures for infant industries, but not for dying industries in developed countries. Asherman, *supra* note 313, at 304 n.353.

317. Gregory Shaffer, *WTO Blue-Green Blues: The Impact of U.S. Domestic Politics on Trade-Labor, Trade-Environment Linkages for the WTO's Future*, 24 *FORDHAM INT'L L.J.* 608, 612 n.10 (2000) (arguing that developing countries should “retain more discretion to promote ‘infant industries’ and other policies through subsidies and import barriers than under WTO rules”); General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. 5-6, T.I.A.S. 1700, 55 U.N.T.S. 187, Art. XVIII (legitimizing the infant industry argument); Kevin C. Kennedy, *A Review of Globalization and its Discontents*, 35 *GEO. WASH. INT'L L. REV.* 251, 258 (2003) (noting that developing countries have used GATT Art. XVIII to justify protectionist measures).

318. Guroian, *supra* note 229, at 231 (citing Armenian Orthodox leaders).

319. Although some commentators might argue that religious “protection” may be in the eye of the beholder, they may point out that European, Eastern, and Eastern Christian religions focus more on “group rights” than individual rights. Payne, *supra* note 87, at 263. Therefore, instead of considering “the right of religious freedom . . . [as] the right of the individual to believe as he or she desires, but rather it is the freedom of the church to exist[.]” This is why proselytism by minority churches is often outlawed by these countries. *Id.* (pinpointing Greece as an example of this phenomenon with its anti-proselytism legislation). Regardless of whether a country claims to be protecting “group rights,” granting advantages to certain religions still violates non-discrimination principles established by international agreements. There are also several international agreements recognizing the importance of freedom of religion.

protectionism of industry with less developed countries, allowing state protection of religion is less defensible.

The similarities between the arguments made by industrial and religious monopolies for state protection are remarkable. Although many arguments are similar, dominant religions also express several unique arguments in favor of state protection. The next section explores the acute interests made in the case of religious protection.

VI. MORE ACUTE INTERESTS IN CASE OF RELIGION

Religious monopolies often justify state protection with acute interests in protecting citizens. Religions claim that state protection is necessary to allow citizens to be inculcated with moral values, retain a sense of community and place, and recognize proper social roles.

A. *Inculcation of Moral Values*

States often allow a dominant religion to teach moral values to society, especially in places where religion has been absent from public life. A reason for state protection of a dominant religion in some Eastern European countries may be to fill a “spiritual vacuum” in a society and in general to raise the “moral level” of the citizenry.³²⁰ In Greece, the Orthodox Church views its role in society as preserving the national identity of the Greek people, including their religious faith.³²¹ In Denmark, religion is such a vital part of the culture that educators rely on religious teachings of the Danish National Church to familiarize students with “fundamental values in Danish culture.”³²² Other state churches are legally obligated to teach morals of the dominant religion in state schools.³²³ Norway used to require the teaching of the doctrine of the Church of Norway to improve the morals of the students, but eventually determined that this could be done without a more inclusive religious message.³²⁴

B. *Community and Place*

Many dominant churches identify a community of followers over which they have fellowship, which may include citizens who are nonbelievers. In

320. Schlafly, *supra* note 38, at 135 (citations omitted). Schlafly cites studies showing that in Russia, “although 75 percent of Russians are baptized and 50 percent consider themselves Orthodox, only 5 percent go to church more than once a month and only 10 percent confess and communicate at least once a year.” *Id.*

321. Payne, *supra* note at 87, at 266; *see supra* note 3 and accompanying text for discussion of how the Greek Orthodox Church is the dominant religion in Greece.

322. Dübeck, *supra* note 87, at 48; *see supra* note 155 and accompanying text for discussion of the Danish National Church as the state church of Denmark.

323. *See, e.g.*, Canas, *supra* note 71, at 272–73 (pointing out that in Portugal state churches must allow “Catholic morals and religion” to be taught “by the church in some state schools” because it is the “major Church”).

324. Inge Eidsvåg et al., *The Emergence of Interfaith Dialogue: The Norwegian Experience*, in FACILITATING FREEDOM, *supra* note 44, at 777–79, 785–86.

many countries, the center of community and culture has been and remains the dominant church.³²⁵ Dominant churches may insist on identifying their members to the public in an effort to solidify a community of followers.³²⁶ Through creating a united community of worshippers a dominant church justifies its place as the “prevailing religion in the land.”³²⁷ Leaders of dominant religions, in Spain for example, reject state legislation and constitutional referendums that fail to promote Catholic religious values and fail to mention “God or Catholic values” because of perceived harms to their community. The Catholic Church in Spain rejects all state documents that are “an attempt to foist an agnostic constitution on a nation of the baptized.”³²⁸ Part of maintaining the “dignity and personality” of a community of followers may include actively opposing proselytism by minority religions.³²⁹ Russian Orthodox leaders consider the Orthodox Church a community “to which even its unchurched sons and daughters rightfully belong.”³³⁰ Protecting religion is often seen as a means of protecting cultural integrity, particularly in African communities that were subject to proselytizing as part of colonization.³³¹

C. Social Roles

Religious monopolies claim they benefit society by promoting appropriate social roles through preserving the faith of the citizens. Some states, like Ireland, recognize the dominant church as a “guardian of the

325. Canas, *supra* note 71, at 271 (claiming that “[f]or centuries the Catholic Church has been one of the most important cent[ers] of culture (and until the last century probably the only one)”).

326. Mavrogordatos, *supra* note 5, at 122 (“Until recently, birth certificates, compulsory identity cards, and other official records in Greece routinely included religious affiliation: Christian Orthodox for almost 97 per cent [sic] of Greek citizens.”) (internal quotations omitted).

327. *Id.* (internal quotations omitted). This practice was outlawed in May 2000 and the Greek Orthodox Church “apparently perceived this move as a first step in the gradual erosion of its institutional monopoly, and refused to accept it.” *Id.*

328. Anderson, *supra* note 5, at 141 (describing comments of Cardinal Martin of the Catholic Church in response to constitutional clauses that “left the door open for the introduction of divorce legislation”).

329. Kokkinakis v. Greece, App. No. 14307/88, 17 Eur. H.R. Rep. 397, at ¶ 34 (1994) (citing the Greek government which forbids proselytism and “attache[s] a criminal penalty to this prohibition” in Article 13 of the 1975 Constitution); *see, e.g.*, JOHN WARWICK MONTGOMERY, THE REPRESSION OF EVANGELISM IN GREECE: EUROPEAN LITIGATION VIS-À-VIS A CLOSED RELIGIOUS ESTABLISHMENT 24, 655, 99, 135 (2001) (discussing the “Athens Three” case where charges of proselytism led to a fine of 50,000 drachmas “as pecuniary satisfaction for moral damage which she suffered” and noting that the “main aim of the [anti-proselytism] legislation, as applied in practice is to protect the dominant religion . . . to the detriment of all other faiths”).

330. Schlafly, *supra* note 38, at 137.

331. Mutua, *supra* note 234.

Faith professed by the great majority of the citizens.”³³² This recognition is not just in name but has been relied on in an Irish Supreme Court decision granting custody over a child to the mother “because she was a Catholic rather than to the father, who was a Protestant.”³³³ To be raised to fulfill his proper social roles, the Court reasoned that he required a Catholic upbringing. Similarly, the dominant church in Greece, the Orthodox Church is viewed as the “protector of the collective tradition and the way of life of the nation.”³³⁴ In addition, dominant religions place emphasis on educating children in the tenets of the dominant religion in schools.³³⁵

The similarities between the arguments made by industries and religion relying on state protection are remarkable, despite a few acute interests expressed only by religious monopolies.

VII. CONCLUSION: COMMODIFICATION OF RELIGION

Religious monopolies receive protectionist legislation through asserting benefits to religion, state and society, and citizens. Industries and religious groups claim benefits including better service, preserving social stability and national security for state and society and protection of citizens from fraud. The remarkable similarity between the arguments for protection of industry and religion demonstrate that protectionist arguments in the religion context treat religion like a garden variety market commodity. Even if it is appropriate to treat religion in the same way as industry, the asserted benefits of state protection of industry have been broadly discredited in other contexts, suggesting that the same arguments should be viewed skeptically in the religious context.

While some state protection of religious monopolies may not officially violate religious freedom under international law,³³⁶ this article has tried to

332. Kissane, *supra* note 5, at 77 (describing Ireland’s Article 44.1.2 referring to the “Holy Catholic Apostolic and Roman Church”) (internal quotations omitted).

333. *Id.* at 77.

334. Payne, *supra* note 87, at 269.

335. In Greece, the religious instruction is only in the Orthodox faith. Mavrogordatos, *supra* note 5, at 121. The Council of State (the Greek Supreme Court) “ruled unconstitutional a reduction in the hours of religious instruction in the schools.” *Id.*

336. See the discussion of this point in W. Cole Durham, Jr., *Freedom of Religion or Belief: Laws Affecting the Structuring of Religious Communities* (1999), available at http://www.osce.org/odhr/1999/09/1502_en.html (last visited Jan. 16, 2005). Violations under the International Religious Freedom Act of 1998 (U.S. law based on international treaties and agreements) include:

- (A) arbitrary prohibitions on, restrictions of, or punishment for—
 - i. assembling for peaceful religious activities such as worship, preaching, and prayer, including arbitrary registration requirements;
 - ii. speaking freely about one’s religious beliefs;
 - iii. changing one’s religious beliefs and affiliation;
 - iv. possession and distribution of religious literature, including Bibles; or
 - v. raising one’s children in the religious teachings and practices of one’s choice;

OR

- (B) any of the following acts if committed on account of an individual’s religious belief or practice: detention, interrogation, imposition of an onerous financial penalty, forced

show how the arguments for protection made by religious and industrial monopolies are often unconvincing.³³⁷ In fact not only are these arguments suspect, state protection may actually harm the three constituents they aim to benefit. Protection of industry and religion may lead to a weaker industry or religion, a decrease in democracy, and limits on individual freedom. State protection of religion, which is more harmful than protection of industry, may degrade the liberty of citizens, undermine the autonomy and vibrancy of all religions, and allow oppression by dominant religions. Democracy and liberty are two of the key values that underlie the arguments against economic protectionism, and are also the values most threatened by religious attempts at protectionism. Since the “manner in which a society” protects freedom of religion is the true “litmus test of its commitment to human rights,”³³⁸ perhaps it is time that a more critical eye be focused upon the arguments made in the apologetics of religious protectionism.

labor, forced mass resettlement, imprisonment, forced religious conversion, beating, torture, mutilation, rape, enslavement, murder, and execution.

22 U.S.C. § 6402(13)(A)–(B); *see also* Bahiyyih G. Tahzib, FREEDOM OF RELIGION OR BELIEF: ENSURING EFFECTIVE INTERNATIONAL LEGAL PROTECTION (1996) (providing a thorough discussion of international norms protecting freedom of religion and belief).

337. For further discussion see discussion *supra* Parts II-B, III-B, and IV-B.

338. Arzt, *supra* note 70, at 378; *see* NEW RELIGIOUS MOVEMENTS, *supra* note 269, at 28.

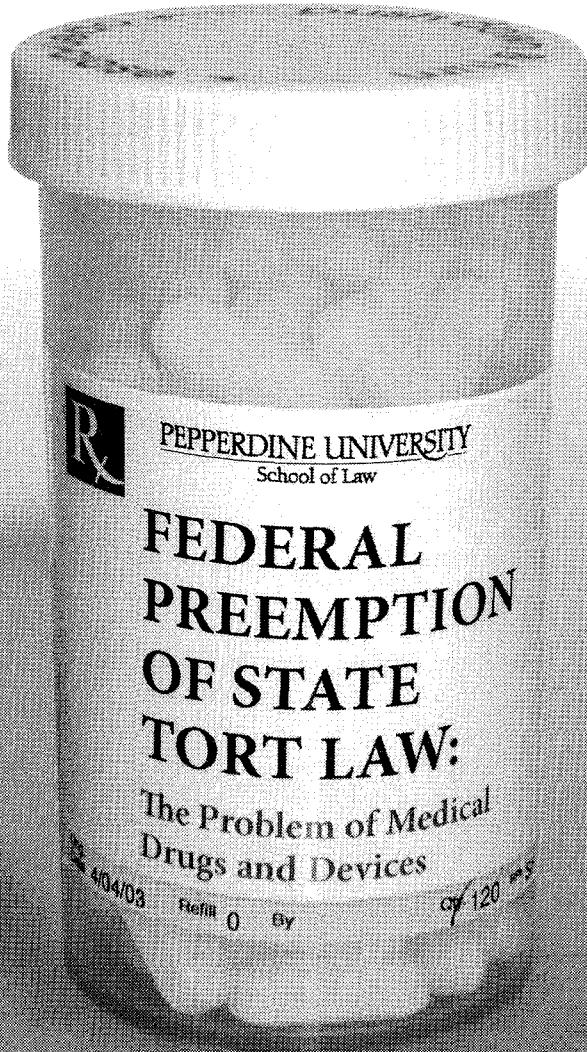
If one had to select one criterion that might indicate the extent to which a society was “open” or “closed,” the legal position of NRMs [new religious movements] would be a not altogether ridiculous choice. For somewhat finer tuning, the second criterion could well be the legal treatment of NRMs.

Id. at 28.

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