

# **Religious Liberty in Germany and the United States: A Comparison**

Dissertation  
zur Erlangung des Doktorgrades  
des Fachbereichs Rechtswissenschaften  
der Universität Osnabrück

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Osnabrück, 2015

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**Tag der mündlichen Prüfung: 18. Dezember 2015**



## **Abbreviations**

BAG – Bundesarbeitsgericht (German Federal Labor Court)

BVerfG – Bundesverfassungsgericht (German Federal Constitutional Court)

BVerwG – Bundesverwaltungsgericht (German Federal Administrative Court)

DE – Delaware

GA - Georgia

GG – Grundgesetz (German Basic Law or German Constitution)

Hess. StGH – Staatsgerichtshof Hessen (State Constitutional Court of Hessen)

MA - Massachusetts

MD – Maryland

NC – North Carolina

NJ – New Jersey

N.D.C.C – North Dakota Century Code

OLG – Oberlandesgericht (higher regional court)

OVG – Oberlandverwaltungsgericht (higher administrative court)

PA - Pennsylvania

RDH - Reichsdeputationshauptschluss of 1803

U.S.C. - United States Code

VG – Verwaltungsgericht (administrative court of first instance)

VGH – Verwaltungsgerichtshof (higher administrative court)

WRV – Weimar Verfassung (Weimar Constitution)

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# Chapter 1: Comparative Constitutional Interpretation

## A. Introduction

*“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” - First Amendment, United States Constitution*

*The Establishment Clause protects religious liberty on a grand scale; it is a social compact that guarantees for generations a democracy and a strong religious community—both essential to safeguarding religious liberty. . . . When the government puts its imprimatur on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs. A government cannot be premised on the belief that all persons are created equal when it asserts that God prefers some.” - Justice Harry Blackmun, Lee v. Weisman, concurring opinion*

The views Justice Blackmun expressed in his *Lee* concurrence regarding the importance of the Establishment Clause reflect a long held belief by many jurists and academics in the United States that religious liberty cannot be fully protected without a vigorous interpretation of the Establishment Clause. To others, especially from countries whose Constitution does not expressly contain a similar clause, this idea that religious freedom cannot be fully protected without express non-establishment principles in either a written constitution or the jurisprudence interpreting it might seem to be at best foreign and at worst condescending. Surely, it was not the intention of the Justice to cast dispersions on countries that do not have an equivalent of the Establishment Clause, and the purpose here is most certainly not to decide whether his statement is valid. Others have indeed warned against making such value judgments when comparing constitutional non-establishment principles:

“the critical point is that Americans must be careful not to impose their uniquely American notion of religious freedom upon the international community because such a notion is not widely shared. Indeed, Americans fail to differentiate between the principles of non-establishment and religious freedom, misguidedly regarding them both as equally fundamental to liberal democracy.”<sup>1</sup>

Keeping these words of warning in mind, this work uses the Justice's quote to frame a broader question: how does a country that has no express equivalent of the American Establishment Clause provide religious liberty “on a grand scale.” Are there some principles other than non-establishment at play that offer equally effective protection of religious liberty? Is there something “hidden” in their jurisprudence interpreting constitutional provisions related to religious liberty that ultimately plays a similar role as the non-establishment principles that have been developed by the United States Supreme Court? Are these non-establishment principles actually necessary to fully protect religious liberty?

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<sup>1</sup>     Alberts, American Separationism and Liberal Democracy, 88 Marq. L. Rev. 867, 898 (2005).

To answer these questions, and others, this work will compare two systems that similarly cherish religious freedom: the United States, whose jurisprudence contains non-establishment principles based on a specific clause in its constitution, and Germany, a country whose constitution, at least on its face, seems to contain limited non-establishment principles. From an institutional church/state perspective, these two countries are routinely placed in different categories with words like “separation” and “cooperation” being used to distinguish them.<sup>2</sup> These words, however place too much emphasis on the institutional relationship between church and state while overlooking some of the potential similarities that exist regarding questions of individual religious liberty.

Interpretations of the Establishment Clause, especially in the realm of individual religious liberty, have without a doubt resulted in some of the most confusing and convoluted of the U.S. Supreme Court's constitutional jurisprudence. For non-Americans trying to understand American Establishment Clause jurisprudence in a vacuum, the task can become even more daunting, leading perhaps to broad characterizations of American religious liberty doctrine that miss the finer points of the disputes over the application of this doctrine. On the other hand, observing German religious liberty doctrine from a distance can equally result in a tendency to paint with a broad brush without appreciating some of its nuisances. An initial aim of this work, then, is to create a framework whereby some of these “finer points” and “nuances” that exist in each system can first be exposed and then compared to one another. Justice Blackmun's thesis about the role of non-establishment principles in religious liberty doctrine offers the beginnings of such a framework.

An exploration of these so-called finer points will reveal that despite not having something expressly equivalent to the Establishment Clause, German courts most certainly have developed and applied non-establishment principles in cases concerning individual religious liberty. The reasons why these principles have been incorporated into German jurisprudence, as well as the purposes they serve, are strikingly similar to those used to justify their incorporation into American religious liberty jurisprudence. With that said, a closer look at each of these systems will demonstrate how history, especially its impact on the development of religious liberty doctrine, shapes the manner in which they are applied. By identifying common non-establishment principles and then analyzing how courts in each jurisdiction apply them, one can hopefully move beyond simple labels such as “separation” and “cooperation” and obtain a fuller understanding of how each system deals with the challenges posed by individual liberty questions.

Those wishing to engage in a comparison of constitutional law like the one being undertaken here are constantly reminded that one ignores history to their own peril. Different histories, we are told, can explain many of the variances that exist in how jurisdictions deal with particular constitutional matters. This is undoubtedly true. Yet

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<sup>2</sup> See for instance Monsma/Soper, *The challenge of pluralism: Church and State in Five Democracies*, (Oxford, 1997), Walter, *Religionsverfassungsrecht: In vergleichender und internationaler Perspektive* (Tübingen, 2006).

lurking beneath this very sound advice is the danger that perceived and actual historical differences will lead one to conclude that the possibility of convergence within a particular area of constitutional law is too remote to warrant a closer comparison. Chapters 2 and 3 of this work will provide an overview of how religious liberty doctrine developed in each country up to the point when courts in each were faced with challenges to its existing doctrine brought on by increased religious diversity.<sup>3</sup> Many of the most obvious differences between the United States and Germany concerning the institutional relationship between church and state are without question products of different histories. However, as Chapters 2 and 3 will show, the same does not necessarily hold true for the historical development of individual religious liberty.

More specifically, in the area of institutional church/state relations, what Germans normally refer to as *Staatskirchenrecht*, the possibility of a convergence of religious doctrines from the German perspective with the United States is often dismissed because it is believed that the historical development of such relations is simply too different: the product of colonial era thinkers like Roger Williams who believed that the only way to ensure true religious freedom is to keep the church separate from the state. From the American perspective, focusing on the cooperative relationship between church and state that has developed in Germany makes the idea of searching for similarities almost unthinkable. Americans point to principles found in the German constitution that can be linked back to a time when church and state were one, and more importantly, principles that seem to conflict with the American Establishment Clause. While there is undoubtedly truth in these generalizations, an opportunity is lost if one simply engages in surface comparisons that are influenced too heavily by these actual and perceived historical differences.

Perceived or actual historical differences have not stopped others from noting that bridges can be found linking the two jurisdictions to allow for constitutional comparisons to be made concerning questions of religious liberty and church/state relations, with the concept of neutrality perhaps being the most popular route.<sup>4</sup> However, while neutrality opens the door for comparison, it only opens it partially. This is primarily because the word neutrality itself has multiple meanings, not only linguistically but also legally. Here, then, it can be said that an additional aim of this work is to look behind words like “neutrality” and “non-establishment” and give them meanings based upon exactly what jurists and commentators mean when they use such words. By providing an overview of the current religious liberty doctrine in each jurisdiction, Chapters 5 and 6 seek to not only give these words meaning, but also place them into context.

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3 According to the 2014 Pew Religious Diversity Index modern Germany is in many respects more religiously diverse than the United States. See <http://www.pewforum.org/2014/04/04/religious-diversity-index-scores-by-country/>. See also the Religionszugehörigkeit survey at <http://www.bpb.de/nachschlagen/zahlen-und-fakten/soziale-situation-in-deutschland/145148/religionszugehoerigkeit> and The American Value Atlas, <http://ava.publicreligion.org/> showing that both countries are becoming increasingly non-religious as well.

4 Monsma, *Kirche und Staat in den USA und der Bundesrepublik Deutschland: auf dem Weg zur Konvergenz?* in *Religion und Politik Zwischen Universalismus und Partikularismus*, Ed. Meyer/Minkenberg/Ostner (Opladen, 2000); Weber, *Religiöse Symbole in der Einwanderungsgesellschaft*, ZAR 2/2004 pg. 53; Haupt, *Religion-State Relations in the United States and Germany: The Quest for Neutrality* (Cambridge, 2012); Walter, *Religionsverfassungsrechts: In vergleichender und internationaler Perspektive* (Tübingen, 2006)

An attempt will be made to identify the underlying purposes served in each country by religious liberty in general and neutrality in particular. The result will be a list of principles that will be referred to collectively as “non-establishment principles” and include goals such as equal treatment, the protection of minorities and the prevention of civil strife, just to name a few. In exposing these underlying principles, the survey will provide additional justifications for using the concept of neutrality as a means to draw comparisons between the two countries, while at the same time provide clarity as to what jurists and commentators in each jurisdiction mean when they use words like neutrality and non-establishment. Of course, identifying non-establishment principles in each jurisdiction only tells part of the story, and stopping there would provide one with an incomplete, and perhaps misleading, picture. Chapters 7 and 8 will be devoted to comparing factually similar cases in order to see just how each jurisdiction applies its version of non-establishment principles. Here we will see convergence on some level as well as clear differences between the two systems. More importantly, here we will ultimately be able to see how a country that has no express equivalent to the American Establishment Clause provides protection for religious liberty in a manner similar to the Establishment Clause.

Professor Michael McConnell has said that “[r]eligious freedom claims present paradoxical combinations of duty and liberty, neutrality and special accommodation.”<sup>5</sup> Here the professor was talking about the challenges this “paradoxical combination” pose for American courts, but there is nothing in this statement that limits these considerations only to the United States. The bulk of this work will show that courts in both jurisdictions have had to grapple with these questions, and while these courts have sometimes come up with different answers, the similarities in how each deals with these questions are sometimes striking. Additionally, we shall see that as a country becomes more religiously diverse, answering these questions becomes even more difficult. Illustrating how each country has balanced questions concerning duty, liberty, neutrality and accommodation with respect to individual religious freedom in the face of growing diversity is perhaps the main aim of this work. Here an attempt will be made to provide the reader with the bigger picture of how this balancing has taken place in each country, while also exposing and illuminating the nuisances that exist in each. In so doing, it will ultimately be shown how a country with no express equivalent to the Establishment Clause is able to provide its citizens with religious liberty “on a grand scale.”

## **B. Comparative Constitutional Law**

The focus of this work, the United States Constitution and the German *Grundgesetz* (Basic Law), are prime examples of text that were influenced by foreign political and legal philosophies, and since their ratifications, have significantly influenced the constitutions of other nations. In short, the focus of this work are themselves products of and contributors to comparative law. In light of this long and rich history of nations

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<sup>5</sup> McConnell, The origins and historical understanding of free exercise of religion, 103 Harv. L. Rev. 1409, 1416 (1990)

borrowing from foreign theorists and constitutions, it is not surprising that much has been written about comparative constitutional law over the past hundred years, and even more has been written about the many challenges that face one engaging in comparative public law, and more specifically comparative constitutional law.<sup>6</sup>

Many have argued that public law, especially constitutional law, poses particular challenges to the comparative law analyst. Public law simply does not contain the clear systematic divisions that exist in private law with regards to common law and civil law. With that said, comparative public law has a long and rich tradition<sup>7</sup>, arguably an even longer tradition than comparative private law, and while its usefulness is open to debate<sup>8</sup>, advocates of comparative public law note that there are means to narrow one's analysis in a manner that will result in meaningful and useful comparisons. American advocates of comparative law are painfully aware of the doubts about the usefulness of such works, doubts that among some jurists and academics in the United States take the form of an almost violent reaction to the idea of using foreign law to help answer constitutional questions. The late Justice Antonin Scalia, arguably the intellectual leader of American comparative law doubters, perhaps summed up best the reluctance of many American jurists to even consider looking outside America's borders for answers to legal questions when he said “[w]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.”<sup>9</sup>

Yet American comparative law analysts need not be discouraged by such sentiments, as history has shown that even jurists one might not assume are open to outside influences sometimes surprisingly look outside of the safe confines of American jurisprudence when it meets their objectives.<sup>10</sup> Thus, despite the rhetoric from the likes of Justice Scalia and his fellow comparative law detractors, there does seem to be some agreement among American academics and even jurists, except on the fringes, that once one has exhausted one's own domestic sources of law, it might be proper to look at the experiences elsewhere.<sup>11</sup> In the words of Justice Stephen Breyer, these experiences might at the very least “cast an empirical light on the consequences of different

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6 Baer, *Verfassungsvergleichung und reflexive Methode: Interkulturelle und intersubjektive Kompetenz*, ZaöRV (2004) pp. 735; Großfeld, *Kernfragen der Rechtsvergleichung*, (Tübingen, 1996); Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 Am. J. Comp. L. 125, 2005; Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 Duke L.J. 223, 2001; Krüger, *Eigenart, Methode und Funktion der Rechtsvergleichung im öffentlichen Recht*, in: *Staatsphilosophie und Rechtspolitik: Festschrift für Martin Kriele*, (München, 1997) pg 1393; Sommermann, *Die Bedeutung der Rechtsvergleichung für die Fortentwicklung des Staats- und Verwaltungsrechts in Europa*, DöV 24/1999 pg. 1017; Starck, *Verfassung*, (Tübingen, 2009); Starck, *Rechtsvergleichung im öffentlichen Recht*, JZ 1997, pg. 1021; Trantas, *Die Anwendung der Rechtsvergleichung bei der Untersuchung des öffentlichen Rechts*, (Dresden; München, 1998); Tschentscher, *Dialektische Rechtsvergleichung – Zur Methode der Komparistik im öffentlichen Recht*, JZ 2007 pg 807; Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 Yale Law Journal 1225, 1999; Wieser, *Vergleichendes Verfassungsrecht*, (Wien, 2005).

7 Tschentscher, *Dialektische Rechtsvergleichung* pg. 807.

8 Baer, *Verfassungsvergleichung und reflexive Methode: Interkulturelle und intersubjektive Kompetenz*, pg. 737.

9 *Thompson v. Oklahoma*, 487 U.S. 815, 868-69 (1988) (Scalia, dissenting)

10 Vicki Jackson provides perhaps the most stark example by noting that Justice Rehnquist cites a decision by the BVerfG in his dissent in *Planned Parenthood v. Casey*. See Jackson, *Narratives of Federalism*, pg. 252.

11 Tushnet, *The Possibilities of Comparative Constitutional Law*, pg. 1230.

solutions to a common legal problem.”<sup>12</sup>

## 1. Objectives of Comparative Law

As the foregoing suggests, the practice of courts looking outside of their own jurisdiction to help them interpret their constitution is perhaps one of the most important objectives of comparative constitutional law. This has been referred to by the likes of Peter Häberle, among others, as the fifth method of interpretation next to the four classical methods: grammar, systematic, historical and philo-sophical.<sup>13</sup> Somewhat related to comparative law being used as an interpretation tool is its use as a method of scholarly analysis. In fact, it is often scholarly analysis that shines light on the possibility for a court to use foreign law to answer a particularly taxing legal question or problem. Here both German and American scholars agree that comparative law generally aims to explore the similarities, and more importantly the differences, between laws, jurisprudence and doctrines of legal systems. By doing so, it is said that one can not only learn about other systems, but also fine tune an understanding of one's own system.<sup>14</sup> Some have even suggested that engaging in comparative analysis can be a means of avoiding so-called “legal cultural imperialism.”<sup>15</sup> This involves overcoming the bias that leads one to believe that their own system has a better, more sensible and more comprehensive solution to a particular legal problem, ultimately resulting in the aforementioned reevaluation of one's own system. In some respects, considering the Blackmun quote that frames this work, the comparison being undertaken here is an attempt to overcome biases Americans have concerning the importance of the Establishment Clause and its underlying principles in the overall scheme of religious liberty.

While some works take a system-wide approach, as will be discussed later, others narrow their comparative focus to a particular legal issue or question, and look to foreign jurisdictions in search of possible solutions to the particular problem<sup>16</sup> It is normally not the search for concrete solutions in the jurisprudence of another jurisdiction that drives the comparative analyst,<sup>17</sup> rather it is the search for principles that can be adapted to fit the unique characteristics of the one's home jurisdiction that is

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12 Tushnet, *The Possibilities of Comparative Constitutional Law*, pg. 1232 (quoting Justice Breyer's dissent in *Prinz v. United States*, 521 U.S. 898 (1997))

13 Wieser, *Vergleichendes Verfassungsrecht*, pg. 33; Sommermann, *Die Bedeutung der Rechtsvergleichung*, pg. 1020. Uwe Kischel points out, however, that using comparative law as an interpretive tool is limited to constitutions that stem from a similar source of ideas and similar historical and cultural origins. See Kischel, *Rechtsvergleichung*, (München, 2015) pg. 80

14 “Rechtsvergleichung wird betrieben, um Gemeinsamkeiten und genauso wichtig Unterschiede der Rechtsordnung zu erkennen, die Relativität rechtlicher Denkstrukturen zu durchschauen und Beobachtungen darüber zu machen, wie durch verschiedene Konstruktionen dieselbe Rechtsidee zu verwirklichen angestrebt wird.” Starck, *Rechtsvergleichung im öffentlichen Recht*, pg. 1023; “Comparison is a fundamental tool of scholarly analysis. It sharpens our power of description and plays a central role in concept formation by bringing into focus potential similarities and differences among cases.” Hirschl, *The Question of Case Selection*, pg. 129; see also Tschentscher, *Dialektische Rechtsvergleichung*, pg. 811; Wieser, *Vergleichendes Verfassungsrecht*, pg. 29; Sommermann, *Die Bedeutung der Rechtsvergleichung*, pg. 1020; see also Starck, *Verfassung*, pg. 344.

15 Kischel, *Rechtsvergleichung*, pg. 51 and pg. 56.

16 Krüger, *Eigenart, Methode und Funktion*, pg. 1403; Sommermann, *Die Bedeutung der Rechtsvergleichung*, pg. 1020.

17 Trantas, *Die Anwendung der Rechtsvergleichung*, pg. 51.

normally more fruitful. Furthermore, the search for solutions or clarifications in other jurisdictions cannot take the form of simply comparing legal concepts that on their face appear to be similar, rather one must seek to obtain a fuller understanding of the historical, cultural, and political aspects that have shaped the concepts to get a clearer picture of where true similarities and differences lie.<sup>18</sup>

Mark Tushnet, in talking about a particular approach of comparative constitutional law that will be addressed in more detail in the following pages, writes:

“Every society’s law is tied to so many aspects of that society--its politics, its particular history, its intellectual life, the institutional forms in which its activities are conducted, and many more--that no functionalist account can identify and take into account all the variables that might affect the degree to which participants in one system can learn from the experience in others.”<sup>19</sup>

He continues by noting that most critics of comparative constitutional law attack works because they selectively leave out some of these variables in order to reach certain results.<sup>20</sup> By ignoring historical, political, or cultural aspects of the compared jurisdiction, Tushnet argues, the comparative analyst makes it easier to raise doubts about the validity of the comparisons being made.<sup>21</sup> However, as he makes clear, a comparative constitutional law analyst “can respond to the 'omitted variables' problem by offering a theoretical account explaining why the few variables she uses are in fact important.”<sup>22</sup>

## 2. Methods of Comparative Law

Before breaking down the various approaches to comparative law, it must be noted that as a general matter there is no consensus over proper methods, and searching for one correct method is illusory.<sup>23</sup> With that said, there are common “rules” and “guidelines” that the comparative analyst should consider when undertaking a comparative work. Which guidelines may be used for a particular work is usually dependent on the work’s goals.<sup>24</sup> There is also some agreement that while all methods have at their core the comparison of legal doctrine, comparative analysts ignore at their own peril the legal culture and culture in general in which these principles operate.<sup>25</sup> To avoid some of the problems inherent with the functional comparative method, one is normally encouraged to identify and understand the impact culture has had on the development of constitutional norms in a given jurisdiction. For example, as K.P. Sommermann points out, the only way to understand some of the more unique aspects of American views

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18 “Bei der Suche nach Brüchen dürfen wir nicht einfach Begriffe (Namen) vergleichen; wir müssen die Wirklichkeit und das Bild suchen, auf das sich die Begriffe beziehen.” Großfeld, Kernfragen der Rechtsvergleichung, pg. 18; Krüger, Eigenart, Methode und Funktion, pg. 1399.

19 Tushnet, *The Possibilities of Comparative Constitutional Law*, pg. 1265. For an overview of the criticism of the functional approach and responses to such see Kischel, *Rechtsvergleichung* pp. 95-108.

20 Tushnet, *The Possibilities of Comparative Constitutional Law*, pg. 1265.

21 Tushnet, *The Possibilities of Comparative Constitutional Law*, pg. 1265.

22 Tushnet, *The Possibilities of Comparative Constitutional Law*, pg. 1269.

23 Sommermann, *Funktionen und Methoden der Grundrechtsvergleichung* §16, Rn. 50; Kischel, *Rechtsvergleichung*, pg.93.

24 Sommermann, *Funktionen und Methoden der Grundrechtsvergleichung* §16, Rn. 52

25 Kischel, *Rechtsvergleichung*, pg. 93

regarding comparative and international law is to understand the role that the positive rights movement has played in shaping American legal culture and American culture at large.<sup>26</sup> Along these same lines complete comparative works should also contain something akin to a sociology of the law whereby attention is paid to the relationship between law and society, and how each impacts the other.<sup>27</sup> One cannot lose sight of the possibility that constitutions are a likeness of their people, or mirror their people, instead of shape them.<sup>28</sup>

In addition to comparing the influence culture and society has had in the development of the constitutions under examination, a comparison of history can also serve to enlighten one regarding aspects of the conditions that were in place leading up to the drafting of a constitution as well as how the document was received by the populace and developed over time by the judiciary.<sup>29</sup> Exploring the historical development of a legal system or legal doctrine allows one to look beyond the principles contained in the doctrine and see why the doctrine was created in the first place.<sup>30</sup> Finally, in carrying out a comparative analysis one must never lose focus of for whom and from whom the law offers protection, and what function it serves.<sup>31</sup> This too can differ from jurisdiction to jurisdiction even when the concept being examined seems to be similar on its face. For example, Uwe Kischel reminds readers that while the constitutions of both the United States and Germany contain provisions related to freedom of speech, the interests being advanced by free speech are arguably different in each.<sup>32</sup> In Germany free speech arguably advances the interests of personal development and human dignity, while in the United States it is aimed more at advancing the so-called marketplace of ideas.

What follows will be a discussion of the methods that will serve as the basis for the comparison being undertaken in this work. However, before setting off on this discussion, it is worth noting that there are at least six different categories of comparative methods.<sup>33</sup> At the top of this list is the classical problem and concept comparisons whereby norms are compared to see how they are used to solve a particular legal problem or how they operate conceptually. This broad category is seen as more of a sliding scale whereby the further one moves away from pure factual problem questions, the closer one gets to conceptual comparisons. The results of classical comparison usually focus on similarities and differences between legal systems, and sometimes even on solutions to particular problems. The next method on this list asks how the law functions, the so-called functional approach, and will be discussed in greater detail in following pages. Here it is enough to note that the goal of this kind of comparison is to impart knowledge so as to avoid misconceptions about another legal system. In undertaking this kind of analysis one can look at: 1) legal

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26 Sommermann, Funktionen und Methoden der Grundrechtsvergleichung, §16, Rn. 20.

27 Kischel, Rechtsvergleichung, pg. 14. (noting that sociology of the law is not as far removed from dogmatic aspects of the law as one might think.)

28 Kischel, Rechtsvergleichung, pg. 78

29 Sommermann, Funktionen und Methoden der Grundrechtsvergleichung, §16, Rn. 7

30 Kischel, Rechtsvergleichung, pg. 13

31 Kischel, Rechtsvergleichung, pg. 95

32 Kischel, Rechtsvergleichung, pp. 95-96

33 Kischel, Rechtsvergleichung, pp. 175-179

methods and philosophical questions; 2) legal culture; or 3) the practical effect of legal norms. A third category is more narrow and looks at particular aspects of legal doctrine, something Kischel refers to as “subtopic comparisons.” This category will likely overlap with either of the first two, with the primary difference being its scope. Two other categories of comparison look at instances where nations either voluntarily or are “forced” to incorporate foreign legal concepts into their national legal doctrine. The final category is a comparison that focuses on abstract or systemic questions. If one were to attempt to pinpoint into which category this work fits, perhaps saying that it is a subtopical, functional analysis would be appropriate, with the primary goal being to shed light on how particular religious liberty principles operate in two countries whose constitutions contain differing language concerning the protection of this right.

#### a. Macro and Micro Comparisons

Comparative constitutional law can generally be divided into two additional broad categories: macro comparisons and micro comparisons. The macro comparison compares entire legal systems or parts thereof whereby the micro comparison looks at smaller components of systems or more commonly tackles specific legal questions with which the compared systems have dealt.<sup>34</sup> However, these two kinds of comparisons are not necessarily mutually exclusive, as many works will contain elements of both. Thus, some have suggested that it is perhaps better to view macro and micro comparisons as the poles on a sliding scale, with most comparative works having elements of both and the only question being in which direction the work is primarily focused.<sup>35</sup> Because this work focuses on a specific legal issue that is common to the jurisdictions being compared, namely the role played by non-establishment principles in the overall religious liberty doctrine, it leans more toward the micro category. However one cannot fully appreciate how these principles work without also providing a macro view of the religious liberty doctrine and how it fits into the overall system of rights that exist in each jurisdiction. Thus, one must obviously have a grasp of the macro in order to understand the potentially unique characteristics of the system(s) being compared that might play a role in how the micro question/issue is framed or handled in each legal system.<sup>36</sup>

Properly framing the micro question to be analyzed is a critical first step for any comparison. It is often recommended that the problem be framed, as best as possible, in a manner that is free from the biases one might have from working extensively with material from one's own jurisdiction. Avoiding the unique perspectives and limitations of one's own legal system is thus critical to a proper framing of the micro question.<sup>37</sup> To combat this, many scholars characterize a pure comparative work as being neutral or at least having a neutral starting point.<sup>38</sup> However, others claim that perfect neutrality need

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34 Starck, *Rechtsvergleichung im öffentlichen Recht*, pg. 1026; Trantas, *Die Anwendung der Rechtsvergleichung*, pg. 56.

35 Kischel, *Rechtsvergleichung*, pg. 9

36 Starck, *Verfassung*, pg. 351.

37 Krüger, *Eigenart, Methode und Funktion*, pg. 1405; Sommermann, *Die Bedeutung der Rechtsvergleichung*, pg. 1022; Kischel, *Rechtsvergleichung*, pg. 94

38 see generally Starck, *Rechtsvergleichung im öffentlichen Recht*

not be achieved, especially if the goal is to analyze a potential weakness or ambiguity in one's home legal system.<sup>39</sup> Striving to achieve such neutrality in this context is unnecessary, inefficient and burdensome.<sup>40</sup> Justice Blackmun's quote set forth at the beginning of this chapter perhaps exemplifies this difficulty. His thesis takes the position that in the absence of non-establishment principles, it is impossible to have true religious freedom. Instead of asking simply whether this is true, which would reflect clear biases this writer brought into this work at its inception, the question here is broader: a search for the meaning of non-establishment and the role these principles play in two similarly situated countries. Yet even this framing of the question is not without its biases. By focusing on non-establishment principles, it is already implied that these principles have some kind of value in the protection of religious liberty. In short, true neutrality is illusory, and the best one can hope for in a work like this is objectiveness.

## b. A Functional Approach to Micro Comparisons

When discussing approaches to micro comparative constitutional law, both German and American academics inevitably touch upon aspects of the so-called functional approach of comparative law.<sup>41</sup> Under this approach one begins with substantive issues and solutions put forth by courts in the examined jurisdictions. Here similarities and differences are first identified and then examined closer, going beyond doctrine, in search of an explanation as to why these similarities and difference exist.<sup>42</sup> Through this process, one seeks to obtain a better understanding not only of other legal systems but also of one's own. More importantly, though, the idea is that by comparing roughly comparable questions of law in roughly comparable jurisdictions one might gain insight into what "the law" is.<sup>43</sup> However, when comparing text, one must be careful not to simply rely on words alone. Here Roscoe Pound's distinction between law in the book and law in action is often cited as a useful guideline.<sup>44</sup> How the law is applied in practice, not simply the words alone, must be the focus of comparative legal studies. Thus, simply stating that courts in both the United States and Germany demand the state to be neutral on questions of religion would only provide a superficial comparison. One must also know how this term is applied by courts and what the practical results of this application are.

The functional approach is undoubtedly not without its pitfalls. In acknowledging this Vicki Jackson points out that "[i]nterestingly, though, this idea of looking to foreign

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39 Tschentscher, *Dialektische Rechtsvergleichung*, pg. 812

40 Tschentscher, *Dialektische Rechtsvergleichung*, pg. 812; Kischel, *Rechts-vergleichung* pg 98. (noting that simply by referring to legal questions as a problem, one has already engaged in making a value judgment that contradicts the idea of neutrality).

41 See generally Wieser, *Vergleichendes Verfassungsrecht*; Tushnet, *The Possibilities of Comparative Constitutional Law*.

42 Kischel, *Rechtsvergleichung*, pg. 94; Bernd Wieser, *Vergleichendes Verfassungsrecht*, pg 20; Jackson, *Narratives of Federalism*, pg. 258

43 Jackson, *Narratives of Federalism*, pg. 255. see also Baer, *Verfassungsvergleichung und reflexive Methode*, pg. 739.

44 Pound, *The Spirit of the Common Law*, (Francetown, 1921), pp. 212-213; See also Sommermann, *Funktionen und Methoden der Grundrechtsvergleichung* §16, Rn. 68; Sommermann, *Die Bedeutung der Rechtsvergleichung*, pg. 1022 ; Kischel, *Rechtsvergleichung*, pg. 7

practices to inform our understanding of the law depends in part on the idea that constitutional law is distinctive and to some extent autonomous from culture, historical contingencies, politics, and so forth.”<sup>45</sup> This begs the question whether findings regarding how other jurisdictions handle a particular legal problem can truly be of any value. The general view is that comparative constitutional law has little value unless one also clearly takes into consideration the historical, political and sociological backdrop of the jurisdictions being compared. Failure to do this will result in a superficial comparison at best.<sup>46</sup>

### 3. The Application of These Principles

In his recent work “Rechtsvergleichung” Uwe Kischel suggests that a functional approach that takes into consideration all the outside influences that might impact how the law has developed and is being applied might be labeled as a contextual comparative analysis (*kontextuelle Rechtsvergleichung*). Kischel argues that a proper application of the functional approach requires one to take into consideration the conceptual, dogmatic, cultural context in which the norm under consideration is being applied.<sup>47</sup> Furthermore, any undertaking to explain similarities and difference must be aware of the legal, social, historical or political nature of the environment and explain how each of these might account for similarities or differences between how the norm in question operates in each system. Finally, because the functional approach requires one to consider the context in which the norms being compared operate, one should more likely refer to this as a contextual approach.

Ultimately, this work is an endorsement of the so-called contextual approach and as such the remainder of this introduction will seek to explore the differing context in which the religious liberty jurisprudence of the United States and Germany operate. Before doing so, however, it must again be stressed that this work is not beginning at a purely neutral starting point, as the main purpose here is to explore how something characterized as a uniquely American principle of religious liberty, i.e. non-establishment, operates in a foreign system whose constitution does not expressly contain this principle. Furthermore, this survey will take an unabashedly Anglo-American approach by placing a heavy emphasis on the jurisprudence of United States Supreme Court to create a framework by which German non-establishment principles can be identified. With that said, every effort has been made throughout this work to approach the topics as objectively as possible, keeping in mind the warning found in

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45 Jackson, *Narratives of Federalism*, pg 256 (Jackson actually listed four potential purposes, including obtaining a better understanding of one's own constitutional traditions, and strengthening the quality of constitutional decisions); see also Kischel, *Rechtsvergleichung*, pg. 6.

46 Jackson, *Narratives of Federalism*, pg 256

47 Kischel, *Rechtsvergleichung*, pp. 187 (“Im Kern geht es der funktionalen Herangehensweise darum, das rechtliche und außerrechtliche Umfeld zu berücksichtigen, in dem jede rechtliche Regelung steht: der Rechtsvergleicher muß erkennen, in welchem etwa begrifflichen, dogmatischen oder kulturellen Umfeld die eigene Norm steht und sie gegebenenfalls von diesem Kontext abstrahieren, muß kontextunabhängig die Sachfragen erkennen, die geregelt werden, muß auch bei fremden Rechtsinstituten etwa deren Geschichte, Bedeutung oder Wirkung berücksichtigen und muß vor allem bei der Klärung des Warum von Unterschieden und Gemeinsamkeiten alle einschlägigen Informationen etwa rechtlicher, gesellschaftlicher, historischer oder politischer Art über das Umfeld berücksichtigen. Kern der Rechtsvergleichung ist also stets die Berücksichtigung des Kontexts: es geht um kontextuelle Rechtsvergleichung.”)

the preceding pages about avoiding value judgments.

### C. The Limits to Comparative Constitutional Law

As has already been clearly pointed out, one cannot look at an abstract question without taking into consideration historical, political, economic and societal factors.<sup>48</sup> “The dangers of 'borrowing' from one legal system to another are famous: the law of any polity is a construct embedded in a specific social and political culture and its transmutation to other polities is not easily achieved.”<sup>49</sup> This is especially true in the area of constitutional law where comparing text alone, without paying attention to cultural and political factors that might heavily influence how this text in practice is applied, will likely lead one astray. As Hartmut Krüger argues, when making constitutional comparisons, one must go beyond simply comparing text and pay close attention to political and cultural influences.<sup>50</sup> With this in mind, the remaining part of this section of the introduction will touch upon many of the cultural and political influences that might present potential pitfalls.

#### 1. Problems of Language

Whether the comparison is a micro or macro analysis, one must keep in mind that the exact same words and phrases found in the languages of the jurisdictions being compared can have different meanings.<sup>51</sup> Recognizing this initially is difficult enough, but once realizing that there are differences, the proper response might not be all that clear. Especially in the German comparative public law setting, how one deals with this problem has been a source of some debate. Some advocate for the creation of a “metaphysical” language that bridges the gap between meanings. By doing so, one is less likely to impose one's own biases onto the meaning of the word in question.<sup>52</sup> Others argue that one can pay attention to various meanings words might have without having to shed one's own already ingrained perspectives, or put differently, without having to be purely neutral.<sup>53</sup> Regardless of one's views of the need to create some kind of a “metaphysical language,” it goes without saying that it is crucial to pay close attention to how the meaning of these words and phrases have developed in the given jurisdiction and how that may impact the comparison.<sup>54</sup> Once different meanings are

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48 Sommermann, *Die Bedeutung der Rechtsvergleichung*, pg. 1022 (he also includes economics in his potential pitfalls).

49 Weiler/Trachtman, *European Constitutionalism and Its Discontents*, 17 *Nw. J. Int'l L. & Bus.* 354, 355 (1996-1997)

50 Krüger, *Eigenart, Methode und Funktion*, pg. 1399 (“Mehr als jedes andere Rechtsgebiet ist das Verfassungsrecht dem Druck und Gegendruck der politischen und gesellschaftlichen Kräfte ausgesetzt, die miteinander um direkten oder indirekten Einfluß auf die politischen Zielbestimmungen des Gemeinwesens konkurrieren bzw. ihre partiellen Interessen durchsetzen wollen. Der ständige Wandel der politischen Konstellationen und die vielfältigen Aktivitäten intermediärer Gewalten führen dazu, daß die Verfassungspraxis in allen Ländern anders aussieht, als es der Text der Verfassungen vermuten lassen könnte. Die Verfassungswirklichkeit wird von vielen Faktoren beeinflusst, die in allen Staatsordnungen nach Art, Stärke und Mannigfaltigkeit variieren”).

51 Starck, *Rechtsvergleichung im öffentlichen Recht*, pg. 1027; Baer, *Verfassungsvergleichung und reflexive Methode*, pg. 745; Kischel, *Rechtsvergleichung* pg 188

52 Starck, *Rechtsvergleichung im öffentlichen Recht*, pg. 1027; Starck, *Verfassung*, pg. 352.

53 Tschentscher, *Dialektische Rechtsvergleichung* pg. 812.

54 Trantas, *Die Anwendung der Rechtsvergleichung*, pg. 79; Sommermann, *Funktionen und Methoden der Grundrechtsvergleichung in Handbuch der Grundrechte*, Vol. 1, Ed. Merten/Papier (Heidelberg, 2004) §16, Rn.

identified, the goal should then turn to building a bridge between these meanings that will allow for some kind of fruitful comparison.<sup>55</sup> Focusing on the origins of these different meanings is necessary in order to truly bridge this gap. As will be seen in the pages that follow, close attention must be paid in this work to the meaning of words such as neutrality, positive religious freedom, negative religious freedom, establishment, and free exercise, just to name a few. The fair amount of space in this work being devoted to the historical development of religious freedom and related questions in both jurisdictions is intended to unearth and explain how these words are used in order to create the bridge needed for purposes of comparison.

## 2. Problems of Sources

Often cited as a potential pitfall in comparative public law, the concern with sources is that in public law there can be a variety of them, many of which might be fragmented or not fully developed.<sup>56</sup> However, this appears to pose little problem for the comparisons about to be made. Religious rights in both jurisdictions are anchored in a written constitution, and as will be illustrated, each system has over 70 years of case law interpreting these provisions.<sup>57</sup> Furthermore, the interpretations create binding precedent on lower courts and are rarely changed by the highest courts in Germany and the United States. Nevertheless, attention must also be paid to sources that set forth these rights and give them additional meaning. In this work we will see, for instance, an over-reliance on the words of judges in the United States context as opposed to academics in the German context. This “over-reliance” is a product of how each jurisdiction views the roles of judges and academics in shaping constitutional jurisprudence, as well as how courts in each legal system set forth their opinions. For example, it is relatively rare for members of the German Constitutional Court to draft dissenting opinions. On the other hand, it is rare for members of the U.S. Supreme Court not to set forth dissenting or concurring opinions. The weight these “extra” opinions are given in each system also is a product of the legal tradition, and understanding this is crucial to being able to determine what are legitimate sources of constitutional interpretation in each country.

## 3. Systematic/Jurisdictional Differences

### a. Perspectives

From a macro perspective, there are numerous similarities and differences between Germany and the United States. Both are stable constitutional democracies. Both have federal systems. Both have constitutions that seek to separate powers. Both have a rich tradition of judicial review; each with a strong constitutional court, or in the American case a court that acts as a constitutional court, that is not afraid to exercise its power.

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59 and Rn. 73; Kischel, *Rechtsvergleichung*, pg. 189

55 Großfeld, *Kernfragen der Rechtsvergleichung*, pg. 18.

56 Krüger, *Eigenart, Methode und Funktion*, pg. 1397; Kischel, *Rechtsvergleichung* pg 190.

57 Obviously the American constitution is older than 70 years, but as will be seen, up until the mid 1940s the Supreme Court rarely was asked to apply and/or interpret the two religion clauses found in the First Amendment.

However, each of the above examples, while facially similar, contain differences as well. While both have written constitutions, the American version is far shorter and contains far more ambiguities than its longer, more specific German cousin. A prime example of such ambiguity can be seen in how each deals with questions of federalism. While the German approach leans more in the direction of trying to expressly define the contours of federalism, the American version is plagued with vague clauses, such as the Commerce Clause and Necessary and Proper Clause, that have been the source of sometimes heated confrontations between the federal government and the states. Further, while both countries have a tradition of judicial review, differences can also be seen regarding, for instance, at what point the courts will become involved in an issue,<sup>58</sup> and the ability of lower courts to also exercise this power.

None of these macro differences, however, likely impact the comparison being made here. Instead, Christian Walter, among others, has perhaps put his finger on a macro comparison that just might need to be considered when thinking about how these two countries deal with questions of religion. Walter focuses on how citizens view the role of the state in society when he writes that for Germans, the concept of society is centered on the State, as compared to the Anglo-American concept of “civil society,” which makes the people the focal point.<sup>59</sup> This potential difference at the macro comparative level will be explored in more detail in the following chapters dealing with the historical development of religious freedom and related questions in both countries, as failure to explain and understand this difference might result in false conclusions concerning the differences that exist in the religion jurisprudence of each country.

From a micro perspective, as current German Constitutional Court Judge Susanne Baer points out and nicely illustrates, an effective comparative analysis must pay close attention to how the jurisdictions being compared frame constitutional questions being addressed in a study.<sup>60</sup> Baer uses abortion as a classic example, whereby the discussion in Germany has been framed as one involving the life of the fetus, in the United States the focus has been placed on the privacy rights of women. In this work framing questions of religious liberty, especially in context of so-called negative and positive religious freedom, pose perhaps the largest challenge.

## b. Methods and Roles of Interpretation

Outside of ignoring history, there is perhaps no greater pitfall than overlooking how courts in the compared jurisdictions view their role within the legal system and more importantly what methods they use to interpret their country's constitution.<sup>61</sup> Both can impact how an almost identical text operates in practice in a given jurisdiction.<sup>62</sup> For instance, in the United States, the Supreme Court's interpretations of the religion clauses have been heavily influenced by what the Justices believe were the subjective

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58 See Kommers/Miller, *The Constitutional Jurisprudence of Federal Republic of Germany*: 3<sup>rd</sup> Ed. pp. 33-40 (Durham, London, 2012)

59 Starck also talks about “Staatsverständnis” (Starck, *Verfassung*, pg. 357).

60 Baer, *Verfassungsvergleichung und reflexive Methode*, pg. 741.

61 Krüger, *Eigenart, Methode und Funktion*, pg. 1401

62 Krüger, *Eigenart, Methode und Funktion*, pg. 1401

views of the drafters of the constitution. In a comprehensive study of various uses of history in Supreme Court cases concerning the two religion clauses, Mark David Hall points out that “76% of the Justices who have written at least one Religion Clause opinion have appealed to history, and every one of the twenty-three Justices who authored more than four Religion Clause opinions have done so.”<sup>63</sup> He later concludes that the use of history as an interpretative tool in religion cases crosses ideological lines, the main difference being that these Justices do not necessarily appeal to the same history when making their arguments.<sup>64</sup> However, merely focusing on the use of history overlooks how and why Justices have done so over the past two centuries. Here it should be noted that interpreting the American Constitution poses many challenges, primarily because of its age, difficulty to amend, and a vagueness of terms.<sup>65</sup> The need to interpret it has existed since the founding of the country, and the debate over how it should be interpreted is equally as old, the question in the founding era being whether the Constitution was subordinate to natural law as opposed to being the final source of law.<sup>66</sup>

While in other countries, the primary means of amending the constitution is through the amendment process, in the United States constitutional change has taken place primarily as a result of court interpretation.<sup>67</sup> Because of this, the distinction in the United States “between interpretation and alteration is accordingly quite thin.”<sup>68</sup> With that said, the differing levels of difficulty vis-a-vis amending the constitution plays a limited role in the overall analysis in this work as neither jurisdiction has sought to amend their constitution in a manner that impacts religious liberty. Nevertheless, providing an overview of how both countries engage in constitutional interpretation is warranted as it will help explain the rise of so-called originalism in the United States as a method of interpretation, and illustrate how this method differs from those used by German jurists, especially in cases concerning the interpretation of each constitution’s religious clauses.

Constitutional interpretation in the United States commonly begins with an analysis of the text of the constitution itself.<sup>69</sup> This so-called textual method of interpretation can take many forms including: 1) looking at the ordinary meaning of the word in the constitution; 2) determining whether the word had a particular or technical meaning at the time it was written into the constitution; 3) taking into consideration how amendments to the constitution impact the text; and 4) seeing whether longstanding practice has developed concerning the application of the text.<sup>70</sup> Textualism, however,

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63 Hall, *Jeffersonian Walls and Madisonian Lines: The Supreme Court's Use of History in Religion Clause Cases*, 85 *Oregon Law Review* 563, 572 (2006).

64 Hall, *Jeffersonian Walls and Madisonian Lines*, pg. 580.

65 Tushnet, *The United States: Eclecticism in the Service of Pragmatism*, in *Interpreting Constitutions: A Comparative Study*, Ed. Goldsworthy (Oxford, 2006) pg. 7.

66 See Rosenfeld, *Constitutional adjudication in Europe and the United States: paradoxes and contrasts*, 2 *Int'l J. Const. L.* 633, 657, 2004

67 Compare to Germany where between 1994 and 2005 amendments to the Basic Law have changed or deleted 25 articles and 44 clauses. See Kommers, *Germany: Balancing Rights and Duties*, in *Interpreting Constitutions: A Comparative Study*, Ed. Goldsworthy (Oxford, 2006) pg. 171.

68 Tushnet, *The United States*, pg. 7.

69 Tushnet, *The United States*, pg. 26; Rosenfeld, *Constitutional adjudication in Europe* pg. 660.

70 Tushnet, *The United States*, pp. 26-30.

rarely results in a conclusive interpretation, forcing judges to use some of the other interpretative tools at their disposal. Arguably unique to the United States, a method of constitutional interpretation has been developed, which focuses almost solely on the subjective intent of the drafters of the constitution. Broadly labeled as “originalism,” “original intent,” or “original understanding,” the popularity of this method can best be seen as a reaction to what many jurists and commentators “perceived as the unjustified activism of the Supreme Court in the 1960s.”<sup>71</sup> In other words, this form of interpretation was and is an attempt to rein in “judicial activism” by limiting the scope of interpretation to only the subjective views of the drafters of the text. To be sure, looking at the original intent of the drafters of the constitution is nothing new in American constitutional interpretation doctrine, as the aforementioned study by Hall clearly illustrates, however only recently has the subjective intent of the founders been used by some Justices as the primary and even sole interpretive tool for interpreting the constitution.

Three others tools are also often used by American jurists, including: 1) constitutional theory, which seeks to interpret the word in a manner that is consistent with the text or spirit of constitution itself<sup>72</sup>; 2) court precedent, which while not binding, is almost always controlling; and 3) value arguments or appeals to Justice, which can be found in cases concerning concepts such due process, where the ideal of fairness is the main focus and equal protection, with its emphasis on the ideal of equality. When using the first of these three methods, judges will also often rely on history to determine whether their interpretation of a word or phrase fits within the spirit of the constitution as a whole. However, the main difference here is that unlike “original intent” interpretation, the subjective intent of the drafters is not determinative. Rather history is scoured in order to determine both the subjective and objective purpose of the provision, and then applied in a manner that best fits the needs of the modern populace.<sup>73</sup> Finally, the order in which judges use these tools normally begins with a textual analysis and then either moves onto a search for the original intent or the application of precedent, depending on the judge and their views on so-called judicial restraint.<sup>74</sup>

With its 146 articles plus five from the Weimar Constitution, the German Basic Law is a far different document than its compact and sometimes vague American cousin. While many of the fundamental rights found in the German Constitution basically mirror what can be found in the U.S. version, its protections go well beyond the American Bill of Rights, both from the perspective of express fundamental rights as well as the values found in it. Perhaps the most interesting value found in the German document, at least from an American perspective, is the idea that not only do fundamental rights protect one from the state, they also envision a role for the state to

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71 Thus, the argument might be that originalism was more a way to check the power of judges and less a means to find the “true meaning” of a constitutional provision. See Rosenfeld, *Constitutional adjudication in Europe* pg. 656; See also Tushnet, *The United States*, pg. 35.

72 Rosenfeld, *Constitutional adjudication in Europe* pg. 660, See also Tushnet, *The United States* pg. 26 where he characterizes this as part of the textual analysis.

73 For a discussion on the idea of a living constitution see Breyer, *Active Liberty* (New York, 2005)

74 See Tushnet, *The United States*, pg. 30; Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 *Utah Law Review* 963, 970 (1997).

insure that these rights become “an integral part of the general legal order.”<sup>75</sup> As W. Cole Durham observes, the Basic Law takes a facilitative approach to rights, which is based on a “tradition in which freedom tends to be seen not as the polar opposite of community, but as a value that must be achieved in synthesis with community. In this setting it is natural for the state to assume a more affirmative role in actualizing specific constitutional rights.”<sup>76</sup>

This role for the state will play an important part in the comparison being undertaken in this work, especially in the context of so-called “positive rights,” but for the time being it is sufficient to simply point out that unlike in the United States, “a right in the German constitutionalist view embraces not only the right to be left alone, free of state interference, but also a claim to assistance in the enjoyment of the right.”<sup>77</sup>

Other than the values of negative and positive rights found in the constitution, the sources available to the interpreter of German constitutional rights are not much different than those that are at the disposal of his or her American counterpart. The obvious starting point for any constitutional interpretation exercise is the written constitution itself. Historical materials, such as the debates from various drafts of past constitutions as well as from the formation of the Basic Law, also provide a source for the interpreter. Perhaps one of the more unique sources, considering its limited relevance in the civil law system, is court precedent, as decisions handed down by the German Federal Constitutional court are binding on all lower German courts.<sup>78</sup> Just like the U.S. Supreme Court, the Constitutional Court is not bound to follow its own precedent, but it almost always does.<sup>79</sup> Finally, academic commentators play an important role in shaping how the Basic Law is interpreted, a role that, relatively speaking, is larger than that played by academics in the United States.<sup>80</sup>

German judges approach constitutional interpretation much the same as American judges do, starting with the basic idea that any textual interpretation of the constitution “must respect bounds of grammatical analysis” and cannot manipulate ordinary meaning.<sup>81</sup> However, the second general rule of constitutional interpretation in Germany is a departure from the American version in that German jurists believe that the historical method of interpretation should be last among the four common tools used by judges: textual, structural, and teleological being the others.<sup>82</sup> These four German approaches to constitutional interpretation begin with the so-called textual approach, which holds that “words mean what they say.”<sup>83</sup> However, even the straight application of the textual method leaves room for discretion, and this discretion should

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75 Kammers, Germany: Balancing Rights and Duties, pp. 180-181.

76 Durham, General Assessment of of the Basic Law—An American View, in Germany and its Basic Law : past, present, and future ; a German-American symposium, Ed. by Kirchhof/Kammers (Baden-Baden, 1993) pg. 45.

77 Kammers, Germany: Balancing Rights and Duties, pp. 183.

78 §31 BVerfGG

79 Kammers, Germany: Balancing Rights and Duties, pg. 192; Eberle, Human Dignity pg. 970.

80 Kammers, Germany: Balancing Rights and Duties, pg. 193.

81 Brugger, Legal Interpretation, Schools of Jurisprudence, and Anthropology: Some Remarks from a German Point of View, 42 American Journal of Comparative Law 395, 400 (1994).

82 Brugger, Legal Interpretation pg. 401.

83 Kammers, Germany: Balancing Rights and Duties, pg. 197.

be exercised keeping in mind the underlying purpose of the constitutional text at issue.<sup>84</sup> An example of this will be seen later in these pages regarding the manner in which the German Constitutional Court has broadly interpreted religious freedom, an interpretation that recognizes this freedom as one of the pillars of modern German constitutional democracy.

What Winfried Brugger has referred to as contextual interpretation, and is also often referred to as structural interpretation, is the second tool in the informal hierarchy of German constitutional interpretation. This method looks to see “whether an interpretation is compatible with the fundamental principles of the Constitution as a whole. In its narrow sense, structural analysis focuses not on the meaning of specific, isolated clauses, but rather on the location of the clause and its relation to the whole text. In a broader sense, it seeks unity and coherence not only in the text, but in the larger political order the text signifies.”<sup>85</sup> Arguably of equal importance in the hierarchy is the purposive approach to interpretation that looks at the function of the constitutional rule and how it should operate to promote the underlying value being served by it.<sup>86</sup> Described as “objektive-teleologische Auslegung,” (objective purposive interpretation), the “objective” in this method refers to the origin of the purpose and looks at the norm used to serve this purpose, rather than the subjective view of the drafter of the constitutional norm.<sup>87</sup> Finally, considered a secondary method of interpretation, references to the intent of the drafters of the Basic Law rarely are seen in German jurisprudence, and when used, it is only under circumstances when one of the other three approaches yields an unsatisfactory/inconclusive result.<sup>88</sup> Thus, Judges on the *Bundesverfassungsgericht* (BVerfG or German Constitutional Court) have rarely asked themselves what the drafters of the *Grundgesetz* (German Constitution or German Basic Law) and Weimar Constitution meant when they used terms such as “there will be no state church” to describe the relationship between church and state.<sup>89</sup>

Upon a close inspection of the aforementioned constitutional interpretation tools available to judges in both jurisdictions, one can see similarities and one major difference.<sup>90</sup> Both start with textual tools that place an emphasis on the ordinary meaning of the word or phrase in need of clarification. However, as is usually the case, while plain meaning might be helpful, it can never be used in a manner that is inconsistent with the overall values of the constitution itself.<sup>91</sup> Thus, a search for those values usually must also be undertaken, and here is where the two jurisdictions head in different directions. At this point in the process, Americans are more apt to use an interpretive technique that has been banished to a secondary role in Germany, namely

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84 Kommers, Germany: Balancing Rights and Duties, pg. 197; Brugger, Legal Interpretation, pg. 403.

85 Kommers, Germany: Balancing Rights and Duties, pg. 199; Brugger, Legal Interpretations, pg. 403.

86 Kommers, Germany: Balancing Rights and Duties, pg. 200.

87 Jakab, Judicial Reasoning in Constitutional Courts: A European Perspective, 14 German Law Journal 1215, 1241 (2013).

88 Kommers, Germany: Balancing Rights and Duties, pg. 198.

89 Kommers, Germany: Balancing Rights and Duties, pg 198; Kischel, Rechtsvergleichung, pg. 83.

90 Rosenfeld, Constitutional adjudication, pg. 660 (“For all the differences at the levels of theory and ideology, when it comes to the practice of constitutional adjudication, there are remarkable similarities between the United States and Europe, or at least Germany.”)

91 Barak, A Judge on Judging: The Role of a Supreme Court in a Democracy, 116 Harvard Law Review 16, 67 (2002)

drafters' intent.<sup>92</sup> To be clear, the use of original intent is controversial in the United States, with many seeing it as backward looking and unresponsive to current and future needs of the populace.<sup>93</sup> Non-Americans also take a dim view of this method, characterizing it as enslaving the constitutional interpreter to views of the past.<sup>94</sup> Members of the Supreme Court, as well as American academics, argue over the utility of original intent, with clear lines being drawn between those who view the constitution as a living document and those that believe judicial restraint requires judges to only look at the intent of the drafters and nothing more. Interestingly the “living constitution” approach advocated by some in the United States has much in common with its European teleological or purposive relative. While both use history to a certain extent as part of its interpretation process, the purposive approach “devalues” the original intent in favor of finding a more contemporaneous purpose.<sup>95</sup> As Israeli Supreme Court Justice Barak has argued, the purposive approach contains both objective and subjective elements: “On a low level of abstraction, objective purpose is the hypothetical intent that a reasonable author would want to realize through the given legal text or a type of legal text. On a high level of abstraction, the objective purpose of a text is to realize the fundamental values of the legal system.”<sup>96</sup> In other words, even when history is used by American judges as part of their interpretative analysis, it is not always done so in the context of “original intent” interpretation, but rather is used in a manner similar to what one would expect to see in the European teleological method.

In the end, the main tools used by jurists in both jurisdictions are almost identical, with the use of history by judges in the United States being the true distinguishing principle between the two jurisdictions. Yet, many judges in the United States use history in a manner not that much different than how European judges use it as part of a teleological or purposive approach. The true difference, then, can be found with those American judges who place primary importance on the intent of the drafters when interpreting a constitutional provision that does not easily lend itself to a straight textual interpretation.<sup>97</sup>

#### 4. The Use of Teleological Interpretation in This Work

With a goal of this work being the unearthing of the purposes served by the principles of neutrality and non-establishment, one could argue that in many respects the aim here

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92 Graebner, *Dialogue and Divergence: The Vienna Convention on Consular Relations in German, American, and the International Courts*, 42 *Geo. J. Int'l L.* 605, 632 (2011); Scheppele, Jack Balkin in an *American*, 25 *Yale J.L. & Human.* 23, 24 (2013)

93 Scheppele, Jack Balkin, pg. 24 (“Purposive interpretation requires us to ask what the point of a particular constitutional order is in order to work out what the constitution demands of us now. Divining the point of a constitutional order requires that we look forward to the imagined future of a polity rather than backward to its historical starting point, as originalism asks of us.”)

94 Brugger, *Legal Interpretation*, pg. 401. See also Kischel, *Rechtsvergleichung*, pg. 82.

95 Brugger, *Legal Interpretation, Schools of Jurisprudence, and Anthropology: Some Remarks from a German Point of View*, 42 *American Journal of Comparative Law* 395, 397 (1994). See also Barak, *A Judge on Judging*, pg. 69 (“The original intent of the framers at the time of drafting is important. One cannot understand the present without understanding the past. . . . The intent of the constitutional authors, however, exists alongside the fundamental views and values of modern society at the time of interpretation. The constitution is intended to solve the problems of the contemporary person, to protect his or her freedom.”)

96 Barak, *A Judge on Judging*, pg. 67.

97 See also Graebner, *Dialogue and Divergence* pg. 632 (2011).; Rosenfeld, *Constitutional adjudication*, pg. 662

is to analyze the teleological interpretations judges and commentators have given to the religion clauses of the German and American Constitutions. However, as will be seen in Chapter 5, many of the Justices who expressly discuss the purpose(s) served by the American religion clauses focus on the subjective intent of the drafters when looking for the underlying purpose(s) of them. In other words, this is not teleological interpretation in its truest form, but rather an example of original intent interpretation that asks what purposes the drafters of the text believed would be served by religious liberty. Even Justices of the United States Supreme Court who might fall into the traditional teleological camp place a great emphasis on the subjective intent of drafters of the First Amendment, although they admittedly do so with an eye toward interpreting the clauses in a manner that meets the needs of today's society. The end result of Chapter 5 will be a list of purposes served by religious liberty that will then be used in Chapter 6 to categorize the purposes German jurists believe are served by religious liberty. Here we will see more traditional uses of the teleological interpretation method, especially in the courts' discussions concerning neutrality. In short, teleological interpretation plays a large role in identifying how non-establishment principles operate in each jurisdiction, although to say that the emphasis of this work is to illustrate how judges in each jurisdiction have used teleological interpretation in finding the "true" meaning of religious liberty would be rather misleading considering the role that history and original intent plays in the American system.

## Chapter 2: The Historical Origins of Religious Liberty in Germany

### A. Introduction

The idea that religious freedom is one of the foundations of a well functioning democracy is nothing new in either Germany or the United States. Both countries have, over the course of their histories, undergone a process whereby religious liberties have been expanded.<sup>98</sup> While each might stress various aspects of religious freedom differently, the fact remains that both set aside for special protection religious association, beliefs and practices either expressly or impliedly in their list of fundamental rights.<sup>99</sup> In short, both systems treat religion as being special.<sup>100</sup>

Just how special each jurisdiction treats religion has its roots in the historical development of the relationship between state, church and society. The next two chapters seek to provide an overview of this development as a means to not only avoid the pitfalls mentioned in the preceding pages, but also to shed light on how historical events have influenced the ways each jurisdiction treats questions concerning religion. In doing so, one should not lose sight of the focus of this work. While an exploration into the meaning and utility of non-establishment principles implies a focus on the relationship between state and church, the goal of this work in general is to move beyond simple discussions of separation toward examining how non-establishment principles impact individual rights, if at all. While these two chapters devote much of their attention to state/ church relations, the goal here is to show how these relations changed over time, and explain how the changes in these relationships began to impact individual rights. When one narrows the focus in such a manner, the perceived sharp historical differences between the two countries begin to blur.

Finally, this historical summary represents how scholars in each jurisdiction generally approach the historical relationship between religion, state and society. In Germany, much of the discussion focuses on the relationship between the state and church. Axel Frhr von Campenhausen, and Heinrich de Wall illustrate this nicely when they break this history down into three distinct stages, all of which focus on the church/state relationship.<sup>101</sup> In the United States, on the other hand, almost all of the discussion focuses on the various views that existed at the founding regarding individual rights, as well as discussions regarding the relationship between church and state.<sup>102</sup> However, as

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98 Robbers, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Germany*, 19 *Emory Law Review* 841 (2005). As a general statement this is true, but it must be acknowledged that at times the pendulum between rights and limitations moves slightly from one side to the other.

99 Admittedly, the German Grundgesetz goes farther by expressly protecting not only religious beliefs, but also philosophical and ideological beliefs.

100 A debate has been raging among academics in the United States over the past several years questioning whether religion is truly something special. For examples of this debate see: Ellis, *What Is Special about Religion?*, 25 *L & Phil* 219, 238 (2006); Leiter, *Why Tolerate Religion?* 54–67 (Princeton 2012); Schwartzman, *What if Religion Isn't Special?* 79 *University of Chicago Law Review*, 1351 (2013); McConnell, *The Problem of Singling Out Religion*, 50 *DePaul Law Review* 1, 3 (2000)

101 von Campenhausen/de Wall, *Staatskirchenrecht: Ein systematische Darstellung des Religionsverfassungsrechts in Deutschland und Europa*, (München, 2006) pg. 2.

102 McConnell, *The origins and historical understanding of free exercise of religion*, 103 *Harvard Law Review* 1409 (1990); Witte Jr., *Religion and the American Constitutional Experiment* (Boulder, 2005)

we shall see, there is some significant overlap between the two jurisdictions concerning the historical development of these relationships.

As was mentioned in Chapter 1, the historical development of religion, and the role it has played in matters of state and society, pose perhaps the biggest challenge to one engaging in a comparative analysis, especially in the constitutional law context. One risks jeopardizing the validity of the work if the historical roots of the system are not adequately explored, this being especially true when the focus of the work is on how a legal system deals with a specific problem or question of law.<sup>103</sup> Intertwined with history are political, cultural and social characteristics of a society that must be equally considered so as not to draw false conclusions.<sup>104</sup>

To this end, Christian Walter's views on the historical development of the relationship between state, society and the church in both Germany and the United States might provide a suitable jumping off point for an attempt to avoid the pitfall of ignoring history and all that is associated with it. In his comparative treatise on German, American and French religious liberty doctrine, Walter notes that whereas the state was stable and firmly in control of society when the German people started to become aware of their natural rights; after their war with England, Americans found themselves in a situation where society had just thrown off the chains of the state.<sup>105</sup> Thus, at this pivotal time in western civilization, the relationship in colonial America between state (England) and society (the colonists) was initially confrontational and then replaced by a concept of the state whose legitimacy came from the people. In Germany, on the other hand, views of society and state were shaped by people like Friedrich the Great who saw himself not as a servant of the people, but as the servant of the state, and thus his legitimacy was unrelated to society.<sup>106</sup>

Walter's point here is that concepts of state and society, both current and historical, are shaped by historical events. And for our purposes, his juxtaposing of the relationship between state, religion and society in the immediate aftermath of the Enlightenment is important and instructive.<sup>107</sup> Instead of being intertwined, Walter argues that the German view of the relationship between state and society is not one where the state is the servant of society, but rather is society's overseer and guardian. Put differently, state

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103 Starck, *Rechtsvergleichung im öffentlichen Recht*, 1997 JZ 1021, 1028; Starck, *Verfassung* (2009, Tübingen) pg. 355.

104 Starck, *Rechtsvergleichung*, pg. 1028, see also Großfeld *Kernfragen in der Rechtsvergleichung*, (1996, Tübingen) pg. 12; Krüger, *Eigenart, Methode und Funktion der Rechtsvergleichung im öffentlichen Recht*, in *Staatsphilosophie und Rechtspolitik: Festschrift für Martin Krieledler* (1997) pg. 1399;

105 Walter, *Religionsverfassungsrecht: In vergleichender und internationaler Perspektive*, (Tübingen, 2006), pg 11 ("Während in Kontinentaleuropa die Staatsgewalt bereits vorhanden war, als die Gesellschaft sich ihrer selbst bewußt wurde, erwachte am Morgen nach der erfolgreichen Revolution in den nordamerikanischen Kolonien eine Gesellschaft, der der Staat verloren gegangen war. Die Kombination der ohnehin nicht staatsorientierten britischen Tradition mit dem aufklärerischen Gedankengut der Zeit betonte die »civii society« gegenüber dem »government«, dem die hoheitliche Regelung gemeinschaftlicher Angelegenheiten anvertraut war. Das völlig anders gelagerte deutsche Denken kommt besonders deutlich darin zum Ausdruck, daß Friedrich der Große seinen absoluten Herrschaftsanspruch nicht etwa dadurczurücknahm, daß er sich als Diener des Volkes oder der Gesellschaft bezeichnete, sondern als ersten Diener des Staates!"); see also Leibholz, *Staat und Gesellschaft in England*, (Tübingen, 1950) pg 207-212.

106 Walter, *Religionsverfassungsrecht*, pg. 11.

107 Walter, *Religionsverfassungsrecht*, pg. 11.

and society are separate. Admittedly, Walter paints with a broad brush here, but for our purposes his emphasis on perceptions of state and society are useful, especially when religion is added into this mix.

So where exactly does religion fit into this relationship between society and state, a relationship that, on its face at least, appears to be different in Germany and the United States? If Germans indeed think of state and society as being separate and distinct entities, then how might they see the church fitting into this relationship? In this chapter it will be shown how the word “partnership” probably best describes the historical relationship between state and church in Germany, both working together to serve the state interest of the common good, the primary good being the keeping of order.<sup>108</sup> Under the so-called German cooperation model<sup>109</sup>, to be discussed in more detail, the church has a role in helping the state keep order by instilling values in its people. From the American perspective, on the other hand, the role of the church is less clear due to American views regarding society and state: views that see the spheres of state and society as overlapping. Where exactly can the church fit into this relationship? Can it have a relationship with both or just with one or the other? The lack of clarity created by this overlap should leave one with little wonder that Americans have struggled, and continue to struggle, with questions concerning religion and the state; some taking a decidedly traditional German view that state and religion should be partners for the betterment of society, while others emphasizing the need to protect religious minorities from the tyranny of the majority and church from being corrupted by the state.

## **B. The Gradual Separation of Church and State in Germany**

The relationship between church and state plays a central role throughout much of German history. From the fall of Rome through the French Revolution, the relationship between these entities can be summed up by words such as “unity,” “coordination,” and “cohesiveness.” Even as the church was split into two and then three separate entities, the relationship between church and state remained solid, characterized by a oneness in the service of God. However, by the 19<sup>th</sup> century the relationship gradually began to change, moving from one focused on religiously heterogeneous confessional territories to one that started placing emphasis on individual religious freedom and the independence of the church from the state.<sup>110</sup>

### **1. Pre-Reformation**

After centuries of persecution at the hands of the Romans, once Roman Emperors adopted Christianity as their own, the state and church became inextricably connected, with the church initially being seen as yet another public institution (*ius publicum*)<sup>111</sup>

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108 Walter, Religionsverfassungsrecht, pg.17; see also Mikat, Zum Dialog der Kirche mit der modernen Gesellschaft, in: Festgabe für Josef Höfer, (Freiburg, 1967) pg. 704; Muckel, Körperschaftsrechte für die Zeugen Jehovas?, Jura 23 (2001) pg. 456, 461.

109 A term widely used to describe the relationship between church and state in Germany.

110 Heckel, Vom Religionskonflikt zur Ausgleichsordnung, (München 2007).

111 Walter, Religionsverfassungsrecht, pg. 23; Unruh, Religionsverfassungsrecht, (Baden-Baden, 2009) pg. 29, von Campenhausen/de Wall, Staatskirchenrecht, pg. 5; Jeand'Heur/Koriath, Grundzüge des Staatskirchenrechts, (Stuttgart, 2005) pg. 25.

and then as being the focal point of a state established religion.<sup>112</sup> By the Middle Ages, and the fall of the Roman Empire, the contours of the two power entities were beginning to take shape: one spiritual led by the church, the other worldly led by monarchs, both being ordained by and doing the work of God.<sup>113</sup> Beginning in the 9<sup>th</sup> century the focal point of this relationship in the Germanic world was the *Reichskirche*. No longer part of a declared state religion, such as in the time of the Romans, the church was still the focal point of what for all purposes remained a state religion: its leaders (bishops, priests, monks) found themselves beholden to worldly leaders (the Kaiser, princes and feudal landowners), making the church the cornerstone of royal dominion characterized by a close cooperation whereby the church increasingly found itself undertaking state responsibilities.<sup>114</sup> While worldly leaders had the upper hand in this relationship, they were also members of the church and viewed themselves as well as being vested with the power of God.<sup>115</sup> Furthermore, the church itself had become large landowners and its leaders were important members of the state apparatus.<sup>116</sup> In short, the Medieval church/state relationship was close, solid and unquestioned.<sup>117</sup>

The first cracks in this relationship can be seen during the “Papal Revolution,” or the Investiture Controversy, when Pope Gregory VII led a quasi-revolt against the practice of secular rulers choosing church leaders. Gregory sought to redefine the church's status as not only the dominate spiritual power, but the dominate political power as well. While the ruler of the time, Henry IV of Germany, capitulated for a brief period of time<sup>118</sup>, the ultimate result arguably planted the seeds for the idea that church and state are relatively separate entities.<sup>119</sup> In the Concordat of Worms (1122), a compromise was reached whereby the Pope was given complete control over the appointment of religious leaders and Canon Law, and in return the Pope allowed the Monarch to take part in the appointment process.<sup>120</sup>

This arrangement acknowledged that there were indeed two separate and distinct entities, but both continued to operate jointly in the public sphere,<sup>121</sup> with secular rulers still relying heavily on the church and local Bishops to carry out the functions of the state, but no longer having the power to appoint them.<sup>122</sup> While settling the power

112 de Wall/Muckel, *Kirchenrecht*, (München, 2010) pg. 11.

113 Unruh, *Religionsverfassungsrecht*, pg. 30 (referring to it by the commonly used term “Zwei-Schwerter-Lehre”); Jeand'Heur/Korioth, *Grundzüge des Staatskirchenrechts*, pg. 25.

114 Willoweit, *Deutsches Verfassungsgeschichte*, 6<sup>th</sup> Ed. (München, 2006) pg. 52; von Campenhausen/de Wall, *Staatskirchenrecht*, pg. 7; Jeand'Heur/ Korioth, *Grundzüge des Staatskirchenrechts*, pg. 26.; deWall/Muckel, *Kirchenrecht*, pg. 14.

115 For a detailed overview of early papal elections see Baumgartner, *Behind Locked Doors: A History of the Papal Elections*. (2003, New York).

116 Jeand'Heur/Korioth, *Grundzüge des Staatskirchenrechts*, pg. 26; deWall/ Muckel, “*Kirchenrecht*,” pg. 15.

117 Willoweit, *Deutsches Verfassungsgeschichte*, pg 53; Unruh, *Religionsverfassungsrecht*, pg. 30 (he points out that leading up to the Investiture Controversy the “worldly” leaders usually had the upper hand over the “spiritual” ones). See also Link, *Staat und Kirche in der neueren deutschen Geschichte*, (2000, Frankfurt/M.) pg. 12.

118 For an overview of this see Appelby, *U.S. Catholic* , Vol. 64, No. 9 , September 1999; Bueno de Mesquita, *Popes, Kings, and Endogenous Institutions: The Concordat of Worms and the Origins of Sovereignty*, *International Studies Review*, Vol.2, No. 2 (2000); For more detailed look at the shifting power structure between the Pope and Kaiser see deWall/Muckel, *Kirchenrecht*, pp. 17-22..

119 Walter, *Religionsverfassungsrecht*, pg. 25; deWall/Muckel, *Kirchenrecht*, pg. 16.

120 deWall/Muckel, *Kirchenrecht*, pg. 16.

121 Walter, *Religionsverfassungsrecht*, pg. 25; Jeand'Heur/Korioth, *Grundzüge des Staatskirchenrechts*, pg. 27.

122 Willoweit, *Deutsches Verfassungsgeschichte*, pg 55; von Campenhausen/de Wall, *Staatskirchenrecht*, pg. 8;

dispute between the two power bases, the Worms agreement also can be seen as the beginning of the total *Feudalisierung* of the *Reichskirche*.<sup>123</sup> Implied in the description of *Feudalisierung* is the idea that affairs were managed at the local/territorial level, an idea that would play an increasingly important role in the development of the relationship between church and state over the next several centuries.<sup>124</sup> Furthermore, the localization of power also resulted in the church slowly losing any upper hand it had obtained pursuant to the Investiture Controversy, as the political power base slowly shifted from the monarchy level to the principality level.<sup>125</sup> However, the church's role in matters of state cannot be underestimated here. Church law played a dominant role in matters that today we consider to be solely state matters: Family Law, Intestacy Law, procedural rights were all dictated by Canon Law.<sup>126</sup> In societal matters the role of the church was just as pronounced, as inhabitants of the local territories were induced to belong to the church, and crimes of heresy were severely punished.<sup>127</sup> Perhaps most importantly, and a clear illustration of how interconnected the relationship between church and state at this time was, the monarchy began referring to itself as the Holy Roman Empire.<sup>128</sup>

## 2. The Reformation and the Treaty of Augsburg

What impact the Reformation and the Treaty of Augsburg had on the aforementioned relationship is a matter of some debate. Martin Luther's work undoubtedly had an enormous impact on church/state relations as it sought to move the relationship away from being one of "two swords" where both existed for the overriding purpose of serving God, to one of "two kingdoms" where the entities were strictly separate, serving different purposes, the worldly kingdom being solely responsible for governing, the spiritual kingdom being solely responsible for the salvation of souls.<sup>129</sup> Along these same lines, the Treaty of Augsburg is commonly referred to as "one of the most important sources of constitutional law in the old Empire."<sup>130</sup> Yet, it cannot be overlooked that the essential characteristics of the relationship between church and state were undisturbed by the Reformation, although the Catholic Church's loss of dominance made the relationship between the state and church much more complicated.<sup>131</sup>

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deWall/Muckel, Kirchenrecht, pg. 16.

123 Willoweit, Deutsches Verfassungsgeschichte, pg 55; Jeand'Heur/Korioth, Grundzüge des Staatskirchenrechts, pg.27. See also Bueno de Mesquita, Popes, Kings, and Endogenous Institutions: The Concordat of Worms and the Origins of Sovereignty, International Studies Review, Vol.2, No. 2 (2000)

124 Bueno de Mesquita, Popes, Kings, and Endogenous Institutions: The Concordat of Worms and the Origins of Sovereignty, International Studies Review, Vol.2, No. 2 (2000); von Campenhausen/de Wall, Staatskirchenrecht, pg. 8.

125 Unruh, Religionsverfassungsrecht, pg. 32; Jeand'Heur/Korioth, Grundzüge des Staatskirchenrechts, pg. 28.

126 von Campenhausen/de Wall, Staatskirchenrecht, pg. 9.

127 Campenhausen/de Wall, Staatskirchenrecht, pg. 9.

128 Willoweit, Deutsches Verfassungsgeschichte, pg 56.

129 Unruh, Religionsverfassungsrecht, pg. 31; von Campenhausen/de Wall, Staatskirchenrecht, pg. 9; Jeand'Heur/Korioth, Grundzüge des Staatskirchenrechts, pg. 31.; deWall/Muckel, Kirchenrecht, pg. 24; See also Böckenförde, Geschichte der Rechts und Staatsphilosophie (Tübingen, 2002)

130 Unruh, Religionsverfassungsrecht, pg. 32; Link, Staat und Kirche in der neueren deutschen Geschichte, pp. 14-15; Jeand'Heur/Korioth, Grundzüge des Staatskirchenrechts, pg. 32; See also Gotthard, Der Augsburger Religionsfrieden (Münster, 2005); Heckel, JZ 2005/961;

131 Walter, Religionsverfassungsrecht, pg. 26; von Campenhausen/de Wall, Staatskirchenrecht, pg. 11 (thus, they argue both that the Reformation had an enormous impact, at least from a theoretical standpoint, but they also acknowledge that its practical implications were limited).

From a constitutional perspective, the Treaty did have an enormous impact as the concepts of state neutrality and *Parität* have their origins here.<sup>132</sup> The Reformation had created two religious entities with which the *Reich* needed to interact, forcing the *Reich* to remain neutral in the name of peace.<sup>133</sup> But while the *Reich* was now neutral toward questions of religion, the unity that had once existed at the *Reich* level between church and state was merely shifted to local rulers who were given the authority over questions of religion in their territory, resulting in a sort of “territorial confessionalization” of the *Reich*<sup>134</sup>. The Peace of Augsburg made it possible for these local territories, each dominated by one of the two main religions, to co-exist as equals,<sup>135</sup> but its impact on the existing close relationship between the church and state actors (in this sense the various principalities in existence at the time) generally was minimal. At the local level, as Dietmar Willoweit points out, the relationship between the church and the individual princes was far from being simply a matter of personal religious preference, it was a matter of state interest.<sup>136</sup>

Further, it must be noted that any rights that were gained as a result of the Reformation belonged to the two established churches, and indirectly to their members, but not to individuals, who had no right to decide for themselves what to believe and practice.<sup>137</sup> While it was generally accepted after the Treaty that members of a minority religion could move to another territory, the freedom to practice religion, even if one belonged to one of the two established churches, was markedly different depending on where one lived: the Lutheran regions being generally more tolerant than the Catholic regions.<sup>138</sup>

The peace created by the Treaty of Augsburg was relatively short lived, primarily because the two warring religions failed to agree on a common interpretation of its terms.<sup>139</sup> After numerous skirmishes, the two sides found themselves in the same battle, over the same issues, that ended basically with the same result. The Thirty Years War was the tragic climax of this interpretation dispute, and the signing of the Treaty of Westphalia, ending the war, seemed to change little. Instead it basically entrenched the preexisting territorial principalities structure of governing set forth in the Treaty of

132 Unruh, Religionsverfassungsrecht, pg. 32; Link, Staat und Kirche in der neueren deutschen Geschichte, pg. 15; Heckel, Vom alten Reich zum neuen Staat. Entwicklung des deutschen Staatskirchenrechts in der Neuzeit, Zeitschrift für Neuere Rechtsgeschichte, 28 (2006), pg 235, 237.

133 Link, Staat und Kirche in der neueren deutschen Geschichte, pg. 15. (for a more detailed look at the relationship between church and state in Catholic and Lutheran regions see Link pp. 16-19)

134 Walter, Religionsverfassungsrecht, pg. 26.; deWall/Muckel, Kirchenrecht, pg. 29; see also Bhuta, Two Concepts of Religious Freedom in the European Court of Human Rights, South Atlantic Quarterly 2014 Volume 113, Number 1: pp. 9-35; Fischer, Trennung von Kirche und Staat (Frankfurt a/M, 1984) at 24.

135 Walter, Religionsverfassungsrecht, pg. 26; Link, Staat und Kirche in der neueren deutschen Geschichte, pg. 15. Heckel, Vom alten Reich zum neuen Staat, pg. 236.

136 Willoweit, Deutsches Verfassungsgeschichte, pg. 139. (“Das Verhältnis zur Religion konnte in den Händen der politisch Mächtigen nicht nur eine Sache persönlicher Glaubensentscheidung sein, sondern stellte sich stets zugleich auch als eine Frage des Staatsinteresses dar. Erst die unlösbare Verbindung der beiden an sich konträren Prinzipien, Staatskonfession und Staatsräson, hat dem Obrigkeitsstaat in der zweiten Hälfte des 16. Jahrhunderts sein unverwechselbares Gesicht und seine spezifische Stärke gegeben”)

137 Unruh, Religionsverfassungsrecht, pg. 32; Borowski, Die Glaubens- und Gewissensfreiheit des Grundgesetzes, (2006) pg 19.

138 Link, Staat und Kirche in der neueren deutschen Geschichte, pp. 14-15; Heckel, Vom alten Reich zum neuen Staat, pg. 236.

139 Link, Staat und Kirche in der neueren deutschen Geschichte, pg. 19; Unruh, Religionsverfassungsrecht, pg. 33; Walter, Religionsverfassungsrecht, pg. 26.; deWall/Muckel, Kirchenrecht, pg. 32 . See also Heckel, Vom alten Reich zum neuen Staat.

Augsburg,<sup>140</sup> an arrangement that seemingly had not served the *Reich* well.

On its face, however, the Treaty contained hints of a changing attitude toward religious matters, and seemed to more clearly set forth the expectations of the local rulers.<sup>141</sup> First and foremost it recognized a third religion, Calvinism, creating in the words of Martin Borowski a *Glaubendreiheit* (a confessional triangle or triad) in the *Reich*<sup>142</sup>. Additionally, it also expressly recognized the concepts of *Parität* (parity) and majority rule as principles by which the relationship between religions and state would be defined.<sup>143</sup> By embedding the concept of *Parität* into the governing culture, it was perhaps at the *Reich* level where the change was the greatest, as it was at this level where the state promised to remain neutral toward conflicts between the recognized religions.<sup>144</sup> However, under concepts of majority rule, the traditional church-state relationship lived on, just at an increasingly local level where the contours of the relationship were now spelled out more clearly.<sup>145</sup>

As for the Treaty's impact on individuals, in the short-term the state continued to use its power to coerce inhabitants to practice the territorial religion, albeit in a less heavy handed manner.<sup>146</sup> Longer term some progress could be seen in some Lutheran dominated principalities where the beginnings of true tolerance was taking shape. By the late 1700s, for instance, the Lutheran dominated state of Prussia not only was in compliance with the Treaty of Westphalia with regards to Catholics, it also was leading the way in its treatment of dissenting Protestant sects by agreeing to tolerate their existence.<sup>147</sup> To be sure, this was not full religious freedom, but even groups such as Jews, Menonites and Moravians (*Herrenhuter*) no longer were forced to flee in the face of repression, although they were strictly prohibited from engaging in missionary work.<sup>148</sup>

In summary, the Reformation, the Thirty Years War and Treaty of Westphalia changed the landscape of church-state relations, especially the relationship the Empire had with the church, which, out of necessity, could now be characterized as one of neutrality and *Parität*. Yet it would be inaccurate to imply that the era of a unified church and state was finished as the close relationship between the two was now merely shifted to and

140 Borowski, *Die Glaubens- und Gewissensfreiheit des Grundgesetzes*, pg. 21; Bhuta, *Two Concepts of Religious Freedom in the European Court of Human Rights*, *South Atlantic Quarterly* 2014 Volume 113, Number 1: pp. 9-35; see also von Campenhausen/de Wall, *Staatskirchenrecht*; Schlaich, *Westfälischer Frieden*, in: *Evangelisches Staatslexikon*, 3. Aufl., Bd. II, 1987, pp. 3970–3974.

141 Heckel, *Vom alten Reich zum neuen Staat*, pg. 248.

142 Borowski, *Die Glaubens- und Gewissensfreiheit des Grundgesetzes*, pg. 21.

143 Borowski, *Die Glaubens- und Gewissensfreiheit des Grundgesetzes*, pg. 21; Unruh, *Religionsverfassungsrecht*, pg. 33; Jeand'Heur/Korioth, *Grundzüge des Staatskirchenrechts*, pg. 34; von Campenhausen/de Wall, *Staatskirchenrecht*, pg. 14; deWall/Muckel, *Kirchenrecht*, pg. 34. But see Heckel, *Vom alten Reich zum neuen Staat*, pg. 249 (who argues that the Treaty created a “Fülle verschiedener Paritätsfiguren” (a richly different form of *Parität*))

144 Walter, *Religionsverfassungsrecht*, pg. 27.

145 Unruh, *Religionsverfassungsrecht*, pg. 33; von Campenhausen/de Wall, *Staatskirchenrecht*, pg. 14; Heckel: *Vom alten Reich zum neuen Staat*, pg. 247.

146 Jeand'Heur/Korioth, *Grundzüge des Staatskirchenrechts*, pg. 34. (For instance it was no longer common practice to force inhabitants to change religion if the local ruler had done so.)

147 Borowski, *Die Glaubens- und Gewissensfreiheit des Grundgesetzes*, pg. 24; deWall/Muckel, *Kirchenrecht*, pg. 33; Walter, *Religionsverfassungsrecht*, pg. 102

148 Borowski, *Die Glaubens- und Gewissensfreiheit des Grundgesetzes*, pg. 24; Walter, “*Religionsverfassungsrecht*,” pg. 103.

cemented at the local level. And while there were hints of tolerance taking place in some of the regions of the *Reich*, from a modern perspective individual free exercise rights were still a long way off into the future.<sup>149</sup>

### 3. Impact of the Enlightenment on Church/State Relations

The words Enlightenment and secularism are often associated with one another. Yet the term secularization in the context of the Enlightenment is open to multiple meanings.<sup>150</sup> Heinrich de Wall, among others, argues that to truly understand how the term is used in the context of post-Enlightenment Germany one must distinguish between the secularization of authority and the secularization of property.<sup>151</sup> Both are important to understanding the development of church/state relations in Germany. The secularization of property will be more fully discussed in the next section, while here we will focus on the secularization of authority.

Under the term secularization of authority, one often thinks about the state no longer having the advancement of God or religion in general as its primary purpose. The *Reich's* position of neutrality toward religious questions in the aftermath of the Treaty of Westphalia is a good example of the secularization of authority.<sup>152</sup> If secularization is seen as one of the building blocks of modern church/state relations, then the Enlightenment can be seen as the early beginning of the secularization of the German state, with its main goal at this time in history being peace and security, replacing the traditional goal of advancing the word of God.<sup>153</sup> Concepts of natural law and law of reason also impacted the views of the time regarding religious freedom, and by the late the 1680s, Christian Walter argues, a form of individualized religious freedom could be seen in that local masters were prohibited from interfering with individual religious freedom if it was seen as negatively impacting the *Reich's* goal of peace and security.<sup>154</sup>

However, this form of tolerance clearly had its limitations (not only in Europe but also in colonial America, as we shall see) as restrictions could be placed on religions when doing so did not jeopardize the aforementioned goals of peace and security.<sup>155</sup> Furthermore, in most territories of the *Reich*, this tolerance was limited only to “natural religions,” the three recognized by the Treaty of Westphalia,<sup>156</sup> leading some to question the impact of Enlightenment principles on the development of matters of religion in

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149 Although Martin Heckel argues that the main roots of modern German religious freedom lie in this new form of Parität, one that relied on membership in one of the two main religions, but most certainly were not based on concepts of individual rights or rights for members of religious sects. Heckel, *Vom alten Reich zum neuen Staat*, pg 253.

150 de Wall, *Die Entstehung der deutschen Verhältnisbestimmung von Kirche und Staat*, in *Kirche und Staat in Deutschland, Frankreich und den USA* (2012), pg. 54.

151 *Die Entstehung der deutschen Verhältnisbestimmung von Kirche und Staat* in *Kirche und Staat in Deutschland, Frankreich und den USA* (2012), pg. 56; Heckel, *Vom alten Reich zum neuen Staat*, pg 249.. See also Ernst Rudolf Huber, *Deutsche Verfassungsgeschichte seit 1789*, Vol 1, 2<sup>nd</sup> Edition, (Stuttgart, 1990); Krings, *Das Alte Reich am Ende - der Reichsdeputationshauptschluss 1803*, JZ 4/2003.

152 de Wall, *Die Fortwirkung der Säkularisation im heutigen Staatskirchenrecht*, pg. 56.

153 Walter, *Religionsverfassungsrecht*, pg 43.

154 Walter, *Religionsverfassungsrecht*, pg 43.

155 Walter, *Religionsverfassungsrecht*, pg 43. See also Jeand'Heur/Korioth, *Grundzüge des Staatskirchenrechts*, pg. 34; deWall/Muckel, *Kirchenrecht*, pg. 33.

156 Walter, *Religionsverfassungsrecht*, pg. 44.

Germany. Christian Hillgruber, for instance, argues that the modern understanding of the word secularization simply did not exist at this time as local states were still sharply divided and defined by their religious affiliations, and modern concepts of tolerance and free exercise, as we have already seen, simply were not the norm, despite the language of the Peace of Westphalia.<sup>157</sup> Whereas Martin Heckel agrees with Walter that secularization of authority took place at the *Reich* level, he then goes on to argue that it was the secularization at that level which made possible the entrenchment of the aforementioned “territorial confessionalization” of the *Reich*, which by no means amounted to a secularization of authority at the territorial level.<sup>158</sup>

Whatever the disagreements are over the meaning of secularization during this time and its impact on today's church/state relations in Germany, it is clear that *Parität* was the controlling doctrine dictating the relationship between the *Reich* and the church, and this resulted in the *Reich* remaining neutral toward questions concerning the recognized religions. However even at the *Reich* level this neutrality had its limits as a *Sektenverbot* was enforced against minority religions until 1806.<sup>159</sup> Thus, any equality that existed at this time of “enlightenment” was not a means of emancipating minority religions, but rather a means of balancing the interests of two/three equally powerful religions.<sup>160</sup> Furthermore, it most certainly did not touch upon questions of religious equality and freedom for the individual citizen as they are understood in the modern context.<sup>161</sup>

#### 4. The Reichsdeputationshauptschluss of 1803 (RDH)

Perhaps the real seeds of modern German principles related to matters of religion were planted by the *Reichsdeputationshauptschluss* of 1803 (RDH), which radically reshaped the political boundaries of the *Reich*, decreasing almost overnight the number of principalities from over 300 to only 39 and stripping the church of its close relationship with local princes, as well as its property.<sup>162</sup> This, more than anything that happened during the Enlightenment period, resulted in a true secularization of authority, a true distancing of church and state from one another, this time also impacting local principalities.<sup>163</sup> The effects of this were numerous, and as Heinrich de

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157 Hillgruber, *Staat und Religion: Überlegungen zur Säkularität, zur Neutralität und zum religiös-weltanschaulichen Fundament des modernen Staates*, (Paderborn, 2007) pg. 25: (“Im Gegenteil: Sieht man im moderen-aufgeklärten Verständnis Religionen und Konfessionen als Spielarten eines ideologischen Verständnisses der Welt, wird erkennbar, dass sich Europa mit Beginn der Neuzeit scharf ideologisierte. Toleranz oder gar Religionsfreiheit sollten sich in Europa erst sehr viel später durchsetzen.”). Hillgruber goes on to reject the idea that the foundation of the WRV and GG is secular. Rather, he claims that at its foundation is a “christliche Grundcharakter”. See also de Wall, *Die Fortwirkung der Säkularisation im heutigen Staatskirchenrecht*, pg. 57.

158 Heckel, *Vom alten Reich zum neuen Staat*, pg 250.

159 Hillgruber, *Staat und Religion* pg. 23.

160 de Wall, *Die Entstehung der deutschen Verhältnisbestimmung von Kirche und Staat*, pg. 57.

161 de Wall, *Die Entstehung der deutschen Verhältnisbestimmung von Kirche und Staat*, pg. 105.

162 de Wall, *Die Entstehung der deutschen Verhältnisbestimmung von Kirche und Staat*, pg. 107, Link, *Staat und Kirche in der neueren deutschen Geschichte*, pg. 31; Heckel, *Vom Religionskonflikt zur Ausgleichsordnung: Der Sonderweg des deutschen Staatskirchenrechts vom Augsburger Religionsfrieden 1555 bis zur Gegenwart*, (München, 2007) pg. 35.. See also Krings, *Das Alte Reich am Ende - der Reichsdeputationshauptschluss 1803*, JZ 4/2003.

163 Krings, *Das Alte Reich*, pg 177; deWall/Muckel, *Kirchenrecht*, pg. 38; von Campenhausen/de Wall, *Staatskirchenrecht*, pg. 23; Heckel, *Vom Religionskonflikt zur Ausgleichsordnung*, pg. 35.

Wall points out, included: 1) allowing adherents of the two major religions to freely mix, 2) making the church primarily a religious entity, i.e. no longer political in nature and 3) making the state sovereign and separate from the church.<sup>164</sup> Thus, after 1815, the idea that a territory would be dominated by a single confession was replaced with an attempt to mix confessions within territories, which was usually accomplished by joining regions with two different confessions into one region, e.g. joining Bavaria and Franconia (*Franken*).<sup>165</sup> Furthermore, the public sphere at this time was becoming more thoroughly secularized, in the modern sense of the word, as administrative functions that had belonged to the church were now placed in the hands of the state.<sup>166</sup> The result was an even more clear division of the state and church.<sup>167</sup>

More importantly perhaps, the foundations of modern German federalism have their roots here as well. There was no longer a need for a “national” government that remained neutral in order to keep a balance between two religious powers. The individual states, which after the RDH were much larger and more religiously diverse, were now charged with maintaining this balance within their individual jurisdictions.<sup>168</sup> Thus, the concepts of neutrality and *Parität* that had served the *Reich* well were now necessary at the state level, where the populace was usually comprised of a mixture of the three major religions. Furthermore, the facts on the ground after the RDH, namely a more diverse population in a given state, required more attention be paid to rights of the minority.<sup>169</sup> Provisions of the RDH sought to give members of the mainstream religions who were in the minority in a given territory true freedom to practice their religion without the interference of the local state. The RDH went even further by extending some rights to non-mainstream religions as well, although in practice this merely gave these individuals the guarantee that they would not lose their civil rights on the basis of their religion, but this did not amount to a full fledged freedom to practice their religion as they saw fit.<sup>170</sup> Nevertheless, this marked a momentous change in the development of religious freedom in Germany, as now the focus began to shift, albeit slowly, to the individual.

For the churches, this meant a diminished role, one where they were no longer equal partners with local princes forming a holy state. Instead the focus was more on their role of fostering religious principles, and they were seen now more as an arm of the state rather than a partner.<sup>171</sup> In addition, the secularization of church property, which basically involved the state seizing all church property and bringing it under state control, meant that the state was now in control of what once belonged solely to church.

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164 de Wall, *Die Entstehung der deutschen Verhältnisbestimmung von Kirche und Staat*, pg. 107

165 Walter, *Religionsverfassungsrecht*, pg. 100; Jeand'Heur/Korioth, *Grundzüge des Staatskirchenrechts*, pg. 38.

166 Link, *Staat und Kirche in der neueren deutschen Geschichte*, pg. 31. Although, as we shall see later in the section dealing with the historical role of religion in schools, this secularization did not necessarily mean that religious entities were banned from taking part in these traditionally state functions.

167 Link, *Staat und Kirche in der neueren deutschen Geschichte*, pg. 31.

168 See generally Krings, *Das Alte Reich am Ende der Reichsdeputations-hauptschluss 1803*, JZ 4/2003.

169 de Wall, *Die Fortwirkung der Säkularisation im heutigen Staatskirchenrecht*, pg. 59; von Campenhausen/de Wall, *Staatskirchenrecht*, pg. 27.

170 von Campenhausen/de Wall, *Staatskirchenrecht*, pg. 27. (It should also be noted that the various states were also beginning to extend these freedoms in their own governing documents)

171 de Wall, *Die Fortwirkung der Säkularisation im heutigen Staatskirchenrecht*, pg. 61; Heckel, *Vom Religionskonflikt zur Ausgleichsordnung*, pg. 35.

In return, and for our purposes incredibly important, the RDH made the state responsible for ensuring the financial survival of the three mainstream religions (this being basis for the concept “*Staatsleistung*.”).<sup>172</sup> For the Catholic Church, these developments meant a turn toward a more universal church with its members now looking more to the Pope in Rome for leadership.<sup>173</sup> To be sure, in some parts of Germany, this did not mean the end of the privileged relationship the Church enjoyed with the state, Bavaria being perhaps the best example whereby after the signing of the 1817 Bavarian Concordat with Rome, the Catholic Church enjoyed a dominate position with regards to its relationship with the state.<sup>174</sup> Nevertheless, in most of Germany, the old *Reich* and the old relationship that the church enjoyed with it and its numerous principalities was dead, and the arrangement that took its place laid the foundations for today's *Staatskirchenrecht*, and the so-called “hinkenden Trennung von Kirche und Staat” whereby the state is totally responsible for worldly matters and the church for spiritual.<sup>175</sup> For the Lutheran Church, it must be noted, the separation from the state was less complete and can be characterized more as a progressive separation, with regional monarchs serving as the ceremonial head of church (*Summus Episcopus*) up until the adoption of the Weimar Constitution, and the church basically operating as an official arm of the state.<sup>176</sup>

By 1815, in the aftermath of the RDH, Enlightenment concepts concerning religious liberty, such as freedom of thought, freedom of conscious, and religious tolerance were beginning to take hold in the various states<sup>177</sup> that were drafting constitutions as directed by *Deutsche Bundesakte*. These constitutions were to include language protecting the three established religions and pursuant to Art. XVI its members, directing the new states to include provisions concerning religious liberty. Under this provision, the three mainstream religions and their members were to be guaranteed full civil and political rights in the state constitutions.<sup>178</sup> As could be expected, interpretations of and practices related to this provision varied. Some states specifically protected religious beliefs (*Gewissensfreiheit*) while others went further by protecting both beliefs and some form of practice. What what was missing, however, were rights associated with practicing one's religion in public and religious associational rights.<sup>179</sup> Thus, in these states, rights to believe and practice in private seemed to be respected by the new constitutions, but true religious freedom in the modern sense, which includes the right to openly acknowledge and practice one's religion, simply was not available. Furthermore, these religious freedom rights were enjoyed primarily only by members of the three mainstream religions and were not, in the modern sense of the word,

172 de Wall, *Die Fortwirkung der Säkularisation im heutigen Staatskirchenrecht*, pp. 63-66; Unruh, *Religionsverfassungsrecht*, pg. 35, von Campenhausen/de Wall, *Staatskirchenrecht*, pg. 24-25.

173 Unruh, *Religionsverfassungsrecht*, pg. 36; von Campenhausen/de Wall, *Staatskirchenrecht*, pg. 27; Jeand'Heur/Korioth, *Grundzüge des Staatskirchenrechts*, pg. 39.

174 Heckel, *Vom Religionskonflikt zur Ausgleichsordnung*, pg. 46.

175 Krings, *Das Alte Reich* pg. 177.

176 von Campenhausen/de Wall, *Staatskirchenrecht*, pg. 28.

177 Jeand'Heur/Korioth, *Grundzüge des Staatskirchenrechts*, pg. 40.

178 The *Deutsche Bundesakte* vom 8. Juni 1815 can be found at: <http://www.documentarchiv.de/nzjh/dtba.html> (“Die Verschiedenheit der christlichen Religions-Partheyen kann in den Ländern und Gebiethen des deutschen Bundes keinen Unterschied in dem Genusse der bürgerlichen und politischen Rechte begründen.”)

179 Borowski, *Die Glaubens- und Gewissensfreiheit des Grundgesetzes*, pp. 26-28 (Hessen: “Gewissens und Religionsübung”; Sachsen: *Gewissensfreiheit* and “Schutz in der Gottesverehrung seines Glaubens;” Hannover: *Glaubens- und Gewissensfreiheit*.”.)

individual rights.<sup>180</sup>

## 5. First Steps Toward a Modern Understanding of Religious Freedom

A momentous shift was underway as the delegates of the St. Paul's Church Assembly convened in 1849 to discuss the creation of a new constitution that would reunify the German states of the former Holy Roman Empire. The shift can be seen in the debates and the proposed constitutional provisions concerning matters of religion. In these debates one begins to see fundamental rights being framed as positive rights, as opposed to natural rights, laying the groundwork for modern concepts of religious liberty. *Parität* and equality for members of the mainstream religions were of course the starting point for these discussions, but the delegates sought more. They sought a new kind of religious freedom whose existence would not rely on being a member of the established religions.

The debates that took place during the constitutional convention reflected this new approach to religious liberty. Catholics, eager to be more than just a contractual servant of the state, seemed to support a more strict version of church/separation and cited the American Constitution as a model for a new relationship.<sup>181</sup> They were not the only ones. Various publications related to and published by participants of the Paul's Church Assembly dealt with issues of church independence, separation of church and state, and religious freedom in general.<sup>182</sup> The debate was moving away from the narrow question regarding the relationship of church and state and moving toward a broader discussion of the rights of individuals and groups in society. Discussions generated by petitions such as the Petition des Mainzer Piusvereins (18. April 1848), which attempted to push the assembly toward a more liberal<sup>183</sup> and modern view of religious freedom, exemplified this new spirit. The petition sought to create a doctrine where religious freedom lay with the individual, not the established religions; a groundbreaking achievement had it been actually put into force.<sup>184</sup>

In the end, Article V of the draft constitution contained language setting forth the basic right to believe and practice one's religion as one chooses ("Jeder Deutsche hat volle Glaubens-und Gewissensfreiheit," §144) to be limited only in the context of interference with general criminal law ("Recht zur häuslichen und öffentlichen Religionsausübung in den Schranken der Strafgesetze," §145).<sup>185</sup> As Martin Borowski points out, this was a monumental step forward, whereby the rights of the individual were being protected regardless of the religion to which s/he belonged, and more importantly, these rights were extended beyond members of the three mainstream religions.<sup>186</sup>

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180 de Wall, *Die Entstehung der deutschen Verhältnisbestimmung von Kirche und Staat*, pg. 109; Walter, *Religionsverfassungsrecht*, pg. at 103.

181 Walter, *Religionsverfassungsrecht*, pg. 107.

182 Walter, *Religionsverfassungsrecht*, pg. 107.

183 Borowski, *Die Glaubens- und Gewissensfreiheit des Grundgesetzes*, pg. 28.

184 Walter, *Religionsverfassungsrecht*, pg. 108.

185 Borowski, *Die Glaubens- und Gewissensfreiheit des Grundgesetzes*, pg. 36.

186 Borowski, *Die Glaubens- und Gewissensfreiheit des Grundgesetzes*, pg. 36.

Regarding the status of churches, various views were present in the assembly, ranging from the total separation of church and state, to a close relationship of the two entities whereby church and state were equals. Ultimately a compromise was found that, while eventually not implemented, would have a wide ranging impact on church/state relations that can still be seen today. The compromise version of Article V, §147 called for self-administration of religious organizations, although still subject to state law; the ability of groups to create new religious societies without the need for state recognition and the prohibition of a state church,<sup>187</sup> the latter arguably going far beyond the existing relationship and amounting to a complete separation.<sup>188</sup>

In the end, the failure to pass the new constitution meant that whatever rights individuals had regarding religion would still be found only in the provisions of the various state constitutions and laws. Shortly after the failed attempt at constitutional reform in Frankfurt, Prussia amended its constitution in a manner that appeared to adopt some of the principles set forth by the Paul's Church delegates.<sup>189</sup> For example, Art. 14 of the 1850 Constitution stated that while Prussia was a Christian state, it would also respect individual and collective religious freedom, as well as allow both mainstream churches to administer themselves.<sup>190</sup>

From the perspective of the state's relationship with religious entities, the Prussian Constitution, unlike the Frankfurt Constitution, did not contain a limitation on the church's right to self-administration.<sup>191</sup> On its face, this seemed like another groundbreaking advancement for religious freedom, but under the Prussian constitution, freedom and equality did not mean the same thing. While freedom from the state existed to a certain extent for religious entities, there was no requirement for equal treatment by the state. The principle of church/state separation that existed was one acknowledging that the entities were indeed separate, but certainly not a principle like what was found in the Frankfurt Constitution, which forbade the state from privileging one religious group over another.<sup>192</sup> What the provisions in the Prussian Constitution, as well as some found in other states during this period of time, created was merely a form of *Parität* on a sliding scale whereby the two main religions were granted public corporate status, generally privileging them over other religious groups.<sup>193</sup> A second tier of religions enjoyed some of the same privileges without the designation of public corporation, while a third tier of religions contained those who merely were given associational privileges like that of any other association.<sup>194</sup> In short, the increasing religious pluralism that was taking place at this time did not result in equality for all religions.

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187 Walter, Religionsverfassungsrecht, pg. 112; de Wall, Die Entstehung der deutschen Verhältnisbestimmung von Kirche und Staat, pg. 111; deWall/ Muckel, Kirchenrecht, pg. 40.

188 Jeand'Heur/Korioth, Grundzüge des Staatskirchenrechts, pg.40.

189 Jeand'Heur/Korioth, Grundzüge des Staatskirchenrechts, pg. 41.; deWall/ Muckel, Kirchenrecht, pg. 40.

190 Referring to Art. 12; See Jeand'Heur/Korioth, Grundzüge des Staatskirchenrechts, pg. 41.

191 Walter, Religionsverfassungsrecht, pg. 114; Jeand'Heur/Korioth, Grundzüge des Staatskirchenrechts, pg. 41.

192 Hillgruber, Staat und Religion pg. 37. (citing G. Anschütz, Die Verfassungsurkunde für den Preußischen Staat, Kommontar, Bd. 1, 1912, Art. 14 nr.1 S. 260-264)

193 de Wall, Die Entstehung der deutschen Verhältnisbestimmung von Kirche und Staat, pp. at 113-114; Heckel, Vom Religionskonflikt zur Ausgleichsordnung, pp. 117-120.

194 de Wall, Die Entstehung der deutschen Verhältnisbestimmung von Kirche und Staat, pg. at 114.

Nor did it result in broad individual religious freedom. Here again we can see that freedom and equality were not synonymous. The individual and collective rights to practice one's religion did not result in a form of negative freedom of religion that provided absolute protection to believe and practice as one chose, rather it was generally viewed that one could not be relieved of having to comply with general laws simply because the laws conflicted with one's beliefs.<sup>195</sup> For example, the schools at this time were predominately religious in nature (Catholic, Lutheran or non-denominational), and students were not excused from legally required religion courses, even if attending interfered with their own religious beliefs.<sup>196</sup>

Thus, while there were some small advancements, matters of religion at this time were still heavily influenced by the relationship between church and state, a relationship that had indeed undergone changes and was beginning to morph into what today is commonly referred to as "Staatskirchenrecht," an arrangement, which at its inception, truly benefited only the recognized religions.<sup>197</sup> Here too Prussia can serve as an example of how *Staatskirchenrecht* was developing in the aftermath of the failed constitutional reforms. By this time the concept of *landesherrliche Kirchenregiment* had firmly taken hold in many of the states with a majority Lutheran population.<sup>198</sup> Under this arrangement the church gradually freed itself from having its internal matters administered by the secular state, but remained under the control of the territorial ruler, who had ultimate authority over all public corporations and religious entities during this period. However by 1876 this relationship too was undergoing gradual change as only the sovereign authority of local rulers and a few aspects of royal patronage and property supervision remained within the authority of the state.<sup>199</sup> The church was becoming gradually more independent.

The relationship between the state and the Catholic Church, on the other hand, was set by agreements entered into by the states with Rome (*Bulle De salute animarum*) drawing physical boundaries within the states in which church authority would be exercised. Here it is enough to point out that there were several flash points in this relationship related to state control of the schools and the appointment process of church leaders, to name a few. Suffice it to say that the state attempted to exercise control over the church wherever and whenever it could, culminating in the *Kulturkampf*<sup>200</sup>, which led to a less than comfortable relationship between the state and Catholic Church.<sup>201</sup> While the *Kulturkampf* did not spread into Bavaria and other predominately Catholic states, the Catholic Church's close relation with these states

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195 Link, *Staat und Kirche in der neueren deutschen Geschichte*, pg. 55 ( "Es ist dem Staatsbürger nicht gestattet, dem Gott an der er glaubt, mehr zu gehorchen als dem Staatsgesetz.")

196 Hillgruber, *Staat und Religion* pg. 38.

197 de Wall, *Die Fortwirkung der Säkularisation im heutigen Staatskirchenrecht*, in *Essener Gespräche zum Thema Staat und Kirche*, 38 (2004), pg 53. see also Link *Staat und Kirche in der neueren deutschen Geschichte*, pp. 54-57.

198 Link, *Staat und Kirche in der neueren deutschen Geschichte*, pg. 63.

199 Link, *Staat und Kirche in der neueren deutschen Geschichte*, pg. 63. ("verblieben nur die allgemeinen Kirchenhoheitsrechte, Teile der Vermögensaufsicht und einige Patronatssachen bei den staatlichen Behörden.")

200 For an in depth look at how the *Kulturkampf* played out not only in Prussia but also in the other states, see Link, *Staat und Kirche in der neueren deutschen Geschichte*, pp. 83-91.

201 For a full discussion of this relationship see Link, *Staat und Kirche in der neueren deutschen Geschichte*, pp. 65-69.

also came under fire as the end of the 19<sup>th</sup> century approached with liberals, for instance, attempting to remove church control (with the exception of religion courses) over the schools.<sup>202</sup>

In short, the very close relationship between church and state that existed entering into the 19<sup>th</sup> century had undergone drastic changes throughout the century. Christoph Link provides an apt summary of church/state relations and questions of individual religious freedom entering into a new century when he lists the various points where the relationship had undergone changes.<sup>203</sup> According to Link, what was left entering into a new century was a kind of independence for the established religious entities (Catholics and Lutherans) without complete separation of church and state. There were no religious tests to hold public/administrative office, and the churches had the ability to train their own religious personnel as well as supervise religious instruction in schools and theological faculties. *Placet* (assent by territorial ruler before church legislation could take effect) and *recursus ab abusu* (ability of civil powers to charge with church leaders with abuse of power) were abolished, and Catholic associations had free rein over their affairs, while churches were also given unhindered development of their own constitutional foundations. The state recognized ecclesiastical law regarding teaching and education as well as provided adequate funding. Most importantly, however, for our purposes, the relationship between state and church that did exist only encompassed the two traditional religious institutions. Individual religious freedom for those outside of the traditional religions was limited at best.

## 6. A Special Note Regarding the Church Tax

Of the many things that differ between the way Americans and Germans approach questions of religion, perhaps none are more divergent than how religious institutions are funded. And here history is primarily responsible for this divergence. What is unthinkable from the modern American perspective, using the state tax apparatus to directly fund religion, is the norm for Germany primarily because of the historical relationship between church and state. As has already been stated, in many respects for much of German history church and state were a unified entity with a common goal: serving God. While this relationship underwent some changes, most obviously as a result of the Reformation and Treaty of Westphalia, the two entities remained unquestionably intertwined. However, it is worth pointing out again that events at the beginning of the 19<sup>th</sup> century radically changed this relationship as both church authority and church property were secularized under provisions of the RDH, and it was this change that directly led to the church tax system that remains in existence today. As compensation for having their power and property stripped from them, the state guaranteed the two main religions that they would receive financial support.

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202 Link, *Staat und Kirche in der neueren deutschen Geschichte*, pg. 70.

203 Link, *Staat und Kirche in der neueren deutschen Geschichte*, pg. 73. (“Anspruch auf Kirchenfreiheit ohne Trennung von Kirche und Staat, Freiheit der Ämterbesetzung, Klerikerseminare, Aufsicht über Religionsunterricht und theologische Fakultäten, Abschaffung von *Placet* und *Recursus ab abusu*, Freiheit des katholischen Vereinswesens und ungehinderte Entfaltung der eigenständigen Verfassungsgrundlagen, Anerkennung des kirchlichen Rechts auf Lehre und Erziehung sowie auf angemessene Dotation der Bistümer.”)

So how did this guarantee turn into a tax? The reasons for this are numerous including the creation and proliferation of the cash based economy, and the urbanization of the populace. Additionally, the end of the principality system, and with it, the end of citizens being forced to identify with a particular religion, as well as the secularization of church property pursuant to the RDH and the resulting promise by the state to fund the churches as compensation for the secularization played a significant role in the creation of the tax system.<sup>204</sup> A tax was deemed to be the best means of fulfilling this promise under the circumstances. Furthermore, many of the church tax regimes were instituted during the time of the *Kulturkampf* as part of the state's attempt to exercise control over the Catholic church,<sup>205</sup> perhaps confirming the fears of American Enlightenment thinkers like James Madison, who, as we shall see, believed in separation in order to protect the church from the heavy hand of the state. In short, the existence of a church tax regime in Germany can best be explained by historical events that simply have no equivalent in American history, and have remained in place because of 20<sup>th</sup> century compromises, which are the focus of the remaining part of this survey of German history.

### C. Modern Church/State Relations

#### 1. Weimar: the Beginning of the Modern Church-State Doctrine

The shadow cast by the attempted 1848 Constitution, the implementation of the Prussian 1850 Constitution and Bismarck's *Kulturkampf* loomed large over the Weimar convention in 1919.<sup>206</sup> Fingerprints of the 1848 Constitution can be found throughout the Weimar Constitution<sup>207</sup> (*WRV, Weimarer Verfassung*), which finally brought the St. Paul's Church concept of the individualization of religious rights into German constitutional culture.<sup>208</sup> The break up of the old Empire also played a role here as the traditional relationship between church and state seemed to be crumbling along with the Empire.<sup>209</sup>

While perhaps not as contentious as those seen at the St. Paul's Church, coming into the Weimar National Assembly two familiar competing views dominated the debates concerning the relationship between church and state,<sup>210</sup> and neither one of these views enjoyed a majority. In the end it was a compromise, and on some issues public protest, that resulted in a middle ground being found between these positions.<sup>211</sup> On the one side were the separationists who believed that church and state should be strictly separate, with no formal legal relationship existing between the two.<sup>212</sup> For the separationists it

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204 Link, Staat und Kirche in der neueren deutschen Geschichte, pg. 93.

205 Link, Staat und Kirche in der neueren deutschen Geschichte, pg. 94.

206 Walter, Religionsverfassungsrecht, pg. 121; Borowski, Die Glaubens- und Gewissensfreiheit des Grundgesetzes, pg. 43

207 A copy of the Weimar Constitution can be found at (in German): <http://www.documentarchiv.de/wr/wrv.html>. It can also be found in English at [http://www.zum.de/psm/weimar/weimar\\_vve.php](http://www.zum.de/psm/weimar/weimar_vve.php).

208 Borowski, Die Glaubens- und Gewissensfreiheit des Grundgesetzes, pg. 49.

209 Unruh, Religionsverfassungsrecht, pg. 38.

210 Borowski, Die Glaubens- und Gewissensfreiheit des Grundgesetzes, pg. 47

211 Link, Staat und Kirche in der neueren deutschen Geschichte, pg. 104. See also von Campenhausen/de Wall, Staatskirchenrecht, pg. 41; Field, Religion in the German Volksschule, 1890-1928.

212 Martin Borowski argues that the French system of *laïcité* was the model for the separationists. Borowski, Die

was the relationship between the state and the individual that should be front and center, i.e. the goal should be to create a document that emphasizes individual religious freedom and equality rights regardless of religious membership. For the separationists this was the logical conclusion to the increasing distance that had developed over the past century between church and state, as well as the increased emphasis that was gradually being placed on individual rights.<sup>213</sup> On the other side stood the traditionalists who viewed separationist ideas as an attack on the two established churches, especially those proposals seeking to remove church influence over schools and funding from the state for the church.<sup>214</sup> The primary goal of the traditionalists was to maintain some semblance of the status quo, namely the legal relationship between the state and the two main churches, including the state's obligation to ensure their financial stability.<sup>215</sup>

With neither side having a clear majority in this debate, a compromise was sought and eventually reached, a compromise that is often referred to as the *Doppelter Kompromiß* (double compromise)<sup>216</sup> or *Kulturkompromiß*.<sup>217</sup> At the heart of this compromise was the ending of any status quo that included concepts of a “Christian state” or “Holy state.” Thus, absent in the new constitution was a clause similar to Art. 14 of the Prussian Constitution (that Prussia was a Christian nation), a nod to the Social Democrats who during the debates talked about ending the concept of Germany being a Christian nation. On paper, from this point on, all religious entities were strictly separate from the state but could maintain legal arrangements with it that allowed for the religious entities to operate in the public sphere.<sup>218</sup> What impact this compromise actually had on the nature of the state is a matter of some debate, as this arrangement seems to have at least maintained the *christliche Grundcharakter* of the Prussian constitution, especially, as will be discussed in more detail below, in the realm of schools and the granting of public corporate status to the two main churches.<sup>219</sup> The compromise also seems to have instituted what would later be referred to as a friendly or halting separation of church and state (*freundschaftliche Trennung* or *hinkende Trennung*), whereby the emphasis seemingly was not on what kind of relationship between church and state was prohibited, but rather what was permitted.<sup>220</sup>

Aspects of the compromise can be seen upon closer inspection of the various provisions of the WRV. Martin Borowski offers a succinct summary of the potential impact of these provisions on individual rights when he notes that the ideals first expressed in the failed attempt at drafting a constitution in Frankfurt 1848, ideals that sought to make religious liberty a fundamental right to be enjoyed by people of all religious persuasions, were finally realized with the passage of the Weimar Constitution.<sup>221</sup>

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Glaubens- und Gewissensfreiheit des Grundgesetzes, pg. 43.

213 Unruh, Religionsverfassungsrecht, pg. 37.

214 von Campenhausen/de Wall, Staatskirchenrecht, pg. 41.

215 de Wall, Die Entstehung der deutschen Verhältnisbestimmung von Kirche und Staat, pp. 114-115.

216 Walter, Religionsverfassungsrecht, pg. 187. (Peter Unruh refers to this as a Kulturkompromiß, see Unruh, Religionsverfassungsrecht, pg. 38.)

217 de Wall/Muckel, Kirchenrecht, pg. 47.

218 Borowski, Die Glaubens- und Gewissensfreiheit des Grundgesetzes, pg. 48 (who characterizes this as a momentous change); von Campenhausen/de Wall, Staatskirchenrecht, pg. 32.

219 Hillgruber, Staat und Religion, pp. 45-46.

220 Jeand'Heur/Korioth, Grundzüge des Staatskirchenrechts at 42-43;

221 Borowski, Die Glaubens- und Gewissensfreiheit des Grundgesetzes, pg. 49. (“Zusammenfassend kann man

Specifically, Article 135 called for all inhabitants to have the right to believe as they wished regarding religion and practice those beliefs as they saw fit, so long as they did not come into conflict with general laws. This in many respects was a concession to the separationists who wanted individual religious rights to be the foundation of the new constitution, at least with regards to matters of religion. Along the same lines, Article 136 stated that basic civil rights could not be conditioned upon or withheld because of religious belief, nor could the state compel the disclosure of one's religious beliefs or participation in a religious activity. Additionally, Article 177 banned any kind of religious test for state office. Here again we see at its core an emphasis on individual religious rights.

While the separationists seemed to have achieved their goals with the aforementioned articles, traditionalists were also placated by provisions in the new constitution, first and foremost by the provisions found in Article 137. Even though the article starts off with language that is also clearly a concession to the separationists, namely there shall be no state church,<sup>222</sup> the main focus of this article was on setting forth the permissible legal relationship between church and state. At the heart of this provision was language that seemingly once and for all created an independent church, as the provision gave all religions the right to organize themselves into societies and administer themselves accordingly. Here too we see hints of concessions to the separationists in that these rights were now expanded to all religious entities, not only those preferred by the state. However it was the traditionalists who had the most to gain from language in Article 137 as it allowed religions that had already obtained public corporate status under prior agreements with the states to keep this status, with the caveat that the status would also now be open to any religion that could be deemed as lasting, seemingly ending the *Parität* on a sliding scale that had existed in places such as Prussia.<sup>223</sup> Finally, and clearly a concession to the traditionalists, any religion attaining the status of public corporation would be allowed to levy taxes on its members that would be collected by the state in order to financially support the church. Thus, locking in the concept of *Staatsleistungen* that came into being in the aftermath of the RDH.

Article 137 seemingly served the dual purpose of freeing the state from the church, while at the same time freeing the church from the state. Regarding the former, the state was seen to be distancing itself from its prior relationship with the two main religions, now instead being required to remain neutral toward all religions, as can be seen in provisions opening the door for other religions to gain state recognized status such as *Religionsgemeinschaften* or public corporation.<sup>224</sup> At the same time, the church was potentially freed from the state's grasp, which was especially so for the Lutheran Church, which, on paper, obtained full freedom from state domination via the express

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sagen, daß der gescheiterte Versuch der Frankfurter Reichsverfassung, die Glaubens- und Gewissensfreiheit auf der Ebene der Grundrechte des Reiches auf alle christlichen Konfessionen und alle nicht-christlichen Religionen zu erstrecken, nunmehr realisiert war. Gleiches gilt für den Schutz jeglicher Ausübung der Religion, sei es häuslich oder öffentlich, und die umfassende Freiheit der Vereinigung zu Religionsgemeinschaften.”)

222 Borowski, Die Glaubens- und Gewissensfreiheit des Grundgesetzes, pg. 48.

223 von Campenhausen/de Wall, Staatskirchenrecht, pg. 32.

224 von Campenhausen/de Wall, Staatskirchenrecht, pg. 32; Jeand'Heur/Korioth, Grundzüge des Staatskirchenrechts, pg. 43.

right of self-administration.<sup>225</sup> Thus, it is generally recognized that Article 137 ended once and for all the concept of *Staatskirche*, especially the *landherrliche Kirchenregiment* (state control of churches) that came into effect in the early 19<sup>th</sup> century.<sup>226</sup>

However, the separation contemplated under Article 137, Section 1 (prohibiting a state church) was far more moderate than what was proposed in Frankfurt at St. Paul's Church Assembly, as it retained elements of the traditional church/state relationship and most certainly was not intended to result in a strict, insurmountable separation of church and state.<sup>227</sup> Instead, as was previously mentioned, these provisions should be seen not necessarily as being restrictive, but rather outlining a permissive church/state relationship.<sup>228</sup> Furthermore, it is clear that the church was to have some kind of role in public life, illustrated perhaps most vividly by the retention of the ability for religious entities to obtain the public corporate status and with it a form of *Staatsleistung*.<sup>229</sup> Equally important, the language in Article 137, seemingly separating the two entities, cannot be seen as an attempt to relegate religion to the private sphere.<sup>230</sup>

Other provisions of note that seem to be concessions to the traditionalists include: Article 138 protecting church property, Article 139 setting aside Sunday as a day of rest, and Article 140 setting aside time for military members to practice their religion. In addition to these, several articles seem to clearly suggest that religion would continue to have a role in the public sphere. These include: an allowance of religious entities to provide pastoral services in public spheres such as the military and hospitals (Art. 141); guarantees that religion faculties would be formed at state universities with input from the churches (Art. 149); and a guarantee of religious instruction in schools (Art. 149). However, this last provision, along with Article 146, also contained elements of compromise in that the oversight of schools no longer would lie with the churches, and instead be placed into the hands of the state,<sup>231</sup> while religious courses overseen by the two main religions would continue to be a part of every school child's life, should they so desire it.<sup>232</sup> In short, religion would continue to play a role in the school setting, but the schools themselves would no longer be administered by the

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225 von Campenhausen/de Wall, *Staatskirchenrecht*, pg. 32; Jeand'Heur/Korioth, *Grundzüge des Staatskirchenrechts*, pg. 43.

226 It should be noted that while the state church had already basically been eliminated at this point, most prominently in Prussia where the Constitutions of 1848 and 1850 led to a more independent church, as was earlier noted, this did not create a total separation of church and state, with elements of state domination still in existence. See von Campenhausen/de Wall, *Staatskirchenrecht*, pg. 32 (“Das Bündnis von Thron und Altar war beendet.” and “Die Festlegung, daß keine Staatskirche bestehe, bedeutet insofern in erster Linie das Verbot der Fortführung oder Wiedereinführung eines Landeskirchentums, allgemein das Verbot der 'Einführung Staatskirche Restformen'.”); see also Jeand'Heur/Korioth, *Grundzüge des Staatskirchenrechts*, pg. 42 (where the authors refer to the *landherrliche Kirchenregiment* as a thing of the past); Borowski, *Die Glaubens- und Gewissensfreiheit des Grundgesetzes*, pg. 48 (who calls it a momentous change); Link, *Staat und Kirche in der neueren deutschen Geschichte*, pg. 99.

227 Jeand'Heur/Korioth, *Grundzüge des Staatskirchenrechts*, pg. 42 (referring to more as a “freundschaftliche Trennung”); von Campenhausen/de Wall, *Staatskirchenrecht*, pg. 32;

228 Jeand'Heur/Korioth, *Grundzüge des Staatskirchenrechts*, pg. 42

229 Link, *Staat und Kirche in der neueren deutschen Geschichte*, pg.110; von Campenhausen/de Wall, *Staatskirchenrecht*, pg. 32

230 Link, *Staat und Kirche in der neueren deutschen Geschichte*, pg. 105; von Campenhausen/de Wall, *Staatskirchenrecht*, pg. 32;

231 Link, *Staat und Kirche in der neueren deutschen Geschichte*, pg. 114.

232 Link, *Staat und Kirche in der neueren deutschen Geschichte*, pg. 113.

church.

As is sometimes the case, the potential implications of a compromise and the true impact of such can often diverge. The compromise struck here by the Weimar delegates is an excellent example of this. On paper, Article 135's protection of individual religious freedom was groundbreaking, and the imprint it left on the *Grundgesetz* is unquestioned<sup>233</sup>, but the short-term impact of these provisions were minimal at best.<sup>234</sup> Changes envisioned to the church/state relationship moved at a snail's pace and for the most part never came to fruition before the end of the Weimar Republic, as states sought to retain control over the two main churches via rules related to the public corporation status.<sup>235</sup> Furthermore, by entering into public corporate status agreements only with the two main religions, the states maintained the system of sliding scale *Parität* whereby the two major religions continued to be privileged.<sup>236</sup> Thus, the freedom and equality for religious entities that some of the drafters had hoped for, a system of *hinkende Trennung* (a halting separation), never got off the ground, as the old system basically stayed in place until the Nazis rose to power.<sup>237</sup> In reality then, the changes the WRV made to questions of religion were more a theoretical matter:<sup>238</sup>

## 2. Religious Freedom in the Nazi Period

Up until 1933 the progression of individual religious rights in both Germany and the United States were arguably on similar trajectories, in that the rights of the individual were increasingly becoming the focal point of questions concerning religion, especially with regards to members of non-mainstream religions. While it goes without saying that the Nazis destroyed any gains that were made on the individual religious rights front, it was perhaps the way the Nazis sought to reshape the state's relationship with the established churches that sent questions related to religion on a different course in Germany after Hitler's fall.

With the rise of Hitler individual rights disappeared almost overnight. They were supplanted by the idea of *Volksgenosse*, which essentially meant the interests of society were superior to the interests of the individual.<sup>239</sup> Any individual rights that were gained under provisions of the WRV were suddenly lost under the Nazis. With regards to the established religions, however, the Nazis were politically savvy enough to understand that it would be unwise to expressly and purposefully attack at the beginning of their rule an institution that had been at the heart of German culture for centuries. Thus in their manifesto they disguised their true intentions by using words such

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233 See generally Fischer, *Trennung von Staat und Kirche*, (3. Aufl, Bielefeld, 1984).

234 Link, *Staat und Kirche in der neueren deutschen Geschichte*, pg. 116.

235 von Campenhausen/de Wall, *Staatskirchenrecht*, pg. 33; Jeand'Heur/Korioth, *Grundzüge des Staatskirchenrechts*, pg. 43. (citing laws passed in Prussia, Württemberg, and Baden as examples).

236 von Campenhausen/de Wall, *Staatskirchenrecht*, pg. 33; Link, *Staat und Kirche in der neueren deutschen Geschichte*, pg. 38.

237 See also Unruh, *Religionsverfassungsrecht*, pg. 38.

238 Link, *Staat und Kirche in der neueren deutschen Geschichte*, pg. 101. ("Aufs Ganze gesehen, blieb der Staat 1918-1933 in weiterem Umfange auf der bisherigen Linie staatskirchenrechtlicher Aufsicht und Nähe im Verhältnis zu den Kirchen, als dem Wortlaut und der Tendenz der Verfassung entsprochen hätte.") von Campenhausen/de Wall, *Staatskirchenrecht*, pg. 33.

239 E. R. Huber, *Verfassungsrecht des Großdeutschen Reiches*, S. 361 (Hamburg, 1939)

*Religionsfreiheit* (religious freedom) and *positivem Christentum* (positive Christianity).<sup>240</sup>

It didn't take long, however, for both churches to realize that they were powerless to fight against Hitler's regime and its ultimate goal of creating a confession free society in which the church has no role in politics and a limited role in society.<sup>241</sup> The process known in German as *Entkonfessionalisierung* (removal of confessional beliefs from society) was gradual but purposeful. Between 1934 and 1938, all schools were stripped of their religious content or affiliations, including, to a certain extent, private religious schools.<sup>242</sup> During the same period laws were instituted forbidding citizens from being a member of both the church and the Nazi party; religious faculties were banned at Universities, and the church was relieved of its duties to help the poor, youth and the sick.<sup>243</sup> Furthermore, one's right to practice religion was confined to the private sphere of church services,<sup>244</sup> and by 1941 religious institutions had lost their public corporation status, and as such their power to fund themselves via taxes.

In short, the Nazis did seek to simply separate state and church in the traditional sense, rather they sought to root out all religious influences from both the state and society. This was an outright attack on religion, both established and otherwise, that, as we shall see, had an enormous impact on how the drafters of the *Grundgesetz* (GG) approached questions of religion, and continues to influence German jurisprudence on these matters.

### 3. Post War Germany: The Modern Cooperation Model

In July of 1948 the three western allied powers in control of the western three-fourths of Germany called together leaders of the German states and requested that they begin the process of creating a constitution that would serve as the basis for a democratic and federal west German nation. By this time, the two mainstream churches had reestablished themselves as one of the few organizations that could fill the void that was left by the destruction of the Nazi regime. The church was seen as one of the few remaining and relatively uncompromised entities within Germany that could help deliver the goods and services necessary to care for a population decimated by war,<sup>245</sup> as

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240 Borowski, *Die Glaubens- und Gewissensfreiheit des Grundgesetzes*, pg. 51. See also Link, *Staat und Kirche in der neueren deutschen Geschichte*, pp. at 39-40 and 135.; Unruh, *Religionsverfassungsrecht*, pg. 39.; Jeand'Heur/Korioth, *Grundzüge des Staatskirchenrechts*, pg 45; von Campenhausen/de Wall, *Staatskirchenrecht*, pg. 33.

241 Borowski, *Die Glaubens- und Gewissensfreiheit des Grundgesetzes*, pg. 52. See also Link *Staat und Kirche in der neueren deutschen Geschichte*, pg. 40 (who points out that this is not to say there was no opposition, but rather that the opposition stood no chance of successfully repelling Hitler's goals regarding the church).

242 Link, *Staat und Kirche in der neueren deutschen Geschichte*, pg. 147.

243 Unruh, *Religionsverfassungsrecht*, pp. 39-40; von Campenhausen/de Wall, *Staatskirchenrecht*, pg. 34.

244 Link, *Staat und Kirche in der neueren deutschen Geschichte*, pg. 148. Unruh, *Religionsverfassungsrecht*, pg. 40; von Campenhausen/de Wall, *Staatskirchenrecht*, pp. 34-36; Jeand'Heur/Korioth, *Grundzüge des Staatskirchenrechts*, pg 47 (other examples include: the deconfessionalization of confessional schools, abolition of school church services, obstruction and repression of residential pastoral services, the downsizing and elimination of religious faculties at universities, the conveyance of church run cemeteries to local government, the conveyance of religious affiliated social services to secular entities, the relativization of religious holidays, the rejection of religious entities from public airwaves and press, and finally denial of permits to build new churches, see von Campenhausen/de Wall, *Staatskirchenrecht*, pg. 36; )

245 Link, *Staat und Kirche in der neueren deutschen Geschichte*, pg. 41; Jeand'Heur/Korioth, *Grundzüge des*

well as help the state reestablish order of and morality in a defeated and destroyed population.<sup>246</sup> Thus, the church was perfectly positioned to influence the debates leading up to the passage of the *Grundgesetz*, influence that would be critical in securing at the very least something similar to the so-called double compromise that we saw during the debates surrounding the drafting of the Weimar Constitution. Once the church was viewed by the war's victors as a trustworthy partner, it sought to use some of its new influence to reestablish itself as a political power, especially in the school policy arena.<sup>247</sup> In fact the churches had already exercised their influence in the drafting of state constitutions that were in place on the eve of the formation of the *Grundgesetz*, so it was only natural that they would also seek to influence the drafters of the new German constitution.<sup>248</sup>

The climate leading up to the drafting of the constitution was far different from the one that existed in the Weimar of 1919. The church most certainly benefited from a society that craved morality after the perversion of the legal system by the Nazis. Rather than being met with hostility, they generally were viewed as being positive and neutral. The old liberal calls for separation were replaced by a desire for a closeness between church and state, a closeness that the Nazis had tried to destroy.<sup>249</sup>

Despite these positive views of the church, there were still discussions concerning how religion should be handled in the new governing document. How contentious these discussions were is open for debate,<sup>250</sup> but it seems that many of the questions that faced the drafters of the Weimar Constitution were once again part of an overall discussion concerning the role of religion in society as the new country struggled to regain some semblance of constitutional order. The pro-religious parties sought to add provisions into this new Basic Law that protected marriage and families, the rights of parents, the establishment of private schools, the continuation of religion lessons in public schools, and perhaps most importantly the independence of the church.<sup>251</sup> This was met with opposition by the other parties who, for various reasons, were reluctant to give religion such a primary role in society.<sup>252</sup> The compromise position ended up being the incorporation in the Basic Law of the *doppelten Kompromiß* that formed the basis of the Weimar Constitution's religion provisions, which in some respects moved many

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Staatskirchenrechts, pg. 49; See also Czermak, *Öffentliche Schule, Religion und Weltanschauung in Geschichte und Gegenwart der Bundesrepublik Deutschland: Eine Rückschau unter dem Aspekt der individuellen Religionsfreiheit und Neutralität* in *Kirche und Religion in sozialen Rechtsstaat*, FS Rübner (2003), pg. 81.

246 Waldhoff, "Neue Religionskonflikte und staatliche Neutralität – Erfordern weltanschauliche und religiöse Entwicklungen Antworten des Staates?" NJW 2010, pg. 90

247 Mikat, "Verfassungsziele der Kirchen unter besonderer Berücksichtigung des Grundgesetzes," in: , *Christen und Grundgesetz*, ed. Morsey/Reppen, pp. 33-69 (Paderborn, 1989)

248 Czermak, *Öffentliche Schule*, pg. 82 (he points to Bayern, Rheinland-Pfalz, Baden-Württemberg, and Saarland as examples where "starke dezidiert christliche Elemente" could be seen.)

249 Jeand'Heur/Korioth, *Grundzüge des Staatskirchenrechts*, pg. 50. ("In diesen Jahren des Wiederaufbaus, bis hin zum Ende der Fünfzige Jahre, wurde dementsprechend das alte liberale Trennungsgedanken von Postulat eine "neuen Nähe" von Staat und Kirche überlagert.")

250 For instance Christian Walter characterizes the debates as being less contentious as those that took place leading up to the adoption of the Weimar Constitution. He tends to view the divisions as being less stark in this post-war period, where there was no appetite to find solutions to the debates of the Weimar time. See Walter, *Religionsverfassungsrecht*, pg. 187. However, Christoph Link argues that the only real contentious issue was over the religion in schools. Link, *Staat und Kirche in der neueren deutschen Geschichte*, pg. 157.

251 Kröger, *Die Entstehung des Grundgesetzes*, NJW 1989, 1318, 1323

252 Kröger, *Die Entstehung des Grundgesetzes*, NJW 1989, 1318, 1323

of these questions to the state level where they were dealt with differently.<sup>253</sup>

In his book “Die Glaubens- und Gewissensfreiheit des Grundgesetzes,” Martin Borowski provides a detailed summary of the debates over the various draft provisions concerning questions of religion, which are helpful to understand the development of religious provisions of the *Grundgesetz*.<sup>254</sup> The initial draft of the proposed constitution that resulted from two weeks of work on the Herreninsel in the Chiemsee contained only two short provisions related to religion, jointly protecting religious beliefs and practices.<sup>255</sup> Once these were sent to the *Parlamentarische Rat* (Parliamentary Council), where no one party or side in this debate enjoyed a majority, the proposals regarding religion become more numerous and contentious.

The provisions that ultimately were to become Article 4 of the *Grundgesetz* were for the most part not contentious, however just how far these protections should be expressly extended were the source of some debate.<sup>256</sup> Changes were made soon after as the Herreninsel draft was amended to include a provision allowing for religious freedom to be restricted by general laws.<sup>257</sup> But by the end of this round of debates (the 24<sup>th</sup> Session), the restrictive general laws clause was removed, and additional provisions concerning no state coercion and the prohibition of requiring one to divulge his or her religion were also added.<sup>258</sup> Two sessions later, advocates on behalf of the churches sought to expand the scope of these provisions by adding language that would have expressly protected both public and private practice of religion, changes that were ultimately rejected and then by the 47<sup>th</sup> Session morphed into an extensive list of protections. The list included provisions that: 1) covered freedom of belief, conscience, religion and ideology, while allowing religious and ideological groups to form around these rights; 2) protected the free exercise of religion; 3) prohibited state coercion on matters of religion; 4) allowed people to keep private their religious or ideological persuasions, with limited exceptions; and 5) allowed for conscientious objection to military service.<sup>259</sup> Ultimately, some of these clauses were removed from the proposal once it was decided to incorporate provisions of the Weimar Constitution as leaving them in would have been redundant.<sup>260</sup>

While concepts of individual religious freedom were expressly included in the original draft that came out of the working group in Herreninsel, defining the contours of the relationship between church and state did not become part of the discussion until some months later. The churches initially sought to use their new found power to ensure that the new Constitution took into consideration Christian/western values, but more

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253 Link, *Staat und Kirche in der neueren deutschen Geschichte*, pg. at 157 (citing Bremen and Hessen as being states with a stronger principles of separation as many of the other states).

254 See Borowski, *Die Glaubens- und Gewissensfreiheit des Grundgesetzes*.

255 Borowski, *Die Glaubens- und Gewissensfreiheit des Grundgesetzes*, pg. 57. (“(1) Glaube, Gewissen und Überzeugung sind frei. (2) Der Staat gewährleistet die freie Religionsausübung.”)

256 Borowski, *Die Glaubens- und Gewissensfreiheit des Grundgesetzes*, pg. 58.

257 Borowski, *Die Glaubens- und Gewissensfreiheit des Grundgesetzes*, pg. 58. (“(1) Die Freiheit des Glaubens, des Gewissens und der Überzeugung ist unverletzlich. (2) Die ungestörte Religionsausübung wird im Rahmen der allgemeinen Gesetze gewährleistet.”)

258 Borowski, *Die Glaubens- und Gewissensfreiheit des Grundgesetzes*, pg. 58.

259 Borowski, *Die Glaubens- und Gewissensfreiheit des Grundgesetzes*, pg. 59.

260 Borowski, *Die Glaubens- und Gewissensfreiheit des Grundgesetzes*, pg. 59.

importantly to provide express protections for its relations with the state.<sup>261</sup> These took the form of seven additional provisions offered up by church advocates, described by Borowski as: 1) the recognition of churches' significance; 2) a guarantee of self-administration for the churches; 3) the recognition of the church as a public corporation (*Körperschaftsstatus*) 4) protection of church property; 5) a promise to change the system of so-called *Staatsleistung* only upon express agreement of the churches; 6) recognition of the church as a charitable entity for tax purposes; and 7) continuation of the existing agreements between the state and the two main religions.<sup>262</sup> These were rejected by a narrow vote, and followed up by a proposal to simply incorporate provisions from Weimar Constitution (WRV), which was ultimately agreed to by the delegates.

One cannot lose sight of the fact that these debates were taking place in the shadow of Nazi atrocities and their outright hostility toward religion. Thus, it should come as no surprise that the debate over the role of religion was far less contentious than what occurred leading up to the signing of the WRV.<sup>263</sup> The WRV was a compromise that rejected both a strict separation of the two spheres as well as the idea that religion should be relegated to the private sphere only. However, in the shadow of the Nazis and their attempt to eliminate the church as a meaningful entity, these provisions were no longer seen as a compromise but as a necessary part of the allocation of responsibilities in the building of a new society which would require giving churches the freedom and independence they needed to fulfill their spiritual missions and the responsibilities allocated to them by the state.<sup>264</sup>

In the end, the *Grundgesetz* finally cemented the concept of individual rights into the already existing doctrines related to questions of religion, while at the same time incorporating the Weimar provisions that sought to balance the competing goals of separation and closeness with regards to church/state relations. As we will see in the following chapters, what developed in the aftermath of the passage of the *Grundgesetz* (Basic Laws) is a system whereby church and state have a cooperative relationship while at the same time the rights of the individual have been elevated to a status never seen before in German history. The extent to which these two developments compliment each other, as well as the tensions between the two, will be a focus of the remainder of this work.

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261 Borowski, *Die Glaubens- und Gewissensfreiheit des Grundgesetzes*, pg. 60.

262 Borowski, *Die Glaubens- und Gewissensfreiheit des Grundgesetzes*, pg. 61 (Section 1 called for the recognition of the meaning of the church, Section 2 protected the churches' right to self-administration, Section 3 gave churches the right to become public corporations, Section 4 protected church property from state interference, Section 5 sought to limit the removal of state support from the churches, Section 6 dealt with the tax status of the churches and Section 7 sought to extend the previous state agreements with the church).

263 Jeand'Heur/Korioth, *Grundzüge des Staatskirchenrechts*, pg. 48.

264 Jeand'Heur/Korioth, *Grundzüge des Staatskirchenrechts*, pg. 48.

## Chapter 3: The Historical Origins of Religious Liberty in the United States

### A. Introduction

Whereas German history is shaped by the relationship between one and then two established religions and the state, the American experience is shaped by a religious diversity of Protestant sects, spread throughout thirteen colonies, some of which were dominated by a particular sect, some of which containing a plurality of sects.<sup>265</sup> As was the case in Germany, the development of religious liberty was not driven solely by Enlightenment thinking, rather, as we shall see, it was changes in federal and state structures that necessitated a rethinking of the church/state relationship. This does not mean that events such as the Reformation and the Enlightenment played no role in the American concepts of religion, state and society. Colonial Americans were without a doubt influenced by the works of Luther and Calvin focusing on two kingdoms, one spiritual and one worldly, that should be separate,<sup>266</sup> as well the views of Enlightenment philosophers such as Locke, Hobbs Volitare and Montesquieu. By the time of the American Revolution, some kind of separation of the two kingdoms was seen by much of the political elite as necessary to protect one world from the corruption of the other, while toleration and inalienable rights were considered pillars of the changing relationship between church, state and society.<sup>267</sup> However, it would be a mistake to characterize the changes that were taking place around the Revolution as secular in nature: state constitutions of the time as well as the Declaration of Independence reflect the important role that religion played in revolutionary American society.<sup>268</sup>

It would be equally erroneous to characterize the views on religion's role in matters of state and society at this time in American history as monolithic. The competing views on this subject were numerous ranging from republicans like Washington and Adams who justified a close church/state relationship to advance secular causes such as good government, to Enlightenment advocates such as Madison and Jefferson who advocated for less interaction between the two spheres, arguing that religion was too important to allow the state to corrupt it.<sup>269</sup> While these divergent views made finding a consensus on questions concerning religion difficult, they somehow led to the drafting of the Establishment and Free Exercise Clauses, which some have characterized as a “grand experiment<sup>270</sup>” and “one of America's greatest contributions to Western Civilization”<sup>271</sup>

265 According to Samuel Huntington, 97% of Americans in 1790 were members of Protestant sects. See Huntington, *Who Are We? The Challenges to America's National Identity*, (New York, 2004), pg. 47. Thus, the divide that existed in Germany between Catholics and Protestants simply did not exist in colonial America. What did exist was a diversity of sects within Protestantism. In 1760 60% of the population were Anglicans or Congregationalists, by 1790 this number had decreased to 30%, with an explosion of smaller sects taking its place. See Lambert, *The Founding Fathers and the Place of Religion in America*, (Princeton, 3003) pg. 208.

266 Adams, *A Heritage of Religious Liberty*, 173 Penn Law Review 1559, 1561 (1989)

267 Adams, *A Heritage of Religious Liberty*, pg. 1562.

268 Driesbach, *In Search of a Christian Commonwealth: An Examination of Selected Nineteenth-Century Commentaries on References to God and the Christian Religion in the United States Constitution*, 48 Baylor Law Review, 927, 936 (1996)

269 McConnell, *The origins and historical understanding of free exercise of religion*, pg. 1442

270 See Driesbach, *A Lively and Fair Experiment: Religion and the American Constitutional Tradition*, 49 Emory Law Journal 223 (2000).

271 Adams, *A Heritage of Religious Liberty*, 173 Penn Law Review 1559 (1989); Albert, *American Separationism*

Whether these two clauses can be seen as one of the greatest contributions America has made to Western Civilization is debatable, but the use of the word “experiment” seems apt considering that up to this point in western civilization, as the review of early German history, which is representative of the time, has shown, state and religion were essentially unified.<sup>272</sup> In seeking to break away from England, Americans not only were seeking to break away from the monarchy, but also seeking to abandon the unity of state and church, which in England took the form of the state run Church of England.<sup>273</sup> In short, the experiment sought to rethink the relationship between church, state and society. Like with most experiments, results were not immediate. Furthermore from 1776 to 1940 this experiment belonged squarely to the states, for reasons that will be discussed in greater detail. Thereafter it was federalized by the United States Supreme Court.<sup>274</sup>

While there is not much debate among American scholars over whether America was breaking with western civilization tradition with regards to religion when it drafted its constitutions, both state and federal, agreement on the historical development of the relationship between church, state and society ends there. The drafters' views of the First Amendment remain front and center in the modern debate over the role of religion in America, and historians and academics in the United States have been engaged in a decades long battle over this history, one side claiming that the country was founded as a Christian nation, the other side claiming it was founded as a secular nation.<sup>275</sup> To support their claims each side tends to selectively use views of various founders while generally ignoring that the founders themselves were deeply divided over the proper relationship of church and state.<sup>276</sup> Since the late 1870s the Supreme Court has sought to find a consensus in these divergent views and has engaged in a quasi-originalist analysis of the religion clauses, searching eagerly for the “real” intent of the drafters of the constitution in order to define its vague terms.<sup>277</sup> Yet, even those who prefer to use

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and Liberal Democracy: The Establishment Clause in Historical and Comparative Perspective, 88 *Marquette Law Review* 867, 870 (2005)

- 272 Here the term “state” applies as well to the numerous German principalities, as was described in the prior chapter.
- 273 Hartogensis, “Denial of Equal Rights to Religious Minorities and Non-Believers in the United States,” 39 *Yale L. J.* 659 (1929-1930).
- 274 As will be seen, up until the 1940s, the Establishment and Free Exercise Clauses of the First Amendment were deemed only to apply to the federal government, not the states. Because relationships between church, state and society are more local in nature, these relationships were defined by state constitutions more or less. For a detailed overview of this see Lash, *The Second Adoption of the Establishment Clause: The Rise of Non-Establishment Principle*, 27 *Arizona State University Law Review* 1085 (1995).
- 275 Advocates of the secular nation view often point out that there is no reference whatsoever to God in the U.S. Constitution. (see Lambert, “The Founding Fathers,” pg. 238) Opponents of this view argue that God was left out not to advance the idea of a secular nation but rather because compromise among the various sects was necessary; the consensus view was that the federal government had no role in matters of religion, and the overwhelming presence of religion in everyday life made reference to God unnecessary. (see Driesbach, *In Search of a Christian Commonwealth*, 1996)
- 276 Lambert, “The Founding Fathers,” pg. 209. One scholar has observed that the Constitution “was assented to by a motley groups of citizens; and socially, religiously, and regionally diverse thought went into its making. By the standards of good history, then, [the pursuit of original intent and] the attempt to depict a single true meaning or intent, is a questionable enterprise.” See Driesbach. “A Lively and Fair Experiment, quoting Elizabeth B. Clark, *Church-State Relations in the Constitution-Making Period, in Church and State in America: A Bibliographical Guide: The Colonial and Early National Periods* 151, 154 (John F. Wilson ed., 1986).
- 277 See *Reynolds v. United States*, 98 US 145 (1878), which was most likely the first time the Court sought to define the scope of the religion clauses by using the views of their drafters. See also Driesbach, *A Lively and Fair Experiment*, pg. 226.

an originalist approach when interpreting the religion clauses acknowledge that the country the founders created was far different in terms of religious diversity than the one with which today's Supreme Court is faced.<sup>278</sup> In short, when seeking to find the meaning of the American religion clauses, history matters, but it has its limitations.

Finally, American history is also, for the most part, dominated by how the Protestant sects dealt with one another, Catholicism being viewed for much of American history by most of the colonial Protestant sects, and then by political elites in post-revolutionary America, with suspicion or outright hostility.<sup>279</sup> Thus, instead of the state seeking a balance between two great religious powers, in early America any balance that was sought was among the various Protestant sects, with Catholics being generally treated in a manner similar to the non-mainstream religions in Germany.

## **B. Colonial America**

In school, Americans are generally taught that the settlers came to the New World in search of religious freedom. At the same time, most Americans are also familiar with dark chapters of early American history such as the Salem witch trials, made famous by Arthur Miller's *the Crucible*. Americans can be excused for being confused by these conflicting historical narratives concerning religious liberty. They are part of a long, rich and diverse history of the role religion has played in American society. In fact, today's disputes over the role religion should have in American society are in many respects no different than, and heavily influenced by, the different opinions that existed during the colonial times.

### **1. Differing Views of Religion in Early America**

While escaping religious persecution was undoubtedly a driving force in the decision of many settlers to flee from Europe, it is a fallacy to claim that the primary purpose of the settlers was to set up a Utopian society where all could believe and practice religion as they pleased. Nothing could be further from the truth. Company charters creating the first settlements in Virginia, whose establishment was driven more by economics than religion, contained language expressing concern for ensuring that only a "true religion" would be practiced in the new world.<sup>280</sup> The Puritans, whose journey was indeed motivated by religion and who followed these original company settlers, were equally intent upon setting up a society built on one "true" belief. The early American settlers, many of whom sought to escape persecution, used their new found freedom not to set up colonies where religious freedom could flourish, but rather to set up a society that was just as intolerant toward dissenting beliefs as the European society from which they had escaped.<sup>281</sup> As one scholar put it, "[p]ersecuted groups, when they finally

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278 See Driesbach, *In Search of a Christian Commonwealth*, pg. 955.

279 Esbeck, *Religion During the American Revolution and the Early Republic*, in *Law & Religion* (Farnham, 2013); University of Missouri School of Law Legal Studies Research Paper No. 2012-30, Available at SSRN: <http://ssrn.com/abstract=2154443>; Feldman, *Religious Minorities and the First Amendment: The History, the Doctrine, and the Future*, 6 *Univ. of Penn Journal of Constitutional Law* 222, 225 (2003).

280 Adams, *A Heritage of Religious Liberty*, 173 *Penn Law Review* 1559, 1562 (1989)

281 Albert, "American Separationism and Liberal Democracy," pg. 882. See also Robert S. Alley, *How Much God in the Schools?: Public Education and the Public Good*, 4 *Wm. & Mary Bill of Rts. J.* 277, 278 (1995) and Mark

escape and gain an ascendancy of their own, have a tendency to persecute others with the same enthusiasm from which they had previously suffered.”<sup>282</sup> So it was in early colonial America. In many respects then, the toleration, or lack thereof, at this time mirrored that which existed in Germany after the signing of the Treaty of Westphalia: dissenters were usually not welcome in most early, religiously homogeneous colonial communities, and were forced either to find someplace else in the new world where their views would be more accepted or stay and be persecuted.<sup>283</sup>

Religion was the guiding principle in the every day lives of late 16<sup>th</sup> and early 17<sup>th</sup> century colonialists,<sup>284</sup> and those governing the people during this time thought it was their duty to support religion:

“State officials provided various forms of material and moral aid to churches and their officials. Public properties were donated to church groups for meeting houses, parsonages, day schools, and orphanages. Tax collectors collected tithes and special assessments to support the ministers and ministry of the congregational church. Tax exemptions and immunities were accorded to some of the religious, educational, and charitable organizations that they operated. Special subsidies and military protections were provided for missionaries and religious outposts.... Sabbath day laws prohibited all forms of unnecessary labor and uncouth leisure on Sundays and holy days, and required faithful attendance at worship services.”<sup>285</sup>

To most colonists, separation of church and state, if they even thought in these terms, referred only to a separation of functions between religious leaders and government officials, not a disestablishment of religion.<sup>286</sup> Thus, the belief that existed in Germany at the time leading up to the Thirty Years War, namely that the two spheres had separate functions but worked in unison to serve a higher power, was the norm as well in early colonial America.<sup>287</sup> This unison remained, for the most part, well into the 18<sup>th</sup> Century when the so-called First Great Awakening (1720s to 1750s), characterized by the idea that individuals have religious freedom, ushered in a new way of thinking about religion, a more “individualistic, voluntaristic, enthusiastic” version that would heavily influence the relationship between church and state going forward.<sup>288</sup>

Despite this new awakening taking place in parts of New England, pre-revolutionary America was still by no means a society that was open to all religions. Almost all of the colonies had a state established religion,<sup>289</sup> many extended full religious rights only to

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A. Noll, *A History of Christianity in the United States and Canada* (Grand Rapids, 1992).

282 See Dackson, Richard Hooker and American Religious Liberty, 41 *J. Church & St.* 117, (1999)

283 Albert, *American Separationism and Liberal Democracy*, pg. 895.

284 For an overview of religion in colonial America see Evans, *Histories of American Christianity: an Introduction*, (2013, Waco)

285 John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 *Notre Dame Law Review* 371, 379-80 (1996)

286 Greenawalt, *Religion and the Constitution*, Vol 2., (Princeton, 2009) pg 21.

287 Esbeck, “Religion During the American Revolution and the Early Republic,” in *Law and Religion*,” pg. 2

288 Miller, *The American Theory of Religious Liberty*, in *Freedom of Religion in America: Historical Roots, Philosophical Concepts and Contemporary Problems* 137, 139 (Center for Study of the American Experience, 1982).

289 Durham, *What goes around comes around: the new relevancy of state constitution religion clauses*, 38 *Valparaiso University Law Review* 353, 355 (2004); Tarr, *Church and State in the States*, 64 *Washington Law Review* 73, 81 (1989)

Protestants, and most required its officer holders to be Protestant.<sup>290</sup> Several required their citizens to be Christian and pay taxes supporting the state established religion or in the case of Massachusetts local established religion.<sup>291</sup> Some colonies practiced a kind of “benign neglect,” an approach taken by leaders in New York and New Jersey, primarily due to the extraordinary religious diversity (including Jews and Catholics) that existed in these two colonies.<sup>292</sup> Yet even benign neglect did not mean religious freedom for all. In New York, for example, Catholics were denied the privileges of full citizenship and laws that allowed residents to live in accordance with their conscience did not apply to Jews and Catholics.<sup>293</sup> In New Jersey, only Protestants were allowed to hold public office.<sup>294</sup> Only in Rhode Island and arguably Pennsylvania were minority sects and religions (Quakers, Jews, other Protestant sects) in early 18<sup>th</sup> century America truly left alone.<sup>295</sup>

This divergence of experiences among the colonies is a result of the divergence of views toward religion's role in matters of state and society that had developed in colonial America during the 18<sup>th</sup> Century, as no one colony dealt with matters of religion exactly like another. Understanding the various views towards religion that existed in colonial America on the eve of the Revolutionary War is necessary to fully comprehend the arguably unique nature of the Establishment Clause and the debates concerning the meaning of this clause that continue to plague American religious freedom jurisprudence. Scholars such as Michael McConnell and John Witte Jr., have attempted to categorize the various influential groups and their views on religion that existed in the period of time leading up to the drafting of the American Constitution.<sup>296</sup> In doing so, they illustrate that in pre and post revolutionary America, including the period of time when the Establishment and Free Exercise Clauses were drafted, there was no consensus on what the relationship between church and state should be, rather varying views were found along a continuum between a relatively close relationship and a more distant one.

Early colonial America is most commonly associated with the Puritans, as their views dominated the landscape in much of New England. Descendants of earlier settlers who came to the New World in order to establish a “Christian commonwealth,” early Puritan America was characterized by decentralized religious communities who chose their ministers and funded their churches through taxes.<sup>297</sup> Considered to be the heirs of European Calvinists, they made up almost 75% of the entire colonial population at time

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290 Durham, *What goes around comes around*, pg. 356; Tarr, *Church and State in the States*, pg. 81.

291 For a more detailed colony by colony summary of the status of religion in pre-revolutionary America see Albert, *American Separationism and Liberal Democracy*, pp. 883-895; see also Tarr, *Church and State in the States*, pg. 81.

292 McConnell, *The origins and historical understanding of free exercise of religion*, pg. 1424; Albert, *American Separationism and Liberal Democracy*, pg. 890.

293 Albert, *American Separationism and Liberal Democracy*, pg. 890

294 Albert, *American Separationism and Liberal Democracy*, pg. 890

295 McConnell, *The origins and historical understanding of free exercise of religion*, pp. 1424-25; Albert, *American Separationism and Liberal Democracy*, pg. 893

296 McConnell, *The origins and historical understanding of free exercise of religion*, pg. 1425; See also Adams, *A Heritage of Religious Liberty*, (who breaks these groups into Enlightenment separationists, political centrists, and pietistic separationists, but comes to similar conclusions as Witte concerning the variety of views that existed at the time.)

297 McConnell, *The origins and historical understanding of free exercise of religion*, pg. 1422

of Revolution.<sup>298</sup> Despite wishing to create a “Christian commonwealth,” Puritans also believed that the relationship between church and state should be separate, each with their own responsibility and functions.<sup>299</sup> However, while separate, the relationship was to be close, both working in the name of God, and often described by scholars with words such “cooperation” and “coordination,” words that are familiar to students of German church/state history.<sup>300</sup> For the Puritans, the primary role of the church in this cooperative relationship with the state was to teach obedience for law and instill moral values. While early colonial Puritans “had no room for religious pluralism or even for toleration,”<sup>301</sup> over the course of the 18<sup>th</sup> Century this once very intolerant sect came to accept the religious diversity with which it was surrounded. By revolutionary times Puritans were indeed accepting of most Christian sects.<sup>302</sup> In summary, Puritan ideas regarding the role of the religion in fostering morality in society in furtherance of state objectives, as well as their grudging acceptance of dissenters, is not that far removed from the views held by many territorial princes and leaders in 18<sup>th</sup> Century Germany.

As was briefly alluded to above, the Puritan way of life was threatened by the Great Awakening that took place in the early part of the 18<sup>th</sup> Century, marking a turning point in the relationship that existed in colonial America between religion, state and society. This movement was driven by Evangelicals who shook up the established order by going into communities and preaching where they saw fit, resulting in “confusion and disorder” in what, up to this time, were relatively homogeneous communities.<sup>303</sup> Heirs of 16<sup>th</sup> Century European Anabaptists,<sup>304</sup> the views of Evangelicals were characterized by liberty of conscience, disestablishment and separation of church and state, although certainly not for the purpose of creating a secular society.<sup>305</sup> With these views in mind, it should come as no surprise that Roger Williams of Rhode Island and William Penn of Pennsylvania, the main advocates of Evangelical thinking in early colonial America, were able put these beliefs into practice in their respective colonies. Penn rejected the coercive practices of 17<sup>th</sup> Century Puritans, establishing an openly theocentric society in which the individual was protected from state coercion.<sup>306</sup> Williams' concern, on the other hand, focused on protecting all religions from corruption by the state, something he had seen in the colony of Massachusetts from where he fled in search of religious freedom, and led him to be perhaps the first person to talk about a wall needed to separate church and state.<sup>307</sup> John Leland, an influential baptist preacher during this period, probably summed up best the views that Evangelicals had about the relationship between church and state when he said: “the notion of Christian commonwealth should be exploded forever;”<sup>308</sup> the proper role of the state with regards to religion being the

298 Adams, *A Heritage of Religious Liberty*, 173 *Penn Law Review* 1559, 1564 (1989)

299 Witte, *Religion and the American Constitutional Experiment*, pg. 23.

300 Witte, *Religion and the American Constitutional Experiment*, pg. 24.

301 McConnell, *The origins and historical understanding of free exercise of religion*, pg. 1422

302 Witte, *Religion and the American Constitutional Experiment*, pg. 26.

303 Lambert, *The Founding Fathers*, pg. 208.

304 Witte, *Religion and the American Constitutional Experiment*, pg. 26. See also Adams, *A Heritage of Religious Liberty*, pg 1590 (referring to this group as pietistic separationists)

305 Witte, *Religion and the American Constitutional Experiment*, pg. 27, Adams *A Heritage of Religious Liberty* , pg. 1591.

306 Adams, *A Heritage of Religious Liberty*, pg. 1567

307 Witte, *Religion and the American Constitutional Experiment*, pg. 28; Adams, *A Heritage of Religious Liberty*, pg 1566.

308 Witte, *Religion and the American Constitutional Experiment*, pg. 28.

fostering of an “environment conducive to religious faith and practice.”<sup>309</sup>

Evangelicals were not alone in gradually pushing colonial American society to rethink the relationship its government should have with religion, and more importantly rethink the scope of individual religious freedom. Early colonial Virginia was dominated by the Virginia Church of England, which was “imposed from above and dedicated to government control over religion.”<sup>310</sup> This system soon spread to Maryland and other southern colonies, with varying degrees of intolerance towards minority religions. Yet in the period leading up to the Revolution, Virginia had shed its intolerance, primarily as a result of Enlightenment thinking taking hold among political elites. The views of these elites were shaped by prominent philosophers of this time (Locke, Paine, Voltaire, Jefferson, Madison), some of whom were members of the Virginia political elite themselves.<sup>311</sup> Absolute separation of church and state was central to the views of many Enlightenment thinkers, but not out of some desire to create a secular society, rather to protect the church from state encroachment and vice versa.<sup>312</sup> Regarding church/state relations, Madison's views are illustrative of the Enlightenment school of thought, whereby he opposed the state giving aid to the church (granting property, collecting taxes, etc) and was equally opposed to the state interfering with internal church business. But this was not an attempt to relegate God only to the private sphere. Both Jefferson and Madison deftly drafted provisions of the Virginia constitution that, while exalting the virtues of separation, were justified as the best way to serve God.<sup>313</sup>

Years later this same justification was used successfully by Madison to convince dissenting sects to join his effort to defeat a bill introduced in the Virginia legislature by Patrick Henry that would have taxed Virginians to pay for religion teachers in the schools.<sup>314</sup> In other words, separation was not hostile toward religion, rather it was deemed necessary to protect religion. In addition, Enlightenment views on separation can be understood as a desire to ensure peace between the various and growing religious factions of the time,<sup>315</sup> and advance the cause of individual liberty.<sup>316</sup> To advance this individual liberty, many Enlightenment thinkers believed that free exercise of religion and non-establishment principles were tied together, as many of the strongest arguments against what dissenters perceived as establishments were cast in terms of liberty of conscience and equal civil rights.<sup>317</sup> Here too we see some overlap

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309 Adams, *A Heritage of Religious Liberty*, pg. 1591.

310 McConnell, *The origins and historical understanding of free exercise of religion*, pp.. 1423-24

311 Witte, *Religion and the American Constitutional Experiment*, pg. 29. However, it should be noted that among these Enlightenment thinkers views on religious tolerance varied. Thus, while Madison and Jefferson were devoted to the idea of religious tolerance, John Locke took a particularly narrow view in that he saw no reason to tolerate the religious practices of Catholics, Jews or Muslims and believed that the laws of the state should reflect the beliefs of the Protestants that ran it.

312 As Kent Greenawalt points out, some Enlightenment thinkers such as Locke were not terribly tolerant toward Catholics and were more comfortable with church/state entanglements, while in contrast to Locke, Madison explicitly contended that financial and other government support of religion is not consistent with a voluntarist view of free exercise. Greenawalt, *Religion and the Constitution*, Vol. 2, pg. 24.

313 See Article 16 of the Virginia Bill of Rights (1776) and early Virginia statutes regarding religious freedom. Witte, *Religion and the American Constitutional Experiment*, pg. 29

314 Tarr, *Church and State in the States*, pg. 82.

315 Lambert, *The Founding Fathers*, pg. 242

316 Shakelton, *Remembering What Cannot Be Forgotten: Using History as a Source of Law in Interpreting the Religion Clauses of the Connecticut Constitution*, 52 *Emory Law Journal* 997, 1005 (2003)

317 Greenawalt, *Religion and the Constitution*, Vol. 2, pg. 34.

between views regarding the relationship between church and state in colonial American and the Old Reich, as the Enlightenment view of separation in many respects contains elements of the German concept of *Parität*, but at its extreme contained the added element that in order to truly serve individual religious liberty, church and state must remain separate, a view that went well beyond simple *Parität*.

The fourth and final group identified by Witte is far less regional in nature than the prior three. So-called Republicans were made up of thinkers and political leaders spanning all thirteen colonies, and included most prominently the likes of George Washington and John Adams, the nation's first two Presidents. Both men were deeply religious, and like other Republican thinkers, strongly believed that religion played an important role in instilling morality in citizens, which was essential for an orderly society.<sup>318</sup> Illustrating this belief, George Washington is once thought to have said, “[r]eligion and morality are essential pillars of civil society.”<sup>319</sup> In many respects, this group of thinkers were religious accommodationists as they advocated for government actions such as the funding of military chaplains, opening Congress with a prayer, and recognizing religious holidays in order to facilitate religious beliefs among the populace. Furthermore, they believed that support for and accommodation of religious entities were justified as these entities were “essential allies of good government and agents of the common good”.<sup>320</sup>

Which religious entities should receive state support was not an issue so long as it was Christian and would help the government “promote individual and communal moral development.”<sup>321</sup> John Adams, drafter of the Massachusetts Constitution, captured this sentiment when he wrote “[s]tatesmen may plan and speculate for liberty, but it is religion and morality alone which will establish the principles upon which freedom can squarely stand.”<sup>322</sup> To this end, Adams and other Republicans advocated a kind of “public religion” that would instill morals and help the government keep order, and believed that this was necessary if freedom was to thrive in the new country.<sup>323</sup> Judicial giants such as Chief Justices Marshall and Story fall into this group as well, both believing that the country was basically a Christian nation and Christianity was a part of the common law.<sup>324</sup> This view continued to hold sway with members of the Supreme Court into the 1890s, Justice Brewer summing it up best during a Haverford Lecture when he referred to the United States as a “Christian nation” where “Christianity must

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318 Adams, *A Heritage of Religious Liberty*, pg. 1588 (Adams refers to this group as “political centrists” but they correspond with Witte’s Republican group). See also Shakelton, *Remembering What Cannot Be Forgotten*, pg. 1005.

319 Witte, *Religion and the American Constitutional Experiment*, pg. 33, Adams, *A Heritage of Religious Liberty*, pg. 1588

320 Witte, *Religion and the American Constitutional Experiment*, pg. 34; Shakelton, *Remembering What Cannot Be Forgotten*, pg. 1005.

321 Shakelton, *Remembering What Cannot Be Forgotten*, pg. 1005.

322 Witte, *Religion and the American Constitutional Experiment*, pg. 35.

323 It should be noted that the use of the word “Republican” to describe this group is not universally accepted, and has actually been used by some to describe the Enlightenment group to which the likes of Jefferson belonged. See Shakelton, *Remembering What Cannot Be Forgotten*, pg. 1005 (where she uses the term “Jeffersonian-Republicans” to describe the anti-federalists, but then sets forth their views on religion in a manner that mirrors Witte’s Enlightenment thinkers.)

324 Adams, *A Heritage of Religious Liberty*, pg. 1590 (echoing views held by their English contemporaries such as Blackstone).

be neither impugned nor repudiated.”<sup>325</sup> In short, Republicans had much in common with the three aforementioned groups, however, they were much more tolerant than Evangelicals of Catholics and dissenting Protestant sects, and while this characteristic put them in league with the Enlightenment thinkers, Republicans were far less concerned with separating church and state. Furthermore, like German rulers of this same period, they believed that religion played an integral role in keeping order. However, unlike their German counterparts, they were far more likely to tolerate all sects, so long as they were Christian.

It is clear that views in colonial America concerning the relationship between state, church and society were varied and moved along a continuum. Furthermore, these views were at times relatively in sync with those that existed in Germany, while at other times almost diametrically opposed. Regarding church/state relations, the Enlightenment thinkers and Evangelicals had the strongest separationist tendencies, but often for different reasons. On the other hand, Puritans and Republicans were quite comfortable with a close relationship between church and state so long as both were working together to instill morality in the populace. Regarding questions of tolerance, divisions could be found within each group more or less, with Republicans and Evangelicals such as Roger Williams expressing the most liberal views. For Puritans and Enlightenment thinkers, tolerance was often limited only to other Protestant sects. With so many varying views spread across four distinct schools of thought regarding the role of religion, it is little wonder that the state constitutions drafted at the time of the American Revolution show no consensus on these matters.

## 2. State Constitutions at the Time of the American Revolution

As we just saw, on the eve of the American Revolution views regarding the role of religion in matters of state and society were as diverse as the religious sects that had spread throughout the colonies.<sup>326</sup> However, it was a commonly held belief throughout colonial America that any freedom of religion that did exist was limited only to the realm of religion. This included the right of one to believe and practice a religion, but it in no way amounted to a freedom from religion. Thus non-believers could claim no protection under the concept of religious freedom from being exposed to unwanted religious beliefs. Furthermore, any rights that did exist at this time were not so much individualistic in nature, but rather were tied to the individual's membership in one of the numerous Protestant sects.<sup>327</sup>

Revolutionary America was a time of enormous change regarding matters of religion, and each state was faced directly with the question of religion as they began drafting their individual state constitutions in preparation for war with England.<sup>328</sup> This change

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325 Hartogensis, *Denial of Equal Rights to Religious Minorities*, pg. 662

326 On the Eve of the war, John Adams noted how diverse the continental army was, “[t]here were among them, Roman Catholics, English Episcopalians, Scotch and American Presbyterians, Methodists, Moravians, Anabaptists, German Lutherans, German Calvinists, Universalists, Arians, Priestleyans, Socinians, Independents, Congregationalists, Horse Protestants and House Protestants, Deists and Atheists; and 'Protestants que ne croyent rien ['Protestants who believe nothing']. see Lambert, *The Founding Fathers*, pg. 219.

327 McConnell, *The origins and historical understanding of free exercise of religion*, pg. 1429

328 Tarr, *Church and State in the States*, pg. 85.

was primarily a result of the changing religious demographics in the decades leading up to the Revolution, as the once dominant Anglicans and Congregationalists (Puritans) were losing their power in numbers in many parts of the colonies. The growing power of dissenters was enough to demand that state constitutions do more than simply tolerate their existence.<sup>329</sup> As directed by the Continental Congress, eleven of the thirteen colonies drafted new constitutions on the eve of the Revolution. Additionally, many of these states revised their constitutions within the first few decades of the new country's existence.

The short survey of state constitutions that follows is an attempt to understand the views held by the drafters of the Establishment and Free Exercise Clauses, as many of the drafters of these state constitutions were also instrumental in the drafting of and debate over the First Amendment to the United States Constitution, or at the very least their views were shared by their elected representatives to Congress.<sup>330</sup> The survey reflects the changes that were taking place on the eve of the American revolution, as well as in the decades during and immediately after it when the First Amendment was drafted, changes that gradually increased the religious liberty of its citizens while at the same time increasingly took on a disestablishment element.<sup>331</sup>

On the eve of the war, no fewer than nine of the thirteen colonies had established religions, however five of them immediately disestablished their state religions in their new constitutions.<sup>332</sup> In addition to disestablishing religion, four states prohibited members of the clergy from holding elective office, presumably believing that this was also an inappropriate mixing of state and religion.<sup>333</sup> Yet this should not be viewed as an attempt to strictly separate church and state or force elected representatives to make decisions solely on the basis of secular concerns. Three of these four states that prohibited clergy from serving as elected officials also required all elected officials to believe in “God and Jesus” (Delaware) or practice a Protestant religion (North Carolina and Georgia). Five additional states also had provisions in their constitutions requiring office holders to take a religious oath or have particular religious beliefs,<sup>334</sup> and a few of these also required voters to take the same oath. Thus, in total eight states required their elected officials to be Protestant or take religious oaths, normally in the form of swearing to a belief in God and Jesus (DE), Christian beliefs (MD, MA), God and the scriptures (PA), God with exceptions for specific religions (GA) or a Protestant belief (NJ, NC). South Carolina simply ended its oath with the now familiar words “so help me God.”<sup>335</sup> New Hampshire, who drafted its second Constitution in 1784 and Vermont, who joined the union 1791, can be added to this list, as they also required religious oaths. In short, the disestablishment movement that took hold in the colonies as they

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329 Lambert, *The Founding Fathers*, pg. 208.

330 To be exact, 7 of the original 13 states revised their constitutions within 30 years of the Revolution, and Massachusetts amended theirs.

331 Wilson, *Religion under the state constitutions, 1776-1800*, 32 *J. Church & St.* 753, 762 (1990).

332 Wilson, “Religion under the state constitutions.” pg. 755

333 The colonies were Delaware, Georgia, New York and North Carolina.

334 Maryland, Massachusetts, New Jersey, Pennsylvania and South Carolina.

335 The original text of all the constitutions enacted by the colonies on the eve of the Revolution can be found at: <http://www.landofthebrave.info/state-constitutions.htm>

broke away from England had very little to do with a desire to create secular states.<sup>336</sup> Religion was still front and center in matters related to the state and society in general.

Perhaps the real revolution that was taking place as the colonies prepared for war had more do with individual religious rights. Eight of the revolution era constitutions expressly provided protections for the free exercise of religion, however, many of these provisions also contained some limitations as to who could enjoy these rights: in Maryland and Massachusetts only Christians enjoyed full free exercise rights; in North Carolina, Pennsylvania and Virginia only men (although presumably women as well either through their fathers or husbands); and in New Jersey the right was enjoyed by all persons who had only one God. Only Georgia and New York extended this freedom expressly to “all persons.” The limits on these rights, unsurprisingly, also varied from state to state. Three of the eight states that had free exercise clauses in their new constitutions also limited the religious exercise to those practices that did not interfere with “peace and safety” (Georgia, Massachusetts, and New York). At the opposite end of the free exercise spectrum were Massachusetts and Maryland, both of whom made it a duty for its citizens to engage in religious exercise. Thus, in Massachusetts on paper one had the right of free exercise, but partaking in this “free exercise” of religion was required of all citizens! Presumably one was free to choose their own religion, but nevertheless there was no option to forgo practicing a religion. As a logical extension of this duty, both states also provided for a tax to be levied on all citizens in order to financially support either Christian religions (Maryland) or only Protestant sects (Massachusetts). Only one state, New Jersey, expressly prohibited the levying of such taxes. It should be noted, however, that in many of those states whose new constitutions were silent on the matter of taxation for religion, some form of taxation to support religion was in effect.<sup>337</sup>

### **C. Religious Freedom in the New America and Beyond**

Between the time of the Revolution and the drafting of the Constitution and its amendments, the new federal Congress, formed by the Articles of Confederation, took numerous actions related to religion, including the hiring of its own chaplain to begin sessions of Congress with a prayer, hiring military chaplains, passing laws concerning the importation of Bibles, and proclaiming days of prayer and religious fasting.<sup>338</sup> Many of the practices continued well after the adoption of the religion clauses of the First Amendment, and while the official relationship between the state and established religions began to slowly change soon after the First Amendment was ratified by the states, religion continued to play a central role in American society well into the middle of the Twentieth Century.

#### **1. Post-Revolutionary America & The Religion Clauses**

As the country quickly expanded westward, Congress set aside land for religious

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336 Tarr, *Church and State in the States*, pg. 88.

337 Wilson, *Religion under the state constitutions*, pg. 755.

338 Adams, *A Heritage of Religious Liberty*, pg. 1571.

purposes, even preferring some religious groups over others, while territorial laws contained provisions such as restrictions on Sabbath activities and outlawing blasphemy.<sup>339</sup> One such Congressional act that is often set forth as evidence that the founding generation viewed the new country as a Christian nation is the Northwest Ordinance, which among its provisions can be found the words, “[r]eligion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”<sup>340</sup> What exactly the drafters of this law intended is matter of some debate, some claiming it is evidence of an intent to build a Christian nation as it expanded westward,<sup>341</sup> others arguing that “legislators did not perceive what they did as prohibiting free exercise or establishing of religion (as) [e]ven nonestablishment states had laws restricting Sabbath activities and forbidding blasphemy.”<sup>342</sup> Considering the divergent views that existed at this time regarding the proper relationship between church, state and society, it is likely that no consensus existed as to the intention of this provision other than that some kind of “public religion” should be encouraged to advance the common good in the new territories, which as we shall see, is not very different then the consensus that formed regarding the role of religion in schools in the middle and later part of the 19<sup>th</sup> century.

Around the same time Congress drafted the Ordinance, it was faced with a larger issue: how to replace or fix the Articles of Confederation. The Articles were an unmitigated disaster as the federal government it had created was weak, bankrupt, and ineffective, leading to a group of representatives from twelve of the thirteen states to meet in Philadelphia to find a solution. Once the delegates realized that simply fixing the Articles would not be sufficient, they started working on what would eventually become the Constitution of the United States of America.<sup>343</sup> By far one of the most contentious issues facing the delegates, and perhaps the central question regarding the entire enterprise of drafting a new constitution, was just how powerful the new federal government should be. The eventual compromise that led to the creation of a stronger federal government included a promise to immediately amend the new constitution with a Bill of Rights, aimed at protecting individuals from this new and powerful central government. As to matters of religion, other than a provision banning religious oaths for federal office, the new constitution was silent, and while the banning of religious oaths was indeed a “significant achievement,” especially considering how many states had such religious oaths in their own constitutions,<sup>344</sup> this provision likely was more a political compromise than a sweeping advancement of religious liberty.<sup>345</sup>

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339 Greenawalt, “Religion and the Constitution, Vol. 2, pg. 31.

340 A digital copy of the Northwest Ordinance can be found on the Library of Congress' website, <http://www.loc.gov/rr/program/bib/ourdocs/northwest.html>.; See also Greenawalt, “Religion and the Constitution, Vol. 2,” pg. 31 (who points out that in governing the territories Congress set aside land for religious purposes, and it financed missions, even naming particular religious groups to receive funds. Territorial regulations included coerced observances of restrictions on Sabbath activities and prohibitions against (Christian) blasphemy.)

341 Adams, *A Heritage of Religious Liberty*, 173 *Penn Law Review* 1559, 1572 (1989); For a summary of some of the arguments concerning how one can interpret actions such as the Northwest Ordinance see Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 *Iowa Law Review*, 1, 20-21 (1998)

342 Greenawalt, *Religion and the Constitution*, pg. 31.

343 For a detailed history of the events leading up to the Philadelphia convention as well what took place in the convention itself see Stewart, *The Summer of 1787: The Men Who Invented the Constitution* (New York, 2007)

344 Adams, *A Heritage of Religious Liberty*, pg. 1576.

345 Driesbach, *In Search of a Christian Commonwealth* pg. 951 See also Witte, *Religion and the American*

The America of 1791 had many of the same characteristics of Germany in the Napoleonic era. The country was comprised of 13 states where religious sects mixed with one another, and where increasingly no one religious sect dominated. The relationship between these sects was not always cordial, and the interests of the states vis-à-vis their relationship with religion was in no way uniform. The drafters of the First Amendment had to keep these considerations in mind, balancing the various interests and views in a manner that would allow for a consensus to be struck regarding questions of religion, state and society.

“Curiously, the fabric of colonial unity was different from the period of rebellion to the era of nation building. In the former, the colonies' cooperation took the form of an offensive attack directly aimed against the Crown. In the latter, cooperative efforts revealed a more defensive disposition, as the constituent states of the new nation sought to jealously safeguard their own respective liberties, free from unwarranted intrusion or imposition by the national body.”<sup>346</sup>

This defensive posture left drafters of the First Amendment in a difficult position, and ultimately led to a consensus on the role of the federal government in church/state matter, namely very limited and with church/state questions being left to the states.<sup>347</sup> Thus, while on their face the words “Congress shall make law respecting the establishment of religion” seem to be revolutionary, they in fact amounted to a compromise that left the states to their own devices, with each state having its own unique way of dealing with matters of church and state; the states being unwilling to cede this territory to a strong federal government. The language of the Establishment Clause was aimed at keeping the new federal government neutral in matters of religion, which arguably was the aim of both clauses.<sup>348</sup> In this respect similarities again can be seen with late 17<sup>th</sup> and early 18<sup>th</sup> century Germany where the *Reich* and then the loose confederation of German states post-RDH remained neutral in matters of religion in order to maintain peace and stability. In the new America, maintaining a balance between the various views concerning matters of religion was crucial to getting the consensus needed to enact the First Amendment.

Furthermore, a closer look at the drafting process does not shed much light on the “true intent” of the drafters of the First Amendment, primarily because the records concerning the debate over the drafts are sparse and more questions are left unanswered by the records that do exist.<sup>349</sup> Instead, jurists and academics who seek out the intent of the founders are left to look at laws like the Northwest Ordinance that were passed by the same Congress who drafted the First Amendment, or actions of that Congress such as their opening each session with prayer. The search also looks at speeches and writings of individual founders, even personal letters, the latter being the source for the term “wall separating church and state.”<sup>350</sup> What is clear, though, is the final text

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Constitutional Experiment, pg. 89.

346 Alberts, American Separationism and Liberal Democracy, pg. 898

347 Adams, A Heritage of Religious Liberty, pg. 1608.

348 Alberts, American Separationism and Liberal Democracy, pg. 900.

349 Witte, Religion and the American Constitutional Experiment, pg. 89.

350 The term is thought to originate in a letter from Thomas Jefferson to the Danbury Baptists in 1802 in which he

appears to be a compromise among the four aforementioned views of religion, using words that are open to multiple interpretations, perhaps by design.

John Witte Jr. has written extensively on this, noting that the word “establishment” alone is open to at least three interpretations: 1) limited to federal laws respecting state religions that were in place at the time of the drafting, 2) prohibiting Congress from passing laws that, taken together, could lead to the establishment of a national religion in a piecemeal fashion or something similar, or 3) prohibiting the federal government from preferring one religion.<sup>351</sup> He goes on to suggest that other words in this short clause are equally vague and possibly intentionally so.<sup>352</sup> Suffice it to say that it is at least conceivable that the inability to reconcile the competing views regarding the role of the religion in state and society left the drafters with no choice but to choose their words carefully, and in a manner that perhaps purposefully lacked precision, making attempts to find one true meaning of the clause futile.

## 2. The Religion in Early to Mid 19<sup>th</sup> Century America

Because the 1st Amendment was deemed only to apply to the federal government, questions concerning religious liberty were normally resolved at the state level under state constitutions.<sup>353</sup> Generally, as it will be seen here and below in the short summary of religion and schools in Germany and the United States, it is not without merit to argue that “[f]or much of American history . . . America was a ‘Christian nation,’ not in any particular denominational sense, but more generally as manifested in traditions, institutions, values, and symbols.”<sup>354</sup> The Second Great Awakening (1790s to 1820s) saw yet another dramatic expansion of Protestant sects beyond the traditional established sects of the Revolutionary era,<sup>355</sup> and placed renewed importance on the well-being of the individual, religiously and otherwise, to the overall well-being of society.<sup>356</sup>

“It is not an overstatement to say that the very meaning of ‘well-ordered society’ was at stake in the post-Revolutionary debates regarding the protection of religious liberty. Disestablishment of church and state threatened the creation of an orderly society by removing the institution that promised to stamp American citizens with decent, moral characters; characters that recognized, respected, and yielded to their proper

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wrote: “Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion, or prohibiting the free exercise thereof,’ thus building a wall of separation between Church & State.” A text of the letter can be found on the website of the Library of Congress, <http://www.loc.gov/loc/lcib/9806/danpre.html>.

351 See also Driesbach, *In Search of a Christian Commonwealth* pg. at 953

352 Witte, *Religion and the American Constitutional Experiment*, pp. 89-100

353 John Witte Jr. talks about “literally thousands of cases being heard over this 150 year period” regarding questions of religion. See Witte, *Religion and the American Constitutional Experiment*, pg. 107, see also Durham, *What goes around comes around*, pg. 362.

354 Driesbach, *In Search of a Christian Commonwealth* pg. at 938. See also Tarr, *Church and State in the States*,” pg. 88 and Jeffries/Ryan, *A political history of the Establishment Clause*, 100 *Mich. Law Review* 279, 301 (2001).

355 Esbeck, *Religion During the American Revolution*, (2013)

356 Shakelton, *Remembering what cannot be forgotten*, pg. 1007.

authorities.”<sup>357</sup>

Through disestablishment the state had lost its officially recognized partner in instilling morals in the populace, yet political elites still not only believed that the values of Christianity were necessary in order to ensure good government and order,<sup>358</sup> but also that religion was the glue holding this religiously diverse (in a Protestant sense) country together.<sup>359</sup> Thus, in place of a state established church, state government shifted its focus to facilitating a common “public religion” among its people.<sup>360</sup>

“The general pattern was that states sought to balance the general freedom of all private religions with the general patronage of one common public religion (generally protestant in nature), increasingly relying on the frontier as a release valve for the tensions between this private religious freedom and public religious patronage.”<sup>361</sup>

This frontier release valve allowed dissenters who did not wish to partake in this new religious common culture, or who were discriminated against for refusing to conform, to flee, mirroring the migration that took place from Europe in the 17<sup>th</sup> Century as religious minorities sought to flee persecution by moving to the New World.<sup>362</sup>

The cultivation of this public religion became the new model for the role religion would play in matters of state and society in the early 19<sup>th</sup> century. The closeness to religion would be at the society level, facilitated by a state who would honor and promote Christian traditions in order to instill morals.<sup>363</sup> To this end states recognized God in their constitutions,<sup>364</sup> gave religious symbols and messages a prominent place in public forums, recognized religious holidays as state holidays, set aside Sunday as the day of rest, and funded chaplains in places such as legislatures, the military, hospitals and prisons.<sup>365</sup> The impact this new state relationship with religion had on the populace impressed the young French diplomat Alexis de Tocqueville:

“In France I had almost always seen the spirit of religion and the spirit of freedom pursuing courses diametrically opposed to each other; but in America I found that they were intimately united, and that they reigned in common over the same country. . . . The Americans combine the notions of Christianity and of liberty so intimately in their minds, that it is impossible to make them conceive the one without the other.”<sup>366</sup>

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357 Shanelton, Remembering what cannot be forgotten, pg. 1007.

358 Driesbach, In Search of a Christian Commonwealth pg. 940

359 Pair, Majority rights, minority freedoms: Protestant Culture, Personal Autonomy and Civil Liberties in Nineteenth-Century America, 14 William and Mary Bill of Rights Journal 987, 996 (2006) (he goes on to cite legal giants of the time such as Justice Story and Thomas Cooley who believed that not only was the country a Christian nation, but the government should encourage Christianity.)

360 Driesbach, In Search of a Christian Commonwealth pg. at 942; Pair, Majority rights, minority freedoms, pg. 996

361 Witte, Religion and the American Constitutional Experiment, pg 117.

362 Adams, A Heritage of Religious Liberty, pg. 1564; Witte, Religion and the American Constitutional Experiment, pg 117.

363 Driesbach, In Search of a Christian Commonwealth pg. 946; Esbeck The Establishment Clause as a Structural Restraint on Governmental Power, pg. 23. (noting that there was a “widely held belief that a democracy could endure only if composed of an educated and moral citizenry, and that religion was the primary source of the needed moral teaching.”)

364 Durham, What goes around comes around, pg. 361, see also Tarr, Church and State in the States, pg. 88.

365 Witte, Religion and the American Constitutional Experiment, pg. 118.

366 de Tocqueville, Democracy in America, vol. 1, pp. 335, 337, Henry Reeve trans., 4th ed., New York, 1841); See also Esbeck, Religion During the American Revolution, pg 2 (Carl Esbeck notes that by the time of de Tocqueville's visit, this idea that religion and liberty co-existed and supported one another was well established).

As de Tocqueville points out, the focal point here was not Christianity and the state, as it was still in early 19<sup>th</sup> century Germany, rather it was on the relationship between Christianity and liberty at the individual level.<sup>367</sup> Furthermore, the Americans to which de Tocqueville refers are not political or religious elites, rather he means society at large. In short, by the early 19<sup>th</sup> century the focus was no longer on the relationship the state had with established churches, it was on the relationship individuals in society had with their chosen religion, a relationship that was without a doubt facilitated by the state and was seen as a cornerstone to the new American sense of liberty.

More specifically, under this new arrangement state coercion was shunned and voluntarism, equality among the religions (Christian), and a “friendly separation” between church and state were the hallmarks.<sup>368</sup> This friendly separation allowed the majority, via its elected representatives at the state level, to determine the limits of religion's role in society and courts were generally hesitant to interfere with these decisions.<sup>369</sup> And while minority religions might not have had their views equally represented in this “public religion,” they were not to be oppressed, in the common sense of the word, by the government.<sup>370</sup> Nevertheless, there were some inconsistencies in this arrangement. On the one hand, government generally was neutral toward all religions, but on the other hand dissenters' right of religious conscience was not absolutely protected from coercion as general laws favored by the majority of the populace aimed at facilitating the public religion could place dissenters in situations where they were forced to act in a manner that violated their own religious beliefs, e.g. Catholics having to take part in readings from the Protestant King James Bible in the common schools<sup>371</sup>

By 1833, the disestablishment that started on the eve of the American Revolution was complete. No state in the union had an established religion, and it was commonly accepted that state funding of religious entities, outside of a few extreme cases, was improper.<sup>372</sup> The primary beneficiaries of this decoupling of church and state were, for the most part, individuals of Protestant religions rather than religious establishments themselves.<sup>373</sup> Churches were not left to die, rather they were able to take advantage of new laws allowing entities to create corporations, giving them a new legal status. To be sure this corporate status was nothing like the public corporate status that churches were gradually given in 19<sup>th</sup> century Germany. For instance by 1833 no state allowed

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367 Writing in the 1830s, Alexis de Tocqueville remarked on Americans' unanimity on the subject: “To a man, they assigned primary credit for the peaceful ascendancy of religion in their country to the complete separation of church and state. I state without hesitation that during my stay in America I met no one--not a singly clergyman or layman--who did not agree with the statement.” Alexis de Tocqueville, *Democracy in America* 341 (Arthur Goldhammer trans., 2004) (1835)

368 Driesbach, *In Search of a Christian Commonwealth* pg. 944

369 Pair notes that “[t]he bulk of the century's civil rights cases were claims brought by minorities with whose freedoms the majority was interfering. Jews and Seventh-Day Baptists sought relief from Sunday laws; Catholics tried to purge the public schools of the King James Bible; nonbelievers challenged blasphemy laws. Pair, *Majority rights, minority freedoms*, pg. 999.

370 Driesbach, *In Search of a Christian Commonwealth* pg. 945

371 Pair, *Majority rights, minority freedoms*, pg. 1002 (This will be further elaborated on at the end of this historical survey)

372 Driesbach (1996), *In Search of a Christian Commonwealth* pg. 45; Tarr, *Church and State in the States*, pg. 88.

373 Barringer, *The First Disestablishment: Limits on church power and property before the civil war*, 162 *University of Pennsylvania Law Review*, 307, 370-371 (2014)

for taxes to be imposed for the support of religion,<sup>374</sup> but it gave churches certain rights related to the payment of taxes and ownership of property that were beneficial to their long-term survival.

However, these laws also had a downside for the churches, as many states sought to use them to exercise control over religious entities, for example, by placing requirements on church governance (normally requirements that they govern themselves in a democratic manner) and limitations on the amount of property that could be owned by a church.<sup>375</sup> In this respect, it might be said that the early 19<sup>th</sup> century was marked by “deep government involvement in religious institutions, rather than strict separation or respectful support.”<sup>376</sup> Of course the “deep government involvement” had nothing to do with religion, but rather was an attempt to control religious entities just as states placed limits on other corporate entities. Furthermore, the aforementioned decoupling of religion and state by no means was a form of secularism as “anything that came between the people and their faith--including priests, presbyters, synods, dioceses, doctrines, and creeds--came under attack.”<sup>377</sup> In short, early to mid 19<sup>th</sup> century America was marked by a deep and individual relationship between members of society and their religion, with the state playing the role of facilitator and sometimes regulator but having no formal relationship with the churches.

### 3. The Gradual Changing Role of Religion in American Society

As the country attempted to heal the wounds from its devastating civil war, religion continued to play a central role in society, but the combined effect of the pre-war Second Great Awakening, mass Catholic immigration, and the lack of a frontier to act as an escape valve for these new dissenters challenged the Protestant status quo.<sup>378</sup> With no place to escape, these dissenters sought to challenge the so-called common religious culture in courts and statehouses. This led to a fierce backlash by the Protestant old guard who, because they held the keys to power in most states, were able to turn away these challenges. Thus, efforts to repeal practices such as Bible readings in public schools, which was primarily lodged by Catholics who objected to readings from the Protestant King James Bible, were dispatched with regularity by the courts well into the mid-20<sup>th</sup> Century,<sup>379</sup> as Protestant judges simply could not conceive of how reading from the Bible or being required to bow one's head during prayer could interfere with religious liberty.<sup>380</sup> The Protestant backlash simply sought to maintain the “Christian

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374 Lambert, *The Founding Fathers*, pg. 225.

375 Barringer, *The First Disestablishment: Limits on church power and property before the civil war*, 162 *Penn. Law Review* 307 (2014)

376 Barringer, *The First Disestablishment* pg. 311.

377 Barringer, *The First Disestablishment* pg. 355

378 As Jeffries and Ryan point out, “[a]t the time of the Revolution, 30,000 Catholics lived in the new United States, barely one percent of the population. By 1830, that number had increased to 600,000. By 1850, there were 1.6 million U.S. Catholics, and twice that many ten years later. The number quadrupled to twelve million in 1900, and doubled again by 1930.” Jeffries/Ryan, *A Political History of the Establishment Clause*, pg. 299; See also Witte, *Religion and the American Constitutional Experiment*, pg 119.

379 Viteritti, *Blaine's Wake: School Choice, The First Amendment and State Constitutional Law*, 21 *Harvard Journal of Law and Public Policy* 657, 668 (1998) (from 1857 to 1925 twenty-five different challenges were lodged in state courts with only five being successful).

380 Pair, *Majority rights, minority freedoms*, pg. 1020

consensus” that had become “interwoven into public life.”<sup>381</sup> And interwoven it was. As late as 1929 many states still had laws requiring witnesses in court and elected officials to take religious oaths, barring non-Christians from serving on juries, and recognizing only those marriages that were solemnized by members of the clergy<sup>382</sup> Challenges to Sunday closing laws were numerous and almost always unsuccessful with many of the courts upholding these laws while referring to the necessity of the minority to defer to the needs of the majority.<sup>383</sup>

By the end of the World War II, the rise of Catholics as a power base challenging the “public religion” status quo had been joined by the increased influence enjoyed by Jews in the aftermath of the Holocaust. As a result, Americans no longer saw their country as a Protestant one, rather they acknowledged the existence of three main religions: Protestant, Catholic and Jewish, which meant for the first time in the nation's history the consensus position of a Protestant based “public religion” was no longer tenable.<sup>384</sup>

“The splintering of a Protestant nation into three great faiths also reinforced a growing public secularism, especially among educated elites. That secularism usually did not deny or condemn religious belief. On the contrary, most persons we would call secularists were affiliated with a church. But increasingly, many Americans took the view that in a nation of diverse belief, public observances and governmental policies should respect all faiths.”<sup>385</sup>

Thus, on the eve of the Supreme Court's *Everson* decision, the nation was beginning to move from one based on a common public religion to one based more on public secularism. Polling data from this time seems to confirm this. While a vast majority of Americans believed in God, a smaller majority also believed that religion should play no role in politics or business.<sup>386</sup> In short, as the Court got set to hear the case that would forever change the landscape of American religious liberty jurisprudence, society was undergoing a transformation vis-a-vis its relationship with religion, and how it viewed the proper relationship between church and state. For the first time in American history there was a truly strong dissenting class, and there was no frontier to which they could escape. At the same time, appeals to state legislatures and state courts in many parts of the country had been met with resistance by the Protestant establishment, leaving these dissenters with little choice but to turn to the federal courts for protection and change.<sup>387</sup>

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381 Pair, *Majority rights, minority freedoms*, pg. 1016; See also Jeffries/Ryan, *A Political History of the Establishment Clause*, pg 304-305

382 Hartogensis, *Denial of Equal Rights to Religious Minorities*, pg. 663.

383 Pair, *Majority rights, minority freedoms*, pg. 1008. (As will be discussed later, once the U.S. Supreme Court finally took up this matter, its reasoning in upholding such laws was based more on the secular purpose of the law).

384 Jeffries/Ryan, *A Political History of the Establishment Clause*, pg 308.

385 Jeffries/Ryan, *A Political History of the Establishment Clause*, pg 308.

386 Jeffries/Ryan, *A Political History of the Establishment Clause*, pg 309.

387 Witte, *Religion and the American Constitutional Experiment*, pg. 120. (It must be acknowledged that the *Everson* case was actually a challenge to a policy that Catholics had successfully pushed through many state legislatures, namely state funded transportation to religious schools. With that said, the seeds for allowing challenges to the Protestant status quo had been long since planted in the *Gobbitis* case. *Everson* simply opened the door wider for dissenters to bring their grievances into federal court.)

## **Chapter 4: Comparing the Historical Influence of Religion in Germany and the United States.**

In order to tie the prior two chapters together, this chapter will begin by focusing on a public space that has been and continues to be at the center of the fiercest debates over the role of religion in society in both countries, namely public schools. The short comparison of the role of religion in schools will then be followed by some final conclusions and comparisons regarding the historical relationship between church, state and society in Germany and the United States. In doing so, this will also begin the analysis concerning some of the differences in how religious liberty jurisprudence has developed in the two countries, which is the focus of Chapters 5 and 6. At the same time, the final conclusions in this chapter highlight some of the similarities in how these relationships operated historically in each country, which might go a long toward explaining some of the similarities that we will see in each country's religious liberty legal thinking, which is the focus of Chapters 7 and 8.

### **A. A Short Comparative History of the Role of Religion in State Run Schools**

Because so many of the cases found in the final part of this work involve schools, and also because the German *Grundgesetz* is unique from an American perspective in that it requires religion courses to be offered in the public schools, a short survey looking at the role of religion in the development of the German school system is warranted. Equally warranted is a short survey of the role religion has played in American public schools up to the federalization of American religious freedom jurisprudence. Readers likely won't find any surprises in the German survey, although those unfamiliar with this history might gain a better understanding as to why religion courses are protected by the German constitution, and why the *Bundesverfassungsgericht* (German Constitutional Court or BVerfG) has allowed German states to create common schools with a so-called Christian nature. The American survey, on the other hand, might come as a surprise to those without a firm grasp of 19<sup>th</sup> century American history. It tells the story of an America shaped not by the strict separation of church and state, rather one that went through its own battles between Protestants and Catholics, a battle that helped set the stage for the federalization of American religious freedom jurisprudence.

#### **1. The Role of Religion in the Development of German State Schools**

It is commonly believed that the origins of Germany's state school system can be traced back to the Reformation and the views of Martin Luther, who, in his sermon "Keeping Children in School" said:

"But I hold that it is the duty of the temporal authority to compel its subjects to keep their children in school, especially the promising ones we mentioned above. For it is truly the duty of government to maintain the offices and estates that have been mentioned, so that there will always be preachers, jurists, pastors, writers, physicians, schoolmasters, and the like,

for we cannot do without them. If the government can compel such of its subjects as are fit for military service to carry pike and musket, man the ramparts, and do other kinds of work in time of war, how much more can it and should it compel its subjects to keep their children in school.”<sup>388</sup>

Luther's views can be seen as a call to create a professional class who could competently assume leadership roles in both the secular and sectarian worlds.<sup>389</sup> Local secular (governing) authorities heeded this call, marking a shift whereby the church was no longer solely responsible for the limited schooling that was available. Yet this shift did not make schools any less religious. On the contrary, the schools established in Protestant territories in the shadows of the Reformation were based primarily on reading “the Bible itself and also countless devotional manuals and works of popular edification.”<sup>390</sup> Not to be outdone, rulers in Catholic territories also increased the availability of schooling, here too with the Bible and other religious text being core elements of the curriculum.<sup>391</sup>

It should come as no surprise that the Enlightenment and its emphasis on reason had an enormous impact on how the state went about educating its populace, as schools sought to promote “a reasonable as well as Christian instruction of youth in true piety and other useful things.”<sup>392</sup> The 18<sup>th</sup> century Prussian school arrangement offers a glimpse into the world of German schools prior to the RDH:

“Compulsory attendance between ages five and thirteen was prescribed, though pupils could be excused from the requirement earlier based upon demonstrated mastery of the skills taught in elementary school, and the requirement did not apply to Catholic children, for whom a separate law was enacted in 1765. Schools were to be supported by parental contribution (*Schulgeld*), while the charitable funds of the church or community paid for the children of poor families. The local pastor was expected to meet each month with the schoolmaster, and assign the religious songs and catechism responses which should be learned; higher church officials were to inspect schools annually. Anyone wishing to teach was required to obtain both government and church approval.”<sup>393</sup>

A Württemberg school ordinance of 1729 also illustrates that religious leaders were not merely administrators: “Schools are not to be regarded as a mere preparation for civic life but as workshops of the Holy Spirit, because the Lord is best served not with skilled people but with pious ones.”<sup>394</sup> In short, those who were fortunate enough to be schooled took part in a system usually run by the church on behalf of the state that sought to instill in their students both Enlightenment and religious values.

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388 Lehmann/Schlutz, *Luther's Works: The Christian in Society III*, Vol. 46 (Philadelphia, 1967), pp. 213-57; See also Russell, *German Higher Schools: The History, Organization, and Methods of Secondary in Germany*, (London and Bombay, 1898), pg. 213.

389 Gawthrop/Strauss, *Protestantism and literacy in early modern Germany, Past and Present* 104 (1984), 31–55. (Interestingly the thesis of this article is that the Bible was not at the core of this early school curriculum).

390 Glenn, Charles L., *Contrasting Models of State and School: A Comparative Historical Study of Parental Choice and State Control*, (New York and London: Continuum. 2011), pg. 11.

391 Glenn, *Contrasting Models*, pg 11.

392 Glenn, *Contrasting Models*, pg. 17.

393 Glenn, *Contrasting Models*, pg. 17.

394 See Show, *Historical Significance of the Religious Problem in the German Schools*, Education, March 1911, p. 11.

The upheaval caused by the Napoleonic wars and the resulting RDH were also felt in the schools, as responsibility for education moved from the hundreds of small territories to the dozens of remaining, larger and diverse states. Some states, especially Prussia, sought to create a full separation from the Church with the creation of provincial school boards (*Provenzial Schulcollegien*) that placed an educational emphasis on humanism, a practice that was followed by many northern states, but rejected by central and southern states who opted for their own models that tended to reject humanism and emphasize classical training.<sup>395</sup> Nevertheless, full separation proved to be unattainable. Despite schools being defined as “state establishments” in many territories, laws generally stipulated that Protestant and Catholic clergy were to continue playing an important administrative role primarily because the state simply lacked the resources to run an effective and efficient school system.<sup>396</sup> Additionally, as Martin Heckel points out, if the state wished to avoid conflicts at the local level, it couldn't push too hard with efforts to remove the church from its administrative roles.<sup>397</sup>

This was especially true for school related questions, as deeply rooted religious sentiment in German society created a situation where “whatever was pleasing to the church or the clerical parties was sure to succeed, whatever was opposed to clerical interests was equally certain of failure.”<sup>398</sup> To be sure, northern states did not simply roll over in the face of church opposition to their efforts to take control of the common schools, as the *Kulturkampf* illustrates, but the close relationship between church and state that was a hallmark of German schools for centuries remained well into the 20<sup>th</sup> century.

This was especially true for the *Volksschule*, one of the three schools that was established in most states and where the majority of students were educated, which were primarily organized on a confessional basis.<sup>399</sup> As Geoffrey Field points out “[s]chool inspection in most of the *Reich* was in the hands of the clergy and the curriculum, burdened by heavy doses of memorisation, consisted of religion, basic skills in reading, writing and arithmetic, and hymn singing.”<sup>400</sup> Furthermore, despite the emphasis shift more toward a reason-based, Enlightenment influenced curriculum, a primary function of schools continued to be instilling morality and a sense of religious spirit in its pupils.<sup>401</sup> Yet by the later part of the 19<sup>th</sup> century this system was increasingly coming under attack from political parties on the left and teacher organizations, not only because of how the system seemed to solidify class barriers, but

395 Green, *German Higher Schools*, pp. 92-98.

396 Glenn, *Contrasting Models*, pg. 22.

397 Heckel, *Vom Religionskonflikt zur Ausgleichsordnung*, pp. 44-45. (“Weil sich Monarch und Volkssouveränität die staatliche Entscheidung der religiösen Wahrheitsfrage versagten und sie den Bürgern anheimgaben, mußte die Staatsgewalt bei ihren kulturellen und sozialen Aktivitäten in den spezifisch religiösen Fragen die religiöse Besonderheit und Selbstbestimmung respektieren und sich deshalb mit den Religionsgemeinschaften in den „gemeinsamen Angelegenheiten“ verständigen, wenn sie die Bürger und Religionsgemeinschaften nicht in ihrer religiösen Freiheit kränken und die weltliche Aufgabenerfüllung nicht durch vermeidbare Konflikte erschweren wollte.”)

398 Russell, *German Higher Schools*, pg. 92

399 Field, *Religion in the German Volksschule, 1890-1928*, *Leo Baeck Institute Yearbook* (1980), pp. 41-72.

400 Field, *Religion in German Volksschule*, pg. 42.

401 Glenn, *Comparing Models*, pg. 30; See also Green, *German Higher Schools*, pg. 213; See also Field, *Religion in the German Volksschule*, pg. 46.

also because of the religious components of the schools.<sup>402</sup>

Reforms pushed by the *Deutscher Lehrerverein* (DLV) in eastern Germany, for instance, included:

“the abolition of clerical *Schulaufsicht* and a limitation of church authority in the selection of classroom materials; the training of teachers at universities; curricula changes involving less memorisation and less religious instruction; and, most importantly, the reorganisation of education to create an "integral" school or *Einheitsschule* which would abolish the existing social and confessional segregation of children.”<sup>403</sup>

Calls for reforms were met with stiff opposition as a “conservative coalition of landowners, right-wing state officials and churchmen” sought to maintain their power over local school boards, and argued that changes to the educational system would destabilize society.<sup>404</sup> These battle lines should sound familiar as they basically were the same as those described in the preceding pages concerning the debates over the Weimar Constitution, debates that ultimately led to a grand compromise that even today continues to shape how matters of religion are dealt with in Germany and its schools.

## 2. The Role of Religion in the Development of American Public Schools

As was the case with church/state relations in the early colonial settlements, early American schools and the role religion played in them was almost identical to that which existed in Europe.<sup>405</sup> Illustrative of this phenomenon were laws enacted in mid 17<sup>th</sup> century Massachusetts stating that the clear goal of the common schools was to teach students how “to read and understand the principle of religion and the capital lawes [sic] of this country.”<sup>406</sup> Massachusetts was by no means unique. Southern colonies also sought to make religion an important component of its education system, as is illustrated by language in the North Carolina constitution stating “the great necessity of having a proper school . . . of learning established whereby the rising generation may be brought up and instructed in the principles of the Christian religion . . . .”<sup>407</sup> As we have seen, views regarding the relationship between the state and religion were not uniform in pre-revolutionary America, yet most colonists had no problem with an education system that included heavy doses of religion. With that said, Enlightenment thinkers such as Thomas Jefferson sought to shake up the status quo by advocating for a state run school system that was less tied to religion; one that should be non-sectarian in a manner that ensured nothing in its curriculum would be inconsistent with teachings of any religious sect.<sup>408</sup>

Jefferson stated this view in the early 19<sup>th</sup> century, and by the 1830s some states were beginning to take up his call for a more organized structure of education. Massachusetts

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402 Field, *Religion in the German Volksschule*, pg. 44.

403 Field, *Religion in the German Volksschule*, pg. 48.

404 Field, *Religion in the German Volksschule*, pg. 44.

405 Wood, *Religion and the Public Schools*, 1986 *Brigham Young Law Review* 349, 350.; Alloway, *Crucifix Case: Germany's Everson v. Board of Education*, 15 *Dick. J. Int'l L.* 316, 380 (1997)

406 See Boles, *The Bible, Religion, and the Public School*, (Ames, 1961) pg. 6.

407 See Moehlman, *School and Church: The American Way*, 2d. Ed. (New York, 1944)

408 Wood, *Religion and the Public Schools*, pg. 351.

and its state assemblyman Horace Mann were at the forefront of this so-called common school movement that sought to revolutionize American schools by creating a system that was fully tax-supported, free of charge and ideally one that was sectarian.<sup>409</sup> By 1865 this vision was a partial reality in most northern states.<sup>410</sup> It was on this latter point, however, that Mann and his fellow school reformers in other states failed. Whether by design or due to political expediency, the system they created was one dominated by the Protestant “vague and inclusive” public religion where between 75% and 85% of schools engaged in Bible readings from the Protestant King James version as part of their daily routine (not because the law required this, but because they chose to do so, which would have been consistent with the public religion of the times).<sup>411</sup> These schools “promoted a religious orthodoxy of its own that was centered on the teachings of mainstream Protestantism, was intolerant of those who were non-believers,”<sup>412</sup> and sought to “undertake to inculcate morality as well as transmit knowledge”.<sup>413</sup> And while these public schools took on the mission of instilling the populace with morality, over the first half of the 19<sup>th</sup> century public funding for private religious schools was gradually phased out, with Connecticut leading the way in 1818 by passing a law that specifically prohibited state funds from being used to support religious schools.<sup>414</sup> In short, direct public funding of overtly religious schools was unknown in mid-19<sup>th</sup> century America, but the common schools themselves were infused with the “public religion” that dominated American society as a whole.

This system went unchallenged for most of the first half of the century, but waves of Catholic immigrants would indelibly leave their mark on American schools.

“When the United States gained its independence in 1789, only 35,000 of its citizens-- less than 1%--were Roman Catholics. By 1840, their numbers had risen to 563,000, or approximately 3.3% of the American population. The rate of increase quickened during the next two decades, and shortly after the end of the Civil War, in 1866, just over one in ten Americans were Catholic. The Catholic population nearly doubled between 1864 and 1884, a time when the overall population grew 59%. By 1891, 8,277,000 American Catholics made up 12.9% of the nation's population. Through a combination of immigration and domestic birth rate, the number of Catholic Americans grew by over two million each decade from 1891 until 1921, by which time they constituted 16.5% of the nation's population.”<sup>415</sup>

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409 Wood, *Religion and the Public Schools*, pg. 352. This last point is controversial, as many claim that despite statements to the contrary, the true purpose was to create a school system “with explicitly religious instruction”. See Duncan, *Secularism's Laws*, 72 *Fordham Law Review* 493, 503 (2003).

410 Tarr, *Church and State in the States*, pg. 89.

411 Viteritti, *Blaine's Wake: School Choice, The First Amendment, and State Constitutional Law*, 21 *Harvard Journal of Law and Public Policy* 657, 667 (1998); See also Duncan, *Secularism's Laws*, pg. 502 (2003); Tarr, *Church and State in the States*, pg. 89.

412 Viteritti, *Blaine's Wake*, pg. 666 (this author clearly believes this was by design when he says: “The entire concept of a free, universal, secular education was in fact an institutional hypocrisy perpetrated by the political establishment.”) See also Duncan, *Secularism's Laws*, pg. 503; Tarr, *Church and State in the States*, pp. 89-90; Durham, *What goes around comes around*, pg. 357; Jeffries/Ryan, *A Political History of the Establishment Clause*, pg. 299.

413 Tarr, *Church and State in the States*, pg. 90.

414 Wood, *Religion and the Public Schools*, pg. 352.

415 Heytens, *School Choice and State Constitutions*, 86 *Virginia Law Review* 117 (2000), pg. 135 (footnotes omitted); See also Jeffries/Ryan, *A Political History of the Establishment Clause*, pg. 299-300; Durham *What goes around comes around*, pg. 357.

For Catholics, the thought of sending their children to schools where readings from the Protestant King James Bible were daily fare was untenable.<sup>416</sup> As the Catholic population grew, especially in large cities, organized efforts were made to rid schools of the public religion, which they found to be repugnant to their own religious beliefs. In the alternative these efforts sought to procure public funding for their own religious schools.<sup>417</sup>

In places where Catholics were in the minority, removing Protestant religious influences from schools was the main objective and, for the most part, undertaken in the state courts. These actions proved to be relatively unsuccessful, primarily because most judges, Protestant and ingrained with the public religion ideology, didn't view the Bible as a sectarian book, making it difficult for them to understand the position of dissenters like Catholics.<sup>418</sup> Even worse, these Catholic efforts sometimes led to a fierce backlash. In Maine and Massachusetts, for example, incidents were reported where Catholic students were physically harassed or expelled from school for refusing to take part in Bible readings.<sup>419</sup> In larger eastern cities, where the Catholic population was exploding, seeking funding for their own religious schools was the primary goal, but it too met with stiff resistance.

As early as 1846, New York sought to deal with the tensions caused by religious diversity by passing laws that restricted the teaching of religion in public schools, and banned the use of state funds to support religious schools, a direct response to the growing "Catholic problem."<sup>420</sup> However, Catholics persisted.

"Catholics formed political alliances with other religious minorities in response to the hostility of the public schools. Their aims were generally two-fold: removing Protestant bias from public institutions and gaining public funding for Catholic institutions. Catholic activists achieved notable success on both fronts during the late nineteenth century. In 1872, three years before Representative Blaine introduced his famous amendment, the highest court in Ohio sustained the Cincinnati Board of Education's decision to remove the King James Bible from the public schools. In addition to their success in Cincinnati, Catholics also succeeded in removing the King James Bible from the curricula in New York, and Chicago; these successes spurred further efforts in other northern states. Catholics succeeded in obtaining funding for their schools in New York, Wisconsin, and several other states."<sup>421</sup>

Catholic successes only upped the ante, as Protestants moved the fight to the United States Congress where Maine Senator James Blaine, with the support of President Ulysses Grant, authored an amendment to the United States Constitution that sought to

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416 Heytens, *School Choice and State Constitutions*, pg. 136; Viteritti, *Blaine's Wake*, pg. 666; Jeffries/Ryan, *A Political History of the Establishment Clause*, pg. 300.

417 Duncan, *Secularism's Laws*, pg. 504; Heytens, *School Choice and State Constitutions*, pg. 136; Viteritti, *Blaine's Wake*, pg. 669.

418 Viteritti, *Blaine's Wake*, pg. 668.

419 Jeffries/Ryan, *A Political History of the Establishment Clause*, pg. 300.

420 Tarr, *Church and State in the States*, pg. 92; Durham, *What goes around comes around*, pg. 357; Jeffries/Ryan, *A Political History of the Establishment Clause*, pg. 300.

421 Heytens, *School Choice and State Constitutions*, pg. 136-137 (footnotes omitted)

prohibit any public funds from being used for private religious schools.<sup>422</sup> By this time almost all private schools were Catholic affiliated, making it clear that this Amendment was aimed more at checking Catholic power than creating some kind of secular society.<sup>423</sup> Despite falling short in Congress, the Amendment effort spurred a state level movement that by 1890 ultimately resulted in twenty-nine states approving so-called Blaine Amendments to their individual state constitutions, prohibiting state money from being used to fund private religious schools.<sup>424</sup>

These fights continued into the early part of the 20<sup>th</sup> century, but by the mid-1930s to early 1940s the Protestant public religion era was over in many parts of the country.<sup>425</sup> Society and much of the political elite accepted that post-war America was now comprised of three main groups: Protestants, Catholics, and Jews, the former being small but influential on matters of religious discrimination in the aftermath of Nazi atrocities in Germany.<sup>426</sup> As part of this new reality, legislatures were more willing to bend to Catholic power, as illustrated by the fact that on the eve of the *Everson* case twenty-two states had laws that provided transportation to and textbooks for private religious (Catholic) schools.<sup>427</sup> A new, albeit awkward, consensus had formed, but as we shall see, it was not universally accepted.

The battles that followed, and will be the focus of the final chapters of this work, were left over from the half-century of conflict between Protestants and Catholics, as well as a product of an increasingly influential Jewish population that resisted state sanctioned religious practices in all public forums, including schools. The *Everson* case, where Protestant groups challenged the funding of transportation laws in New Jersey, is a prime example of the uneasiness that continued to surround questions of religion in the United States,<sup>428</sup> and once the Court opened the door to federal litigation, it was followed by cases involving Jews challenging Sunday closing laws and prayer in schools, Jehovah's Witnesses challenging the mandatory recitation of the Pledge of Allegiance as well as anti-soliciting laws, and even later atheists challenging any presence of religion in public forums.<sup>429</sup> As none of these new dissenters constituted a majority of the population, courts became the chosen forum for these battles.

## **B. Historical Similarities and Differences**

As has been shown in the previous two chapters, arguably for much of the 17<sup>th</sup> and part of the 18<sup>th</sup> centuries, the experiences in both countries regarding the role religion played in matters of state and society were similar in many respects. Both societies were incredibly fragmented: German society geographically and politically because of the

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422 Viteritti, *Blaine's Wake*, pg. 670-71; Jeffries/Ryan, *A Political History of the Establishment Clause*, pg. 301.

423 Heytens, *School Choice and State Constitutions*, pg. 138.

424 Jeffries/Ryan, *A Political History of the Establishment Clause*, pg. 305; Viteritti, *Blaine's Wake*, pg. 673.

425 Jeffries/Ryan, *A Political History of the Establishment Clause*, pg. 305.

426 Jeffries/Ryan, *A Political History of the Establishment Clause*, pg. 306.

427 Jeffries/Ryan, *A Political History of the Establishment Clause*, pg. 306-307.

428 For a detailed history of the events that lead up to *Everson*, see Barringer, *Free Religion and Captive Schools: Protestants, Catholics and Education, 1945-1965*, 56 *DePaul Law Review* 1177 (2007)

429 Interestingly, as Barringer points out, by the time of the *Engel* decision, Catholics found themselves in league with conservative Protestants, proving that the prior battle had nothing to do with removing religion from schools, rather it involved who controlled how religion was interjected into the school setting.

arrangements between the *Reich* and the numerous principalities; American society religiously with its abundance of Protestant sects, as well as small Catholic and Jewish populations. There existed in both societies versions of state established religions, whereby territorial (Germany) or colonial (America) rulers had formal relations with an established religion. Both struggled in terms of dealing with subjects/citizens who were not members of the state sanctioned religion. As we have seen above, the experience of Catholics and dissenting Protestant sects in early colonial America was not that much different than the experience of Catholics or Protestants who found themselves living in a territory dominated by the other main religion. Thus, in both Germany and America we see that colonies/territories with established religions, or something similar thereto, generally did not respect the rights of dissenting religions. To a certain extent, this should not be terribly surprising as at this time Enlightenment principles had not taken hold in either place, and concepts of individual rights were virtually non-existent. Nevertheless, at this point in their histories, Germany and the United States appear to be on a similar trajectory regarding the role religion played in matters of state and society.

Arguably, the American Revolution is the first event that takes the two in different directions. The war resulted in an almost immediate disestablishment of religion in most of the colonies as the colonists sought to disassociate themselves with everything British, including the Church of England. Furthermore by this time most of the political elite believed that tolerance, primarily in response to the growing diversity and power of the numerous Protestant sects, although not necessarily equality, needed to be the cornerstone of the state's relationship with religion. For some, principles of non-establishment were an element of this new cornerstone, and thus separation served the purpose of religious tolerance. For others, religious freedom would be best served if the church had no formal ties, especially financial, with the state. Regardless of why, there did seem to be a consensus that non-establishment in this sense rejected the idea of a state sanctioned religion, but most certainly did not mean that religion had no role in the public sphere. On the contrary, the new American states took actions to ensure that their populace was instilled with the religious and moral values that they believed were necessary for good government and the common good in general.

Germany was not far behind, however. By the early 19<sup>th</sup> century it too had undergone enormous changes brought on by the Napoleonic Wars. The system of small principalities was replaced by larger states that became more religiously diverse. Furthermore, the secularization of both authority and property seemed to mark the end of state sanctioned religion in Germany. Here too, diversity, in this sense a mixing of the main religious populations, forced the states to become more tolerant. Nevertheless, despite these structural changes, the states still believed religion played an important role in helping them instill the citizenry with morality which was deemed necessary to maintain order.

Here is where the similarities with the American experience end. Instead of divesting itself of formal relationships with religious institutions, as was the case in post-Revolutionary America, the German states entered into formal agreements with Rome

and sought to incorporate the Lutheran Church into the state apparatus. As Christian Walter points out, it is not surprising that a state who sees itself as the origin of state power would opt to simply partner with, or perhaps better put co-opt, the religious institutions it felt could instill the citizenry with morality. In the United States, on the other hand, where the state believed its power came from the citizenry, it is equally not surprising that it chose to allow its citizenry to obtain moral principles directly from the church, with the state simply playing the role of facilitator by advancing a common “public religion.” Yet expediency and Enlightenment/Evangelical views regarding the need to protect the church from state corruption arguably were equally influential in the path being taken by the Americans.

From the perspective of individual rights, however, the path taken by these two countries at this point in their histories do not seem to be that much different. In Germany religious freedom was primarily limited to members of the two mainstream religions, with tolerance being the hallmark of the treatment of religious dissenters. In the United States, so long as one played within the rules set by the Protestant influenced “public religion,” religious freedom was attainable. However, those who were unwilling to play by these rules found themselves either being oppressed or traveling westward in search of a place where they could create their own religious community.

These arrangements remained, for the most part, static for much of the 19<sup>th</sup> century: America with its public religion at the societal level, Germany with its formal relationship between the two main churches and the various states. To be sure struggles ensued in both countries as the principle of individual rights became more ingrained in the psyche of the political elite, and to a lesser extent the populace, but for the most part these arrangements continued into the 20<sup>th</sup> century. However, by the 1920s public religion in America was in decline, primarily as a result of changes in demographics which made the Protestant consensus no longer tenable, and Germany had just emerged from a quasi-revolution that saw the end of the monarchy and the creation of its first truly national constitution. In both countries it seemed that individual rights were about to replace systems that more or less were built upon a religious consensus that had little patience for dissent.

However, here again to we see the countries potentially taking different paths with regards to non-establishment principles. While the Supreme Court had yet to weigh in on the exact contours of the Establishment Clause, there was at least a consensus that the non-establishment principles found in the United States Constitution operated as a limit on the federal government. Whether this was a limit on creating a state religion or merely a prohibition on the federal government from interfering with what was traditionally a state matter, the clause was commonly viewed as a limitation. Furthermore, the relationship between the state and religion at the state level was engulfed in a battle between Protestants and Catholics over the limits of the so-called public religion that the state had facilitated for over a century. Germany, on the other hand, was on the verge of codifying its system of “Staatskirchenrecht” into its new constitution whereby religions who could qualify for the status of public corporation would enjoy a privileged relationship with the state. This included being funded by

taxes paid by church members and collected by the government as well as religion courses being offered in schools, to name the two most prominent privileges. The relationship described in the Weimar Constitution (WRV) was not, like its American counter-part, a restriction on church/state relations, rather it set the guidelines for what was permissible. Thus, on its face regarding non-establishment principles, the two countries seemed to be headed in different directions, one limiting the relationship the other permitting it.

According to von Campenhausen and de Wall, simple words such as separation, neutrality and religious freedom do not adequately recognize the reality of how the relationship between church, state and society has developed, and most certainly these words cannot be read per se to mean a relationship whereby the state is to ignore religion.<sup>430</sup> By the late 1940s, where the above survey ends, this is most certainly true. In both countries, on the eve of the *Everson* case, a mere two years before the drafting of the *Grundgesetz*, the role of religion in matters of state and society could in no uncertain circumstances be described using the term strict separation. In the United States, in states dominated by Protestants, the last remnants of the public religion could be seen, and in states where the Catholic population was large and politically active, laws were passed to assist them with educating their children in private Catholic schools. Jewish groups and religious dissenters such as the Jehovah's Witnesses, on the other hand, were beginning to push for a society where the public forum was scrubbed clean of a dominant religious influence, primarily because the religious influences that were allowed into various public forums placed these dissenters in positions where their own religious rights were in jeopardy. The stage was set for the court battles that would redefine the relationship between state, society and religion.

In Germany, around this same time, a traumatized people were trying to recover from the Nazi terror and were all too eager for a return to some kind of moral order. Battles over the proper role of religion were the furthest from their minds. Instead, they looked to regain some sense of normalcy in which religious institutions were invited to play a significant role. There was still a relatively homogeneous society where the division played out, as it had for centuries, along Catholic and Protestant lines, but a consensus had formed that both religions needed to play a role in the new Germany. Fights over questions of religion were simply deemed unnecessary and in some respects inappropriate considering the task at hand. In short, as both countries headed into the 1950s, they found themselves faced with different challenges and priorities regarding the role religion played in matters of state and society.

However, as we have seen, history tells us that these relationships are not static. They change in response to historical events. Events such as the Reformation, the Enlightenment, the movement toward federalism, and increased religious diversity via immigration or federalization have helped shape the ever shifting relationship that religion has with the state and society. And as we shall see in the following chapters, this relationship continues to adapt to political, social and demographic developments. So what, if anything, does the history tell us about how each country has interpreted the

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430 von Campenhausen/de Wall, Staatskirchenrecht, pg. 3

concept of non-establishment, and how this concept has, if at all, impacted individual religious liberty? The survey above ends at a point where there are no clear answers to this question. It ends as both countries are about to embark on radical transformations of how they deal with matters of religion, transformations that for the first time are driven primarily by the courts. What follows is an attempt to show what role, if any, the principles of non-establishment have played in the protection of individual religious freedom in both countries over the past seventy years as each have undergone political, social, and demographic changes that have tested the limits of their devotion to these freedoms.

## Chapter 5: Religious Liberty in the United States

*“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”*

This is all the Bill of Rights says about religion: a phrase perhaps purposefully written in a vague manner, open to multiple meanings and in the end raising more questions than answers. Unlike the German *Grundgesetz*, which simply says that there shall be no state church<sup>431</sup> and more specifically sets forth individual and institutional religious rights in several detailed provisions,<sup>432</sup> the First Amendment uses vague words such as “respecting,” “establishment,” and “exercise” to define the scope of religious liberty in the United States. What is a law respecting establishment? Any law that establishes a state church? Laws that taken together might lead to a de facto state church? What does it mean to exercise religion? Does this cover both beliefs and practices? Do the words “no law” mean Congress can in no way limit these rights? Do the two clauses here compliment one another or conflict with one another? Do they serve the same purpose or different ones?

The list of questions could go on, and how one answers these questions is shaped primarily by the purposes one believes these clauses aim to advance. Thus, instead of simply listing the norms that have been established by the Court over the past seventy years regarding these two clauses, this survey will attempt to bring clarity to these words, or perhaps bring clarity to why it is impossible for the Court to speak clearly on them, by looking at the various purposes that jurists and commentators believe these sixteen words serve.

### A. Introduction

As we saw in the last chapter, heading into the late 1940s (United States) and early 1950s (Germany) the federal courts in each jurisdiction had not spoken to any significant extent as to how non-establishment principles like those implied by the wording of the Establishment Clause might contribute to individual religious liberty. Instead discussions about non-establishment up this point focused primarily on the separation of church and state, or perhaps more succinctly what kind of relationship the state should have with religion. However the late 1940s/early 1950s marked a new chapter in the story of religious freedom in both countries.<sup>433</sup> While the speed with which the stories progress varies in each, they both progress in a manner that moves the discussion of non-establishment beyond simple discussions of separation.

This Chapter and the next will clarify what exactly it means to talk about non-establishment in the modern religious liberty context. In the United States, the Supreme Court has at times attempted to deal with non-establishment cases by creating tests, e.g.

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431 Art. 137 Abs. 1 WRV

432 Art. 4 GG, and the incorporated articles from the Weimar Verfassung.

433 See Classen, *Religionsrecht*, pg 54 (2015, Tübingen) claiming that decisions by the BVerfG in the 1950s and 1960s reshaped the relationship between church and state. Another shift begins to take place in the 1990s and continues to play itself out as we shall see.

the so-called Lemon Test, the Coercion Test, the Endorsement Test, etc., but these tests tell us little about how or if non-establishment principles might be important to the idea of religious liberty. Thus, it should come as no surprise that members of the Court on numerous occasions have expressed frustration with the various tests, and many scholars have equally concluded that no one test can provide an answer to non-establishment questions.<sup>434</sup> This conclusion is driven primarily by the fact that these tests are often based on interpretations of what purposes are being served by the Establishment Clause, and the frustration with the various tests is simply an outgrowth of the disagreements among jurists and commentators about the purpose of the Clause.

Equally unsatisfying are attempts to define the scope of the Establishment Clause by using terms such as “separation” or “neutrality,” as these terms ignore the political, social, and demographic changes that have forced jurists and commentators over the course of time to reevaluate the role non-establishment principles can play in protecting individual religious liberty. Interestingly, jurists and commentators in both the United States and Germany use words such as neutrality and separation in their religious liberty discourse, but again, these words seem to ring hollow without having a deeper understanding of the purposes they seek to serve. The aim of this Chapter then is to obtain an understanding of how non-establishment principles in the modern context are defined in the United States and what they might actually contribute to individual religious liberty. Once these purposes have been identified and explained in context, they will be used to frame the discussion in the next chapter, which will explore whether German academics and jurists also believe these purposes are served by religious freedom and if so in what manner.

## **B. The Origins of the Divergent Views in American Jurisprudence**

Arguably, the dispute concerning American religious liberty doctrine has its origins in the *Schempp* case, which nicely illustrates the differences that continue to plague the Court, and provides a convenient jumping off point for this survey over the various purposes served by the religion clauses of the United States Constitution.<sup>435</sup> As the various opinions in *Schempp* make clear, it is difficult to determine the meaning of the Establishment Clause without also considering what purpose the Free Exercise Clause serves.

“At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day.” So read the state law that resulted in Pennsylvania school children beginning each school day with a recitation of Bible verses and the Lord's Prayer.<sup>436</sup> While the state provided each school with only the Kings James (Protestant) version of the Bible, students were allowed to bring their own version if they were selected to give a reading. In Abbington Senior High School, this policy resulted in students hearing recitations not only from the King James Bible, but

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434 See *Edwards v. Aguillard*, 482 U.S. 578, 639 (1987) (Scalia, J., dissenting); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970); Hamilton, “Power, the Establishment Clause and Vouchers,” 31 *Connecticut Law Review* 807, 810 (1999).

435 *School District of Abbington v. Schempp*, 374 U.S. 203 (1963).

436 *School District of Abbington v. Schempp*, 374 U.S. 203 (1963).

the Douay and Revised Standard versions as well as the Jewish Torah. The Schempp family, devout Unitarians, believed that literal readings from different versions of the Bible interfered with their ability to raise their children according to their own religious tenets. Furthermore, they believed that the voluntary nature of the law—it allowed unwilling participants to excuse themselves from the room during the reading—placed their children in a situation that might adversely effect their relationship with their teachers and classmates.<sup>437</sup>

Beginning with the words: “It can truly be said . . . that today, as in the beginning, our national life reflects a religious people . . . ”<sup>438</sup> the Court went on to frame the legal question as one involving the religious freedom of dissenters like the Schempps. Noting that the America of 1963 contained eighty-three (83) separate religious sects with a membership of more than 50,000, the Court began by setting forth the primary goal of religious freedom: “absolute equality before the law of all religious opinions and sects.”<sup>439</sup> To achieve this goal, according to the Court, the government must remain neutral regarding matters of religion.

While eight of the nine Justices ultimately ruled that Bible readings in public schools violated the Establishment Clause, four of the majority opinion co-signers felt the need to clarify their positions regarding the reach and purpose of the Establishment Clause. The various views staked out by the concurring Justices, as well as the lone dissenter, find their differences primarily in how each viewed the purposes served by Establishment Clause, and they unwittingly set the stage for the battles that have been fought in American courts over the past fifty plus years concerning its meaning.

Eight Justices agreed that a purpose of the Establishment Clause was to “prevent the fusion of government and religious functions or a concert or dependency of one upon the other . . . .”<sup>440</sup> In reaching this conclusion they noted that all of the Justices in the landmark *Everson* case found the purposes served by the Establishment Clause were much broader than simply banning an official state church. There the Court said “(n)either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.”<sup>441</sup> Additionally, noted the Court, the dissenters in *Everson* went further claiming that the Clause prevented all direct and indirect financial support of religion.<sup>442</sup>

Initially, the eight Justices forming the majority in *Schempp* sought to clarify the relationship between the two clauses noting that while they at times might overlap, the clauses serve distinct purposes: the Establishment Clause prohibits the fusion of church and state, the Free Exercise Clause guarantees the ability to freely choose the religion

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437 A companion case from Maryland was also heard by the Court on the same day, whereby the readings were conducted pursuant to local school policy rather than a state law.

438 374 U.S. at 213.

439 374 U.S. at 125 (quoting an 1870 opinion written by Ohio state court judge Alphonso Taft striking down Bible readings in Ohio Schools under the Ohio Constitution).

440 374 U.S. at 222.

441 *Everson v. Board of Education of Ewing Twp.*, 330 U.S. 1, 15 (1947)

442 330 U.S. at 26

of one's choice, free of any compulsion from the state.<sup>443</sup> However, five of the Justices felt the need to more fully explain what interest each clause, especially the Establishment Clause, advanced.

Justice Douglas wrote separately to drive home the point that a primary purpose of the Establishment Clause was to ensure that no state funds or facilities could be used to give churches more power than they otherwise would have if they relied solely on funding from their own members.<sup>444</sup> Justice Douglas was already on record as stating that another purpose of the Establishment Clause is the protection of religious minorities,<sup>445</sup> illustrating how Justices can believe that the clause have more than one main purpose.

Also writing separately but concurring with the majority opinion were Justices Harlan and Goldberg who believed that the two clauses should be read together to serve the singular purpose “to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end.”<sup>446</sup> While somewhat vague, at the heart of this view is the belief that government should neither engage in nor compel religious practices. These Justices were also concerned that an over reliance on the concept of neutrality could result in hostility toward religion in favor secularism.<sup>447</sup>

Finally, in his concurrence Justice Brennan wrote perhaps the most expansive view concerning the purposes served by the Establishment Clause: a multifaceted norm that focused on the prevention of an interdependence between state and religion in general, and more specifically in the school setting the protection of non-believers, members of minority religions, and the devoutly religious: the latter being protected from having to take part in “watered down” religious exercises that are more acceptable to a wider range of students.<sup>448</sup> According to Brennan, the two clauses were “designed comprehensively to prevent those official involvements of religion which would tend to foster or discourage religious worship or belief.”<sup>449</sup> Brennan's analysis pays particular

443 374 U.S. at 222.

444 Douglas was the author of the *Zorach* decision, which is (mis)used often by advocates of religious accommodation: “We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.” (343 U.S. at 314-15)

445 *McGowan v. Maryland*, 366 U.S. 420, 576 (1961) (in his dissent from the Court's decision to uphold a Maryland Sunday closing laws against an Establishment Clause challenge, Douglas noted that “[a] legislature of Christians can no more make minorities conform to their weekly regime than a legislature of Moslems, or a legislature of Hindus. The religious regime of every group must be respected-unless it crosses the line of criminal conduct. But no one can be forced to come to a halt before it, or refrain from doing things that would offend it. That is my reading of the Establishment Clause and the Free Exercise Clause”). For a more detailed look at Douglas' dissent regarding the need to protect minorities via the Establishment Clause see Levine, *Looking at the Establishment Clause through the Prism of Religious Perspectives: Religious Majorities, Religious Minorities, and Nonbelievers*, 87 *Chicago Kent Law Review* 775, 779-781 (2012).

446 374 U.S. 305 (Harlan and Goldberg, concurring).

447 374 U.S. at 306.

448 374 U.S. at 260 (Brennan, Concurring)

449 “We must not confuse the issue of governmental power to regulate or prohibit conduct motivated by religious beliefs with the quite different problem of governmental authority to compel behavior offensive to religious

attention to the changed composition of American society that was already apparent in 1960s America, and as such, he advocated for a robust interpretation of the Establishment Clause that goes beyond the original purposes conceived of by the founders who lived in a far less diverse society.<sup>450</sup>

As the lone dissenter in *Schempp*, Justice Stewart took a very narrow view of the purposes served by the Establishment Clause believing that the Court had erred when it talked about a “wall” separating church and state. He argued that this phrase could not be used as a “mechanical standard” that could be applied to every case,<sup>451</sup> and felt that there was not much substance to the Clause, at least as originally intended by the founders, beyond prohibiting the federal government from establishing a national religion and preventing it from interfering with state religious establishments that existed at the time.<sup>452</sup>

Taken together the Justices in *Schempp* found at least six different purposes that might be served by the Establishment Clause alone or the two clauses in tandem. Many of these purposes would later be expanded upon by jurists and commentators forming the basis of the non-establishment principles identified at the conclusion of this chapter. However, upon closer inspection, and despite the Court's sometimes confusing language regarding how the clauses interact, one can discern separate and distinct aims being served by the two clauses. What follows is an overview of the numerous views concerning the purposes served by the religion clauses, many which have their roots in one of the opinions in *Schempp*.

### C. The Federalizing of Religious Liberty in America

*Schempp* was a watershed moment in American religious freedom jurisprudence as it marks the beginning of the sometimes fierce disagreements among the Justices and commentators over the role religion should play in matters of state and society, as well the purposes that are served by religious liberty in general. As was noted in the prior chapters, cases like *Schempp*, and the more than one hundred other cases the U.S. Supreme Court has heard in the past seventy years raising issues of religious liberty at the state and local level, were traditionally dealt with in state courts.<sup>453</sup> Prior to 1940, individuals seeking protection of their religious rights from actions taken by state or local actors were forced to rely on state courts for redress as Supreme Court jurisprudence was quite clear that these local actions involved matters reserved to the

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principles.” 374 U.S. at 250.

450 374 U.S. at 242.

451 “It is, I think, a fallacious oversimplification to regard these two provisions as establishing a single constitutional standard of ‘separation of church and state,’ which can be mechanically applied in every case to delineate the required boundaries between government and religion.” 374 U.S. at 309 (Stewart, dissenting).

452 “The events leading to its adoption strongly suggest that the Establishment Clause was primarily an attempt to insure that Congress not only would be powerless to establish a national church, but would also be unable to interfere with existing state establishments.” 374 U.S. at 309-310

453 Kurt Lash vividly tells us that under the original understanding of the Establishment Clause “religious establishments were neither good nor bad--they were simply a matter left to the states.” Lash, *The Second Adoption of the Establishment Clause: The Rise of Non-Establishment Principles*, 27 *Arizona State Law Review* 1085, 1092 (1996)

states and their courts.<sup>454</sup>

With the passage of the 14<sup>th</sup> Amendment to the U.S. Constitution in the aftermath of the Civil War, the door was opened for federal courts to begin applying those rights found in the U.S. Constitution to actions taken by state and local actors.<sup>455</sup> Gradually the U.S. Supreme Court started applying individual federal constitutional rights to the states, a process commonly known as incorporation. Because the 14<sup>th</sup> Amendment prohibits the states from infringing on the liberty rights of any individual, the question for federal courts increasingly was which rights found in the federal constitution fall within concepts of liberty envisioned by the drafters of the Amendment. This question was not immediately answered, with the Court taking a piecemeal approach toward incorporating the various rights found in the Bill of Rights, an approach that has still not lead to a full incorporation of all those rights.<sup>456</sup>

Incorporation of the religion clauses certainly did not happen over night, but incorporation did eventually happen. In 1940 the Court finally opened the door for individuals to have violations of their religious liberty by state and local actors heard in the federal courts, finding that the religious liberty rights contained in the First Amendment of the U.S. Constitution were indeed within the scope of liberty protected by the 14<sup>th</sup> Amendment.<sup>457</sup> In *Cantwell v. Connecticut*, the Court was faced with the first in a series of cases brought by Jehovah's Witnesses challenging local solicitation ordinances that interfered with their their missionary work.<sup>458</sup> To reach the local law, the Court first had to find that the law deprived the Witnesses “of their liberty without due process of law in contravention of the Fourteenth Amendment,” and then conclude that the “concept of liberty embodied in that Amendment embraces the liberties guaranteed by” the religion clauses of the First Amendment.<sup>459</sup> By doing so, the Court opened the door for all future claimants to bring their religious liberty disputes to federal court regardless of whether the entity violating these rights was federal, state or local.

In short, the grand experiment outlined in Chapter 3 was about to take a dramatic shift from state court forums to the forum of federal courts. It is difficult to overstate just how important this shift has been to modern American religious liberty jurisprudence, as questions of religious liberty now have been placed in the hands of nine people who, as we have already seen, had and continue to have different ideas about what religious liberty should encompass. What was left unclear by *Cantwell*, however, was whether the door had been opened only for claims based on the Free Exercise Clause or both

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454 *Permoli v. Municipality No. 1 of the City of New Orleans*, 44 U.S. (3 How.) 588 (1845)

455 The second sentence of 14<sup>th</sup> Amendment ends with the phrase “nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” By inserting the word “state” in the context of deprivations of fundamental rights, the door was opened for the fundamental rights found in the U.S. Constitution to be applied to the individual states.

456 For instance the prohibition against excessive fines found in the Eighth Amendment has not be incorporated against the states.

457 Tarr, *Church and State in the States*, pg. 78; Eberle, *Free Exercise of Religion in Germany and the United States*, 78 *Tulane Law Review* 1023 (2003-2004) pg. 1036; Driesbach, *A Lively and Fair Experiment*, pg. 228.

458 *Cantwell v. Connecticut*, 310 U.S. 296 (1940); For a history of cases brought by the Witnesses see McAnich, *Catalyst for the Evolution of Constitutional Law: Jehovah's Witnesses in the Supreme Court*, 55 *U of Cinn. Law Review* 997 (1986).

459 310 U.S. at 303.

clauses. Seven years later the Court squarely answered this by also extending the reach of the Establishment Clause to state and local actors;<sup>460</sup> a decision that was controversial at the time and remains controversial to this day.<sup>461</sup>

#### **D. The Relationship Between the Religion Clauses**

The Supreme Court has on several occasions characterized the clauses as reinforcing each other by claiming that free exercise does not exist if the state is involved in religion.<sup>462</sup> Well before the Court began developing its modern religious liberty doctrine, state courts were already beginning to consider the relationship between free exercise and non-establishment principles. For example in striking down a Sunday closing law in California, the California Supreme Court in 1858 noted that “[w]hen our liberties were acquired, our republican form of government adopted, and our Constitution framed, we deemed that we had attained not only toleration, but religious liberty in its largest sense--a complete separation between Church and State, and a perfect equality without distinction between all religious sects.”<sup>463</sup> While this case was decided on state constitutional grounds, the California Supreme Court saw no difference between the free exercise and non-establishment principles found in both the California and United States constitutions, and it clearly believed that one principle reinforced the other.<sup>464</sup>

This view was not limited to the courts. As Thomas Cooley, one of the foremost constitutional scholars of his day, writes around the time of Reconstruction:

“[t]he legislatures have not been left at liberty to effect a union of Church and State, or to establish preferences by law in favor of any one religious

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460 *Everson v. Board of Education of Ewing Twp.*, 330 U.S. 1, 15 (1947); It has been argued that when doing so the Court had no choice but to explain what purposes are served by the religion clauses as the process of incorporation required the Court to justify their belief that the clauses advanced concepts of liberty. See Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause From Liberty to Equality*, 90 *California Law Review* 673, 680 (2002).

461 For arguments concerning why incorporation was improper see Amar, *The Bill of Rights as a Constitution*, 100 *Yale Law Journal* 1131, 1157-58 (1991) (“[T]he nature of the state's establishment clause right against federal dis-establishment makes it quite awkward to ‘incorporate’ the clause against the states via the Fourteenth Amendment. To apply the clause against a state government is precisely to eliminate its right to choose whether to establish a religion—a right explicitly confirmed by the establishment clause itself!”); See also Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 *Harv. L. Rev.* 1700, 1701-02 (1992); Conkel, *Towards a General Theory of the Establishment Clause*, 82 *Nw. U. L. Rev.* 1113, 1141 (1988) where he says that the Establishment Clause “embraced only a policy of federalism on the subject of church and state” and should not be read as “a general principle concerning the proper role of government and the rights of individuals.”

462 Not only the Supreme Court has made this argument. For an overview of how some 19<sup>th</sup> century state courts viewed the clauses as reinforcing each other see VanSant, “From Opportunity to Right: Constitutional Change and the Establishment Clause,” 25 *Yale Journal of the Law & Humanities* 149 (2013). See also Esbeck, *When Accommodations for Religion Violate the Establishment Clause: Regularizing the Supreme Court's Analysis*, 110 *West Virginia Law Review* 359, 360 (2007) arguing that when “properly conceived” the Establishment Clause “is far more about protecting religious freedom than it is about furthering modernity's project to confine religion, or at least to cabin those religions which modernity regards as dangerous and thus best practiced only in private.”

463 *Ex parte Newman*, 9 Cal. 502, 507 (1858).

464 Lash, *The Second Adoption*, pg. 1109. (Lash provides other mid-19<sup>th</sup> Century examples of state courts linking the two clauses together and notes: “The Founders had been anything but unanimous about the dangers of a union between church and state and had not intended to express any such non-establishment value. However, by Reconstruction, northern state courts had translated the prohibition of the original Establishment Clause to be an expression of fundamental religious liberty.” pg. 1133).

denomination or mode of worship. There is not religious liberty where any one sect is favored by the State and given an advantage by law over other sects. Whatever establishes a distinction against one class or sect is, to the extent to which the distinction operates unfavorably, a persecution; and, if based on religious grounds, is religious persecution. It is not toleration which is established in our system, but religious equality.”<sup>465</sup>

Again, here we see the discussion framed as religious liberty in general, rather than one focused on free exercise and non-establishment principles separately.

When the Supreme Court signaled that it was ready to start using the religion clauses to protect individuals from actions taken by state and local government, it too spoke about the dual aspects of the protections found in the First Amendment:

“The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion.”<sup>466</sup>

While it is difficult to know for sure whether the Court was implying that the Establishment Clause protected against coercion and the Free Exercise Clause protected the right to believe, the Court does seem to think that these two purposes are served by the religious freedom found in the First Amendment, with each tending to reinforce the other.

Seven years later in *Everson*, when the Court started the trend of treating the clauses separately, it is clear from reading the dissenting opinion that not all of the Justices were comfortable with basing a religious liberty claim solely on the Establishment Clause. Writing for the dissenters, Justice Rutledge relies heavily on the writing of James Madison and concludes that:

“[f]or him religion was a wholly private matter beyond the scope of civil power either to restrain or to support. Denial or abridgment of religious freedom was a violation of rights both of conscience and of natural equality. State aid was no less obnoxious or destructive to freedom and to religion itself than other forms of state interference. ‘Establishment’ and ‘free exercise’ were correlative and coextensive ideas, representing only different facets of the single great and fundamental freedom.”<sup>467</sup>

Thus, pursuant to this view the two clauses work together to keep the two spheres separate, free exercise protecting religions from the government, non-establishment protecting the government from being used to advance religion.<sup>468</sup>

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465 Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 469 (1st ed. 1868). However, as Kurt Lash points out, while Cooley was not entirely consistent on matters of non-establishment, this statement provides yet another example of the increasingly prevalent view of the time that principles of non-establishment and free exercise worked in tandem to protect individual rights. See Lash, *The Second Adoption*, pg. 1134.

466 310 U.S. at 303.

467 330 U.S. at 40.

468 It should be noted that even some of the strongest proponents of church/state separation acknowledge that the separationist world in which the *Everson* dissenters lived never really existed in America. See Green, *Of*

As was seen in the above summary of the various opinions in *Schempp*, the idea that the clauses work in tandem was alive and well a good twenty years after the *Everson* decision. Nevertheless, by the mid-1960s, American religious liberty dogma was moving decidedly in a direction where the clauses were seen as serving separate and distinct purposes.<sup>469</sup> There have been, however, rare exceptions. For instance in 1985 the Court once again returned to the framework used by the *Cantwell* Court stating that the two clauses work in conjunction to stop compulsion and promote exercise.<sup>470</sup> More recently in its *Hosana-Tabor* decision, the Court seemed to signal a willingness to return to a doctrine that views the clauses as working together when it ruled that the clauses, taken together, protect internal workings of the church from interference by the state:

“Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.” By forbidding the 'establishment of religion' and guaranteeing the 'free exercise thereof,' the Religion Clauses ensured that the new Federal Government—unlike the English Crown—would have no role in filling ecclesiastical offices. The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.”<sup>471</sup>

As will be shown in the pages that follow, however, modern American religious liberty dogma is shaped more by the idea that the clauses serve separate and distinct purposes. It is simply far more common to see Justices and commentators frame issues as either focusing squarely on the relationship between government and religion (Establishment) or the ability of an individual to act accordance with one's religion (Free Exercise).

## **E. Purposes Served Solely by the Free Exercise Clause**

The Court's decision in *Everson* ushered in a new era of religious liberty jurisprudence with its application of the Establishment Clause to the states, yet the Court in that case continued to imply that the clauses worked in tandem. It was not until the 1960s that the clauses began to take on separate and independent identities, each serving separate and distinct purposes, primarily as a result of the evolving views on the Court and in academia regarding the purpose and scope the Establishment Clause. Illustrative of this shift is the majority opinion in *Schempp* which draws a clear distinction between the two clauses by stating that the purpose of the Free Exercise clause:

“is to secure religious liberty in the individual by prohibiting any invasions

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(Un)Equal Jurisprudential Pedigree: Rectifying the Imbalance between Neutrality and Separationism, 43 B. C. L. Rev. 1111, 1120 (2002).

469 For example see Sherry, Lee v. Weisman: Paradox Redux, 1992 Sup. Ct. Rev. 123 (1992) (she argues that when both clauses are interpreted broadly, they cannot be reconciled with one another. For instance, the Court's decision in *Yoder v. Wisconsin* exempting Amish children from having to comply with the state's compulsory school attendance laws cannot be reconciled with the so-called Lemon Test that demands government actions be taken with a secular purpose, as exempting children on the basis of religion is per se being done to advance a religious purpose in violation of the test.)

470 “The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion.” *Wallace v. Jaffree*, 472 U.S. 38, 51 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940))

471 *Hosana-Tabor v. EEOC*, 132 S.Ct 694, 703 (2011)

thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. The distinction between the two clauses is apparent--a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.”<sup>472</sup>

Thus, by the mid-1960s the Free Exercise Clause was seen a bulwark against government coercion, while the Establishment Clause had taken on a life of its own well beyond simply protecting the right to believe and prohibiting coercion.

## 1. The Right to Believe Without Government Interference

The Supreme Court made it clear very early on its religious liberty jurisprudence that possessing religious beliefs without government interference is absolute, but acting in accordance with those beliefs is not. Faced with a challenge to a federal law banning polygamist marriages, the Court in *Reynolds* laid the foundations for modern American free exercise doctrine.<sup>473</sup> Relying heavily on a letter written by Thomas Jefferson, which also contains the famous “wall separating church and state metaphor,” the Reynolds Court noted that while the founders believed that religious freedom encompassed the right to believe, it did not encompass the right to act in a manner “in violation of social duties.”<sup>474</sup> Applying this principle, the Court found that laws related to marriage were part of the “social duties” that all citizens must follow regardless of their religious beliefs, and thus the law was upheld against this religious liberty based challenge.

The line between beliefs and complying with “social duties” is not always clear. In a series of cases dealing with the religious rights of members of the Jehovah's Witnesses, the Court struggled to provide contours to this line. The law at issue in *Cantwell* fined individuals for soliciting “money, services, subscriptions or any valuable thing for any alleged religious, charitable or philanthropic cause” without a city issued license. The challengers to the law were fined for distributing religious material in exchange for which they often received monetary donations, claiming that this interfered with their religious liberty. The state, on the other hand, justified the law as a protection against fraud, and argued that compliance with the law was one of the social duties referred to in *Reynolds*.

The Court began its analysis by reiterating the proposition first expressed in *Reynolds* that religious liberty aimed to promote the rights of individuals to believe as they see fit, but this did not free individuals from complying with laws enforced “for the protection of society.”<sup>475</sup> Noting that the state may enforce laws that neutrally regulate

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472 374 U.S. at 223.

473 *Reynolds v. United States*, 98 U.S. 145 (1879)

474 98 U.S. at 164 (The Court quotes Jefferson's letter to the Danbury Baptists: “Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions,-I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion or prohibiting the free exercise thereof,’ thus building a wall of separation between church and State.”)

475 “[T]he Amendment embraces two concepts, freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.” 310 U.S. at 303-304. (basically echoing what the Court in *Reynolds* had said).

the time, place and manner of solicitations, the Court was concerned that the licensing requirement, and the discretion given to city officials to deny a license, placed an undue “burden upon the exercise of liberty protected by the Constitution.”<sup>476</sup> It is difficult to know exactly what liberty was burdened here, but in a decision issued by the Court a mere four weeks later, it appears that free speech, rather free exercise, was the liberty threatened by the solicitation ordinance’s licensing requirement.

In *Minersville School District v. Gobitis*, fresh on the heels of *Cantwell*, a sharply divided Court allowed the government to compel school children to take part in the school day practice of pledging allegiance to the American flag, an activity in which some students refused to partake because it violated their deeply held religious tenets.<sup>477</sup> Harkening back to the language found in *Reynolds*, Justice Frankfurter, writing for the majority, said that while beliefs enjoy absolute protection under the Constitution, actions can be limited when they conflict with societal norms.<sup>478</sup> The dissenters, on the other hand, noted “[i]f these guaranties are to have any meaning they must . . . be deemed to withhold from the state any authority to compel belief or the expression of it where that expression violates religious convictions, whatever may be the legislative view of the desirability of such compulsion.”<sup>479</sup>

However, a mere three years later, the Court overturned the controversial flag salute decision holding that “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”<sup>480</sup> For the majority, the distinguishing feature between this case and dogma first created by the Court in *Reynolds* was that the challengers' attempt to exercise their religious liberty rights:

“does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. . . . The sole conflict is between authority and rights of the individual.”<sup>481</sup>

Thus, state laws that seek to protect the rights of others or the state's interest in keeping order may inadvertently restrict free exercise rights, but where the state has no such justification, the right to believe and act in accordance with those beliefs will prevail. Furthermore, any restriction must be neutral and not enforced in a discretionary manner.

## 2. The Modern American Free Exercise Dogma

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476 310 U.S. at 307.

477 *Minersville School District v. Gobitis*, 310 U.S. 586 (1940)

478 *Minersville School District v. Gobitis*, 310 U.S. 586, 593 (1940).

479 310 U.S. at 604.

480 *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) (The majority in this case were primarily comprised of the dissenters in *Gobitis*)

481 319 U.S. at 630.

While there is little argument among jurists and academics that preventing government from interfering with religious beliefs in a coercive manner is the primary purpose of the Free Exercise Clause, it is the scope of this protection that continues to be the focus of a raging debate set off by the Court's 1990 decision in *Employment Division v. Smith*.<sup>482</sup> While a full discussion of the case is beyond the scope of this work, it is important to note that this is an area where American and German jurisprudence seem to diverge.<sup>483</sup> The story of the *Smith* case actually begins in 1963 when the Court, in the landmark case of *Sherbert v. Verner*, strayed from the bright line distinction between religious beliefs and acts motivated by such beliefs.<sup>484</sup> Acknowledging the distinction made by the Court in 1878, Justice Brennan, writing for the Court in *Sherbert*, said that the state may pass laws that inadvertently restrict religious practices, but applying the law in a manner that restricts a person's religious practice can only be done after the state has shown a "colorable interest" for doing so.<sup>485</sup> In other words, the Court from this point on would require the state to show that applying a general law in a manner that inadvertently restricted religious practices was necessary to serve a compelling state interest, the so-called strict scrutiny test.<sup>486</sup> Once adopting this test, the Court had no trouble reversing the decision made by state authorities to withhold unemployment benefits from an employee who was fired for refusing to work on a Saturday because doing so violated her religious beliefs.<sup>487</sup>

The *Sherbert* case, however, would prove to be the high watermark for the scope of Free Exercise Clause protection as in the years that followed the Court rarely applied this high standard to general laws that inadvertently restricted religious practices,<sup>488</sup> and when it and lower courts did, they did so a manner that usually benefited the more mainstream religions. As Stephen Feldman points out, quoting two studies of federal appeals court decisions:

"claimants who belonged to mainstream Catholic and Protestant sects were more likely to win than were claimants who belonged to other religions (38.9% versus 24.5%). In free exercise exemption cases at the Supreme Court level, the numbers are even more striking: while members of small Christian sects sometimes win and sometimes lose such free exercise

482 494 U.S. 872 (1990); The response to the decision was described by one academic as one that "produced widespread disbelief and outrage." See Laycock, *The Remnants of Free Exercise*, 1990 *Supreme Court Review* 1, 1. For a more detailed list of some of the more harsh criticisms of the decision see Garnett, *The Political ( and Other ) Safeguards of Religious Freedom*, 32 *Cardozo Law Review*, 1815 (2011); Conkle, *The Path of American Religious Liberty: From Original Theology to Formal Neutrality and an Uncertain Future*, 75 *Ind. L.J.* 1 (2000); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 *DePaul L. Rev.* 993 (1990).

483 For a comparison of German and American views on Free Exercise see Eberle, "Free Exercise of Religion in Germany and the United States," 78 *Tulane Law Review* 1023 (2003-2004)

484 Holding that absent a showing of a compelling interest the government could not withhold unemployment benefits from someone who was fired from her job because she refused to work on a day that her religion deemed a day of rest. 374 US 398 (1963)

485 *Sherbert v. Verner*, 374 U.S. 398, 406 (1963)

486 From the German perspective, *Sherbert* unified the rights to believe and act on one's beliefs and shifted the analysis to the question of whether the state had sufficient justification. See Chapter 6 sections B1 and B3.

487 The claimant was a member of the Seventh Day Adventist Church for whom Saturday is the Sabbath and working on the Sabbath is forbidden.

488 494 U.S. at 883; See also Feldman, *Religious Minorities and the First Amendment: The History, the Doctrine, and the Future*, 6 *University of the Pacific Journal of Constitutional Law* 222, 265 (2003); Eisgruber/Sager, *Congressional Power and Religious Liberty After City of Boerne v. Flores*, 1997 *Sp. Ct. Review* 79, 79-80 (1997)

claims, non-Christian religious outsiders never win.”<sup>489</sup>

Admittedly, these studies are a bit outdated, but they do reflect how the courts were treating free exercise claims brought by members of non-mainstream religions at the time when the courts were also expanding the reach of the Establishment Clause. Keeping this in mind, as Feldman notes, it is no wonder that members of minority religions sought refuge under the protections of the Establishment Clause considering their dismal record of obtaining relief under the Free Exercise Clause.<sup>490</sup> The Free Exercise Clause simply did not provide sufficient protection for minority religions, but as we shall see, the Establishment Clause increasingly did.

Modern Free Exercise jurisprudence is shaped primarily by Justice Scalia's opinion in *Employment Division v. Smith*, the 1990 case that officially revived the *Reynolds* standard that treated separately the scope of protection for religious beliefs and acts done in accordance with those beliefs, i.e. one where beliefs are absolutely protected but practices can be inadvertently restricted by general laws<sup>491</sup>. In *Smith* the Court was once again faced with the denial of unemployment benefits, this time because the applicant was fired from his job for smoking Peyote, a plant that when ingested acts as a hallucinogenic drug. The applicant claimed that the drug was part of his Native American religious practices and being fired for taking the drug, and then denied unemployment benefits by the government for being fired for a drug-related offense, amounted to a violation of his rights under the Free Exercise Clause. Writing for the Court, Justice Scalia began his analysis of whether the Free Exercise Clause shields a person from having to comply with state drug laws for purposes of receiving unemployment benefits by noting the firm distinction Court precedent made between the protection of religious beliefs and acts under the Clause. Justifying this distinction, Justice Scalia concluded that to allow individuals to escape from compliance with the law because of their individual religious beliefs would turn the individual beliefs into a law of one, which, in his view, the Free Exercise Clause most certainly did not require.<sup>492</sup>

This return to the *Reynolds* standard not only was rejected by four of the nine Justices, who pointed out that “laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion . . . ,” but also by a broad range of academics, as well as Congress

489 See generally Feldman, *Religious Minorities and the First Amendment: The History, the Doctrine, and the Future*, 6 *Univ. of Penn Journal of Constitutional Law* 222, 251 (2003). (Feldmann goes on to give examples of language in those Supreme Court cases that did provide for exemptions under the Free Exercise clause, seeming to indicate that these exemptions were granted in order to allow those practicing traditional religions to do so without government interference. He also provides summaries of the Supreme Court cases where exemptions for members of non-mainstream religions were rejected.) pp. 251-259..

490 As we will see, the story in Germany is significantly different as German courts have read the free exercise provisions under Art. 4 GG in a far more expansive manner than their American counter-parts.

491 It should be noted here that the term “general laws” as used in this work mean generally applicable and neutral laws, ones that are not aimed at restricting religious conduct but do so inadvertently. In many respects, this is similar to the term “allgemeine Gesetze” as it is used in Article 5 of the German Basic Law, although this author is aware of the various definitions this term has been given by German academics and the controversial nature of its interpretation. See Ipsen, *Staatsrecht II Grundrechte* Rn. 469-478 (München 2012). Addressing this controversy is beyond the scope of this work.

492 “We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition.” 494 U.S. 877-79

and numerous state legislatures.<sup>493</sup> Nevertheless, after *Smith* it was clear the Court viewed the primary purpose being served by the Free Exercise clause as protecting the religious beliefs of individuals from government coercion, but this protection did not extend to religious practices that were in violation of generally applicable laws. With that said, it is arguably equally clear that while exemptions from general laws to accommodate religion are not constitutionally required, they are “nevertheless usually worthy, welcome and constitutional.”<sup>494</sup> It should be noted that accommodation in this sense “refers to government laws or policies that have the purpose and effect of removing a burden on, or facilitating the exercise of, a person's or an institution's religion.”<sup>495</sup> Thus, while according to *Smith*, the Constitution does not require government to accommodate religious practices that run afoul of general laws, legislatures are generally encouraged to craft exemptions to general laws in order to accommodate religious practices.

Once the government does act to make such accommodations, however, non-establishment issues might arise as the purpose of these accommodations is clearly to aid or benefit religion. In response to this concern, Michael McConnell, an advocate of a robust Free Exercise Clause, as well as government accommodations of religious practices, has provided a helpful explanation as to the limits of accommodation in the Free Exercise context, writing that “[t]he key difference between legitimate accommodation and impermissible “establishment” is that the former merely removes obstacles to the exercise of a religious conviction adopted for reasons independent of the government's action, while the latter creates an incentive or inducement (in the strong form, a compulsion) to adopt that practice or conviction.” Where the line is between accommodation and compulsion has been the subject of several Establishment Clause cases that will be outlined shortly. Here however, it is sufficient to note that questions of accommodation also arise in the Free Exercise context, and can blur the lines between what is required to facilitate exercise and prohibited under non-establishment principles.

For comparison purposes, however, it is also interesting to note that advocates of a rigorous accommodation regime usually distinguish between negative and positive accommodations, using language that should be familiar to readers with an understanding of German religious liberty jurisprudence. According to Professor McConnell, negative accommodation occurs when government action threatens to interfere with exercise of religion, accommodation in this sense amounting to exemptions from general law, whereas positive accommodation takes place “when the

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493 494 U.S. at 901 (O'Conner, concurring in part); See also Eisgruber/Sager, *Congressional Power*, pg. 80-81 (noting that the coalition in opposition to the opinion was large and diverse). In 1993 the United States Congress passed the Religious Freedom Restoration Act in response to *Smith*, see 42 U.S.C. ch. 21B. As of 2015 more than 20 twenty states had their own versions of the Religious Freedom Restoration Act. See <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx>.

494 Garnett, *Accommodation, Establishment and Freedom of Religion*, 67 *Vanderbilt Law Review* En Banc 39, 44 (2014). See also Esbeck, *When Accommodation for Religion Violates the Establishment Clause*, pg. 367. For counter-arguments to this proposition see Hamilton, *The Religious Freedom Restoration Act Is Unconstitutional*, *Period*, 1 *U. Pa. J. Const. L.* 1 (1998); See also Sherry, *Lee v. Weisman: Paradox Redux*, 1992 *Sup. Ct. Rev.* 123, 143 (1992)

495 McConnell, *Accommodation of Religion: An Update and Response to Critics*, 60 *Geo. Wash. L. Rev.* 685, 686 (1992).

government has taken other action that puts religion at a disadvantage,” and is in a position to rectify these disadvantages (citing leave time for religious class and moments of silence in public schools as examples.)<sup>496</sup>

“The hallmark of accommodation is that the individual or group decides for itself whether to engage in a religious practice, or what practice to engage in, on grounds independent of the governmental action. The government simply facilitates (“accommodates”) the decision of the individual or group; it does not induce or direct, by means of either incentives or compulsion.”<sup>497</sup>

In this respect one can see glaring similarities to the German approach toward religious liberty. Professor McConnell's positive accommodation approach can be seen to encompass something akin to the German view of positive religious freedom, which obliges the state to provide individuals with room to develop religiously on their own and offer protection to them from others who might interfere with this right.<sup>498</sup> Advocates of Professor McConnell's view also argue that “[m]embers of minority religions--like those of majority religions--should be able to carry out their beliefs in practice openly, as long as **they do not infringe on the rights of others** (emphasis added),”<sup>499</sup> a position that mirrors the prevailing view of religious liberty in Germany.<sup>500</sup> In other words, negative rights should never be applied in a manner that interferes with the positive rights of others. Nevertheless, how far government in the United States may accommodate religion, whether it be a so-called negative or positive accommodation, in order to allow for individuals to exercise their “private choice” will most certainly be dictated by some of the soon to be discussed non-establishment principles, as even some American jurists and commentators who advocate for a robust interpretation of the Free Exercise Clause maintain that the Establishment Clause should serve as a constraint on government going too far in offering accommodations.<sup>501</sup>

While *Smith* clearly allows for religious practices to be restricted by general laws, it does not allow government to hide behind general laws when the passage of such is motivated by restricting religious practice. So held the Court three years later in *Church of Lukumi v. Haileah*, striking down a city ordinance banning ritual slaughter that was passed under the guise of promoting animal protection but was clearly motivated by the

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496 McConnell, Accommodation of Religion pg. 686.

497 McConnell, Accommodation of Religion pg. 688. (he goes on to argue that an Establishment Clause violation takes place when government supports one religion over another, or in some way treats religions differently.)

498 BVerfGE 93, 1 (16). To be clear, this is more a general duty to provide space for personal development, which includes personal religious development, as well as a duty to protect individuals from having their religious liberty interfered with by third parties. This becomes an issue in German jurisprudence when individuals seek to exercise their negative rights in a manner that might decrease or nullify this space. By doing so, the exercising of negative rights are said to be in conflict with the exercising of the positive right to hold religious beliefs and act on them, and in this instance the state has a duty to protect both these rights and must engage in a balancing. For a short explanation of this English see Muehlhoff, Freedom of religion in public schools in Germany and in the United States, 28 Ga. J. Int'l & Comp. L. 405, 447 (1999). For a critique in German of this position see Hegerfeld, Religiöse Symbole in staatlichen Räumen in Liber amicorum für Joachim Gaetner pg. 290 (Frankfurt am Main, 2003)

499 Berg, “Minority Religions and the Religion Clauses,” 82 Washington University Law Quarterly 919, 928-29 (2004).

500 See Chapter 6 Section B.

501 Brownstein, The Religion Clauses as Mutually Reinforcing Mandates, 32 Cardozo Law Review, 1701 1728 (2011)

desire to keep the Church of Lukumi from establishing a presence within the city limits.<sup>502</sup> Thus, arguably another purpose served by the Free Exercise Clause is to protect against intentional discrimination based on religious practices.

Before we leave our brief survey about the purposes served solely by the Free Exercise Clause, it is worth pointing out here that the question of whether both clauses or only the Free Exercise Clause alone are aimed at protecting the right to believe from government coercion has taken on a central role in the debates concerning the meaning of the Establishment Clause. As the Court in *Schempp* noted, “[t]he distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.”<sup>503</sup> However, as will be discussed in the next section, by the mid 1980s advocates of a more limited interpretation of the Establishment Clause were beginning to argue that the primary purpose served by the Establishment Clause is also shielding the right to believe from government coercion. Today the question of whether the central purpose served by the Establishment Clause is primarily to stop government coercion has gradually taken center stage in the debates over non-establishment principles and is perhaps now seen by at least five Justices as the primary purpose being served by the Establishment Clause as well as the Free Exercise Clause. The response to this has been robust and will be more fully flushed out in the next section. However, it is sufficient here to note that the argument boils down to the common sense observation that “[i]f coercion is . . . an element of the establishment clause, establishment adds nothing to free exercise.”<sup>504</sup> In other words, if the main purpose of both the Establishment and Free Exercise Clauses is to prohibit government coercion, then the Establishment Clause is basically redundant and unnecessary.

## **F. Purposes Served Solely by the Establishment Clause**

By 1962, as illustrated by the *Engel* case, the idea that the Clauses might serve separate and distinct purposes was firmly rooted in Supreme Court jurisprudence:

“Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially

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502 508 U.S. 520 (1993) (According to the Court “[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt.”) at 534.

503 374 U.S. at 223.

504 Laycock, “Nonpreferential Aid to Religion: A False Claim About Original Intent,” 27 William and Mary Law Review 875, 922 (1986). See also Justice Souter’s concurring opinion in *Lee v. Weisman*, 505 U.S. 577, 621 (1992) where he notes that “a literal application of the coercion test would render the Establishment Clause a virtual nullity.”

approved religion is plain.”<sup>505</sup>

Thus, under *Engel* and the cases that adopted its reasoning, the primary purpose of the Free Exercise Clause is to prevent government from compelling people to violate their religious beliefs, whereas the purpose of the Establishment Clause is more varied and not solely aimed at preventing government coercion. The goal of what follows is to provide a brief overview of the various alleged aims of the Establishment Clause as set forth by jurists and commentators over the past 50 plus years. By doing so one should be able to obtain a deeper understanding of how various interpretations of the Clause have shaped the application of non-establishment principles by the courts in the United States, and perhaps also provide a baseline for comparing and contrasting how non-establishment principles have been applied in Germany by the Federal Constitutional Court (BVerfG) and other German courts.

## 1. No State Religion

At a minimum, the Establishment Clause prohibits the federal government from establishing a national church.<sup>506</sup> Because prior to the 1940s, the religion clauses were deemed only to apply to the national government and not the individual states, there is very little discussion about the meaning of the Establishment Clause in the first 150 years of the Court's jurisprudence. In 1940 Justice Frankfurter gave voice to the idea that at the very least the Establishment Clause was intended to decrease religious strife by prohibiting the government, both state and local, from creating a state religion.<sup>507</sup> Seven years later in *Everson* the Court, for the first time, engaged in a more direct analysis of the Establishment Clause's meaning: “The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church.”<sup>508</sup> The Court went on to list several other purposes, many of which will form the basis of the discussion that follows.

Only a year after *Everson*, the Justices began to argue over how far beyond a simple ban of state religion the Establishment Clause should reach. In *McCullom*, Justice Reed took issue with the Court striking down a school release time program excusing students from their regular school classes so that they could voluntarily attend religious courses funded and taught by private religious entities during school hours in school classrooms. In his view, by doing so the Court went well beyond the original intent of the Establishment Clause when it held that such an accommodation for religious classes was the equivalent of establishing a religion.<sup>509</sup> Thus, by the time *Schempp* was decided

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505 *Engel v. Vitale*, 370 U.S. 421, 430-431 (1962); Others have made similar arguments noting that “the two texts are independent but complimentary.” Esbeck, *When Accommodations for Religion Violate the Establishment Clause*, pg. 361.

506 Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 Harv. L. Rev. 1700, 1701-02 (1992)

507 310 U.S. at 539

508 330 U.S. at 15

509 *McCullom v. Board of Education of Champaign County*, 333 U.S. 203, 244 (1948) (Reed, dissenting) (“Passing years, however, have brought about acceptance of a broader meaning, although never until today, I believe, has this Court widened its interpretation to any such degree as holding that recognition of the interest of our nation in religion, through the granting, to qualified representatives of the principal faiths, of opportunity to present religion as an optional, extracurricular subject during released school time in public school buildings, was equivalent to an establishment of religion.”)

there was a consensus that at the very least the original purpose of the Establishment Clause was “to insure that Congress not only would be powerless to establish a national church, but would also be unable to interfere with existing state establishments.”<sup>510</sup> In fact there is literally no debate in the United States that a purpose served, and some might argue the only purpose being served, by the Establishment Clause is to prohibit the federal government from creating a national religion.

Over the past two decades Justice Thomas has given voice to what some might argue is an even more narrow interpretation of the Establishment Clause, claiming that its sole original purpose was to promote federalism. Under this reasoning, by prohibiting the federal government from establishing a national religion, the sole aim of the founders was to protect those states who at the time of the drafting of the First Amendment had state religions of their own.<sup>511</sup> Justice Thomas, and those who believe that federalism is the sole purpose of the Establishment Clause openly acknowledge that this would leave states to create their own relationships with religion, which could only be limited by free exercise and equality arguments.<sup>512</sup>

## 2. No Preference of One Religion Over Another

The *Everson* Court did not stop with the “no state religion” purpose when discussing the Establishment Clause, and clearly to the dismay of the aforementioned Justices who sought and continue to seek to limit the reach of the Clause, neither did subsequent courts. In addition to prohibiting the state from creating a religion, the Court went on to say that “[n]either can (the state) pass laws which aid one religion, aid all religions or prefer one religion over another.”<sup>513</sup> Admittedly, there is a lot to unpack in this statement, however the Court on several occasions has boiled this down to the principle that the very essence of the Establishment Clause is government should not favor one religion over another,<sup>514</sup> a view that has been endorsed by most of the Justices who have served on the modern Supreme Court. Even most so-called religion accommodationists, those believing that government should acknowledge and even facilitate religion in the public square, believe that in addition to prohibiting the federal government from establishing a national church, the Establishment Clause was intended to prohibit the federal government from favoring one religious sect over another.<sup>515</sup> As long as all religions are treated equally, so the accommodationist argument goes, there is no

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510 374 U.S. at 309

511 *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 50 (2004); *Town of Greece v. Galloway*, 134 S.Ct. 1811, 1835 (2014) (Thomas, concurring). See also Steinberg, *The Myth of Church-State Separation*, 59 *Cleveland State Law Review* 623 (2011); Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* 17 (1995); Munoz, *The Original Meaning of the Establishment Clause and the Impossibility of its Incorporation*, 8 *U. Pa. J. Const. L.* 585, 588 (2006).

512 *Zelman v. Simmons-Harris*, 536 US 639, 679 (2002); *Newdow*, 124 S. Ct at 2330. (Thomas, concurring).

513 330 U.S. at 16.

514 see *Wallace v. Jaffree*, 472 U.S., at 52-54; *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *School Dist. of Abington Township v. Schempp*, 374 U.S., at 216-217; *Board of Education of Kiryas Joel v. Grumet*, 512 U.S. 687, 703 (1994) and *Larson v. Valente*, 456 U.S. 228, 244 (1982) (where the Court gave perhaps one of its clearest pronouncements on this by stating “[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”).

515 See *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, dissenting). See also Koppelman, *Phony Originalism and the Establishment Clause*, 103 *Northwestern University Law Review* 727, 732 (2009) (Koppelman points out that under this view a non-denominational prayer, for instance, would not violate the Establishment Clause because it does not violate the prohibition of treating religious sects differently).

problem with permitting “the government to include religious institutions, even religious schools, among the beneficiaries of neutrally defined, nonsectarian subsidies.”<sup>516</sup> Thus, government support of religion poses no problems under this view of the Establishment Clause so long as all religions are treated equally. However, as usual, the devil is in the details, and when it comes to this “no preference” purpose of the Establishment Clause the Justices have found themselves at odds with one another over the exact meaning of preference: whether a no preference standard alone is enough to protect religious liberty, and whether this standard should be extended to non-believers as well.<sup>517</sup> Because the Court has been somewhat vague and inconsistent on the meaning of equality between the religions, and in some instances between religion and non-religion, a closer look at some of the underlying purposes served by equality or “no preference” sheds some light on the various views regarding “no preference” and rather clearly illustrates why no consensus has emerged on the Court concerning what “no preference” means in the non-establishment context.

#### a. Protect Against Religious Strife in Society<sup>518</sup>

Avoiding the conflicts that had plagued Europe was undoubtedly on the minds of the founders as they drafted the First Amendment.<sup>519</sup> As Douglas Laycock points out, creating a document that would avoid such strife contained two goals, a negative one that sought to minimize conflict between sects and a positive one that sought “to create a regime in which people of fundamentally different views about religion can live together in a peaceful and self-governing society.”<sup>520</sup> In his controversial and short-lived opinion in *Gobitis*, Justice Frankfurter was perhaps the first member of the Court to make the argument that a primary purpose of the religion clauses was to avoid the religious strife that had plagued Europe at the time of the drafting of the First Amendment.<sup>521</sup> Eight years later, in his concurrence in *McCullom*, Frankfurter revisited the no religious strife purpose of the Establishment Clause when he reasoned that in-school religion classes taught by private individuals with private funds would sharpen “the consciousness of religious differences” within the school and in the community as a whole, in direct contradiction to a primary purpose of the Establishment Clause.<sup>522</sup> By

516 Eisgruber/Sager, *Congressional Power*, pg. 106

517 For a critique on the idea that non-preference alone is sufficient to adequately protect religious liberty see Hamilton, Power, *The Establishment Clause and Vouchers*, 31 *Connecticut Law Review* 807 (1999). (Hamilton writes: “Nonpreferentialism forbids the evil of a single-church state, but it fails to redress the inappropriate exercise and accumulation of power when religious entities band together. Indeed, it invites the political union of religious entities seeking similar ends as a way of avoiding establishment strictures. pg. 823); See also Greenawalt, *Secularism, Religion, and Liberal Democracy in the United States*, 30 *Cardozo Law Review* 2383, 2385 (2009).

518 Protecting against religious strife should be distinguished from protecting minority religions. In the former, the idea is that powerful religions might battle one another to curry favor from the government, whereas the latter is concerned with government using its power to infringe upon the rights of minorities. See Merel, *The Protection of Individual Choice*, pg. 811.

519 James Madison, *Memorial and Remonstrance Against Religious Establishments* P 11 (1785), reprinted in *Everson v. Board of Educ.*, 330 U.S. 1, 69 (appendix to opinion of Rutledge, J., dissenting)

520 Laycock, *Religious Liberty as Liberty*, 7 *J. Contemp. Legal Issues* 313, 317 (1996).

521 “Centuries of strife over the erection of particular dogmas as exclusive or all-comprehending faiths led to the inclusion of a guarantee for religious freedom in the Bill of Rights. The First Amendment, and the Fourteenth through its absorption of the First, sought to guard against repetition of those bitter religious struggles by prohibiting the establishment of a state religion and by securing to every sect the free exercise of its faith.” *Gobitis* 310 U.S. at 593.; See also Laycock, *Religious Liberty as Liberty*, pg. 317.

522 333 U.S. at 228. (Justice Frankfurter goes on to say that “the Constitution . . . prohibited the Government

1972 this purpose was central to the creation of the Court's (in)famous Lemon test<sup>523</sup> when it noted that “political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.”<sup>524</sup> The strife feared by some members of the Court was real and even recent, as we saw in the last chapter. As Catholics and other minority religions began to challenge the Protestant status quo that had existed since the nation's founding, a real sense that religious strife could be on the horizon existed, at least in the minds of many Justices and commentators.<sup>525</sup> Finally it is worth noting that a possible corollary of refraining from taking actions that prevent religious strife is government taking actions that seek to create tolerance and acceptance,<sup>526</sup> a view espoused in a concurring opinion issued by Justices Goldberg and Harlan in *Schempp*. Regardless of how one characterizes this purpose, however, it is clear that jurists and commentators have viewed the Establishment Clause as also serving the state's interest of keeping religious strife to a minimum.

Whether this is still a purpose of the Establishment Clause, however, has more recently become a matter of debate among members of the Court and like-minded commentators, as is nicely illustrated by the debate between the Justices first in *Mueller v. Allen* (1983) and later in *Mitchell v. Helms* (1999).<sup>527</sup> All the Justices involved in this debate acknowledge that an original purpose of the Clause was to prevent religious strife, however adopting Justice Powell's concurrence in *Wolman*, the *Mueller* decision marked the first time that a majority of the Court declared that “[t]he risk of significant religious or denominational control over our democratic processes--or even of deep political division along religious lines--is remote.”<sup>528</sup> This coming a mere 12 years after a majority of the Court had found the purpose of avoiding religious strife to be alive and well in Establishment Clause jurisprudence.<sup>529</sup> Despite significant changes to the Court's composition by 1999 when it heard the *Mitchell* case, the division among the Justices over whether avoiding religious strife was still a valid purpose of the Clause remained deep. In *Mitchell* the Justices argued over whether a

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common to all from becoming embroiled, however innocently, in the destructive religious conflicts of which the history of even this country records some dark pages.”)

523 The so-called Lemon Test has been used by some members of the Court to determine whether government actions have violated the Establishment Clause, although its use has fallen out of favor in more recent cases. The test originally contained three factors: whether the government actions 1) were motivated by a secular purpose; 2) had the effect of advancing religion; and 3) created an improper entanglement of religion and state.

524 *Lemon v. Kurtzman*, 402 U.S. 602, 622 (1971)

525 One must distinguish here between political strife and outright violence. While there was very little outright violence in the name of religion at the time of the founding up to the *Everson* case, as we have seen in the prior chapter, there was a good deal of political strife along religious lines. For a discussion about the lack of violent religious strife leading up to the *Everson* decision see Feldman, *From Liberty to Equality*, pp. 681-684.

526 Garfield, *A Positive Rights Interpretation of the Establishment Clause*, 76 *Temple Law Review* 281, 286 (2003)

527 *Mueller v. Allen*, 463 U.S. 388 (1983), *Mitchell v. Helms*, 530 U.S. 793 (2000). It should be noted Justice Thomas' plurality decision in *Mitchell* was groundbreaking in the manner in which it changed the neutrality analysis for purposes of funding religious activities and the Establishment Clause. A discussion of this change is beyond the scope of this work, however concise explanations and criticisms of the change can be found at: Ravitch, *A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause*, 38 *Ga. L. Rev.* 489 (2004); Green, *Of (Un)Equal Jurisprudential Pedigree: Rectifying the Imbalance between Neutrality and Separationism*, 43 *B. C. L. Rev.* 1111 (2002); Green, *The Ambiguity of Neutrality*, 86 *Cornell L. Rev.* 692 (2001); Brownstein, *Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free Speech Values B A Critical Analysis of “Neutrality Theory” and Charitable Choice*, 13 *Notre Dame J.L. Ethics & Pub. Pol'y* 243 (1999)

528 463 U.S. at 400. (quoting *Wolman*, 433 U.S., at 263 (Powell, concurring in part, concurring in the judgment in part, and dissenting in part))

529 See *Lemon v. Kurtzman*, 402 U.S. 602, 622 (1971)

program that allows government funds to flow indirectly to religious schools would result in political strife between religious factions. The majority, while acknowledging that protecting against such strife was at one time a legitimate concern, noted with approval that more recent cases had “rightly disregarded” this as a live purpose of the Clause.<sup>530</sup> However, as recently as 2005 a majority could still be mustered to revive the idea that protecting against religious strife remains a purpose of the Establishment Clause:

“We are centuries away from the St. Bartholomew's Day massacre and the treatment of heretics in early Massachusetts, but the divisiveness of religion in current public life is inescapable. This is no time to deny the prudence of understanding the Establishment Clause to require the Government to stay neutral on religious belief, which is reserved for the conscience of the individual.”<sup>531</sup>

Writing on another case heard and decided on the same day as the Court's 2005 pronouncement above, Justice Breyer noted that the Clauses collectively “seek to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike.”<sup>532</sup> In short, members of the Court, as well as commentators, continue to debate over whether protecting against religious strife is still an underlying purpose served by the Establishment Clause, however, at the very least it can be said that when members of the Court talk generally about “no preference” avoiding religious strife is one of the reasons some of them cite for treating religions equally.

#### b. Protect Minorities and Promote Diversity

Other rationales sometimes cited for the “no preference” doctrine involve the treatment of minority religions, or more specifically the promotion and protection of religious diversity by ensuring that government treats all religions equally.<sup>533</sup> One of the earliest acknowledgments that the Establishment Clause serves to protect minorities and promote diversity was made by the Justices in the *Barnette* case where the Court struck down a state law that forced school children to partake in the daily recitation of the Pledge of Allegiance, as was already mentioned, a practice that members of the Jehovah's Witnesses believed violated their religious liberty. In doing so the Court noted that “[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials. . . . [Such] fundamental rights may not be submitted to vote; they depend on the outcome of no elections.”<sup>534</sup> Here, of course, the provisions of the Bill of Rights at stake were the religion clauses. Even the dissenters acknowledged that the Establishment Clause was a tool to place religions “on an equal footing,”<sup>535</sup> although for them simply being a member of a minority religion did not excuse one from having to comply with a general law requiring school children to participate in a recitation of

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530 530 U.S. at 825.

531 *McCreary County v. ACLU*, 545 U.S. 844, 880 (2005)

532 *Van Orden v. Perry*, 545 U.S. 677, 698 (Breyer, concurring)

533 Garfield, *A Positive Rights Interpretation of the Establishment Clause*, 76 *Temple Law Review* 281, 283 (2003)

534 319 U.S. at 638.

535 319 U.S. at 654 (Frankfurter, dissenting) (although he then went on to find that treating religions equally did not excuse individuals from following general laws, in this case a law that required all school student children to engage in a recitation of the Pledge of Allegiance even if doing so violated their religious beliefs.)

the Pledge.

The roots of the idea that the Establishment Clause was intended to protect minorities can be found in the writings of the founding generation, James Madison perhaps being the biggest proponent of this view seemingly out of fear that sects might join together and use their political power to establish a state religion and force others to conform to the beliefs of such state religion.<sup>536</sup> While the *Barnette* Court hinted that a goal of the Establishment Clause was to protect minorities when it recognized that doing so is the broad purpose of the Bill of Rights, the Court in its landmark *Everson* decision made it clear that one of the primary evils the Establishment Clause seeks to address is the persecution of minorities.<sup>537</sup> The Justices did not expand upon what exactly this meant until the 1960s, beginning with Justice Douglas' dissent in *McGowan* where he gave voice to Madison's fears by expressly arguing that “[t]he ‘establishment’ clause protects citizens also against any law which selects any religious custom, practice, or ritual, puts the force of government behind it, and fines, imprisons, or otherwise penalizes a person for not observing it.”<sup>538</sup> Douglas goes on to observe that “[t]he reverse side of an ‘establishment’ is a burden on the free exercise of religion.”<sup>539</sup> In other words, when the state violates non-establishment principles by crafting its laws in a manner that benefits members of the mainstream religions, it is infringing on the religious rights of members of minority religions who are powerless to defend themselves against such intrusive laws.

A year later in the Court's landmark school prayer case, Justice Black writing for the Court noted that “[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.”<sup>540</sup> With such a bold pronouncement as the one made by Justice Black, it is no wonder that scholars have subsequently made claims such as “[t]he purpose of the Constitution generally, and the Establishment Clause specifically, is to protect minorities from raw majoritarian impulses.”<sup>541</sup> Some have even gone so far as to argue that “if there are good arguments for the strict separation ideal, one of them is that religious minorities will fare better when majoritarian government is kept far from religious life.”<sup>542</sup>

The concept of tolerance is part and parcel of this overall desire to protect religious

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536 Berg, *Minority Religions*, pg. 934.

537 See Feldman, *From Liberty to Equality*, pg. 681 (arguing that the chief concern of the Court was “to put a stop to the European practice of persecuting religious minorities that was imported to the colonies from the ‘old world.’”)

538 See Justice Douglas' dissent in *McGowan* where the Court refused to strike down on Establishment Clause grounds a law that penalized store owners who opened their stores on Sunday. The owners in question were devout Jews who, for religious reasons, closed their stores on Saturdays. By being forced to also close their store on Sunday, the store owners claimed they were being disadvantaged because their religious day of rest fell on another day. *McGowan v. Maryland*, 366 U.S. 420, 564 (1961).

539 366 U.S. at 578.

540 370 U.S. at 431.

541 Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 *Colum. L. Rev.* 2083, 2171 (1996). See also Greenawalt, *Secularism, Religion, and Liberal Democracy in the United States*, pg. 2385 and Green, *Of (un)equal jurisprudential pedigree*, pg. 1131; (Green noting that “[d]iscrimination among religions strikes more deeply at the heart of Establishment Clause values— creating impressions of government favoritism and inviting religious dissension—than distinctions between religion and non-religion.”)

542 Berg, *Minority Religions*, pg. 921.

minorities, and early on in modern Supreme Court jurisprudence it was mentioned as another purpose of the religion clauses. For instance, as previously stated, Justice Goldberg in his *Schempp* concurrence believed the clauses were intended to promote tolerance and provide the fullest possible opportunity for one to develop one's own religious identity.<sup>543</sup> The tolerance mandate in this sense, however, seems to be directed at the state, and should not be compared directly with *Toleranzgebot* (principle of tolerance) established by the German Federal Constitutional Court, which, as will be discussed in the next chapter, is more aimed at what individuals should tolerate as part of the balancing of rights that takes place in the German religious liberty doctrine.<sup>544</sup>

Whether the minorities being protected by the non-establishment doctrine include non-believers is a matter of some debate. Arguably the Court has taken the tolerance principle to the extreme, and without question beyond the original intent of the founders, by expanding its minority rights concept to include non-believers, as was the case in *Torcaso v. Watkins* where Justice Black, writing for seven members of the Court noted “neither a State nor the Federal Government can constitutionally force a person ‘to profess a belief or disbelief in any religion.’ Neither can it constitutionally pass laws or impose requirements which aid all religions as against non-believers . . . .”<sup>545</sup> Extending this protection to non-believers is without any doubt a controversial view and one that probably reached its high watermark in the mid 1980s.<sup>546</sup> More recently, Justices have criticized this expansion of religious liberty to the non-religious, arguing that the nation's history is filled with examples of the state accommodating religion in a manner that disregards non-believers.<sup>547</sup>

Arguably it was the goal of protecting minorities that drove Justice O'Connor to create a new test by which the court could determine whether state actions violated the Establishment Clause: the so-called Endorsement Test. The origins of this test can be traced back to Justice Frankfurter's concurrence in *McCullom* where he hinted that making sure minorities are also full members of society is a goal of the Establishment Clause. In agreeing with the Court that a program allowing students to take part in religion courses during school hours violated the Establishment Clause, Frankfurter noted:

“[t]he children belonging to these non-participating sects will thus have inculcated in them a feeling of separatism when the school should be the training ground for habits of community, or they will have religious instruction in a faith

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543 “The basic purpose of the religion clauses of the First Amendment is to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end.” *Schempp* at 305. (Goldberg, concurring)

544 For a discussion of this principle see Chapter 6 Section C.

545 367 U.S. 488, 495 (1961). However, as we have seen in the prior chapter and as others have pointed out, there is little doubt that the founders were not thinking of the rights of non-believers when they consumed themselves with questions of religious liberty. Kurland, *The Origins of the Religion Clauses*, 27 *Wm. & Mary L. Rev.* 839, 856 (1986). See also Green, *Of (un)equal jurisprudential pedigree*, pg. 1126.

546 “Precisely because of the religious diversity that is our national heritage, the Founders added to the Constitution a Bill of Rights, the very first words of which declare: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....” Perhaps in the early days of the Republic these words were understood to protect only the diversity within Christianity, but today they are recognized as guaranteeing religious liberty and equality to “the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.” *Wallace v. Jaffree*, 472 U.S., at 52, 105 S.Ct., at 2487” at 589-90.

547 545 U.S. at 899 (Scalia, dissenting).

which is not that of their parents. As a result, the public school system of Champaign actively furthers inculcation in the religious tenets of some faiths, and in the process sharpens the consciousness of religious differences at least among some of the children committed to its care.”<sup>548</sup>

More recently members of the Court have on several occasions in cases dealing with the placement of religious symbols on government property reminded their fellow Justices that a primary purpose served by the Establishment Clause is to prevent the type of discrimination that occurs when the government acts in a manner that makes minorities feel as though they are outsiders.<sup>549</sup> The aforementioned Endorsement Test is based on the idea that government endorsement of a religion sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.<sup>550</sup> It has more recently been used by members of the Court seeking to challenge government practices aiding religion that are justified as a “historical practice,” noting that “[h]istorical acceptance of a practice does not in itself validate that practice under the Establishment Clause if the practice violates the values protected by that Clause.”<sup>551</sup> The values here, of course, being the protection of members of minority religions. Advocates of this view note that James Madison had a similar concern and saw non-establishment principles as guarding against “a kind of political alienation.”<sup>552</sup> They further argue that the Establishment Clause, by serving the purpose of protecting minorities, demands that government should strive for inclusiveness rather than engage in conduct that has the effect of making some of its citizens feel like outsiders,<sup>553</sup> and results in a leveling of the playing the field that otherwise advantages mainstream religions.<sup>554</sup>

When the Establishment Clause is framed as a minority protection provision, it is clear why this Clause, and not the Free Exercise Clause, has been used by religious

548 333 U.S. at 227-228.

549 “The anti-discrimination principle inherent in the Establishment Clause necessarily means that would-be discriminators on the basis of religion cannot prevail.” 492 U.S. at 611; “Government’s obligation to avoid divisiveness and exclusion in the religious sphere is compelled by the Establishment and Free Exercise Clauses, which together erect a wall of separation between church and state.” Van Orden (Stevens, dissenting) 545 U.S. at 709.

550 *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor concurring) In her concurrence Justice O’Connor first sets forth her now well established Endorsement Test where she says that another purpose served by the Establishment Clause is to ensure that minorities are not made to feel like outsiders by government actions vis-a-vis religion. To determine whether one feels as an outsider, the government action must be viewed from the perspective of a reasonable observer familiar with the history of the government’s actions or reasons therefore.

551 *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 631 (1989) (O’Connor, concurring).

552 Koppelman, Phony Originalism pg. 747 (quoting Madison’s Memorial and Remonstrances text that establishment “degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority.”). For an opposing argument see Getchell/Brady, *How the Constitutions of the Thirty-seven States in Effect When the Fourteenth Amendment Was Adopted Demonstrate that the Governmental Endorsement Test in Establishment Clause Jurisprudence Is Contrary to American History and Tradition*, 17 *Tex. Rev. Law & Pol.* 125 (2012) (arguing that the concepts embraced by the Endorsement Test were simply not part of American legal culture when the 14<sup>th</sup> Amendment was adopted).

553 Garfield, *A Positive Rights Interpretation*, pg. 292 (Garfield argues that “[t]he history behind the Establishment Clause is a history of the problems that arise when a society is noninclusive. The central evil of state establishment is that in choosing to align itself with one particular religious group, the state automatically excludes others. A state can be inclusive only if it avoids any form of religious establishment - that is, if it avoids choosing or promoting any particular religious belief system.”)

554 Brownstein, *The Religion Clauses as Mutually Reinforcing Mandates*, pg. 1725.

minorities time and time again as the primary source of their religious liberty under the U.S. Constitution. The danger, from a minority rights perspective, of recent attempts to narrow the meaning of the Establishment Clause to some kind of formalistic neutrality principle, or as we will see in the next few paragraphs as only applying to instances where government uses the force of law to coerce religious participation, becomes clear. As Thomas Berg notes, modern concepts of neutrality found in cases like *Smith* (Free Exercise) and *Zelman* (Establishment) might place minorities at a disadvantage as they generally do not have the political power to demand exemptions from general laws or numbers that would allow them to take advantage of government aid distributed to religious entities on a “neutral” basis.<sup>555</sup>

### 3. No Funding of Religion From Taxes

In addition to banning the government from creating a national religion and making sure that it treats religions equally, the majority in *Everson* also interpreted the Establishment Clause to mean that “[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.”<sup>556</sup> By the 1960s, the Court had developed a relatively clear test for determining Establishment Clause violations vis-a-vis the use of tax dollars to fund religious activity. The Court's language in *Flast v. Cohen*, a case that had only one dissenting opinion, illustrates the near consensus that existed at this time. Referring to James Madison's “Memorial and Remonstrance” text, the Court found that:

“[t]he concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general. The Establishment Clause was designed as a specific bulwark against such potential abuses of governmental power, and that clause of the First Amendment operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, s 8.”<sup>557</sup>

In short, no money from the public coffers was to be used to aid religion.

The Court held firm to this view throughout most of the 1960s and early 1970s, however, the consensus that existed in early religious activities funding cases began to slowly crumble with the addition of Justice Rehnquist to the Court in 1972, where he led a charge to break down the strict prohibition of government funding of religion.<sup>558</sup>

555 Berg, *Minority Religions*, pg 922; See also Brownstein, *The Religion Clauses as Mutually Reinforcing Mandates*, pg. 1726.

556 330 U.S. at 16. See Green, *Federalism and the Establishment Clause*, pg. 779, where he argues that the accepted definition of establishment at the time of the drafting of the First Amendment was a system where taxes were used to fund a state church. Kurland makes a similar argument noting that the non-establishment principles at the time of the founding were centered primarily prohibiting the government from coercing people to support a religion through taxation or otherwise. Kurland, *The Origins of the Religion Clauses*, pg. 856.

557 *Flast v. Cohen*, 392 U.S. 83, 104 (1968); See also *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 347-349 (2006)

558 The list of cases concerning government funding of religious activity is long, and a full discussion of these cases is beyond the scope of this work. See *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (holding that loaning of school books to religious schools does not amount to financial support of religion); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (prohibiting the state from funding teacher salaries and the purchase of textbooks for secular subjects in religious schools); *Tilton v. Richardson*, 403 U.S. 672 (1971) (allowing government grants to

After a series of sharply divided decisions by the Court concerning the use of government funds to construct buildings on the grounds of religious-based universities, the Court was poised to change course regarding its views on the use of tax dollars to fund religious activities. Justice Rehnquist used the dispute in *Mueller v. Allen* to begin the dramatic shift in the Court's jurisprudence concerning tax dollars being used to fund religious activity. *Mueller* concerned a state law allowing parents to deduct from their taxes the cost associated with educating their children at a religious school. Relying on a series of cases that allowed government grants to be used by religious universities to construct buildings on their campuses, Justice Rehnquist boldly claimed that the one fixed principle in Establishment Clause jurisprudence is "our consistent rejection of the argument that any program which in some manner aids an institution with a religious affiliation violates the Establishment Clause."<sup>559</sup> And in one fell swoop, the door was opened to permit some funding of religious activities, even in the school setting, so long as the funding was distributed in a "neutral" manner.<sup>560</sup> The dissent, relying on the no tax argument that enjoyed a short-lived consensus in the prior decade, noted that the program had a "direct and immediate effect of advancing religion" with tax dollars.<sup>561</sup> Even indirect financial aid benefiting religion is impermissible, argued the dissenters.<sup>562</sup> By 2002, the strict prohibition of government funding religious activity had for a majority of the Court all but disappeared under guise of neutrality and parental choice.<sup>563</sup> Thus, for a brief period of modern religious liberty jurisprudence, the Establishment Clause was seen as strictly prohibiting any tax dollars from being used to aid religion, directly or indirectly. Today, as will be further developed in the final section of this chapter, this kind of strict prohibition is rejected by a majority of the Court.

#### 4. Keep Two Spheres Separate

The final purpose served by the Establishment Clause, according to the *Everson* majority amounts to the command that "[n]either a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by

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religious colleges for the construction of buildings to be used for non-religious purposes); *Norwood v. Harrison*, 413 U.S. 455 (1973) (upholding textbook loan program); *Levitt v. Comm. for Pub. Ed and Rel. Lib.*, 413 U.S. 472 (1973) (prohibiting the state from reimbursing religious schools for costs associated with preparing students for state required standardized tests); *Hunt v. McNair*, 413 U.S. 734 (1973) (allowing state to issue revenue bonds to be used by religious colleges to construct buildings for non-religious purposes); *Comm. for Pub. Ed. and Rel. Liberty v. Nyquist*, 413 U.S. 756 (1973) (prohibiting the state from reimbursing parents for costs associated with sending their children to private religious schools); *Sloan v. Lemon*, 413 U.S. 825 (1973). By 1975 the consensus had already broken down as can be seen in a series of cases where no majority view could be mustered concerning these school funding questions. See *Meek v. Pittenger*, 421 U.S. 349 (1975); *Roemer v. Maryland Board of Public Works*, 426 U.S. 736 (1976); *Wolman v. Walter*, 433 U.S. 229 (1977). By the 1980s the tide had turned as the Court began to loosen its hard line stance toward government funds flowing to religious schools. See *Comm. for Pub. Ed. and Rel. Liberty v. Regen*, 444 U.S. 646 (1980); *Mueller v. Allen*, 463 US 388 (1983).

559 463 U.S. at 393.

560 It should be noted that the Court found the tax deduction was neutral because any parent can use the tax deduction, regardless of whether the education is offered by a private religious institution or a public school.

561 463 U.S. at 405 (Marshall, dissenting)

562 463 U.S. at 407.

563 See *Zelman v. Simmons-Harris*, 536 US 639 (upholding a program that gave parents a voucher that could be used to offset the expense of sending their child to a private, religious school, so long as the money was given out on a neutral basis and served a non-religious purpose.)

law was intended to erect 'a wall of separation between Church and State.'"<sup>564</sup> In other words, the Clause also aimed to enshrine in the Constitution Luther's view of two separate kingdoms, one religious and one secular. Some have viewed this purpose served by the Establishment Clause as being more structural in nature, with Carl Esbeck noting that "[t]he Free Exercise Clause is a rights-conferring clause that vests in religious individuals, including protection for any religious organizations they may form. On the other hand, the Establishment Clause is a structural clause that is about limiting in all cases the government's net power to legislate on matters more properly within the purview of organized religion."<sup>565</sup> Whether one characterizes the Clause as structural or rights conferring, Justices and commentators have set forth numerous underlying reasons as to why keeping the institutional spheres of church and state separate is a desirable goal.

A year after the *Everson* decision, the Court expanded on why having a wall between church and state was necessary when it concluded "the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."<sup>566</sup> A concurring opinion from the same case also noted that "(s)eparation is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally."<sup>567</sup> In his treatise-like concurrence in *Schempp*, Justice Brennan argued that:

"government and religion have discrete interests which are mutually best served when each avoids too close a proximity to the other. It is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government."<sup>568</sup>

This push for keeping the two spheres separate, however, has been tempered by observations that absolute separation is impossible and unwise. In *Lemon v. Kurtzman*, the Court acknowledged that a purpose of the Establishment Clause is "to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other."<sup>569</sup> However, in *Lynch v. Donnelly* the Court then hedged on this rule by stating that "some relationship between government and religious organizations is inevitable,"<sup>570</sup> and went on to criticize the oft-used wall metaphor as being "not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state," as the Court has never demanded total and complete separation.<sup>571</sup> The majority in *Lynch* instead focuses on a kind of separation that provides accommodation for religious beliefs, not mere tolerance, and one that most

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564 330 U.S. at 16; Thus, separationism was originally cast as a means, among other things, to protect religion from state interference. Green, *Of (un)equal jurisprudential pedigree*, pg. 1119 (although Green claims that this original purpose was overshadowed by language in *Everson* that focused on the no-tax aspects of the decision.)

565 Esbeck, *When Accommodations for Religion Violate the Establishment Clause*, pg. 366.

566 333 U.S. at 212.

567 333 U.S. at 227 (Frankfurter, concurring)

568 374 U.S. at 259 (Brennen, concurring)

569 402 U.S. 602, 614 (1971)

570 465 U.S. at 672 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 614)

571 465 U.S. at 673 (quoting *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973))

certainly forbids hostility toward religion.<sup>572</sup>

Despite the disagreements on the Court and among commentators over the meaning of separation, there appears to be somewhat of a consensus concerning why some kind of separation between the two entities is desirable and an aim of the Establishment Clause. Early on in the Court's jurisprudence, Justice Frankfurter noted that the "purpose of Establishment Clause was to assure that the national legislature could not exert its power for religious ends."<sup>573</sup> Marci Hamilton, among others, argues that this view is consistent with the general distrust founders had toward power being concentrated in one place.

"The Framers' general attitude of distrust was not limited to the government or politicians. Even religion was worthy of distrust. While the Framers acknowledged religion's power and potential goodness, they were more than a little concerned that religion could exceed its appropriate bounds in the political sphere. . . . The Framers valued religious liberty and therefore believed in protecting religion from a potentially tyrannical state, but they equally regarded religion itself as potentially tyrannical. In their view, religion was capable of applying political pressure in ways that were unacceptable in a republican democracy. . . ."<sup>574</sup>

Phillip Kurland makes a similar argument noting that Madison's views on separation of powers could also be seen in his attitude towards the religion clauses, in that he sought to use non-establishment principles to ensure a competition among the sects that would prohibit any one of them from becoming too powerful, thus assuring freedom for all.<sup>575</sup>

While protecting against the concentration of religious power in government seems to be a purpose of the Clause, it is protecting religion from the potentially corrupting influence of government that has enjoyed a near consensus among jurists and commentators. This should come as no surprise as these were views held by Enlightenment thinkers and Evangelicals around the time of the First Amendment's drafting.<sup>576</sup> Furthermore, this purpose has been characterized as the American version of secularism where "the basic idea is that the government is to leave religious practice free and stay out of religion."<sup>577</sup> This view was at the heart of the Court's landmark school prayer decision, where it unequivocally noted that the "first and most immediate purpose (of the Establishment Clause) rested on the belief that a union of government

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572 465 U.S. at 673.

573 366 U.S. at 466 (Frankfurter, concurring) (although he goes on to note that regulations advancing secular goals are beyond the reach Establishment Clause protections).

574 Hamilton, *The Establishment Clause and Vouchers*, pg. 812-814; See also Green, *Of (un)equal jurisprudential pedigree*, pg. 1124.

575 Kurland, *The Origins of the Religion Clauses*, pg. 857. See also Esbeck, *When Accommodations for Religion Violate the Establishment Clause*, pg. 363 (where he makes the argument that "[t]he Free Exercise Clause is rights based and vests in the holder of a religious faith. The modern Establishment Clause operates quite differently: as a structural clause that limits the government's net authority or jurisdiction. And as with the doctrine of separation of powers, a consequence of any structural limit on government authority is to expand the breathing room for the exercise of the people's liberty."); See also Green, *Of (un)equal jurisprudential pedigree*, pg. 1124.

576 See Koppelman, *Phony Originalism* pg. 747 (noting that another of Madison's primary concerns was to protect the church from being corrupted by the state.)

577 Greenawalt, *Secularism, Religion, and Liberal Democracy in the United States*, 30 *Cardozo Law Review* 2383 (2008)

and religion tends to destroy government and to degrade religion.”<sup>578</sup> As Justice Brennan explained in his *Marsh* dissent, by keeping the realms separate the Establishment Clause protects religious autonomy and demands that the state refrain from engaging in questions about religion or “unduly involving itself in the supervision of religious institutions or officials.”<sup>579</sup>

More recently many jurists and commentators have acknowledged that the separation required by a modern interpretation of the Establishment Clause is different than that practiced by the founders and the generations thereafter who didn't see government facilitating religion in the populace as being dangerous to religion.<sup>580</sup> This admission is important, as it is a clear rebuttal to those advocating for an originalist interpretation of the Clause who do not view separation or neutrality in absolutist terms, and instead favor a version of separation that is more accommodating to religion. In other words, the battle lines among jurists and commentators regarding separation is a debate over whether a modern or originalist interpretation of the Clause should be adopted.

Finally, before moving on to a discussion about whether stopping government coercion is also a purpose advanced by the Establishment Clause, it is worth pointing out that for a short three-year period in the mid-1970s the Court generally and unanimously seemed to believe that the primary purpose of the Establishment Clause was the prohibition of the so-called three evils: sponsorship of, financial support for, and active involvement in religious matters, although some members of the Court maintained that some degree of involvement was inevitable<sup>581</sup> It was perhaps the only time since the the pre-*Schempp* era that members of the Court agreed on a general framework for determining what purposes are served by the Establishment Clause, and underlying this framework were strong separationist tendencies.

## 5. No State Coercion

The origins of the view that the Establishment Clause serves to protect against state coercion can also be found in the landmark *Everson* case where the Court noted that “. . . neither can (the government) force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.”<sup>582</sup> After years of the Court using the so-called Lemon Test to determine whether government actions violate the Establishment Clause,

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578 370 U.S. at 431. This alleged purpose of the Establishment Clause has been criticized for opening the door to other potential purposes that have nothing to do with protecting the liberty of conscience from government coercion, which many believe is the sole and primary purpose of the Establishment Clause. See also *Larkin v. Grendel's Den*, 458 U.S. 116 (1982); Feldman, *From Liberty to Equality*, pg. 688; and Esbeck, *When Accommodations for Religion Violate the Establishment Clause*, pg. 369.

579 *Marsh v. Chambers*, 463 U.S. 783, 803-804 (1983) (Brennan, dissenting, citing as precedent *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969); *United States v. Ballard*, 322 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148 (1944). See *Lemon v. Kurtzman*, 403 U.S., at 614-622, 91 S.Ct., at 2112-2115; *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501-504, 99 S.Ct. 1313, 1319-1320, 59 L.Ed.2d 533 (1979))

580 This argument is fully address by Andrew Koppelman in *Corruption of Religion and the Establishment Clause*, 50 *William and Mary Law Review* 1831 (2008).

581 465 U.S. 668.

582 330 U.S. at 15.

the additions of Justices Kennedy and Scalia to the Court marked the beginning of a new era where an attempt would be made to narrow the scope of the Establishment Clause by characterizing it mainly as an anti-coercion clause. The first hints of this view can be seen in concurring opinions written by Kennedy in *Allegheny* and *Mergens*, where he argues that the dual purposes of the Establishment Clause aim at prohibiting the state from creating a state religion and coercing people to participate in religious activities.<sup>583</sup>

By 1992 every member of the Court had signed onto an opinion acknowledging at least that a finding of coercion might also suffice to state a claim based on the Establishment Clause. In *Lee*, Justice Kennedy, writing for a majority that included separationists like Justices Stevens and Souter but not accommodationists like Justices Rehnquist, Scalia and Thomas, found that “at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which establishes a [state] religion or religious faith, or tends to do so.”<sup>584</sup> The case involved a local school policy whereby a member of the clergy was invited to lead attendees at a school graduation in prayer. While the Justices were sharply divided regarding the constitutionality of the practice, they were all in agreement that at least one of the purposes served by the Establishment Clause is prohibiting government from coercing individuals regarding matters of religion.

The division among the Justices, a division that can still be seen in the Court's most recent pronouncements on the matter, can be boiled down to whether coercion is a necessary element of an Establishment Clause claim, and if so, what kind of coercion must be proven. Five of the Justices in *Lee*, the four dissenters and Justice Kennedy writing for the majority, seem to suggest that the original primary purpose of the Establishment Clause was to prohibit the government from creating a state church and coercing people to financially support religion.<sup>585</sup> Furthermore, for these Justices there were/are no other purposes served by the Establishment Clause, other than a vague requirement of equality between religions. Non-establishment principles in the United States simply amount to a ban on a state church and the protection against government advancement of religion in a coercive manner, and not much more, according to this view.<sup>586</sup> However several of the justices who signed onto parts of the Court's opinion in *Lee* also wrote to express “that proof of government coercion is not necessary to prove

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583 *Westside Comm. Schools v. Mergens*, 496 U.S. 226, 260 (1990) (Kennedy, concurring). Academics had already been pressing for this “revival” of the Establishment Clause's “original purpose.” Michael McConnell, *Coercion: The Lost Element of Establishment*, 27 *Wm. & Mary L. Rev.* 933, 939 (1986).

584 505 U.S. at 587.

585 505 U.S. at 641 (Scalia, dissenting). By stating that “at a minimum” the Establishment Clause bars the government from engaging in coercion, Justice Kennedy was able to persuade four other Justices who viewed the Clause as serving many more purposes to join his opinion. Despite this somewhat vague statement about coercion, Kennedy was already on record in his *Mergens* concurrence as believing that the Clause served two primary purposes: 1) prohibition of direct benefits to religion to a degree that it establishes a state religion and 2) prohibition of government coercing people to participate in religious activity. See 496 U.S. at 260.

586 In *Board of Education of Kiryas Joel v. Grumet*, 512 U.S. 687, 748 (Scalia, dissenting) Justice Scalia wrote to clarify his position by stating: “Contrary to the Court's suggestion . . . I do not think that the Establishment Clause prohibits formally established “state” churches and nothing more. I have always believed, and all my opinions are consistent with the view, that the Establishment Clause prohibits the favoring of one religion over others.” However, considering Scalia's narrow views on what amounts to “favoring” and “coercion” this would seem to be somewhat of an overstatement.

an Establishment Clause violation,” arguing that “government pressure to participate in a religious activity is an obvious indication” of an improper endorsement of religion, but the Clause demands more, it demands that government not engage in religious practices itself.<sup>587</sup> According to this view, stopping government coercion is the primary purpose of the Free Exercise Clause, and while some aspects of the Establishment Clause might offer increased support to this purpose, the Clause also advances additional ones.<sup>588</sup>

The Justices in *Lee* were also sharply divided over what kind of government coercion is banned pursuant to the Establishment Clause. The majority contended that prayers of the sort that took place at the graduation ceremony “carry a particular risk of indirect coercion.”<sup>589</sup> In this sense coercion could be found to be a sufficient enough infringement of religious liberty in situations where “public pressure as well as peer pressure” amount to a “subtle and indirect” compulsion to take part in a religious exercise, in this case standing for a prayer.<sup>590</sup> The Court further found that while this kind of pressure is not necessarily limited to the school setting, “prayer exercises in public schools carry a particular risk of indirect coercion.”<sup>591</sup> Finally, the Court characterized the Establishment Clause as limiting “state intervention in religious affairs” to prevent the kind of coercion that would put “at grave risk” religious liberty.<sup>592</sup>

With Justice Scalia leading the way, the dissenters in *Lee* found this definition, to say the least, unconvincing. “The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty,”<sup>593</sup> wrote Scalia on behalf of three other Justices. “While I have no quarrel with the Court's general proposition that the Establishment Clause 'guarantees that government may not coerce anyone to support or participate in religion or its exercise . . . I see no warrant for expanding the concept of coercion beyond acts backed by threat of penalty.’”<sup>594</sup> The dissenters brushed off the majority's view of coercion as having created a psycho-coercion test that has no basis in the original understanding of the Establishment Clause.<sup>595</sup>

Over the past twenty-four years since the *Lee* decision, the Justices have continued to battle over what kind of coercion is sufficient to show an infringement of religious liberty. Calling Establishment Clause jurisprudence “inconsistent guideposts,” Justice Thomas echoed the views of Justice Scalia in *Lee* when he wrote “actual legal coercion” by the state is the standard that should be applied in Establishment Clause

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587 505 U.S. at 604.

588 Laycock, *Religious Liberty as Liberty*, pg. 322. (“If we interpret the Religion Clauses to mean that government may promote the religious views of the dominant religious faction so long as it refrains from coercion, we ensure perpetual battles for dominance, perpetual battles to control or influence the government's religious message.”)

589 505 U.S. at 592.

590 505 U.S. at 593.

591 505 U.S. at 592.

592 505 U.S. at 591-592.

593 505 U.S. at 640 (Scalia, dissenting)

594 505 U.S. at 642 (Scalia, dissenting)

595 505 U.S. at 644 (Scalia, dissenting)

coercion cases.<sup>596</sup> More recently, the Justices argued once again over the true meaning of coercion in the *Town of Greece* decision, a case that will be explored in greater depth in Chapter 7. Here it is sufficient to note that arguments over what is constitutionally prohibited state coercion raised in *Town of Greece* mirrored those first raised in *Lee*. Thus, the battle lines over coercion formed in *Lee* continue to exist among members of the Supreme Court as well as in academia. In fact, this dispute arguably has shifted the focus away from one focused on the other claimed purposes served by the Establishment Clause.

## **G. From Dogma to Disorder: U.S. Religious Liberty Doctrine**

As is the case with German jurisprudence, where one can see a series of constitutional court decisions dealing with similar issues handed down within short periods of time,<sup>597</sup> American religious liberty jurisprudence is also marked by periods where the court considers several related cases in an attempt to bring clarity to the law. These issue specific periods provide an artificial set of boundaries for dealing with the various stages in which American religious liberty doctrine has developed. What follows is a summary of those doctrines, with references to sections of this work where aspects of the doctrines are discussed in more detail. The object here is to make clear that American religious liberty jurisprudence, just like its German counterpart, is dominated by dogma that, as will become more clear in the final chapters of this work, partially explains why non-establishment principles are applied differently in the two countries.

### **1. Stage One: Creating the Wall**

*“I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion or prohibiting the free exercise thereof,’ thus building a wall of separation between church and State.”*

With these words Thomas Jefferson, surely unwittingly, provided the language that would form the basis of a religious liberty dogma that guided American jurisprudence, without interruption, for over twenty-five years. Starting in 1947 with the *Everson* case, a metaphoric wall separated church and state in the United States.<sup>598</sup> The wall that was erected by the Court in cases heard between 1947 and 1969 was almost uniformly a response to instances where the state was engaged in some form of religious activity in its public schools or providing aid to religious schools. In *Everson* it was the state providing transportation to all students, including those attending parochial schools, while the *Allen* Court was faced with a program that loaned school textbooks to religious schools. In *McCollum* it was local school districts opening up their building to religion instructors during school hours, while *Zorach* involved a policy whereby students were excused from school to attend off-campus religion courses. In *Engel* and

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596 545 U.S. at 693 (Thomas, concurring).

597 For example, in 1965/66 the BverfG heard eight cases concerning the church tax, while period of 1968 to 1973 saw the court tackle ten cases concerning religious exemptions to general laws.

598 A more detailed discussion of *Everson* can be found in this Chapter, Section F, subsection 3.

*Schempp*<sup>599</sup>, cases that have already been and will once again in Chapter 8 be closely analyzed, school officials sought to lead their students in prayer and Bible readings. Finally, in *Epperson* school policy sought to ban the teaching of evolution. All of these cases involved questions of line drawing, and instead of drawing a line, the Court built a wall.

The wall, however, was by no means impenetrable. Its aim was to prevent the state from engaging in religious activity or using tax money to support religious activity. The wall erected by the Court was high related to the former but permeable related to the latter. *Everson*, the case that brought the wall metaphor into the American religious liberty lexicon, illustrates this point. There a majority acknowledged that sometimes public money may incidentally aid religion. The wall that was being erected was not intended to stop the flow of this sort of incidental benefit. A year later the Court made this point even clearer when it prevented schools from holding privately funded religion classes on school grounds even when unwilling participants were allowed to opt out.<sup>600</sup> Here the state's relationship with religion was too close, its aid of religion too direct. The wall was meant stop this kind of government advancement of religion.

The contours of the wall became even clearer in *Zorach*, where the Court allowed schools to take part in a voluntary program permitting public schools to release students during the school day in order to take church funded religion classes off-campus. Writing for the Court, Justice Douglas begins his decision with the (in)famous words: “We are a religious people whose institutions presuppose a Supreme Being,”<sup>601</sup> which have become the mantra for American accommodationist doctrine. Yet it is the words that come after this oft cited line which are more telling. “We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary,” writes Douglas. “We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.”<sup>602</sup> When *Zorach* and *McCullum* are read together, it is clear what Douglas is saying here regarding how advocates of “the wall” doctrine view the state's role in facilitating the religious development of its students. It may provide space for such development, but it may not itself, in any manner, take in active role in this development.<sup>603</sup>

The 1960s are the high watermark of this doctrine, but even here we see a wall that is permissive at times. There is no doubt that both *Engel*<sup>604</sup> and *Schempp* stand for the proposition that the state may not actively participate in religious activity, at least in the school setting. Nor may the state craft its school curriculum in a manner that promotes

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599 An exhaustive discussion of the various views expressed by the Justices in *Schempp* can be found in this Chapter, Section B.

600 *McCullum v. Board of Education*, 333 U.S. 203 (1948). See also this Chapter, Section F, subsection 1 for a discussion of this case.

601 343 U.S. at 313.

602 343 U.S. at 313.

603 This was not the only view espoused by members of the Court. Justice Black, perhaps one of the Court's most ardent advocates of strict separation, dissented in *Zorach* saying that only when the state is “wholly isolated” from religion can it be neutral. 343 U.S. at 319 (Black, dissenting)

604 See Chapter 8, Section A, subsection 1 for a relatively detailed discussion of *Engel*.

particular religious beliefs.<sup>605</sup> Yet even during this strict separation era, incidental aid to religion would be tolerated. In *Allen*, the Court let stand a state program that loaned textbooks covering secular topics to religious schools, holding that this was no different than the transportation program the Court upheld in *Everson*.<sup>606</sup> Assisting students with learning about math and English simply was not the kind of advancement of religion that “the wall” was aimed at preventing.

By this point, the Court was applying a separationist concept of neutrality as a means to keep church and state separate. In the 1969 case *Walz v. Tax Commission of City of New York* Justice Burger slipped the adjective “benevolent” into the majority opinion’s discussion of state neutrality. The Court rejected an Establishment Clause challenge to a state law that gave tax exemptions to religious organizations on the same grounds as it gave other non-profit organizations.<sup>607</sup> According to Burger, the Clause generally prohibits “sponsorship, financial support, and active involvement of the sovereign in religious activity,”<sup>608</sup> but within an overall scheme of “benevolent neutrality” that allows religion to prosper.<sup>609</sup> Because the tax exemption law did not involve the transfer of state money to religious entities, this was not the kind of financial support prohibited by the Establishment Clause.<sup>610</sup> Burger, writing for the Court, rejected an absolutist approach to neutrality, and in opting instead for a “benevolent neutrality” approach,<sup>611</sup> he acknowledged the benefits of religion in society and sought to “permit religious exercise to exist without sponsorship and without interference.”<sup>612</sup> At the core of this view was a belief that a primary objective of the Establishment Clause was to prevent government control of churches and prohibit the “excessive entanglement” of church and state.<sup>613</sup> This view also acknowledged that social service providers, including religious ones, were “beneficial and stabilizing influences in community life.”<sup>614</sup> In other words, it sought to combine the purposes of keeping church and state separate while acknowledging that religion in general should be encouraged as means of instilling morality in the populace.

Up until *Walz*, the Court had a rather clear view of what a wall separating church and state looked like. The state was prohibited from directly supporting, in a financial manner or otherwise, religious activity. Furthermore, the state was not allowed to act in a manner that promoted religious doctrine. However it could provide space for “spiritual needs” of the individual, so long as it was not actively involved in catering to these spiritual needs. Whether the *Walz* majority knew it at the time or not, the attachment of the simple adjective “benevolent” to the concept of neutrality opened the

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605 See *Epperson v. Arkansas*, 393 U.S. 97 (1968) (holding that a state law banning the teaching of evolution in its schools was an effort to promote religious doctrine in violation of the Establishment Clause).

606 *Board of Education v. Allen*, 392 U.S. 236 (1968).

607 *Walz v. Tax Commission of City of New York*, 397 U.S. 664 (1969)

608 397 U.S. at 668

609 397 U.S. at 669

610 397 U.S. 675

611 397 U.S. at 669. (This case concerned whether religious entities could obtain the same kind of tax exempt status that non-religious social service providers enjoyed under the tax code. The Court concluded the extending these tax credits to religious social service providers was consistent with the “benevolent neutrality” demanded by the Establishment Clause so long as there was no “excessive entanglement” between church and state.)

612 397 U.S. at 669.

613 397 U.S. at 670.

614 397 U.S. at 673.

door to the second stage of the development in America's religious liberty doctrine.

## 2. Stage Two: Neutrality and the Battle Over Funding Religious Activity

Between 1971 and 2002 the Court heard no fewer than twenty-four (24) cases concerning state money that flowed to religious schools. In the 1970s alone the Court heard fourteen (14) such cases, making up over 80% of that decade's religious liberty docket. Over a three-year span in the 1980s, 50% of the religious liberty docket was comprised of these cases. To say that the Court's focus during this period was on questions concerning government funding of religious schools is somewhat of an understatement. While on the surface these cases were battles over the use of state money, they really mark the next stage in the development of American religious doctrine: the neutrality stage. Arguably, the word "neutrality," at least in the American context, is relatively meaningless without understanding what purpose(s) the concept of neutrality is serving.<sup>615</sup> Put differently, the word "neutrality" in the Establishment Clause context has no more meaning than the words "non-establishment" or "separation." All of these terms are open to various interpretations and these interpretations are all influenced by what the interpreter believes the underlying purposes of the Establishment Clause are. Because the word "neutrality" is open to so many different meanings, it offered the perfect opportunity to knock down the wall that had been erected by the separationist jurisprudence of the 1960s Court.

The principle of state neutrality can be found in jurisprudence concerning both the Free Exercise and Establishment Clauses, where it has often been used in its traditional sense, namely as a "formal constraint on government" as well as a means to ensure equality.<sup>616</sup> In the Establishment Clause context, neutrality has become nothing more than a proxy for determining what purposes are served by it, and over the past several decades two distinct extremes have emerged regarding state neutrality toward religion, with many other views falling somewhere in between. On one end of the spectrum are what Andrew Koppelman calls the "radical secularists" who conceive of neutrality as the complete eradication of religion from the public sphere.<sup>617</sup> On the other end of the spectrum are traditionalists who believe that true neutrality is an unattainable mirage.<sup>618</sup> Many of the traditionalists, such as Justices Scalia and Thomas, further believe that "there is nothing unconstitutional in a State's favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments."<sup>619</sup>

615 Richard Garnett and Andrew Koppelman make a similar point in their summary of the "many paths to neutrality" when they set forth the range of possible justifications for neutrality. See *First Amendment Stories*, ed. Garnett/Koppelman (New York, 2011); See also Ravitch, *Funny Thing Happened on the Way to Neutrality*, pp. 490-491; Ledewitz, *Toward a Meaning-Full Establishment Clause Neutrality*, 26 *Valparaiso Law Review* 37 (1991).

616 Pierik/van der Berg, *What is Neutrality? Inclusive and Exclusive Approaches to State, Religion, and Culture*, Centre for Ethics, University of Toronto

617 Koppelman, *And I Don't Care What It Is: Religious Neutrality in American Law*, 39 *Pepperdine Law Review* 1115 (2013); See also Pierik/van der Berg, *What is Neutrality* (they refer to this extreme as "exclusive neutrality.")

618 For an example of this view see Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* 77-98 (Oxford, 1995); Ravitch, *Funny Thing Happened on the Way to Neutrality*, pg. 419; See also Schauer, *Neutrality and Judicial Review*, 22 *Law & Phil.* 217, 234 (2003).

619 *Van Orden v. Perry*, 545 U.S. 677, 692 (2005) (Scalia, concurring)

The word neutrality obviously does not appear in the text of the Constitution itself, and because of the Supreme Court's historical reluctance to apply the religion clauses to the states, it does not appear in Supreme Court jurisprudence until the Court started to “incorporate” the clauses. One of the first mentions of the word at the U.S. Supreme Court level appears in Justice Rutledge's *Everson* dissent where he argues that there is nothing “unneutral” about prohibiting public funds from being used to transport children to religious schools, rather “the only way the state can remain neutral under the First Amendment is a rigid prohibition of state funds to aid religious institutions, even indirectly.”<sup>620</sup>

#### a. Benevolent Neutrality Applied

As was already alluded to, whether Chief Justice Burger intended his version of neutrality to change the way the Court viewed the Establishment Clause is open to question. However, it is clear that advocates, like Justice Rehnquist, of a more narrow reading of the Establishment Clause saw their chance to chip away at the separationist precedent of the 1960s. By 1973 seeds were being planted for a revolution in American religious liberty doctrine, and a series of education funding cases would serve as the means to effect this change. To be clear, change did not happen over night. The early 1970s saw the creation of the so-called Lemon Test, under which state actions taken for a religious purpose or having the effect of advancing religion were deemed to be a violation of the Establishment Clause.<sup>621</sup> This test sought to enshrine the separationist doctrine of the 1960s into Court dogma, and during the first half of the decade was applied by the Court on numerous occasions with mixed and inconsistent results. For instance, programs that provided financial support to non-public schools for teacher salaries, textbooks, and instructional materials were deemed inappropriate<sup>622</sup>, while grants for the construction of buildings on the grounds of religious affiliated universities were acceptable,<sup>623</sup> but similar grants were barred from being used for repairs and maintenance of private primary and secondary schools.<sup>624</sup>

It was the latter case, *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), prohibiting the state from issuing grants to non-public schools for facility repairs and instituting a tuition reimbursement plan for parents, that elicited the strongest challenge from members of the Court to the separationist dogma. Here the dissenters set in motion the idea that there is no unconstitutional coercion in instances where tax money is used to indirectly aid people wishing to exercise their “recognized freedoms.” Leading the way, Justice Rehnquist wrote that the concept of “benevolent neutrality” adopted in *Everson*, *Allen* and *Walz* allows the state to help “those at the lower end of the income brackets who are less able to exercise freely their consciences

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620 330 U.S. at 59 (Rutledge, dissenting)

621 *Lemon v. Kurtzman*, 402 U.S. 602 (1971)

622 See *Lemon v. Kurtzman*, 402 U.S. 602 (1971); *Levitt v. Comm. for Pub. Ed and Rel. Lib.*, 413 U.S. 472 (1973); *Meek v. Pittenger*, 421 U.S. 349 (1975)

623 *Tilton v. Richardson*, 402 U.S. 672 (1971); *Hunt v. McNair*, 413 U.S. 734 (1973);

624 *Comm. for Pub. Ed. and Rel. Liberty v. Nyquist*, 413 U.S. 756 (1973).

by sending their children to nonpublic schools.”<sup>625</sup> In a separate dissent, Chief Justice Burger concluded that government aid to individuals is different than directing aid to religious institutions, and the state may aid people where it “enhances recognized freedoms.”<sup>626</sup> In case there was any doubt about the direction these dissenters were pushing the Court, two years later Justice Rehnquist again noted that when interpreting the Establishment Clause the Court must also “take account of the free exercise clause and the values it serves.”<sup>627</sup> It is hard not to see these cases as standing for the proposition that the state may use its resources to assist individuals with exercising their free exercise right.

By 1976 Rehnquist was able to convince a plurality of the Court to adopt benevolent neutrality as the basis for upholding a federal aid program whose general, non-categorical grants freed up money to be used by the universities to engage in religious instruction, and <sup>628</sup> a year later another plurality decision upholding state grants for diagnostic and guidance services provided to students by religious schools.<sup>629</sup> These were the first in a series of cases that eventually lead to monumental changes in the concept of neutrality as it applies to government funding of religious activity.<sup>630</sup>

### *b. Formalist Neutrality*

The idea of a formalist version of neutrality began to take hold in the aforementioned indirect support/funding of religious activity cases.<sup>631</sup>

Prior to this, under the Establishment Clause, even formal neutrality was not enough to insulate government programs seeking to provide some kind of financial aid to religious entities from constitutional challenges.<sup>632</sup> According to the formalist view, so long as the government is providing support to similarly situated groups, both religious and non-religious, be it by granting them access to government property or giving them funding to provide a service, there are no Establishment Clause problems.<sup>633</sup> This

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625 *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 810 (1973) (Rehnquist, dissenting) (Nyquist involved a state law that provided a tax deduction for those parents who could not afford to send their students to religious schools).

626 413 U.S. at 801 (Burger, dissenting)

627 *Meek v. Pittenger*, 421 U.S. 349, 395 (1975)

628 *Roemer v. Maryland Board of Public Works*, 426 U.S. 736 (1976)

629 *Wolman v. Walter*, 433 U.S. 229 (1977)

630 See *Roemer v. Maryland Board of Public Works*, 426 U.S. 736 (1976); *Wolman v. Walter*, 433 U.S. 229 (1977); *Comm. for Pub. Ed. and Rel. Liberty v. Regen*, 444 U.S. 646 (1980); *Mueller v. Allen*, 463 U.S. 388 (1983).

631 Although its roots can be traced much further back. See Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 *DePaul Law Review* 993, 999-1001 (1990) (Laycock ultimately rejects this principle, instead opting for what he calls “substantive neutrality” where the focus is on limiting government interference with private religious choice). It should also be noted that “formal neutrality” is also at the core of the *Smith* decision, but the Court makes clear that this kind of neutrality in the Free Exercise context is not constitutionally required as legislatures are free to carve out exceptions to general laws in order to accommodate religious practices. See *Employment Division v. Smith*, 494 U.S. at 890. (Although Conkle points out that even here there is some sense of formal neutrality as the Court seems to indicate that even legislative exemptions to general laws must be “nondiscriminatory.”) see Conkle, “The Path to American Religious Liberty,” pp. 12.

632 For a short summary of the cases rejecting formal neutrality under Establishment Clause principles see Conkle, *The Path to American Religious Liberty*, pp. 17-25.

633 See *Rosenberger v. University of Virginia*, 525 U.S. 819, 877 (1995) (Souter, dissenting) where Justice Souter refers to this kind of neutrality as being formalist in nature. See also Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 *Ind. Law Journal* 1, 28-32 (2000); Ravitch, *Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause*, 38 *Georgia Law Review* 489 (2004).

“evenhandedness” form of neutrality, according to its advocates, is consistent with the Clause’s “no preference” or equality purpose. Furthermore, government’s failure to act with this “evenhandedness” is seen as being hostile toward religion.<sup>634</sup>

By 1999, in a series of cases that can be grouped under the heading of “private choice,” the idea of “evenhandedness” had finally found a majority that adopted it as the new meaning of neutrality, at least in the realm funding cases. In *Mitchell v. Helm*, the Court upheld a federal program that gave aid to all schools on a neutral basis allowing them to purchase equipment and library books. Writing for the Court, Justice Thomas noted that “[i]f the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government.”<sup>635</sup> In addition to relying on concepts of equality to justify their position, the majority also focused on who was actually making the decision as to whether government money flowed to a religious entity. Under the program at issue in *Mitchell*, funding found its way to private religious schools “only as a result of the genuinely independent and private choices of individuals,” and was thus not seen as government granting “special favors that might lead to a religious establishment.”<sup>636</sup>

This principle of neutrality as “evenhandedness” or “formalist neutrality” was taken to its logical conclusion when a majority of the Court upheld an Ohio program that gave parents money in the form of vouchers that could be used to help them offset the cost of private, and even religious education. Here again, because the vouchers could be used in secular and non-secular private schools alike, and because it was parents and not the government making the choice as to where these funds should flow, the majority found the program to be neutral and thus in accordance with the Establishment Clause.<sup>637</sup>

Critics of this literal interpretation of the “no preference” purpose of the Establishment Clause noted that it seemed to have been “designed to favor the religious mainstream to the detriment of religious outsiders.”<sup>638</sup> In other words, its laser focus on one purpose of the Clause resulted in the other purposes, especially the protection of minorities, being ignored by the Court.

### 3. Stage Three: Public Acknowledgment Cases and the Rise of the No Coercion Doctrine

Up through the mid-1980s the Court’s Establishment Clause docket had basically been filled with cases involving instances where government had either used its resources or acted in a manner that advanced religion. In these cases the government was not merely identifying itself with religion, it was actively supporting religion, either by providing

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634 See *Good News Club*, 533 U.S. 98, 118-20 (2001); *Mitchell*, 530 U.S. at 828-29 (plurality opinion).

635 530 U.S. 793, 809 (1999).

636 530 U.S. at 810. (The argument here is somewhat odd in that the federal funds were distributed to local government authorities to then be redistributed. In this respect the “private choices” seemingly were still being made by government officials).

637 *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

638 Feldman, *Religious Minorities and the First Amendment*, pg. 264.

something of value to religious entities (grants for textbooks to be used in non-public schools or for the construction of infrastructure on the campuses of religious universities building, etc.) or leading students in religious activity (prayer, Bible reading). Without a doubt, when government acts in such a manner it is acknowledging religion. Yet up to this point, outside of a few exceptions,<sup>639</sup> the Court had rarely been faced with instances challenging the government symbolically acknowledging religion.

In 1984 the Court was faced with a question concerning whether a holiday display erected by the government on government property that included a depiction of the nativity scene violated the Establishment Clause. Instead of being faced with a question concerning some kind of tangible benefit provided to a religious entity or particular religion in general, here the Court was asked whether it was appropriate for government to convey a religious message. Much of the final chapters of this work are devoted to government acknowledgment of religion cases, but here it is important to say that these cases mark another stage in the evolution of American religious liberty doctrine; a stage where three new tests are introduced into an already conflicting and confusing religious liberty doctrine.

In 1984 Chief Justice Burger brought his benevolent neutrality theory into the realm of government acknowledgment of religion cases, writing for the majority in *Lynch v. Donnelly*, and finding that a holiday display containing symbols generally associated with the public holiday of Christmas that included overtly religious symbols such as a creche did not violate the Establishment Clause because “whatever benefit to one faith or religion or to all religions, is indirect, remote and incidental.”<sup>640</sup> In doing so, the Court expressly rejected the idea of total separation between church state,<sup>641</sup> as well as the idea that government could take no action that aided or promoted religion.<sup>642</sup> The majority opinion in *Lynch* further argued that the founders most certainly did not intend the Establishment Clause to be an absolute prohibition of governmental acknowledgment or accommodation of religion.<sup>643</sup> Finally, the Court concluded that potential political divisiveness alone would not be sufficient to sustain an Establishment Clause claim.<sup>644</sup> In short, the concept of benevolent neutrality had opened the door to an interpretation of the Establishment Clause that allowed government to actively acknowledge religion in the public sphere, despite concerns that it might lead to political divisiveness and be seen as aiding only mainstream religions.

As the composition of the Court began to change in the 1980s so too did the views on neutrality with regards to government acknowledgment of religion. The addition of Justices O'Connor and Kennedy to the bench had an enormous impact on these government expression cases. In *Lynch*, O'Connor argued that a neutral government should not endorse religion in a manner that makes members of minority religions feel

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639 *Stone v. Graham*, 449 U.S. 39, 41 (1981) (posting of Ten Commandments in public school classrooms); *McGowan v. Maryland*, 366 U.S. 420 (1961) (rejecting challenges to Sunday closing laws based on claimed Establishment Clause violations); *Zorach v. Clauson*, 343 U.S. 306 (1952).

640 465 U.S. at 683.

641 465 U.S. at 672-73

642 465 U.S. at 681

643 465 U.S. at 681.

644 465 U.S. at 684.

unwelcome or as outsiders, which is the basis of her Endorsement Test that will be discussed in greater detail at later point. Justice Kennedy, on the other hand, along with Justice Scalia, sought to redefine the terms “separation” and “neutrality” in manner that only prevented the government from engaging in proselytization. By the turn of the century, some of the Justices began to advocate for the abandonment of the neutrality principle in so-called government acknowledgment of religion cases, arguing that “[t]hose who wrote the Constitution believed that morality was essential to the well-being of society and that encouragement of religion was the best way to foster morality.”<sup>645</sup> When neutrality prevents government from acknowledging religion in the public sphere because it allegedly amounts to favoring religion over non-religion, the goal of fostering morality can no longer be achieved. This kind of neutrality might be appropriate in funding and free exercise cases, explained Justice Scalia, but is simply not required in government acknowledgment of religion context.<sup>646</sup>

Richard Garnett argues that the three stages discussed here can be best understood as representing three models of religious liberty in America. He describes freedom from religion as being somewhat hostile to religion, an attempt to keep religion in the private sphere. Freedom of religion, on the other hand, is neutrality but does not treat religion as something special. Freedom for religion acknowledges that religion:

“is special; its exercise is seen as valuable and good, and worthy of accommodation, even support. . . . The government, under this approach, will not only refrain from discriminating against religion, it will take special care to accommodate and facilitate it—though always in a way that respects the distinction between “church” and “state” and the liberty of individual conscience.”<sup>647</sup>

These government acknowledgment of religion cases are where advocates of Garnett's third model have attempted to push American religious liberty doctrine away from the 1960s separationist dogma to something more akin to what German religious liberty doctrine refers to as “positive religious freedom.”

## H. Preliminary Conclusion

Whether setting forth the various claimed purposes that are served by the religion clauses of the United States Constitution brings one any closer to obtaining a fuller understanding of how Americans approach non-establishment questions is debatable, and quite frankly was not the objective of this short survey. Rather the goal here is to illustrate why the concept of religious liberty in America is so convoluted, the answer clearly being that jurists and commentators simply cannot agree on the aim of religious liberty. Despite failing to achieve the impossible, namely bringing clarity to this contentious area of American law, this survey provides a blueprint by which one can explore German religious liberty jurisprudence with an eye toward identifying how non-establishment operates.

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645 545 U.S. at 887 (Scalia, dissenting)

646 545 U.S. at 893 (Scalia, dissenting) (Scalia goes on to argue that “[i]f religion in the public forum had to be entirely nondenominational, there could be no religion in the public forum at all.”)

647 Garnett, *Positive Secularism and the American Model of Religious Liberty*, Engage Vol. 11, Issue 1 (2007) pg. 127.

Generally, the blueprint distinguishes between purposes served by free exercise principles and those served by non-establishment principles. The Free Exercise Clause undoubtedly serves the purpose of protecting the right to believe, as well as ensuring that the state cannot act in a manner that forces people to abandon their beliefs. With that said, since the *Smith* case, and arguably even dating back all the way to *Reynolds*, it is clear that the state may inadvertently restrict religious practices through general laws.

In short, the Free Exercise Clause aims to absolutely protect religious beliefs but not necessarily actions motivated by those beliefs. Furthermore, earlier case law also stressed that the Clauses working in tandem serve the purpose of creating a tolerant society where religious minorities are protected. These purposes were later subsumed under the Court's interpretation of the Establishment Clause, arguably because the Court's narrow interpretation of the Free Exercise Clause's protection of religious practices forced minorities to seek redress under the Establishment Clause, and many of Justices were receptive to their requests for protection.

With its decision in the *Everson* case, the Court ushered in a new era of religious liberty jurisprudence, one that treated the Establishment Clause as being separate and distinct from the Free Exercise Clause. The Court not only gave the Establishment Clause its own identity, it also set forth a laundry list of purposes served by it. From *Everson* going forward, there has rarely been a consensus concerning the aim of the Clause, and when there is a consensus, it is generally based on broad concepts such as “no preference” or no state coercion, with disagreements breaking out over the details of these concepts. To make matters more confusing, the Justices, as well as commentators, have used the word “neutrality” when advocating for a particular purpose that is served by the Clause. Thus, neutrality has been used by some judges as a standard that seeks to protect religious minorities, promote diversity or impede religious strife. The vague term “separation” has suffered the same fate, with Justices agreeing broadly that some kind of separation is warranted, but fiercely disagreeing over the extent.

Finally, both historically and in the modern context there does seem to be a general consensus that protecting religious liberty serves the purpose of fostering morality in the populace. Here, though, the debate centers on what the role of the state is, if any, in facilitating this fostering morality goal. The discussion of whether the state should take positive actions to foster morality perhaps provides a good segue into a concept that will play a crucial role in the survey that follows covering religious liberty in Germany, namely positive religious freedom. Advocates of a narrow interpretation of the purposes served by the Establishment Clause seem to also take the view that the state should positively promote and aid religion, not only to advance its own interest of keeping order, but also to ensure that those wishing to exercise their religious rights in the public sphere can do so. As we have seen, this idea of positive religious freedom lurks in the background of the debates over religious freedom in the United States.

In the next survey, however, we will see how an open and honest acknowledgment of

the concept of positive religious freedom operates in a system that, like the United States, places the highest priority on religious liberty. We will also consider how the purposes set forth in this survey of the United States factor into questions of religious liberty in a system that, at least on its face, contains no provisions similar to the Establishment Clause.

## Chapter 6: German Concepts of Religious Liberty, Both Individual and Collective

### A. Introduction

The sections of Article 4 of the German Basic Law (*Grundgesetz* or *GG*) along with the incorporated articles of the Weimar Constitution (*Weimarer Reichsverfassung* or *WRV*) form the basis of religious freedom in Germany. As already noted, the incorporation of the *WRV* provisions into the new “Basic Law” was part of a compromise, with the intention being that these provisions would be integrated into, as opposed to being subservient to, the new constitution. Thus, it should come as no surprise that very early on in the jurisprudence of the German Federal Constitutional Court (*Bundesverfassungsgericht* or *BVerfG*), Article 4 of the new constitution and the incorporated articles of the prior constitution were seen as complimenting each other, with many aspects of individual, as well as institutional, religious freedom being found expressly in the incorporated articles and impliedly in Article 4.<sup>648</sup> Taken together, Article 4 *GG* and the *WRV* provisions basically implicate four principles<sup>649</sup>: freedom of religion (belief and practice); religious equality; the right to self-organize of religious associations and the separation of church and state.

The protection of religious equality finds support in additional provisions in the *Grundgesetz*, namely Article 3, which contains a general equal protection command, and Article 33, Section 3, which makes specific mention of non-discrimination principles in the context of civil and political rights and the ability to be a civil servant. Furthermore, as was detailed in Chapter 2, the concept of *Parität* (originally equality between the two main religions) is deeply embedded in German constitutional history and serves as the basis for the religious equality principles found in modern German constitutional law, albeit no longer limited to just the two main religions.

Taken together, the four “first principles” lead to a fifth principle: religious and philosophical neutrality (*die religiös-weltanschauliche Neutralität des Staates*). German neutrality is marked by some additional principles that distinguish it from the American version, the first being a cooperative relationship (sometimes referred to as the “German Cooperative Model”) between church and state regarding aspects of the populace's general welfare and second, the idea that church/state separation does not require the church to remove itself from the public sphere.<sup>650</sup>

Finally, and related to the aforementioned relationship between the newer Article 4 *GG* and the older *WRV* provisions, most commentators, as well as the jurisprudence of the *BVerfG*, have treated the various religious freedom provisions as part of a unified

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648 BVerfGE 125, 39 (80). See also Unruh, *Religionsverfassungsrecht*, (2009, Baden-Baden) Rn 51; For slightly different view see Jeand'Heur/Korioth, *Grundzüge des Staatskirchenrecht*, Rn. 73 (arguing that Art. 4 is the primary basis of religious freedom in the *Grundgesetz*).

649 Unruh, *Religionsverfassungsrecht*, Rn 69

650 De Wall, “Die Entstehung des deutschen Verhältnisbestimmung von Kirche und Staat, pg 102. It should be noted that there are commentators in America who also think this is what neutrality should mean in the United States.

system of religious liberty, one where the various provisions are interpreted keeping the others in mind. Put differently, one cannot apply any one of these provisions in a vacuum, rather the application of each must take the other into consideration. So when one applies Article 4, one cannot lose sight of the WRV provisions and vice versa.<sup>651</sup>

## 1. Staatskirchenrecht vs. Religionsverfassungsrecht

Despite the rhetoric of a unified system of religious liberty in which all the various provisions of the *Grundgesetz* play an equal role, the relatively recent debate over whether religious freedom in Germany should be recognized under the traditional heading of *Staatskirchenrecht*, loosely translated into church-state law with a focus on institutional relationships, or the more modern term *Religionsverfassungsrecht*, loosely translated into constitutional law of religious liberty with an increasing focus on the individual, illustrates the tension between the various provisions making up German religious liberty principles.<sup>652</sup> Advocates of using the term *Religionsverfassungsrecht* argue that doing so is not meant to dismiss concepts related to *Staatskirchenrecht*, which arguably have their foundations in the WRV provisions, rather it is an attempt to incorporate those concepts into an overall discussion that uses the freedoms found in Article 4 GG as the foundation of religious liberty doctrine.<sup>653</sup>

By doing so, advocates of *Religionsverfassungsrecht* seek to give the rights found in Article 4 a greater role in shaping German concepts of religious liberty, arguing that this new emphasis seeks to find a balance between the enabling of religious freedom while acknowledging limits placed on the state regarding its relationship with religion.<sup>654</sup> Additionally, this new term recognizes that the clear lines existing between individual rights (Article 4 GG) and the institutional relationship between church and state (WRV Articles) began to blur in the late 1990s, culminating with a decision regarding the granting of public corporate status to the Jehovah's Witnesses whereby the BVerfG held that the granting of this status must also be judged under religious liberty concepts found in Article 4 GG.<sup>655</sup> In short, concepts of religious liberty in Germany have been in flux for several decades, primarily in response to the changing religious demographics of the country.<sup>656</sup> And while the WRV provisions still play an

651 Morlok, Art. 4 GG, in: Ed. Dreier, Grundgesetz. Kommentar, Präambel, Artikel 1–19, Bd. 1, 3rd ed. (Tübingen, 2013), Rn. 55

652 Unruh, Religionsverfassungsrecht, Rn 4.; Robbers argues that in Germany those advocating for secularism as understood by Americans are actually advocating for a fundamental change in the role religion plays in matters of state and society, as the American version of secularism (for example as illustrated by the first prong of the Lemon Test) simply has not been adopted by German courts or the majority of academics. See Robbers, Religion and Law in Germany (2010). pg 88-89.

653 Unruh, Religionsverfassungsrecht, Rn 6; Heinig, Die Verfassung der Religion: Beiträge zum Religionsverfassungsrecht, pg. 53 (Tübingen, 2014); Walter, Staatskirchenrecht oder Religionsverfassungsrecht? in Religionsfreiheit zwischen individueller Selbstbestimmung, Minderheitenschutz und Staatskirchenrecht - Völker- und verfassungsrechtliche Perspektiven, pg. 217. Ed. Frowein/Wolfrum (Berlin, 2001); For a dissenting view see Ladeur, The Myth of the Neutral State and the Individualization of Religion: The Relationship Between State and Religion, 30 Cardozo Law Review 2446, 2452-53 (2009) (arguing that Religionsverfassungsrecht has replaced the Staatskirchenrecht model, which “is one of the symptoms of an increasing individualization of religious freedom, which increasingly undermines the former public status of the churches, and, as a consequence, the collective and organizational dimension of religion as opposed to the individual rights of man.”)

654 Unruh, Religionsverfassungsrecht, Rn 11; Classen, Religionsrecht Rn. 109.

655 Unruh, Religionsverfassungsrecht, Rn 67, BVerfGE 102, 370 (387, 395.)

656 A recently released Pew Religious Diversity Index actually listed Germany above the United States when it

important role in German concepts of religious liberty, their importance has been overshadowed by the growing role that Article 4 GG plays in both the jurisprudence of the BVerfG and among commentators.

## 2. The Implied Mandate of State Neutrality Toward Religion

Before moving to an overview of German religious liberty doctrine, the concept of state neutrality toward religion must be addressed in more detail, as it plays an increasingly important role in how Germans conceptualize religious freedom in their country, and it is often viewed as being best suited to serve as a bridge that can be used to make comparisons to American non-establishment jurisprudence.<sup>657</sup> As mentioned at the outset of this survey, the concept of state neutrality (*weltanschaulich-religiöse Neutralität*) is one of the pillars of German religious liberty doctrine. However, the word *Neutralität* cannot be found in any of the religious liberty provisions of the *Grundgesetz*. It is in fact a court created pillar. While mentioned in earlier cases,<sup>658</sup> the principle of neutrality started taking form in a series of cases where the BVerfG ruled that individuals, including legal entities, can opt out of paying the church tax<sup>659</sup> pursuant to principles of neutrality found in the various provisions of the *Grundgesetz*.<sup>660</sup> These provisions, when read together, demand that the state be one that is home to people of all religious and ideological persuasions.<sup>661</sup> Unpacking some of the provisions underpinning the concept of state neutrality toward religion exposes some of the underlying purposes that are served by religious liberty and more specifically neutrality, and thus opens the door to some useful comparisons to the American Establishment Clause.

Article 137, Section 1 of the Weimar Constitution says simply “there shall be no state church.” However, it has been suggested that the separation of church and state set forth in this provision is not an end to itself but rather advances of the goal of state neutrality in a manner that still allows for the state to both cooperate with and distance itself from religion.<sup>662</sup> By abandoning the prior relationship whereby only the two mainstream religions had a relationship with the state, Article 137, Section 1, in conjunction with the non-coercion and non-discrimination provisions found in Article 136 WRV, allows for the creation of a state that is “welcoming to all its citizens,”<sup>663</sup> a neutral state that may not privilege or identify with a particular religion<sup>664</sup>, nor enforce

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came to religious diversity. See Pew Religion and Public Life Project, Religious Diversity Index Scores by Country, April 2014 (<http://www.pewforum.org/2014/04/04/religious-diversity-index-scores-by-country/>)

657 See for example Weber, *Religiöse Symbole in der Einwanderungsgesellschaft*, ZAR 2/2004 pg. 54; Haupt, *Religion-State Relations in the United States and Germany* (Cambridge, 2012)

658 For example see BVerfGE 18, 385

659 See Chapter 2, Section B(1)(f) for an overview of the history behind the church tax Germany. See also WRV 137, Abs. 6 allowing churches who attain the public corporate status to levy taxes on their parishioners.

660 The court specifically cited Art. 4 Abs. 1, Art. 3 Abs. 3, Art. 33 Abs. 3 GG as well as Art. 136 Abs. 1 and 4 WRV and Art. 137 Abs. 1 WRV.

661 BVerfGE 19, 206, 216.

662 German, BeckOK GG Art. 140 (Hrsg: Epping/Hillgruber), Rn 16.4; Classen, *Religionsrecht* Rn. 111.

663 Classen, *Religionsrecht*, Rn. 111. (quoting or paraphrasing BVerfGE 19, 206 (216); BVerfGE 93, 1 (17); 108, 282 (299); and 105, 279 (294). See also BVerfG, 27.01.2015; 1 BvR 471/10, 1 BvR 1181/10, Rn. 109 for the court's most recent pronouncement.

664 Some commentators such as Christian Starck take issue with this interpretation, arguing that the provisions of the WRV privileged the two main religions of the time and the drafters most certainly did not object to the state working in cooperation with select religious entities that could assist the state with its primary purpose, namely

its laws in a manner that allows a religious entity to exercise authority over or make demands of a non-member of the religion, nor marginalize members of minority religions<sup>665</sup>. Neutrality, it would seem, thus serves the purposes of plurality, non-preference, no coercion, ensuring citizens do not view themselves as outsiders and in doing so the protecting of minority rights: all purposes, as we saw in the American survey, arguably served by the Establishment Clause.

However, as is made clear by the presence of the WRV provisions creating a permissive relationship between church and state, as well as Article 7's language concerning religion courses in school, neutrality does not mean indifference to religion or strict separation.<sup>666</sup> Rather it demands that religions and people practicing their religion be treated equally by the state.<sup>667</sup> Here we see the imprint of Article 3's general equality mandate, and the principles found Article 137 Sections 1, 3, and 5.<sup>668</sup> Special provisions related to equality can also be found throughout the *Grundgesetz*, including Article 33 Sections 2 and 3 (related to civil/political rights as well as civil service); and Article 136 Section 1 WRV (a general non-discrimination clause also related to civil/political rights). These equality concepts have all been filtered into the religious liberty scheme by the Federal Constitutional Court (BVerfG) via Article 4, demanding the kind of formal neutrality endorsed by Justice Rehnquist and his fellow accommodationists that allows the state to support religious activity so long as access to such support is open to all religions.<sup>669</sup> An important caveat to the equality/neutrality principle created by the court is that this kind of neutrality does not prohibit the state from creating exemptions to general laws (*Sonderregelungen*) or similar accommodations for religion,<sup>670</sup> a view shared by many neutrality advocates in the United States. Finally, a state that is open to all religions and treats them equally serves the purpose of ensuring a peaceful co-existence between members of the various faiths, as well non-adherents.<sup>671</sup> This peaceful co-existence is also protected when the state is barred from using its influence to advance a particular set of religious or ideological beliefs.<sup>672</sup> Thus, German neutrality also seems to serve the purposes of equality and keeping the peace, in much the same manner as the Establishment Clause.

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keeping order in society. Starck in von Mangoldt/Klein/Starck, Art. 4 Abs. 1, 2 GG, Rn 8.

665 BVerfGE 19, 206, 216; BVerfGE 93, 1 (17); BVerfG, 27.01.2015; 1 BvR 471/10, 1 BvR 1181/10, Rn. 110. See also BVerfGE 93, 1, (24) and Marauhn/Ruppel, Balancing Conflicting Human Rights: Konrad Hesse's Notion of "Praktische Konkordanz" and the German Federal Constitutional Court, in *Conflicts Between Fundamental Rights* (Antwerp/Oxford/Portland, 2008) pg. 291.

666 BVerfGE 108, 282, 300; Unruh, *Religionsverfassungsrecht*, Rn. 140; Classen, *Religionsrecht*, Rn. 125; Robbers, *Religion and Law in Germany* (2010)

667 BVerfGE 108, 282, 300

668 Classen, *Religionsrecht*, Rn. 127; Jeand'Heur/Korioth, *Grundzüge des Staatskirchenrecht*, Rn. 64; Article 137 Section 1 WRV says there shall be no state church. Section 3 creates room for religious entities to operate independently from the state, and Section 5 allows for religious entities to become public corporations, giving them a special status that allows them to work with the state to advance goals related to the general welfare of society.

669 See Chapter 3, Section F, subsection 2b for a discussion of formalist neutrality in the United States.

670 Classen, *Religionsrecht*, Rn. 207 (arguing that in fact sometimes exemptions might be constitutionally required to protect religious rights).

671 "Aus der Glaubensfreiheit des Art. 4 Abs. 1 GG folgt im Gegenteil der Grundsatz staatlicher Neutralität gegenüber den unterschiedlichen Religionen und Bekenntnissen. Der Staat, in dem Anhänger unterschiedlicher oder gar gegensätzlicher religiöser und weltanschaulicher Überzeugungen zusammenleben, kann die friedliche Koexistenz nur gewährleisten, wenn er selber in Glaubensfragen Neutralität bewahrt." BVerfGE 93, 1 (16)

672 BVerfGE 108, 282 (300)

In light of this, it should come as no surprise that some observers have referred to German concepts of religious neutrality as being “parallel” to the American Establishment Clause.<sup>673</sup> Yet the parallels with the American Establishment Clause do not end with a comparison of neutrality's purpose, as just like in the American discussion of the values advanced by the Establishment Clause, a debate has erupted among German scholars over the aim of neutrality in the context of religious liberty doctrine. Some commentators believe that neutrality is essential to ensuring religious liberty, especially in an increasingly diverse society,<sup>674</sup> seeing it as a limit on the state from identifying with religion so as to ensure that state actions reflect the collective identity of its diverse citizens.<sup>675</sup> Critics, on the other hand, view neutrality as a court invented doctrine that is not required for the enjoyment of religious liberty.<sup>676</sup> Yet another strain of the criticism focuses more on the kind of neutrality that is encompassed in the provisions of the *Grundgesetz*, opting to characterize it more as a “positive” neutrality that allows the state to cooperate with religions in order to maintain the general welfare of society.<sup>677</sup> In other words, positive neutrality allows the majority religions who are best equipped to aid the state with such matters to enjoy a close relationship with the state so long as members of minority religions are not discriminated against or coerced by the government to believe or engage in practices associated with the majority religion; a position not much different than that advanced by the American accommodationists.

Regardless of how one characterizes the neutrality mandate implied by provisions of the *Grundgesetz*, it is clear that many of the reasons advanced for having a neutrality principle as part of the overall system of religious liberty mirror those set forth by advocates of a robust Establishment Clause. Furthermore, just like in the United States, an entrenched principle of neutrality in the overall scheme of religious liberty has been met with a backlash that seeks to either discredit or soften it.

## B. The German “Dogmatic” Approach to Analyzing Religious Liberty

Regardless of whether one uses the term *Staatskirchenrecht* or *Religionsverfassungsrecht*, or how one views the role of neutrality in questions of religious freedom, the analysis used by jurists in Germany for Article 4 questions has remained basically the same over the years. This self-described dogmatic approach to determining whether religious liberty has been unconstitutionally infringed usually encompasses a three step analysis that looks at: 1) scope of protection; 2) level of infringement; and 3) justification put forth by the state for that infringement.<sup>678</sup> This

673 Marauhn/Ruppel, “Balancing Conflicting Human Rights: Konrad Hesse's Notion of “Praktische Konkordanz” and the German Federal Constitutional Court” p. 277

674 Morlok, Art. 4 GG, in: Ed. Dreier, *Grundgesetz. Kommentar, Präambel, Artikel 1–19*, Bd. 1, 3rd ed., Rn 161.

675 Morlok, Art. 4 GG, in: Ed. Dreier, *Grundgesetz. Kommentar, Präambel, Artikel 1–19*, Bd. 1, 3rd ed., Rn 162.

676 Ladeur/Augsberg, *Der Mythos vom neutralen Staat* JZ 2007, pg 12.; Hillgruber, *Können Minderheiten Mehrheiten blockieren? Religionsbezüge staatlicher Ordnung zwischen individueller Religionsfreiheit und demokratischer Mehrheitsentscheidung*, in: *Zeitschrift für die kirchliche und staatliche Praxis, Kirche und Recht (KuR)* 2010, 8, 15.

677 Starck in von Mangoldt/Klein/Starck, Art. 4 Abs. 1, 2 GG, Rn 8

678 Classen, *Religionsrecht*, Rn. 141. Considering how convoluted American Establishment Clause jurisprudence is, with its numerous tests, it is difficult to argue that American religious liberty doctrine is also dogmatic. With that said, clearly some of the principles underlying these tests could be said to fit into an American religious liberty

approach will be used to frame most of the discussion that follows, with attempts at various times to fit some of the aforementioned American principles into the German dogma. More importantly this overview will also seek to determine how the purposes served by the American religion clauses are handled in discussions regarding religious liberty in Germany.

Before moving to a discussion of the first step in this three-step analysis, it is crucial to point out that this survey will only address the freedom of faith and freedom to profess religious creed found in Section 1 of Article 4, and will not address questions pertaining to protections for conscience and philosophical creed, which are also protected by Section 1. A great deal of this discussion focuses on the more controversial part of Article 4, namely Section 2's protection of religious practices, while none of this survey will cover the protections found in Section 3 regarding the conscientious objection to military service. Furthermore, for comparison sake, this survey is heavily tilted toward the protection of individual rights, although the protection of so-called collective religious freedom will also be addressed, albeit to a far lesser extent.

## 1. Factor One: The Scope of Protection

### a. Jurisprudence of the BVerfG: A Unified Right

Determining the reach or scope of Article 4 protections involves diving into a myriad of questions including: what is the relationship between the various rights found in Article 4; what religious practices are covered; who determines whether an act or belief is religious; and how should that determination be made. As will shortly become apparent, while the Federal Constitutional Court (BVerfG) has been somewhat consistent in answering these questions, commentators, and to a lesser extent some individual members of the court, have raised serious concerns about the recent impact the court's jurisprudence has had on German society and culture in light of growing religious diversity.

Calling the jurisprudence of the BVerfG regarding the scope of Article 4 protections robust might actually be somewhat of an understatement. Dating back to the late 1960s the court has consistently held that the *Grundgesetz* (The German Constitution) gives individuals the right to lead one's life in accordance with one's convictions (an individual right), as well as associate oneself with others who share these convictions in order to practice them jointly (a collective right).<sup>679</sup> Religious freedom is more than simply tolerating religious or non-religious convictions.<sup>680</sup> At the heart of this freedom is the right to practice one's religion without interference from the state.<sup>681</sup> Furthermore, the religious freedom found in Article 4, Sections 1 and 2 covers more than just the

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dogma as well.

679 BVerfGE 24, 236 (245); 33, 23 (28); 41, 29 (49); BVerfGE 93, 1 (15); BVerfG, 27.01.2015; 1 BvR 471/10, 1 BvR 1181/10 Rn. 85; In fact it might be said that one of the purposes of religious freedom is to protect beliefs that are associate with one's personal identity and development. See Jeand'Heur/Korioth, *Grundzüge des Staatskirchenrecht*, Rn. 89; Maurer, *die Schranken der Religionsfreiheit*, *Zeitschrift für evangelisches Kirchenrecht* (ZevKR) 2004, 311, 327.

680 BVerfGE 12, 1; see also BVerfGE 24, 236, 247.

681 BVerfGE 108, 282 (297)

freedom to believe, it includes vigorous protections for religious practices as well,<sup>682</sup> with the types of religious practices protected under Article 4 including not only traditional activities related to church services, but also a religious upbringing as well as non-religious and atheistic celebrations and other expressions of a religious or ideological life.<sup>683</sup> The purpose of protecting both practices as well as beliefs to the same extent has its origins not only in the special importance that has been placed on practicing religion historically in German culture, but also on the Nazi's interference with religion during their reign.<sup>684</sup> In short, the ultimate goal of Sections 1 and 2, when read together, is to allow individuals to fully develop their religious beliefs; to act in a manner fully consistent with their inner convictions of the faith.

The idea that religious beliefs and religious practices are a unified freedom, with both receiving the same protection under Article 4, has its origins in the *Lumpensammler* case where the court was faced with the question of whether an anti-competition law could be applied to a Catholic youth group who collected old clothes, textiles and used paper for purposes of raising money to support the charity work of a Catholic associated welfare group. While these actions were motivated by religious beliefs, they were at the same time detrimental to companies who were in the business of collecting such items for profit: the companies claiming that the actions of the youth group violated anti-competition laws. The difficulty facing the court was on the surface the actions taken by the youth group could not be distinguished from similar actions normally taken to make a profit. In other words the acts themselves were religiously neutral, and thus, so it was argued by the competing for-profit companies, should not enjoy the protections found in Article 4 of the *Grundgesetz*. In rejecting this argument, the court paid special attention to the motivation behind the actions of youth group, finding them to be associated with and advancing the religious beliefs of the Catholic charity group with which the youth group was associated. The religious freedom found in Article 4 Sections 1 and 2 GG, the court concluded, covers more than just the freedom to believe, it also covers the right to express and act on these beliefs, and should not be limited merely to traditional acts of worship or expression of belief.<sup>685</sup> Thus, even actions that on their face are religiously neutral might enjoy protections under Article 4 GG so long as the practice is being undertaken in accordance with and to advance religious beliefs.<sup>686</sup>

Three years later the court solidified its views on the unity of the rights found in Article 4 by ruling that the refusal of life saving medical treatment, when based on religious beliefs, also fell within the scope of religious liberty protection. At issue was a married couple who belonged to a Protestant sect that believes prayer is the only proper form of medicine. After birth, the wife was in need of medical assistance but she refused based on her religious beliefs, and subsequently her husband refused to allow doctors to treat his wife after she had lost consciousness, resulting in him ultimately being charged with

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682 BVerfGE 24, 236, 245. See also BVerfGE 32, 98; and BVerfG, 27.01.2015; 1 BvR 471/10, 1 BvR 1181/10 Rn. 85; von Campenhausen/de Wall, Staatskirchenrecht (Fn.130), S.51; Unruh, Religionsverfassungsrecht, Rn 85.

683 BVerfGE 24, 236, 246

684 BVerfGE 24, 236, 245

685 BVerfGE 24, 236, 246-247

686 Jeand'Heur/Korioth, Grundzüge des Staatskirchenrecht, Rn. 85.

a crime after his wife died of medical complications. Upholding its earlier *Lumpensammler* ruling, the court noted that religious freedom is more than just mere tolerance, and it protects more than just beliefs.<sup>687</sup> In this case, it shielded the rights holder from criminal prosecution, even though the act in question, the refusal of medical care, was on its face religiously neutral, or at the very least not associated with a traditional religious practice.

In recent decades the court has not shied away from its earlier pronouncements, with the post-*Lumpensammler* jurisprudence morphing into a dogma that adopts a wide scope of protection, one that allows an individual to lead her life in accordance with her religious beliefs without interference from the state. Leading one's life has been deemed to encompass not only believing, but also expressing and acting in accordance with those beliefs.<sup>688</sup> In this respect, then, the rights found in Sections 1 and 2 of Article 4 are seen to create a unified right of religious freedom with the purpose of equally protecting both beliefs and actions related to those beliefs.<sup>689</sup>

#### b. Jurisprudence of the BVerfG: Unified Positive and Negative Rights

However, the court has taken great pains to emphasize that the unified right is not merely defensive in nature, rather it includes the positive right to actively practice and develop one's beliefs. Furthermore, the state should take measures to give people the space in which to realize this right, as well as protect individuals who seek to exercise their positive rights from being interfered with by third parties.<sup>690</sup> To be clear, when discussing positive rights in the context of religious, liberty, one should distinguish this from the more traditional meaning of positive rights whereby the state is obligated to provide individuals with something of substance. Here the discussion focuses on the state providing room for one to enjoy their religious freedom rights, if they so choose; with the legislature being charged with determining how best to achieve this goal and the courts becoming involved only when it can be shown that the state has acted in an inadequate manner to facilitate the ability of one to exercise these rights.<sup>691</sup> In the same vein, some have argued that there is also a protective right component to religious freedom, which stems from its neutrality mandate, whereby the state has the duty to protect individuals from having their religious rights infringed by actions of third

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687 BVerfGE 32, 98, 106-107 See also BVerfGE 41, 29; BVerfGE 93, 1, 15.

688 BVerfGE 93, 1, 15. ("Zur Glaubensfreiheit gehört aber nicht nur die Freiheit, einen Glauben zu haben, sondern auch die Freiheit, nach den eigenen Glaubensüberzeugungen zu leben und zu handeln.")

689 BVerfGE: 24, 236, 245; 32, 98, 106; 44, 37, 49; 83, 341, 354; BVerfG, 27.01.2015; 1 BvR 471/10, 1 BvR 1181/10 Rn. 85.

690 BVerfGE 108, 282, 300; Classen, Religionsrecht, Rn. 124; von Campenhausen, Religionsfreiheit in Handbuch des Staatsrecht, Isensee/Kirchhoff (2009, Heidelberg) Rn. 53; Jarass/Pieroth, GG Kommentar Art 4. Rn. 48a; Unruh, Religionsverfassungsrecht Rn 88; Muckel, Religiöse Freiheit und staatliche Letztentscheidung, pg. 141 (Tübingen, 2006); von Campenhausen/de Wall, Staatskirchenrecht pg. 59; Classen, Religionsrecht Rn 124; Heinig, Die Verfassung der Religion: Beiträge zum Religionsverfassungsrecht pg. 47 (Tübingen, 2014); von Campenhausen, Religionsfreiheit in Handbuch des Staatsrecht.

691 BVerfGE 125, 39, 78-79. Although, at the same time the BVerfG has made it clear that the state cannot be forced to take particular actions related to creating this space. For instance, the state cannot be forced to provide the opportunity for students to begin their school day with prayer. However, if the legislature believes this is appropriate in the name of giving students who so choose room to exercise their religious beliefs, the court will not interfere with this decision, so long as the rights of those who do not wish to participate are protected. See BVerfGE 52, 223, 242.

parties,<sup>692</sup> a topic that will be discussed in more detail in the context of cases involving religion in schools.

Finally, it should be noted that negative religious freedom has been deemed by the court as giving people the right to express a particular belief, act in accordance with a particular belief, or not hold any religious belief at all. The source of this right stems not only from Article 4, but can also be found in other provisions of the *Grundgesetz*: Article 7 Section 3 (teachers cannot be forced to provide religious instruction); Article 136, Section 3 WRV (no person shall be forced to disclose religious convictions), and Section 4 (no person may be compelled to perform any religious act or ceremony, to participate in religious exercises, or to take a religious form of oath). In this sense, negative religious freedom can be said to have the purpose of protecting minority rights. As the BVerfG has noted, the overriding principle of personal dignity requires the strictest protection of religious rights for all, including outsiders and members of minority religions, so long as these protections do not interfere with others values found in the *Grundgesetz*,<sup>693</sup> a question that is posed in factor three of the Article 4 “dogmatic” analysis. Furthermore, and perhaps more importantly for this comparative analysis, the principle of personal dignity in the context of religious freedom can also operate in certain situations to free individuals of minority religions from having to tolerate actions taken by members of the majority religion.<sup>694</sup> Thus, in the controversial cross in the classroom case (to be discussed in greater detail in later chapters of this work), the court seemed overly concerned with not forcing a member of a minority religion, in violation of her negative religious freedom, to be confronted by a religious symbol that was placed in the classroom by the state in order to accommodate the religious beliefs of members of the majority religion.<sup>695</sup>

### c. Jurisprudence of the BVerfG: Defining the Scope

In addition to the characterization of the rights found in Article 4 as being unified, the BVerfG and commentators are in agreement that the courts have the power to determine the scope of religious liberty, and as part of this determination examine the legitimacy of the claimed protection.<sup>696</sup> However, the BVerfG has exercised this power cautiously, and has rejected the idea that it can simply determine the validity of a religion or religious practice objectively, ruling in the *Lumpensammler* case that the subjective views of the rights holder cannot be ignored, a view that the court has never

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692 Robbers, *Religion and Law in Germany*, pg. 89; Classen, *Religionsrecht*, Rn. 213. (especially in public forums where attendance is mandatory, eg. prison, school, army); See Borowski, *Glaubens- und Gewissensfreiheit*, pg. 380; Unruh, *Religionsverfassungsrecht*, Rn. 104 (“Der Staat hat sich schützend und fördernd vor die Religion zu stellen, sie auch vor rechtswidrigen Eingriffen von Seiten anderer zu bewahren.”)

693 BVerfGE 33, 23, 29. (“Kennzeichnend für einen Staat, der die Menschenwürde zum obersten Verfassungswert erklärt und der Glaubens- und Gewissensfreiheit ohne Gesetzesvorbehalt und unverwundbar garantiert, ist vielmehr, daß er auch Außenseitern und Sektierern die ungestörte Entfaltung ihrer Persönlichkeit gemäß ihren subjektiven Glaubensüberzeugungen gestattet, solange sie nicht in Widerspruch zu anderen Wertentscheidungen der Verfassung geraten und aus ihrem Verhalten deshalb fühlbare Beeinträchtigungen für das Gemeinwesen oder die Grundrechte anderer erwachsen.”)

694 BVerfGE 35, 366 (376); See also BVerfGE 93, 1 (16); Morlok, Art. 4 GG, in: Ed. Dreier, *Grundgesetz. Kommentar, Präambel, Artikel 1–19*, Bd. 1, 3rd ed., Rn 137

695 BVerfGE 93, 1

696 See BVerfGE 83, 341; BVerfG, 27.01.2015; 1 BvR 471/10, 1 BvR 1181/10, Rn. 86.

abandoned.<sup>697</sup>

Regarding the question of defining religion, the Federal Constitutional Court (BVerfG) has talked about the central element of religion being its *geistiger Gehalt* (its spiritual content)<sup>698</sup> and “die Ziele des Menschen, sprächen ihn im Kern seiner Persönlichkeit an und erklärten auf eine umfassende Weise den Sinn der Welt und des menschlichen Lebens.” (a belief system that plays an important role in shaping the person and his views of the world and life.)<sup>699</sup> This can be compared to the United States Supreme Court's dicta in *United States v. Seeger*, 380 U.S. 163, 166 (1964) where the Court seemed to indicate that the test for whether something is a religious belief is “whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox beliefs in God. . . .”<sup>700</sup> Thus, while both courts seem reluctant to use a purely objective test in measuring the validity of actions motivated by alleged religious beliefs, they have each developed a quasi-objective standard to test whether a religious belief is at stake.

In addition to the above cited BVerfG dicta, it is generally believed that to qualify as “religion” under Article 4 at least four factors must be taken into consideration concerning the role religion plays in the life of the person seeking protection: 1) how meaningful; 2) integral and 3) obligatory the belief system is to the individual; 4) as well as whether the belief system has a transcendental element to it.<sup>701</sup> To be clear, advocates of this view do not claim that the court should be placing objective value judgments on this consideration, rather the question is what role the belief plays for the individual, thus the subjective views of the individual also are a factor in the calculation.

Concerning whether something should be considered an expression of religion or a religious practice, the BVerfG has taken a similarly cautious approach, mixing both objective and subjective standards to answer this delicate question. In its most recent pronouncement on the issue of religious expression--the court's second teacher headscarf case--the majority seemed to develop an objective/subjective test whereby the objective view of the religious symbol or expression in question is shaped by the subjective view of the person wearing the symbol or engaging in the expression. In applying this standard, the court noted that objectively a simple headscarf worn by a teacher is not per se a religious symbol. However when the teacher's subjective view that wearing it is part of her religion is taken into consideration, then objectively one can conclude that the headscarf is a religious symbol under such circumstances.<sup>702</sup> Thus, the act of wearing anything to conform with religious beliefs qualifies as a religious symbol when it is objectively clear that this is the purpose, and to determine the purpose, the subjective views of the rights holder, in this case the teacher, are to be considered.

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697 See BVerfGE 83, 341; BVerfG, 27.01.2015; 1 BvR 471/10, 1 BvR 1181/10, Rn. 86.

698 BVerfGE 83, 341, 353

699 BVerfGE 105, 279, 293

700 *United States v. Seeger*, 380 U.S. 163, 166 (1964)

701 Classen, *Religionsrecht*, Rn. 83; Borowski, *Glaubens- und Gewissensfreiheit*, pg. 392.

702 BVerfG, 27.01.2015; 1 BvR 471/10, 1 BvR 1181/10

The basis for the court's use of the rights holder's subjective views in this analysis stems primarily from the German version of separation that has developed since the drafting of the Weimar Constitution, which places a heavy emphasis on church independence, an independence that relies on making sure that the state does not involve itself with making value judgments about religion.<sup>703</sup> A solely objective standard, according to the court, would result in the neutral state making improper value judgments regarding religious matters. Here we can see how religious liberty aims at keeping religion independent from the state, and in doing so how it acts as a restriction on the court from passing purely objective judgments on matters of religion.

With regards to religious practices, the scope of protection is generally left to the rights holders themselves: their own self understanding of what it means to practice religion<sup>704</sup>. The state, according to the BVerfG, should refrain from making value judgments concerning belief and should instead focus on what the members of a religious group deem to be a required religious practice.<sup>705</sup> However, to protect against the misuse of a purely subjective standard,<sup>706</sup> the BVerfG has also developed a plausibility test that takes into consideration what the community to which the individual belongs believes is required; the result being that the court will not interfere with a claim that an act is religiously motivated as long as it is plausible.<sup>707</sup> The BVerfG has interpreted what qualifies as a “religious community” under this standard rather liberally, noting that actually belonging to a specific community is not a prerequisite for applying the plausibility test.<sup>708</sup> For example, in the court's most recent headscarf decision, it was faced with a teacher who wore a headscarf out of religious convictions but did not have active ties with a mosque or Islamic religious community. Despite a lack of ties to a specific religious community, the court had little problem finding that the claimant's subjective view that her religious beliefs required her to wear the headscarf was plausible.<sup>709</sup>

Finally, when speaking about scope, it must be noted that the BVerfG has viewed the rights found in Article 4 as being both individual and collective.<sup>710</sup> As such, carriers of this right can also be a religious organization,<sup>711</sup> and even groups of people in the form

703 see BVerfGE 105, 279, 293; 90, 112, 115

704 BVerfGE 24, 236, 247; See also BVerfGE 33, 23; 83, 341, 353; Morlok, Art. 4 GG, in: Ed. Dreier, Grundgesetz. Kommentar, Präambel, Artikel 1–19, Bd. 1, 3rd ed., Rn. 60; Unruh, Religionsverfassungsrecht, Rn.92;

705 BVerfG 104, 337.

706 Morlok, Art. 4 GG, in: Ed. Dreier, Grundgesetz. Kommentar, Präambel, Artikel 1–19, Bd. 1, 3rd ed., Rn. 60; Classen, Religionsrecht, Rn. 90-92.

707 BVerfGE 108, 282 (298-299); See also BVerfG, 27.01.2015; 1 BvR 471/10, 1 BvR 1181/10, Rn. 86; Morlok, Art. 4 GG, in: Ed. Dreier, Grundgesetz. Kommentar, Präambel, Artikel 1–19, Bd. 1, 3rd ed., Rn. 60.

708 Nevertheless some have argued that while membership in such a community is not a prerequisite, there must be a religious community upon which one can test the legitimacy of the beliefs. See Bock, Die Religionsfreiheit zwischen Skylla und Charybdis, AöR, 1997 pg. 461; .

709 BVerfG, 27.01.2015; 1 BvR 471/10, 1 BvR 1181/10

710 BVerfGE 19, 129 (132); 24, 236 (246 f.); 42, 312 (323); 53, 366 (386 ff.); 57, 220 (240 f.); 61, 82 (102); 70, 138 (161); 83, 341 (353 ff.) see also Jarass in Jarass/Pieroth7, Art. 4 GG, Rn 19; Starck in von Mangoldt/Klein/Starck, Art. 4 Abs. 1, 2 GG;, Rn. 46.; Morlok, Art. 4 GG, in: Ed. Dreier, Grundgesetz. Kommentar, Präambel, Artikel 1–19, Bd. 1, 3rd ed., Rn 96. Often referred to as collective religious liberty, Borowski points out that this idea is not unique to Germany, noting that American scholars have also claimed that religious life is inherently associational. See Borowski, Glaubens- und Gewissensfreiheit, pg. 371 & pg 445; Jeand'Heur/Korioth, Grundzüge des Staatskirchenrecht, Rn. 81.

711 BVerfGE 24, 236, 246

of “religious societies” devoted to advancing the religious lives of their members, so long as a goal of the group or society is the furtherance of the religious lives being led by its members.<sup>712</sup> As with the individual rights contained in Article 4, principles of neutrality and equality (*Parität*) require this collective right be extended beyond members of established religions; it is a right to be enjoyed by members of all religions regardless of the size of the religious community,<sup>713</sup> as well as ideological and cultural entities and individuals acting in accordance with such beliefs.<sup>714</sup> Again, the Nazi attacks on religious freedom seem to have shaped the views of the BVerfG when it comes to collective religious liberty. While collective religious liberty is not expressly found in Article 4, the jurisprudence of the BVerfG makes it clear that, after the experience of the Nazi regime, the drafters of the *Grundgesetz* wanted a broad interpretation of the right that covers beliefs and acts (both private and public), and can be exercised by a community organizing itself for purposes of practicing religion.<sup>715</sup>

The question of who qualifies for this collective religious freedom has also been rather liberally interpreted by the court, but not in a manner that allows for abuse of the broad scope. The guarantee of religious association encompasses the right to join together to further a joint belief. The law cannot require people wishing to take advantage of this religious associational right to form a specific type of association, so long as the group can show that it can abide by the general laws related to forming associations.<sup>716</sup> However, the protections of Article 4 will not be bestowed to any group who claims to understand themselves as a religion, rather one must also consider the spiritual nature of their beliefs as well as how they hold themselves out to the public.<sup>717</sup> In summary, by defining the scope of protection for religious liberty quite broadly, the BVerfG has made it clear that a primary purpose of religious liberty is to allow individuals and groups of individuals the ability to lead their lives in accordance with their religious beliefs without interference from the state.

#### d. The Academic Debate Related to Scope: An Introduction

The debate among academics basically questions whether the BVerfG has created too broad of a scope of protection under Article 4. While it is difficult to identify two consistent opposing positions on this question, for our purposes Martin Borowski's terminology of “strong thesis” (those advocating a broad scope) and “weak thesis” (those advocating a more limited scope of protection) might be useful.<sup>718</sup> At the center of this debate are two primary questions: 1) who should define religion? and 2) how

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712 BVerfGE 24, 236 (247).

713 BVerfGE 32, 98, 106.

714 BVerfGE 24, 236, 247. see also BVerfGE 105, 279

715 BVerfGE 83, 341 (354) “Die Intention des Verfassungsgebers war nach der Erfahrung der Religionsverfolgung durch das NS-Regime darauf gerichtet, Religionsfreiheit nicht nur in bestimmten Teilfreiheiten, sondern voll zu gewährleisten. Jedenfalls sollte keines der religiösen Freiheitsrechte, die als Ergebnis jahrhundertelanger geschichtlicher Entwicklung in der Weimarer Verfassung Anerkennung gefunden hatten, nunmehr ausgeschlossen sein. Zu diesen religiösen Freiheitsrechten gehörten die Glaubens- und Gewissensfreiheit einschließlich der Bekenntnisfreiheit, die Freiheit der privaten und öffentlichen Religionsausübung (Kultusfreiheit) und die religiöse Vereinigungsfreiheit.”

716 BVerfGE 83, 341 (355)

717 BVerfGE 83, 341 (353)

718 See Borowski, Die Glaubens- und Gewissensfreiheit pg 360.

closely connected to religion must a protected practice be. It should be noted that there is some overlap between these two questions as well as between those who advocate the strong thesis and those the weak thesis. Nevertheless, in most instances clear lines can be seen between the two camps.

e. The Academic Debate Related to Scope: Unified Rights?

While finding the contours of the scope of protection provided by Article 4 GG most surely involves how one defines religion and related practices, scope is arguably impacted to a greater extent by questions concerning just how unified the rights found in the *Grundgesetz* are.<sup>719</sup> Focusing solely on the religious aspects of Article 4, one can find at least three distinct rights: the freedom to believe (*Glaubensfreiheit*), the freedom to express one's beliefs (*Bekenntnisfreiheit*)<sup>720</sup> and the freedom to act in accordance with one's religious beliefs (*Freiheit der Religionsausübung*)<sup>721</sup> At the heart of the debate over whether the rights are unified is the fact that if one can break the rights apart, the almost absolute nature of the right to believe no longer sets the perimeters of how broad the scope is regarding religious practice and expression, arguably a lesson that can be learned from the American experience with this question.

The majority opinion among commentators, as well as the prevailing opinion of the BVerfG, is that these rights are unified and together provide comprehensive individual and cooperative freedom of religion.<sup>722</sup> Besides basing this view on the expansive language used by the BVerfG in the *Lumpensammeler* case, advocates of this “strong thesis” believe that a broad scope of protection furthers the goal of making sure that religious liberty remains one of the basic and key foundations of the rights regime set forth by the *Grundgesetz*.<sup>723</sup> Many further argue that the proper way to restrict the exercise of religion, when necessary to protect a competing important interest, should not be achieved through limiting the scope of protection, but rather be based on a finding that the state has a legitimate interest in restricting religious freedom<sup>724</sup>

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719 Unruh, Religionsverfassungsrecht, Rn 77.

720 According to the BVerfG the wearing of religious symbols also falls into this category, see BVerfG 108, 282 (294, 298); as does the right to express or refuse to identify one's religious beliefs, see See BVerfG 12,1 (4). While this work will not undertake such comparisons, on its face it would appear that the concept of *Bekenntnisfreiheit* has some similarities to the free speech concerns expressed by the United Supreme Court in its series of solicitation ordinance cases. It should also be noted that some commentators in Germany seem to take a narrow view of *Bekenntnisfreiheit* and believe that when used as a negative right, it does not originate from Art. 4 GG but rather from Art. 140 WRV and Art. 7 (concerning teachers not being forced to teach the mandated religion course). See de Wall/Muckel, Kirchenrecht pg. 71.

721 It is pretty much undisputed that those practices associated with worship (services, church bells, call to prayer) fall within this protection, see Unruh, Religionsverfassungsrecht, Rn. 84. The controversy here centers on what kinds of practices that are not “normally associated” with religious worship qualify under this category as well, the BVerfG seeming to interpret the reach of this protection extremely broadly as illustrated by its *Lumpensammelerfall*. See BVerfG 24, 236. It should also be noted that some suggest that *Bekenntnisfreiheit* (right to religious expression) and *Freiheit der Religionsausübung* (right to practice religion) cannot easily be distinguished from one another. See Jeand'Heur/Korioth, Grundzüge des Staatskirchenrecht, Rn. 79

722 See BVerfG 24, 236 (245); deWall/Muckel, Kirchenrecht, 2. Auflage (München 2010), pg 66; von Campenhausen/de Wall, Staatskirchenrecht, pg. 54; Jeand'Heur/Korioth, Grundzüge des Staatskirchenrecht, Rn. 74; Unruh, Religionsverfassungsrecht Rn. 78; Morlok, Art. 4 GG, in: Ed. Dreier, Grundgesetz. Kommentar, Präambel, Artikel 1–19, Bd. 1, 3rd ed., Rn 54.

723 Unruh, Religionsverfassungsrecht Rn 85; Morlok, Art. 4 GG, in: Ed. Dreier, Grundgesetz. Kommentar, Präambel, Artikel 1–19, Bd. 1, 3rd ed., Rn 62; von Campenhausen/de Wall, Staatskirchenrecht, pg. 54; Mauer FS Brohm 455 (456).

724 Unruh, Religionsverfassungsrecht, Rn. 85; It should be noted that the question of a unified right goes beyond

A minority of commentators, on the other hand, seek to divide Article 4, Sections 1 and 2 into subcategories that are then individually scrutinized to determine the possibility of placing limits on each. For example, Christian Starck simply separates the freedom to hold and express both religious and philosophical beliefs from the freedom to act in accordance with these beliefs;<sup>725</sup> whereas Stefan Muckel believes the two sections contain five separate and distinct rights: 1) the right to believe, 2) the right to express those beliefs, 3) the right to act in accordance with those beliefs, 4) religious associational rights and 5) collective religious liberty, with only the right to believe enjoying absolute protection.<sup>726</sup> At the heart of this view is the fear that by linking every expression or action to the subjective religious beliefs of the rights holder, the right to religious expression and practice becomes more akin to a general right to act as one pleases, and in doing so degrades the special place that the protection of religious beliefs and actions has in the scheme of fundamental rights found in the GG.

A sub-argument related to the question of the relationship between the rights contained in Article 4 involves how closely connected expressions of belief and actions must be to the religious belief itself. Here we see a further clustering of opinions among commentators. One group generally believes that the rights are unified and the connection between the rights at play should be left up to the individual seeking to exercise religious liberty rights.<sup>727</sup> In other words, if the holder of right genuinely believes that his or her expression and actions advance his or her religious beliefs, full protection under Article 4 should be granted. This view will be further explored in the discussion concerning who should define religion and related practices.

Another group who believes that the rights are unified argues that there must be a real or concrete link between the practice and belief.<sup>728</sup> Examples offered by advocates of this view<sup>729</sup> include: the oath refusal case<sup>730</sup>, teacher headscarf case<sup>731</sup>, butcher case<sup>732</sup>, blood transfusion case<sup>733</sup>, and religious marijuana case.<sup>734</sup> It should also be noted that

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the relationship between faith and acting on one's faith. Because Art. 4, Sec. 1 also contains a right of conscious, there is some debate over whether the right of conscious should be unified with the right of faith. For a detailed discussion see Borowski, *Die Glaubens- und Gewissens-freiheit* pp. 355-360 (he ultimately concludes that faith and conscious have separate and distinct problem areas: "Im Rahmen einer grundrechts-dogmatischen Untersuchung sind damit jedenfalls die Glaubensfreiheit und die Gewissensfreiheit als eigenständige grundrechtliche Gewährleistungen zu behandeln.").

725 See Starck in Mangoldt/Klein/Starck, Art. 4 Abs. 1, 2 GG, Rn 10.

726 Muckel, *Religöse Freiheit und staatliche Letztentscheidung*, pg. 130 (Tübingen, 2006)

727 Advocates of this position almost uniformly adopt the BVerfG's plausibility test as discussed in the prior section.

728 Walter, *Religionsverfassungsrecht*, pg 511; Borowski, *Die Glaubens- und Gewissensfreiheit* pg 433; Classen, *Religionsrecht* Rn 151-154; Unruh, *Religionsverfassungsrecht* Rn. 87.

729 Classen, *Religionsrecht*, Rn. 151.

730 BVerfGE 33, 18 (holding that the concept of neutrality prohibits the court from deeming a belief to be "good" or "bad" and requires the court to only consider whether the actions are truly motivated by religious beliefs).

731 BVerfGE 108, 282 (accepting as plausible the views of the teacher that her beliefs required her to wear a headscarf).

732 BVerfGE 104, 337 (finding a sufficient link between the actions of the butcher and the views of the religious community which he served that religious beliefs required the slaughter of the animal to be done without tranquilizers).

733 BVerfGE 32, 98 (finding a real and concrete link between the act of not accepting medical treatment and the religious belief that the only proper medical treatment was prayer).

734 NJW 2001, 1365 (accepting Rastafari as a religion as well as the premise that using marijuana had a sufficient link to the beliefs of the religion).

advocates of this view do not limit the scope to practices that are required by a particular religious community, rather they simply demand that there be a valid connection to a religious belief. They justify demanding this connection by noting that without it, the types of actions, when viewed subjectively, that could fall under the scope of protection are almost limitless, thus sharing the fears of those who wish to treat the rights separately. Finally, advocates of this view also reject a purely objective test for determining the validity of the connection, arguing instead that the subjective views of the rights holder concerning the connection to religious beliefs plays an important, albeit not conclusive, role in this determination.<sup>735</sup> According to Martin Borowski, there are two primary means of testing the legitimacy of the subjective connection between beliefs and the practices in question: one involves looking at what the source or foundations of the beliefs are; the other looks at whether viewed objectively there is a connection between the beliefs of the individual and the questionable practice.<sup>736</sup> In short, advocates of this view adopt something similar to plausibility test created by BVerfG.<sup>737</sup>

A third group rejects the unified approach and as such believes that by separating beliefs from actions the scope of religious liberty can be more manageable. This group is most closely associated with Borowski's "weak thesis" category. Once this separation is accomplished, religious belief continues to enjoy the broad protection it has been granted by the BVerfG, but only religious expressions and actions truly commanded by and closely related to a religious belief shall enjoy full Article 4 protection.<sup>738</sup> Arguably, advocates of this view are seeking a result similar to the one found in Justice Scalia's *Smith* opinion, whereby once a firm rule is set forth that only beliefs have absolute protection, the ability to limit expressions and actions was more easily achievable.<sup>739</sup> The problem with the unified approach, according to advocates of the weak thesis, is that treating all acts that are subjectively viewed as being motivated by religion jeopardizes the state's interest in keeping order, and the way to protect against this is to limit the scope of protection only to those acts commanded by a legitimate religious community.<sup>740</sup> Abandoning an analysis that places too much weight on the subjective views of the rights holder alleviates the danger of this becoming a general actions protection, as well as provides clarity to the scope questions.<sup>741</sup>

Finally, advocates of this view argue that a narrow scope of protection is more in tune

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735 Borowski, Die Glaubens- und Gewissensfreiheit pg 406 ("Zunächst bedarf der Hervorhebung, daß dies keine Objektivierung des subjektiven Merkmals darstellen soll und kann. Mit der 'religiösen Überzeugung' als einem der Elemente, zwischen denen 'Konnexität' bzw. 'Konsistenz' bestehen soll, wird das subjektive Merkmal des Begriffs der Religion und der Weltanschauung gerade vorausgesetzt.")

736 Borowski, Die Glaubens- und Gewissensfreiheit pg. 407.

737 See BVerfGE 108, 282, 298.

738 See Schoch, pg. 159 („Nicht jedes religiös motivierte Verhalten ist Ausfluss von Glaube, Bekenntnis oder Religionsausübung; geschützt sind von Art. 4 Abs. 1 und 2 GG vielmehr nur Glaubens- und Kultushandlungen in einem engeren Sinne, d. h. Aktionsformen in Vollzug von Glaube, Bekenntnis, Religion.“) See also Kästner, Hypertrophie des Grundrechts auf Religionsfreiheit? JZ 20/1998, 979, 980.

739 Without a doubt Justice Scalia's views also fall under factor three of the three-part dogma, and they will also be discussed there. The point here is that in both jurisdictions, regardless of one's views on religious freedom, absolute protection of beliefs is almost universally accepted, and once you break the rights of religious expression and practice off from the right to believe, it becomes easier to limit them.

740 Kästner, Hypertrophie des Grundrechts auf Religionsfreiheit? JZ 20/1998, 979Kästner, pg. 980.

741 Fischer/Größ, Die Schrankendogmatik der Religionsfreiheit, DöV 22/2003, 932, 939.

with the legislative history of Article 4, as well as with the historical development of religious freedom in Germany, especially in the aftermath of Nazi attacks on the church and church practices, the latter indicating that the drafters of the provision intended there to be a close connection between a religious community, the commands it places on its members, and the action being claimed for protection.<sup>742</sup> Furthermore, narrowing the scope does not conflict with the command of state neutrality, so long as the state does not make any distinction between or identify with particular religious practices,<sup>743</sup> nor does it leave people who fall outside of the scope of protection under Article 4 with no protection at all, as religious expression and associational rights could still be protected under the general speech and association clauses of the *Grundgesetz*.<sup>744</sup>

While there is unanimity among these commentators regarding the desirability of separating the right to believe from the rights to express and act in accordance with religious beliefs, how one should measure whether expressions or actions are truly required by one's religious beliefs is a source of some debate, as we shall see in the following section. Nevertheless, what becomes clear is that in some sense a convergence is taking place here between the two jurisdictions regarding the purpose of religious liberty. In both Germany and the United States, at least with regards to what can be categorized as Free Exercise rights, there appears to be two schools of thought, one that believes religious liberty only fully protects beliefs, with actions motivated by religious beliefs being less protected; another that believes religious liberty has the purpose of fully protecting both religious beliefs and actions taken in accordance with those beliefs. The split regarding the purpose served by religious liberty in the context of the scope of protection, then, does not necessarily exist between the two jurisdictions but rather among schools of thought within each jurisdiction.

#### f. The Academic Debate Related to Scope: Determining the Scope

Of course, whether the rights are treated as being unified or not is only part of the analysis. Commentators are equally divided over the question of how one determines what qualifies as a religion,<sup>745</sup> or more to the point, what qualifies as religious expression or practices.<sup>746</sup> There is little question among commentators that the courts ultimately have the final say in this matter. However, when making this determination the court must also remain neutral toward questions of religion under the aforementioned state neutrality mandate. How exactly the court can remain neutral when making this determination is where the heart of the controversy lies. At one extreme is the idea that the court should accept the subjective views of the individual seeking to exercise their rights, while at the other extreme is the idea that the court

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742 Käßner, Hypertrophie des Grundrechts auf Religionsfreiheit? JZ 20/1998, 979; Fischer/Groß, Die Schrankendogmatik der Religionsfreiheit, pg. 939

743 Waldhoff, Die Zukunft des Staatskirchenrechts, Essener Gsp. (2008) 55 (79)

744 Käßner, Hypertrophie des Grundrechts auf Religionsfreiheit ? pg. 980.

745 There is some debate over whether religion in this context also includes philosophical beliefs. For purposes of this work, the discussion here is limited to those situations where a person is seeking to exercise rights based on religious beliefs. For an overview of the discussion concerning whether protections based on religious and philosophical beliefs should be treated the same, see Borowski, Die Glaubens- und Gewissensfreiheit pp. 411-413.

746 Borowski, Die Glaubens- und Gewissensfreiheit pg. 388

should use purely objective measures. Most academics, as well as the BVerfG, seem to have adopted a position somewhere in between this poles.

Advocates tilting toward the objective end of the spectrum tend to believe that allowing the court to primarily use an objective standard opens the door to limiting the scope of protection in a manner that makes it more manageable. At the heart of this argument is a concern that in many respects echoes that expressed by Justice Scalia in *Smith*, namely that if one allows the individual to define the scope of protection, the result is a system where each individual decides whether the law applies to him, a proverbial law of one.<sup>747</sup> Some have argued that this was not an apparent problem so long as the country remained religiously homogeneous, but once it became more diverse, the court's broadening of the scope jeopardized the legal order.<sup>748</sup> As previously stated, an additional problem concerns the danger of expanding the scope so far that religious practice loses its meaning, turning it into a right that protects all actions (*allgemeine Handelsrecht*).<sup>749</sup>

While the most extreme strain of this view seeks to use an objective test that limits the scope of religious freedom only to actions taken in accordance with Christian beliefs, this argument lost its currency as the country became more religiously diverse and most likely lost its legal underpinning with the adoption of the Weimar Constitution, which once and for all took the state out of the business of overseeing religious entities. With that said, a good deal of pages in the literature are still devoted to the meaning of the *Grundgesetz* preamble, with one commentator noting that the God mentioned there is a Christian God and most certainly not Buddha or Allah.<sup>750</sup>

The more modern strain of this view encourages the Court to limit practices protected under Article 4 to forms typically associated with religious worship. Christoph Waldhoff, for example, advocates a return to the “Kulturadäquanzformel,” an idea that limits the scope to those practiced accepted by the “folk” as being religious.<sup>751</sup> This formula was adopted by the BVerfG in 1960, but the court later impliedly abandoned it.<sup>752</sup> Waldhoff’s updated version, however, would reflect the changed composition of the “German folk.”<sup>753</sup> The obvious problem with the culture formula is that it limits protection to those practices accepted by the majority or dominate religions, which not only seems to violate concepts of neutrality but also concepts of equality and minority

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747 *Employment Division v. Smith*, 494 U.S. 872, 885 (1990)

748 Schoch, *Die Grundrechtsdogmatik vor den Herausforderungen einer multikonfessionellen Gesellschaft* in FS Hollerbach (Berlin, 2001) pg. 155-156. (arguing that by doing so the court created a theocratic inspired anarchy.) See also de Wall/Muckel, *Kirchenrecht* pg. 68; Waldhoff, *die Zukunft des Staatskirchenrechts*, in *Essener Gsp.* 2008, pg. 69; Kästner, *Hypertrophie*, pg. 975.

749 de Wall/Muckel, *Kirchenrecht* pg. 69; Borowski, *Glaubens- und Gewissensfreiheit* pg. 251; Muckel *Religöse Freiheit* pg. 195; Kästner *Hypertrophie* pg. 977 (arguing that the state is not required to acknowledge every practice claimed as religious by the would be rights holder).

750 Pawlowski, *Das Verhältnis von Staat und Kirche im Zusammenhang der Pluralistischen Verfassung*, *Der Staat* 28 (1989). For a deeper discussion of the debate concerning the meaning of the preamble see Borowski, *Die Glaubens- und Gewissensfreiheit* pp. 414-417.

751 See BVerfGE 12, 1 (where the court seemingly limited the scope of protection under Article 4 only to those practices viewed by the “cultural folk” as being connected with religion.)

752 See BVerfGE 41, 29, 50; *Unruh, Religionsverfassungsrecht*, Rn. 98; Germann, *BeckOK GG Art. 140* (Hrsg: Epping/Hillgruber), Rn 16; *Jeand'Heur/Korioth, Grundzüge des Staatskirchenrecht*, Rn. 97.

753 Waldhoff, *die Zukunft des Staatskirchenrechts*, pg. 76.

protection.

Because of this, others in favor of a more limited scope of protection advocate instead for a test that focuses on whether the religious community to which the rights holder belongs views the practice as being required by their beliefs.<sup>754</sup> A limited version of this seeks to protect only those practices regarded by a consensus of any religious community as being an element of their religion.<sup>755</sup> Either way, implied in this view is the existence of a religious community to which the rights holder must belong or identify with, and the idea that the court can objectively determine the scope of protection by looking at the subjective views of a particular religious community. It is worth repeating here that on this point there seems to be some convergence between those seeking to limit the scope and those seeking a broad scope. The convergence pertains to the existence of a religious community by which the legitimacy of the claimed religious practice can be measured,<sup>756</sup> which impliedly is one of the factors considered in the aforementioned plausibility test adopted by the BVerfG. Whether advocates of this view are willing to judge the relationship between the rights holder and a religious community as leniently as the BVerfG did in its recent teacher headscarf ruling remains to be seen.<sup>757</sup>

A further limitation to the scope of religious protection that enjoys a somewhat broader acceptance states that acts taken for economic gain<sup>758</sup> or in the form of political statements<sup>759</sup> should not be considered religious expression or practice. As such, two different high federal courts have found that Scientology does not qualify as a religion under Article 4's scope of protection because their primary purpose is economic, not the advancement of religion, and thus expression or practices related to it also do not enjoy Article 4 protection.<sup>760</sup> While the Scientology case dealt with the question of whether it was indeed a religion, the BVerfG was already on record holding that activity undertaken by religious adherents, which is primarily economic in nature does not fall within the scope of protection offered by Article 4. Thus, when an American missionary group seeking converts in Germany charged people to attend its gatherings and then sought to have the proceeds from the gathering be treated as tax-exempt under tax exemptions for religious activities, the BVerfG ruled the sale of food and accommodations associated with a religious event is not exempt, and taxing such does not interfere with the groups ability to practice their religion.<sup>761</sup> Finally, practices that harm society will generally not be considered to fall within the scope of religious

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754 Fischer/Größ, die Schrankendogmatik, pg 938; see also de Wall/Muckel, Kirchenrecht pg. 69 (arguing that dicta in the Bahai case seems to support this conclusion)

755 Unruh, Religionsverfassungsrecht, Rn. 99; Classen, Religionsrecht, Rn. 89; von Campenhausen/de Wall, Staatskirchenrecht pg. 56.

756 For example, see Morlok, Art. 4 GG, in: Ed. Dreier, Grundgesetz. Kommentar, Präambel, Artikel 1–19, Bd. 1, 3rd ed., Rn 68 where he argues that one cannot be a religion unto himself.

757 BVerfG, 27.01.2015; 1 BvR 471/10, 1 BvR 1181/10

758 Jeand'Heur/Korioth, Grundzüge des Staatskirchenrecht, Rn. 92.; Starck in von Mangoldt/Klein/Starck, Art. 4 Abs. 1, 2 GG, Rn 55

759 This was an argument set forth by the dissenters in the first teacher headscarf case where they claimed that the headscarf can be best understood objectively as a political symbol that should not enjoy Article 4 protections. See BVerfGE 108, 282 (333):

760 BVerwG, JZ 1995, 949, BAG, JZ 1995, 951,

761 BVerfG 19, 129.

liberty protection<sup>762</sup>, although courts also have the option to allow restrictions of such activities under step three of the religious liberty analysis, namely that the state has a sufficient justification for restricting the practice.

While the plausibility test was briefly discussed above in the context of a more objective test for judging the scope of Article 4 protection, the reality is that the test places a significant emphasis on the subjective views of the rights holder. Advocates of the plausibility test consider this to be a sufficient guard against the misuse of religious freedom; with the basic question being how one determines what is plausible. As one would expect, the answer to this question varies among commentators. Claus Dieter Classen, for example, advocates for a rather liberal view that considers the beliefs of the group to which the individual belongs, rather than the religion as a whole.<sup>763</sup> Classen and like-minded commentators openly acknowledge that the scope cannot be limitless, but must, at the same time, offer protection for minority and new religions, so long the nature of religion itself is not lost and the scope is not broadened to the point that practices with no relation to religion are protected.<sup>764</sup>

Finally, it should again be noted that some advocates of a more restrictive view of religious liberty believe that any limits placed on these rights should take place at the level of justifying restrictions rather than trying to narrow the scope of things protected.<sup>765</sup> Thus, simply because one advocates for a broad scope does not mean that they disfavor limits being placed on the exercising of religious liberty. What can be clearly seen here, though, is that one's position on scope and the kind of test that should be used to measure it, is shaped by what one sees as a primary purpose of religious liberty. If the primary purpose is to allow individuals to live their life in a manner that conforms with their religious beliefs, the strong thesis approach will more likely be emphasized, whereas those who view the purpose only as protecting beliefs or a limited number of traditional religious practices, advocate a weak thesis approach.

Before moving to the second factor of the Article 4 analysis, a short discussion over the characterization of religious rights as comprising both positive and negative aspects is warranted, especially in light of their impact on non-establishment principles in Germany. As was noted in the preceding pages concerning the jurisprudence of the BVerfG, the court, as well as a majority of commentators, believe that Article 4 and some provisions of the WRV contain principles that protect individuals from coercive acts by the state or third parties that violate their religious beliefs, protections that are normally characterized as negative rights. For many, included within this scope are non-believers who, under non-coercion principles, need to be shielded from any

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762 Starck in von Mangoldt/Klein/Starck, Art. 4 Abs. 1, 2 GG, Rn 14.

763 Classen, Religionsrecht, Rn. 93, ultimately taking an approach similar to that advocated by the majority in the Teacher Headscarf case. BVerfGE 108, 282, 299.

764 Classen, Religionsrecht, Rn. 78; Rn. 143. For an argument that this is still not enough to make religious liberty meaningless see Schoch pg. 156 where he argues that this still places the burden on the state to show a sufficient justification to restrict the practice in question and because there is no general law restriction available at this level, doing so is overly difficult; See also Kästner, JZ 1998, 974 (978), Muckel, Religiöse Freiheit pg 125; Borowski Glaubens- und Gewissensfreiheit, 251, de Wall/Muckel, Kirchenrecht pg. 69; von Campenhausen, Religionsfreiheit in Handbuch des Staatsrecht, Isensee/Kirchoff (Heidelberg, 2009) Rn. 94.

765 Unruh, Religionsverfassungsrecht, Rn 85; von Campenhausen/de Wall, Staatskirchenrecht pg. 54; von Campenhausen, Religionsfreiheit in Handbuch des Staatsrecht, Isensee/Kirchoff (2009, Heidelberg) Rn. 92

missionary actions taken by the state.<sup>766</sup> Including non-believers in the mix of religious freedom protection normally boils down concluding that this negative right, when limited to the freedom of belief, allows one to not take advantage of the right, and refuse to believe.<sup>767</sup> Put differently, included in this so-called negative rights is the right not to believe.

However, some commentators, including weak thesis advocates, argue that there are no negative aspects of religious liberty that should be allowed to interfere with the ability of others to exercise their positive (free exercise) religious rights. One argument advanced for this is that by opening up the possibility of negative rights trumping positive rights, the status of rights becomes uncertain, creating a kind of constitutional confusion.<sup>768</sup> It is in this vein that critics of the school cross decision characterize the forced removal of the cross to accommodate the negative rights of an individual student as privileging negative rights while at the same time unnecessarily muddling the jurisprudence related to the rights of the states to shape the character of their schools, as well as the positive rights of students and parents.<sup>769</sup> This is especially so in light of the emphasis placed on the subjective views of individuals seeking to exercise their negative rights.<sup>770</sup> The response to this criticism, in some respects being consistent with the BVerfG jurisprudence, is that while negative rights do not give the individual the right to be totally free from being confronted with objectionable state sponsored religious activities or symbols, the very purpose of individual rights is to protect one from the state, and when the confrontation with so-called positive religious rights is a result of actions taken by the state (hanging crosses in classrooms, for example), these negative protections must have meaning.<sup>771</sup> This potential for competing religious rights is the focus of the final chapters of this work.

## 2. Factor Two: Infringement on Area of Protection

### a. Infringements Generally

As a general matter, there is far less debate concerning this factor, as most commentators and the BVerfG have adopted a rather lenient approach concerning what amounts to an infringement. The debates that do exist normally involve the more controversial, fringe cases, and often focus on the relationship between negative and positive religious rights. Thus, this section will combine views from jurisprudence and literature, and focus mainly on how the definition of infringement has evolved over the past several decades, and then turn its attention to a few difficult cases that illustrate where the debate, when there is one, lies concerning what qualifies as an infringement.

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766 Borowski, *Die Glaubens- und Gewissensfreiheit* pg. 438.

767 Jeand'Heur/Korioth, *Grundzüge des Staatskirchenrecht*, Rn. 99.

768 Kloepfer, *Technikverbot durch gesetzgeberisches Unterlassen? Zur Entscheidung des VGH Kassel vom 6.11.1989*, in: *Wege und Verfahren des Verfassungslebens*, Festschrift für Peter Lerche, (München, 1993) pg. 755, 764; Muckel, *Religious Freedom and Freedom of Conscience in Fundamental Rights in Europe and North America*, Ed. Weber (2002) pg. 185.

769 von Campenhausen, *Zur Kreuzifix-Entscheidung des Bundesverfassungsgerichts*, AöR 121(1996), 448 (451); (c) Heckel, „Religionsfreiheit und Staatskirchenrecht in der Rechtsprechung des Bundesverfassungsgerichts“ FS 50 Jahre BVerfG, 379 (399 Fn. 74).

770 Kästner, *Hypertrophie des Grundrechts auf Religionsfreiheit?* pg. 981.

771 Classen, *Religionsrecht*, Rn. 162; Jeand'Heur/Korioth, *Grundzüge des Staatskirchenrecht*, Rn. 101.

The classic view of Article 4 infringements looked at four factors in determining whether the infringement was sufficient enough to justify protection.<sup>772</sup> The first factor, finality (*Finalität*), asked whether the infringement was an inadvertent impairment, one where the state did not act with an intent to infringe the right. Under this factor, only intentional actions by the state aimed at infringing religious rights were sufficient to qualify for Article 4 protection. Additionally, under the concept of *Unmittelbarkeit* it had to be shown that the impairment was a direct result of state action, and pursuant to the *Rechtsformigkeit* factor the act infringing on the right had to be an official act of state. Finally, *Imperativität* asked whether the command by the state was made against the will of the person being infringed. If all four of these factors were present, an infringement would be found under Article 4. The classic approach has, for the most part, been abandoned in favor of a more modern approach that covers any actions taken by the state that interfere, even partially, with one's ability to enjoy the aforementioned full scope of religious freedom.<sup>773</sup> None of the classic four factors need be fully shown; simply showing some kind of infringement will suffice. Thus, the type of infringement necessary to make an Article 4 claim has undergone a somewhat expansive interpretation.

However, there are still some limits: acts of private individuals are not seen as infringements, although they might raise questions about the state's obligation to protect against such infringements; nor are commands made by religious entities on their followers deemed infringements.<sup>774</sup> Furthermore, there is still some disagreement as to the level of severity needed to show a sufficient infringement. Some have used the word “concrete” to measure the level of severity needed to show a sufficient infringement. For example, a primary criticism of the school cross case is that the challengers to the cross were unable to show concretely how their rights to believe were infringed by the simple presence of the cross.<sup>775</sup> Interestingly, this lack of concrete danger to negative rights of school children faced with a teacher wearing a religious headscarf was also a factor for the BVerfG when it decided in favor of the teacher's religious right to wear a headscarf.<sup>776</sup> Finally, the duration of the infringement is not seen as a factor limiting the severity of the infringement. Thus, the mere fact that a teacher who wishes to wear a headscarf for religious reasons only needs to forgo doing so for the school day was not seen as limiting the severity of the infringement.<sup>777</sup>

772 Borowski, *Die Glaubens- und Gewissensfreiheit* pg. 446; Classen, *Religionsrecht* Rn. 186; Jeand'Heur/Koriath, *Gründzüge des Staatskirchenrecht*, Rn. 113; Unruh, *Religionsverfassungsrecht*, Rn. 107.

773 Jeand'Heur/Koriath, *Gründzüge des Staatskirchenrecht*, Rn. 113; Germann, *Beck'scher Online-Kommentar GG*, Art 4, Rn. 44; Morlok, *Art. 4 GG*, in: Ed. Dreier, *Grundgesetz. Kommentar, Präambel, Artikel 1–19*, Bd. 1, 3rd ed., Rn. 109; Borowski, *Die Glaubens- und Gewissensfreiheit* pg. 447;

774 von Campenhausen/deWall, *Staatskirchenrecht*, pg. 63; Germann, *Beck'scher Online-Kommentar GG*, Art 4, Rn. 38-39

775 See Kästner *Hypertrophie*, pg. 981. The cross case is discussed briefly in the pages that follow and in more detail in Chapter 8, Section B(2).

776 BVerfG, 27.01.2015; 1 BvR 471/10, 1 BvR 1181/10

777 BVerfG, 27.01.2015; 1 BvR 471/10, 1 BvR 1181/10, Rn. 96. While the conclusion in these two cases (concerning the cross and the teacher headscarf) dealing with sufficiency of infringement seems similar, arguably the primary reason for the different results lies in how the BVerfG characterized who was responsible for bringing the objectionable religious symbol into the public forum. For the majority in both the first and second headscarf cases, the fact that it was the school bringing the religious symbol into the classroom in the cross case, as compared to a teacher, who also has religious rights, was seemingly dispositive, while the concrete nature of the infringement played a secondary role.

## b. Special Cases: Confrontation with Religious Symbols

It should come as no surprise to American readers that cases involving the state or its representatives bringing religious symbols onto state property have been some of the most controversial in Germany; mirroring the American experience with such cases. And just like in the United States, much of the debate centers around whether being confronted with religious symbols or government acknowledgment of religion can result in a severe enough infringement of rights to be deemed a violation of religious liberty. Those arguing that such a confrontation is insufficient, even when the confrontation is a result of state action, generally fall into two camps. One strain of this argument believes that simply being confronted with a religious symbol, without more, cannot be deemed an infringement.<sup>778</sup> Proponents of this view would likely concur with Justice Scalia's finding that any peer pressure placed upon someone when in the presence of such symbols simply does not rise to the level of coercion needed to state a religious liberty claim.<sup>779</sup> The other strain of this argument is one that we have already seen in the scope of religious liberty discussion, namely whether negative rights can trump positive rights. Advocates of this position argue that when a religious symbol is brought into the public forum by the state to accommodate individual positive religious rights, no amount of infringement of negative religious liberty can act as an absolute trump card that overrides the positive rights being served, nor can negative rights ever result in a per se ban of the symbol. This view seeks to limit infringements only to those situations where state actions impact one's ability to express and practice their religion, but not allow negative religious rights to be used as a shield to protect against unwanted confrontation with religious symbols.<sup>780</sup> The debate over severity of infringement can best be illustrated by exploring discussions regarding this question that have taken place in some of Germany's most controversial religious liberty cases.

The Federal Constitutional Court's (BVerfG) first foray into the area of religious symbols cases involved the display of a cross in a courtroom, an often overlooked case<sup>781</sup> that opened the door for later courts to find an infringement of religious liberty when one is confronted with a religious symbol erected by the state. At issue was a challenge by a Jewish lawyer and his Jewish client who believed their religious liberty was violated when they were confronted with a cross placed on the desk of the presiding judge and required to proceed with their court business after their request for removal of the cross was rejected.<sup>782</sup> The issue was framed narrowly by the BVerfG: whether the refusal to remove the cross for the hearing involving the two challengers violated their religious liberty. By narrowing the question, the court chose to bypass the question of whether having a Christian symbol in a state courtroom in general raised

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778 See Kästner, *Lernen Unter dem Kreuz?* ZevKR 41 (1996) pg. 260.

779 See in Chapter 5, Section F, subsection 5 for a discussion of Justice Scalia's so-called psycho-coercion test.

780 See Zacharias, *Schutz vor religiösen Symbolen durch Art. 4 GG?* In FS Rüfner, pg. 1005

781 An example of this case being overlooked is the argument made by some critics of the classroom cross case that the court had for the first time recognized that being confronted with religious symbols was an infringement of rights, which obviously overlooks the courtroom case. See for example Isensee, *Entscheidungsbesprechung, Aufsatz: Bildersturm durch Grundrechts-interpretation*, ZRP 1996, pg. 12.

782 BVerfGE 35, 366.

constitutionality problems.<sup>783</sup>

On the narrow question, the court imagined that one might feel their religious rights were being violated by being forced to conduct a hearing “under the cross.”<sup>784</sup> By noting that Article 4 should be viewed as protecting against state coercion even in those instances where the majority of people would see or feel no coercion, the court clearly viewed Article 4 protections as being something akin to a minority rights provision. The BVerfG further concluded that in light of the removal request being rejected, resulting in the claimants being forced to confront a religious symbol erected by the state, a sufficient showing of infringement was made to invoke Article 4 protections.<sup>785</sup>

Two decades later the court handed down a decision that to this day remains one of its most controversial. In 1995 the Court was asked to review a Bavarian school law that, in keeping with the tradition of supporting parental wishes to ensure that their children have the opportunity to be raised in accordance with Christian values, required each classroom to be equipped with a crucifix. The BVerfG relied on three factors that go well beyond the traditional view of infringement in striking down the law<sup>786</sup>: 1) the school attendance requirement; 2) coupled with an inability avoid cross resulting in situation where students were forced to “learn under the cross;” 3) a symbol that has a clear religious meaning.<sup>787</sup> Looking at these three factors, the majority believed that the length of time (*Dauer*) and intensity (*Intensität*) of the confrontation with this clearly religious symbol amounted to a sufficient enough infringement to trigger Article 4 protection.<sup>788</sup> In addition, the majority noted that it could not be ruled out that having the cross in the classroom would have an impact on the impressionable children; this potential impact also supporting the conclusion that a sufficient infringement took place.<sup>789</sup> It is in this light that German readers might best understand the aforementioned dispute between Justice Kennedy and Justices Scalia and Thomas over the kind of state coercion necessary to trigger Establishment Clause protection.<sup>790</sup> Their debate is really nothing more than one involving the intensity of the infringement, and from a comparative perspective it is remarkable how similar the majority's conclusions in the Bavarian cross case regarding the intensity of the infringement are to those reached by the U.S. Supreme Court in *Lee v. Weisman*. In both cases the courts focused on the role negative religious freedom and state neutrality played in protecting minorities as well as creating a welcoming atmosphere for people of all religions.<sup>791</sup>

A rare dissent was filed in the Bavarian cross case arguing that the cross only had a religious meaning for Christians, while for non-Christians, the cross was more a symbol

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783 BVerfGE 35, 366, 374. (This aspect of the case will be more fully discussed in Chapter 7, Section B(1)(b)).

784 BVerfGE 35, 366, 376. (“Dennoch muß anerkannt werden, daß sich einzelne Prozeßbeteiligte durch den für sie unabweichlichen Zwang, entgegen eigenen religiösen oder weltanschaulichen Überzeugungen "unter dem Kreuz" einen Rechtsstreit führen und die als Identifikation empfundene Ausstattung in einem rein weltlichen Lebensbereich tolerieren zu müssen, in ihrem Grundrecht aus Art. 4 Abs. 1 GG verletzt fühlen können.”)

785 See Chapter 7, Section B(1)(b).

786 BVerfGE 93, 1

787 BVerfGE 93, 1 (18)

788 BVerfGE 93, 1, 18.

789 BVerfGE 93, 1, 20.

790 See Chapter 5, Section F(5) .

791 See Chapter 8, Section B(2).

associated with one of the underpinnings of western civilization.<sup>792</sup> Any psychological harm associated with the presence of the cross, according to the dissenters, was minimal at best and under the principle of tolerance (*Toleranzgebot*) must be endured by non-Christians.<sup>793</sup> Furthermore, and most importantly for purposes of the sufficiency of the infringement, the cross could not be viewed as a missionary symbol whereby non-Christian students were being coerced to take part in exercises or adopt beliefs repugnant to their religion or philosophical beliefs.<sup>794</sup> Thus, for the dissenters, the intensity of the infringement simply was not enough to warrant protection under Article 4,<sup>795</sup> a position not that different than that espoused by Justices Thomas and Scalia in *Lee*, who believed that only “force of law” state coercion rises to the level of intensity needed to trigger protections under the American Establishment Clause. It is worth mentioning here that the line of arguments taken by the majority and dissenters in this case are mirrored in the commentary, with some arguing that when peer pressure is placed on a student to take part in a practice, the students' negative rights are sufficiently infringed to raise Article 4 concerns,<sup>796</sup> while others seem to take the same force-of-law approach advanced by Justices Scalia and Thomas, believing that an infringement can only be found when the state uses its power to force individuals to believe or practice in a certain manner.<sup>797</sup>

More recently the Federal Constitutional Court (BVerfG) has stepped into the controversy regarding teachers wearing religious symbols in state schools, or more specifically regarding teachers wearing Muslim headscarves. The Court's first decision regarding this matter, as well as its second, dealt with the question of whether the meaning of the symbol in question should be determined by an objective standard based on how a reasonable person would view the symbol or by the subjective views of the person/entity who brings the symbol into the public sphere.<sup>798</sup> The meaning of the symbol obviously having an impact on the intensity of the infringement. These cases clearly had a different procedural posture than the cross cases. In the teacher headscarf cases there were no parties who were actively seeking to exercise their negative religious rights in a manner that would shield them from an objectionable symbol, rather it was an individual who was seeking to exercise her positive religious (free exercise) rights in the face of state resistance due to a perceived violation of state neutrality.<sup>799</sup> Nevertheless, the court still needed to determine how the religious symbol should be characterized and from whose perspective it should be judged, in order to determine whether the state's mandate of neutrality was imperiled by the presence of a teacher with a headscarf in the classroom. Thus, the views of those whose negative religious rights could be violated by being confronted with the symbols were also

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792 BVerfGE 93, 1, 32.

793 BVerfGE 93, 1, 33

794 BVerfGE 93, 1, 33

795 Classen, Religionsrecht Rn. 186.

796 Jeand'Heur/Korioth, Grundzüge des Staatskirchenrecht, Rn. 124. (characterizing religious freedom as a kind of religious minority protection so long as the minority position is not allowed to operate as an “intolerance negation,” or place the minority position as the only consideration.)

797 For example see von Campenhausen, Zur Kruzifix-Entscheidung des Bundesverfassungsgerichts, pg. 451.

798 It first must be determined how the symbol is viewed by the person claiming the infringement in order to assess whether the infringement is sufficient enough to trigger to Article 4 protections.

799 Although, the state claimed that its ban on teachers wearing religious symbols, in addition to being mandated by the principle of state neutrality, also was instituted to protect the negative rights of students and parents.

considered by the court in the context of the neutrality analysis. Both the majority and dissenters in these cases believed that symbols worn by a representative of the state in a public forum should be judged, for purposes of determining whether a sufficient infringement of negative rights are at stake, by taking into consideration all the possible interpretations of the symbol from all perspectives.<sup>800</sup> While not completely an objective test, as the subjective views of the party bringing the symbol into the public forum also need to be considered<sup>801</sup>, the court was clearly concerned with the competing interpretations of the symbol, especially in a closed setting such as school, when dealing with questions of sufficient infringement.<sup>802</sup>

The final case worth mentioning in the context of infringement sufficiency involves a program run by the German government which sought to provide citizens with information about sects and new religions that were deemed pseudo-religious or destructive and engaged in possible psychological manipulation of its members.<sup>803</sup> From a classic infringement perspective, such a warning posed no factual infringement, however under the modern approach to infringement an argument could be made that these warnings, by mis-characterizing some elements of the religious groups, interfered with the groups' expression of and ability practice their beliefs.<sup>804</sup> However, instead of simply applying the accepted modern formula, namely whether any rights were infringed by state actions, the BVerfG seemed to adopt a different standard whereby the state's warnings would be deemed an infringement only if they could be seen as defamatory or discriminatory, arguing that such statements violate state neutrality.<sup>805</sup> Applying this standard, the Court ruled that characterizing a religious group as a “sect” or “new religion” was not defamatory, but using such words as “destructive, and “manipulative” was.

### c. Preliminary Conclusions Regarding Infringement

Despite the infringement prong playing a less significant role in the debates over religious liberty, there still is room for debate here, and the focus of this debate tells us a bit more about how the purposes served by religiously liberty are ranked by jurists and commentators. The debate, as we have seen, centers on measuring the severity of the infringement, especially when the claim is an infringement of negative religious freedom. The BVerfG, as well as advocates of a robust reading of Article 4 protections,

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800 See Borowski, *Die Glaubens- und Gewissensfreiheit* pg. 468

801 See BVerfGE 108, 282 (294) (finding a potential infringement because the wearing of the headscarf was an important part of the claimant's religious identity.)

802 BVerfG, 27.01.2015; 1 BvR 471/10, 1 BvR 1181/10, Rn. 94. Compare Kästner, *Hypertrophie*, JZ 1998 pg. 981 arguing that normally an infringement is measured objectively by the court, but there might be instances where the subjective religious sensitivities of an individual could be taken into consideration.

803 BVerfGE 105, 279; Jeand'Heur/Korioth, *Grundzüge des Staatskirchenrechts* Rn. 130.

804 See Borowski, *Die Glaubens- und Gewissensfreiheit* pg. 450; Unruh, *Religionsverfassungsrecht*, Rn. 116; Classen. Borowski also provides a relatively detailed look at four similar cases decided by the Federal Administrative Court and one decided by the Federal Constitutional Court. *id.* at 450-456.

805 BVerfGE 105, 279 (299). It should be noted that the Court allowed elements of the warnings that did not characterize the groups as destructive, manipulative or pseudo-religious. For a critique of this ruling see Borowski, *Die Glaubens- und Gewissensfreiheit* pg. 456-461 where he argues that bringing in elements of defamation into the infringement was unnecessary and confusing. See also Classen, *Religionsrecht*, Rn. 187 where he also takes issue with the Court's use of defamation standards to create “a new category of infringement” that was unwarranted and unnecessary.

emphasize, either expressly or impliedly, that the protection of minority rights is a primary purpose of religious liberty, a purpose that under the right circumstances can override the competing purpose of providing individuals space to practice their beliefs.<sup>806</sup> Critics of this approach rank these two purposes in the opposite order. Nevertheless, it is quite clear from the debate over severity of infringements that religious liberty serves both of the aforementioned purposes, with the ranking of each being the main source of debate.

### 3. Factor Three: Constitutional Justifications for an Infringement

#### a. The Jurisprudence and its Broad Support

While the *Grundgesetz* (GG) does not expressly provide for any kind of restriction of Article 4 rights, it is undisputed in both the jurisprudence of the Federal Constitutional Court (BVerfG) and among commentators that at the very least religious liberty can be restricted when it conflicts with another constitutional right or value.<sup>807</sup> Very early on in its jurisprudence, the BVerfG made it equally clear that religious liberty, because of its historical importance, is one of the most cherished rights found in the *Grundgesetz*, and as such cannot be restricted by a general law, which does not aim to advance a constitutional right or principle.<sup>808</sup>

In those cases where constitutional rights or interests conflict with religious freedom rights, the principle of *praktische Konkordanz*, a theory championed by Konrad Hesse and eventually adopted by the BVerfG, is applied, and in so doing an attempt is made to find a compromise that seeks to protect both conflicting rights, and when that fails, engages in a balancing of the rights against one another. The basis of the principle is the so-called *schonender Ausgleich* (reasonable compromise) and this balancing of rights is not limited to religious freedom, having its origins in the *Mephisto* case where the competing rights involved human dignity (Article 1 GG) and artistic freedom found in Article 5.<sup>809</sup> The BVerfG has used *Konkordanz* in several of the cases that will be discussed in more detail in the final chapters of this work, as well as be addressed in several of the pages that follow.

While *Konkordanz* is relatively easy to apply when the case involves express rights found in the *Grundgesetz* (GG), more problematic are those cases that involve a

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806 A discussion about what constitutes “the right circumstances” can found in Chapter 8, Section B(2).

807 BVerfGE 33, 23, 29. See also BVerfG, 27.01.2015; 1 BvR 471/10, 1 BvR 1181/10, Rn. 98. Morlok, Art. 4 GG, in: Ed. Dreier, *Grundgesetz. Kommentar, Präambel, Artikel 1–19*, Bd. 1, 3rd ed., Rn. 131; Classen, *Religionsrecht*, Rn. 190. See also von Campenhausen, *Religionsfreiheit in Handbuch des Staatsrecht*, Isensee/Kirchoff (2009, Heidelberg) Rn. 105; Jarass/Piero, *GG Kommentar Art 4*. Rn. 27; Jarass/Piero, *GG Kommentar Art 4*. Rn. 126; Borowski, *Glaubens- und Gewissensfreiheit*, pg. 482; Morlok, Art. 4 GG, in: Ed. Dreier, *Grundgesetz. Kommentar, Präambel, Artikel 1–19*, Bd. 1, 3rd ed., Rn. 112.

808 BVerfGE 24, 236, 246. See also BVerfGE 32, 98, 107; 33, 23. (“Da die Glaubensfreiheit keinen Vorbehalt für den einfachen Gesetzgeber enthält, darf sie weder durch die allgemeine Rechtsordnung noch durch eine unbestimmte Klausel relativiert werden, welche ohne verfassungsrechtlichen Ansatzpunkt und ohne ausreichend: rechtsstaatliche Sicherung eine Gefährdung der für den Bestand der staatlichen Gemeinschaft notwendigen Güter genügen läßt. Vielmehr ist cm im Rahmen der Garantie \_der Glaubensfreiheit zu berücksichtigender Konflikt. nach Maßgabe der grundgesetzlichen Wertordnung und unter Berücksichtigung der Einheit der Verfassung zu lösen”)

809 BVerfGE 30, 173

conflict between religious rights and an interest representing the “order of values” found in the GG.<sup>810</sup> There is no debate that highest among these values is the protection of personhood, and any act that conflicts with this overriding value cannot be defended by claiming the act is motivated by religious beliefs<sup>811</sup>. Thus, a prisoner cannot seek protection under Article 4 after being disciplined for trying to bribe fellow inmates to abandon their religion, an act that was viewed by the court as attacking the personhood of his fellow inmates.<sup>812</sup> Nor may one claim an exemption from drug laws for cultivating and using drugs as part of a religious practice. According to the Federal Administrative Court (*Bundesverwaltungsgericht* or *BVerwG*) drug use in the form of an alleged religious practice interferes with the values represented in Article 2, Section 2 GG (the right to life and physical integrity) that serve as the basis for the anti-drug laws whose main purpose is to prevent drug addiction and other infringements on one's personal integrity due to drug usage.<sup>813</sup>

As the religious marijuana case illustrates, though, courts can get creative with defining conflicting rights for the purposes of limiting actions allegedly motivated by religious belief, so long as the restriction can be justified by the protection of “values found in the constitution.” In this light, Martin Borowski points out that while no one argues over whether religious rights may be restricted when they conflict with a third party right expressly found in the *Grundgesetz*, the BVerfG has invited restrictions of religious rights to be based on values implied in the *Grundgesetz*.<sup>814</sup> Borowski argues that so long as a general law has the purpose of protecting a “value” found in the *Grundgesetz* and is not aimed directly at restricting religious practices, it may restrict religious liberty when doing so is proportional to the interest being protected: a proportionality analysis similar to the one adopted by the court in *Lüth* when it interpreted the reach of the general restrictive clause found in Article 5 (freedom of expression) of the *Grundgesetz*.<sup>815</sup>

An example of this balancing involving implied rights can be seen in the aforementioned *Osho* case where the court allowed the state to characterize certain religious groups using arguably derogatory terms that were potentially in violation of the groups' Article 4 rights in order to advance the competing right of protecting the public, something the court deemed to be covered by the “values found in the

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810 BVerfGE 12, 1; See also BVerfGE 32, 98.

811 BVerfGE 12, 1 (“Aus dem Aufbau der grundrechtlichen Wertordnung, insbesondere der Würde der Person, ergibt sich, daß Mißbrauch namentlich dann vorliegt, wenn die Würde der Person anderer verletzt wird”). See also von Campenhausen, Religionsfreiheit in Handbuch des Staatsrecht, Isensee/Kirchoff (Heidelberg, 2009) Rn. 110

812 BVerfGE 12, 1.

813 NJW 2001, 1365, 1366, see also Morlok, Art. 4 GG, in: Ed. Dreier, Grundgesetz. Kommentar, Präambel, Artikel 1–19, Bd. 1, 3rd ed., Rn. 67.

814 BVerfGE 28, 243, 261 (“Nur kollidierende Grundrechte Dritter und andere mit Verfassungsrang ausgestattete Rechtswerte sind mit Rücksicht auf die Einheit der Verfassung und die von ihr geschützte gesamte Wertordnung ausnahmsweise imstande, auch uneinschränkbare Grundrechte in einzelnen Beziehungen zu begrenzen. Dabei auftretende Konflikte lassen sich nur lösen, indem ermittelt wird, welche Verfassungsbestimmung für die konkret zu entscheidende Frage das höhere Gewicht hat (BVerfGE 2, 1 [72 f.]). Die schwächere Norm darf nur so weit zurückgedrängt werden, wie das logisch und systematisch zwingend erscheint; ihr sachlicher Grundwertgehalt muß in jedem Fall respektiert werden.”)

815 Borowski, Glaubens- und Gewissensentsfreiheit, pg. 506; For a general discussion about *Lüth* in English see Bomhoff, *Lüth's 50th Anniversary: Some Comparative Observations on the German Foundations of Judicial Balancing*, 79 Yale Law Journal 2003 (2008)

constitution.”<sup>816</sup> The court came to a similar conclusion in the *Krankenhausaufnahme* (hospital admission) case where the state's interest in providing religious counseling in hospitals, as allowed by Article 141, was deemed sufficient enough to force a patient being admitted into the hospital to state his religious affiliation.<sup>817</sup>

Whether all general criminal laws represent the order of values contained in the *Grundgesetz* is also open for discussion. The BVerfG, in the *Gesundbeter* decision concerning the woman who refused a blood transfusion for religious reasons, seemed to imply that one might be excused from compliance with criminal law when doing so presents a concrete conflict with religious rights.<sup>818</sup> Some commentators have warned that taking the court's language literally and applying it too broadly is unwarranted and unwise, instead opting for a view that as a general matter religious liberty does not excuse one from compliance with general criminal laws.<sup>819</sup> Thus, while Article 4 lacks express limiting language, the BVerfG as well as an overwhelming majority of commentators, have concluded that the very nature of the *Grundgesetz* allows for the provisions contained within it as well as the values it serves to act as a potential limit on religious liberty.

#### b. The Debate Over the Need for General Restrictions

In the early 1990s, as the country was becoming more religiously diverse and the Constitutional Court was being confronted with the consequences of the broad scope of protection it had created in its Article 4 jurisprudence, a movement started to gel in academia seeking to place some limits on the exercise of religious liberty beyond those found in the *Grundgesetz* itself. Unlike Martin Borowski's view that general laws may restrict religious liberty so long as the law advances a constitutional value, this school of thought bases restrictions on language found in Article 136, Section 1 WRV requiring that actions taken with a religious purpose conform with so called “civic duties” (*bürgerlichen und staatsbürgerlichen Pflichten*).<sup>820</sup> In full, the clause states that “civil and political rights and duties shall be neither dependent upon nor restricted by the exercise of religious freedom,” and so the argument goes that one cannot be excused from civic duties (i.e. following the law) simply because the law might conflict with one's sense of religious freedom. So long as the state maintains its neutrality in enforcing a general law, it can be used to inadvertently restrict religious practices in accordance with proportionality principles,<sup>821</sup> again harking back to the language found

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816 BVerfGE 105, 279, 301.

817 BVerfGE 46, 266.

818 BVerfGE 32, 98, 108 (“Die sich aus Artikel 4 Abs. 1 GG ergebende Pflicht aller öffentlichen Gewalt, die ernste Glaubensüberzeugung in weitesten Grenzen zu respektieren, muß zu einem Zurückweichen des Strafrechts jedenfalls dann führen, wenn der konkrete Konflikt zwischen einer nach allgemeinen Anschauungen bestehenden Rechtspflicht und einem Glaubensgebot den Täter in eine seelische Bedrängnis bringt, der gegenüber die kriminelle Bestrafung, die ihn zum Rechtsbrecher stempelt, sich als eine übermäßige und daher seine Menschenwürde verletzende soziale Reaktion darstellen würde.”)

819 von Campenhausen, *Religionsfreiheit in Handbuch des Staatsrecht*, Isensee/Kirchhoff (Heidelberg, 2009) Rn. 79 (arguing that one cannot rely on religious freedom to excuse oneself from having to follow criminal laws). See also Starck, GG Art 4, Rn. 44.

820 See Heinig, *Herausforderungen des deutschen Staatskirchen- und Religionsrechts*, p. 131 and Sacksofsky, *Religiöse Freiheit als Gefahr*, VVDStRL 68 (2009) pg. 18, Fn 61 for a relatively extensive list of the scholars who set forth this argument.

821 Jarass/Pieroth, GG Kommentar Art 4. Rn. 28; Hillgruber, *Der deutsche Kulturstaat und der muslimische*

in the *Lüth* decision.

This debate is primarily driven by the view that Germany has become more religiously diverse, making rules created by the BVerfG during a time of religious homogeneity difficult to apply in today's religiously diverse setting and resulting in a threat to the legal order.<sup>822</sup> As such, the argument here mirrors those made in the scope phase of the Article 4 dogma.<sup>823</sup> Words such as “anarchy” and “creating a law of one,” are used to characterize the nature of the crisis, words that are almost identical to those used by Justice Scalia in his *Smith* opinion,<sup>824</sup> and words that clearly illustrate the frustration that many scholars have with the current situation of German religious liberty jurisprudence.

Because limiting the scope of protection has been met with such stiff resistance, advocates of this view believe that the only solution for taming the unwieldy religious liberty jurisprudence that has developed over the past several decades is to allow the state to more easily restrict practices that conflict with general laws and citizen obligations.<sup>825</sup> This debate has sharply divided the academic community, with opponents of using Article 136 WRV to restrict religious liberty warning that doing so will create a regime that either allows courts to narrow the scope of protection, or lawmakers to pass general laws that negatively impact, albeit indirectly, the ability to live one's life in accordance with their religious beliefs.<sup>826</sup>

The debate over whether Article 136 can be used to restrict Article 4 rights has focused primarily on two arguments that can be characterized by the adjectives systematic and originalist.<sup>827</sup> The systematic argument for allowing Article 136 to limit religious liberty focuses on relationship between Article 4 and the WRV provisions as interpreted by the BVerfG. If the WRV provisions, including Article 136, are indeed fully incorporated into and equal with the other provisions of the *Grundgesetz*, then these articles can

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Kulturimport, JZ 1999, pg. 543; Bock, Die Religionsfreiheit zwischen Skylla und Charybdis, AöR 123 (1998), 444, pg. 472); Muckel, Religiöse Freiheit, pg. 224-234. See also Classen, Religionsrecht, Rn. 198.

822 See Muckel, Religiöse Freiheit, pg. 1; Schoch, pg. 155-156 (arguing that by doing so the court created a theocratic inspired anarchy.); See also de Wall/Muckel, Kirchenrecht pg. 68; Waldhoff, die Zukunft des Staatskirchenrechts, in Essener Gsp. 2008, pg. 69; Kästner, Hypertrophie, pg. 975; Sacksofsky, Religiöse Freiheit als Gefahr, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer, 68 (2008) pg. 13; Bock, Die Religionsfreiheit zwischen Skylla und Charybdis, AöR, 1997 pg. 444.

823 See de Wall/Muckel, Kirchenrecht pg. 68; Waldhoff, die Zukunft des Staatskirchenrechts, in Essener Gsp. 2008, pg. 69; Kästner, Hypertrophie, pg. 975; Bock, Die Religionsfreiheit zwischen Skylla und Charybdis, AöR, 1997 pg. 446;

824 Schoch, Die Grundrechtsdogmatik pg. 155.

825 Kästner, Hypertrophie, pg. 975. (“Eine solche Entwicklung setzt einerseits die freiheitliche Offenheit der religiösen und weltanschaulichen Sphäre als solche Gefährdung aus und verstärkt in dieser Hinsicht das Bedürfnis nach Schutz; sie erhört gleichzeitig aber auch im Blick auf die legitimen Belange des Gemeinwesens in allgemeine Rechtsleben das Konfliktpotential religiöser und weltanschaulicher Phänomene und legt insofern die Frage nach den Grenzen freier Entfaltung nahe.”)

826 Heinig, Die Ordnung der Freiheit. Das Staatskirchenrecht vor neuen Herausforderungen, ZevKR 53 (2008), S. 238-239; Morlok, Art. 4 GG, in: Ed. Dreier, Grundgesetz. Kommentar, Präambel, Artikel 1–19, Bd. 1, 3rd ed., Rn. 41-154; Germann, Beck'scher Online-Kommentar GG Ed. Epping/Hillgruber (Stand 01.09.2014) Art. 4 Rn. 47.3.

827 A third argument concerning the teleological interpretation of Article 136 makes the claims that by characterizing the WRV articles as only pertaining to religious institutional rights, with any individual rights contained within them being replaced by principles found Article. 4 GG, the BVerfG has made Article 136, Section 1 WRV meaningless, and/or redundant. Thus, Article 136, Section 1 only has relevance if it is interpreted as a limitation. This argument, at least up to now, has fallen on deaf ears in the Federal Constitutional Court.

operate as a restriction on, as well as a compliment to, the rights found in Article 4.<sup>828</sup> Advocates of this view also point out that language in Article 137, Section 3 has been interpreted by the BVerfG to allow general laws to limit the Article 4 rights of religious entities, so in turn Article 136 must carry the same weight and be allowed to restrict individual religious rights. More importantly, though, is the harm done to the general legal order when Article 4 rights are interpreted to allow individuals, based upon their own subjective views of religion, to avoid having to comply with the law.<sup>829</sup> A related argument, the so-called originalist view, claims that the words in Article 136, as well as the historical development of religious liberty in general, seem to allow for a restriction based on general laws. Advocates of this view look beyond the Weimar Constitution (WRV) to the state constitutions whose provisions served as the basis for Article 136, and conclude that those provisions had two purposes: 1) prohibit religious discrimination by the state, and 2) clarify that religious practices or membership in a particular religion did not excuse one from complying with general laws.<sup>830</sup>

The counter-argument to this reading of the origin of Article 136 is best set forth by Hartmut Maurer who notes that Article 135 WRV (an article that was not incorporated into the *Grundgesetz*) contained the general restricting clauses on religious liberty, with the purpose of Article 136 being primarily to secure and guarantee religious liberty, and as such Article 136 should be seen solely as an anti-discrimination provision.<sup>831</sup> Furthermore, opponents of using Article 136 to restrict religious freedom point to the important place religion was given in a constitutional order that places special emphasis on the right to develop one's identity and personality, and for this reason reject any claim that the drafters intended this special right to be restricted via a general law.<sup>832</sup> Finally, the idea that Article 136 and Article 137 should be treated similarly overlooks the overriding purpose of each: Article 137 deals with institutions, while the concepts found in Article 136 WRV deal with individual rights and are aimed at promoting, not restricting, them.<sup>833</sup> To date, the Constitutional Court (BVerfG) has rejected the systematic argument that Article 136 allows for a general law restriction on religious liberty.

The debate over the originalist argument in favor of an Article 136 restriction has much in common with the debates that have taken place in the United States over the “true” meaning of the Establishment Clause. As with the various interpretations concerning the intent of the drafters of the United States Constitution, views vary regarding what the drafters of the *Grundgesetz* intended when they drafted Article 4 without a general

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828 deWall/Muckel, Kirchenrecht, Pg. 73, Muckel, Religiöse Freiheit, pg. 228

829 Kästner, Hypertrophie, pg. 982.

830 Borowski, Glaubens- und Gewissensfreiheit, pp. 489-495 (Borowski provides an extensive discussion as to the meaning and purpose of a clause that sought to make political rights and duties independent from religion.)

831 Maurer, Die Schranken der Religionsfreiheit, pg. 323. (arguing that Art. 136 WRV was primarily aimed at prohibiting discrimination in the form of privileging or impairing the rights of someone based on their religion, and was also aimed at ensuring that the state remained neutral toward religion.). See also Sacksofsky, Religiöse Freiheit als Gefahr, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer, 68 (2008) pg. 19; Morlok, Art. 4 GG, in: Ed. Dreier, Grundgesetz. Kommentar, Präambel, Artikel 1–19, Bd. 1, 3rd ed., Rn. 124.

832 See BVerfGE 24, 236 (245); 33, 23 (28); 41, 29 (49); BVerfG, 27.01.2015; 1 BvR 471/10, 1 BvR 1181/10 Rn. 85; Jeand'Heur/Korioth, Grundzüge des Staatskirchenrecht, Rn. 89; Maurer, Die Schranken der Religionsfreiheit, pg. 327; Heckel, Religionsfreiheit, pg. 671.

833 Maurer, die Schranken der Religionsfreiheit, pg. 328.

restrictive clause but left intact Article 136 WRV, with its language that seemingly opened the door to restrictions based on general laws. As at least one commentator has pointed out, this is primarily because advocates for one view or the other tend to cherry pick from the legislative history of the *Grundgesetz*.<sup>834</sup> The same kind of cherry picking we saw in the American law survey. At the outset, it can be said that the intention of the *Grundgesetz* drafters regarding Article 136, Section 1 is at best unclear, and legislative history shows that those in favor of Article 4 being placed into the *Grundgesetz* without language concerning limits by general law also acknowledged that the religious rights contained within would still be subject to the “framework of public policy” (*Rahmen der öffentlichen Ordnung*) and the limitations contained in Article 2, Section 1 concerning constitutional order and moral law.<sup>835</sup> While some make the claim that the drafters of the *Grundgesetz* intended to allow religious rights to be restricted via a general law,<sup>836</sup> others argue that even if the drafters did not intend to allow for general laws to limit religious liberty, they at least intended to allow the legislature to limit religious freedom via general laws advancing competing constitutional interest so long as the restriction is proportional to the competing interest at stake.<sup>837</sup> Opponents of these views, including the BVerfG, reject this and point out that there was already a limit on religious freedom by general law contained in the WRV (Article 135) and this was intentionally not incorporated into the constitution. According to this view, the removal of Article 135 from the provisions incorporated into the *Grundgesetz* indicates clearly that the drafters did not want religion to be limited by a general law.<sup>838</sup>

A further, and perhaps more convincing originalist argument against viewing Article 136 as a general law restriction focuses on the debate that took place in the *Grundsatzausschuss* (policy committee) on November 23, 1948, concerning the removal of any language regarding a general law restriction on religious liberty from the draft text of what would later become Article 4. The advocates of removing such language, a position that eventually carried the day, argued that the limiting clause in Article 2, Section 1 (stating that limits can be placed on actions that “violate the rights of others or offend against the constitutional order or the moral law”) was the only source of a limitation on religious liberty contained in the new constitution, thus eliminating the possibility of Article 136 WRV being used as a limiting clause.<sup>839</sup> Here both Harmut Maurer and Martin Borowski tell the same historical story, but reach slightly different conclusions regarding what kind of laws can restrict religious liberty.

834 Maurer, die Schranken der Religionsfreiheit, *Zeitschrift für evangelisches Kirchenrecht (ZevKR)* 2004, 311, 316

835 Muckel, Religiöse Freiheit, pg. 226. See also Hilgruber, *JZ* 1999, pg 535 (543); Muckel, Religionsfreiheit für Muslime in Deutschland, *Festschrift für Listl*, (Berlin, 1999) pg. 253.

836 See Bock, *AöR* 123 (1998) pg. 469

837 Borowski, Glaubens- und Gewissensfreiheit, pg. 503. (While Borowski seems to reject Art. 136 WRV as an express limitation on religious liberty, he characterizes the implied limitation under the BVerfG's theory of competing constitutional rights as one that ultimately allows the legislature to find a compromise that might in the end limit religious rights, and in doing so he reaches a similar conclusion as that reached by Muckel, namely that the clause can operate as a restriction so long as the law in question is neutral, not aimed at religious practices, and is proportional.). For a more in-depth discussion of the legislative history surrounding the exclusion of a restrictive clause in Art. 4 see Borowski, *Glaubens- und Gewissensfreiheit*, pg. 530-538

838 Walter, *Religionsverfassungsrecht*, pg. 515, Heinig, *Verfassung der Religion*, pg. 116; Morlok, Art. 4 GG, in: Ed. Dreier, *Grundgesetz. Kommentar, Präambel, Artikel 1–19*, Bd. 1, 3rd ed., Rn. 124; von Campenhausen, *Religionsfreiheit in Handbuch des Staatsrecht*, Isensee/Kirchoff (Heidelberg, 2009) Rn. 111; Classen, *Religionsrecht*, Rn. 194.

839 See Maurer, *Die Schranken der Religionsfreiheit*, pg. 318.

Borowski finds an implied restriction similar to the general restriction principles that have been developed by the BVerfG post-Lüth, while Maurer takes a more limited approach similar to that of the BVerfG, reading Art. 2 as the only source and rejecting the implied restrictions arguments. Nevertheless, after closely examining the history, both reject the argument that Art. 136 WRV provides for an express restriction of Art. 4 rights, a conclusion that most importantly is shared by the BVerfG.

Finally, and most importantly for comparative purposes, it cannot be stressed enough that advocates of interpreting Article 136, Section 1 WRV as a general law restriction on religious liberty do so in a manner that is far more narrow than that advocated in Justice Scalia's *Smith* decision. Similar to American jurisprudence on the issue of general law restrictions, proponents of an Article 136 WRV limitation unanimously agree that laws motivated by or aimed at curbing religious practice are unconstitutional.<sup>840</sup> However, unlike the general law restrictions found in the *Smith* decision, general laws that incidentally restrict Article 4 rights pursuant to Article 136, Section 1 would be subject to same kind of proportionality review to which other rights in the *Grundgesetz* with limiting clauses are subjected, namely the review set forth by the BVerfG in *Lüth* that rejects the premise that a general law can restrict a right for any reason, and instead requires the court to balance the right at stake against the interest being protected by the law.<sup>841</sup> Furthermore, the interest in question should be one that reflects or advances the spirit of principles found in the *Grundgesetz*. Thus, criminal law, as well as general laws concerning civil court process, civil service, employment and welfare could operate as an indirect restriction on religious practices so long as a court deemed the laws to be advancing an interest that outweighed the right protected under Article 4.<sup>842</sup> Again, the BVerfG, at least up now, has expressly resisted this idea, but even should they decide to adopt it, doing so would not result in the kind of general law restrictions that exist under U.S. jurisprudence where hardly no balancing of interests takes place, and general laws are simply allowed to inadvertently restrict religious practices.

### c. Preliminary Conclusions Regarding Justifications for Placing Limits on Religious Liberty

On the surface, this brief survey of step three of the Article 4 dogma tells us perhaps even less about the purposes served by religious liberty than the summary of the infringement prong, at least from a non-establishment perspective. This is primarily because the justification prong focuses on the circumstances under which government may restrict so-called positive individual religious freedom, an analysis that is much more similar to issues related to principles advanced by the Free Exercise Clause.<sup>843</sup>

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840 Muckel, *Religiöse Freiheit*, pg. 231-232; Jurass/Pieroth, *GG Kommentar*, Art. 4 Rn. 28

841 BVerfGE 7, 198. Muckel, *Religiöse Freiheit*, pg. 233; Jurass/Pieroth, *GG Kommentar*, Art. 4 Rn. 28; Heckel, *Religionsfreiheit*, pg. 756. To be clear, a balancing of sorts takes place in the American context when the Court uses the Rational Basis Test in such situations. However, this is hardly a true balancing as the state need only show a conceivable reason for enacting the law, a far lower standard than what is demanded under the Lüth analysis.

842 Bock, *Die Religionsfreiheit zwischen Skylla und Charybdis*, AöR, 1997 pg. 467; Starck in von Mangoldt/Klein/Starck, Art. 4 Abs. 1, 2 GG, Rn 52-66.

843 As should be clear by now, it is common for Americans to view the Establishment Clause as purely a limit on

Nevertheless, this survey of the final step in German religious liberty doctrine does provide us with an opportunity to make some further preliminary observations.

First, there is little doubt that advocates of a robust application of religious liberty in both jurisdictions view religious freedom as one of the most cherished rights in the litany of fundamental rights. Furthermore, when one explores the language used by at least some advocates of Article 136 WRV being read to contain a general restriction clause, especially comments concerning the homogeneity that existed in Germany during the formative years of the BVerfG's jurisprudence and Germany's the increasingly diverse society, one sees hints of where these jurists and commentators rank the protection of minority rights and advancement of pluralism among the various purposes served by religious liberty in general. While the protection of minority rights is important, it should never take priority over or interfere with the right of others to have space in which they too can exercise their religious freedom, the ability to exercise so-called positive rights. On the other hand, those opposing reading Art. 136 WRV as a general law limitation on religious liberty seem to place great emphasis on the non-discriminatory nature of the clause, illustrating where they place non-discrimination in the rank of purposes.

Second, a limitation scheme based solely on competing constitutional rights and principles seems more practical in a system whose constitution contains far more express fundamental rights, and in turn more language upon which to base government justification of restrictions. The religious marijuana case is illustrative of this. The German Federal Administrative Court had no problem finding a competing constitutional interest upon which the state could base its claim for restricting the alleged religious practice of smoking marijuana. However, Article 2's broad protection of "physical integrity" simply does not have a counter-part, either expressly or impliedly, in the American Constitution. As such, when faced with a similar issue, the U.S. Supreme Court was left with only general anti-drug laws on which to base a restriction of drug use as part of a religious practice. Whether the law advanced some underlying constitutional principle was not an issue in the case.

One aspect in particular of this discussion regarding justifications for limiting religious rights under Article 4 does seem to touch upon how non-establishment principles operate in Germany: the interplay between positive and negative religious freedom. What follows will bring to light what is perhaps the biggest difference regarding how these two jurisdictions deal with questions of religious liberty, and along with the final chapters of this overall work, will illustrate how non-establishment operates differently in the two countries under review.

### **C. When Competing Rights Collide: *Konkordanz***

The balancing of competing constitutional rights is a challenge for any constitutional court, and when the constitution is silent as to this question, as is the case with the *Grundgesetz*, the court itself is left to figure out how best to deal with this conundrum.

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government that can aid those seeking to exercise their negative religious freedom.

Very early on in its jurisprudence, the Federal Constitutional Court (BVerfG) adopted Konrad Hesse's version of *praktische Konkordanz*, which seeks to avoid hasty balancing and resolve conflicts in a manner where each of the conflicting rights can be optimally enjoyed without significantly infringing on the other (a so-called *schonender Ausgleich*).<sup>844</sup> Used almost exclusively in situations where the rights at issue stem from provisions of the *Grundgesetz* without a limiting clause,<sup>845</sup> this form of dispute resolution gives the legislature the task of finding the proper balance, but only once it can be shown that all other methods of dispute resolution between the conflicting rights have been exhausted.<sup>846</sup> While some have argued that it should only be used when the rights of citizens are in conflict in the public sphere (schools for example) but not when the rights holder is seeking protection from actions taken by the state,<sup>847</sup> the BVerfG has basically rejected this limited reading of its applicability and opted to use this dispute resolution technique broadly.

Viewing religious freedom as containing both negative and positive rights that must be respected by the state has predictability resulted in the frequent use of *praktische Konkordanz* by courts and commentators. This is especially true in cases concerning closed public settings (schools, prisons, courthouses, etc) that have individuals interacting with one another who potentially have competing religious rights, especially in light of the increased religious diversity in Germany over the past several decades. In these closed settings, where the state must at the same time both protect and promote religious liberty, it is little wonder that the use of *Konkordanz* has resulted in controversy and disagreement.

As a general matter the theory *praktische Konkordanz* is not a true balancing process, but rather begins with the premise that the competing rights at issue are of equal value; neither to be considered superior to the other.<sup>848</sup> Thus, in the realm of religious liberty, negative religious freedom rights are not seen as being superior to rights or interests based on positive religious freedom and vice versa. This command of “equal treatment” of rights has resulted in the development of a dogma whereby holders of negative rights are not per se protected from having to confront objectionable state expressions of religion, an idea based on another principle developed by the BVerfG, and advocated by an overwhelming majority of commentators, namely the *Toleranzgebot* (tolerance principle). This principle requires rights holders, as part of the give and take inherent in

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844 Marauhn/Ruppel, “Balancing Conflicting Human Rights: Konrad Hesse's Notion of “Praktische Konkordanz” and the German Federal Constitutional Court’ p. 279; von Campenhouse, Religionsfreiheit Rn. 137; deWall/Muckel, Kirchenrecht, pg. 67; Isensee, Menschenwürde: die säkulare Gesellschaft auf der Suche nach dem Absoluten, AöV, 131 (2006) pg. 175 Unruh, Religionsverfassungsrecht, Rn. 133.

845 Marauhn/Ruppel, “Balancing Conflicting Human Rights, pp. 282-284. (discussing how some view this in the context of a proportionality review.)

846 108 BVerfGE 282, 302; BVerfG, 27.01.2015; 1 BvR 471/10, 1 BvR 1181/10, Rn. 86.; Marauhn/Ruppel, “Balancing Conflicting Human Rights, p. 279.; von Campenhausen/de Wall, Staatskirchenrecht, pg. 75; Blanke, Religiöse Symbole in Staat und Gesellschaft, in Religion und Recht (Münster, 2014);

847 Jeand'Heur/Korioth, Grundzüge des Staatskirchenrecht, Rn. 116 (arguing that the cross case was wrongly framed as one involving competing rights, and rather it was a case where the state's actions infringed upon the rights of some students).

848 Marauhn/Ruppel, “Balancing Conflicting Human Rights, p. 281; Unruh, Religionsverfassungsrecht Rn 89; Jarass/Pieroth, GG Kommentar Art 4. Rn. 27a; von Campenhausen, Religionsfreiheit in Handbuch des Staatsrecht, Isensee/Kirchoff (2009, Heidelberg) Rn. 133; Bock, Die Religionsfreiheit zwischen Skylla und Charybdis, AöR, 1997 pg. 460.

the search for a compromise between competing rights, to tolerate some level of infringement on their own rights in order to accommodate the competing rights of another rights holder.<sup>849</sup> The *Toleranzgebot* is not without its critics, with some commentators arguing that it operates as a quasi-restriction on religious rights,<sup>850</sup> and others pointing out that tolerance in this sense does not demand members of minority religions to simply tolerate the dictates of the majority.<sup>851</sup>

In some respects the latter argument is correct as many advocates of *praktische Konkordanz*, including the BVerfG, also note that when the state provides room for individuals to exercise their positive religious (free exercise) rights in a state setting, it must at the same time ensure that the negative rights of minorities are also protected.<sup>852</sup> Squaring these two seemingly contradictory commands, keeping public space open for religious expression while at the same time protecting others from any coercion that might result from being confronted with such expression, has led some to question the relevance of the *Toleranzgebot*, especially in light of some of the BVerfG's more controversial decisions.<sup>853</sup> Nevertheless, the court continues to use the tolerance principle as a tool to assist with the balancing of rights required by the principle of *praktische Konkordanz*.<sup>854</sup>

In extreme Article 4 cases *praktische Konkordanz* has on occasion operated in a manner that seeks to protect minorities, as is the case when individuals have been confronted with unwanted religious symbols with no meaningful opportunity to avoid them, especially in the aforementioned closed public settings.<sup>855</sup> However, despite the protection of minority rights playing an increasingly important role in this analysis, rarely does the application of this principle result in a court-enforced bar on state-sanctioned religious expression or acknowledgment in a public forum; the court rather leaving it up to the legislature to find a solution that protects minorities while also protecting the positive religious rights of others.<sup>856</sup> As we shall see in the final chapters of this work, the BVerfG has viewed itself as the ultimate safeguard for ensuring that *praktische Konkordanz* is undertaken in a manner that does not result in a right (be it negative or positive) being disproportionately favored at the expense of a competing right, an exercise that obviously is not without controversy and provides us with fertile ground for comparison with controversial American religious freedom cases.

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849 Most recently BVerfG, 27.01.2015; 1 BvR 471/10, 1 BvR 1181/10 Rn. 98; Badura, GG Art. 7, Rn. 17 in Maunz/Dürig Grundgesetz-Kommentar 2011; Jeand'Heur/Korioth, Grundzüge des Staatskirchenrecht, Rn. 116; Starck in Mangoldt/Klein/Starck, Art. 4 Abs. 1, 2 GG, Rn 31.

850 Anger, Islam in der Schule: Rechtliche Wirkungen der Religionsfreiheit und der Gewissensfreiheit sowie des Staatskirchenrechts im öffentlichen Schulwesen, pg. 114 (Berlin, 2003)

851 Morlok, Art. 4 GG, in: Ed. Dreier, Grundgesetz. Kommentar, Präambel, Artikel 1–19, Bd. 1, 3rd ed., Rn. 137; Jeand'Heur/Korioth, Grundzüge des Staatskirchenrecht, Rn. 116

852 Morlok, Art. 4 GG, in: Ed. Dreier, Grundgesetz. Kommentar, Präambel, Artikel 1–19, Bd. 1, 3rd ed., Rn. 168

853 Ladeur/Augsberg, Toleranz, Religion, Recht, pg. 109 (Tübingen, 2007).

854 BVerfG, 27.01.2015; 1 BvR 471/10, 1 BvR 1181/10 Rn. 98

855 Morlok, Art. 4 GG, in: Ed. Dreier, Grundgesetz. Kommentar, Präambel, Artikel 1–19, Bd. 1, 3rd ed., Rn. 128.

856 Thus, the Court refused to issue a broad ban on teachers wearing religious clothing, but left open the possibility for the legislature to issue such a ban if it was deemed justified by competing constitutional values. The Court has also required crosses to be removed from classrooms when an objection to its presence is lodged, but left the door open for the cross to remain in the classroom should no such objection exist. In short, unlike the U.S. Supreme Court, the BVerfG has been reluctant to hold that the *Grundgesetz* requires broad bans on religious expression in public forums. This has been deemed as judicial self-restraint by at least one commentator. See Marauhn/Ruppel, "Balancing Conflicting Human Rights, p. 293.

#### **D. The Special Relationship Between Church and State Permitted by the WRV Articles**

Before comparing these controversial cases in more detail, it is worth noting that many of the disputes arising in the United States concerning the application of non-establishment principles simply do not exist in Germany. This is due in large part to the special relationship between church and state that is the product of a long and varied relationship between the two entities dating back to the fall of the Romans. A relationship that was also more recently enshrined in the WRV Articles and later incorporated into the *Grundgesetz*. These articles set forth the permissive contours of the “cooperative” relationship between church and state that exists in Germany. Furthermore, they by in large deal with institutional relationships rather than individual rights. With that said, Article 136 is devoted to shielding individuals from losing their individual civil and political rights due their religion as well as preventing the government from compelling people to divulge their religious affiliation or engage in any religious acts. In many respects this article adds to the religious liberty guaranteed under Article 4.

However, the bulk of the articles set forth a detailed list of institutional rights enjoyed by religious entities and provide guidelines concerning how these entities are to interact with the state. While Article 137 begins with the words “there shall be no state church,” the remainder of the provisions specify the various rights and privileges that shall be enjoyed by religious societies, associations and “corporations under public law.” Here we see that once a religious group attains the status of public corporation, it has the right to use the machinery of the state to levy taxes on its members; something that would be unthinkable in the United States. Here we also find provisions related to the right of self-administration, a concept that, as will be illustrated in the pages that follow, most certainly is based on non-establishment principles. Additionally, these same religious entities are given the task of working with the state to provide the religious courses in state schools mandated by Article 7 of the *Grundgesetz*. From an American perspective, many of these rights and protections for religious entities raise significant non-establishment issues in that they specifically allow certain relationships to exist between church and state that would likely be rejected by an overwhelming number of American jurists and academics.<sup>857</sup> Here we see the role of history having its largest influence, and it is the institutional relationship created by these provisions that results in observers sometimes arguing that there is a large gulf between how Americans and Germans approach questions of religion.

The remainder of this work will be devoted to showing how, when it comes to individual rights, this gulf is not always so vast. But before doing so, it is worth noting that there are some interesting parallels in how courts in these two jurisdictions have approached questions involving the relationship between church and state, despite the extremely different manner in which the constitutions of each address this relationship.

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857 Using the machinery of the state to tax members of religious entities and allowing specific religious doctrines to be taught in schools at the expensive of the state are two that come to mind.

Over the next several pages two examples will be used to illustrate how despite the existence of extensive provisions dealing with church/state relations in Germany, as compared to the United States where only have the words “congress shall make no law regarding the establishment of religion” touch on this relationship, courts in both countries sometimes take similar approaches when faced with defining the appropriateness of church/state interactions. The idea here is not to show some kind of convergence, rather it is to illustrate how, even when working within an entirely different church/state regime, courts in these two jurisdictions sometimes treat non-establishment issues related to institutional church/state relations in a similar manner.

## 1. Church Autonomy/Intra-Church Disputes

The idea of allowing churches to deal with their own internal business has deep roots in both systems, and is based on the concept of keeping the two spheres of religion and state separate. From the American perspective, as we saw in Chapter 3, by the time of the Revolution a near consensus had formed that at the very least religious freedom in the new nation must be based on the principle of an independent church.<sup>858</sup> In Germany, on the other hand, a consensus regarding church independence took a bit longer to develop and finally attained constitutional status with the ratification of the Weimar Constitution, which ended once and for all state domination of the church.

In a series of cases stretching over a twenty year period, the German Federal Constitutional Court (BVerfG) established a robust separation between church and state, at least from an institutional perspective. In 1965 German courts were asked to assist with a dispute over the division of a regional Lutheran congregation into smaller parts. Affected members of the church sought to stop the separation with the assistance of the courts. Rejecting this request for assistance, the BVerfG held that Article 137, Sections 1 and 3 WRV<sup>859</sup> give religious entities the right to organize and administer themselves and as such prohibits the Court from interfering with intra-church affairs.<sup>860</sup> Eleven years later the Court was asked to weigh in on the propriety of a Lutheran Church rule requiring church employees to take a leave of absence upon being elected to public office. Once again the BVerfG refused to interfere with an internal church decision, noting that while the German principle of church/state separation allowed for the church and state to cooperate with one another, the foundation of this cooperation is the idea that each must be independent from and equal with the other.<sup>861</sup>

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858 For a somewhat different view on the historical relationship between church and state in the United States see Barringer, *The First Disestablishment: Limits on church power and property before the civil war*, 162 *Penn. Law Review* 307 (2014).

859 Article 137, Section 1 says “there shall be no state church” and Section 3 says “[r]eligious societies shall regulate and administer their affairs independently within the limits of the law that applies to all.”

860 NJW 1965, 961. It should be noted that American courts have traditionally dealt with factually similar disputes in a different manner, although for reasons to be discussed in the following pages, that trend might be reversing itself. See Ellman, *Driven from the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 *Calif. L. Rev.* 1378, 1382-83, 1410-12 (1981) (arguing that courts should ignore their traditional dispute-resolution responsibility when dealing with church disputes); Gerstenblith, *Civil Resolution of Property Disputes Among Religious Organizations*, 39 *Am. U.L. Rev.* 513, 515 (1990) (arguing that there are strong public policy justifications for courts to involve themselves in civil law disputes).

861 BVerfGE 42, 312, 330. (Article 137, Section 3 WRV being the primary source of church independence).

Whether this now well established church independence would protect religious institutions from the reach of general laws was the central focus of a series of cases decided between 1977 and 1986. At issue was language in Article 137, Section 3 WRV stating that the church's self organization and administration rights are subject to “the law that applies to all.” Once again citing the importance of church independence, the Court held that laws requiring the creation of workers' councils in the workplace did not apply to religiously affiliated institutions<sup>862</sup>, nor could state laws seeking to make hospitals more efficient be applied to staffing decisions of religiously affiliated hospitals<sup>863</sup>. Furthermore, unions seeking to unionize the workforce in religiously affiliated institutions were told by the Court that the right to form unions did not extend to such institutions<sup>864</sup>, and workers were told that laws protecting the rights of workers in the workplace also could not reach into the religiously affiliated workplace.<sup>865</sup> Even laws requiring employers to offer apprenticeship places were deemed not to apply to religiously affiliated institutions.<sup>866</sup>

Supreme Court precedent regarding church independence is not as well developed as, but is arguably moving in the direction of, German jurisprudence. These cases are increasingly using non-establishment principles as guideposts for defining the proper relationship between the state and religious institutions.<sup>867</sup> If non-establishment stands for any proposition, it stands for the idea that the government should stay out of the internal affairs of the church, and the best way to achieve that goal is to treat both as two separate and distinct spheres. Despite the idea of institutional separation being ingrained in the American version of religious liberty almost since its founding, it has generally been assumed that this right stems from the Free Exercise Clause.<sup>868</sup> As the Court in *Kedroff* stated, referring to its prior decision in *Watson v. Jones* that was based on common law principles:

“The opinion (*Watson v. Jones*) radiates, however, a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as a part of the **free exercise of religion** against state interference.” (emphasis added)

However, the reasoning of the Court in these earlier cases is more consistent with modern Establishment Clause jurisprudence in that the purpose being served here is to

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862 BVerfGE 46, 73, 85 (holding that Article 137, Section 3's right to self administer applied equally to religiously affiliated organizations who were advancing the goals of the religion).

863 BVerfGE 53, 366; (But see the dissenting opinion in this case arguing that religiously affiliated organizations should have to comply with religiously neutral laws.) BVerfGE 53, 366, 412.

864 BVerfGE 57, 220.

865 BVerfGE 70, 138

866 BVerfGE 72, 278 (arguing that such a law impacted staffing decisions, which as an earlier decision had noted, were part of the self-administration rights found under Art. 137, Ab. 3 WRV).

867 Academics have been arguing for decades that the Establishment Clause limits the ability of courts to involve themselves in internal church matters. See Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 *Iowa L. Rev.* 1, 5-6, 75 (1998); Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 *Notre Dame L. Rev.* 837, 851-52 (2009); Koppelman, *The Troublesome Religious Roots of Religious Neutrality*, 84 *Notre Dame L. Rev.* 865, 869 (2009).

868 *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952)

separate the two spheres in order to allow for church autonomy, a purpose served, at least partially, by the Establishment Clause according to later courts. For instance, in *Schempp* Justice Brennan notes that:

“One line of decisions derives from contests for control of a church property or other internal ecclesiastical disputes. This line has settled the proposition that in order to give effect to the First Amendment's purpose of requiring on the part of all organs of government a strict neutrality toward theological questions, courts should not undertake to decide such questions. These principles were first expounded in the case of *Watson v. Jones*, 13 Wall. 679, 20 L.Ed. 666, which declared that judicial intervention in such a controversy would open up ‘the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination \* \* \*.’ 13 Wall., at 733. Courts above all must be neutral, for ‘(t)he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.”

While it could be argued that Justice Brennan took this language from *Kedroff* out of context, recently the United States Supreme Court seemed to endorse his view that non-establishment principles also serve the purpose of keeping the church independent from the state. In the *Hosanna-Tabor* case the Court was faced with the question of whether anti-discrimination laws can be applied to churches, marking the Court's first foray into this area of church/state law in many decades. Creating a narrow holding that for the time being seems to be limited to staffing decisions of the church, the Court noted that “[b]oth Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.”<sup>869</sup> *Hosanna-Tabor* raises the question of whether the Court might be moving in a direction similar to where the BVerfG has been going for decades, namely churches and their affiliated entities have the right to administer themselves and should be free from state interference in order to best fulfill their religious missions.

As is clear from these cases, the BVerfG has taken the mandate of church independence found in Article 137 of the Weimar Constitution quite seriously, and in doing so has guaranteed that the state cannot interfere with internal church decisions, which, as the United States Supreme Court recently noted, is at least partially due to the application of non-establishment principles. The obvious difference between the two jurisdictions is the existence of the WRV provisions which expressly set the parameters of the institutional relationship between church and state. These provisions are an example non-establishment principles that are expressly found in the *Grundgesetz* and applied in a manner no different than Supreme Court has applied them. As was noted at the outset of this short overview, despite the different language found in each constitution regarding this relationship, both courts seem to be heading in the same direction when it comes to church autonomy, and both seem to believe that non-establishment principles, whether express or implied, play a role in defining the scope of this autonomy.<sup>870</sup>

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869 132 S.Ct. 694, 703 (2012)

870 For a discussion on the possible impact of the *Hosanna-Tabor* case see Cordes, *The First Amendment and Religion After Hosanna-Tabor*, 41 *Hastings Law Quarterly* 299 (2014);

## 2. Sunday Closing Laws

Article 139 WRV of the *Grundgesetz* expressly sets forth Sunday as a day of rest from work and for spiritual improvement. The U.S. Constitution, on the other hand, makes no mention of a day of rest. Despite this, the two highest courts in both systems have taken surprisingly similar approaches to answering questions concerning the propriety of having a day rest on the holiest day of a particular religion.

Because the German Constitution expressly sets aside Sunday as a day of rest<sup>871</sup>, the cases before the BVerfG dealing with this issue are framed somewhat differently than they are in the United States, but the conclusions reached by the court are at times remarkably similar to those reached by the U.S. Supreme Court. On several occasions the Constitutional Court has been asked to review laws that allow some businesses to remain open on this constitutionally mandated day of rest or allow all businesses to open on select Sundays. Concerning the latter, the Court's most detailed analysis of Sunday Closing Laws can be found in its so-called “*Adventssonntage Berlin*” decision from 2009.<sup>872</sup> At issue was a Berlin law allowing stores to have opening hours on ten Sundays each year, including the four Advent Sundays before Christmas. The challenge to the law was based squarely on Article 4 GG and Article 139 WRV.

The Court began by noting that Article 4 GG was not merely intended to allow individuals to defend themselves from state interference with their religious rights, but also contained a “positive right” that, together with Article 139 WRV, required the state to protect Sunday as a day of rest, both for its original purpose of allowing Christians to worship (Art. 4 GG), but also and more importantly for the modern purpose of allowing workers the chance to mentally and physically rejuvenate after a long work week, advancing other constitutional principles found in the *Grundgesetz*: the right to physical integrity (Art. 2, Abs 2), the protection of the family (Art. 6, Abs1), as well as associational rights (Art. 9, Abs 1).<sup>873</sup>

The narrower question of whether having Sunday as a day of rest violates state neutrality toward religion was quickly dealt with by the court when it noted that Article 139 WRV specifically provided for Sunday to be the day of rest, and further that the idea of a day of rest had taken on new dimensions beyond simply advancing religion, and thus any preference of religion that might have existed was now secondary.<sup>874</sup> In doing so, the Court acknowledged that there were potential non-establishment issues

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871 Although it should be noted that federal shop closing laws, which regulate opening hours generally, have been challenged on several occasions. In 1956 the BVerfG rejected both federalism and interference with personal freedom claims challenging the federal government's ability to force store owners to close early on Saturday afternoons. (see BVerfGE 13, 230 - Ladenschlußgesetz I). Five years later it also rejected a challenge to these closing laws based on equality claims, Art. 3 GG. (see BVerfGE 13, 237 - Ladenschlußgesetz II). Finally in 2004 the court rejected claims based on professional freedom, this time relying specifically on Art. 139 WRV. In this case the Court also addressed in a cursory fashion the propriety of setting aside Sunday as a day of rest. The Court went into more detail concerning this aspect in its 2009 decision concerning Berlin's shop closing law, discussed in more detail in this chapter.

872 BVerfGE 125, 39

873 BVerfGE 125, 39 (82)

874 BVerfGE 125, 39 (84)

involved in the case because of the Court's earlier state neutrality jurisprudence, however, the existence of Article 139 WRV negated this concern. Ultimately, the Court ruled that Article 139 WRV created at a minimum a protection for worker's "synchronicity" whereby Sundays were to be deemed as a general rule the day of rest with limited exceptions being allowed as long as this "synchronicity" was not disturbed.<sup>875</sup>

In the United States, the question of whether the state violates non-establishment principles by mandating that Sunday be recognized as a day of rest is framed differently primarily because: 1) establishing Sunday as a day of rest is nowhere to be found in the United States Constitution, and 2) as non-establishment principles began to take form, more doubt was raised as to the propriety of such laws. Keeping in mind that modern Establishment Clause jurisprudence begins in the 1940s, it is unremarkable that the long history of Sunday Closing Law jurisprudence in the United States is dominated by state court decisions applying state constitutional law.<sup>876</sup> At the time of the Court's first Sunday Closing Law case, over 40 states had comprehensive laws related to what kinds of business could be conducted on Sundays.<sup>877</sup> Thus, when the U.S. Supreme Court first dealt with Sunday Closing Laws in the context of the religion clauses of the U.S. Constitution, it was faced with a rich history of Sunday being a day of rest and accepted as such by most state courts.

The Court's first foray into the Sunday Closing Law debate involved two separate challenges, each based on only one of the two religion clauses. In *McGowan*, the Court quickly dispatched with the claim that the Sunday Closing Laws gave an unconstitutional preference to religion, especially Christianity, when it found that the modern purpose of the law was no longer substantially religious in nature, and thus, did not pose any Establishment Clause problems.<sup>878</sup> In his dissent, Justice Douglas made a forceful argument that the Court was ignoring a primary purpose of the Clause, namely the protection of minorities such as the Jewish businessmen bringing this claim.<sup>879</sup>

"The First Amendment commands government to have no interest in theology or ritual; it admonishes government to be interested in allowing religious freedom to flourish—whether the result is to produce Catholics, Jews, or Protestants, or to turn the people toward the path of Buddha, or to end in a predominantly Moslem nation, or to produce in the long run atheists or agnostics. On matters of this kind government must be neutral."<sup>880</sup>

The second case raised the question of whether observant Jews religiously required to close their business on the Jewish holy day (Saturday), and then again on the state-sanctioned "day of rest" of Sunday were unconstitutionally placed in the difficult situation of, for business reasons, having to work on their religion's day of rest or suffer a disadvantage compared to competing businesses. Starting with the basic principle that

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875 BVerfGE 125, 39 (82)

876 The history is recited at length in the opinion of the Court in *McGowan v. Maryland*, 366 U.S. 420, 431-40 (1961), and in Justice Frankfurter's concurrence. *Id.* at 459, 470-551 and appendix.

877 366 U.S. 420, 435.

878 366 U.S. 420, 444 (1961) (The Court also rejected a claim based on the Equal Protection Clause because some businesses were exempt from the mandatory closing law, see pg. 426-428)

879 366 U.S. at 561.

880 366 U.S. at 565.

“the freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions. . . .”<sup>881</sup> the Court concluded that as the law was not motivated by a desire to restrict religious practice; the incidental burden on such practices was in accordance with the Free Exercise Clause.<sup>882</sup>

As a matter of constitutional non-establishment principles, it can be said that the Supreme Court has consistently rejected the idea that states are barred by the Establishment Clause from setting aside Sunday as a day of rest. Even in instances where such laws create a disadvantage for members of minority religions, the Court, by holding that these laws advance a secular interest, has been unwilling to strike these laws down as a matter of constitutional law. With that said, Sunday Closing Laws are rare today. No state has a law on its books requiring businesses to completely close on Sunday, while some, like North Dakota, restrict opening hours of businesses on Sunday.<sup>883</sup> Furthermore, federal civil rights laws have stepped in to provide members of minority religions protection from being discriminated against for refusing to work on their religion's own day of rest.<sup>884</sup>

Nevertheless, as can be seen in these two examples despite not having express constitutional provisions on which to rely, the Supreme Court has sometimes reached similar conclusions as the BVerfG when dealing with factually similar questions related to church/state questions. In the church independence cases, the BVerfG was able to rely on specific provisions of the *Grundgesetz* in a manner that American jurists would say involved the application of non-establishment principles. In the Sunday Closing Law cases, we saw both courts place a particular emphasis on how the laws developed in a way that today promote non-religious objectives, with the religious objectives being now secondary and incidental,<sup>885</sup> in order to avoid non-establishment questions. Thus, even though the countries clearly have different rules concerning how church and state may interact, there are times when its courts seem to consider non-establishment questions in a similar manner to disputes involving this relationship.

### **E. Conclusions: Non-Establishment Principles in the German Doctrine**

At the outset of these country surveys, we saw that the modern trend in American jurisprudence and among commentators is to treat concepts of free exercise of religion and questions concerning non-establishment principles separately. For purposes of comparison, conclusions here and at the very end of this work will do the same.

While not the main focus of this work, it is worth noting that from a purely free

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881 *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961).

882 366 U.S. at 607. See Robbers, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Germany*, 19 *Emory Law Review* 841, 855 (2005) (arguing that this would also be the result under Article 4 GG in conjunction with Article 139 WRV).

883 See N.D.C.C. CH. 12.1-30. It should also be noted that there are municipal laws throughout the country that restrict opening hours on Sunday.

884 See Section 702(a) of Title VII, 42 U.S.C. Sec. 2000e-1(a)

885 See Weber, *Religionsfreiheit in der westlichen Welt*, in *Religionsfriede als Voraussetzung für den Weltfrieden*, Ed. Kröger (Osnabrück, 2000) pg. 94 (making a similar comparison between Supreme Court of Canada and German Federal Administrative Court decisions).

exercise perspective the differences between Germany and the United States, at least post-*Smith*, are striking. Both jurisdictions treat the right to believe as being absolutely protected, however, the similarities, at least in the jurisprudence, end there.<sup>886</sup> According to the Supreme Court in *Smith*, the state may act, through a generally applicable and neutral law, in a way that forces people to act or forgo acting in a manner that conflicts with their religious beliefs. Whether these general laws are advancing an underlying constitutional principle is simply not a consideration. The BVerfG, on the other hand, has said that the purpose of the religious freedom rights found Article 4 GG is to allow individuals to fully develop their religious beliefs; to act and express themselves in a manner fully consistent with their inner convictions of their faith without state interference, except in those circumstances where these rights come into conflict with competing constitutional principles. Even religiously neutral practices enjoy this protection. This simple summary of the black letter law in each jurisdiction illustrates the wide gulf that exists between how each view the breadth of religious liberty from the free exercise perspective. By closely linking the right to hold a religious belief with the right to express and act in accordance with those beliefs, the BVerfG has made it quite difficult for the state to restrict religious expressions and practices.<sup>887</sup> Furthermore, by adopting the position that generally applicable laws may indirectly restrict religious expressions or actions only when advancing a competing constitutional principle, the BVerfG has raised yet another hurdle for the state to clear its laws indirectly restrict the free exercise of religion. It is certainly then no exaggeration to say that from the German perspective, protecting the right to believe and act on those beliefs ranks as one of the primary purposes of religious freedom.

A more difficult task, even after setting forth the above summary of German religious liberty doctrine, is to identify non-establishment principles in Germany, as well as the purposes these principles aim to serve. Nevertheless, there are traces of these principles in the above survey, traces that will become much more clear in the final chapters of this work. At this point, though, one can make out the faint outlines of principles in German jurisprudence that look suspiciously similar to the non-establishment principles that have evolved and been debated in the United States.

First and foremost, it is absolutely clear that the German version of religious liberty has rejected the idea of a state established religion, a core non-establishment principle. It is also clear that the religious freedom found in Article 4, as well as several of the WRV provisions, envisions the kind of separation between church and state that creates an independent church and guards against the state being too heavily influenced by any particular religion. To be sure the separation required under German non-establishment principles comes no where near approaching that which is demanded by American jurists and commentators who advocate for a robust interpretation of the Establishment Clause, but the German version finds a sympathetic audience among American accommodationists who advocate for a tamer, more religion-friendly version of

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886 Reaching a similar conclusion see Eberle, Free Exercise of Religion in Germany and the United States, 78 *Tulane Law Review* 1023 (2003).

887 It should be noted that from the perspective of religious expression, one could argue that the American courts have also expanded this right considerably by using the expressive rights found in the free speech clause of the First Amendment, a right that the court has never suggested could be restricted by a simple general law.

separation.

Non-establishment principles can also be seen in the German version of the no preference principle that serves the purpose of ensuring equality among religions and prohibiting discrimination, which taken together operate to protect minority rights. Furthermore, the German state is encouraged to take actions that will promote peace among people of different religions and ensure that individuals of all religious persuasions are made to feel at home in Germany, concepts that are also considered to fall under the non-establishment umbrella. Finally, while the German conception of positive religious freedom brings to mind American Free Exercise Clause principles, it's the concept of negative religious freedom that contains many similarities to the non-establishment principles used in the United States to protect individuals from improper government coercion in matters pertaining to religion.

In the final chapters that follow, these non-establishment principles, as they are applied in Germany, will be brought to life by comparing factually similar cases that have been heard by courts in both jurisdictions. Through this comparison, we will not only see more clearly which of these non-establishment principles are truly the aim of religious freedom protections in Germany, but we will also be able to highlight the differences in how these principles are applied to similar situations, and most importantly, be able to identify reasons for the differing applications.

## Chapter 7: Government Acknowledgment of Religion in the Institutional Public Sphere

### A. Introduction: Passive and Active Acknowledgment in Spheres, Squares and Forums

The survey undertaken in Chapters 5 and 6 illustrated that at least to some extent principles normally associated with the Establishment Clause in the United States are also present in German religious liberty doctrine. In many instances the neutrality mandate implied in several provisions of the *Grundgesetz* play a similar role as the non-establishment principles developed by the United States Supreme Court's interpretations of the Establishment Clause. Without a doubt, the survey illustrated some of the divergences between the two systems, however arguably many of these differences are primarily based on express provisions in the *Grundgesetz* that run counter to long held beliefs in the United States,<sup>888</sup> many of which can be linked to the historical developments discussed in the first several chapters of this work.<sup>889</sup>

With the discussion that follows concerning government acknowledgment of religion in the public sphere,<sup>890</sup> we begin to see how each jurisdiction has struggled to set the boundaries on state actions that recognize religion. Here we will see some stark differences and disagreements in the jurisprudence, not only between Germany and the United States, but more importantly among jurists and commentators within each jurisdiction.<sup>891</sup> It will be shown that schools of thought have developed in each country with striking similarities as well as differences emanating from views regarding to what extent non-establishment principles may limit government action. This chapter is the first of three that will explore how these similarities and differences impact the manner in which courts and commentators treat non-establishment principles in the overall scheme of religious liberty.

To achieve these goals two additional factors will be used for comparison purposes;

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888 For instance, even most accommodationists in the United States would balk at having the state help churches fund themselves via the tax system.

889 In addition to these historical differences, others have argued that there are fundamental differences in how Americans and Europeans view the role of the church within the society, the "American model" viewing religious entities as "voluntary associations that must compete in a free religious market, while the "European model" views religious entities as 'public utilities' that provide a kind of religious infrastructure for the nation as a whole. For a fuller discussion on these views see Movsesian, Crosses and Culture: State-Sponsored Religious Displays in the US and Europe, 6 Oxford Journal of Law and Religion 1, 3 (2012). (He also provides a short of summary of the historical development of this view in the United States.)

890 Perhaps the best way to describe these cases was set forth by Justice Scalia in his *McCreary County* dissent where he called them cases "dealing with public acknowledgment of religion." 545 U.S. 844, 893 ((2005). This state acknowledgment of religion has been dealt with on both sides of the Atlantic as one involving the state's self expression (*Selbstdarstellung*) or as Americans like to say "government speech." For a discussion on state acknowledgment of religion being a kind of state self expression see Böckenförde, Kreuze (Kruzifixe) in Gerichtssälen? ZevKR 20/119 (1975). (Where he notes that state self-expression implies that the message is being heard by citizens; "Nur vor einem Publikum kann von staatlicher Selbstdarstellung die Rede sein.")

891 For a discussion on how the sharp divisions in American jurisprudence regarding these questions has resulted in a great deal of confusion among lower court judges see Janssen, "Led Blindly: One Circuit's Struggle to Faithfully Apply the US Supreme Court's Religious Symbols Constitutional Analysis," 116 West Virginia Law Review 33 (2013); For a comprehensive list of commentary in the United States see Gedicks/Annicchino, Cross, crucifix, culture: an approach to the constitutional meaning of confessional symbols, 13 First Amendment Law Review 71, 78 (2014) Fn. 10.

factors that seem to be more prevalent in the types of cases that are being compared in the next three chapters. These factors look at the type of public sphere in which the government acknowledgment of religion is taking place, as well as the nature of the relationship between the government and the religious message expressed by these government actions. The first part of this chapter will seek to clarify these two factors, while the majority of the chapter, and the one that immediately follows, will be devoted to comparing factually similar cases from Germany and the United States dealing with government acknowledgment of religion in the so-called institutional public forum.

## 1. Walls, Spheres, Squares and Forums

Beginning with the *Everson* decision, and expanded by several decisions in 1960s, the entities of church and state in America were seen to be separated by a “wall” that protected each from the other. The discussion of a “wall separating church and state” was the dominate theme of most Establishment Clause jurisprudence from the late 1960s to the late 1970s, and the term still has a place in the modern American lexicon. From the very beginning of its use, this metaphor has been the source of heated discourse among members of the Court and academia alike, often descending into debates about the height and impervious nature of the “wall.”

Somewhat recently, the wall metaphor has come under attack on two fronts. The first front concerns government funding of religious activity, which was the focus of the discussion in Chapter 5 concerning principles of neutrality. There we saw that the wall was dismantled by redefining neutrality to mean equal treatment of religion by government rather than a strict separation of state and religion. The second front is the focus of this part, namely how government may recognize religion on its property.<sup>892</sup> Advocates of a more open church/state relationship have sought to convince the Court that these “public sphere” cases involve different issues than those concerning government funding or government acting in a religious manner. As was illustrated in Chapter 5, this attempt to carve out of a new category of church/state cases has resulted in efforts to replace doctrine created in the late 1960s and early 1970s, specifically the so-called Lemon Test, with doctrine that is, according to its advocates, more suited to the non-establishment questions in these “public sphere” cases. To be sure the movement toward treating these so-called public sphere cases in a separate and distinct manner has not brought more clarity to American religious liberty jurisprudence, as the idea of a “public sphere” also opens itself up to various interpretations which are sometimes shaped by historical and cultural factors.<sup>893</sup>

As was seen in Chapters 2 and 3, Americans and Germans generally have different views related to the relationship between state, society and religion. This difference in views also influences how each sees the role of government in the public sphere. As

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892 See Richard J. Neuhaus, *The Naked Public Square: Religion and Democracy in America* (Grand Rapids, 1984). Adopting this metaphor see for example Ladeur, *The Myth of the Neutral State and the Individualization of Religion: The Relationship between State and Religion in the Face of Fundamentalism*, 30 *Cardozo Law Review* 2445 (2008).

893 See Chelini-Pont, *Religion in the Public Sphere: Challenges and Opportunities*, 2005 *BYU Law Review* 611 (2005)

French scholar Blandine Chelini-Pont has pointed out, for Americans the public square is first and foremost a place where they can attempt to exercise their influence on the state, whereas in Europe the public square is a place devoted to the common good, where the emphasis is placed on the state's obligation to advance that common good.<sup>894</sup> Here, for instance, the state is said to keep the public sphere “secular” in order to advance the public good of equality, liberty and fraternity,<sup>895</sup> a view that places the role of the state, rather than the individual, as the focus of attention.

Again, history plays an enormous role in concepts related to the public square, especially when the question involves the role of religion. The long history of state and church working together to advance the common good of the populace in Germany no doubt has shaped and continues to shape German views on how religion and the state should interact, especially in the public sphere. Some have gone so far as to suggest that religious entities are akin to a public utility when operating in the public sphere in Germany and other European countries.<sup>896</sup> In Germany, this history, until recently, also meant that the institutional relationship between the state and religious entities was the main focus of questions concerning religion in the public sphere, as can be seen in the debate over whether the area of law related to religion in Germany should fall under the heading of *Staatskirchenrecht* or *Religionsverfassungsrecht*.<sup>897</sup> Despite these general differences related to how Germans and Americans view the public square, both countries struggle with relatively similar questions related to the boundaries of the “public square” and the rules for engaging in it.

Instead of simply distinguishing between public vs. private spheres, some on both sides of the Atlantic have argued that there is a third square that encompasses aspects of both<sup>898</sup>, or suggested that the public sphere can be divided into various sub-spheres.<sup>899</sup> For instance, in his, what some considered, surprising declaration that Europe was now moving into a post-secular era, Jürgen Habermas implied that not only is there a division between private and public spheres, but there is also a division within the public sphere between institutional and political spheres,<sup>900</sup> a simple yet effective means of categorizing the spheres that offers the easiest way to organize the case comparisons that follow.

According to his view, the political public sphere is where public discourse and debate takes place: an open exchange of ideas where a plurality of religious messages should be a welcome part of this exchange. Habermas notes that “the liberal state has an

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894 Chelini-Pont, Religion in the Public Sphere, Challenges and Opportunities, 2005 *BYU Law Review* 611 (2005); See also Walter, *Religionsverfassungsrecht* pg. 17 (where he argues that state's function in open society is an organizational one); Böckenförde, *Kreuze (Kruzifixe) in Gerichtssälen?* Pg 127.

895 See Taylor, The Polysemy of the Secular, *Social Research* 76, no. 4 (2009): 1143-66.

896 Movsesian, *Crosses and Culture: State-Sponsored Religious Displays in the US and Europe*, pg. 3

897 See Chapter 6, Section A (1).

898 Teitel, *Postmodernist Architectures in the Law of Religion*, 1993 *BYU Law Review* 97, 103 (1993).

899 See for example Ladeur, *The Myth of the Neutral State*, pg. 2457 where he talks about a separate societal public square. See also Böckenförde, “*Kreuze (Kruzifixe) in Gerichtssälen?* *ZevKR* 20/119, 127 (1975) arguing that one must distinguish between the sphere in which the state is primarily exercising its authority and the sphere where the state is playing more of an organizing role.

900 Habermas, *Religion in the Public Sphere*, 14 *EUR. J. PHIL.* 1, (2006). It should be noted that implied in this dichotomy is the idea that government acknowledgment of religion in the open political sphere is passive whereas in the institutional setting it moves closer to being active.

interest in unleashing religious voices in the political public sphere, and in the political participation of religious organizations as well. It must not discourage religious persons and communities from also expressing themselves politically . . . .”<sup>901</sup> Some have further argued that state sponsored religious symbols or acts having a “cultural significance” should be unproblematic in this open forum considering that the state generally has less direct influence over the actors in this sphere.<sup>902</sup> For purposes of this work, however, Habermas’ “political public sphere” will be enlarged to include all open spaces owned by government, whether they are a place where people usually would engage in political expression or not.

This open public sphere, as we will call it, will be juxtaposed against the institutional public sphere, places where government not only controls the environment, but also uses its power to coerce participation in it, eg. courts, city hall, schools, etc.<sup>903</sup> While the distinction between these two spheres seems obvious enough, in practice it is not always easy to distinguish them as some government property might contain elements of both spheres. For example, some have argued that in the school setting the relationship between the state and students can be characterizes as taking place in an institutional public sphere, however the interaction between the individuals inside the school, especially outside of the classroom, is more apt to be deemed as taking place in something more akin to an open public square.<sup>904</sup> As the following cases will illustrate, the distinction between these two spheres is often one of the deciding factors used by courts and commentators in both jurisdictions to determine whether the state acknowledgment of religion is appropriate.

## 2. Active and Passive Acknowledgments of Religion

The characterization of these cases as ones involving government acknowledgment of religion by their very nature raises questions concerning what limits can be placed on the state when its expression in the public sphere contains religious content.<sup>905</sup> A factor considered by courts and commentators regarding these limits involves whether the government's speech or expressive actions are deemed to be passive or active. While German courts and commentator have been less apt to use this terminology, hints of these distinctions can be seen in discussions concerning the intensity of the infringement. Furthermore, this distinction has been recently adopted by the European Court of Human Rights (ECHR) and was a critical factor in the Grand Chamber's decision to uphold an Italian law that mandated the crucifix be hung in all public school classrooms.<sup>906</sup>

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901 Habermas, Religion in the Public Sphere, pg. 10.

902 See Ferrari, State-Supported Display of Religious Symbols in the Public Space, 52 Catholic Journal of Legal Studies 7, 20 (2013)

903 Ferrari, State-Supported Display of Religious Symbols, pg. 18.

904 Ferrari, State-Supported Display of Religious Symbols in the Public Space, pg. 18 (2013); See also Teitel, Postmodernist Architectures in the Law of Religion, 1993 BYU Law Review 97, 108 (1993) recognizing the same, albeit in a much more critical fashion.

905 From the American perspective, the focus of this section will be on U.S. Supreme Court jurisprudence. However, there is a wealth of case law from state supreme courts interpreting government acknowledgments of religion under their own state constitutions. For an overview and list of these cases see Howard, State Constitutional Challenges to the Display of Religious Symbols on Public Property, 26 A.L.R. 6<sup>th</sup> 145 (2014).

906 Case of Lautsi v. Italy, No. 30814/06, ECHR (GC) 2011 §72

Before one can explore the impact of labeling government acknowledgment of religion as passive or active, one must first define what exactly is meant when these labels are used. From the outset, it must be acknowledged that some have taken issue with the passive/active dichotomy<sup>907</sup>, yet exploration of how courts have used these labels, especially when engaging in an analysis that includes the application of non-establishment principles, is warranted and useful for comparison purposes.

The labels passive and active acknowledgments of religion have been used interchangeably to describe the coercive impact of the government's actions on individuals or the intensity of the relationship between the state and the message being conveyed by its actions. Thus, state actions that are deemed not to rise to the level of unconstitutional coercion are often labeled as being passive acknowledgments of religion, while actions that are deemed to be the equivalent of making commands on an individual to act in a manner that violates religious convictions are given the "active" label.<sup>908</sup> As part of this analysis, courts often focus on the message being conveyed by the state. When the state's message contains religious elements that are part of a larger secular message, or when the state's actions appear to be religious on their face but are used to advance a secular purpose, the state's acknowledgment of religion is said to be passive.<sup>909</sup> Obviously, when the message being conveyed by the government action can be deemed to be only partly religious or devoid of religion, it is far less likely for a court to conclude that the action somehow amounts to coercing people in a manner that violates their religious convictions.

The other common way of defining "passive" involves focusing on how the government is interacting with the symbol or religious message. Thus, when government is said to be only tangentially supporting the message being conveyed, its actions are deemed to be passive and unlikely to be found to violate concepts of church/state separation or neutrality. Whereas the more symbolically connected the state is with the religious message, the more active the state's acknowledgment of religion is said to become. In short, the two most common usages of the word "passive" describe either how coercive the message is on the individual claiming religious protection or whether the government's involvement with the message can be said to violate limits placed on the state by concepts such as neutrality.

Perhaps no recent case better illustrates how these factors shape government acknowledgment disputes better than *Lautsi v. Italy*, the aforementioned case heard by the European Court of Human Rights involving an Italian law requiring that a crucifix be hung in each public school classroom.<sup>910</sup> The case began when a parent of two

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907 See Haupt, Active Symbols, 55 BC Law Review 821 (2014) (arguing that dismissing symbols as being merely passive as part of an analysis concerning how these symbols impact negative rights is misplaced.)

908 See Haupt, Active Symbols, pg. 831; See also Berg, Can State-Sponsored Religious Symbols Promote Religious Liberty?, 53 Journal of Catholic Law Studies 23, 30 (2013)

909 See Mancini, Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence, 30 Cardozo Law Review 2629 (2008); McGoldrick, Religion in the European Public Square and in European Public Life--Crucifixes in the Classroom? 11 Human Rights Law Review 451, 479 (2011). We will also see examples of this in the various court opinions that will be set forth in the following pages.

910 See McGoldrick, Religion in the European Public Square, pp. 471-472 (Describing the backlash to the decision

school aged children challenged an Italian law requiring that each public school classroom be equipped with a crucifix. After finding no remedy in Italian courts, the parent took her claim to the European Court of Human Rights pursuant to Article 9 of the European Human Rights Convention, claiming that the principle of secularism was violated.<sup>911</sup> There she initially found a receptive ear with the lower chamber ruling that the placement of the crucifix in classrooms amounted to the state “imposing beliefs” on “particularly vulnerable” school children.<sup>912</sup> Impliedly the court seemed to be saying that in an institutional public sphere like a school, where impressionable children are required to attend, the state simply cannot express its own views on religion without running afoul of the negative religious freedom rights enjoyed by students and their parents. Finding the crucifix to be a predominately religious symbol, the court concluded that students forced to face this symbol on a daily basis suffered a sufficient infringement on their negative religious freedom rights, especially in light of the fact that they had no reasonable alternative that would have allowed them to avoid having to confront it.<sup>913</sup> In this sense, the state's acknowledgment of religion was deemed to be active and in violation of Article 9.

In reversing the lower chamber, the Grand Chamber placed significant emphasis on the “passive” nature of the crucifix and ruled that it was within the margin of appreciation for Italy to conclude that being faced with such a passive symbol did not sufficiently infringe negative religious freedom.<sup>914</sup> The court made clear what it meant by passive when it stated that the mere presence of this symbol “is not associated with compulsory teaching of Christianity,” a clear indication that in the court's view, passive was the equivalent of non-coercion, and Article 9 protections did nothing more than protect against such.<sup>915</sup>

Equally important, although less of a focus in the reams of academic comments made in the aftermath of the Grand Chamber decision, is the court's seeming unwillingness to adopt a multifaceted public sphere approach. For the majority, as well as the concurring judges, all public spheres are alike, and the state may engage in the forum as one of the many speakers seeking to have their message heard.<sup>916</sup> In fact, this was the central argument made by the eight intervening states who believed that the state might actually be required to enhance the pluralism existing in the classroom by injecting various religious messages into the public sphere.<sup>917</sup> Others in both Europe and the

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as “unprecedented” and leading to a “political storm.”)

911 Her claim was really more one based on a violation of the principle of state neutrality toward religion, and the state was violating this neutrality by coercing her sons to, borrowing a phrase from the BVerfG, learn under the cross. See *Case of Lautsi v. Italy*, No. 30814/06, ECHR, 2009 §32.

912 *Lautsi* §48.

913 *Lautsi* §55.

914 *Case of Lautsi v. Italy*, No. 30814/06, ECHR (GC) 2011 §72. (The court also concluded that because of the passive nature of the symbol, the state could not be seen as violating its neutrality or improperly influencing its pupils).

915 *Lautsi* §74. See also McGoldrick, *Religion in the European Public Square*, pg. 480.

916 See for example the concurring opinion from Judge Power where she claims that neutrality does not demand secularism but rather a pluralism approach where the state may bring symbols into the classroom to add to the already diverse religious expressions of the students. *Lautsi* (Power, concurring) §32.

917 Weiler, *Oral Submission by Professor Joseph Weiler before the Grand Chamber of the European Court of Human Rights*, *ilsussidiario.net*, 1 July 2010. The argument basically focused on the fact that the state allowed students to wear religious clothing and recognized the holidays of a variety of religions. In such a setting, according to this argument, the state's erection of the cross simply adds to an already religiously diverse setting.

United States have made similar arguments claiming that when the state places religious symbols into the public sphere, it is merely contributing to the plurality of religious messages already present in the public sphere.<sup>918</sup>

The Grand Chamber dissenters took issue with the characterization of the crucifix as being a passive symbol, noting that it conveys a powerful religious message that jeopardizes the negative religious freedom of non-Christians.<sup>919</sup> Calling for “special protection” of these rights under circumstances where children have no choice but to learn in the presence of the state erected crucifix, the dissenters believed that by acting in this manner, the state was violating its duty to remain neutral toward questions of religion.<sup>920</sup> In this sense, the dissenters also seemed to recognize that context matters and perhaps not all public spheres are alike. The criticism of the approach taken by the majority can be summed up by noting that its decision overlooks the fact that state sanctioned symbols likely convey a more powerful message than symbols brought into the public sphere, especially the institutional public sphere, by private individuals. Not to mention it is difficult to see how the state is acting neutrally when it adopts a particular religious symbol or act as one of its own.<sup>921</sup>

### 3. The Role of Free Speech Principles in American Religious Liberty Jurisprudence

The identity of the speaker in the public forum has been a critical element in many of the American cases that have recognized the right of speakers to express themselves religiously in so-called public forums. American jurisprudence is filled with recent cases dealing with the rights of individuals to express themselves religiously on public property such as schools after school hours. Here it is important to note that in these cases “public sphere” and “public forum” are sometimes used interchangeably, however in reality the words “public forum” have a particular meaning that is much more nuanced than the broad phrase “public sphere.” Generally speaking both phrases are used to denote government owned property where one might be able to express oneself. From the American perspective, however, especially in free speech cases, the word “public forum” has a specific meaning that cannot be substituted with “public sphere.”<sup>922</sup> How a court characterizes a “public forum” will impact the kind of rights the

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918 Berg, *Can State-Sponsored Religious Symbols Promote Religious Liberty?* pg 37. (Berg goes on to further argue that when the state places religious symbols into the public sphere it encourages or frees individuals to also express themselves religiously.); See also Jiménez Lobeira, *Veils , Crucifixes , and Public Sphere: What Kind of Secularism? Rethinking Neutrality in a Post-Secular Europe*, available at <http://ssrn.com/abstract=1648711>.

919 Lautsi (Dissenting opinion) §5 (“Even if it is accepted that the crucifix can have multiple meanings, the religious meaning still remains the predominant one. In the context of state education it is necessarily perceived as an integral part of the school environment and may even be considered as a powerful external symbol.”)

920 Lautsi §57 (Dissenting opinion) .

921 See Horwitz, *Religion and American Politics: Three Views of the Cathedral*, 39 *University of Memphis Law Review* 973, 1011 (2009) noting that then Presidential candidate Mitt Romney made this mistake when he argued that vigorous pursuit of non-establishment principles amounts to a command that religion remain only in the private sphere, without taking regard to the possibility that the real impetus behind the vigorous pursuit of non-establishment principles is to prohibit the state from adopting religious messages as its own. See also Teitel, *A Critique of Religion as Politics in the Public Sphere*, pg. 818 arguing that when the state becomes involved with supporting religious messages in the public square it could “erode religious equality and pluralism” that it claims to be protecting.

922 For a full overview of the different public forums in American Free Speech dogma see Nowak/Rotunda, *Constitutional Law*, 8<sup>th</sup> Hornbook Series, §16.1(f) (2009).

speaker has in it.<sup>923</sup> Thus, in the so-called “traditional public forum,” government property that by its very nature is open for people to engage in speech, a speaker enjoys the most protection from government interference with regards to freedom of speech. Traditional public forums are generally limited to parks, streets, and sidewalks. On the other hand, in a non-public forum, government property that has been opened for a limited purpose that is not associated with speech, individuals have far less protection from government interference with their speech rights. Examples of non-public forums include schools, prisons, and military bases. In several of the cases that follow concerning religious speech on government property, this distinction is made by the courts, but from an Establishment Clause perspective it is rarely determinative. For purposes of this work, this difference between the various public forum doctrines created by the Supreme Court will be downplayed, with an emphasis instead being placed on the aforementioned open and institutional public spheres.

#### 4. The Balancing of Competing Rights: The Christian Nature of Schools Example

As the cases in this chapter and the next will clearly illustrate, and as was pointed out in Chapter 6 of this work, the dogma that has developed in Germany regarding religious freedom recognizes both so-called positive and negative religious freedom rights. No other area of German religious liberty jurisprudence is more impacted by these rights than cases concerning government acknowledgment of religion in the public sphere. This has much to do with the nature of the public sphere, and it is well established in German case law and literature that “[i]n situations creating a certain degree of control over an individual's surroundings the state is required to provide for the religious needs of this person, such as when one is obligated to attend school.”<sup>924</sup> These religious needs are the so-called “positive rights” that the state must take into consideration when it interacts with people in such a forum. In addition to these “positive rights,” the state must also be mindful of the so-called “negative rights” that individuals have under Article 4 of the *Grundgesetz* in such a setting. These rights often operate as a protection of minorities in those situations where there is no ability for the individual to avoid being confronted with the state action being undertaken to accommodate the positive rights of others.<sup>925</sup> As will be illustrated in the cases that follow, in certain situations these negative rights might give individuals the right to avoid state sanctioned foreign expressions of religions, acts of worship or religious symbols, however in a diverse society this right is not an absolute one.<sup>926</sup>

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923 Using this in religious speech cases has been criticized by some who believe it does not adequately take into consideration the impact of religious speech in public forums, and is instead simply asking the question who controls the speech without taking into consideration the impact that speech might have on others. See Tietel, *A Critique of Religion as Politics in the Public Sphere*, 78 *Cornell Law Review* 747, 802 (1993).

924 Robbers, *Religion and Law in Germany* pg. 89; Christian Starck argues that positive rights in the school setting stems from the history of the church running schools. Once the state took this over, it had to continue to provide students the opportunity to develop religiously in this closes setting. See Starck, *Art. 4 GG in Kommentar zum Grundgesetz*, 1996, Rn. 28.

925 BVerfGE 41, 29, 48. (“Dieses Individualrecht steht jedem einzelnen Erziehungsberechtigten zu und gewinnt seine besondere Bedeutung als Minderheitenschutz, wenn der Einzelne durch den Staat ohne die Möglichkeit des Ausweichens mit einer weltanschaulich ausgerichteten öffentlichen Einrichtung konfrontiert wird (vgl. BVerfGE 35, 366 (375 f.) - Kreuz im Gerichtssaal.”); see also BVerfG, 27.01.2015; 1 BvR 471/10, 1 BvR 1181/10, Rn. 104.

926 BVerfGE 108, 282, 302.

In addition to the rights found under Article 4, the state must also be mindful of the rights granted to parents by Article 6 of the *Grundgesetz*, which give them the right to raise their children in accordance with their own religious and world views. This right also is not deemed to be absolute in the school setting or any other setting where the state might be interacting with children.<sup>927</sup> Thus, where the state can show that teaching students a particular subject is a valid and necessary part of its curriculum, parents cannot rely on their Article 6 rights, or their Article 4 religious freedom rights for that matter, to veto the teaching of the subject to which they object.<sup>928</sup> Nevertheless, Article 6 rights in conjunction with those found under Article 4 do include the right of parents to protect their children from religious influences that they deem false or inappropriate.<sup>929</sup> Finally, it goes without saying that in a public forum where the participants increasingly come from a diversity of religious and ethnic backgrounds, it is impossible for the state to satisfy every individual demand placed upon it by individuals related to questions of religion.<sup>930</sup>

As was pointed out in the prior chapter, in situations where these rights are in conflict, the BVerfG has turned to the principles of *praktische Konkordanz* and *Gebot des Toleranz* (principle of tolerance) to assist it with balancing these rights.<sup>931</sup> As a general matter, under these principles it is up to lawmakers to find a compromise that attempts to protect the rights of all individuals in a neutral manner.<sup>932</sup> When undertaking this balancing process, neither one of these rights should per se take precedent over the other. The court, however, has placed some limitations on lawmakers when they engage in this balancing. Thus, in cases concerning the religious character of state schools, the court held that at a minimum the solution found by the lawmakers cannot result in forcing the holders of negative religious freedom rights to abandon those rights, nor can it turn the school into a missionary school.<sup>933</sup> On the other hand, under principles of tolerance, students seeking protection from Christian influences in state schools had to tolerate minimal confrontation with these influences in order to accommodate the positive the rights of their fellow students.<sup>934</sup>

Where the issue was non-denominational prayer in public schools, the Court again noted that, although the prayer in question did not favor any particular religion, it did have special meaning for Christians and thus non-Christians were protected by Art 4

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927 BVerfGE 47, 77-78

928 BVerfGE 47, 77-78

929 BVerfGE 93, 1, 17

930 BVerfGE 41, 29, 50 (“Da es in einer pluralistischen Gesellschaft faktisch unmöglich ist, bei der weltanschaulichen Gestaltung der öffentlichen Pflichtschule allen Elternwünschen voll Rechnung zu tragen, muß davon ausgegangen werden, daß sich der Einzelne nicht uneingeschränkt auf das Freiheitsrecht aus Art. 4 GG berufen kann. In der Ausübung seines Grundrechts wird er insoweit durch die kollidierenden Grundrechte andersdenkender Personen begrenzt (vgl. dazu BVerfGE 28, 243 [260 f.]”)

931 BVerfGE 41, 29, 51. See also BVerfGE 52, 223, BVerfGE 91, 1

932 BVerfGE 41, 29, 51; It has also been suggested that some decisions might best be decided via the political process in the United States. See Davis, Religion, Democracy and the Public Schools, 25 *Journal of Law and Religion* 33, 54 (2010).

933 BVerfGE 41, 29, 51

934 BVerfGE 41, 29, 83. The *Gebot des Toleranz* has been viewed by some as being one of the major differences between American and German jurisprudence. Gerhard Robbers argues that it is this *Toleranzgebot* that forecloses any right to demand public religious displays during Christmas or crosses on top of a mountain to be removed. Robbers, Religion and Law in Germany, p. 97.

GG and Art 136 WRV in that they could not be required to participate in the practice.<sup>935</sup> As these two examples illustrate, a finding that negative rights are impacted by state action does not automatically result in a per se ban of the state action, it begins an analysis that takes into consideration the positive rights of other individuals in the public sphere. Discussions of conflicting positive and negative rights are not limited to the school setting, as the cases in this chapter will illustrate.

One final note before leaving this introductory section and moving on to the cases concerning state acknowledgment of religion in the public sphere. Article 7 of the *Grundgesetz* gives each state, rather than the federal government, the power to shape their own school systems, resulting in states being the decision maker regarding questions concerning how the aforementioned positive religious rights are to be accommodated in the school setting.<sup>936</sup> Thus, in addition to conflicting rights listed above, the court must also take care not to intrude too far into a competency that lies primarily with the individual states. Of course, as the cases in the next chapter will make clear, the power of each state in the school setting is not absolute as each must also take into consideration the individual rights found in the *Grundgesetz*.<sup>937</sup>

A series of cases concerning the religious nature of state schools illustrates this principle and has served as a basis for other decisions concerning competing rights in the school setting. These cases touched upon both the state's rights under Article 7 as well as the negative and positive religious freedom rights found in Article 4. At issue were schools in several states that were organized as schools with a Christian nature. Challengers to this arrangement argued that by doing so, the state was preferring one religion over others in violation of the concept of state neutrality. As a general matter, the court ruled that states are not prohibited from identifying with religion, so long as the school does not take on the character of a missionary school.<sup>938</sup> The acceptance of Christian references in education should do nothing more than recognize the influence of Christianity on western civilization, and not judge the validity of Christian beliefs.<sup>939</sup> However the school must remain open to other religious values.<sup>940</sup> While many view these cases as illustrating the preference that Christianity is given under German law, an alternative view is that these cases set limits on the state in accordance with the implied non-establishment principles found in the *Grundgesetz*. This alternative view will be more fully discussed in the pages that follow.

The Christian nature of school cases, as well as the cases that follow in both the school and non-school settings, illustrate that by expressly recognizing the state's ability to

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935 BVerfGE 52, 223, 238

936 See Heckel, Das Kreuz im öffentlichen Raum. Zum "Kruzifix-Beschluß" des Bundesverfassungsgerichts pg. 479 (The decision as to what is sufficient room is left up the state under this Article). See also: Questioning whether this is the proper role of the state see. Hegerfeldt, Religiöse Symbole in staatlichen Räumen, in *Liber amicorum für Joachim Gaetner* (2003) 282, 290.

937 BVerfGE 41, 29, 48

938 BVerfGE 52, 223, 237

939 BVerfGE 52, 223, 237, ("Die Bejahung des Christentums in den profanen Fächern bezieht sich in erster Linie auf die Anerkennung des prägenden Kulturfaktors und Bildungsfaktors, wie er sich in der abendländischen Geschichte herausgebildet hat, nicht auf die Glaubenswahrheit und ist damit auch gegenüber dem Nichtchristen durch das Fortwirken geschichtlicher Gegebenheiten legitimiert.")

940 BVerfGE 108282, 300.

accommodate “positive rights” by acknowledging religion in some public forums, German courts have set up a situation where rights will inevitably collide. In the average religious rights dispute in the school setting, for example, a court is often faced with no fewer than three competing rights holders who are staking claims based on a variety of rights found in the *Grundgesetz*. Thus, before embarking on a comparison of similar cases, it must be acknowledged that perhaps the biggest difference in the way the courts in Germany and the United States frame cases involving the role of religion in the public sphere is the manner in which religious rights are characterized. By characterizing the rights found in Article 4 as not merely a limitation on the state but also one that allows the state to acknowledge religion in order to provide individuals with room and protection to develop religiously on their own,<sup>941</sup> the BVerfG has created a setting where rights are bound to conflict in a manner that simply has not yet been recognized by a majority of the United States Supreme Court.<sup>942</sup> Despite this enormous difference, what follows will illustrate that there is still much to learn from a comparison of cases involving government acknowledgment of religion in the public sphere.

## **B. Government Acknowledgment of Religion in the Institutional Public Sphere**

The “institutional public sphere,” at least as it will be used going forward in this work, are those government owned arenas where the government is able to exercise some amount of control over the participants in the sphere. Furthermore, participation in this sphere is either required by law or necessary to interact with the government. Courts, prisons, and government offices where citizens can interact with officials all fall within this sphere. Schools also fall within this sphere, but as has already been mentioned, perhaps not entirely. As such schools will be dealt with as a distinct kind of institutional sphere in the next chapter.

At the heart of the Habermasian concept of the institutional public sphere is the idea that in such a setting, the state must “not privilege one side at the expense of the other.”<sup>943</sup> He goes on to note, however, that this “no privilege” principle “is to be distinguished from the laicist demand that the state should defer from adopting any political stance which would support or constrain religion per se, even if this affects all religious communities equally.” In other words, even under this view of the public sphere, there is potentially room for the state to engage in some forms of religious expression.

The cases being compared in this section involve government settings where the state almost completely controls who can access it for purposes of expressing themselves. Furthermore, individuals normally access these settings either because they are required to do so (in response to a court subpoena for example) or need to do so in order to access government services. At the outset, it must be noted that the comparison being

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941 BVerfGE 93, 1, 16; See also BVerfGE 41, 29, 49

942 Another way to think about this difference is the fact that courts in the United States have generally rejected arguments that government acknowledgment of religion in the public sphere can be justified as promoting the Free Exercise rights of participants in the square.

943 Habermas, Religion in the Public Sphere, pg. 6

undertaken is not perfect. Factually, the cases differ in that the German cases deal with religious symbols while the American cases deal with prayer. Here it should also be noted, for reasons that will be expounded upon, that there is little dispute in the United States that a purely religious symbol hanging inside a courtroom or legislative chamber violates non-establishment principles unless the symbol is part of a larger display communicating a secular message.<sup>944</sup> While the Supreme Court has never ruled as such, lower courts have cobbled together this rule from many of the cases that will be discussed in the final part of this work. For now, it is enough to note that the intensity of such a display in a setting where one must interact with the government without having the opportunity to avoid the display is enough to make a valid Establishment Clause violation argument for all but the strictest of accommodationists.

On the other hand, from the German perspective, it is almost unthinkable to engage in such a clearly (active!) religious practice such as a prayer in institutional settings like the courtroom or legislative chamber. Even the strongest advocates of a close relationship between church and state in Germany do not encourage such practices, nor have the courts been faced with such questions. Arguably, as will become more clear by the end of this part, the active nature of a religious prayer violates the basic principles at the heart of the neutrality concept impliedly demanded by the *Grundgesetz*, and cannot be justified in such a setting on the grounds that the state is merely providing space for others to enjoy their positive religious freedom.

## 1. United States: Legislative Prayer

From a chronological perspective, the legislative prayer cases heard by the United States Supreme Court act as metaphorical bookends for government acknowledgment of religion cases. *Marsh v. Chambers* was the Court's first foray into this area of the law, while *Town of Greece v. Galloway* is the Court's latest attempt to bring clarity to the manner in which government may acknowledge religion in the public sphere. These cases do not question the ability of one to pray privately, even on government property, as this is without a doubt protected by the Free Exercise clause.<sup>945</sup> Rather the question here concerns government actors engaging in prayer as representatives of the government, when the practice is undertaken just prior to the conducting of their official duties as elected officials.

In *Marsh v. Chambers*<sup>946</sup>, the Nebraska state legislature had a long standing policy of hiring a chaplain who would open up each session of the Nebraska State Senate with a non-denominational prayer. A sitting member of the legislature challenged the prayer as amounting to an unconstitutional establishment of religion under the First Amendment.<sup>947</sup> A divided Supreme Court abandoned the now well established Lemon

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944 For instance, see *Suhre v. Board of Commissioners*, 894 F. Supp. 927 (W.D.N.C. 1995) holding that a display of the Ten Commandments in a courtroom room was proper so long as it was part of a display containing non-religious symbols as well, and the purpose of the display was to communicate a primarily secular message. See also Levine, *Religious Symbols and Religious Garb in the Courtroom: Personal Values and Public Judgments*, 66 *Fordham Law Review* 1505 (1998).

945 *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290 (2000)

946 463 U.S. 763 (1983)

947 Importantly, for purposes of this comparison, the legislator did NOT also make a challenge based on an

Test, and instead began its analysis by noting that “[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country.”<sup>948</sup> Crucial to the majority's analysis was the fact that the very first Congress, which contained many individuals who took part in the drafting of the First Amendment, almost from day one operated with a state-funded chaplain who opened sessions with a prayer.<sup>949</sup> From here it was quite easy for a majority of the Justices to conclude that the founders could not have intended a prayer opening the session of a legislative body to violate the Establishment Clause.

In his dissent, Justice Brennan gave perhaps one of the more vivid descriptions of the separationist interpretation of the Establishment Clause when he said:

“[m]ost of the provisions of the Bill of Rights, even if they are not generally enforceable in the absence of state action, nevertheless arise out of moral intuitions applicable to individuals as well as governments. The Establishment Clause, however, is quite different. It is, to its core, nothing less and nothing more than a statement about the proper role of government in the society that we have shaped for ourselves in this land.”<sup>950</sup>

This idea that the Establishment Clause is more akin to a necessary limitation on government in order to completely protect individual religious liberty is central to how at least some Americans view the proper relationship between religion and state, and as we shall see, is perhaps the most striking difference between the way some American jurists and the majority German jurists apply religious liberty doctrine.

In upholding the prayer because if its historical use, the Court seemed to have carved out an exception to the so-called Lemon Test<sup>951</sup>, namely that if the government acknowledgment of religion was undertaken by the founders, then it must be consistent with the intended meaning of the Establishment Clause. This presumed exception to the Lemon Test took on a life of its own with the Court's recent holding in *Town of Greece v. Galloway*.<sup>952</sup> Writing for a divided Court, Justice Kennedy found that governmental bodies could open their public meetings with a prayer so long as the practice does not “denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion.”<sup>953</sup> At issue was a practice undertaken by a local city council whereby local

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interference with his Free Exercise rights. The sole question in this case was whether the state acted improperly by hiring a chaplain to give a prayer in the Nebraska Legislature.

948 463 U.S. at 786.

949 463 U.S. at 787-788 (“Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress.”)

950 463 U.S. at 801. Here it might be worth noting that in the eyes of its advocates, framing the Establishment Clause in this manner does not decrease its constitutional value in the same manner that some suggest was done by the drafters of the EU Charter of Fundamental Rights when they distinguished between fundamental principles and fundamental rights. See generally Alexy, *A Theory of Constitutional Rights* (Oxford, 2010). For a critique on this distinction, one that seems to be more in tune with the American view, see Hilson, 15 *Maastricht J. Eur. & Comp. L.* 193 (2008).

951 As discussed in Chapter 5, the Lemon Test says that the state must act with a secular purpose and not in a manner that has the effect of advancing religion.

952 134 S. Ct. 1811 (2014)

953 134 S. Ct. at 1823 (“Prayer that is solemn and respectful in tone, that invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing, serves that legitimate function. If the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort. That circumstance

religious leaders were invited by the council to open each of its sessions with a prayer. Challengers to this policy claimed that because the prayers were almost without exception Christian and took place in a setting where members of the public interacted with the council, this case was different than *Marsh* where a non-denominational prayer was aimed only at members of the legislature.

Characterizing the prayer as a “tolerable acknowledgment of beliefs widely held rather than a first treacherous slope toward the establishment” of religion, the Court disagreed with the characterization of *Marsh* as simply having created an exception to *Lemon*<sup>954</sup>, and further found that *Marsh* did not require such prayers to be non-denominational<sup>955</sup>. According to the Court, the Establishment Clause must be interpreted “by reference to historical practices and understandings” rather than some rigid test.<sup>956</sup>

While *Town of Greece* clearly takes American religious freedom jurisprudence with regards to the application of non-establishment principles in a different direction than Justice Brennan's above quoted claim that these principles are first and foremost a limit on government, it is the disagreement among the Justices, in some respects especially those in the majority, that illuminate how Americans' views regarding non-establishment are changing. Today's theoretical battles are decreasingly being fought over whether a “wall” separating church and state best represents the aims of religious freedom. Instead the battle is increasingly over the nature of the public forum and extent of the government's acknowledgment of religion in that forum. Three of the Justices in the majority focused on to whom the prayer was aimed and the setting in which it takes place. Noting that there is nothing impermissible about legislators who “find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing,” these members of the Court seemingly viewed this act undertaken by government officials in the chambers of the government council just before engaging in their official duties as nothing more than a private act similar to what one would find in the private sphere.<sup>957</sup>

The purpose of these prayers, according to these three Justices, “is largely to accommodate the spiritual needs of lawmakers and connect them to a tradition dating to the time of the Framers”<sup>958</sup> For them the “analysis would be different if the town board members directed the public to participate in the prayer,” seemingly because this would turn the setting into something more akin to the institutional public sphere.<sup>959</sup> Furthermore, for this group of Justices, any feeling of having to join the legislators in

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would present a different case than the one presently before the Court.”)

954 134 S. Ct. at 1823 (“*Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted. Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change.”)

955 134 S. Ct. at 1823 (“An insistence on nonsectarian or ecumenical prayer as a single, fixed standard is not consistent with the tradition of legislative prayer outlined in the Court’s cases. The Court found the prayers in *Marsh* consistent with the First Amendment not because they espoused only a generic theism but because our history and tradition have shown that prayer in this limited context could ‘coexist[t] with the principles of disestablishment and religious freedom.’” (citing *Marsh*, 463 U.S. at 786))

956 134 S. Ct. at 1819.

957 134 S. Ct. at 1825.

958 134 S. Ct. at 1826.

959 134 S. Ct. at 1826.

prayer is not enough to show coercion, however, the intensity of this act becomes greater if citizens are expressly asked to join the prayer by the council members or not given an opportunity to leave the room during the prayers. Again, the implication here is that under these circumstances the practice becomes too much of an active acknowledgment of religion and as such violates the main the purpose of the Establishment Clause, namely stopping government coercion.<sup>960</sup>

Finally, these Justices found that people often are confronted with religious symbols and messages that they find disagreeable, but that alone does not constitute an Establishment Clause violation even in the government setting.<sup>961</sup> So long as people have the option to leave the room or remain quietly without being pressured to join in; neither choice represents an unconstitutional imposition as to mature adults, who “presumably” are “not readily susceptible to religious indoctrination or peer pressure.”<sup>962</sup> As we shall see, this view, when compared to others expressed by the various opinions in *Town of Greece*, is most in line with the German doctrine that has developed around positive religious liberty rights and the need to allow dissenters the ability to avoid being confronted with government sanctioned religious practices or symbols.

For Justices Thomas and Scalia, the distinction between active and passive symbols, or the kind of public sphere in which the government acknowledgment of religion takes place, appears to play no role in their views of what constitutes a violation of the Establishment Clause. After explaining that the Establishment Clause is “best understood as a federalism provision,”<sup>963</sup> Justice Thomas goes on to declare on behalf of himself and Justice Scalia that if the Establishment Clause is anything more than a federalism provision, it is limited to prohibiting government from using the power of law to coerce people to financially support religion, “compel religious observance, or control religious doctrine.”<sup>964</sup> Responding directly to the idea that peer pressure could amount to an Establishment Clause violation, these Justices added, “peer pressure, as unpleasant as it may be, is not coercion.”<sup>965</sup> Classic force of law coercion, then, is what the Establishment Clause is really aimed at preventing, according to this view.

For the four dissenters, the state's acknowledgment of religion in the form of the prayer policy, especially in the context of a town council meeting, was contrary to the various purposes they believed are advanced by the Establishment Clause. Justice Breyer, writing separately, focuses on the city's failure to make the prayer practice more inclusive and the prayer itself less proselytizing. The city's inaction, in the form of not affirmatively reaching out to potential non-christian prayer givers, amounted to supporting a particular religion in a manner that was anything but passive.<sup>966</sup> Breyer

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960 Along the same lines, the plurality in another part of the Court's decision stresses that the government has virtually no role, nor can it, in the contents of the prayer. By stressing this point, these Justices seem to be highlighting the passive nature of the state's acknowledgment of religion. 134 S. Ct. at 1823.

961 134 S. Ct. at 1826.

962 134 S. Ct. at 1827.

963 134 S. Ct. at 1835 (Thomas, concurring).

964 134 S. Ct. at 1837 (Thomas, concurring).

965 134 S. Ct. at 1838 (Thomas, concurring).

966 134 S. Ct. at 1830-1840 (Breyer, dissenting)

notes that government sponsored prayer itself is not what violates non-establishment principles, rather prayers that are almost uniformly delivered by Christians with an overt and often proselytizing message are the problem. In other words, a government can acknowledge religion through a prayer policy so long as it does so in a non-proselytizing manner, which avoids the kind of religious divisiveness that the Establishment Clause was intended to protect against.<sup>967</sup>

Speaking as a group, the four dissenters accuse the Court majority of ignoring the central purpose of religious freedom, namely regardless of how individuals worship “they will count as full and equal Americans.”<sup>968</sup> For them, non-establishment principles promote pluralism and inclusion, and the Board's policy is in direct conflict with these goals.<sup>969</sup> Furthermore, echoing Justice Breyer’s dissent, a policy that is too closely associated with one faith amounts to something more than the passive acknowledgment of religion.<sup>970</sup> This is government aligning itself too closely with one religion, choosing sides regarding questions of religion,<sup>971</sup> and in doing so violating another central non-establishment tenant, namely the no preference principle.<sup>972</sup> Writing for the four dissenters, Justice Kagan then sets forth a series of hypothetical situations that she and her fellow dissenters believe are the logical conclusions of the majority opinion, the constant theme throughout each being the fear that individuals will feel coerced into taking part in government sponsored religious activity. Characterizing this as something akin to the institutional public sphere, the dissenters believed that government must refrain from the active acknowledgment of religion in order to further the goals of inclusion, plurality and equality that are the foundation of American religious liberty principles.

These two legislative prayer cases make it clear that a majority of the Court believes governmental bodies may open their meetings with prayer so long as the practice does not seek to disparage non-believers or religious minorities or seek to proselytize. The split of opinion in these cases involves three questions: 1) in what kind of public sphere is the acknowledgment taking place; 2) is the acknowledgment passive or active and 3) what primary purpose(s) does non-establishment serve. Admittedly, for two of the Justices only the third question is relevant, as their belief that the only purpose served by non-establishment principles in these cases is to protect individuals from so-called force of law coercion is for them determinative, regardless of how one characterizes the public sphere. However, for the remaining seven Justices, these questions concerning the nature of the forum and relationship between the government and the religious message being conveyed by its actions are deciding factors, and illustrate that today's arguments in the United States regarding the application of non-establishment principles have little to do with how high or porous the metaphorical wall separating church and state is. The wall is gone, at least in these government acknowledgment of

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967 134 S. Ct. at 1841 (Breyer, dissenting)

968 134 S. Ct. at 1841 (Kagan, dissenting)

969 134 S. Ct. at 1842 (Kagan, dissenting)

970 134 S. Ct. at 1842 (Kagan, dissenting). While Justice Kagan does not use the word passive, she is clearly concerned with the intensity of the relationship between the state and religion.

971 134 S. Ct. at 1843 (Kagan, dissenting)

972 134 S. Ct. at 1844 (Kagan, dissenting)

religion cases, and it has been replaced by a more open, accepting public sphere doctrine that focuses on the nature of the government's relationship with the religious message it is conveying.

## 2. Germany: Crosses in Courtrooms and Legislative Chambers

In 1973 a non-Christian lawyer and his client brought a claim before the BVerfG concerning a state policy dating back to 1949 that adorned all of its courtrooms with a Latin cross.<sup>973</sup> Characterized by the court primarily as a “Standkruzifix” (table crucifix), its presence was immediately noticeable when one looked at the judge.<sup>974</sup> The challengers focused on both whether it was appropriate to have crosses in the courtroom as a general matter, and more specifically whether the refusal of the judge to remove the cross for the challenger's hearing violated rights found in Article 1 (Human Dignity), Article 2 (Personal Freedom and Integrity), Article 3 (Equality), Article 4 (Religious Freedom) and Article 12 (Occupational Freedom) of the *Grundgesetz*. From a non-establishment perspective, the challengers argued that any placement of a cross in a courtroom violated state neutrality as a general matter, and the refusal to allow for a hearing to take place without a cross violated the individual rights of the challengers. From an American perspective, then, the first claim involved a classic Establishment Clause challenge, while the second was more akin to a Free Exercise challenge.

Focusing initially and primarily on the religious liberty claims under Article 4, the Court found that the placement of the crosses in courtrooms as a general matter did not violate individual rights, however, requiring the challengers to engage in a legal process “under the cross” did raise religious liberty concerns.<sup>975</sup> While acknowledging that the hanging of this overtly Christian symbol in the courtroom gave at the very least an impression of an improper relationship between religion and state,<sup>976</sup> the court impliedly rejected the claim that as a general matter this state action violated the *Grundgesetz*.<sup>977</sup> It instead framed the issue in a manner that avoided having to firmly answer the question about the state's relationship to the crucifix, deeming such a determination as unnecessary to decide the case.<sup>978</sup>

Turning its attention to the more narrow of the two claims advanced by the claimant, the court noted that the mere fact that most people entering the courtroom probably don't see their religious freedom at risk by the presence of a crucifix in this setting is

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973 The court actually uses the terms “crucifix” and “cross” interchangeably, and the same will be done in this short summary of the case.

974 BVerfGE 35, 366

975 BVerfGE 35, 366, 373

976 BVerfGE 35, 373, 374

977 Seemingly saying that the issue was not ripe for consideration because the state had not decided whether to adorn its new courtrooms with the crucifix, and questioning whether the purchase of religious symbols impacted individual rights. (“Denn bei der Bewilligung der Haushaltsmittel für die Anschaffung von Kreuzen sowie bei etwaigen Weisungen über die Verwendung dieser Kreuze in den Sitzungssälen handelt es sich um Verwaltungsmaßnahmen, deren Anordnung und Ausführung noch nicht unmittelbar in die Rechtssphäre des einzelnen Staatsbürgers eingreifen.”) BVerfGE 35, 366 (372). Others have argued that the subjective views of being coerced to take part in a process “under the cross” do not give rise to a finding that the placement of such crosses in courtrooms in general violate individual rights or concepts of neutrality. See Böckenförde, “Kreuze (Kruzifixe) in Gerichtssälen?”, ZevKR, 20/119 (1975).

978 BVerfGE 35, 374-375.

not enough to turn this display into a passive acknowledgment of religion.<sup>979</sup> For some, being forced to engage in a legal process “under the cross” could conceivably result in them feeling as though they were being coerced by the state in a manner that sufficiently harms their Article 4 religious freedom rights.<sup>980</sup> Placing a particular emphasis on the protection of minority rights, the court noted that even under those circumstances where the majority would not feel that their rights are being infringed, the goal of protecting minorities might justify restrictions on government acknowledgment of religion in institutional public spaces like a courthouse so long as these restrictions do not interfere with the positive religious rights of the majority population.<sup>981</sup> This was the case here where non-Christians were “forced” to conduct their legal process while being confronted with a subjectively objectionable, state-sanctioned religious symbol, and where the temporary removal of the cross would in no way fundamentally harm any positive rights held by participants in the legal process.

Several points for purposes of initial comparison can be made about this case. First, there is no question that the BVerfG viewed the characteristics of this forum as those typically associated with the institutional public sphere. Second, inside this kind of public sphere, the state's mandate of neutrality coupled with the negative religious freedom found in Article 4 required the state to refrain from placing members of minority religions in a situation where they felt that they had no choice but to confront unwanted, state-sponsored religious acknowledgments, in this case a cross.<sup>982</sup> Finally, at the very least, this case illustrates how the application of non-establishment principles by German courts can sometimes operate to protect minorities, especially when doing so does not conflict with competing positive religious freedom rights.<sup>983</sup> Somewhat related to this final point and perhaps most illuminating from a comparative perspective, is the court's unwillingness to apply non-establishment principles in a broad manner, focusing only on the situation involving the two Jewish participants. From a precedent perspective this case clearly gives individuals the right to address the court outside of the presence of a crucifix, but it most certainly does not prohibit the state in general from adorning its courtrooms with religious symbols, which more than likely would have been the result under American jurisprudence.

It should be noted that even today crosses adorn some courtrooms in Germany, as can

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979 Seven years earlier a lower court had ruled in a similar manner when it held that witnesses could not avoid testifying in a courtroom where a cross hung. The Court reasoned that the hearing was based on law and could not be improperly influenced by the presence of a cross. NJW 1966, 1933.

980 BVerfGE 35, 374-375. (“Dennoch muß anerkannt werden, daß sich einzelne Prozeßbeteiligte durch den für sie unausweichlichen Zwang, entgegen eigenen religiösen oder weltanschaulichen Überzeugungen "unter dem Kreuz" einen Rechtsstreit führen und die als Identifikation empfundene Ausstattung in einem rein weltlichen Lebensbereich tolerieren zu müssen, in ihrem Grundrecht aus Art. 4 Abs. 1 GG verletzt fühlen können.”). It should be noted that some have disagreed with the court's characterization of this situation as giving rise to Art. 4 Glaubens- and Bekenntnisfreiheit issues and have instead framed this situation as potentially violating the Gewissensfreiheit (right of conscience) found in Art. 4. See Böckenförde, “Kreuze (Kruzifixe) in Gerichtssälen?” pg. 140

981 BVerfGE 35, 366, 376

982 The mandate of neutrality in this sense is non-identification with a particular religion, which is the appropriate standard inside this kind of setting. This is to be compared to the more open kind of neutrality that is more appropriately applied in a more open, public setting. See Böckenförde, “Kreuze (Kruzifixe) in Gerichtssälen?” pg. 131-138.

983 Ladeur/Augsberg, *Toleranz, Religion, Recht*, pg. 120 (arguing that the lack of competing constitutional rights is what distinguish this case from the, in their opinion, improperly decided school crucifix case).

be seen by the recent controversy over the NSU (National Socialist Underground) hearings<sup>984</sup> taking place in a Bavarian courtroom where a cross hangs. The placement of crosses in German courtrooms is alive and well; undisturbed by the BVerfG's ruling and potentially even emboldened by later court rulings concerning the hanging of crosses in classrooms.

While the practice of adorning courtrooms with crosses as a general matter seems to still be prevalent in Germany, German lower courts, at least in Hessen, have been critical of the placement of the crucifix in a town council meeting room during public hearings. In 2002 an Administrative Court in Darmstadt granted a temporary injunction, and a year later a permanent injunction, regarding the placement of a cross, purchased with state funds, by the head of a county council in the council meeting room during public meetings.<sup>985</sup> The challenge to the cross was brought by a fellow county council member who refused to take part in meetings held “under the cross,” and whose request to have the cross removed was rejected by a majority of the council.<sup>986</sup> Arguments made by the head of the council in favor of allowing the cross to remain in the hearing room included: 1) state neutrality is not a fundamental right; 2) the complainant is not being forced to engage in a religious activity; 3) the cross is there pursuant to the traditional christening of the room, which has deep cultural roots in this respect; 4) during the room dedication the cross also symbolized peace and it continues to have this meaning during the council meetings; 5) the cross can also signify secular western traditional values; 6) there is only an infringement of rights when the cross is seen as being used by the state to oppress non-believers; 7) the mere presence of the cross is not coercive for an adult; and finally 8) the challenger also has the duty to tolerate the religious beliefs of others.<sup>987</sup>

In rejecting these arguments, the courts reviewing this challenge placed special emphasis on the duty of the state to remain neutral regarding questions of religion and protect people from government coercion with regards to religion. Quoting the Bavarian school crucifix case, the lower court said that in order to ensure the peaceful coexistence of the numerous religions in Germany as well as promote plurality and equality, the state must remain neutral on questions of religion, and because the head of the county council was in this sense the state, his actions regarding the placement of the cross violated state neutrality.<sup>988</sup> Furthermore, his actions had the effect of making a fellow member of the council feel uncomfortable because of her own beliefs toward religion, and placed the state in a position of weighing in on matters of religion in violation of its duty to remain neutral, ultimately making the challenger feel as though she was being treated as an outsider.<sup>989</sup>

On appeal the council member seeking to display the cross during meetings tried to

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984 See for instance “Streit um das Kreuz im NSU-Gerichtssaal” Focus Online, 09.05.2013

985 NJW 2003, 455

986 VG Darmstadt, 26. September 2003, Az: 3 E 2482/02 (1).

987 VG Darmstadt, 26. September 2003, Az: 3 E 2482/02 (1), Rn 11.

988 NJW 2003, 455, 456. See also VG Darmstadt, 26. September 2003, Az: 3 E 2482/02 (1), Rn 22.

989 NJW 2003, 455, 456 and VG Darmstadt 3. Kammer , Entscheidungsdatum: 26.09.2003; Aktenzeichen: 3 E 2482/02 (1)

distinguish the Bavarian school cross case by claiming that the determinative fact of that case was the age of the children, a claim that was soundly rejected by the court of appeals.<sup>990</sup> For the appeals court, like the lower court, being confronted by state-sanctioned religious symbols in a public forum where attendance is mandatory for elected council members<sup>991</sup> simply outweighed any claims to positive religious liberty rights that the other council members might have.<sup>992</sup> Finally, both the lower court and court of appeals took great pains to distinguish the facts of this case from the dedication ceremony for the new council meeting room in which religion played a role, focusing on the one-time, voluntary and open nature of the dedication event.<sup>993</sup> The court also was quick to acknowledge that individuals are confronted on a daily basis with religious symbols, but a distinction had to be made between acknowledgment of religion by the state in a closed, mandatory setting, and one made in an open, voluntary setting like the dedication ceremony.<sup>994</sup> In other words, the distinguishing feature of these two instances was how the court characterized the nature of the public forum.

### 3. Initial Conclusions

While not a perfect match factually, these cases are still illuminating when compared to the legislative prayer cases from the United States. The courts in both jurisdictions were unwilling to enforce a broad ban on all government religious acknowledgments in this institutional public sphere. Instead they were accepting of such government actions so long as it was: 1) not “offensive” to a person who had no ability to avoid the state's action, or 2) did not degrade those who sought to avoid the government's action. In both jurisdictions, preventing coercion is seen as the primary purpose of non-establishment principles in these settings: the neutral state may not engage in religiously coercive actions.

To be sure, there are Justices in the United States who take issue with these holding. At the one extreme some American jurists believe that even in this institutional public sphere, non-establishment principles only prevent the government from engaging in so-called force of law coercion, which none of the cases, except perhaps the council cross case, involved. At the other extreme, some American jurists argue that it is not the proper role of government to be acknowledging a particular religion in such a forum regardless of whether one has the ability to avoid this acknowledgment. Neither one of these views have been adopted by German courts<sup>995</sup>, nor are held by a majority of the Justices of the Supreme Court. Thus, the fact remains that the holdings of the cases

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990 NJW 2003, 2471, 2472

991 The Court cites the Crucifix case noting the mandatory school laws and then draws a parallel to the current case whereby a perpetually absent council member can be fined and even temporarily barred from partaking in the proceedings for unexcused absences. NJW 2003, 2471, 2472.

992 NJW 2003, 2471, 2473. (the court recognized that council members who desired to conduct the meetings in the presence of the cross are holders of positive religious rights, but referencing the school cross case, noted that when there is a conflict between negative and positive rights, and no opt-out option is available, the principle of majority rule cannot be used to settle this dispute, and great care must be given to protecting the rights of the dissenters).

993 NJW 2003, 456 (The lower court also mentions this in passing at the end of its decision.)

994 NJW 2003, 2471, 2472.

995 While one can argue that that force of law coercion existed in the county council cases, the language used by the court in the courtroom cross case seems to suggest that mere psychological coercion is enough to prevail on a challenge to such an acknowledgment of religion by the government.

being discussed here are remarkably similar.

So why the different outcomes? Why did the German courts, some might say surprisingly, seem to be less receptive to these acknowledgments of religion than the American courts? These cases make it clear that how the court characterizes the nature of the public sphere in question plays a significant role in the outcome. Public forums that are open, where participation is more voluntary, seemingly raise little concern for German courts<sup>996</sup>, and are equally seen as unproblematic by American jurists outside of those demanding a strict separation of church and state. Forums that are closed, where participation is mandatory or at least required to access government services, are more closely scrutinized, as we saw in both German cross cases and the debate between the Justices in *Town of Greece*.<sup>997</sup> Equally important is the nature of the government's relationship with religious message. Is the acknowledgment taking place under circumstances that might be coercive to individuals wishing to avoid it? Is the relationship between the acknowledgment and a particular religion too close?<sup>998</sup> Answers to these questions help courts determine whether the acknowledgment is too "active" in violation of non-establishment principles.

The outlier case in this group surely is the most recent of the bunch: *Town of Greece*, with the court ultimately viewing the prayer in question as taking place in a temporary quasi-private forum where the intent of the prayer was to cater to the religious needs of the council members. As was discussed in the foregoing pages, the challengers, according to the majority, simply were not the intended targets of the acknowledgment of religion, rather it was the council members themselves who asked for religious leaders to come and lead them in prayer before the meeting started. The Court further noted that the case would have been different had the prayer been directed to the attending public, which would have presumably turned the forum into something more akin to an institutional public sphere.

On the other hand, the decision in the German country council cross case, as well as in *Marsh*, illustrates that sometimes the characterization of the forum may have less influence on the case than the nature of the religious acknowledgment. The distinguishing factor in these two cases arguably was the duration of the acknowledgment, which also impacted the objecting individual's ability to avoid being confronted with the state action. In *Marsh*, the prayer was short enough that anyone objecting to it could simply remove themselves from the floor of the legislature. In the council cross case, on the other hand, the government's acknowledgment of religion was continuously present throughout the objecting individual's participation in the forum. In this respect, then, one might say that the acknowledgment in *Marsh* was passive while the acknowledgment in the county council cross was too active, with the

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996 The discussion in the German council cross cases concerning the dedication ceremony provides an excellent example of this.

997 The dissenters in *Town of Greece* rejected the majority's view that the prayer was delivered in a quasi-private forum, instead arguing that this was an instance where citizens who wished to address their elected officials had no choice but to attend and sit through the prayer. In other words, this was akin to the same kind of institutional public forum that existed in the German courtroom cross case. See 134 S.Ct 1811, 1844 (Kagan, dissenting)

998 This is the argument Justice Breyer makes in his dissenting opinion in *Town of Greece*. 134 S.Ct. 1811, 1840 (Breyer, dissenting)

crucial factor being the ability of one to avoid the government practice. Despite the different outcomes, the central premise in each case is the same: government may acknowledge religion so long as the duration is short enough for individuals to opt out of being confronted with the acknowledgment.

It is possible that the *Marsh* court, at least, made little reference to type of forum at issue because even if it could have been considered a classic institutional public forum, the duration of the prayer was still the controlling factor. We see hints of this argument in the *Town of Greece* plurality opinion where at least three Justices argue that even if the prayer had been directed at both the council members and the attending public, the duration of the prayer allowed for those objecting to temporarily remove themselves from the council meeting room and essentially opt out of the objectionable setting. This seems to have been the exact same holding in the German courtroom case where the critical factor in the court's decision to remove the cross from the courtroom when the challengers were present was the inability of the challengers to avoid this state acknowledgment of religion, primarily because of its continuous presence in the courtroom. Active acknowledgment of religion, in this sense the coercive kind, seems to be the thread that links these cases together. In both jurisdictions, if one can avoid the government acknowledgment of religion in the institutional public sphere, the government actions are deemed to be passive, or not coercive, and not in violation of non-establishment principles.<sup>999</sup>

These cases also shed further light on the role that the perceived purposes of the non-establishment principles play in the ultimate decision by the court. Regarding these principles, there appears to be some agreement and some disagreement between the jurisdictions in a manner that is somewhat surprising. From the perspective of purposes served by non-establishment principles, these cases seem to confirm that under certain circumstances, it is the German courts that today view promoting religious equality and plurality, avoiding religious strife and protecting minorities as important purposes served by non-establishment. For the majority in *Town of Greece*, these purposes played a secondary role, if any. These cases also begin to shed light on exactly when these purposes play a role in the German concept of religious freedom: here they play a central role when the issue involves only the actions of the state and the individual seeking protection from those actions.<sup>1000</sup>

Seemingly when government chooses to speak about religion in the kind of closed public forum that is associated with the aforementioned institutional public sphere (at least in the non-school setting), German courts view non-establishment/neutrality principles as placing limits on the state in a manner similar to that advocated by American jurists who lean in a separationist direction. To be sure, in the German context these principles are used only in the limited situation confronting the challenger, and only when the challenger has no meaningful ability to opt out, whereas

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999 It should be noted that the dissenters in *Town of Greece* adopted the other version of passive acknowledgment arguing that the passive nature of the acknowledgment could not simply be measured by whether it was coercive, rather the closeness of the relationship between the acknowledgment and a particular religion also play a role in this characterization. This view does not enjoy much support in German jurisprudence or commentary.

1000 In other words, in those situations where no one is making a claim based on positive religious freedom.

in the United States non-establishment principles have been used to justify blanket bans on government acknowledgment of religion.

With this in mind, one might say that it is the impact of the application of non-establishment principles that best explains why some American jurists are seeking to narrow the scope of the purposes served by these principles. If the remedy for violating these principles is a broad based ban on government acknowledgment of religion, it is no wonder that advocates of allowing government to acknowledge religion in the public sphere would wish to limit the reach of the Establishment Clause. In comparison, an attempt to limit the purposes served by non-establishment principles in Germany is unnecessary considering the secondary role these principles play in the established German doctrine. Namely they are invoked in situations where the individual cannot avoid state acknowledgment of religion in the public sphere, but only to the extent of protecting that individual and not as a per se ban on the type of state acknowledgment of religion being challenged. Thus, while a facial reading of these cases might leave one with the impression that German courts now view non-establishment principles as serving a broader range of purposes than the now dominate accommodationist view in America, one should not lose sight of the different ways that courts in these two jurisdictions have traditionally sought to cure violations of the non-establishment principles.

Finally, as was alluded to already, these cases were relatively easy to compare because the interests in them were limited to the state's action and the negative religious freedom of the person challenging the state action. While there was some mention of positive rights in the council cross cases, the courts generally rejected the claim that those rights were being impacted. In Chapter 8, we will see that once the court takes these positive rights into consideration, the similarities between the United States and Germany regarding the application of non-establishment principles tends to become more nuanced, and true differences begin to emerge. Nevertheless, these cases will also illustrate the growing trend in the United States to impliedly recognize something akin to the German view that the state has a role in facilitating positive religious freedom rights.

## Chapter 8: Government Acknowledgment of Religion in Schools

Schools raise an interesting dilemma concerning how one categorizes the type of forum. As was previously noted, schools have features that are characteristic of both the institutional public sphere and open public sphere. Further, one could argue that students might also at times be in a quasi-private sphere inside the school setting, e.g. saying a prayer to themselves prior to taking a math exam or a group of friends meeting before the school day to pray. With that said, this work will treat schools as a special sphere inside the broad category of the institutional public sphere. The focus here will be on the institutional public sphere as it exists in the school setting and how in some instances the actors within it are operating in a slightly more open setting than the classic institutional sphere. This in-depth look at how religious liberty doctrine has been applied by each jurisdiction in the school setting is divided into four parts. The first part of this section will focus on government actions inside the classroom setting. The second will look at cases involving instances where government has brought religious symbols into the school setting. The third part is somewhat related to the second and deals with the rights of teachers and the responsibility of the state to shield students from the expression of those teachers. The final part will look at efforts taken by the state to limit religious expression inside the school setting. While all of these instances relate to government acknowledgment of religion in the school setting, the degree of acknowledgment varies as does the manner in which courts have framed these cases.

### A. Direct Government Actions Encouraging Religious Activity

#### 1. Prayer/Bible Reading in the United States

School prayer and Bible readings have a long, rich, and mixed history in the United States that extends well beyond the relatively recent decisions by the U.S. Supreme Court. A good half century before the Supreme Court weighed in, numerous state courts had already addressed the question of whether such practices violate concepts of religious liberty, with mixed results.<sup>1001</sup> On the eve of the aforementioned *Schempp* case, for example, nine state courts had already ruled that Bible readings were a perfectly acceptable activity for state schools to engage in, while five states had banned the practice. This rich and varied history only made it more difficult for the Supreme Court to find its footing, and it should come as no surprise that on no fewer than nine occasions the Court has addressed some aspects of prayer in the school setting, as it struggled to find the proper balance.<sup>1002</sup> Two cases concerning these school-related issues in the early 1960s radically changed the way Americans viewed the relationship

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1001 For an overview of these cases see Harrison, *The Bible, the Constitution and Public Education*, 29 *Tenn. Law Review* 363 (1962) (noting further that 12 state constitutions expressly prohibited religious instruction in schools).

1002 See *Doremus v. Board of Education*, 342 U.S. 429 (1952); *Engel v. Vitale*, 370 U.S. 421 (1962); *Abington School District v. Schempp*, 374 U.S. 203 (1963); *Chamberlin v. Dade County Bd. of Public Instruction*, 377 U.S. 402 (1964); *Treen v. Karen B.*, 455 U.S. 913 (1982); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Lee v. Weisman*, 505 U.S. 577 (1992); *Santa Fe Ind. School Dist. v. Doe*, 530 U.S. 290 (2000); *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004). For a list of lower court decisions involving the question of government sponsored prayer in school see 110 *ALR Fed* 211 (214).

between church state, and while both were met with widespread dissent<sup>1003</sup>, they laid the groundwork for a period of American jurisprudence that came awfully close to the French version of *laïcité*.<sup>1004</sup>

These early cases also mark the turning point that took place post World War II when religious minorities started using the federal courts to protect their individual religious liberty. As Douglas Laycock points out “[w]hen the Court began to take religious minorities seriously after World War II, majoritarian religious ceremonies at public events, and especially in public schools, looked less and less tolerable.”<sup>1005</sup> The “intolerable” government acknowledgments of religion in these two early cases were the recital of a prayer at the opening of each school day (*Engel*) and regular Bible readings from the Protestant King James Bible as part of the school curriculum. (*Schempp*)

At issue in *Engel v. Vitale* was a state law that allowed public schools to open each day with a non-denominational prayer drafted by the state, but also gave students the opportunity to excuse themselves from participating in the prayer if they found it objectionable.<sup>1006</sup> Describing the prayer as an obvious religious activity, the Court in *Engel* seemed most concerned with the fact that it was state officials who drafted the prayer.<sup>1007</sup> Furthermore, the Court was unimpressed by the opt-out clause finding that while it satisfied Free Exercise concerns, the Establishment Clause adds an additional limit on government that simply forbids it from placing its “power, prestige and financial support . . . behind a particular religious belief”.<sup>1008</sup> This case, better than any, illustrates what proponents of a robust Establishment Clause believe is added to religious freedom in the United States when compared to Germany, especially considering the factual similarities of this case to the school prayer case heard by the BVerfG.<sup>1009</sup> Carl Esbeck perhaps sums up the distinction between the two religion clauses best when he writes:

"The Free Exercise Clause is rights-based and vests in a holder of a religious faith. The modern Establishment Clause operates quite differently: as a structural clause that limits the government's net authority or jurisdiction. And as with the doctrine of separation of powers, a consequence of any structural limit on government authority is to expand

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1003 See Smith, Constitutional Divide: The Transformative Significance of the School Prayer Decisions, Legal Studies Research Papers Series, No. 10-038 (2010) [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1691661](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1691661).

1004 At the very least this is how some German commentators viewed this period of American jurisprudence. See for example Göbel, Der Kampf um die Schule: Religiöse Präsenz an staatlichen Schulen in der Rechtsprechung des Bundesverfassungsrechts in Festschrift für A. Hollerbach (2001) pg. 781 (warning that the BVerfG crucifix decision would move German jurisprudence in the direction of the American model where the subjective views of an individual seeking to exercise negative rights could limit the will of the religious majority). See also Heinig, Ordnung der Freiheit. Das Staatskirchenrecht vor neuen Herausforderungen, ZevKR 2008, 240.

1005 Laycock, Collected Works on Religious Liberty, Vol. 1: Overviews and History, (Cambridge, 2010) pg. 254.

1006 370 U.S. 421 (1962) (The prayer in question read: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country. Amen.”)

1007 *Engel v. Vitale*, 370 U.S. 421, 425 (1962)

1008 370 U.S. at 430-431

1009 Factually, the prayer at issue in the German case was not crafted by the state itself, but the state most certainly had a policy that not only carved out time for the prayer to take place, but also allowed teachers to take part in it with the students.

the breathing room for the exercise of the people's liberty."<sup>1010</sup>

As such, the opt-out clause simply played no role in the Court's analysis of whether non-establishment principles were violated by the state's prayer policy, whereas, as will be shown, it was the deciding factor in the decision made by the BVerfG.

The discussion in *Engel* regarding the opt-out policy also illustrates how the Justices viewed the purposes served by the Establishment Clause as being separate and distinct: the Free Exercise Clause prohibits direct government coercion, while the Establishment Clause is intended to protect against indirect coercion of religious minorities that comes about when government supports particular religious beliefs.<sup>1011</sup> Having to leave the room while their classmates engaged in a group prayer was exactly the kind of indirect coercion that the Establishment Clause sought to protect against. In addition to prohibiting indirect coercion, the Court also noted that the Establishment Clause was intended to keep religion and the state separate because "a union of government and religion tends to destroy government and to degrade religion."<sup>1012</sup>

In his dissent, Justice Stewart would have none of the idea that the state is establishing a religion by letting students voluntarily take part in prayer. Setting forth a quasi-positive religious freedom argument Stewart noted "that to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation."<sup>1013</sup> For Stewart, the opt-out provision added more than enough protection for individual religious liberty, implying that the provision struck the correct balance between negative and positive rights, a view that basically mirrors the one made a decade later by the BVerfG.

A year later the Court addressed the question of whether a state could require schools to engage in Bible readings as part of its curriculum.<sup>1014</sup> As was already pointed out, members of the Court differed on what purposes the Establishment Clause served, leading them to different conclusions as to why the Clause prohibited this practice. However, all but one of the Justices agreed that the Clause most certainly prohibited this deeply religious exercise from being a part of the official school curriculum. For eight of the Justices, the Clause at least requires the government, when it acknowledges religion in school, to remain neutral and act with "a secular legislative purpose" in a manner that does not have the "primary effect" of either advancing or inhibiting religion.<sup>1015</sup> The Court here notes that the idea of neutrality can be traced back to Judge Alphonso Taft, Father of President and Supreme Court Justice William Taft, who in an unpublished opinion wrote that religious freedom means "absolute equality before the law, of all religious opinions and sects . . . . The government is neutral and while protecting all, it prefers none, and it disparages none."<sup>1016</sup> After citing prior decisions related to neutrality, the court concluded that the purpose of neutrality is to prevent a

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1010 Esbeck, *When Accommodation Religion Violates the Establishment Clause*, pg 364.

1011 370 U.S. at 431.

1012 370 U.S. at 431.

1013 370 U.S. at 445.

1014 *Abington v. Schempp*, 374 U.S. 203 (1963)

1015 374 U.S. at 222. (This language would later form the basis of the so-called Lemon Test)

1016 374 U.S. at 215.

fusion of government and powerful religious groups, and to protect the right of people to practice the religion of their choosing without any undue influence from the state.<sup>1017</sup> The *Schmepp* Court also stressed that no concept of neutrality could allow a majority to impose such exercises on others even when the majority claims they have a Free Exercise (positive) right to do so, noting that the Free Exercise Clause “has never meant that a majority could use the machinery of the State to practice its beliefs.”<sup>1018</sup> In other words, according to the *Schmepp* majority, not only was it unnecessary for the state to facilitate the religious development of its students, non-establishment principles actually prohibited the state from taking an active role in such religious development.

Finding himself alone in dissent once again, Justice Stewart interpreted the Establishment Clause narrowly<sup>1019</sup> and argued that the Bible reading policy actually was consistent with Free Exercise objectives, characterizing it as involving a “substantial free exercise claim on the part of those who affirmatively desire to have their child's school day open with the reading of passages from the Bible.” For Stewart the compulsory nature of school was a critical factor, and a rule prohibiting religious practices in schools would amount to religion being “placed at an artificial and state-created disadvantage. . . . making way for the establishment of a religion of secularism,” in violation of the religious liberty rights of those students who wished to have religion be part of their school day.<sup>1020</sup> Regarding the purpose of the Establishment Clause, Stewart writes:

“religious exercises are not constitutionally invalid if they simply reflect differences which exist in the society from which the school draws its pupils. They become constitutionally invalid only if their administration places the sanction of secular authority behind one or more particular religious or irreligious beliefs.”<sup>1021</sup>

By having an opt-out provision, Stewart argued that the practice cannot be equated with the kind of coercion prohibited by the Establishment Clause.<sup>1022</sup> Finally, and most importantly for comparative purposes, Stewart contended that the state was obligated to provide space for students to develop religiously in this state setting where participation was mandatory.

In this early decision questions concerning the kind of forum and nature of the government's acknowledgment of religion arguably, although not expressly, shaped the competing views on the Court. There is no doubt that for the Justices who struck down both the prayer and Bible reading policy, the fact that these took place at the beginning of the school day, in the classroom, with the teacher leading the activity was a crucial factor in how it applied Establishment Clause principles. The type of coercion being checked in both cases involved the kind that only takes place in a closed forum where

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1017 374 U.S. at 222.

1018 374 U.S. at 226. (This view is in stark contrast to the prevailing view in Germany that contends while citizens cannot demand the machinery of the state to support its religious development, there is no problem with the state providing room for such religious development in the public sphere.)

1019 He limits its reach to cases where “government support of proselytizing activities of religious sects by throwing the weight of secular authority behind the dissemination of religious tenets.” 374 U.S. at 314.

1020 374 U.S. at 313.

1021 374 U.S. at 317-318.

1022 374 U.S. at 318.

the participants are mandated to attend, and it was the act of having to leave the room that opens up the possibility of the student feeling coerced to stay and take part in the religious activity in order not to be identified by his or her classmates as an outsider. This type of coercion simply is not present in an open forum where participation is voluntary.

Regarding whether the government's activities here were active or passive, this too undoubtedly also played a role in the various opinions filed by members of the Court, and basically forms the basis of the disagreement between Justice Stewart and his fellow Justices. The *Engel* Court was especially troubled that it was the state itself creating and leading students in prayer. In *Schempp* the fact that this activity took place on school grounds, during school hours as part of the school's curriculum distinguished this case from *Zorach* where the Court allowed the state to implement a leave time policy for students to engage in religious instruction away from school grounds conducted by non-government actors. The government's role in acknowledging religion via a Bible reading policy was simply too active, whereas merely allowing students to leave school was passive enough an acknowledgment of religion that, at least for a majority of the Court, did not run afoul of non-establishment principles. Justice Stewart, on the other hand, found both policies to be passive acknowledgments of religion because: 1) they were limited in duration; 2) participation in them was voluntary, and 3) they were implemented to accommodate the religious needs of students in this closed setting. Stewart's views, as we shall see, almost mirror those adopted by the German Constitutional Court.

After setting down a relatively firm line regarding prayer in school, the Court was then forced to take on some of the periphery issues testing the limits of this prohibition. In *Wallace v. Jaffree*, the Court struck down a state law allowing each school day to begin with a moment of silence. In doing so, the Court put most of its focus on the primary purpose of the law, which for six of the Justices was the state's attempt to circumvent the Court's *Engel* ruling and allow prayer back into the school setting.<sup>1023</sup> Interestingly, it is Justice Rehnquist's dissent that seems to mark a revival of Justice Stewart's views, and would two decades later become the standard by which at least five Justices on the Court would measure Establishment Clause violations.

According to Rehnquist “[t]he evil to be aimed at . . . appears to have been the establishment of a national church, and perhaps the preference of one religious sect over another; but it was definitely not concerned about whether the Government might aid all religions evenhandedly.”<sup>1024</sup>

It should be noted, however, that creating a moment of silence during which students may pray to themselves is not per se banned by the Establishment Clause. In fact it is endorsed by the federal government and has been approved by several lower federal courts as a constitutional means of allowing students to develop religiously inside the

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<sup>1023</sup> 472 U.S. 38, 56 (1985)

<sup>1024</sup> 472 U.S. at 99 (in 2002 the Court upheld a program that allowed state funds in the form vouchers to be used to help finance religious education so long as it allowed all kinds of schools to qualify for the vouchers, and it was the parents making the decision as to where the voucher would be spent. This idea that neutrality means open to all comers mirrors the even-handedness language used by Rehnquist in his *Wallace* dissent).

school setting.<sup>1025</sup> So long as a moment of silence policy is not deemed solely as a means to encourage students to pray, it is arguably constitutionally valid.

In 1992, the Court was once again faced with a school prayer policy, this time the question being whether a religious leader could open a high school graduation ceremony by requesting all attendees to bow their head and pray.<sup>1026</sup> The question here focused on whether this one-time, one minute prayer that took place at a school sanctioned event but was not part of the school curriculum, nor delivered or drafted by a state official, violated the rule set forth by the *Engel* Court. For the five Justice majority, the setting was a crucial element in determining whether the government had unconstitutionally acknowledged religion by inviting a religious leader to the ceremony in order to lead a prayer: “State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory. . . .”<sup>1027</sup> Thus, at the very outset, the case was framed as one involving the active acknowledgment of religion by the government in an institutional public sphere. From there, the majority had no problem finding that in this setting, religious dissenters and non-believers would feel coerced to partake in the prayer in violation of the Establishment Clause.

While five of the Justices agreed that this policy violated the Establishment Clause because it amounted to government coercion, four of these Justices wrote separately to make it clear that, in their view, a showing of government coercion was not necessary to make out a successful claim under the Establishment Clause.<sup>1028</sup> It is here that Justice Blackmun, in concurrence, sets forth his thesis that serves to frame this work:

“The Establishment Clause protects religious liberty on a grand scale. . . . it is a social compact that guarantees for generations a democracy and a strong religious community—both essential to safeguarding religious liberty. . . . When the government puts its imprimatur on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs. . . . A government cannot be premised on the belief that all persons are created equal when it asserts that God prefers some.”<sup>1029</sup>

In other words, religious freedom is meaningless if the government is allowed to endorse religion in a manner that makes people feel like outsiders and unequal. Further,

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1025 See U.S. Department of Education, Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools [http://www2.ed.gov/policy/gen/guid/religionandschools/prayer\\_guidance.html](http://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html). (The policy also allows students to use their break time to pray and organize prayer prior to the beginning of the school day.); For a discussion of the kinds of prayer practices in schools that might not violate the Establishment Clause see Haupt Mixed Public-Private Speech and the Establishment Clause, 85 Tulane Law Review 571, 610-616 (2011). For a list of lower federal courts who have allowed moments of silence in schools see 110 A.L.R. Fed. 111 (2014).

1026 *Lee v. Weisman*, 505 U.S. 557 (1992)

1027 505 U.S. at 586.

1028 “Although our precedents make clear that proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient. Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion. But it is not enough that the government restrain from compelling religious practices: It must not engage in them either.” 505 U.S. at 604. (Blackmun concurring)

1029 505 U.S. at 606-607 (Blackmun, concurring).

as Justice Souter points out in his concurrence, government efforts to coerce non-adherents to take part in or support religious activity “would virtually by definition violate their right to religious free exercise,” as such a reading that the Establishment Clause only protects against government coercion would basically make it identical to protection offered by the Free Exercise and “a virtual nullity.”<sup>1030</sup>

The disagreement among the Justices that was present in *Town of Greece* concerning what kind of coercion constitutes an Establishment Clause violation has its origins in the *Lee* case (although it can arguably be traced back to Justice Stewart's dissent in *Engel*), as it is here where three of the dissenters for the first time expressly make the argument that only coercion “backed by threat of penalty” amounts to a violation of the Establishment Clause.<sup>1031</sup> Referring to the majority's view of coercion as the “psycho-coercion test,” Justice Scalia writes that a simple, short prayer at a one-time event cannot amount to the type of coercion prohibited by the Constitution because failure to join in the prayer does not result in any state sanctions.<sup>1032</sup> Placing emphasis on the one-time setting arguably could be seen as an attempt characterize it as something less than one taking place in the institutional public sphere, and the words “simple prayer” clearly are aimed at showing just how passive the government's acknowledgment of religion is. However, at the end of the day, it appears that the setting and whether the acknowledgment is passive plays only a limited role in the analysis made by advocates of this strict accommodationist view of non-establishment principles. Only so-called “force of law coercion,” regardless of where it takes place, is banned by non-establishment principles.

The boundaries of the ban on school prayer set forth in *Engel* were again tested in 2000 when a Texas school district's policy of allowing student-led and student-initiated prayer to be read over the public address system prior to a high school football game was brought before the Court as a potential violation of the Establishment Clause. In adopting the reasoning from *Lee*, the Court acknowledged that the Free Exercise Clause gives students the right to voluntarily pray at any time of the school day or extracurricular events, but the “religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer.”<sup>1033</sup>

Taken together, it can be said that the dominate view of prayer and Bible readings that take place in a school's institutional public sphere holds that the state may not actively involve itself with such activities even if students are given the ability to opt out of taking part in them. For at least some of the Justices, such acknowledgment of religion

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1030 505 U.S. at 621. (Souter, concurring)

1031 505 U.S. at 640. (Scalia, dissenting)

1032 505 U.S. at 644. (Scalia, dissenting)

1033 *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000). (An argument can certainly be made that this case more appropriately belongs with those addressing state acknowledgment of religion in the so-called open public sphere. However, while this setting does have the characteristics of a more open forum, the fact remains that the only speakers in this forum were the students allowed to access the public address system, and access to this limited forum was strictly controlled by the government. Furthermore while attendance was not mandatory, spectator sports play an important role in American high school culture, with the peer pressure to attend such events being relatively high, especially in Texas, where this high school is located.)

by the state violates the non-establishment purpose of protecting individuals from government policies that make them feel coerced to partake in religious activities. For other Justices, this kind of government acknowledgment, under these circumstances, violates concepts of equality and non-preference of religion, and threatens to harm the negative religious freedom rights of minorities and dissenters.

Yet, in recent years a growing chorus of academics have put forth a version of neutrality toward religion that seeks to allow government to acknowledge religion in this kind of a public forum. Spearheading this effort has been Professor and former Federal Appeals Court Judge Michael McConnell, who puts forth the argument that:

“If the aspects of culture controlled by the government (public spaces, public institutions) exactly mirrored the culture as a whole, then the influence and effect of government involvement would be nil: the religious life of the people would be precisely the way it would be if the government were absent from the cultural sphere. In a pluralistic culture, this is the best of the possible understandings of “neutrality,” since it will lead to a broadly inclusive public sphere, in which the public is presented a wide variety of perspectives, religious ones included. If a city displays many different cultural symbols during the course of the year, a nativity scene at Christmas or a menorah at Hannukah is likely to be perceived as an expression of pluralism rather than as an exercise in Christian or Jewish triumphalism. If the curriculum is genuinely diverse, exposing children to religious ideas will not have the effect of indoctrination. Individuals should be permitted to opt out of participating in those religious (or antireligious) aspects of the program that are objectionable to them on grounds of conscience, but there is no reason to extirpate all religious elements from the entire curriculum. . . . If members of minority religions (or other cultural groups) feel excluded by government symbols or speech, the best solution is to request fair treatment of alternative traditions, rather than censorship of more mainstream symbols. If a government refuses to cooperate with minority religious (and other cultural) groups within the community, there may be a basis for inferring that the choice of symbols was a deliberate attempt to use government influence to promote a particular religious position.”<sup>1034</sup>

To be clear, by primarily focusing on the actions of government instead of accommodating the religious needs of the individual, this position still fits within the classic American framework of viewing non-establishment principles as being a limit on government, but the language used by Professor McConnell is unmistakably similar to that used by jurists and commentators in Germany when discussing the concept of positive religious freedom.<sup>1035</sup>

Supporters of this view often like to point out that historically, at least up until the 1940s, government sought to instill morals in the populace by advocating a kind of civil religion, even in schools, and the kind of acknowledgment that should be allowed in this forum would continue to serve this purpose. As Douglas Laycock points out,

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1034 McConnell, *Religious Freedom at a Crossroads*, 59 *U. of Chicago Law Review* 115, 193 (1992).

1035 See Tushnet, *Accommodation of Religion Thirty Years On*, 38 *Harvard Journal of Law & Gender* 1, 12 (2015)

“The common school movement attempted to bridge the religious gaps among Americans with an unmistakably Protestant solution: by confining instruction to the most basic concepts of Christianity, and by reading the Bible 'without note or comment.' The Protestant leaders of the common school movement assumed that no one could object to reading the Bible, and by forbidding teachers to explain the passages read, they thought they had avoided sectarian disagreements about interpretation.”<sup>1036</sup>

Laycock correctly notes, however, that this use of religion became untenable as Catholic and other non-Protestant groups grew in numbers and power, ultimately resulting in the Supreme Court's modern Establishment Clause jurisprudence, leading Laycock to label modern calls for “neutral” religious observances a “fiction” in the face of ever growing diversity.<sup>1037</sup>

## 2. School Prayer in Germany

Around the same time that American courts were beginning to define the boundaries of prayer in school, German courts also were trying to determine what role, if any, prayer should play in German public schools. In 1966 the *Staatsgerichtshoff* (State Constitutional Court) in Hessen was asked to review a state policy calling for each school day to begin with a prayer.<sup>1038</sup> Acknowledging that the school setting involved a unique relationship of authority between the state and students, and as a result extra emphasis needed to be paid to the rights of students,<sup>1039</sup> the court was asked to examine a policy whereby students were allowed to excuse themselves from the room if they did not desire to take part in the prayer. The parents challenging the policy argued that it discriminated against non-religious students in violation of the Constitution of Hessen, the provisions of which are basically identical to those found in the *Grundgesetz*.

The court began its analysis by noting that simple principles such as the separation of church and state played no role in its decision, as clearly the *Grundgesetz* envisions some relationship between schools and the state by allowing, for instance, children to attend religion class.<sup>1040</sup> Furthermore, the court characterized separation of church and state principles as being related to the institutions of church and state, whereas modern principles of religious freedom transformed religious liberty into a human right whereby the state may not coerce individuals into doing something that violates their religious freedom. Interestingly, by framing the case as such, the court at this point departs from how U.S. courts characterize these cases, namely as a limit on the state, and attention was placed squarely on the impact the policy had on individuals.

Driving home its point that this case did not concern anything akin to the American “wall of separation” doctrine, the Hessen court expressly mentioned the U.S. Supreme Court's decision in *Engel*, and noted that there the Supreme Court based its decision not

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1036 Laycock, "Noncoercive" Support for Religion: Another False Claim About the Establishment Clause, 26 Valparaiso University Law Review 37, 51 (1991)

1037 Laycock, Nocoercive Support for Religion, pg. 53.

1038 NJW 1966, 31

1039 NJW 1966, 31, 32

1040 NJW 1966, 31, 33.

on free exercise principles that involve coercion, but rather on non-establishment principles that forbid the state from using its resources to benefit religion.<sup>1041</sup> In short, the Hessen court signaled that this was a case about individual free exercise rights, not limitations on the state. The court then went on to interpret Article 9 of the Hessen Constitution (basically the same rights contained in Article. 4 GG) in conjunction with WRV 136, Section 3, as protecting individuals not only from being forced to affirmatively express their beliefs, but also guaranteeing them the right to keep their religious beliefs a secret.<sup>1042</sup> Furthermore, and perhaps more importantly, this right to silence not only protects individuals from the state, but also from other individuals seeking to exercise their so-called positive religious freedom rights.<sup>1043</sup>

The coercion at issue here, however, was not your garden variety “psycho-coercion,” which the court noted would require judges to inappropriately play the role of psychiatrist. Instead the court focused on how the opt-out provisions coerced individuals to disclose their divergent beliefs day after day, in violation of their negative religious freedom rights.<sup>1044</sup> What's important to note here is that again the Hessen court clearly deems this to be the kind of forum that is characteristic of the institutional public sphere, and the state's policy is something more than merely a passive acknowledgment of religion because of the coercive impact it has on students who do not wish to take part in the religious exercise.

Addressing the positive rights of other school children and their parents, the court acknowledges that negative religious freedom rights would provide the challengers with protection so long as enforcing them did not infringe upon the positive religious rights of others. Here the court viewed any infringement on positive religious liberty rights held by other students as being temporary, and stressed that students were not significantly hindered by having to forgo beginning the school day with a prayer as children had unlimited opportunities to prayer throughout the day, e.g. at home, at church, to themselves.<sup>1045</sup>

Interestingly, although perhaps not surprising considering how early this case was decided in the development of modern German religious liberty jurisprudence, the concept of state neutrality with regards to religious matters plays almost no role in this decision, with the only hint of neutrality being language stressing that the school was obligated to be one that is open to children of all religious persuasions.

In the end, the Court reached the same conclusion as the *Engel* court but framed the case using the German religious liberty dogma created by the BVerfG and commentators, which at this early stage of its development was heavily tilted toward

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1041 NJW 1966, 31, 33 (In fact, the Supreme Court went so far as to note that the non-denominational nature of the prayer as well as its voluntariness, might have saved it from a Free Exercise challenge, but because coercion is not necessary to prove an Establishment Clause claim, these facts were irrelevant to that analysis.)

1042 NJW 1966, 31, 34.

1043 NJW 1966, 31, 34 (seemingly implying that when negative and positive rights collide in such a setting, the negative rights prevail).

1044 NJW 1966, 31, 35.

1045 NJW 1966, 31, 35 (Additionally the court seemed to suggest that the principles of tolerance would require the holders of these positive rights to tolerate the rights of their classmates seeking to exercise their negative religious freedom rights.)

what American readers might refer to as Free Exercise concerns. In the years following, several courts and commentators disagreed with the decision out of Hessen, some mistakenly characterizing it as an example of American-style separation of church and state doctrine.<sup>1046</sup>

One court that rejected the Hessen court's view was the Federal Administrative Court (*Bundesverwaltungsgericht* or *BVerwG*), holding that so long as the school prayer was limited in its duration and occurrences per day, the chances of any psychological coercion being placed on non-participants was minimal. Furthermore, the fact that these students likely had already excused themselves from the constitutionally permitted religion courses meant that this policy did not force them to divulge their religious beliefs.<sup>1047</sup> This they had already done by exercising their constitutional right to be excused from the religion course. By characterizing the impact of the policy as being a minimal infringement on the negative religious rights of individuals, the Federal Administrative Court was arguably seeking to diminish the nature of the state's acknowledgment of religion and in turn any threat of coercion arising from this acknowledgment. Interestingly, the Administrative Court also was of the view that allowing the prayer might actually foster peaceful relations among students in the school setting in that students would be forced to tolerate the views of others.<sup>1048</sup>

Finally, the court set forth several reasons why the Hessen Court got the issue wrong: 1) Article 4 does not give holders of negative rights the ability to thwart the positive rights of others; 2) positive rights under Article 4 are no less important than negative rights and cannot simply be subsumed by them;<sup>1049</sup> and 3) nor can the minority force its will upon the majority.<sup>1050</sup> These rationales would, and still do to this day, form the basis of the arguments advanced in favor of allowing the state to robustly acknowledge religion in all public forums. Perhaps most importantly, however, this decision by the Federal Administrative Court set up an instance where two high courts were divided over this issue, forcing the BVerfG to step in and settle the dispute.<sup>1051</sup>

The manner in which the BVerfG framed the issues and rights involved in this case gave a preview of just how difficult these cases would be in the future. According to the court no fewer than four fundamental rights were at stake in this case, with at least five different parties being the holders of these rights.<sup>1052</sup> Article 6, Section 2, Clause 1 of the *Grundgesetz* implicated the rights of parents in this dispute; not just the parents

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1046 VerwRspr 1974, 907 (see also the 27.02.1970 decision of the BVerwG – BVerwG VII B 40.69 – [VRspr. 21, 385] and the lower court decision from court in Lüneburg decided on 18.02.1969, [OVGE 25, 418]). Not just courts were critical of the ruling. Several commentators also argued that the ruling was improper because it elevated negative rights to being an unrestricted right. See von Campenhausen, *Religionsfreiheit in Handbuch des Staatsrechts* (2009) §157 Rn. 132. (“Die negative Komponente des Grundrechts reicht nicht weiter als die positive; sie unterliegt auch den gleichen Schranken wie diese.”) He goes on to argue that negative rights basically and primarily serve to protect individuals from being coerced by the state in matters of religion.

1047 VerwRspr 1974, 907, 910.

1048 VerwRspr 1974, 907, 910. (An interesting twist considering the Hessen Court's view on tolerance and the need for the majority to tolerate the sensitivities of the minority.)

1049 *id.* See also Göbel, *Der Kampf um die Schule: Religiöse Präsenz an staatlichen Schulen in der Rechtsprechung des Bundesverfassungsrechts*, in FS für A. Hollerbach (2001) 773, 780.

1050 VerwRspr 1974, 907, 911.

1051 BVerfGE 52, 223.

1052 BVerfGE 52, 223, 235.

seeking to shield their children from state acknowledgment of religion, but also parents who wished to have the state provide room for their children to develop religiously in the school setting. Students were also holders of rights under Article 4, Sections 1 and 2 of the *Grundgesetz*, the majority being possessors of the so-called positive religious freedom rights and the challengers seeking to exercise their negative religious rights. Finally, Article 7 of the *Grundgesetz* gives each individual state the responsibility of educating its youth. Thus, the court needed to give some deference to the decisions made by the states. On its face, after being framed in such a manner, the challenge of balancing these rights seemed to be an impossible one.

Yet the court had a proverbial ace up its sleeve in the form of its own precedent created several years earlier allowing states to establish schools having a Christian character.<sup>1053</sup> In these cases, as was already mentioned, the court held that as part of its desire to provide room for students to develop religiously and philosophically, schools could acknowledge in its curriculum the role Christianity played in forming the values of western civilization. However, the state had to ensure that its schools did not take on a missionary character and the schools had to remain a welcoming place to students of all religious persuasions.<sup>1054</sup> So long as the state could comply with these two conditions, the Court saw no problem with establishing a school system based loosely on Christian principles.

Arguably these conditions operate as non-establishment principles in that the court had created a line that schools could not cross, a line intended primarily to protect religious minorities and non-believers. Nevertheless, the door had been opened for the court to allow this short prayer, delivered at the beginning of the school day, with the ability for dissenters to opt out, as just part of the state's efforts to accommodate the religious needs of its students. By holding a non-denominational prayer, the school was not taking sides on any questions of religion, ruled the Court, although because it is clearly a religious act, the school cannot force students to take part as doing so would violate students' negative rights under Article 4 and the command that the state may not force individuals to partake in religious practices found under WRV Article 136, Section. 4.<sup>1055</sup>

While the court did not frame its analysis as such, it can be implied that the non-denominational nature of the prayer made the relationship between government and a particular religion somewhat passive, and so long as students could opt out, they could not be said to have been coerced in a manner that would turn the nature of the acknowledgment by the state into something more active. Furthermore, along the lines of how active the relationship between state and religion was in this context, the court went on to hold that the prayer was not part of school's curriculum and as such was more of a voluntary act for both students and teachers.<sup>1056</sup> Acknowledging the state's role of providing room for students to develop religiously and philosophically, the court noted that in this instance it is limited to simply complying with the wishes of parents

1053 BVerfGE 52, 223, 236.

1054 BVerfGE 41, 29, 49; BVerfGE 52, 223, 237.

1055 BVerfGE 52, 223, 237.

1056 BVerfGE 52, 223, 239.

who desire to have their children start the school day with a non-denominational prayer. Finding a way for students to exercise these positive religious rights was impliedly deemed by the court to be a passive act and simply part of what is expected of government actors pursuant to Article 4. By allowing students and teachers to opt out, the state had struck the proper balance between negative and positive religious liberty, just as it was suppose to do under the concept of *praktische Konkordanz*.<sup>1057</sup>

Finally, the Court set out to once and for all put to rest the claim made by the Hessen court concerning the coercive nature of the opt-out policy in that it forced students to reveal their religious beliefs. Negative rights to do not protect against having to state one's views on religion; and if they did, it would be impossible for students to simultaneously exercise their right to opt-out of religion courses, which they have a constitutional right to do.<sup>1058</sup> To exercise these constitutional rights of refusal, one must make public one's disagreement with the act in which one refuses to take part.<sup>1059</sup> Furthermore, citing its Christian nature of schools precedent, the court noted that in the school setting where rights collide, the *Toleranzgebot* principle demands that the state attempt to accommodate all rights involved and provide those seeking to exercise their negative rights with an ability to avoid the collision. Yet the Hessen Court was wrong to require those seeking to exercise their positive rights to forgo these rights in response to claims brought by those seeking to exercise their negative rights.<sup>1060</sup> Finally, the Court agreed with the Federal Administrative Court that simply having to make a decision to opt out of the prayer in no way amounted to coercion in the abstract, psychological or otherwise, and while it is possible that having to excuse oneself from taking part might result in being treated as an outsider or discrimination, absent such a showing, banning the prayer policy was unjustified.<sup>1061</sup>

Interestingly, and importantly for our purposes, the court seemed to suggest that non-establishment principles (state neutrality!) did indeed place some limitations on how the state could carry out this policy. The the prayer must be limited in scope and occurrences, said the court. Furthermore teachers are required to insure that students understand why someone might object, and help students accept other views.<sup>1062</sup> Finally, teachers must notify parents of students who treat non-participants as outsiders, and seek the help of the parents to make the offending student understand the divergent views.<sup>1063</sup> All these demands presumably being the court's way of promoting the non-establishment interest of protecting minorities.

Finally, the court noted that there was nothing in its opinion that foreclosed the possibility of a school having to stop the prayer practice because of students being treated as outsiders or discriminated against by their fellow students, but those cases

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1057 BVerfGE 52, 223, 241.

1058 The court also drew analogies to a line of cases allowing males to opt of mandatory military service based on conscience objections. Here too, so the court argued, one had to divulge one's religious beliefs in order to exercise the constitutional right to something otherwise required by the government.

1059 BVerfGE 52, 223, 246.

1060 BVerfGE 52, 223, 247; see also von Campenhausen, Religionsfreiheit, Rn. 132.

1061 BVerfGE 52, 223, 249.

1062 BVerfGE 52, 223, 250.

1063 BVerfGE 52, 223, 251.

should be treated individually.<sup>1064</sup> This latter point being perhaps the single biggest distinction between how American and German courts apply non-establishment principles. In the United States, the abstract danger of coercion was enough to justify an across the board ban school prayer, while in Germany a concrete showing was necessary to stop the practice, but only in the school where actual coercion was shown.

### 3. Initial Comparisons

Factually, the cases examined in this section could not be more similar. All of them involved policies whereby the state, either directly or indirectly, provided students with the opportunities to engage in religious practices in a school's institutional public sphere. Furthermore, all the cases involved policies that allowed students to opt out of participating in these religious practices, primarily to protect against the creation of a situation where the state's actions could be deemed to be coercive in violation of an individual's free exercise rights. Finally, all of these cases involved, to a certain extent, the application of non-establishment principles. Nevertheless, the outcomes in these cases could not be more different.

As was alluded to at the conclusion of the preceding chapter, what distinguishes the school setting from other institutional public sphere cases involving courtrooms or legislative chambers are the increased number of potential rights impacted by the government's acknowledgment of religion. In these school cases, because of the duration of the mandatory required participation of the individuals inside this forum, the question becomes whether the government should be actively involved in facilitating the ability of students to develop religiously, and when it does, how best can the negative religious rights of other students be protected. German jurists frame this from the perspective of individual rights, whereas Americans tend to focus on the propriety of government actions. Regardless of how one characterizes the dispute, the fact remains that in both the German and American context, courts are forced to take into consideration not only the negative rights of the individuals seeking to avoid being confronted with the state's acknowledgment of religion, but also questions concerning whether the rights of others are somehow being infringed when the state is asked to remove references of religion from this public forum in furtherance of protecting negative religious liberty rights.

The dominate view in the United States continues to be that non-establishment principles prohibit the state from actively sponsoring religious practices in schools. While an opt-out provision certainly satisfies free exercise concerns, non-establishment seeks to ensure that the state does not have the means to engage in indirect coercion of its students. Furthermore, when the court frames these cases as a question of limits on government, it creates a "winner-take-all" situation where if the government's actions are improper, then these actions are per se banned in all similar situations. With that said, this view is clearly losing its dominance as both Justices and commentators in the United States increasingly frame non-establishment principles in a manner that allows for the government to aid all religions evenhandedly, even in the school setting, so long

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<sup>1064</sup> BVerfGE 52, 223, 253.

as in doing so there is no direct coercion of non-believers or students belonging to a minority religion.

While the primary focus here still is on the government's actions, advocates of this position use language that most certainly suggests government should be allowed to acknowledge religion in order to accommodate those citizens who wish to have religion be a part of their lives in this public forum. Furthermore, advocates of this softening of non-establishment principles increasingly, albeit usually impliedly, frame their arguments in the context of public forums and the passivity of the government's acknowledgment of religion, chipping away at the wall that once separated church and state, and in so doing seemingly moving American jurisprudence toward a position that is closer to its German counter part.

From the German perspective, both the nature of schools cases and the prayer case seem to confirm that non-establishment principles play at least some role in placing limitations on how government may acknowledge religion in the school setting. What sets these cases apart from factually similar cases in the United States is the way that free exercise rights in Germany are framed as a “positive right” that not only must be respected by the state, but also protected and facilitated by it. This sets up a situation where, in an institutional public sphere like schools, the state might find itself in the position of having to protect and facilitate both negative and positive rights simultaneously. Here instead of the focus being on limits to governmental actions, it is on the competing individual rights, and the government is no longer seen as a threat, but rather as an arbitrator between the two competing individual rights, where finding a consensus is the primary goal of the state.

Nevertheless, even in this setting where government seemingly can acknowledge religion in order to provide holders of positive religious liberty rights the room to develop religiously and protect these rights from interference by third parties, non-establishment principles place limits on just how far the government may go to accommodate these positive rights when it acts as mediator; limits that seek to promote the non-establishment principles of equality, non-preference, minority rights and plurality. By focusing on coercion in this context, German courts tend to use language associated with the active/passive acknowledgment of religion dichotomy that is increasingly becoming the norm in American jurisprudence. As we will see in the following section, when the state's acknowledgment of religion becomes too active, German courts will step in to protect negative religious freedom rights even if it means restricting positive rights.

Finally, before moving on to a discussion about state sponsored religious symbols in the school setting, it is worth briefly noting here that a more recent line of school prayer cases has created some difficulty for German courts. Because these cases deal more with the characteristics of the school setting that does not fall neatly into the traditional institutional public sphere category, they will be addressed separately later in this chapter.

## B. Religious Symbols in Schools

American Supreme Court jurisprudence regarding the placement of religious symbols in schools is not nearly as developed as its German counterpart primarily because the Supreme Court seems to have created a bright line rule that lower courts have consistently followed.<sup>1065</sup> This bright line has resulted in a dearth of lower court cases and commentary related to this narrow area of government acknowledgment of religion in schools. To make matters more difficult, from a comparative perspective, the case that seems to have settled this area of the law in the United States was a per curiam decision containing a very short and limited dissent. Nevertheless, these cases offer yet another glimpse into how the courts in America and Germany frame cases concerning government acknowledgment of religion in schools, and more importantly show that in extreme circumstances German courts are willing to apply non-establishment principles in a manner similar to their U.S. counterparts.

### 1. United States: Posting of Ten Commandments in Public Schools

The Supreme Court's lone foray into this area is *Stone v. Graham*, a case involving a state law that allowed schools to display the Ten Commandments so long as the displays were donated by private individuals or groups. Proponents of the law argued that there were no Establishment Clause problems with it because: 1) no state funds were used to purchase the displays, and 2) the displays were intended to serve the secular purpose of teaching students about the origins of western laws. Using the three-part Lemon Test, a majority of the Supreme Court concluded in a summary fashion that the display was clearly and overtly religious and placed in the school to advance a religious purpose.<sup>1066</sup> The Court distinguished this from using the Bible as part of a history course, which is permissible, noting that “[p]osting of religious texts on the wall serves no such educational function.”<sup>1067</sup> Furthermore, the Court was convinced that the posting of such an overtly religious display, regardless of who purchased it, amounted to “official support” of religion, which is prohibited by the Establishment Clause.<sup>1068</sup>

In his dissent, Justice Rehnquist took issue with how the Court ignored the stated purpose of the legislation and concluded that the constitution is not violated merely because a religious purpose is also present alongside a stated secular one.<sup>1069</sup> Moreover, he characterized the majority opinion as demanding that the public sector be scrubbed of all religious references, noting that the history of man is inseparable from the history of religion, and thus to learn about man one must also acknowledge the role religion

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1065 The ruling in *Stone v. Graham* basically settled the issue of overtly religious displays being erected in schools by the state, although several lower courts have dealt with periphery issues including displays used as part of educating students about various cultures and religions, displays created by students as part of art class, and depictions of religious symbols as part of holiday celebrations. For a complete list of these cases see 107 ALR 5<sup>th</sup> 1 (2003).

1066 449 U.S. 39, 41 (1981) (“The preeminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact.”)

1067 449 U.S. at 42.

1068 449 U.S. at 42.

1069 449 U.S. at 44.

played in the development of man.<sup>1070</sup> Justice Stewart, in his one sentence dissent, sought to uphold the Supreme Court of Kentucky's decision that the display was within the bounds of the constitution for the reasons set forth by the state, namely the display advanced the secular purpose of teaching students about morals and history. While *Stone* has since stood for the bright line rule that government may not display overtly religious symbols in schools, the dissenters make it clear that in their view the state must be allowed to acknowledge the foundations of western civilization, a stance not far removed from the overwhelming opinion among German jurists and commentators. Absent from the dissenting opinion, however, is any mention that by posting the Ten Commandments, the state was merely seeking to accommodate the religious needs of students, providing yet another example of how reluctant American advocates of religion in the public square are to make something akin to the accommodation of positive religious rights argument made by German jurists and commentators.

Despite the summary nature of the decisions, both majority and dissenting, one can safely say that for one group of Justices the displaying of this overtly religious symbol in this institutional public forum amounted to an active acknowledgment of religion in violation of some of the central purposes of religious liberty, such as government giving no preference to religion and the need to protect minorities from being made to feel as outsiders.<sup>1071</sup> On the other hand, by framing the symbol as containing both religious and secular messages, the dissenters viewed this as nothing more than a passive acknowledgment of religion that served the secular purpose of teaching about morals and the origin of western civilization that in no way substantially infringed on the rights of students.<sup>1072</sup>

## 2. Germany: Kruzifix-Entscheidung (Cross Decision)

Fourteen years after the U.S. Supreme Court's bright line rule forced governments across the country to remove all religious symbols from their schools, the BVerfG was asked to consider a Bavarian law that required each public school to hang a cross in its classrooms as part of the state's desire to provide a space for students to grow religiously.<sup>1073</sup> The law in question contained express language requiring teachers to consider the religious beliefs of all students in the classroom setting, but it provided no means for students to avoid being confronted with this symbol.<sup>1074</sup> The Constitutional Court was not the first to consider this issue, as two lower courts had concluded that the state's actions did not violate any rights found in the *Grundgesetz* primarily because the

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1070 449 U.S. at 46. See also Weiler, Freedom of Religion and Freedom From Religion, 65 Maine Law Review 759 (2013) (arguing that religion is part of the right of self-determination and removing it from the public sphere would violate this right).

1071 Coming to a similar conclusion see Haupt, Active Symbols pg. 835.

1072 See also Gedicks/Annicchino, Cross, crucifix, culture: an approach to the constitutional meaning of confessional symbols, 13 First Amendment Law Review 71 (2014) (arguing that in the United States, when the acknowledgment is attributed to the government, as opposed to private speakers, it must possess "nonconfessional significance" or at least lack "meaningful confessional significance.")

1073 BVerfGE 93, 1.

1074 Volksschulgesetz (VoSchG) beruht. § 13 Abs. 1 VSO ("Die Schule unterstützt die Erziehungsberechtigten bei der religiösen Erziehung der Kinder. Schulgebet, Schulgottesdienst und Schulandacht sind Möglichkeiten dieser Unterstützung. In jedem Klassenzimmer ist ein Kreuz anzubringen. Lehrer und Schüler sind verpflichtet, die religiösen Empfindungen aller zu achten.")

cross, while a religious symbol, in this setting was more a symbol of the common western culture that was being taught in the school.<sup>1075</sup> Furthermore, these courts held that the mere presence of the cross did not turn the school into a missionary school, thereby staying within the limitations set by earlier decisions of the BVerfG.

Equally important, from a non-establishment perspective, the lower courts believed that the hanging of the cross promoted no particular Christian denomination, and in this sense did not amount to an unconstitutional preference of one religion over another. Turning to the individual rights of the challengers, the courts concluded that the presence of the cross did not encroach on any parental rights, nor did it amount to state compulsion along the lines of hanging a cross in a courtroom.<sup>1076</sup> These decisions implied that the state's role in hanging the cross was a limited one, or passive, in that the state was not using the symbol as a means of indoctrinating students, nor was it actively promoting particular religious beliefs.

In what is still today considered as one of its most controversial decisions, a majority of the German Constitutional Court reversed these lower court decisions, setting off a firestorm that resulted in one member of the court issuing an unprecedented press release that sought to soften the otherwise clear language of the decision.<sup>1077</sup> This softening arguably opened the door for Bavaria and other states to revise their cross hanging practices in a manner that all but guaranteed that the symbol would continue to hang in most state run schools. On its face, the court's majority seemed to be overly influenced by the setting in which the cross was displayed and the close relationship between the state and religious beliefs implied by the presence of the symbol in the classroom. Acknowledging that religious freedom does not protect one from having to face the various religious symbols that exist in the public sphere, the majority placed a strong emphasis on the nature of the public sphere noting that the classroom is a closed government run sphere where students have no possibility to avoid the symbol.<sup>1078</sup>

The importance of this characterization cannot be understated, especially when compared to how the ECHR characterized the school setting in the *Lautsi* case, finding it to be more akin to an open public sphere, where the state simply was adding to the open market place of ideas.<sup>1079</sup> While acknowledging that in a setting with the characteristics of an institutional public forum the state may seek to accommodate the

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1075 This view has also been endorsed by critics of the BVerfG decision and cited as a reason why the court decided the case improperly. See von Campenhausen, Religionsfreiheit, in Handbuch des Staatsrechts (2009), Rn. 134. Although others have pointed out that law itself seems to suggest that its primary purpose was to support the religious development of its students, which implies that the state viewed the symbol as a religious one. Hegerfeldt, Religiöse Symbole in staatlichen Räumen, in Liber amicorum für Joachim Gaetner (2003) 282, 284.

1076 BVerfGE 93, 1, 15.

1077 See Jeand'Heur/Koriath, Grundzüge des Staatskirchenrechts Rn. 104 (arguing that the plain language of the court's decision should have resulted in a per se ban of the hanging of crosses in all Bavarian schools, but the court seemed to back away from this stance when the head of the First Senate remarkably issued a press release arguing that the decision had been misinterpreted and did not amount to an outright ban, but rather gave parents and students the right to refuse having a cross in the classroom).

1078 BVerfGE 93, 1, 16. (Even critics of the court's decision have come to the same conclusion and instead placed emphasis on the passive nature of the acknowledgment.) See Heckel, Das Kreuz im öffentlichen Raum. Zum "Kruzifix-Beschluß," pg. 478.

1079 Arguably this is also the position taken by scholars such as Böckenförde, which the dissent points out. See BVerfGE 93, 1, 30.

positive religious freedom of students by providing them space to develop religiously and philosophically,<sup>1080</sup> the BVerfG made it clear that equally important in such a setting is the need to protect negative religious rights. The court had thus turned this dispute into one involving a classic case of competing rights, making it ripe for the application of the *Konkordanz* principle whereby the neutral state is obligated to guarantee the peaceful coexistence among students from various religious background in the school setting, while at the same time respecting the rights of all involved.<sup>1081</sup> A neutral state, in this context, must not only refrain from establishing a religion, but must also not prefer one over another, nor exclude those with different beliefs.

Keeping within the spirit of these additional neutrality mandates, the court acknowledged that while the application of the *Konkordanz* principle was normally left to the legislature, the solution chosen by it could not go beyond "the indispensable minimum elements of coercion" that are part of the give and take nature of a compromise.<sup>1082</sup> In other words, the power of the legislature to solve this dispute was not limitless. There was a line that could not be crossed, a line that took into consideration the concept of state neutrality and the purposes served by it. In determining that the state had crossed the "minimum elements of coercion" line, the court not only focused on the nature of the forum, but also placed heavy emphasis on the state's relationship with the symbol and the message being conveyed by this relationship.

The court impliedly rejected the idea that the state's role was merely passive, noting that the duration and intensity of students' confrontation in this setting is far greater than that experienced by parties in a court.<sup>1083</sup> Additionally, the court's majority held that the cross, while arguably conveying multiple messages, was predominantly a symbol that can be identified with a particular religion and beliefs propagated by that religion.<sup>1084</sup> In pointing this out, the majority took pains to distinguish the mandated

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1080 BVerfGE 93, 1, 16.

1081 BVerfGE 93, 1, 17. The use *Konkordanz* and the *Toleranzgebot* have been criticized by some who claim that while these principles serve a useful purpose when rights of private individuals are competing against one another in the public sphere, they should play no role when it is the state who is acting in a manner that jeopardizes the negative the rights of an individual in the public sphere. See Jeand'Heur/Korioth, *Grundzüge des Staatskirchenrechts*, Rn. 116 and 124.

1082 BVerfGE 93, 1, 23. It should be noted that some commentators have rejected the idea that simply being confronted with a religious symbol, regardless of the setting, can be deemed anything more than "minimum elements of coercion." See Müller-Volbehr, *Positive und Negative Religionsfreiheit*, JZ 20/1995 pg. 1000; von Campenhausen, *Zur Kruzifix-Entscheidung des Bundesverfassungsgerichts*, pg. 450.

1083 BVerfGE 93, 1, 18. Some have also argued that this case can be distinguished from the school prayer case because there the state was seeking to give room to individuals to engage in private prayer, whereas in the cross case, the state was actively involved in the religious activity when it brought the cross into the public sphere. See Hegerfeldt, *Religiöse Symbole in staatlichen Räumen* pg. 286-287. Others have expressly rejected this view arguing that the erection of cross is the exact same kind of state expression concerning religion as providing room for students to pray before the school day begins. Heckel, *Das Kreuz im öffentlichen Raum. Zum "Kruzifix-Beschluß" des Bundesverfassungsgerichts*, pg. 463; Ladeur/Augberg, *Toleranz, Religion, Recht*, pg. 112.

1084 BVerfGE 93, 1, 19. (In fact, the court went so far as to suggest that in the eyes of non-Christians the cross could arguably be seen as a missionary symbol.) See BVerfGE 93, 1, 20. This has led some commentators to claim that on its face the court's decision endorses a per se ban of crosses in all classrooms. See Jeand'Heur/Korioth, *Grundzüge des Staatskirchenrechts*, Rn. 105. Other have argued, however, that even if non-Christians view the cross as a missionary symbol, their subjective view alone should not provide the justification to cleanse the public sphere of religious references. Heckel, *Das Kreuz im öffentlichen Raum. Zum „Kruzifix-Beschluß“ des Bundesverfassungsgerichts*, pg. 467-470.

hanging of this symbol of faith in classrooms from simply acknowledging the role of religion in the development of western civilization, which was at the heart of the cases concerning the Christian character of schools.<sup>1085</sup> Implied here is that the state's acknowledgment of religion will be deemed passive so long as it is advancing a secular purpose, e.g. recognizing the roots of western culture, or providing room for students to individually develop religiously in a manner that does not substantially infringe on the negative rights of others.<sup>1086</sup>

The combination of the setting, the state's active acknowledgment of religion, and age of the children involved resulted in the majority finding that by placing the cross in the classroom, the state was sending a message that the beliefs and values represented by the cross are worthy of being followed, creating the danger of unduly influencing students in a manner that rose to the kind of state coercion prohibited by Article 4 and concepts of state neutrality implied in the *Grundgesetz*.<sup>1087</sup> It must be stressed that the majority did not simply ignore the positive religious freedom rights of students and parents who the state argued it was serving by posting the cross in each classroom. In fact, the court took no issue with earlier rulings upholding school prayer or the characterization of schools as having a "Christian nature."<sup>1088</sup>

In expressly recognizing these past decisions as precedent, the court impliedly considered these state acts to involve passive acknowledgments of religion. They were passive either because there was nothing missionary about the acknowledgment or because the limited duration of the practice allowed for an opt out that accommodated both negative and positive religious rights. Yet crosses in classrooms were different, as in this closed forum the state's acknowledgment was far more active, leaving the court with no choice but to protect the rights of non-adherents who had no possibility to avoid this subjectively objectionable state sanctioned religious symbol.<sup>1089</sup>

In a rare dissent, three judges took issue with the majority opinion. Their opinion illustrates the importance of framing the intensity of the state's acknowledgment of religion, as for them the cross is simply an acknowledgment of the role Christianity has played in the development of western civilization, akin to and in line with the

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1085 BVerfGE 93, 1, 19.

1086 Classen, Religionsrecht Rn. 136; Martin Heckel goes so far as to suggest the cross (in this sense a „Schwurkreuz“) in the court room served the secular purpose of enforcing the seriousness of the oath, while the cross in the classroom serves the secular purpose underlying the common German culture. Heckel, Das Kreuz im öffentlichen Raum. Zum „Kruzifix-Beschluß“ des Bundesverfassungsgerichts, pg. 467. While disagreeing with the majority's characterization of the cross, he seems to also imply that when it is used to advance a secular purpose, it is merely a passive acknowledgment of religion and not violative of Article 4.

1087 BVerfGE 93, 1, 20.

1088 BVerfGE 93, 1, 24; However critics of the decision argue that the court undervalued the importance of this precedent and ignored the state's right to determine the nature of its school. See Heckel, Das Kreuz im öffentlichen Raum. Zum „Kruzifix-Beschluß“ des Bundesverfassungsgerichts, pg. 459.

1089 Critics of the decision were quick to take issue with language in it indicating that when rights conflict, the principle of majority rule cannot be the automatic default solution. See von Campenhausen, Zur Kruzifix-Entscheidung des Bundesverfassungsgerichts, pg. 451. However, this criticism is misplaced as this language clearly was not the basis for the court's opinion. Rather, the court left in place the idea that the legislature is primarily responsible for finding a compromise between these conflicting rights, however, the principles of religious liberty found in Article 4 and the concept of neutrality place some perimeters on the legislature's discretion.

characterization of schools as having a Christian nature.<sup>1090</sup> When viewed in this light, the state's acknowledgment of religion is at most passive if not purely secular. As proof of the secular message the cross can convey, some commentators have pointed to the fact that crosses show up in all kinds of cultural symbols including city (Bonn) and state flags (Rheinland-Pfalz, Saarland), and in all kinds of public places (crosses on the top of mountains or those adorning roadsides, a.k.a. *Wegkreuze*).<sup>1091</sup> Others have noted the prevalence of the cross throughout Bavarian society, basically arguing, using reasoning similar to that used in Justice O'Connor's Endorsement Test, that any reasonable observer would know that the cross is being erected as a cultural symbol, as well as a symbol that aids the religious majority in this setting with their individual religious development.<sup>1092</sup>

Recognizing that there might be some contradiction in arguing on the one hand the cross in this setting is a secular symbol, while on the other hand the placement of crosses classrooms is intended to accommodate the religious needs of students, making it a religious symbol<sup>1093</sup>, commentators have argued that a literal interpretation of Article 4 cannot lead to the conclusions that simply being confronted with a cross violates religious freedom,<sup>1094</sup> and its mere presence is not missionary in nature nor does it amount to the kind of coercion prohibited by Article 4.<sup>1095</sup> Advocates of this view, including the dissenting judges, argue that here we have a passive symbol within the spirit of a constitution that provides for religious education and jurisprudence that recognizes the existence of schools with a “Christian nature” without violating concepts of neutrality.<sup>1096</sup> Some have further suggested that the crosses were placed in schools in the immediate aftermath of the Second World War, replacing the Nazi Swastika, to show the new nation's openness to religion, but was not meant to advance religion per

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1090 BVerfGE 93, 1, 28. Other critics have similarly argued that the mere posting of a cross does not mean the state is giving its approval of certain specific religious beliefs. See Augsburg/Engelbrecht, Staatlicher Gebrauch religiöser Symbole im Licht der Europäischen Menschenrechtskonvention, JZ 9/2010 450, 454; Müller-Volbehr, Positive und Negative Religionsfreiheit, JZ 20/1995 pg. 997.

1091 Streinz, Das Kreuz in öffentlichen Raum, BayVBl 14/2014 pg. 429-430; See also Müller-Volbehr, Positive und Negative Religionsfreiheit, pg. 996; von Campenhausen, Zur Kruzifix-Entscheidung des Bundersverfassungsgerichts, AöR 1996, 448, 453. A rebuttal to this position is that one can easily distinguish crosses that adorn flags from the kinds that hang in churches, the latter being exactly the same as those that are found in German classrooms. See Hegerfeldt, Religiöse Symbole in staatlichen Räumen, in Liber amicorum für Joachim Gaetner (2003) 282, 284.

1092 Heckel, Das Kreuz im öffentlichen Raum. Zum „Kruzifix-Beschluß,“ pg. 478.; See also Müller-Volbehr, Positive und Negative Religionsfreiheit, JZ 1995, 996; von Campenhausen, Zur Kruzifix-Entscheidung des Bundersverfassungsgerichts, AöR 1996, 448, 461; For an opposing view see Hegerfeldt, Religiöse Symbole in staatlichen Räumen pg. 284 who argues that no amount of exposure to this symbol will soften the message being conveyed by the state by hanging the symbol in classrooms.

1093 In addition to there being a potential conflict in these positions, some commentators have noted the irony whereby the majority opinion gives greater religious significance to the crucifix than those who wish to keep the symbol in classrooms. See Hegerfeldt, Religiöse Symbole in staatlichen Räumen pg. 379.

1094 von Campenhausen, Zur Kruzifix-Entscheidung des Bundersverfassungsgerichts, AöR 121 (1996) pg. 450

1095 BVerfGE 93, 1, 29. See also Augsburg/Engelbrecht, Staatlicher Gebrauch religiöser Symbole im Licht der Europäischen Menschenrechtskonvention, JZ 9/2010 450, 453 (arguing that Art. 4 protects individuals from state indoctrination, but is not intended to shield sensitive individuals from being confronted with religious symbols); Kästner, Religiös akzentuierte Kleidung des Lehrpersonals staatlicher Schulen, in Festschrift für Martin Heckel (1999) pg. 366; von Campenhausen, Zur Kruzifix-Entscheidung des Bundersverfassungsgerichts, AöR 121 (1996) pg. 459; Ladeur/Augberg, Toleranz, Religion, Recht, pg. 64.

1096 Streinz, Das Kreuz in öffentlichen Raum, BayVBl 14/2014, pg. 430; Müller-Volbehr, Positive und Negative Religionsfreiheit, JZ 20/1995, pg 998; Heckel, Das Kreuz im öffentlichen Raum. Zum „Kruzifix-Beschluß“ des Bundesverfassungsgerichts, pg. 481.

se.<sup>1097</sup> Regardless of the rationale, each attempts to downplay the impact of being confronted with this religious symbol.

Finally, according to detractors of the majority opinion, the presence of the cross in schools can be justified by the state's role as facilitator of rights.<sup>1098</sup> Martin Heckel has characterized the state's role as a "*Hilfsfunktion für die Religionsfreiheit der Bürger*" (aid for religious liberty of its citizens) whereby he argues that the schools' accommodation of positive religious freedom is not only intended to teach about the common culture which contains religious aspects, but also provide students with the ability to practice their religion in the school setting.<sup>1099</sup> In these arguments we see both kinds of passivity, one where the state's actions are not coercive and one where the state's relationship with religion is distant, serving something akin to a secular purpose. This clearly shows the key role the characterization of state's acknowledgment plays in the outcome of these cases.

In a clear attempt to distinguish this case from the court's earlier decision concerning crosses in courtroom, the dissenting judges also challenged the majority's characterization of the nature of the public sphere. Adopting an approach set forth by E.W. Böckenförde, they viewed the school setting as one where the state's role is merely organizational in nature with its primary purpose being to serve the interests of the citizens interacting inside this public forum.<sup>1100</sup> In such a forum, the state's actions are limited not by the non-identification neutrality principle, but rather the open neutrality principle that allows the state to acknowledge religion in order to aid the religious development of the individuals inside the forum.<sup>1101</sup> This characterization conjures up an image of the open public forum where the state is just one of many actors operating within it, a position adopted by the Grand Chamber in *Lausti*.

Once having concluded that the state's acknowledgment of religion was passive and took place in something dissimilar to the typical institutional public sphere, the dissenters had little difficulty framing the majority opinion as one demanding a kind of neutrality that is indifferent towards religion. This indifference ignores the WRV provisions of the *Grundgesetz*, which make it clear the state may cooperate with religious entities so long as doing so does not result in the establishment of missionary

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1097 Heckel, *Das Kreuz im öffentlichen Raum. Zum „Kruzifix-Beschluß“ des Bundesverfassungsgerichts*, pg. 468.

This is an interesting observation for comparative purposes considering that the main argument for placing the words "Under God" in the American Pledge of Allegiance and national motto was to express the government's position that America was different than the communists who were hostile to religion.

1098 Critics of this view point out that the state has gone well beyond its role of facilitator of rights by bringing overtly religious symbols into the classroom, and as such the idea that this is a conflict between positive and negative rights is misplaced. Rather the Article 4 rights involved in this case are purely defensive in nature where individuals are seeking to protect themselves from actions taken by the state. Hegerfeldt, *Religiöse Symbole in staatlichen Räumen* pg. 290.

1099 Heckel, *Das Kreuz im öffentlichen Raum. Zum „Kruzifix-Beschluß“ des Bundesverfassungsgerichts*, pg. 460.

1100 BVerfGE 93, 1, 30. However, as Hegerfeldt notes, the BVerfG did not make a finding in the courtroom case that the cross had a close connection with the legal proceeding. For them it's mere presence from the subjective perspective of the challengers was enough to find an infringement of Article 4 rights. As such, the claim that there needs be a close connection between the cross and the school's curriculum is inaccurate. See Hegerfeldt, *Religiöse Symbole in staatlichen Räumen* pg. 285.

1101 Böckenförde, *Kreuze (Kruzifixe) in Gerichtssälen?* ZevKR 20/119 (1975); Heckel, *Das Kreuz im öffentlichen Raum. Zum „Kruzifix-Beschluß“ des Bundesverfassungsgerichts*, pg. 472. (Both argue that this should be distinguished from the non-identification neutrality which regulates the state when it is exercising its authority).

schools or bind the state to a specific set of Christian beliefs.<sup>1102</sup> Some detractors of the majority opinion have gone so far as to claim that it elevates the subjective views of individuals seeking to exercise their negative rights to some kind of super right that takes priority over positive religious freedom.<sup>1103</sup> This negative religious freedom can now operate as "the freedom to be able to prohibit the positive exercise of a fundamental right,"<sup>1104</sup> requiring the state to strip the German culture of its religious origins, and create a society where an emphasis on the rights of minorities will place rights of the majority in jeopardy.<sup>1105</sup> Some even questioned whether prior cases, such as the school prayer case, would still be decided in a similar manner under this "new" standard.<sup>1106</sup>

### 3. Germany: the Revision of Classroom Cross Laws

The doomsday scenario painted by the dissenters, and to a larger part commentators, never came to fruition. Soon after the BVerfG decision was handed down, the Bavarian legislature revised its school cross rules. The amended law still mandated the hanging of the cross in classrooms, but this time contained an opt-out provision that would allow parents to remove the cross from the classrooms when their concerns were serious and well founded.<sup>1107</sup> Perhaps not surprisingly, this revision was met by resistance on all sides, and ultimately ended up back in the judicial system after parents' requests to have the cross removed from classrooms were rejected. The challenge sought to not only overturn the rejected request for accommodations but also overturn the revised law entirely as being in violation of the plain language of the majority decision in the school cross case.

Framing the question initially as one concerning whether crosses in all classrooms must be removed, the Federal Administrative Court (BVerwG) distinguished Germany from its neighbor France stating that the German version of religious liberty and neutrality does not require a strict separation of church and state, and as such not every instance

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1102 BVerfGE, 93, 1, 29; See also Muller-Volbehr, Positive und Negative Religionsfreiheit, pg. 998;

1103 Muckel, Religiöse Freiheit und staatliche Letztentscheidung pg. 179; Muller-Volbehr, Positive und Negative Religionsfreiheit, pg. 998; Hillgruber, Staat und Religion, pg. 22; Göbel, Der Kampf um die Schule: Religiöse Präsenz an staatlichen Schulen in der Rechtsprechung des Bundesverfassungsrechts, in Festschrift für A. Hollerback, (2001) 773, 781 (arguing that American Establishment Clause jurisprudence allows the subjective views of radical minorities to curtail the rights of the majority); von Campenhausen, Zur Kreuzifix-Entscheidung des Bundesverfassungsgerichts, pg. 451; Kästner, Das Grundrecht auf Religions- und Weltanschauungsfreiheit in der neuen höchstrichterlichen Rechtsprechung, AöR 123 (1998) pg. 439.

1104 See Muckel, Religious Freedom and Freedom of Conscience, pg. 186 in "Fundamental Rights in Europe and North America", Ed. Weber (2002).

1105 Streinz, Das Kreuz im öffentlichen Raum, pg. 430; Waldhoff, Das Kreuz als Rechtsproblem, KuR 17, 153-174 (2011); Müller-Volbehr, Positive und Negative Religionsfreiheit, JZ 20/1995, pg. 1000; Hillgruber, Staat und Religion, pg. 22; Starck, Art. 4 GG in Kommentar zum Grundgesetz 1996, Rn. 28; Holzke, Die "Neutralität" des Staates in Fragen der Religion und Weltanschauung, Neue Zeitschrift für Verwaltungsrecht, 2002, 903, 904. But see Heckel, Das Kreuz im öffentlichen Raum. Zum "Kruzifix-Beschluß" des Bundesverfassungsgerichts, DVBl, 1996 pg. 471 (arguing that while the decision was flawed because of how it characterized the cross, it most certainly will not lead to the "Laisierung" of German schools, nor did it disturb existing concepts of neutrality.) and Walter, From the Acceptance of Interdenominational Christian Schools to the Inadmissibility of Christian Crosses in the Public Schools, pg. 180 (arguing that the decision was consistent with past precedent).

1106 Ladeur/Augsberg, Toleranz, Religion, Recht pg. 110.

1107 BayGVBl S. 850. The law also seemingly attempts to secularize the cross by referring to it as a cultural symbol. See Hegerfeldt, Religiöse Symbole in staatlichen Räumen pg. 287.

of a cross in a classroom violated the *Grundgesetz*.<sup>1108</sup> From there the court seemed to have a different view than that expressed by the BVerfG majority regarding the nature of the state's relationship to religion under these circumstances, holding that the mere hanging of a cross does not violate concepts of non-identification. The cross, according to the Administrative Court, is merely being placed in each room to accommodate the positive religious freedom of most students.<sup>1109</sup> Pointing to the law's opt-out provision, the court found that the legislature had struck a proper balance between the competing rights at issue, noting that an outright ban was not what the BVerfG called for, nor would it be consistent with principles of *Konkordanz* and *Toleranz*.<sup>1110</sup>

Gone were references to the cross implying that its display by the state in schools was an active acknowledgment of religion.<sup>1111</sup> Replacing it was a view that the state was acting passively so long as it allowed objecting students the ability to have the cross removed from rooms in which they had class. Addressing the opt-out provision itself, the court stressed that this was the state's attempt to balance competing interests as it was obligated to do, and while the provision required non-adherents to affirmatively express their objection, the court held that school masters are required to keep any expression of objection private, and by doing so, decreased the likelihood that the objection would be made public.<sup>1112</sup>

While on its face the decisions of the Federal Constitutional and Administrative Courts seem to contradict one another, they share several underlying principles that shed additional light on how German courts deal with state acknowledgment of religion in the school setting. First, both decisions seem to accept the idea that in the context of the state erecting religious symbols, schools have the characteristics of an institutional public sphere. Although, as has been noted, the dissenters in the Bavarian cross case and some commentators take issue with this characterization.

Second, the line between passive and active acknowledgments seems to focus almost entirely on whether one can opt out of being confronted with the state sponsored religious symbols in this setting. When there is no ability to avoid the state sanctioned symbol, the state's actions are deemed to be too coercive and inconsistent with the non-establishment ideals of protecting minorities and no state preference of a particular religion. It must be remembered, however, that the lower Bavarian courts as well as the dissenters in the school cross case believed the mere hanging of the cross to be a passive acknowledgment of the role religion played in the development of western civilization. Advocates of this view of passivity seem to be arguing that the state crosses the active/passive line only when its actions amount to indoctrination.<sup>1113</sup> Both

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1108 NJW 1999, 3063, 3064; See also Heckel, *Das Kreuz im öffentlichen Raum*. Zum "Kruzifix-Beschluß" des Bundesverfassungsgerichts, pg. 456.

1109 NJW 1999, 3063, 3064-3065.

1110 NJW 1999, 3063, 3064; See also von Campenhausen, *Zur Kruzifix-Entscheidung des Bundesverfassungsgerichts* pg. 453.

1111 This ignores how the cross could be viewed by non-adherents coupled with the fact that this was the state expressing itself with regards to religion, and has led some critics to question the validity of this ruling. See Jeand'Heur/Korioth, *Grundzüge des Staatskirchenrechts*, Rn. 105.

1112 NJW 1999, 3063, 3065.

1113 Streinz, *Das Kreuz in öffentlichen Raum*, BayVBl 14/2014 pg. 426.

views, however, seem to conflate active acknowledgment with coercion.

On the other hand, it is difficult to ignore the clear language of the BVerfG stating that by hanging crosses in its classrooms, the state is too closely (actively!) identifying with specific religious beliefs. Here active acknowledgment relates to the message being expressed by the state. When the message is too closely associated with religious doctrine, it is said to be active and in violation of neutrality principles. Arguably, the backlash to the BVerfG decision opened the door to the more narrow reading of the active/passive dichotomy taken by the BVerwG, which seems to reject the idea that by erecting crosses the state is per se too closely associated with specific religious beliefs.

Finally, the importance of the state's role as facilitator of rights in these cases is readily apparent. An interpretation of this role that allows the state to place religious symbols in this kind of a public setting has the clear effect of softening the intensity of the state's acknowledgment of religion. Rather than promoting a particular religious view, the state's actions are characterized as merely providing space for individuals to develop religiously, even in the school setting.<sup>1114</sup> Doing so is not an active acknowledgment of religion, rather it is a passive act aimed at protecting and promoting the positive religious rights of its students.

#### 4. Initial Conclusions Regarding Symbols in Schools

These cases illustrate at least three methods of analysis related to religious symbols in schools. At one end of the spectrum is the view that when the state erects religious symbols or engages in religious practices in the school setting, its actions have an improper influencing effect on young children in violation of non-establishment principles. This continues to be the dominate view in the United States, and it is where the analysis of these cases begins and ends. In Germany, on the other hand, issues related to non-establishment principles are part of a broader analysis regarding the state's role as facilitator of positive religious freedom, *Kondordanz*, and the principle of tolerance (*Toleranzgebot*). Yet, the majority in the German cross case seemed to initially take a more American approach when they suggested that state policy resulting in students having to “learn under the cross” was in clear contradiction to the purposes served by the non-establishment principle of state neutrality.<sup>1115</sup>

At the other end of the spectrum are the strict accommodationists who view the discussion and acknowledgment of religion as unavoidable in schools where children are being taught about the origins of western civilization. Under this school of thought, these state sanctioned symbols should be seen more as representing the contribution religion has made to the development of western civilization, and while these symbols are obviously also religious in nature, students clearly understand that the purpose of the display is to teach about culture, not religion. As we saw in the dissenting opinions

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1114 Streinz, *Das Kreuz in öffentlichen Raum*, BayVBl 14/2014 pg. 423. See also Kokott in Sachs GG 6<sup>th</sup> Ed. (2011), Art 4. Rn. 44.

1115 Some commentators believe that the analysis should actually end here in the school context arguing that schools should avoid even passive acknowledgments of religion if they prefer one religion over another. Jeand'Heur/Korioth, *Grundzüge des Staatskirchenrechts*, Rn. 107.

in *Stone*, there is a fair amount of sympathy for this view in the United States, and this view unquestionably has a following among German jurists and commentators.

Advocates of this position in both countries seek to soften the impact these religious symbols have on the rights of non-believers and religious minorities by attributing secular meanings to them as well. This then creates a situation where the infringement of rights is not sufficient enough to trigger constitutional protections, or in the alternative, the relationship between the state's actions and religion are not deemed to be coercive enough to call into question the neutrality of the state.<sup>1116</sup> In Germany, of course, advocates of this view have an additional argument that is not available to their American counterparts, namely the symbols also serve the purpose of facilitating the positive religious rights of the majority of students. Either way, though, advocates of this position, regardless of the country, attempt to downplay the relationship between religion and state.

It should be noted here that the decision by the Grand Chamber in *Lautsi* potentially provides a fourth a way to view these cases, a way that seemingly takes the accommodationist perspective in a new direction. According to this view, one does not need to downplay the religious message being conveyed by religious symbols in this setting. Regardless of religious message being conveyed, the fact remains that the state is not actively coercing students to abandon their beliefs. Here we can see some overlap with the jurists and commentators in both the United States and Germany who believe that the sole, or at least primary, purpose served by non-establishment principles is to prohibit government from engaging in so-called force of law coercion. Furthermore, this view seems to characterize the setting in a manner that is more open, containing various state-sanctioned views regarding religion. According to the *Lautsi* majority, by allowing students to express themselves religiously, the state has already indirectly sanctioned a variety of religious views, and when it expresses itself religiously it is merely adding to this rich variety.

The method adopted by the majority of the BVerfG, on the other hand, recognizes the existence of both negative and positive rights in this setting and the duty of the state to find a solution which balances and respects both.<sup>1117</sup> According to this view, the search for a compromise places the state in the role of referee, whereby it must find a suitable accommodation for religious minorities seeking to exercise their negative religious freedom rights while taking into consideration the rights of individuals to develop both religiously (positive religious freedom) and philosophically in this closed setting. While there is some disagreement over the lengths to which the state should go in providing for the needs of students' positive religious freedom rights, there is little disagreement

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1116 Christian Walter argued prior to the *Town of Greece* opinion that because “no coercion” is not yet seen by a majority of Justices as the primary purpose served by religious liberty, this is evidence that separation is stricter in U.S.. This no longer seems to be case after *Town of Greece* and raises the possibility that a real convergence can now be seen between the two jurisdictions concerning the primary role that the no coercion principle plays in views regarding religious liberty. See Walter, *From the Acceptance of Interdenominational Christian Schools to the Inadmissibility of Christian Crosses in the Public Schools*, pg. 173.

1117 Some have argued that the difference between U.S. and German jurisprudence in public acknowledgment cases is really only between concepts of separation and accommodation. See Walter, *From the Acceptance of Interdenominational Christian Schools to the Inadmissibility of Christian Crosses in the Public Schools*, pg. 179.

over the need to provide a space in which these positive rights may flourish, setting up the inevitable conflict between negative and positive rights.<sup>1118</sup>

What distinguishes advocates of this view from the German jurists who fall into the accommodationist category is the acknowledgment that non-establishment principles have a role in limiting the state's ability to acknowledge religion in the school setting, and in extreme cases these principles justify limiting positive religious freedom rights in order to protect holders of negative religious rights. However, this view does not adopt an American approach to the application of non-establishment principles in this setting. Instead of using these principles primarily as a means to place limits on the state, in Germany they are part of an analysis that places primary emphasis on the rights of the individuals participating in this forum. When these rights collide, the state legislature must attempt to find a compromise that takes both interests into consideration. As the school cross case illustrates, the legislature's power to find a solution is not unlimited and is subject to non-establishment ideals such as the promotion of plurality, protection of minorities and non-preference of a particular religion. In other words, the non-establishment principles that exist in German jurisprudence are used to protect the vulnerable religious minority and ensure equality in the context of finding a compromise, but they do not operate as an overall limit on the manner in which the state may interact with religion, as they do in the United States. Rather they focus on protecting individuals on a case-by-case basis.

### C. Teacher Dress Codes

Among the more recent cases decided by the BVerfG, perhaps none have caught the attention of American commentators more than a series of cases decided around the turn of this century concerning whether public school teachers may wear religious clothing, particularly a Muslim headscarf, while in the classroom. To be sure, the response from American commentators has focused more on what many consider to be the unequal enforcement of these bans,<sup>1119</sup> as opposed to taking issue with the bans in general. As some have suggested, this criticism from the other side of the Atlantic should not come as a total surprise considering that application of American style separationist doctrine would most likely result in upholding similar bans in the United States so long as they were applied to all religious symbols.<sup>1120</sup> How these bans have been treated in the United States in comparison to German jurisprudence is the focus of this section.

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1118 Although this view is arguably not unanimous. Some have argued, for instance, that the state sufficiently supports positive rights (free exercise) by allowing students to express themselves, not by providing symbols. A view much akin to the prevailing view in the United States. See Hegerfeldt, *Religiöse Symbole in staatlichen Räumen* pg. 290

1119 See Mancini, *Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence*, 30 *Cardozo Law Review* 2629 (2008); Human Rights Watch, *Discrimination in the Name of Neutrality Headscarf Bans for Teachers and Civil Servants in Germany* (February 2009); Kahn, *Are Muslims the New Catholics? Europe's Headscarf Laws in Comparative Historical Perspective*, 21 *Duke Journal of Comparative & International Law* 567-594 (2011); Kahn, *The headscarf as threat? A comparison of German and American legal discourses*, 40 *Vanderbilt Journal of Transnational Law* 417 (2007); Fogel, *Headscarves in German Public Schools: Religious Minorities are Welcome in Germany, unless, God Forbid, They are Religious*, 51 *New York Law School Review* 619 (2006-2007).

1120 See Kokott, *Laizismus und Religionsfreiheit im Öffentlichen Raum*, *Der Staat* vol 44 pg. 357 (2005)

Now that the BVerfG has weighed in not once, but twice on this issue, it is safe to say that the case law in Germany regarding the right of teachers to wear religious clothing is far more developed and settled than its American counterpart. With that said, American courts have not been silent on this matter, as several state and lower federal courts have interpreted statutes and policies banning teachers from wearing religious clothing in schools. What follows, in reverse order from how the cases up to now have been presented, is a comparison of the jurisprudence in both jurisdictions regarding teachers wearing so-called “religious garb” in schools, with German jurisprudence serving as the basis for comparison.

It should be noted that these “religious garb” cases present a slightly different dispute than the other state acknowledgment of religion in school cases under examination up to now. None of these teacher dress code cases involve individuals claiming that their negative rights are being infringed by states who allow its teaching staff to wear religious clothing in the classroom. Rather these cases all involve teachers claiming that their free exercise or positive religious freedom rights are being infringed by the state, with the state claiming that such restrictions are justified under non-establishment principles with which the state must comply. The irony in these cases could not be more clear. Instead of non-establishment principles being used to limit state actions, in these cases states are attempting to use these same principles to justify their actions! Nevertheless, as will be shown in this section, the manner in which courts apply non-establishment principles, as well as how courts characterize the forum in which the expression is taking place and the nature of the government's relationship to this expression, play an important role in both jurisdictions regarding how these disputes are ultimately decided.

## 1. The German Teacher Headscarf Dispute

If the Bavarian school cross case was the BVerfG's most controversial decision in the area of religious freedom, two cases concerning the right of Muslim female teachers to wear a headscarf while teaching rank a close second.<sup>1121</sup> The two cases serve as bookends for a decade long dispute fought in the courts, state legislatures and arena of public opinion. The cases also illustrate the central role that individual religious liberty, especially so-called positive religious rights, plays in German constitutional law and the limits that the BVerfG is willing to place on how state legislatures administer the principle of *Konkordanz* in order to protect these rights.

### a. The Ludin Case

In 1998, after recently passing her second state teacher's exam, an Afghan-born, naturalized German citizen was rejected for a teaching position in a Stuttgart school

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<sup>1121</sup> Baer/Wrase, Staatliche Neutralität und Toleranz: Das Kopftuch-Urteil des BVerfG, JuS 2003, Heft 12, pg. 1162 (2003). For an overview of this case in English as well as a rather comprehensive list of English and German commentary regarding this decision see Heinig, *The Headscarf of a Muslim Teacher in German Public Schools in Religion in the Public Sphere: A Comparative Analysis of German, Israeli, American and International Law* (Berlin, 2007)

because she refused to remove her headscarf while in the school setting: a headscarf she claimed was required to be worn by her religious beliefs. Arguing that the headscarf was both a religious and political symbol, the school board contended that allowing her to wear this symbol in class would violate the state's mandate of neutrality.<sup>1122</sup>

Characterizing the state's interest as “precautionary neutrality,” the first court to review this challenge held that the state has a duty to refrain from taking actions that can endanger the peaceful school setting, and individual rights that teachers might have while representing the state must be subsumed by the neutrality mandate.<sup>1123</sup> In upholding the lower court's decision, the Federal Administrative Court relied heavily on the BVerfG's school cross decision, ruling that being confronted by this overtly religious symbol continuously during the school day, without any meaningful opportunity to avoid it, jeopardized the negative religious liberty rights of students.<sup>1124</sup> Thus, as the case headed to the BVerfG for final disposition, the lower courts that had analyzed this dispute found that: 1) the headscarf is a symbol containing an overtly religious message; 2) it was being brought into the school setting by the state via one of its employees; 3) allowing the symbol to be worn would endanger school peace in violation of the state's mandate of neutrality, and 4) the negative religious liberty rights of young impressionable children would be substantially harmed by having to confront this state-sanctioned symbol without having any opportunity to avoid it.

The BVerfG took a decidedly different approach when it framed the case as involving equally important competing rights that had to be balanced against one another. The direction in which the court was headed seemed clear from the outset when it noted that treating a teacher applicant who wishes to wear a headscarf for religious reasons as being unfit for employment without having any statutory basis upon which to base such a finding violates both Article 33 (prohibiting religious discrimination in the hiring of state employees) and Article 4 of the *Grundgesetz*.<sup>1125</sup> Seemingly a victory for the teacher, upon closer examination the court was arguably saying that states could enact statutes restricting teachers' religious liberty in the classroom when necessary to protect competing constitutional rights and interests, and the lack of statutory authority to make such a decision was the flaw in this case.<sup>1126</sup>

To be sure the court's decision was not a defeat for the rights of teachers either, as perhaps one of the more controversial aspects of the BVerfG's decision in this case was its finding that, while teachers are clearly representatives of the state, they do not shed their constitutional right to religious liberty once they walk through the doors of the schoolhouse.<sup>1127</sup> Because it was “plausible” that the teacher's wearing of the headscarf

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1122 BVerfGE 108, 282, 284.

1123 BVerfGE 108, 282, 287.

1124 BVerfGE 108, 282, 288.

1125 BVerfGE 108, 282, 294 and 299 (noting that the statutory limitation of such rights might be justified when the state is seeking to protect competing constitutional rights.)

1126 Professor and now Federal Constitutional Court Judge Susanne Baer also noted that religious rights of civil servants find their limit when exercising them interferes with the ability of one to carry out the duties of the position. See Baer/Wrase, *Staatliche Neutralität und Toleranz: Das Kopftuch-Urteil des BVerfG*, pg. 1163; Heinig, *The Headscarf of a Muslim Teacher in German Public Schools*, pg. 193.

1127 BVerfGE 108, 282, 297.

was motivated by religious beliefs, the court concluded that her Article 4 rights were impacted by the rejection of her job application based on her refusal to remove the head covering.<sup>1128</sup>

Addressing the state's interest in complying with its neutrality mandate, the court relied on its own precedent, noting that neutrality does not mean distancing or strict separation, and the state may acknowledge religion so long as it does so in a manner that is not missionary, discriminatory or disruptive.<sup>1129</sup> Neutrality in this sense, according to the court, is open and accepting of the individual positive religious liberty rights, including those of teachers.<sup>1130</sup> However, the court also recognized that neutrality requires the state to maintain a posture that is welcoming to all its citizens (“*Staat als Heimstatt aller Staatsbürger*”). With this version of neutrality in mind, the court turned its attention to the negative religious liberty rights of students and parents, and while it found that the rights of both might be infringed by the presence of a teacher wearing a headscarf in the classroom,<sup>1131</sup> the court ultimately held that the danger was merely abstract, and had not been sufficiently weighed against the competing rights of teachers by the legislature.<sup>1132</sup>

In analyzing these competing interests, the court made two interesting and important observations. First, the headscarf has multiple meanings and cannot per se be viewed as a missionary religious symbol.<sup>1133</sup> Second, this case is different than the school cross case because in that case the state was clearly expressing itself by bringing the symbol into the classroom, whereas in this case it could not be said that the state is expressing itself by merely allowing one of its employees to exercise her religious rights.<sup>1134</sup> If there was a state acknowledgment of religion in this instance, it was indirect at best.

In the end the court's decision basically shifted the dispute to the various state legislatures across Germany where each would weigh the competing interests at stake.<sup>1135</sup> The court simply was not willing to allow school administrators to make this determination, nor was the court itself willing to make the ultimate decision regarding these rights as a matter of constitutional interpretation. In the aftermath of this decision, some saw this interestingly as an invitation to completely ban all religious symbols

1128 The court's Plausibility Test and how it was applied in this case are more fully discussed in Chapter 6 of this work.

1129 BVerfGE 108, 282, 299-301 (relying on its decisions upholding schools characterized by the state as having a Christian nature and their progeny).

1130 See also de Wall/Muckel, Kirchenrecht pg. 82.

1131 As Hans Michael Heinig points out, this does not break down neatly along religious lines as the presence of this symbol would also be offensive to many immigrants from Islamic countries. Heinig, *Die Verfassung der Religion*, pg. 118.

1132 BVerfGE 108, 282, 303. It should be noted here that both the majority and dissenting opinions recognize that the negative rights of students and parents are implicated when a teacher wears a religious symbol in the classroom.

1133 BVerfGE 108, 282, 304 (concluding that it can also signify a desire to hold on to traditional values, while also acknowledging that it can be sign of gender discrimination and fundamentalism.) In the end, the Court gave great weight to the subjective views of the teacher seeking to exercise her religious freedom rights, keeping within the spirit of the court's precedent that takes the subjective views of the rights holder into consideration as part of its plausibility analysis. See also Baer/Wrase, *Staatliche Neutralität und Toleranz: Das Kopftuch-Urteil des BVerfG* pg. 1165; Heinig, *The Headscarf of a Muslim Teacher in German Public Schools*, pg. 190; .

1134 BVerfGE 108, 282, 305. This has been somewhat of point of controversy among German commentators. Supporting this conclusion see: Baer/Wrase, *Staatliche Neutralität und Toleranz: Das Kopftuch-Urteil des BVerfG*, pg. 1164; Hegerfeld, *Religiöse Symbole in staatlichen Räumen*, pg. 379.

1135 BVerfGE 108, 282, 309.

from schools<sup>1136</sup> or at the very least ban teachers from wearing any religious items.<sup>1137</sup> For these critics of the court's opinion, French style separation was about to be imposed on Germany's schools.

Finally, the court's analysis seems to be acknowledging that schools don't quite fit into the typical institutional public sphere category by stating that schools mirror societal religious diversity and are forums where people of different religious backgrounds must interact with one another.<sup>1138</sup> The court goes on to say that in this unique setting, participants must tolerate the diverse of views of others.

The dissenters, on the other hand, framed the case as one involving an individual who had voluntarily chosen to enter civil service, and upon doing so was obligated to put her rights aside in order to ensure that the rights of the individuals with whom she is interacting are protected.<sup>1139</sup> Equating the teacher's right in this setting with those of students and parents, as the majority had done, was simply misplaced under these circumstances.<sup>1140</sup> Equally misplaced was the characterization of the case as involving the infringement of individual positive religious liberty by the state. This was a case involving the employer-employee relationship, where the employee in question has a special obligation of neutrality because she is a representative of the state.<sup>1141</sup>

Because, in their view, the acknowledgment of religion under these circumstances is attributable to the state, the dissenters also took issue with the majority's suggestion that a state law was necessary to restrict this kind of religious expression, noting that state neutrality toward religion is a constitutional mandate that can be directly enforced by the courts.<sup>1142</sup> Regarding the nature of the headscarf, the dissenters were equally unpersuaded by the analogies drawn by the majority to the school cross case. A simple cross is a passive symbol, argued the dissenters, that only marginally interferes with the negative rights of students and parents,<sup>1143</sup> while an authority figure, such as a teacher, wearing a religious symbol creates a much stronger link between a particular religious

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1136 See for example Hillgruber, *Gefährdung der Religionsfreiheit in den Säkularen Gesellschaften Europas*, *IKaZ*, 42 (2013) 612, 614.

1137 Heinig, *Die Verfassung der Religion*, pg. 7.

1138 BVerfGE 108, 282, 305 (“Die gewachsene religiöse Vielfalt in der Gesellschaft spiegelt sich hier besonders deutlich wider. Die Schule ist der Ort, an dem unterschiedliche religiöse Auffassungen unausweichlich aufeinander treffen und wo sich dieses Nebeneinander in besonders empfindlicher Weise auswirkt. Ein tolerantes Miteinander mit Andersgesinnten könnte hier am nachhaltigsten durch Erziehung geübt werden. Dies müsste nicht die Verleugnung der eigenen Überzeugung bedeuten, sondern böte die Chance zur Erkenntnis und Festigung des eigenen Standpunkts und zu einer gegenseitigen Toleranz, die sich nicht als nivellierender Ausgleich versteht.”) See also Robbers, *Schule und Religion*, in *Im Dienste der Sache: Liber amicorum für Joachim Gaertner*, pg 587 (2003, Frankfurt) (agreeing with Böckenförder's characterization of the school as being something different than an typical institutional public forum)..

1139 BVerfGE 108, 282, 315

1140 BVerfGE 108, 282, 316; Agreeing with this conclusion in part see Heinig, *The Headscarf of a Muslim Teacher in German Public Schools*, pg. 193. Agreeing in full see Isensee, *Integration mit Migrationshintergrund*, *JZ* 7/2010 pg. 324

1141 BVerfGE 108, 282, 317; see also Kästner, *Religiös akzentuierte Kleidung des Lehrpersonals staatlicher Schulen*, in *Festschrift für Martin Heckel*, (Tübingen, 1999); Ladeur/Augsberg, *Toleranz, Religion, Recht*, pg. 121; Starck, *Art. 4 GG in Kommentar zum Grundgesetz* (München, 2005) Rn. 120; Blanke, *Religiöse Symbole in Staat und Gesellschaft in Religion und Recht* (Münster, 2014) pg. 96; Jeand'Heur/Korioth, *Grundzüge des Staatskirchenrechts* Rn 130.

1142 BVerfGE 108, 282, 320

1143 BVerfGE 108, 282, 330; Making somewhat of an opposite argument see Unruh, *Religionsverfassungsrecht*, Rn. 113.

message and the state, which is especially troublesome considering the significant role teachers play in shaping a child's personal development.<sup>1144</sup>

#### b. The Aftermath: State Restrictions and Narrowing Constructions

Predictably,<sup>1145</sup> handing this task over to the states did not create any clarity. Instead, it opened up new and, from an equality perspective, more troubling problems for courts and commentators to debate. Eight of the sixteen German states passed laws banning teachers from wearing religious clothing in schools, varying in degree and scope. At one end of the spectrum Berlin banned the wearing of all religious symbols, while at the other end the law in Lower Saxony simply stated that a teacher's outward appearance, regardless of whether it is based on religious or philosophical values, may not interfere with the teacher's ability to fulfill his or her obligations under the school law. Within this spectrum were state laws aimed at protecting state neutrality,<sup>1146</sup> with four of these providing exceptions so that the Christian nature of their schools would not be hindered.<sup>1147</sup> Finally, Bavaria's law was silent concerning the desire to protect state neutrality and instead focused solely on prohibiting the wearing of clothing that contradicted the Christian nature of Bavarian schools school.<sup>1148</sup>

Interpreting the reach of these statutes, especially those that seemingly carved out an exception for Christian symbols, resulted in a decade's long debate.<sup>1149</sup> Soon after Baden-Württemberg passed its law, it was challenged by the same teacher applicant whose case was heard by the BVerfG. The Baden-Württemberg law sought to restrict teachers from engaging in all kinds of expressive activity, including wearing symbols and clothing that conveyed a political, religious, or philosophical view in violation of the state's neutrality mandate. The primary purpose of this law, according to the state,

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1144 BVerfGE 108, 282, 330 (the dissenters also took the position that the headscarf was an overtly political symbol that, when worn by a teacher, was equally problematic from a neutrality perspective); see also Pofalla, *Kopftuch ja - Kreuzifix nein? - Zu den Widersprüchen der Rechtsprechung des BVerfG*, NJW 2004, 1218.

1145 See Ispen, *Karlsruhe locuta, causa non finita - Das BVerfG im so genannten "Kopftuch-Streit"*, NVwZ 2003, 1210.

1146 Baden-Württemberg, Bremen, Hessen, NRW, Saarland

1147 Baden-Württemberg, Hessen, NRW, Saarland

1148 Baden-Württemberg (Gesetz zur Änderung des Schulgesetzes vom 1. 4. 2004, GBl. S. 178); Niedersachsen (Gesetz zur Änderung des Niedersächsischen Schulgesetzes und des Niedersächsischen Besoldungsgesetzes vom 29.4.2004, GVBl. S. 140 ff.); Saarland (Gesetz Nr. 1555 zur Änderung des Gesetzes zur Ordnung des Schulwesens im Saarland vom 23.6.2004, Amtsbl. S. 1510); Hessen (Gesetz zur Sicherung der staatlichen Neutralität vom 18.10.2004, GVBl. I S. 306); Bayern (Gesetz zur Änderung des Bayerischen Gesetzes über das Erziehungs- und Unterrichtswesen vom 23.11. 2004, GVBl. S. 443); Berlin (Gesetz zur Schaffung eines Gesetzes zu Artikel 29 der Verfassung von Berlin und zur Änderung des Kindertagesbetreuungsgesetzes vom 17.1.2005, GVBl. S. 92); Bremen (Gesetz zur Änderung des Bremischen Schulgesetzes und des Bremischen Schulverwaltungsgesetzes vom 28.6.2005, GBl. S. 245); Nordrhein-Westfalen (Erstes Gesetz zur Änderung des Schulgesetzes für das Land Nordrhein-Westfalen vom 13.6.2006, GVBl. S. 270). 310

1149 For instance, some defended the different treatment of symbols by arguing that the headscarf is a divisive political and religious symbol associated with fundamentalism while the habit does not have a similar "aggressive character." See Frenz, *Verdrehte Religionsfreiheit?*, *Die Öffentliche Verwaltung* 16/694 August 2007; Kokott, *Laizismus und Religionsfreiheit im Öffentlichen Raum*, *Der Staat* vol 44 pg. 357 (2005). Others reject this distinction. See Heinig, *The Headscarf of a Muslim Teacher in German Public Schools* pg. 194; Robbers, *Schule und Religion in Im Dienste der Sache: Liber amicorum für Joachim Gaertner* (2003, Frankfurt) pg. 586; Giegerich, *Religionsfreiheit als Gleichheitsanspruch und Gleichheitsproblem in Religionsfreiheit zwischen individueller Selbstbestimmung, Minderheitenschutz und Staatskirchenrecht - Völkerrecht, Minderheitenschutz und Staatskirchenrecht, Völker- und verfassungsrechtliche Perspektiven*, pg. 275. (2001, Heidelberg) calling it discrimination.

being the maintenance of a peaceful atmosphere in the state's schools.<sup>1150</sup> The law also contained language that sought to protect the state's right to establish schools with a Christian nature, expressly stating that nothing in the law was intended to interfere with actions taken by teachers to advance this nature of the school. Finally, and most importantly, the law required no concrete showing of a danger to the school atmosphere, rather a teacher who merely engaged in the kind of expression prohibited by the law was considered to pose an abstract danger that must be avoided.

Rejecting the challenger's argument that the headscarf contains no overtly religious message in violation of the law, the Federal Administrative Court found that so long as the headscarf could plausibly be seen as a religious or political symbol by others, its presence in the classroom was in violation of the law and conflicted with the law's legitimate aim of maintaining state neutrality in order to avoid disruptions to the peaceful school setting.<sup>1151</sup> Furthermore, considering the increased diversity inside most German schools, the court deemed the state's interest here to be particularly important, enough at least to justify the state's use of an abstract danger to school peace standard. Turning its attention to whether the legislature properly applied the principle of *Konkordanz*, the court found that the legislature had done so to the best of its ability, and there was nothing inherent in the law that violated the concepts of proportionality underpinning the principle.<sup>1152</sup> Finally, and perhaps most importantly, the court seems to have given the law a saving construction by interpreting the language concerning the state's prerogative to establish schools with a Christian nature as doing only that and nothing more. Thus, this portion of the law, according to the court, was not aimed at giving preference to Christian religious symbols worn by teachers.<sup>1153</sup>

### c. A Return to the Federal Constitutional Court

The decision upholding the general restriction of religious dress by teachers, as well as the saving construction given to the law by the Federal Administrative Court, did not put the matter to rest. For over a decade commentators<sup>1154</sup> and lower courts<sup>1155</sup> continued to struggle<sup>1156</sup> with and debate over the constitutionality of such laws, some arguing that the saving construction did not fix the inherent inequities of the law, others arguing that

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1150 Gesetzesblatt für Baden-Württemberg = GBl. S. 178, §38 (2004)

1151 NJW 2004, 3581, 3582-83.

1152 NJW 2004, 3581, 3584. (Holding that the decision regarding how to judge abstract fears in the school setting is for the legislature alone, and not something with which the court should interfere).

1153 NJW 2004 at 3584.

1154 For example, former Federal Constitutional Court Judge Udo di Fabio argues that the state has a right to make exceptions for symbols and clothing that are consistent with the nation's Christian heritage, Di Fabio, *Die Kultur der Freiheit*, (München, 2005), S. 173; whereas others challenge both this view (see Ganz, *Das Tragen religiöser Symbole und Kleidung in der öffentlichen Schule*, pg. 193 Fn. 371 (Berlin, 2008); Walter/von Ungern-Sternberg, *Landesrechtliche Kopftuchverbote für Lehrerinnen auf dem Prüfstand des Antidiskriminierungsrechts*, DVBl 2008, 80; and the idea that an abstract danger is sufficient justification for the law (See Sacksofsky, *Die Kopftuch-Entscheidung: von der religiösen zur föderalen Vielfalt*, NJW 2003, 3297)

1155 For an overview of the lower court decisions see Hofmann, *Religiöse Symbole in Schule und Öffentlichkeit Stand der Entwicklung der Landesgesetzgebung und Rechtsprechung nach der Richtungsentscheidung des BVerfG von 2003* NVwZ 2009, 74.

1156 For example, even after it had been given a saving construction, the actual enforcement of the law was uneven at best, and one instance resulted in a court refusing to enforce the law because schools had allowed nuns to teach in the school wearing their traditional dress but had rejected teachers who wore a Muslim headscarf. See VGH Mannheim, IÖD 2008, 131.

a total ban was unjustified and violated concepts of religious liberty found in Article 4 of the *Grundgesetz*. In early 2015 the BVerfG found itself once again embroiled in this issue, this time hearing a challenge filed by two school personnel in North Rhine-Westphalia to that state's law banning the wearing of any clothing or symbol that conveys a political, religious or ideological message.<sup>1157</sup>

The rulings by the lower courts were consistent with how courts over the decade had interpreted these laws: so long as the item of clothing worn by a teacher conveyed a religious message, there was an abstract danger of disruption in the school, and this was enough to justify placing restrictions on the teacher's religious liberty rights.<sup>1158</sup> The BVerfG, in taking the case, took no issue with the ultimate goal expressed by the state, however, the court questioned whether the means used to achieve this goal instituted by the legislature, namely the banning of religious symbols based on an abstract fear, were appropriate. Holding that this standard, when weighed against the religious rights of teachers, was “unreasonable” and “disproportionate” the court ruled that only upon a finding of “concrete danger” may a school infringe on the rights of teachers in this manner.<sup>1159</sup> In so doing, the court effectively struck down all those state laws where bans on teachers wearing religious clothing in the classroom were based on merely an abstract fear, a truly landmark decision.

In reaching this decision the court made four clear findings: 1) teachers also enjoy the protection afforded by positive religious freedom;<sup>1160</sup> 2) narrowing the restriction only to school hours did not diminish the infringement of religious rights;<sup>1161</sup> 3) the interests stated by the legislature when enacting the law were justified; but 4) a blanket ban based simply on an abstract danger is disproportional when balanced against the rights of the teacher.<sup>1162</sup> To be clear, the court did not analyze the rights of the teacher in a vacuum. Expressly acknowledging that the wearing of religious symbols by teachers can disturb school peace, violate negative rights and bring state neutrality into question, the court “merely” noted that to justify the infringement of the teacher's rights, the danger of such must be shown more concretely and not simply in the abstract.<sup>1163</sup>

Addressing the negative rights argument more specifically, the Court recognized that the forum in question here was more akin to the institutional public sphere from the perspective of students<sup>1164</sup> but it took issue with the characterization of the expression as being that of the state, and further argued that while the wearing of religious symbols by teachers touches upon the negative rights of students, it does not automatically do so

1157 SchulG NRW, GV.NRW. S. 270 (13. June 2006). It should also be noted that the law contained language similar to that found in the Baden-Württemberg law stating that nothing in the law was intended to interfere with the state's goal of having schools with a Christian nature.

1158 BVerfG, 27.01.2015 - 1 BvR 471/10, 1 BvR 1181/10 Rn. 9-12. Appeals were also unsuccessful in both the state and federal employment courts where the courts relied heavily on the justification put forth by the state that the law was intended to prevent disruptions in schools.

1159 BVerfG, 27.01.2015 - 1 BvR 471/10, 1 BvR 1181/10 Rn. 80.

1160 BVerfG, 27.01.2015 - 1 BvR 471/10, 1 BvR 1181/10 Rn. 83.

1161 BVerfG, 27.01.2015 - 1 BvR 471/10, 1 BvR 1181/10 Rn. 96.

1162 BVerfG, 27.01.2015 - 1 BvR 471/10, 1 BvR 1181/10 Rn. 101. (The court went on to clarify this by stating that when weighing competing rights the legislature must refrain from creating a solution that is out of proportion with the infringement of rights suffered. Proportionality sets the framework for the legislative solution).

1163 BVerfG, 27.01.2015 - 1 BvR 471/10, 1 BvR 1181/10 Rn.103.

1164 BVerfG, 27.01.2015 - 1 BvR 471/10, 1 BvR 1181/10 Rn. 104.

in a manner that results in an infringement, so long as the teacher does not verbally express her religious views.<sup>1165</sup> In other words, because this was not the state directly expressing itself, and also because the acknowledgment of religion here by the teacher was relatively passive, the chances of a significant infringement of negative rights were minimal. Finally, the court made it clear that the neutrality mandate comes into play upon a concrete showing of danger to the school atmosphere,<sup>1166</sup> but because this was not the state expressing itself directly, as it did in the Bavarian school cross case, there was an insufficient threat to state neutrality that would justify a ban based on an abstract threat.<sup>1167</sup>

Arguing that the proportionality analysis undertaken by the majority was flawed, the two dissenting judges believed that the court's ruling had unjustifiably tipped the scales too far in favor of the teacher's positive rights and in so doing the court hadn't adequately protected the negative rights of students/parents or the prerogative of state neutrality.<sup>1168</sup> For the dissenters, the legislature had made an adequate finding that a religiously neutral ban on the presence of religious symbols brought into the school setting by representatives of the state would be the best way to prevent disruptions in the school, and it was improper for the court to interfere with these findings.<sup>1169</sup> Furthermore, the majority had not appreciated the nature of the public forum in which impressionable school children were mandated to participate and risked being unduly influenced by their teacher's religious expression.<sup>1170</sup> Because the teacher is an authority figure in the classroom, her wearing of religious clothing has a potentially greater impact on the impressionable children than others who wear religious clothing in every day life. By focusing on this aspect, the dissenters seemed to imply that the pressure placed on these children under these circumstances could be emotionally coercive, making the state's acknowledgment of religion via its representative too active.<sup>1171</sup>

By in large, the manner in which the jurisprudence regarding teacher headscarves has developed reinforces the idea that the scope of Article 4 protections from a free exercise perspective are expansive and truly fundamental. However, these cases, especially the most recent case, also contain further hints regarding how non-establishment principles operate within a public forum where individual religious freedom rights compete. The first teacher headscarf case can be best understood as holding that teachers do not shed their constitutional rights once they enter public service. While non-establishment principles play a limited role in the decision, it can at least be said that these principles do not, as a matter of constitutional interpretation, operate as a restriction on the rights of teachers to express themselves religiously in the classroom. However, critics of the case rightly foresaw that by opening the door for the enactment of absolute bans, the court was inviting states to apply non-establishment principles in a manner that would in fact operate as a limit on the free exercise rights of teachers. Language contained in

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1165 BVerfG, 27.01.2015 - 1 BvR 471/10, 1 BvR 1181/10 Rn. 105.

1166 BVerfG, 27.01.2015 - 1 BvR 471/10, 1 BvR 1181/10 Rn. 108, 113.

1167 BVerfG, 27.01.2015 - 1 BvR 471/10, 1 BvR 1181/10 Rn. 113.

1168 BVerfG, 27.01.2015 - 1 BvR 471/10, 1 BvR 1181/10 Rn. 2 (Dissenting Opinion)

1169 BVerfG, 27.01.2015 - 1 BvR 471/10, 1 BvR 1181/10 Rn. 7 (Dissenting Opinion)

1170 BVerfG, 27.01.2015 - 1 BvR 471/10, 1 BvR 1181/10 Rn.11 (Dissenting Opinion)

1171 BVerfG, 27.01.2015 - 1 BvR 471/10, 1 BvR 1181/10 Rn.12 (Dissenting Opinion)

at least four of these state laws cite the non-establishment principle of neutrality and more specifically the goal of maintaining a peaceful school atmosphere as justification for limiting the rights of teachers to express themselves religiously.

The disputes that took place in between the two decisions by the Federal Constitutional Court can best be understood as a battle over state preferences of religion, which clearly involve non-establishment principles. While the laws themselves seem to create loopholes for Christian symbols to be worn by teachers in the classroom, the interpretations given to these laws by courts clearly take the non-establishment principles of equality and no preference of a particular religion into consideration when giving these laws saving constructions. As a result, these cases provide yet another example of how non-establishment principles operate as a limitation on the ability of state legislatures to find a compromise between competing rights (the so-called *schonender Ausgleich*).

The most recent ruling by the BverfG can equally be seen as another illustration of courts' willingness to place limits on how legislatures apply the principle of *praktische Konkordanz*. However, the limitations in this case, at least upon a facial reading of the decision, seem to have their origins in principles of free exercise or positive religious freedom. Yet upon closer inspection of both the majority and dissenting opinions, it becomes clear that non-establishment principles in general, and more specifically how both decisions characterize the nature of the government's acknowledgment of religion, play a determinative role in the court's decision to place additional limits on the use of *Kondordanz*. Again, it must be stressed that in this case the non-establishment principles are not playing their traditional role of limiting state power. Rather the court uses them to determine whether the justification put forth by the state is sufficient to justify the restriction of teachers' positive religious liberty rights. All the same, how the factions on the court frame the issues related to these principles is determinative in this analysis.

Perhaps the biggest impediment facing the majority was the fact that students were being continuously confronted by a religious symbol in what arguably can be best described as a closed forum, or institutional public sphere. The majority decision seemingly downplays this aspect and instead focuses on the source and strength of the message being conveyed by a teacher wearing a headscarf. By characterizing the source of the message as the teacher in her individual capacity, and merely indirectly the state, the court was able to successfully offset concerns regarding state neutrality and non-establishment principles. Furthermore, the court places a great emphasis on the passive nature of the state's indirect acknowledgment of religion by noting that merely wearing an article of clothing conveying multiple meanings, one of which is religious, has a relatively insignificant impact on the students' negative religious freedom rights. In other words, this indirect acknowledgment of religion by the state is not the kind that is linked closely with a message conveying particular religious beliefs, rather it is the sort where the state is acknowledging that one of its employees has religious beliefs and nothing more. Under these circumstances, there simply is not a sufficient enough danger to the rights of students justifying the state's limitation on free exercise rights of

its teachers.

The approach taken by the dissent, however, clearly illustrates the importance of these factors vis-a-vis the application of non-establishment principles, especially when applied in their more traditional manner as placing limits on state actions. The dissenters place this case clearly inside the institutional public sphere, and by doing so, they make the state's actions, or more specifically the actions of one of its representatives, the focal point of their analysis. By focusing on the state, the case becomes less about free exercise and more about the state acknowledging religion. Furthermore, by linking the teacher closely with the state, the message becomes more powerful, and by characterizing the headscarf as primarily a religious symbol expressing particular religious beliefs, the nature of the acknowledgment of religion is ultimately viewed as active in violation of the neutrality principle. In this same vein, by also characterizing the children as being impressionable and the teacher as an authority figure, the dissenters see a significant possibility of coercion, making the teacher's actions active in the other sense of the word as well. Once the dissenters reach these conclusions, they then have little difficulty accepting the state's non-establishment related justifications (neutrality, averting disruptions, etc.) for the enactment of these laws.

While this case most certainly is another in a long line of decisions advocating robust free exercise or positive religious freedom rights, it also provides more evidence as to how non-establishment principles are applied by German courts. Nothing in this decision calls into question the legitimacy of the non-establishment principle of neutrality in general or maintaining peace in a diverse setting specifically. Furthermore, this case illustrates that how the judges characterize the nature of the government's acknowledgment of religion can be determinative when they apply non-establishment principles.

## 2. American "Religious Garb" Statutes

Because the United States Supreme Court has never become directly involved with this issue, American jurisprudence is far less developed than its German counterpart.<sup>1172</sup> Nevertheless, enough state and lower federal courts have reviewed cases concerning teachers wearing religious dress in the classroom allowing for some generalizations to be made regarding how American courts treat this issue. On the one hand, no court has ever directly held that teachers wearing religious clothing in the classroom amounts to a violation of the Establishment Clause of the U.S. Constitution or similar clauses in state constitutions.<sup>1173</sup> In fact, several courts have expressly rejected this claim.<sup>1174</sup> On the

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1172 The Court let stand the decision by the Oregon Supreme Court rejecting a challenge to an Oregon law prohibiting teachers from wearing religious clothing in the classroom. Nevertheless, such a rejection does not establish binding precedent.

1173 It should be noted that a few courts have found the wearing of religious dress by its very nature amounts to religious propaganda in violation of non-establishment principles, although these cases concerned the question of whether schools may implement such policies, not whether the constitution requires them to do so. See *Zellers v Huff*, 55 NM 501, 236 P.2d 949 (1951); *O'Connor v. Hendrick*, 184 NY 421, 77 NE 612, (1906).

1174 See *North Dakota, Gerhardt v. Heid*, 66 N.D. 444, 267 N.W. 127 (1936); *Indiana, State ex rel Johnson v. Boyd*, 217 Ind. 348, 28 N.E.2d 256 (1940); *Connecticut, New Haven v. Torrington*, 132 Conn. 194, 43 A.2d 455

other hand, as will be illustrated in the pages that follow, courts have generally been open to allowing states to restrict the rights of teachers in this context so long as the restriction is being implemented to advance many of the same non-establishment principles that were at play in the German cases. In short, these cases provide yet another opportunity for a comparison concerning how non-establishment principles are applied in the two jurisdictions when courts are faced with factually similar situations.

One of the first courts to hear a case concerning the right of teachers to wear religious garb in public schools was the Supreme Court of Pennsylvania. In an 1894 case the court was asked whether a school's decision to allow the wearing of religious garb by teachers was appropriate.<sup>1175</sup> Pennsylvania law at the time prohibited sectarian teaching but was silent on the question of religious dress. Concluding that nuns wearing the religious habit and crucifix clearly expressed a religious message, the court nonetheless found that this could not be considered in a strict sense a form of sectarian teaching.<sup>1176</sup> Rather, the religious dress worn by teachers in this instance was deemed to be nothing more than “the announcement of fact” that the teacher held a particular belief.<sup>1177</sup> Absent any proof that teachers were engaged in religious instruction, the court would allow teachers to wear religious garb while teaching, basically because the plain meaning of the law was not violated. Soon after this ruling, the Pennsylvania legislature amended the law to include a prohibition on religious clothing, and in *Commonwealth v. Herr*, the Court upheld the statute citing *U.S. v. Reynolds*, noting that the legislature had the power to create such a restriction as it sought to restrict only religious acts, and not religious beliefs.<sup>1178</sup> This ruling, when compared to the German headscarf case, clearly shows how a narrow interpretation of free exercise rights can result in less protection for minority religions.

Around this same period of time the highest court in New York came to a different conclusion regarding a school's power to implement religious-based dress codes for teachers. Using the hypothetical example of a teacher wearing an orange ribbon on the English Protestant holiday of July 12<sup>th</sup> in a school whose students were predominantly Catholic, the court concluded that in the interest of “good order and discipline” schools must have the ability to control, at least to some degree, how their teachers dress, especially dress that could upset the atmosphere of the school.<sup>1179</sup> These early cases, then, stand for the proposition that the state can best determine whether there is a need to restrict such clothing in the classroom, and the constitutional principles of free exercise and non-establishment place few restrictions on this decision. Admittedly, constitutional religious liberty jurisprudence at both the state and federal levels was in its early stages of development when these two cases were decided, however, the few cases at the state level that dealt with this issue well into the mid 1900s basically adopted this proposition.

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(1945); Kentucky, *Rawlings v. Butler*, 290 S.W.2d 801 (Ky.1956); and Ohio, *Moore v. Board of Ed.*, 4 Ohio Misc. 257, 212 N.E.2d 833 (1965).

1175 *Hysong v Gallitzin Borough School Dist.*, 164 Pa 629 (1894).

1176 164 Pa. 629, 657 (1894).

1177 164 Pa. 629, 657 (1894).

1178 *Commonwealth v Herr*, 229 Pa 132, 78 A 68 (1910).

1179 *O'Connor v Hendrick*, 184 NY 421, 429 (1906) (July 12<sup>th</sup> is celebrated by Protestants in Northern Ireland to commemorate Protestant William of Orange's victory Catholic King James II.)

Questions concerning the legitimacy of these religious garb statutes finally moved to the national stage when in 1987 the U.S. Supreme Court summarily rejected reviewing an Oregon Supreme Court decision upholding Oregon's law banning teachers from wearing religious garb in public schools.<sup>1180</sup> After being threatened with the forfeiture of her teaching license for refusing to remove a turban and white clothing worn pursuant to her new found religious beliefs,<sup>1181</sup> an Oregon teacher sought to challenge the state ban on teachers wearing religious clothing by claiming it violated both free exercise and non-establishment principles. Rejecting the idea that the law involved only the restriction of religious acts and not beliefs, the Oregon court framed the issue as one involving free exercise rights of the teacher that had to be balanced against the state's interest of remaining neutral regarding matters of religion.<sup>1182</sup> Turning to earlier case law from other states, the court found that as a general matter state courts were open to statutes and school policy regulating the religious dress of teachers while on the other hand were unwilling to impose such rules on their schools as a matter of constitutional law. In many respects, the approach taken by state courts was similar to that taken by the BVerfG in *Ludin* where legislators are empowered to decide what is best for their community and have a free hand to act when school peace is potentially jeopardized, with the courts ensuring that decisions made by these policy makers conform with basic constitutional principles.<sup>1183</sup>

Branding the law initially as a “policy choice,” the Oregon court concluded that the state legislature acted as it did in order to ensure state neutrality toward religion so that parents and children were not given the impression that the school preferred one religion over another,<sup>1184</sup> as well as in order to protect the religious freedom of the children attending the school.<sup>1185</sup> Furthermore, while the Court seems to characterize this duty of neutrality as one that involves protecting the free exercise rights of students, it uses language that clearly implicates non-establishment principles.<sup>1186</sup>

After holding that the state's interests justified placing limits on the ability of teachers to openly express themselves religiously through their dress, the court concluded its analysis by attempting to give the statute a saving construction so as not to unduly infringe upon the religious freedom of teachers. Focusing on the statute's use of the term “religious dress,” the court found that this encompassed “dress” that went “beyond

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1180 107 S.Ct. 1597 (1987).

1181 *Cooper v. Eugene School District*, 301 Or. 358, 723 P.2d 298 (1986).

1182 301 Or. at 371. (The court here is not saying that religious acts are protected per se, instead they are saying that by limiting what the teacher can wear, her religious beliefs are also being infringed).

1183 301 Or. at 373. (“a rule against such religious dress is permissible to avoid the appearance of sectarian influence, favoritism, or official approval in the public school. The policy choice must be made in the first instance by those with lawmaking or delegated authority to make rules for the schools. The courts' role is to see whether the rule stays within that authority and within the constitution and, if necessary, to give the rule a constitutional interpretation.”)

1184 301 Or. at 373.

1185 301 Or. at 375. (“Government neutrality also serves to protect the 'free exercise, and enjoyment of religious opinions,' under Article I, section 3, of those whose opinions differ from what a majority might uncritically accept as the community's 'official' religion. Recognition that freedom of religion for all implies official sponsorship of none has grown with the growing diversity of the nation itself.”)

1186 In footnote 16 the court even sets forth Supreme Court precedent for this view of neutrality, citing cases that relied heavily, if not entirely, on the non-establishment principles found in the Establishment Clause.

the choice to wear common decorations that a person might draw from a religious heritage, such as a necklace with a small cross or Star of David.”<sup>1187</sup> In other words, turbans and headscarves were to be considered “dress,” while religious jewelry were to be exempted.<sup>1188</sup> The implication here clearly is that from the perspective of the students, symbols that are common place and less obvious convey a different message than those that are obvious, and as such, the former are more passive while the latter are too active.

The court further narrowed the statute by holding that it applied only to “continual or frequent repetition” of the teacher's dress rather than isolated incidences.<sup>1189</sup> In this sense, then, the repeated religious dress of the teacher gave an impression that the state was too closely connected with the religious message being conveyed by the dress, and thus was too actively acknowledging religion in this setting. One can take issue with the unevenness of this construction, especially from an equality perspective, but the fact remains that the court seemed to apply the active/passive dichotomy in narrowing the reach of this statute, and in doing so felt that it was drawing an appropriate line between the rights of teachers and the non-establishment interests of the state.

The only federal court to look directly at the issues raised by these laws is the United States Court of Appeals for the Third Circuit, who entered into the fray in a case challenging a Pennsylvania statute that basically mirrored the Oregon statute at issue in *Cooper*.<sup>1190</sup> The challenger was a substitute teacher in the Philadelphia public schools whose conversion to Islam resulted in her adding a headscarf to her classroom appearance. After being told that she could no longer teach if she insisted on wearing the head covering, the teacher brought a claim under Title VII of the 1964 U.S. Civil Rights Act, a federal law, which prohibits private and governmental actors from discriminating against individuals on the basis of sex, race, color, national origin, and religion.

Because the challenge was brought under federal law, rather than under constitutional principles, the question before the court concerned whether it would be an undue burden on the state to accommodate the claimant's request to wear her religious garb.<sup>1191</sup> To make this determination, however, the court noted that when it came to religious discrimination claims, federal courts also need to take into consideration precedent created by the U.S. Supreme Court interpreting the religion clauses found in the First Amendment, leading all three members of the panel to turn their attention to the Oregon Supreme Court's decision in *Cooper*, which at least two of the judges concluded was factually indistinguishable and controlling concerning questions related to the Free Exercise Clause of the First Amendment.<sup>1192</sup>

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1187 301 Or. at 380.

1188 The court did not seem to be bothered by the fact that some religions have symbols that can be incorporated into jewelry while other religions do not.

1189 301 Or. at 380.

1190 *United States v. Board of Education for the School District of Philadelphia*, 911 F.2d 882 (1990).

1191 Title VII prohibits an employer from discriminating against an employee or potential employee on the basis of religion unless the employer can show that the employee cannot be accommodating without creating an undue burden on the employer. 911 F.2d at 886-887.

1192 Interestingly, two of the judges seem to have had the mistaken impression that denial of review by the U.S.

By framing the case as one primarily involving Free Exercise questions, within the context of the undue burden analysis, the court found that in order for the statute to pass constitutional muster the “religious garb” law must be narrowly tailored to meet a compelling state interest, the so-called strict scrutiny test.<sup>1193</sup> Thus, the determinative question before the court was whether the law served a compelling state interest. In response, the state claimed that enforcement of the religious clothing statute was necessary to maintain the state's neutrality toward religion in its public schools,<sup>1194</sup> and granting of an exception to this teacher would create an undue burden on the state in that it would open the door to potential threats of disrupting the school atmosphere.<sup>1195</sup> In accepting this argument, the majority concluded that the state did not violate federal anti-discrimination laws.

In essence, the arguments in this case mirrored those one would expect to find if it had been brought under the Establishment Clause of the First Amendment, and in fact the concurring opinion acknowledges as much by framing this case as one involving a tension between the two religion clauses.<sup>1196</sup> Applying the Endorsement Test, the concurring judge found that “by permitting her to wear her religious garb while she is teaching conveys to her students that the state favors or prefers religion over non-religion.”<sup>1197</sup> Because of this, forcing the state to accommodate the teacher by allowing her to wear this clothing in the classroom could violate the Establishment Clause, creating an undue burden on the state under Title VII jurisprudence.<sup>1198</sup> In other words, for this judge the state's anti-garb law is not only a wise policy choice, it is one required by the non-establishment principles found in the U.S. Constitution.

### 3. Initial Conclusions

Prior to the 2015 decision by the BverfG overturning laws banning teachers from wearing religious clothing in the classroom based on a mere abstract danger of disruption, an argument could have been made that there was a quasi-convergence

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Supreme Court somehow created precedent in the form of the Oregon Supreme Court's decision, a characterization that the other judge on the panel, in his concurring opinion, notes was false. 911 F.2d at 896 (Ackerman, concurring).

1193 The Court here cites *Sherbert v. Verner*, which the Supreme Court overruled in *Smith v. Employment Division*, however, while *Smith* did change the way the Court analyzes generally applicable laws, it left undisturbed the application of strict scrutiny to those laws that target religious practices on their face, as is the case here.

1194 In a footnote, the court argues this is not an Establishment Clause case because the question here is not whether allowing a teacher to wear religious clothing in the classroom violates the Clause, rather it is about whether a state's decision to ban such clothing can be considered to advance the state's claimed compelling interest of maintaining its neutrality toward religion and protecting its students from being unduly influenced by their teacher's wearing of religious clothing. Because the focus is on the rights of the teacher, this case is arguably a Free Exercise case, but the justifications given by state unquestionably contain non-establishment principles. See 911 F.2d at 889 Fn 5.

1195 911 F.2d at 894. (The school administrators also argued that by granting such an exception, it would open them up to liability under the state law prohibiting teachers from wearing such clothing in schools)

1196 911 F.2d at 897.

1197 911 F.2d at 899.

1198 911 F.2d at 898 (Ackerman, concurring) (Coupled with the fact that the students are an impressionable captive audience, the judge concludes that allowing teachers to wear religious articles would place the state in the position of at least being perceived to be preferring religion over non-religion, or impliedly, a particular religion over others, or as the judge calls it, the creation of a “symbolic connection” between the state and a particular religious message.)

between how the two jurisdictions handled these cases. Both jurisdictions found that teachers did not abandon their free exercise rights once they walked through the schoolhouse gates and further viewed the acknowledgment of religion undertaken by the teacher as merely being indirectly attributable to the state. Both jurisdictions also recognized that the state has significant and competing interests based on the non-establishment principle of state neutrality toward religion, which also obliged the state to protect the negative religious freedom rights of its students. Both jurisdictions seemed willing to allow legislatures to determine how best to handle this conflict of competing rights/interests. And finally, in both jurisdictions some states had decided that an outright ban on teachers wearing religious clothing was necessary to comply with the neutrality mandate, while other states saw no problem with allowing its teachers to be dressed in a religious manner while teaching. As such, courts in both jurisdictions were not convinced that constitutional non-establishment principles required states to ban religious dress in the classroom per se, but they were perfectly willing to accept arguments based on these non-establishment principles advanced by states seeking to justify the enforcement of such bans. Of course, in both jurisdictions there were dissenting views as well, which were primarily the result of how the judges characterized the nature of relationship between the government and religious message being conveyed.

Considering the historical development and resulting broad scope of free exercise rights in Germany, it is perhaps unsurprising that the 2015 decision by the BVerfG tilted the scales in favor of the free exercise rights of teachers in these religious garb disputes. Today in Germany, the state must show a concrete danger of: 1) a disruption to the school atmosphere or 2) an undue infringement of the negative religious freedom rights of students in order to justify banning a teacher from wearing religious clothing in classroom. However, by requiring the state to make such a showing, the court has clearly not abandoned the non-establishment principles underlying the justifications put forth for prohibiting teachers from wearing such clothing. Upon a showing of a concrete danger, these non-establishment principles allow the state to act in a manner that restricts the rights of teachers.

Finally, it would seem that both jurisdictions downplay the characteristics of the forum in which this dispute plays out. To be sure both recognize the mandatory participation of students and the teacher as authority figure, but neither seems to be concerned, at least from a constitutional non-establishment perspective, with the potential for undue influence of students under these circumstances, so long as the message conveyed by the teacher's dress remains merely a passive acknowledgment of religion. In the words of the Pennsylvania Supreme Court, so long as the dress is simply an “acknowledgment of fact” and not part of an effort to proselytize, there is no overriding, constitutionally mandated non-establishment interest superior to that of the free exercise rights held by teachers.

#### **D. The Open Sphere in Schools During After School Hours**

As should now be clear, perhaps the biggest difference between the American and

German approaches to religious liberty is how each views the state's role in facilitating one's ability to develop religiously while in the public sphere. While viewing the state as facilitator of these positive religious rights, as is the case in Germany, has never been expressly recognized by the Supreme Court, advocates of permitting the state to acknowledge religion in the school setting argue that the government should provide space for students to develop religiously during the long and mandatory school day.<sup>1199</sup> However, as we have seen, seemingly every attempt by the government to provide such space in the school setting has been thwarted by a robust, and some would argue misguided, application of the Establishment Clause. The Court has consistently rejected the idea that the state may engage in overtly religious actions in the school setting in the name of promoting the Free Exercise rights of its students.<sup>1200</sup> As a result, students, parents and religious groups have, for the past thirty years, sought to use individual free speech rights to bring religious expression into the schools, particularly into the part of the school that is more open to expressive activity.

Beginning with landmark school free speech case *Tinker v. Des Moines*<sup>1201</sup>, a quasi-open sphere in the school setting has been developed by American courts where the state is acting as an organizer rather than exercising its authority. It includes space used by students during their breaks and between classes, as well as the general use of the school itself after school hours. The first part of this discussion will focus on student initiated prayer. Here we will see that while German and American jurists approach these cases in a slightly, and sometimes significantly, different manner, the conclusions they reach are surprising similar. The second part will provide a brief overview of a uniquely American problem, namely does the state violate the Establishment Clause when it lets its schools be used by religious groups during after school hours.

## 1. Student Initiated Prayer in the School Setting

While the issue of student initiated prayer has indeed been the focus of numerous court battles in the United States, these cases have generally involved students who desire to pray to a captive audience in what is more akin to the institutional public sphere.<sup>1202</sup> In this short summary we are talking instead about instances where students have come together on their own initiative outside of class time to pray. While these are arguably private actions, they are still taking place within a government run forum, and thus potentially raise questions concerning the government's relationship to the religious expression taking place on its property. The cases concerning truly student-initiated prayer are few, and those courts who have weighed in on the matter generally have viewed these cases as being primarily about freedom of speech, with questions concerning free exercise and non-establishment playing secondary roles.<sup>1203</sup> In so doing,

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1199 One need look no further than Justice Stewart's dissents in *Engel* and *Schempp* to see evidence of this.

1200 374 U.S. at 226. As the *Schempp* Court noted, the Free Exercise Clause "has never meant that a majority could use the machinery of the State to practice its beliefs."

1201 *Tinker v. Des Moines*, 393 U.S. 503 (1969).

1202 See the discussion of *Lee v. Wiseman* and *Doe v. Santa Fe Independent Schools* in Chapter 8.

1203 For example see *Chandler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2000) where the court upheld an Alabama law permitting student initiated prayer in the school setting so long as it was truly student initiated. The court further held that the school could not treat this form of speech any differently than it does secular student speech. However, once school personal become involved with the prayer practice, courts are much more reluctant to

these courts have applied the well established school speech precedent that students enjoy free speech rights in the school setting so long as exercising these rights does not substantially disrupt the school atmosphere.<sup>1204</sup>

Illustrative of this approach is a case originally filed by a high school vice-principal challenging an Alabama law expressly “permitting non-sectarian, non-proselytizing student-initiated prayer, invocations and benedictions during compulsory or non-compulsory school-related assemblies, sporting events, graduation ceremonies and other school-related events.”<sup>1205</sup> Ruling in favor of the challengers, a Federal District Court Judge issued an injunction that acknowledged the right of students to engage in purely private prayer while in school, but directed school officials to forbid students from engaging in public, vocal prayer or Bible readings at public school events and on school grounds.<sup>1206</sup> On appeal, the U.S. Court of Appeals for the Eleventh Circuit focused on whether a court may order school officials to ban student initiated prayer during school hours.

Looking at the school prayer jurisprudence that had been developed by the Supreme Court, the Court of Appeals noted that these cases stood for the proposition that states could not engage in religious expression, but nothing in them indicates that permitting religious expression violates the constitution.<sup>1207</sup> Addressing the arguments that permitting such speech violates non-establishment principles, the court rejected the idea of a strict separation between church and state, and instead characterized American style separation as being tolerant and accommodating of religion.<sup>1208</sup> Once the court was satisfied that the original state law did not involve the state speaking on matters of religion, rather it was simply permitting private individuals to do so, the court shifted its analysis to one guided by free speech principles and ruled that to ban only this kind of speech would amount to a content-based restriction of speech in violation of the speech clause of the First Amendment.<sup>1209</sup> Absent any compelling justification to restrict this kind of speech, it deserved full protection under free speech principles.

By characterizing parts of the school as containing somewhat open forums, the few courts that have looked at these issues were not only able to relatively easily avoid questions concerning non-establishment, they were also able to provide students seeking to express themselves religiously with the full protection of the free speech

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allow the practice. See *Chamberlin v Dade County Bd. of Public Instruction*, 377 US 402 (1964); *Steele v Van Buren Public School Dist.*, 845 F2d 1492 (1988, 8<sup>th</sup> Cir.). Also, policies that were seen by courts as merely attempts by the state to inject religion into the school atmosphere have been uniformly struck down despite being couched in equal access language. See for example *Lubbock Civil Liberties Union v Lubbock Independent School Dist.*, 669 F2d 1038 (1982, 5<sup>th</sup> Cir.), reh den 680 F2d 424, cert den 459 US 1155.

1204 *Tinker v. Des Moines*, 393 U.S. 503 (1969).

1205 *Chandler v. James*, 180 F.3rd 1254, 1255 (1999, 11<sup>th</sup> Cir.). One has to remember that laws like these were passed in response to strict separationist doctrine developed by the court between the 1960s and 1980s that some believe sought to strip the public sphere of religious connotations.

1206 180 F.3rd at 1257.

1207 180 F.3rd 1259.

1208 180 F.3rd at 1262.

1209 180 F.3rd at 1261. (Although in passing the court also notes that religious speech is protected by the Free Exercise Clause. But considering the limited scope of the Free Exercise Clause after the *Smith* decision, one's right to religious expression is far better protected under free speech principles ).

clause of the First Amendment.<sup>1210</sup> So long as the state was not actively controlling the forum, free speech rights took priority over any secondary non-establishment concerns the state might have with allowing religious speech to take place on its property.<sup>1211</sup>

Looking at the relatively limited German jurisprudence regarding student-initiated religious speech, it seems on its face that these courts have placed a much greater weight on the potential non-establishment pitfalls that exist when schools permit students to openly and vocally pray during school hours on school property. Nevertheless, a closer look at a decision handed down by the Federal Administrative Court involving student-initiated prayer indicates that the very same kind of concerns that American courts stress in the school free speech context are also determinative in factually similar German cases.

In 2007 Muslim students in a Berlin school congregated in between classes to engage in group prayer. Using the floor in the school's common area, the students spread out their jackets and engaged in the customary Muslim prayer practice of kneeling and bowing one's head to the floor while orally reciting religious text. In all, the prayer lasted about ten minutes.<sup>1212</sup> The students engaged in the prayer were asked to stop and eventually brought suit claiming this prohibition violated their positive religious liberty rights under Article 4 of the *Grundgesetz*.

In defending its actions, the school argued that allowing the prayer to take place would violate state neutrality, which the school claimed was stronger in Berlin due to the so-called Bremen Clause allowing a few states to opt out of the mandatory religion classes regime created by the *Grundgesetz*.<sup>1213</sup> Furthermore, and more importantly for comparative purposes, the school claimed that the religious expression being undertaken by the students posed a disruption to an already tense situation whereby groups of students with various religious backgrounds were at odds with one another. In this context, the school argued that the negative religious rights of other students would be violated by having to be confronted by this prayer practice.

The first court to review this case agreed with the students wishing to pray, holding that they enjoyed positive religious rights to do so. Additionally, the court held that the neutral state was not one that remained distant from religion, rather it was one that protected the rights of those who wished to practice their religion.<sup>1214</sup> This court further rejected the claim that Article 141 (the so-called Bremen Clause) created a stricter separation of church and state in Berlin.<sup>1215</sup> Turning its attention to the competing rights in this setting, the Court also found that where rights compete, the state only needs to

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1210 For example see *Bender v. Williamsport Area School District*, 563 F.Supp 697 (1983); *Nixon v. Northern Local School Dist. Bd. of Ed.*, 383 F.Supp 2d 965 (2005);

1211 Unless, of course, the student speech was deemed to be disruptive. See *Taylor v. Roswell Independent School Dist.*, 713 F3rd. 25 (2013) (holding student religious speech that threatens to disrupt the school atmosphere can be restricted); *Harper v. Poway Unified School Dist.*, 445 F.3rd 1166 (2006) (holding that the disruption caused by religious message on student's T-shirt justified the school's actions taken against him.)

1212 Hufen, *Grundrechte: Religionsfreiheit in der Schule*, JuS 2012, 663.

1213 VG Berlin, 20.09.2009 (Az. 3 A 984.07) Rn 18.

1214 VG Berlin, 20.09.2009 (Az. 3 A 984.07) Rn. 38.

1215 VG Berlin, 20.09.2009 (Az. 3 A 984.07) Rn. 42.

ensure that those seeking to exercise their negative rights can avoid the objectionable religious practice, which clearly was the case here as these prayers took place during break, in an open space that other students could avoid. Finally, the court simply said that the school failed to show a substantial disruption that would warrant an interference with the clear religious rights at stake in this case.

While the middle administrative court of appeals rejected the lower court holding because it failed to adequately protect the negative rights of other students,<sup>1216</sup> the Federal Administrative Court took an entirely different approach that contains elements similar to the manner in which American courts have dealt with this issue. The students unquestionably have a positive right to pray to themselves or as a group in school, the court held, especially considering the nature of the school and demands placed upon the students by their religion.<sup>1217</sup> These rights, of course, can be limited by competing constitutional rights. In analyzing the competing rights, the court rejected the reasoning set forth by the court immediately below, noting that the negative rights of students and parents were not endangered by allowing these students to pray.<sup>1218</sup>

From the neutrality perspective, the court made several interesting observations. Neutrality in its purest form, according to the court, meant the state could not identify with nor prefer a particular religion.<sup>1219</sup> Here the state was doing neither. Yet neutrality also required the state to ensure the peaceful co-existence of an increasingly diverse set of groups populating its schools. In doing so, the state legislature, but not the executive, is charged with determining what measures are necessary to protect this peace, measures that might include across the board bans on student initiated prayer.<sup>1220</sup> With no such ban in place, school administrators simply lacked the power to completely ban prayers because of what they perceived to be an abstract danger to the school setting.

However, this did not foreclose the possibility of school administrators banning prayer practices or other expressive activities that concretely disrupt the school environment. According to the court, Article 7 of the *Grundgesetz* gives states the power not only to organize schools, but also to protect the school environment from substantial disruptions.<sup>1221</sup> Here the Federal Administrative Court was satisfied that the lower courts had made sufficient findings of fact concerning the actual disruption posed by these prayers, and under these circumstances the state was well within its authority to take measures stopping such a disruption.

In other words, when faced with somewhat factually similar cases, courts in both jurisdictions found that students have a right to express themselves religiously in the

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1216 OVG Berlin-Brandenburg, 27.05.2010 (Az OVG 3 B 29.09) and LKV 2012, 27

1217 BVerwG, 30 November 2011, BVerwG 6 C 20.10, Rn. 24. (Noting that devout Muslims pray five times a day, and because of the nature of the school, students are unable to leave the school grounds in order to comply with this religious command).

1218 BVerwG, 30 November 2011, BVerwG 6 C 20.10, Rn. 27. (The court primarily relied on the fact that students could easily avoid the short one-time prayer and as such their negative religious liberty rights were not sufficiently in danger of being harmed).

1219 BVerwG, 30 November 2011, BVerwG 6 C 20.10, Rn. 37.

1220 BVerwG, 30 November 2011, BVerwG 6 C 20.10, Rn. 39.

1221 BVerwG, 30 November 2011, BVerwG 6 C 20.10, Rn. 42; see also Isensee, Integration mit Migrationshintergrund, JZ 7/2010 pg. 324.

school setting that is more open, but only so long as their expressive activity does not substantially disrupt the school environment. Furthermore, no appeals level court in either jurisdiction was convinced by the argument that, as a constitutional matter, non-establishment principles required the state to ban student initiated prayer. While these cases were at times framed differently, the conclusions of courts in both jurisdictions were basically the same; based on similar rationales.

## 2. A Brief Explanation of American “Equal Access” Cases

As was already alluded to in Chapter 5, the *Bekenntnisfreiheit* found in Article 4 of the German Basic Law and the rights granted to individuals in the United States by the free speech clause of the First Amendment have much in common.<sup>1222</sup> Both protect the rights of individuals in the open public sphere to express themselves religiously. The school setting, however, is not a wide open public sphere. The part of this setting that is more open to expressive activity has limitations, and presents the possibility that the state may be associating itself too closely with particular messages and the beliefs contained within them when it permits religious speech in its schools, even after school hours.

The so-called equal access cases in American religious liberty jurisprudence are really nothing more than an attempt to set boundaries concerning the line between private speech and state endorsement of the ideas contained within that speech. These boundaries are generally only applied to those instances where the state has opened up its schools after regular school hours to be used by local community groups. In the spirit of providing a complete picture of how both jurisdictions have applied non-establishment principles in the school setting, a brief overview of this area of the law is warranted, even if it provides little opportunity for comparison considering the absence of factually similar German cases.

The U.S. Supreme Court initially became involved with these school use cases in 1981 when a religious student group challenged a University of Missouri at Kansas City policy prohibiting school buildings from being used “for purposes of religious worship or religious teaching.”<sup>1223</sup> In an eight to one decision, the Court rejected the university's claim that the policy was required to comply with the non-establishment principles found in the U.S. Constitution. Characterizing this as a case where the government had opened up its property for speech, and in doing so was obligated to treat all speech equally, the Court concluded that “a religious organization's enjoyment of merely “incidental” benefits does not violate the prohibition against the “primary advancement” of religion.”<sup>1224</sup>

Almost a decade later in another eight to one decision, the Supreme Court extended its *Widmar* holding to the high school setting. Here again the Court was faced with a school policy that had opened up its facilities to community groups after regular school

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1222 See footnote 720.

1223 *Widmar v. Vincent*, 454 U.S. 263 (1981)

1224 454 U.S. at 273.

hours but sought to exclude groups with a religious message in order to comply with the Establishment Clause.<sup>1225</sup> Citing *Widmar* as controlling precedent, the Court noted that “there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.”<sup>1226</sup> However for two of the Justices, this was much more than simply a free speech case. It was an opportunity to place limits on the reach of the Establishment Clause, limits that for these two Justices should be confined only to instances where the state seeks to directly support religion financially or uses its power in a manner that coerces students to engage in religious activities.<sup>1227</sup>

Two years later a unanimous Court held that once schools opened up their doors to community groups during after school hours, it could not reject a group based upon the content of the group's message. In this case the challengers were a religious group seeking to use the school's facilities to show a religiously oriented film. The school, fearing that allowing such a film to be shown in its building would create the impression that it was endorsing the views expressed in it, rejected the group's room request. The Court, applying both free speech principles and the Lemon Test, found that the school was unjustified in refusing the group's request to use the building for the film.<sup>1228</sup>

Up to this point, the Court had not been faced with a situation where the religious groups in question were seeking to use the school facilities in a missionary fashion. In 2001 the Court was faced with that very issue in *Good News Club v. Milford Central*. Here the challengers were a religious group that sought access to a school immediately after school hours with the hope of reaching school children with their religious message.<sup>1229</sup> Holding that the religious club was no different than any other clubs seeking to instill morals and character in its participants, a divided Court found that singling this club out because of its religious message amounted to a content-based restriction on speech. However, for the dissenters, the line had been crossed. Now the school's facilities were being used for missionary purposes in a manner that directly targeted the young children attending the school.<sup>1230</sup>

These cases can best be understood by keeping in mind the Court's strict separation jurisprudence of the 1960s and 1970s. While the early equal access cases were clearly decided properly on free speech grounds, advocates of inserting religion into the school day saw an opening, and they took it. Today free speech principles are not only used to allow religious groups to access schools immediately after school hours for purposes of engaging in religious activities, it is also being used to insert religious content into the daily routine during school hours. Policies prohibiting students from distributing religious material in school between classes or during lunch have been repeatedly stuck

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1225 *Westside School District v. Mergens*, 496 U.S. 226 (1990)

1226 496 U.S. at 245-250.

1227 496 U.S. at 260 (Kennedy, concurring).

1228 *Lamb's Chapel v. Center Moriches Free School Dist.*, 508 U.S. 384 (1993)

1229 533 U.S. 98 (2001).

1230 533 U.S. at 131 (Stevens, dissenting)

down by lower courts,<sup>1231</sup> and many school districts now have policies that expressly allow for the distribution of such material during school hours. None of this should be surprising considering public attitudes toward religion in schools<sup>1232</sup> and the unwillingness of the Supreme Court to view the state as a facilitator of free exercise rights. Without this option of viewing the state as a facilitator of rights, free speech principles remain the best way for advocates of religion having a presence in schools to obtain their goal.

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1231 For more information see 67B Am. Jur. 2d Schools § 308, citing the cases *Hedges v. Wauconda Community Unit School Dist. No. 118*, 9 F.3d 1295, 87 Ed. Law Rep. 374, 136 A.L.R. Fed. 755 (7th Cir. 1993) (rule prohibits the distribution of religious material which may be reasonably thought to reflect the district's views); *Rivera v. East Otero School Dist. R-1*, 721 F. Supp. 1189, 56 Ed. Law Rep. 861 (D. Colo. 1989) (rule prohibits distribution of material that proselytizes a particular religious belief); *Johnston-Loehner v. O'Brien*, 859 F. Supp. 575, 94 Ed. Law Rep. 167 (M.D. Fla. 1994) (school superintendent must approve material before it is distributed); *Slotterback By and Through Slotterback v. Interboro School Dist.*, 766 F. Supp. 280, 68 Ed. Law Rep. 599 (E.D. Pa. 1991) (rule prohibits distribution of material which proselytizes particular religious belief); *Thompson by Thompson v. Waynesboro Area School Dist.*, 673 F. Supp. 1379, 43 Ed. Law Rep. 138 (M.D. Pa. 1987) (rule requires distribution of materials outside the school building).

1232 As recently as 2014 Gallup reported that 61% of Americans favor opening the school day with prayer. <http://www.gallup.com/poll/177401/support-daily-prayer-schools-dips-slightly.aspx>

## Chapter 9: When Government Uses Its Property to Acknowledge Religion

The political public sphere, one will recall, is where Habermas believes that public discourse and debate takes place. The sphere that is the focus of this short survey is arguably more expansive, and basically includes all public spaces where people can freely interact. In this so-called open public sphere one finds an unfettered exchange of ideas where a plurality of ideas, including religious, should normally be a welcome as part of this exchange. It is the state's role in this exchange that has the potential for controversy. In some open spaces, for instance those that the state has set aside for citizens to express themselves, the state's role can be viewed as a facilitator and organizer.<sup>1233</sup> In this kind of open space, the state might also be one of the speakers, expressing itself by erecting culturally relevant symbols to further its objectives of creating a peaceful and cohesive community.<sup>1234</sup> The state might also choose to express itself in this same manner on property that it has not been opened up for others to engage in expressive activity. Regardless of the nature of the open forum, the question remains how closely the state may associate itself with religion in this type of a forum in light of the neutrality mandate that courts in both jurisdictions place on the state.

Many argue that because of the openness of this sphere, as well as the state's interest in promoting a common culture, government acknowledgment of religion that is culturally significant is more likely to be considered neutral. Furthermore, it can be argued that in this open public sphere, government expression is just one of many taking place. Finally, some contend that the openness of this sphere also decreases the likelihood that the state, via its religious expression, will improperly influence or indirectly coerce its citizens regarding matters of religion. Thus, from the passive/active acknowledgment perspective, the question often focuses more on the nature of the government's relationship with the religious message being conveyed.

The difficulty with cases concerning this kind of open public forum is defining the exact boundaries of the forum itself. This difficulty is perhaps most vividly illustrated by the cases that follow. Here the focus is on those instances where the government has used a portion of its property to erect arguably culturally significant symbols containing a religious message. In framing these cases as fitting within the category of open public forums, the very fact that only the government is allowed to erect symbols on the property in question seems to contradict the idea that we are dealing with an open forum. In fact, it is this exclusiveness that has led separationists to generally reject government acknowledgment of religion under these circumstances. For separationists, the exclusivity of what they perceive to be the forum, coupled with the religious nature

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1233 For example, in *Capitol Square v. Pinette*, 515 U.S. 753 (1995) the Court analyzed the State of Ohio's rejection of a request by the Klu Klux Klan to place a cross on the grounds of the Ohio State Capitol under free speech principles. In this case the state had opened its grounds for expressive activity and claimed that it was excluding the Klan's message because of its religious nature. The Court rejected the idea that abiding by non-establishment principles somehow justified the state in excluding religious messages from a forum it has opened up for speech purposes.

1234 Some have argued that these symbols may also be religious as it is often the dominant religion that provides the overarching values forming part of the glue that holds society together. See Movsesian, *Crosses and Culture: State-Sponsored Religious Displays in the US and Europe*, 6 *Oxford Journal of Law and Religion* 1, 22 (2012).

of the message, is enough to find a violation of non-establishment principles.

However, others view the forum in which the government message is being expressed as encompassing more than just the small piece of government property upon which the symbol has been erected. For them, the forum includes the streets and sidewalks that are adjacent to the property where the symbol has been erected, and on these streets and sidewalks individuals have the right to express themselves as they so please. Furthermore, because of the vast nature of this forum, individuals can more easily avoid the government's reference to religion, making it nearly impossible to argue that government is engaging in some kind of religious coercion through its actions.

From a comparative perspective, the difficulty with these cases is finding their equivalent in Germany. There simply are not any! This dearth of cases, however, should come as no surprise considering the emphasis German religious liberty doctrine places on the individual. If one begins with the premise that religious liberty, for the most part, does not concern itself primarily with placing general limits on the state, but rather is focused on both protecting individuals from having their religious freedom interfered with and promoting the ability of one to develop religiously in the public sphere, the lack of cases is quite understandable. Nevertheless, an attempt will be made in this section to engage in hypothetical case-to-case comparisons, with the main focus of this part being the further exploration of what the Establishment Clause adds to religious liberty in the United States, and how recent developments are moving the jurisprudence in a direction with which German jurists and commentators would be more familiar.

### **A. Temporary Symbols Acknowledging Religion**

Prior to 1984, the Supreme Court had only dealt with questions concerning government acknowledgment of religion in the institutional public sphere, primarily in the school setting. *Lynch v. Donnelly* marked the dawn of a new era in American religious liberty jurisprudence, an era that continues to test the limits of the application of non-establishment principles, and an era that seemingly has led to the demise of the “wall of separation” doctrine that had been so dominant in the early development of modern religious liberty doctrine in the United States. In *Lynch*, the Court was asked to review a 40 year old policy whereby the city of Pawtucket, Rhode Island erected a “Christmas display” on public property located in the heart of the city's shopping zone. The state maintained complete control over what kind of displays were erected on the property, and during the holiday season the display erected here included not only a nativity scene depicting the birth of Christ, but also non-religious figures traditionally associated with the holiday season including a Santa Claus figure, toys/gifts, candy-striped poles, and a Christmas tree.<sup>1235</sup> Challengers to the display, residents of Pawtucket, argued that inclusion of an overtly religious symbol on government property amounted to a preference of a particular religion in violation of the Establishment Clause.

Acknowledging the Court's past use of the “wall separating church and state” metaphor,

<sup>1235</sup> 465 U.S. 668, 671 (1984).

a bare majority of five Justices began its analysis by challenging the accuracy of it, noting that there was plenty of precedent for granting government the ability to accommodate religion.<sup>1236</sup> For the majority, the Court's past attempts to interpret the scope of the Establishment Clause was nothing more than inexact line-drawing. Despite refusing to bind itself to one particular test for all Establishment Clause cases, the majority then decided to apply the well worn three-part Lemon Test to the Christmas display in question. Viewing the crèche in the context of the “Christmas season” depicted by the entirety of the display, the Court found that there was “insufficient evidence to establish that the inclusion of the crèche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message.”<sup>1237</sup> Instead the crèche is a passive religious symbol depicting the historical origins of a holiday season that could no longer be viewed as being entirely religious in nature. In other words, when placed among these non-religious symbols in celebration of a secular “holiday season,” the creche loses its religious nature, and thus is less threatening to the rights of others.

As for the effect of the display, the Court measured this from a purely financial perspective. There were plenty of other instances where the state's expenditure of money had much more of an effect on religion and was still deemed appropriate. These included busing children to religious schools in *Everson*, supplying children in religious schools with non-religious textbooks in *Allen*, and allowing churches to be tax-exempt in *Walz*.<sup>1238</sup>

Finally the Court addressed the concern raised by the dissenters who claimed that such a display would be viewed by non-Christians as advancing the Christian religion. Here the Court, again relying on recent precedent that had begun to chip away at the so-called wall of separation, found that:

“[w]e can assume, arguendo, that the display advances religion in a sense; but our precedents plainly contemplate that on occasion some advancement of religion will result from governmental action. The Court has made it abundantly clear, however, that not every law that confers an ‘indirect,’ ‘remote,’ or ‘incidental’ benefit upon [religion] is, for that reason alone, constitutionally invalid. (quoting *Nyquist*)”<sup>1239</sup>

The Court here acknowledges that a temporary display containing an overtly religious symbol might be seen as endorsing a particular religion, but found that the religious symbol must also be seen as only a part of an overall display whose message was not wholly religious in nature.

The *Lynch* case also marked the entrance of a new test into Establishment Clause

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1236 465 U.S. at 673 (“It has never been thought either possible or desirable to enforce a regime of total separation....” quoting *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 760, 93 S.Ct. 2955, 2958, 37 L.Ed.2d 948 (1973). 463 U. S., at 786.)

1237 465 U.S. at 680. Steven Smith refers to this as “positive public secularism” recognizing that religious symbols can also serve secular purposes. See Smith, *Nonestablishment Under God? The Nonsectarian Principle*, University of San Diego Legal Working Paper Series, No. 04-08 (2004) pg. 4-5, found at <http://ssrn.com/abstract=559148>)

1238 465 U.S. at 681.

1239 465 U.S. at 683.

jurisprudence: the Endorsement Test. In her concurrence, Justice O'Connor argued that government can violate the Clause in one of two ways: 1) becoming excessively involved with religion in a manner that interferes with the independence of both the state and religion or 2) endorsing or disapproving of religion. This new test was seemingly crafted to deal with these legal challenges to government acknowledgment of religion in open public forums. Endorsement, according to O'Connor, divides people into two groups: outsiders and insiders. Where government endorses a religion, members of that religion will see themselves as favored by the state, whereas non-members will see themselves as being outsiders.<sup>1240</sup> Whether one could be viewed as an "outsider" was to be judged using a reasonable person standard, with the primary purpose served by this test being ensuring that all inhabitants feel at home in their own country. Applying her test, O'Connor ultimately allowed the display to stand because she believed a reasonable viewer would view the religious display in the context of the overall secular message being communicated by the "Winter Season" display.

The dissent, on the other hand, focused primarily on the "remarkable and precious religious diversity"<sup>1241</sup> in the United States which the Establishment Clause seeks to protect, and concluded that the Court's decision runs counter to that aim.

"The effect on minority religious groups, as well as on those who may reject all religion, is to convey the message that their views are not similarly worthy of public recognition nor entitled to public support. It was precisely this sort of religious chauvinism that the Establishment Clause was intended forever to prohibit. . . .<sup>1242</sup> It is equally true, however, that if government is to remain scrupulously neutral in matters of religious conscience, as our Constitution requires, then it must avoid those overly broad acknowledgments of religious practices that may imply governmental favoritism toward one set of religious beliefs."<sup>1243</sup>

*Lynch* can best be viewed as an argument over the nature of the government's relationship with religion, and here we see arguments over what exactly amounts to an active acknowledgment of religion. For the majority, active acknowledgment is equated with coercion, and by stressing the secular nature of the overall display, there is an attempt to downplay any danger of government coercion. The dissenters, and arguably Justice O'Connor in her concurrence, view active acknowledgment as being equated with the government interacting too closely with a particular set of religious beliefs. Closeness amounts to endorsement, using Justice O'Connor's language, and endorsement sends the wrong message to non-believers and members of minority religious communities.

Five years later in *County of Allegheny vs. ACLU*, the Court was faced with basically

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1240 465 U.S. at 688. (O'Connor, concurring)

1241 465 U.S. at 696. (Brennan, dissenting)

1242 465 U.S. at 702. (Brennan, dissenting)

1243 465 U.S. at 714. (Brennan, dissenting) Critics of this view claim that the dissenters here mistakenly conflate the word secular with non-religious. See Smith, Nonestablishment Under God? The Nonsectarian Principle, University of San Diego Legal Working Paper Series, No. 04-08 (2004) pg. 4-5, found at <http://ssrn.com/abstract=559148>

the same question raised by the challengers in *Lynch*, but instead of clarifying how such displays are to be treated under the Establishment Clause, the Court showed itself to be even more divided on this issue, leaving legal practitioners and lower court judges at a loss for how to deal with temporary religious displays on government property.<sup>1244</sup> Here again, we see stark differences between the Justices over the purposes served by religious freedom, as well as what amounts to an active acknowledgment of religion. At issue were two displays: a stand alone depiction of the birth of Christ (nativity scene) erected on the property of a county courthouse and a Menorah standing next to a Christmas tree with a message from the city mayor that read “a salute to liberty” standing in front of a city-county government building.

An even more fractured Court than the one that reviewed the Pawtucket display weighed in, resulting in an array of views concerning public acknowledgment of religion that to this day shape the inconsistent nature in which the Court, and lower courts, deal with this issue. A majority of the Court acknowledged generally that the founders had added the religion clauses to the Constitution in order to maintain peace between the various religions, and while at the time of the founding the clauses might have been “understood to protect only the diversity within Christianity . . . today they are recognized as guaranteeing religious liberty and equality to the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.”<sup>1245</sup> These five Justices adopted Justice O'Connor's Endorsement Test for the sole purpose of judging the constitutionality of religious symbols on public property.<sup>1246</sup> In so doing, they also adopted a view of passivity that focused more on the closeness of government and religion and less on questions concerning coercion.

Applying the insider/outsider dichotomy, these Justices found “any endorsement of religion as 'invalid,' because it 'sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.’” (quoting O'Connor's concurrence in *Lynch*.)<sup>1247</sup> Challenging the minority position taken by four of the Justices that *Marsh's* historical test should be used to judge these displays, the majority concluded that doing so would “gut the core of the Establishment Clause” because American history is filled with examples of religious preference and discrimination that “has no place” in modern Establishment Clause jurisprudence.<sup>1248</sup> In applying the Endorsement Test to the two displays, the majority said it would seek to determine “what the reasonable viewer would understand the purpose of the display to be.”<sup>1249</sup> If the viewer believed the government's purpose was to endorse religion, the display would be deemed to have the improper effect of advancing religion.<sup>1250</sup>

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1244 492 U.S. 573 (1989)

1245 492 U.S. 573, 590 (1989)

1246 The Justices acknowledged that other tests might be better suited to address different Establishment Clauses cases. 492 U.S. 573, 595 (1989).

1247 492 U.S. at 595.

1248 492 U.S. at 604. (Interestingly, the dissenting opinion was drafted by Justice Kennedy, who 26 years later penned the majority opinion in *Town of Greece*).

1249 492 U.S. at 604.

1250 The Endorsement Test is often seen as clarifying the effect prong of the Lemon Test. Under the Endorsement Test one is not concerned with the actual government purpose (this is dealt with in the first prong of Lemon), but rather what the reasonable observer would believe the government's purpose to be.

Writing separately, three Justices also challenged the dissenters' view that coercion should be the standard in these cases:

“An Establishment Clause standard that prohibits only “coercive” practices or overt efforts at government proselytization, but fails to take account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others, would not, in my view, adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community. Thus, this Court has never relied on coercion alone as the touchstone of Establishment Clause analysis.”<sup>1251</sup>

The four Justice taking the minority position, led by Justice Kennedy, advocated for a “proselytization test” to be used in these kinds of cases concerning “passive displays of religion” whereby the focus is on coercion. These Justices expressly challenged the neutrality mandate and impliedly the idea that the Establishment Clause can serve multiple purposes in cases such as these, arguing that because of how past precedent used the term “neutrality,” if taken to its extreme the principle would “require a relentless extirpation of all contact between government and religion.” Arguing that this would contradict American history, these Justices pointed out that “government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage.”<sup>1252</sup> Taking a position akin to the German view of the state’s role in facilitating positive religious freedom, and adopting the accommodationist approach first stated by Justice Goldberg in *Schempp*, these Justices also argued that “accommodation entails much more than simply lifting government imposed burdens. It can also take the form of affirmative aid to religion.”<sup>1253</sup> Under this approach, there are two limiting principles:

“government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact “establishes a [state] religion or religious faith, or tends to do so.”<sup>1254</sup>

Justice Kennedy sums up the position nicely when he says: “[n]oncoercive government action within the realm of flexible accommodation or passive acknowledgment of existing symbols does not violate the Establishment Clause unless it benefits religion in a way more direct and more substantial than practices that are accepted in our national heritage.”<sup>1255</sup>

The various opinions filed by the Justices in this case are somewhat confusing, primarily because Justices advocating for the Endorsement Test end up applying the test differently to the mixed display. Five Justices ruled that the stand alone crèche amounted to the county sending “an unmistakable message that it supports and

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1251 492 U.S. at 627-628. (O'Connor, concurring)

1252 492 U.S. at 657. (Kennedy, concurring)

1253 492 U.S. at 658. (Kennedy, concurring)

1254 492 U.S. at 659. (Kennedy, concurring)

1255 492 U.S. at 663. (Kennedy, concurring)

promotes the Christian praise to God that is the crèche's religious message.”<sup>1256</sup> No viewer would believe that this kind of display was sitting where it was without the “support and approval of the government.”<sup>1257</sup> The lesson from *Lynch* was that there are constitutional means of celebrating Christmas and unconstitutional ones. This was an example of one that had crossed the line, arguably because the relationship between the government and message being conveyed was too close, too active.

On the other hand, the Justices advocating for a “proselytization test,” found the stand alone nativity scene as well as the Menorah/Christmas Tree display to be appropriate as there was no effort on behalf of the government to coerce people to “support or participate” in religion.<sup>1258</sup> For them, both displays were passive acknowledgments of religion, although in a footnote these Justices also acknowledged that even passive displays might in extreme circumstances cross the proselytization line.<sup>1259</sup> Concerning the Menorah and Christmas Tree display, these Justices were joined by two of the Justices who had struck down the crèche display. These two Justices once again applied a version of the Endorsement Test but upheld this second display. Characterizing it as a celebration of the “secular” holidays of Christmas and Hanukah, Justice Blackmun found the display to be similar to the one upheld in *Lynch* as it was more a celebration of a holiday season than a particular religious holiday.<sup>1260</sup>

Justice O'Connor<sup>1261</sup>, on the other hand, began her defense of the display by first noting that the use of the coercion test alone, as the “proselytization test” advocates sought to do, would fail to “adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community.” Applying her Endorsement Test, O'Connor found that the reasonable observer would be acquainted with the history of the winter holiday season, and would see this mixed display as nothing more than acknowledging that history while celebrating the secular holiday season.<sup>1262</sup> In short, for four of the Justices, this mixed display was appropriate because it did not amount to government coercion, while for two other Justices, it passed constitutional muster because it did not endorse religion.

Taken together, these two cases offer a variety of perspectives on how to approach these temporary religious display cases. The positions taken, however, can basically be boiled down to: on the one end of the spectrum accommodationists taking a very narrow view of how non-establishment principles should be applied in this case, while at the other

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1256 492 U.S. at 600.

1257 492 U.S. at 600.

1258 492 U.S. at 644.

1259 “One can imagine a case in which the use of passive symbols to acknowledge religious holidays could present this danger. For example, if a city chose to recognize, through religious displays, every significant Christian holiday while ignoring the holidays of all other faiths, the argument that the city was simply recognizing certain holidays celebrated by its citizens without establishing an official faith or applying pressure to obtain adherents would be much more difficult to maintain.” 492 U.S. at 644, Footnote 3

1260 492 U.S. at 615.

1261 492 U.S. at 628. (she goes on to say that “[t]o require a showing of coercion, even indirect coercion, as an essential element of an Establishment Clause violation would make the Free Exercise Clause a redundancy.”)

1262 492 U.S. at 631. (In addition she says that government might even have to accommodate religion in some instances where it is required by the Free Exercise Clause and that “a reasonable observer would take into account the values underlying the Free Exercise Clause in assessing whether the challenged practice conveyed a message of endorsement.” id at 632)

extreme separationists believing that any acknowledgment of religion by the government amounts to an improper preference. Within the spectrum were a group of Justices who took a more practical approach to these cases, focusing more on whether the reasonable observer would believe the displays could make non-believers feel like outsiders. It was their view that was determinative in these cases and would shape religious symbols cases for the next two decades.

## **B. Permanent Religious Symbols**

Challenges to permanent displays on government property containing a religious message are a relatively recent development in U.S. Supreme Court jurisprudence. In 2005 the Court agreed to hear two cases concerning the permanent display of the Ten Commandments on public property. In *McCreary County v. ACLU of Kentucky* the Court was faced with a challenge to the recent erection by county officials of a display in the hallway of a county courthouse featuring the Ten Commandments.<sup>1263</sup> The government officials created the display to commemorate the role that, in their view, the Commandments played in shaping American laws. Unlike the German courtroom cross case, this courthouse display was in the common area of a government building, as opposed to sitting next to a judge in a closed courtroom setting.<sup>1264</sup>

Heard on the same day, *Van Orden v. Perry*, involved a large marble statue of the Ten Commandments that was donated to the State of Texas by a private non-religious organization, and had been on the grounds for over 40 years.<sup>1265</sup> Government officials had accepted the display from the Eternal Order of Eagles who were placing similar displays across the country as part of their effort to curb juvenile delinquency. In the Texas case, the monument joined twenty-one others that were spread out on the grounds of the Capitol, each depicting some element of Texas history, although this monument was the only one containing religious content.

These two cases illustrate nicely the difficulty with characterizing the openness of this public forum. Clearly in both these instances only the state has the privilege of erecting displays in this forum. Yet this is easily distinguishable from the more closed institutional public sphere. There participation in the forum is mandatory, while here it is voluntarily. Further, there the forum is in a physically closed area, while here the display has been erected in a more physically open setting where other messages are more likely to be heard. Finally, the vastness of this more open forum allows individuals to more easily avoid the government-sponsored display. With that said, the fact that only the state is allowed to express itself in this forum by erecting a permanent display raises the possibility of non-establishment problems when the state expresses itself via a religious display.

In both of these cases, a clear divide over the application of non-establishment

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1263 545 U.S. 844 (2005)

1264 If any of the cases in this section do not fit within a discussion concerning the political public sphere, this is the one, however the fact that the building was large and individuals could easily avoid being confronted with the symbol makes this case factually distinguishable from the German courtroom cross case.

1265 545 U.S. 677 (2005)

principles in this setting can be seen. Eight of the Justices ruled consistently in these two cases, while one Justice found that the Texas display was proper whereas the Kentucky display violated the Establishment Clause. Five Justices attempted to apply a combined version of the Lemon and Endorsement Tests to these two cases, although they disagreed on how to apply these tests in *Van Orden*. These tests, according to the five Justices, were the most effective means<sup>1266</sup> of advancing the purposes served by the Establishment Clause, in this context namely diversity and plurality.<sup>1267</sup> Additionally, four of these Justices stressed that when government too actively acknowledges religion, it increases the threat of civil strife among its citizens, violating another central purpose of the non-establishment doctrine: the need to avert religious strife.<sup>1268</sup>

Where these five Justices parted ways was how they applied the reasonable person standard under the Endorsement Test. The four Justices who found both displays to be in violation of the Establishment Clause held that an objective viewer would look at these displays containing overtly religious text and conclude that the state was endorsing a particular religion,<sup>1269</sup> while at the same time making non-believers and members of minority religions feel like outsiders. For Justice Breyer, the deciding vote in both of these cases, the question of history played a decisive role in how he approached the reasonable person standard. Calling it a “boardline case,” Breyer found the Texas monument to be permissible primarily because it is part of a larger display containing other historical monuments, and as such the purpose of erecting it was more historical rather than religious. Furthermore Justice Breyer placed significant weight on the fact that the monument had been on the Texas State Capitol grounds for over 40 years without any controversy, evidence that a reasonable observer would understand the display to be part of an overall depiction of Texas history and not an attempt to advance religion.<sup>1270</sup> This was to be juxtaposed with the Kentucky display, whose short and controversial history illustrated “the substantially religious objectives of those who mounted them, and the effect of this readily apparent objective upon those who view them.”<sup>1271</sup>

Four Justices, on the other hand, advocated for the complete abandonment of both the Lemon Test as well as the principle of state neutrality when deciding cases concerning government acknowledgment of religion, just as they had done in *Alleghany County*,

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1266 Proponents of the Endorsement Test basically believe that a neutral state would not place itself in a position where an objective observer would view the state as endorsing religion. While the BVerfG has never expressly used something similar to the Endorsement Test, elements of it can be found in its jurisprudence. German neutrality at the very least means that the state should be home for all its citizens regardless of religion. In other words, the state should not create outsiders. Further, the BVerfG has approached how religious symbols should be viewed from the perspective of the objective observer.

1267 Justice O’Conner sums this up nicely in her concurrence when she says that “[r]easonable minds can disagree about how to apply the Religion Clauses in a given case. But the goal of the Clauses is clear: to carry out the Founders’ plan of preserving religious liberty to the fullest extent possible in a pluralistic society.”545 U.S. at 828 (O’Connor, concurring).

1268 545 U.S. at 734-735 (Stevens, dissenting) (“The evil of discriminating today against atheists, “polytheists[,] and believers in unconcerned deities,” is in my view a direct descendant of the evil of discriminating among Christian sects. The Establishment Clause thus forbids it and, in turn, prohibits Texas from displaying the Ten Commandments monument the plurality so casually affirms.”)

1269 545 U.S. at 862 and 545 U.S. at 712 (Stevens, dissenting)

1270 545 U.S. at 701.

1271 545 U.S. at 703.

opting instead for a version of the no proselytization test.<sup>1272</sup> These Justices found both displays to be appropriate acknowledgments of religion, characterizing them as a “passive” recognition of the role the Ten Commandments played in development western civilization legal codes.<sup>1273</sup> While these Justice never state exactly why they believe the displays are passive, it is clear, especially when they compare the displays to the text that accompanied the display of the Ten Commandments in schools in *Stone v. Graham*, that by passive they mean intensity and the propensity to coerce.<sup>1274</sup> Thus, at the heart of these decisions upholding the displays lies the belief that the test for government acknowledgments of religion should focus on coercion and not neutrality, and as such, stopping coercion is seen as the primary purpose of the non-establishment principles contained in the religion clauses.

Justice Scalia, while joining the plurality opinion in *Van Orden* upholding the placement of the Ten Commandment monument on the grounds of the Texas State Capitol, urged the Court to adopt a more consistent approach that “is in accord with our Nation's past and present practices, and that can be consistently applied--the central relevant feature of which is that there is nothing unconstitutional in a State's favoring religion generally honoring God through public prayer and acknowledgment, or, in a non-proselytizing manner, venerating the Ten Commandments.”<sup>1275</sup> This approach allows government and religion to freely interact so long as no one is being coerced by the state to practice a particular religion. It is an approach that also does not rely on concepts of neutrality, which have no foundation in the nation's history, according to Scalia, especially if neutrality is interpreted as the state being neutral between religion and non-religion.<sup>1276</sup> To this end, Scalia claims that “[w]ith respect to public acknowledgment of religious belief, it is entirely clear from our Nation's historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.”<sup>1277</sup> Dismissing the claim that a limited reading of the Establishment Clause would discriminate against religious minorities, Scalia notes that their rights are protected by the Free Exercise Clause and “those aspects of the Establishment Clause that do not relate to government acknowledgment of the Creator.”<sup>1278</sup>

In some respects it is hard not to see similarities between the German approach and the one being advocated by Justice Scalia, where free exercise is the main focus and non-

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1272 Three of the Justices from the *Allegheny* dissenters made up this group of four; Justice Thomas being the new members of the group.

1273 545 U.S. at 686.

1274 545 U.S. at 691. (The dissenters take issue with this characterization noting that “[p]lacing a monument on the ground is no more “passive” than hanging a sheet of paper on a wall when both contain the same text to be read by anyone who looks at it. The problem in *Stone* was simply that the State was putting the Commandments there to be seen, just as the monument's inscription is there for those who walk by it”). See at 545 U.S. at 745 (Stevens, dissenting)

1275 545 U.S. at 692.

1276 “With all of this reality (and much more) staring it in the face, how can the Court possibly assert that the ‘First Amendment mandates governmental neutrality between ... religion and nonreligion,’ and that ‘[m]anifesting a purpose to favor ... adherence to religion generally,’ is unconstitutional? Who says so? Surely not the words of the Constitution. Surely not the history and traditions that reflect our society's constant understanding of those words.” 545 U.S. at 889 (Scalia, dissenting)

1277 545 U.S. at 893 (Scalia, dissenting)

1278 545 U.S. at 899. (Scalia, dissenting)

establishment principles place minimal limits on government action in extreme cases. With that said, Justice Scalia was also the author of the infamous *Smith* decision that controversially restricted the scope of free exercise protections to an extent that even the harshest critics in Germany of the broad scope given to Article 4 protections would not recognize. In other words, German jurists can rightfully point to their robust free exercise protections as a proper means of protecting minority rights, but it is more difficult to see how the weakened version of free exercise that exists in the United States post-*Smith* can adequately protect minority rights once the Establishment Clause is stripped down to nothing more than a prohibition of “force of law” coercion.

On two other occasions the Court has looked at religious symbols placed by government in an open forum, and while these cases can hardly be considered to be landmark in their reach, they reinforce the idea that the divisions on the Court concerning such government acknowledgments of religion are based not only on what the Justices view are the purposes being served by non-establishment principles, but also hinge on how the Justices characterize the nature or intensity of the government's acknowledgment of religion. Four years after the Court's decisions in the two Ten Commandments cases achieved the impossible and further complicated American religious liberty jurisprudence, the Court was asked to review a city's refusal to erect a donated monument of the Seven Aphorisms of Summum in a city park, when the city had already accepted and erected a monument of Ten Commandments. The challengers framed this as a free speech issue claiming that the city had created a forum for speech by allowing the Ten Commandments monument to be placed on its property, and that by denying this request, the city was engaging in a content based restriction of speech. The Court ultimately determined that monuments placed in the park amount to government speech, and as such the challengers could not claim their speech was being restricted<sup>1279</sup>, nor was the Court willing to force the government to speak in a particular manner by requiring it to accept the Summum monument.

The Court only mentioned in passing that government speech must comport with the Establishment Clause, i.e. government may not express itself in a manner that overtly advances a particular religion through its speech.<sup>1280</sup> For at least five of the Justices, the fact that the city was allowed to pick and choose between the particular religious message with which it wished to associate itself raised little concern. For them, doing so simply did not amount to preferential treatment of particular religions, or at least not a preferential treatment that could be viewed as either coercive or an active acknowledgment of religion, which for these judges actually is one in the same.

Two years after deciding *Summum*, the Court was again asked to weigh in on a religious monument permanently affixed to state land.<sup>1281</sup> At issue was a cross standing

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1279 By characterizing the monuments as government speech, the Court rejected the idea that by accepting the monument the city had created an open forum where all are welcome to express themselves in a similar manner. 555 U.S. 460, 468 (If the state was “engaging in their own expressive conduct, then the Free Speech Clause has no application. The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.”)

1280 *Pleasant Grove City v. Summum*, 555 US 460 (2009)

1281 *Salazar v. Bouno*, 130 S.Ct. 1803 (2010)

out in the middle of the Mojave Desert on federally owned property. The cross was erected in 1934 by members of the Veterans of Foreign War, a private association, to honor those who died in World War I. Since then the cross had been maintained and replaced once by private individuals. After a lower federal court had ordered the federal government to remove the cross, Congress passed a resolution selling to private individuals the portion of land upon which the cross stands. The Court accepted the case for review to determine whether this land transfer made the case moot because the cross no longer stood on government property.

For a plurality of the Justices, the government's characterization of the cross as doing nothing more than honoring the fallen soldiers seemed to turn it into the kind of passive display that could easily survive Establishment Clause scrutiny.<sup>1282</sup> The dissenters, on the other hand, characterized the transfer as a “government endorsement of the cross” in that Congress took this action specifically to allow an overtly religious symbol to remain standing in an area that was still predominantly owned by the government.<sup>1283</sup> While the case itself was mired in procedural questions concerning constitutional standing and whether the government had violated a lower court injunction, a few things are made clear by the various opinions. First, a majority of the Supreme Court Justices now endorsed the view that the government can accommodate religion by allowing and maintaining acknowledgments of religion on its property. Second, at least two Justices believed that the only way an accommodation of religion will violate the Establishment Clause is if it can be shown the government is promoting religion in a coercive manner, and by coercion they mean the force of law kind. Finally, there is no longer a majority of Justices who would use the Endorsement Test to judge questions concerning public acknowledgment of religion, with perhaps the *Town of Greece* decision marking the final demise<sup>1284</sup> of this test and the successful narrowing of non-establishment principles by viewing them as only serving the purposes of preventing coercion and ensuring equality.

### C. Cross Jurisdictional Hypothetical Comparisons

Before diving into this short, hypothetical exercise, one cannot lose sight of the type of forum that is being discussed here. This is primarily a wide open forum comprised of space in which individuals interact on a daily basis, and here the state has chosen to use the property it owns in this forum to acknowledge religion. The cases in the United States that fall into this category range from religious symbols being placed outside of public government buildings to symbols like a cross standing out in the middle of the Mahove Desert on government park land. Participation in this forum is for the most

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1282 130 S.Ct. at 1817 and 1818 (The cross has a “complex meaning beyond the expression of religious views.” and here its placement “was not an attempt to set the imprimatur of the state on a particular creed. Rather, those who erected the cross intended simply to honor our Nation’s fallen soldiers.”)

1283 130 S.Ct. at 1832 (Stevens, dissenting)

1284 Asking a similar question see Slone, Comment: Whose Morality is it Any? Recognizing the Tension Between Morality Laws and the Establishment Clause, 13 Georgetown Journal of Law and Public Policy 49, 52 (2015); Simson, Religious Arguments By Citizens to Influence Public Policy: The Lessons of the Establishment Clause, 66 Mercer Law Review 273, 293 (2015); Hill, Anatomy of the Reasonable Observer, 79 Brooklyn Law Review 1407, 1408 (2014); Arguing that the test is still alive see Roberts, The Rising None: Marsh, Galloway, and the End of Legislative Prayer, 90 Indiana Law Journal 407, 428 (2015)

part voluntary, and sometimes even accidental, e.g. a passerby who just happens to walk by a Christmas display in front of city hall while on her way to work.

By its very nature, the chances that someone would feel coerced in any way to change his or her behavior by being confronted with such a display in this forum are minimal, although the closer the display is placed to buildings where individuals must enter either because they have been summoned there by or wish to obtain something from the state, the more potential for coercion exists. Thus, in the context of the active/passive dichotomy that has been used here to measure the nature of the government's acknowledgment of religion, these cases rarely involve state actions falling into the category of active that is synonymous with coercion, rather they normally involve questions concerning how the government is interacting with the religious message, with interaction that seemingly has the primary purpose of promoting a particular religious doctrine crossing the passive/active line. Tied up in this discussion as well is the meaning of state neutrality, a term that has been used extensively in both jurisdictions but as we have come to realize often with different meanings.

### 1. German Neutrality

As was noted in Chapter 6, German neutrality is a court created doctrine that encompasses several provisions of the *Grundgesetz*. The German version of neutrality can be divided roughly into two categories, with each kind playing a role in particular settings. As E.W. Böckenförde argued, in the more closed setting where government's primary task is exercising its authority, neutrality demands that government be “home to all its citizens.”<sup>1285</sup> In the community at large, however, where the government plays more of an organizational role, e.g. parks, streets, and possibly even schools, the neutrality mandate is more open, and includes a duty for the government to provide space for its inhabitants to develop religiously and philosophically.<sup>1286</sup> In this space, the government may choose to recognize the cultural significance of religion so long as it does so in a manner that is not proselytizing or favoring one religious doctrine over another.

While the brief comparison that follows is indeed hypothetical, the potential for controversy here is real, as Martin Schultz, President of the European Parliament, found out during the most recent European elections when he seemed to imply that there was no room in the open public sphere for state-sanctioned religious symbols.<sup>1287</sup> Whether his views were misunderstood, as he later claimed, the fact remains that every so often German residents step forward to challenge the prevalence of religious symbols on government property as being a violation of state neutrality. While none of these challenges have turned into full blown court actions, they have resulted in political

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1285 See footnote 903.

1286 The way Böckenförde characterizes schools would put them squarely in the political public forum category. For reasons discussed extensively in this Chapter 8, arguably schools should be seen as containing both a political and an institutional public sphere. Nevertheless, Böckenförde's point as a general matter is still relevant.

1287 See *Das Kreuz in der Diskussion: Eine neue Kreuzifix-Debatte spaltet die Gesellschaft*, 21. May 2014, Katholisch.de: (<http://www.katholisch.de/aktuelles/aktuelle-artikel/das-kreuz-in-der-diskussion>)

discussions<sup>1288</sup> and even sometimes political compromises,<sup>1289</sup> and most certainly involve questions similar to those faced by the Supreme Court in *Lynch* and its progeny.

## 2. Summit and Desert Crosses

Anyone who has spent time hiking in the mountainous regions of Germany has most surely noticed the large Latin Crosses (*Gipfelkreuze* or summit crosses) found at the summit of many German mountain ranges. These mountain ranges are by in large publicly held property, and the crosses, without any doubt, enjoy the blessing of the government that has jurisdiction over the mountaintop on which it is placed. Factually, it is difficult to distinguish these crosses from the one sitting in the middle of the Mojave Desert that caused such a political and legal stir in the early 2000s.<sup>1290</sup> Thus, these summit crosses provide a perfect means of illustrating, for comparison purposes, the standard German courts might use when faced with permanent government acknowledgments of religion in the open public forum, and how the two main American norms might be applied to examples in Germany.

While the *Salazar* Court devoted little of its time to addressing the religious liberty claims in the Mojave Desert cross case, primarily because the land on which the cross was placed no longer belonged to the state, there are hints in the discussion as to how a majority of the Justices would have ultimately decided the non-establishment questions, as well as clear evidence in the prior decisions that have already been addressed. In his *Allegheny County* opinion, Justice Kennedy laid the groundwork for what is arguably the dominate view among today's members of the U.S. Supreme Court concerning permanent and temporary state acknowledgments of religion in the open public forum when he said “[n]oncoercive government action within the realm of flexible accommodation or passive acknowledgment of existing symbols does not violate the Establishment Clause unless it benefits religion in a way more direct and more substantial than practices that are accepted in our national heritage.”<sup>1291</sup>

With this in mind, it is no coincidence that when faced with a Latin Cross on government property, a plurality of the Justices characterized the government's acknowledgment of religion as nothing more than honoring fallen soldiers as has been done throughout much of American history, rather than being a symbol promoting a specific creed.<sup>1292</sup> There can be little doubt that the drafter of this opinion characterized

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1288 For instance, a complaint filed in Stuttgart in response to the local Catholic diocese placing between 2500 and 3000 along a public hiking trail was taken up by a local political body as being serious enough to warrant their attention. See Bock, *Kreuze raus aus dem Wald? Wanderer stört sich an Pilgerzeichen*, *Stuttgarter Nachrichten.de* 24. October 2014 (<http://www.stuttgarter-nachrichten.de/inhalt.kreuze-raus-aus-dem-wald-wanderer-stoert-sich-an-pilgerzeichen.60459c92-bc91-47b3-b699-23e2640bbb13.html>)

1289 See Borchard, *Fragwürdiger Kreuz-Kompromiss*, *OP-Online.de*, 11. May 2012 (<http://www.op-online.de/region/egelsbach/kirchenkreuz-kompromiss-egelsbach-fragwuerdig-debatte-holzkreuze-2312906.html>)

1290 A similar controversy has been ongoing for almost thirty years in San Diego where a large Latin Cross sits atop a hillside in the San Diego neighborhood of La Jolla. In December 2013 a Federal District Court ordered the removal of the cross, but stayed the execution of his order until the appeals court could hear the case. In 2014 the U.S. Supreme Court rejected an attempt to have the case heard by the nation's highest court before the intermediate Federal Court of Appeals had a chance to hear it. See 134 S.Ct. 2658 (2014).

1291 492 U.S. at 663 (Kennedy, concurring in part and dissenting in part).

1292 130 S.Ct 1803, at 1817 and 1818 (The cross has a “complex meaning beyond the expression of religious views.”

the display as such to address the claims that the placement of a cross on government property created too close of relationship between the government and any message conveying particular religious beliefs.<sup>1293</sup> In so doing these Justices seemingly acknowledged that in rare circumstances, government actions that are not coercive might still be considered active because of the nature of its relationship with a particular religious doctrine.

From the German perspective the only precedent concerning the placement of crosses on government property comes from cases involving the type of closed forums normally associated with the institutional public sphere, where there is an increased danger of individuals feeling coerced by having to confront state-sanctioned religious symbols because of the mandatory nature of participation in this forum. In the open forum, however, no such danger exists. Because of its openness, the intensity of the confrontation is limited by the fact that in this setting government is not exercising its authority, and avoiding the symbol is relatively easy. Thus, one is left only with a claim based on the other definition of active acknowledgment of religion, an analysis that focuses on the message being conveyed by the state and its relationship to that message.

Again, to determine whether there are limits as to how the state may express itself religiously in Germany, one is left to rely on precedent related to cases involving the institutional public sphere. One series of cases, though, potentially offers an opening: the cases concerning the state's ability to characterize its schools as having a "Christian nature." As was previously noted, schools arguably contain elements of both institutional and open public spheres. Students do not completely lose their rights to express themselves once entering the school, and in the school's common areas these rights enjoy at least some modicum of protection. While the focus in the nature of schools cases was arguably on the impact such a characterization would have on students operating within the institutional public sphere, it is not a stretch to conclude that the protections set forth by the BVerfG equally apply to students when operating inside the school's more open public sphere, e.g. hallways, cafeteria, playground. For the most part, these protections require the state to refrain from creating schools that have a missionary nature and ensure that its schools are open to students of all religious and philosophical stripes.<sup>1294</sup> There is no reason to think these limitations do not extend to the common areas of the school.

With these two limitations on state acknowledgment of religion in mind, one can more easily predict how the Mojave Desert cross case, or a case concerning the summit crosses, might be decided by a German court. Turning to the first limitation concerning whether the state's acknowledgment of religious could be considered missionary in nature, there is some language in the Bavarian school cross case that seems to

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and here its placement "was not an attempt to set the imprimatur of the state on a particular creed. Rather, those who erected the cross intended simply to honor our Nation's fallen soldiers.")

1293 This is exactly the claim made by three of the dissenters. 130 S.Ct 1803, 1832 (Stevens, dissenting)

1294 One might argue that an additional limitation that emanates from German non-establishment principles is the idea that the state may not prefer one religion over another. However, as these nature of school cases make clear, this purpose is deemed fulfilled upon showing a preference is not missionary or discriminatory in nature.

acknowledge the possibility of interpreting the cross as a missionary symbol. However, not only has this view apparently been softened, it also is less likely to apply in a wide open setting like a desert or mountaintop. As the dissenters in the school cross case noted, students are confronted with the crucifix on a daily basis as they interact in society, i.e. open public forums.

If indeed the language from the Bavarian school cross case is seen as merely dicta, and the hanging of crosses in schools cannot per se be deemed to be a missionary act, it is difficult to imagine German jurists or commentators concluding that that erection of a similar cross in a wide open space takes on the characteristics of a missionary religious symbol. Here it becomes clear that the focus on whether the government's acknowledgment of religion takes on a missionary character is strikingly similar to Justice Kennedy's no proselytization approach. As such, it is equally difficult to imagine American accommodationists concluding that the summit cross is somehow an act of proselytization.

This then turns the focus to whether the state is acknowledging religion in a manner that would make non-believers or members of religious minorities feel unwelcome or not part of German society, the second limitation created by the BVerfG in the Christian nature of schools cases. Keeping Böckenförde's neutrality principles in mind, it is doubtful that a German court would actually apply the "home to all its citizens" principle to this open forum. Thus, arguably only the no coercion principle would play a role in these cases, as was pointed out at the outset of this survey.

However, arguably the aforementioned political compromises that have been struck by local German governments responding to the challenged placement by government of religious symbols in this open sphere leave room for some application of the "home to all citizens" principle in this setting. Using doctrine established by American courts, the questions that might be used to analyze this question would boil down to whether the government acknowledgment of religion is advancing a particular religious doctrine in a manner: 1) that goes beyond recognizing the cultural and historical significance of the symbol (the accommodationist position), or 2) that sends the message to non-believers and members of minority religions that they are outsiders (the modern separationist position applying the Endorsement Test).<sup>1295</sup>

Without diving too deeply into the origins of these summit crosses, a convincing argument can be made that today few see them as an overt advancement of religion, at least not to the extent that exceeds the historical and cultural significance of the symbol in this setting. Considering the arguments that have been made by opponents of the school cross decision, there is no doubt that at least some German jurists and commentators would be comfortable with this norm as a means of measuring how active the government's acknowledgment of religion is when it allows crosses to be erected on mountaintops.

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<sup>1295</sup> Because German courts have been relatively silent as to the norm that should be applied to measuring how the state has violated the "open to all its citizens" principle of neutrality, we are left with having to apply the two norms developed by Justices in the United States.

Application of something akin to the Endorsement Test, however, results in a closer call. How might a reasonable observer view these crosses? If the reasonable observer is aware of their prevalence on German mountaintops, especially in light of the absence of other similarly situated symbols, an argument could be made that a non-Christian might conclude that in fact Christianity is being preferred over all other religions, making non-Christians feel as though they are outsiders. However, if the reasonable observer is familiar with the tradition of climbers placing these crosses on mountaintops upon successfully reaching the summit, the likelihood that the reasonable person would still feel as though they were an outsider by the presence of these crosses becomes significantly diminished. Obviously, there is no “correct” answer here, and it would simply boil down to how a court would characterize the so-called “reasonable person,” perhaps best illustrating the potential subjectiveness of this approach.

Again, considering existing precedent, it is difficult to imagine a German court applying something like the Endorsement Test in this context. Instead, emphasis would likely be placed on the openness of the forum, the ability of one to avoid being confronted with this display, and perhaps the historical/cultural relationship that Germans have with Christianity. All this is to say that in some respects German courts might approach these permanent religious symbols on government property in a manner similar to their American counter-parts, but only in a limited fashion: one that places more emphasis on whether the individual's free exercise rights are at risk, which in an open forum like this, would rarely be the case.

A similar application of the established American norms can also be applied to temporary religious displays erected in the open public forum by the state in Germany. As the forgoing discussion illustrates, the bulk of the jurisprudence in the United States related to temporary religious displays on government property relates to religious holidays, especially Christmas. As at least one German commentator has noted, Christmas in Germany is a relatively peaceful time, at least from the litigation perspective.<sup>1296</sup> One is hard pressed to find any kind of litigation concerning Christmas displays on government property. In fact, outside of a short piece by Dr. Diana Zacharias, there is basically no discussion in legal circles regarding holiday displays or activities on government property that are temporary in nature, and Dr. Zacharias' conclusions deal primarily with the school setting. Only near the end of here article does she mention that hanging Christmas lights or erecting a Christmas tree on government property would unlikely run afoul of the principle of state neutrality because these decorations have more of a secular meaning. In this respect, she seems to be taking the same approach as the Supreme Court did in *Lynch*, namely religion may be acknowledged by the state if it is within a broader secular context. But how would a German court approach a stand alone creche placed outside of a city hall?

Here again there is no precedent to guide the courts outside of those cases concerning forums associated with the more closed institutional public sphere. For the reasons stated above, simply applying the coercion principle to such a display would most

<sup>1296</sup> Zacharias: Das Weihnachtsfest im deutschen öffentlichen Recht, NVwZ 2006, 1329

surely result in the same findings made by the accommodationists in *Lynch* and *Allegheny*, namely there is nothing in this display that would coerce individuals to believe or act differently with regards to their religion, and as such the display is nothing more than a passive acknowledgment of religion. Turning our attention to the nature of the relationship between the acknowledgment and religious message being conveyed, the outcome of this case would hinge on what kind of neutrality a German court would conclude is required under these circumstances: the neutrality that seeks to make Germany a home for all its inhabitants or the more open accommodating neutrality that is comfortable with the state recognizing the role religion has played in German culture. As noted in the preceding pages, it seems unlikely that a German court would apply the former version of neutrality under these circumstances.

Arguably there are just as many similarities as there are differences between the two jurisdictions regarding the potential application of non-establishment principles in cases like these. Here we see that the dominate view in Germany and arguably the increasingly dominate view in the United States is that when the forum is open and participation in it is not mandatory, the state is only prohibited from engaging in acknowledgments of religion that can be deemed missionary, coercive or discriminatory in nature, while the view held by a dwindling number of American jurists is that a robust application of non-establishment principles requires the state to refrain from actions that subtly show “favoritism to a particular belief or convey a message of disapproval to others” in such a forum.

As American jurisprudence in this narrow area of religious liberty doctrine continues to rely more heavily on principles of coercion as its benchmark for applying non-establishment principles, it is arguably moving in a direction that has been and continues to be the norm in Germany, where legal challenges to government sponsored religious displays in these types of open settings are virtually non-existent. On the other hand, it can also be said with some degree of confidence that should German courts start entertaining challenges to displays in this type of setting, it is quite likely that the results of these cases will be no different than those expressed in opinions written by American Justices falling into the accommodationist camp.

## Chapter 10: Closing Observations

This work ends where it began: with the words of Justice Harry A. Blackmun:

“The Establishment Clause protects religious liberty on a grand scale; it is a social compact that guarantees for generations a democracy and a strong religious community—both essential to safeguarding religious liberty. . . . When the government puts its imprimatur on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs. A government cannot be premised on the belief that all persons are created equal when it asserts that God prefers some.”

Blackmun's view, if taken literally, suggests that a constitutional regime lacking something equivalent to the Establishment Clause is one that does not truly, or at least fully, protect religious liberty. There is no doubt that Blackmun was a committed church/state separationist, however it is unlikely that he intended to cast dispersions upon those countries whose constitution lacks an express Establishment Clause equivalent. A more charitable interpretation of Blackmun's thesis might be that free exercise protection alone does not suffice to provide comprehensive religious liberty. It is this notion that framed the issues discussed in this work.

To be clear, the purpose of this work was not to decide whether Justice Blackmun is correct, regardless of how one interprets what he meant. Rather it was to explore how a country that has no express equivalent of the American Establishment Clause provides religious liberty protections that take into consideration non-establishment principles such as religious equality, the protection of minority rights and the maintenance of peace between religions, to name a few. Germany provides a perfect contrast to the United States, as the German Constitution contains nothing, other than a ban on creating a state church, that is expressly equivalent to the Establishment Clause. Yet few would argue with Germany's credentials as a country that cherishes religious freedom.

### A. Pitfalls Avoided

The historical development of religious liberty in Germany and the United States has no doubt at times taken different paths, but in this work it has been shown that along these paths one can find similarities as well. Both saw significant post-war upheavals of an entrenched Pre-Enlightenment church/state relationship. In the United States it was the Revolutionary War, in Germany the Napoleonic Wars. Both saw governments in the 19<sup>th</sup> Century rely on religion to instill morals in its citizenry: believed to be an essential competent of good government and order. And both underwent, and continue to undergo, significant demographic changes that challenge the status quo regarding the state's relationship with religion. These demographic pressures were at least partially responsible for German courts introducing non-establishment principles into German religious liberty doctrine in a substantive way, just as courts in the United States had responded to similar demographic challenges several decades earlier.

All this is not to suggest that the historical relationship between church and state plays no role in explaining some of the differences that exist between the religious freedom doctrine of the two countries. Some of the differences simply cannot be explained any other way than to focus on history. The language found in Article 137, Section 5 of the Weimar Constitution is perhaps the best example of this: “Die Religionsgesellschaften bleiben Körperschaften des öffentlichen Rechtes, soweit sie solche bisher waren.” (Religious societies shall remain corporations under public law insofar as they have enjoyed that status in the past.) For most American jurists and academics it would be unfathomable for the federal government to bestow a special corporate status upon religious entities giving them the right to use the state's tax machinery to fund themselves. However, in Germany, as the text of Article 137 suggests, this has been a historically accepted practice, an outgrowth of the Reichsdeputationshauptschluss of 1803 where, in return for secularizing church property, the state took on the responsibility of financing religion (the so-called “*Staatsleistung*”). Around this time in the United States, on the other hand, the last remnants of state churches were being disbanded as the country was becoming even more religiously diverse, at least within Protestantism.

Other provisions of the German *Grundgesetz* are also responsible for the stark differences between the two jurisdictions over, for instance, the funding of religious education and the cooperative relationship between the state and religious affiliated entities when it comes to providing social services, including education. These provisions as well have deep historical origins. Thus, when commentators talk about the gulf between how the two jurisdictions view questions of church and state, they have these instances in mind. Instances where express provisions of the German Constitution allow the state to interact with religion in a manner that most Americans, for historical reasons, would find objectionable. Add to this the different social-political views of the state, the impact of Nazi terror, and the historical dominance of the two main religions in Germany, just to name a few, and it is clear that there will always be differences between how these two countries approach questions of religious liberty. Yet despite these historical and social-political differences, convergence at some level can be found between the unique structures of each system's religious liberty regime.

## **B. Non-Establishment Principles Identified**

Non-Establishment principles are normally associated with countries like the United States and France that have specific constitutional provisions that either expressly or impliedly seek to place limits on how the state may interact with religion. Often the term is used inter-changeably with words like separation or secularism. As we saw in the overview of German religious liberty doctrine found in Chapter 6, the German version of state neutrality also encompasses at least some aspects of non-establishment principles. The use of the word “neutrality” (*religiös-weltanschauliche Neutralität*) by German courts and commentators seems to already suggest that American-style non-establishment principles exist in German religion liberty doctrine, as in the United States the word neutrality and non-establishment have been synonymous for over half a

century. But words can have different meanings in different languages, and even if they have similar meanings linguistically, they might be applied in a different manner because of a system's unique characteristics.

This work sought to look behind the word “neutrality” for more nuanced and exact principles that might show how non-establishment operates within German religious liberty doctrine. To do this, a quasi-teleological or purposive approach was taken to find out what users of the word “neutrality” really intended to achieve. The results, as one would expect, were mixed, with disagreements among jurists and commentators appearing in both jurisdictions over the purposes served by “neutrality.” Nevertheless, by identifying the various values underpinning interpretations of the Establishment Clause, and then considering how these values are advanced in the German religious liberty doctrine, it was shown that in fact non-establishment principles, in the American sense of the term, are recognized in German jurisprudence and literature.

The common religious liberty principles unearthed during this process are numerous, albeit differently applied, and involve the following: 1) the right to hold religious beliefs; 2) the freedom to act in accordance with religious beliefs; 3) no state church; 4) no state preference for, privilege of, or identification with a religion; 5) preventing government from creating policies that directly or indirectly coerce people to act against their beliefs.

The first two identified principles deal more with free exercise rights. Thus, it is perhaps misleading to say that this work sought only to determine the meaning of non-establishment in each jurisdiction. Instead, one of the goals here was to uncover the various purposes served by religious liberty in general and categorize them as falling under either free exercise or non-establishment principles. To achieve this, the words of every Justice who has ever drafted an opinion concerning modern American religious liberty doctrine were combed through in search of clues as to how vague principles such as “free exercise” and “non-establishment” were actually applied, and more importantly, to what end.

The fundamental right to hold religious beliefs is a bedrock principle in both jurisdictions. Clearly associated with the Free Exercise Clause of the First Amendment and Article 4 of the *Grundgesetz*, this right is absolute and protects one from being coerced by the state to believe in a particular faith. Perhaps the biggest difference between the two jurisdictions, however, is how each treats an individual's right to live in accordance with these religious beliefs. The question here boils down to under what circumstances may the state indirectly interfere with one's ability to practice or act in accordance with religious beliefs. In the United States, post-*Smith*, the answer is clear: laws of general applicability may restrict one's ability to act in accordance with religious beliefs, so long as the law is not motivated by an animosity toward religion. In Germany, on the other hand, the right to hold religious beliefs and act in accordance with those beliefs are seen as a unified right, both being equally protected from government interference. Under German religious liberty doctrine, a general law may interfere with this unified right only if it can be shown that the law is necessary to

advance a competing constitutional interest, a much higher showing than that required under *Smith*.

In short, both jurisdictions recognize the right to hold religious beliefs and act in accordance with them, but only Germany has treated the latter as being equivalent to the former. Because of this, free exercise principles have also operated as a minority rights protection in Germany, protecting, for example, Halal butchers from animal protection laws and Muslim school teachers from teacher dress codes. And even in those instances where religious free exercise has been curtailed, for instance in cases involving the use of illegal drugs as part of religious exercises, the curtailment has been justified by the state's necessity to protect competing constitutional interest, whereas in the United States the claimed religious liberty infringement is dismissed as merely asking the court to ignore the law and recognize a "law of one."

The stark division between the two jurisdictions that one sees in the scope of free exercise principles is not readily apparent upon examining the foundation of non-establishment principles in both countries, where the idea of there shall be no state church is a first principle. If there is one thing that all jurists and commentators in the United States can agree upon it is that the Establishment Clause clearly, albeit not expressly, prohibits the federal government from creating a state church. For some, non-establishment doesn't really have any other additional meaning. For others, this is simply the foundation of a multifaceted doctrine that enhances religious liberty by placing constraints on how the government acts. On its face, the German Constitution, on the other hand, leaves no room for interpretation. Article 137, Section 1 of the incorporated Weimar Constitution simply and plainly says "there shall be no state church."

Whether these words, either express or implied, have a deeper meaning is the source of debate in both countries. The idea that religion is strengthened when it is freed from influences of the state can be traced back to Roger Williams and has substantially influenced how Americans view church/state relations. In Germany, we also see a similar sentiment in the religious entity self-administration provisions of the Weimar provisions incorporated into the German Constitution. Beyond these provision, however, German jurists and commentators go out of their way to disavow concepts of "strict separation," and have instead opted for a cooperative view of church and state, at least when it comes to how the institutions of church and state interact. While Germans openly acknowledge that the institutional relationship between church and state is a cooperative one, Americans struggle with this relationship, due in large part to their historical distrust of government and their desire to protect religious entities from the corrupting powers of the state.

Despite these facial differences in how Americans and Germans view the institutional relationship of church and state, the language each uses to place limits on this relationship are surprising similar. Discussions of the "no preference," "no privilege" and "non-identification" doctrines, all examples of non-establishment principles, can be found in both jurisdictions, with divergence being found in how these doctrines are

applied. From an historical perspective in the United States, these general doctrines make sense considering the sheer number of different Protestant sects in existence at the time of the nation's founding. If the country was going to be held together after the American Revolution, the federal government simply needed to steer clear of taking sides in the religious disputes that were the basis of splintered Protestantism in post-revolutionary America. The motivation behind these doctrines, maintaining religious peace and keeping order, are really no different than those that gave birth to the German concept of *Parität*, which sought to hold together a land that had been torn apart by wars between the two dominant religions, and which serves as the foundation of German “no preference” and “non-identification” doctrines.

Over time, though, these concepts took on additional meanings in both countries, largely in response to the growing diversity of the citizenry in each. In the United States, the idea that minority religions must be protected has deep roots, although these protections were generally only available to minority sects within Protestantism. Non-Protestants were tolerated, but expected to respect the civil religion that was considered to be the glue holding the country together up through the beginning of the 20<sup>th</sup> Century. It was not until these non-Protestant groups started demanding more than simply being tolerated that the “no preference” and “no privilege” doctrines were incorporated into American religious liberty doctrine in a manner that provided comprehensive protection from the Protestant civil religion being imposed on them. As courts became more receptive to this redefinition, non-establishment principles took on the role of being the primary means for religious minorities, and later non-believers, to protect themselves from the state.

Beginning with the courtroom cross case, the concept of neutrality in German religious liberty doctrine also became increasingly associated with the protection of individual religious liberty of minorities. At the heart of the German neutrality dogma is the concept that the state must be home to all its citizens (*Heimstatt aller Staatsbürger*), a clear reference to neutrality serving the purpose of protecting religious minorities. These words seem to echo the concern expressed by advocates of the American Endorsement Test, whose main focus is ensuring that the state does not act in a manner that makes religious minorities feel as though they are outsiders. Yet, it is also clear that these principles were incorporated into a system that focuses more on the rights of the challenger to the government practice and less on the government practice itself. Thus, in the courtroom cross case the remedy was to remove the cross for the hearing in which the challengers were participating, but not ban the state from hanging the cross in its courtrooms in general. The protection offered to minorities by these non-establishment principles in Germany was individualized and limited, not broad based and societal as was the case in the United States. In short, the search for a deeper meaning to words like “neutrality” uncovered that the concepts normally associated with the Establishment Clause: equality, no preference of religion, maintaining the peace, etc.; can also be found throughout German jurisprudence and commentary but simply play a different role in the grand scheme of religious liberty doctrine.

As the discussions found in Chapter 5 and beyond plainly illustrate, the debate over

non-establishment principles taking place today in the United States involves whether these principles can be used to limit government in situations where no direct or indirect coercion is present. This debate is really not that different than the one that has been taking place since the German Constitutional Court's decision in the Bavarian school cross case. Critics of this decision, and its progeny, basically make the same argument as those seeking to limit the reach of non-establishment principles in the United States: preventing the state from coercing people regarding matters of religion is the primary purpose of religious liberty, with doctrines like “no preference” or “non-identification” playing a secondary role, if any. Furthermore, critics in both countries of expanding non-establishment principles beyond stopping government coercion argue that concepts such as neutrality threaten to strip the public sphere of religion and turn negative rights into some kind of super fundamental right that interferes with the ability of others to lead their lives in accordance with their own religious beliefs. Focusing on this transatlantic effort to limit the reach of non-establishment principles reveals a convergence of sorts taking place among some jurists and commentators.

### **C. Non-Establishment Principles Applied**

Before summarizing the convergences, one must have a basic understanding of how these identified non-establishment principles are applied by courts and commentators in each jurisdiction. The overview of the religious liberty doctrine in both countries found in Chapters 5 and 6 provided clues as how these principles are applied in each, and the case comparisons found in Chapters 7 and 8 clearly illustrated that, while these principles exist in both countries, they are applied within completely different doctrines that, as would be expected, have lead to sometimes completely different results. Upon closer inspection of these factually similar cases, however, it becomes clear that in many instances these principles are applied in a surprisingly comparable manner.

In the United States, the breadth of individual free exercise rights has never been broad, with perhaps a few exceptions taking place between the *Sherbert* and *Smith* decisions. It was the weakness of these free exercise principles that resulted in non-Protestant groups to seek protection under non-establishment principles. The result was the development of a doctrine where non-establishment principles were gradually viewed as limits on government. In each instance where the government was found to have violated the Establishment Clause, the remedy granted amounted to broad based restrictions of government action. While these remedies most surely resulted in individuals being protected from unwanted, government sanctioned, religious actions, they also were criticized by many as gradually removing all religious references from the public sphere. The relatively recent trend in the United States of redefining non-establishment to mean something more akin to “open neutrality” is part of the backlash to the separationist doctrine that used non-establishment principles to place far reaching limits on how government interacts with and acknowledges religion.

At the heart of the debate today over the proper scope of non-establishment principles in American religious liberty doctrine is how these principles relate to the Free Exercise Clause. Over the last several decades, two main views in American Jurisprudence

regarding the relationship between the clauses have emerged.<sup>1297</sup> In the spirit of the separationist doctrine that was developed in the 1960s is a view that non-establishment and free exercise do not conflict, rather they compliment each other. Individuals cannot enjoy full free exercise rights, so the argument goes, without proper checks on government action. This view is premised on the idea that government facilitates free exercise not by actively supporting religion, but by refraining from creating burdens on the ability of individuals to live in accordance with their religion, while at the same time creating open space where individuals can freely develop religiously. While this sounds similar to the German view of positive religious freedom, the key here is the role of the government. According to this view, the government should not be expressing itself religiously in the public sphere, it should simply be providing space for individuals to do so.

At the opposite end of the spectrum is a view that the application of non-establishment principles have been taken too far and are now infringing on individual free exercise rights. The limits placed on government have been taken to an extreme creating an unnecessary and counterproductive tension between the clauses. Free exercise, so this argument goes, is advanced when government aids and acknowledges religion in a neutral manner. The combination of formalist neutrality and protections against government coercion are not only enough to protect religious liberty, they also take into consideration the rights found in both clauses. More importantly, according to this view, this more open form of neutrality restores American jurisprudence to its proper place where minorities will be protected while acknowledgments regarding the contribution religion has made to American culture, as well as the need to instill the citizenry with morality, will once again be respected.

The positions obviously view the role of non-establishment principles in American religious liberty jurisprudence from different perspectives, but both focus on how these principles are used to limit government actions. In Germany, on the other hand, non-establishment principles have developed in the past thirty years within the framework of an already fully formed and expansive free exercise doctrine that places the individual at the center of the analysis. The introduction of these principles into existing doctrine were seen not as a means of supplanting or competing with free exercise, but as complimenting it, and in rare instances setting boundaries as to how far the state can go in facilitating free exercise (positive) rights. Their incorporation into existing doctrine, however, has not been without controversy. A close look at the opinions filed in some of the more controversial applications of non-establishment principles in German jurisprudence finds that there are primarily two polar opposite views over these principles: 1) Resistance, marked by the proposition that negative religious freedom rights can never be used in a manner that suppresses positive religious liberty rights; and 2) Restraint, which focuses on the occasional need for non-establishment principles to be applied in a manner that protects religious liberty in those situations where free exercise alone cannot, but only in narrow situations and within the existing religious freedom doctrine.

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<sup>1297</sup> To be sure, there are other views.

It is upon examining the latter view that one sees the primary difference between how Germans approach the application of non-establishment principles in religious liberty cases as compared to their American counterparts. Here these principles place a floor of rights under which the legislature may not go when it engages in the balancing of rights required under the principles of *Konkordanz* and the *Toleranzgebot*. However, the focus of the analysis remains the free exercise rights of the individual, with remedies to violations of such rights taking the form of case specific solutions rather than broad based restrictions on government action. For example, the application of non-establishment principles to the Bavarian classroom cross dispute eventually resulted in a solution that allows individuals to have crosses removed from the rooms in which they learn, but did not result in a ban of crosses from all classrooms, which would surely have been the remedy in the United States, with its focus on the propriety of the government's action. In this sense, then, non-establishment principles operate inside of the existing German religious liberty doctrine in a manner ensuring that negative religious liberty rights are respected when free exercise principles alone offer insufficient protection, but not in a manner that requires a broad-based restriction on government action.

Just because Germany uses some version of non-establishment principles in its religious doctrine obviously does not mean there is some kind of convergence going on between the two systems. In fact, the comparison of factually similar cases clearly illustrates how the manner in which non-establishment principles were incorporated into existing religious doctrine are often determinative in explaining the different outcomes. The state's role in facilitating and protecting "positive religious freedom" offers perhaps the best illustration of this. Found expressly in German jurisprudence, this concept simply forces German courts to approach questions regarding non-establishment principles differently than their American counterparts. In many instances the court cannot only look to see if the government's actions are infringing on the negative rights of individuals, but must also weigh any infringement against the the government's choice to provide space in which individuals can develop religiously.

In the United States, whether courts should be open to a similar "positive rights" concept is an on-going debate, but it is always framed within the established American religious freedom dogma that is perhaps best summarized by Judge Posner when he said the U.S. Constitution "is a charter of negative rather than positive liberties. . . . The men who wrote the Bill of Rights were not concerned that Government might do too little for the people but that it might do too much to them."<sup>1298</sup> As Justice Clark, writing for the Court in *Schmepp* noted, "the Free Exercise Clause . . . has never meant that a majority could use the machinery of the state to practice its beliefs."<sup>1299</sup> In other words, Americans generally do not view the mandate of the Free Exercise Clause as including a role for the state as a facilitator of these rights. Instead, the Clause aims to shield the individual from government acts that interfere with this right and nothing more.

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1298 Currie, Positive and Negative Constitutional Rights, 53 Univ. of Chicago Law Review 864 (1986).

1299 374 U.S. at 226. In addition, one is hard pressed to find language in American jurisprudence that envisions the state as a facilitator of rights. Instead, the discussion focuses on to what extent state action may be limited.

Yet despite these different views on so-called positive religious freedoms rights, the comparison of the factually comparable cases concerning government acknowledgments of religion in the public sphere uncovered similar patterns and practices used by the courts when applying non-establishment principles within each jurisdiction's overall religious liberty scheme. In both jurisdictions, how the court characterized the public sphere, as well as, the nature of the government's relationship to the religious message being conveyed via its actions were often determinative in how non-establishment principles were applied. In the more closed, institutional public sphere, not involving schools, we see a surprisingly growing convergence between the dominate views in the two jurisdictions. Government acknowledgment of religion in this setting is accepted in both jurisdictions so long as it is: 1) not "offensive" to a person who has no ability to avoid the state's action, or 2) does not degrade anyone who seeks to avoid the government's action. Both jurisdictions limit the reach of non-establishment principles in this setting to prohibiting the neutral state from engaging in religiously coercive actions.

Yet can it truly be said that some kind of convergence is taking place when American courts allow legislators to open their meetings with a prayer, while German courts are banning the hanging of crosses in courtrooms and legislative chambers? Is this evidence of the jurisdictions moving in opposite directions concerning the application of non-establishment principles in this setting, instead of converging? Clearly not, as the different outcomes of the cases in the two jurisdictions have more to do with how the courts characterize the nature of the forum and government's relationship to a particular religious message when it acknowledges religion inside this forum and less to do with a disagreement over the role non-establishment principles should play in the overall religious liberty scheme. In these cases both jurisdictions focus almost primarily on the "no coercion" purpose served by non-establishment principles. Because of this, the ability to avoid the government's religious expression is critical, with the duration of the religious expression playing a large role in the courts' determination of whether avoidance was possible. The courts in these cases looked at the same factors, applied non-establishment principles in a similar narrow manner but were simply presented with different facts concerning the duration of the government's religious expression impacting the coercion analysis.

Does this mean that German courts would also allow legislative prayer policies? This depends on how a German court would characterize the forum and nature of the government's relationship to the religious message being conveyed by its actions. Perhaps a German court would consider a prayer in a closed legislative meeting room as being directed not only at the legislators themselves, but also the public attending the meeting. Perhaps a German court would also view the prayer policy as amounting to an active acknowledgment of religion because of the coercive impact it would have on members of the public present, who would feel compelled to join in. Perhaps these findings would lead a German court to a different conclusion than the one reached by the U.S. Supreme Court. But the fact remains that in doing so, they would likely be considering similar factors as American courts when applying non-establishment principles, and their baseline for determining whether these principles are violated

would be coercion, just as it was in *Town of Greece*. In this sense, then, it most certainly can be said that a convergence of sorts has taken place in these kinds of government acknowledgment of religion cases.

In addition to showing that courts in both jurisdictions use similar factors when applying non-establishment principles within their own established religious liberty doctrine, this work has also shown that instances of convergence are more likely found in the various schools of thought that exist in both jurisdictions regarding said application. It is in the closed school setting where the disagreement over the application of non-establishment principles is at its greatest, both from an inter and intra-jurisdictional perspective. Focusing solely on the outcomes of these school cases might give one the impression of a wide gulf between the two jurisdictions regarding the role of religion in schools. However, upon inspecting the various opinions filed by judges in each country, one begins to see common “schools of thought”<sup>1300</sup> emerging that help explain the gap between the outcomes in these cases while also illustrating how there is a cross-Atlantic convergence of views.

The convergences that take place here relate to both how one views the purpose(s) served by religious liberty as well as how these principles should be applied. The separationist doctrine that dominated American religious liberty jurisprudence up through the mid-1970s is one such school of thought. While slight separationist tendencies can be found in German jurisprudence, the idea that religion and state should remain separate is primarily only found in the United States. Generally this view holds that non-establishment principles serve “to protect individual choice from the pressures of an official viewpoint's, (while) the free exercise clause proscribes the more direct constraints of interference with particular beliefs.”<sup>1301</sup> Full protection cannot be achieved by honoring just one of the two principles. This might actually best describe the sentiment found in Justice Blackmun's thesis. In the closed school setting this view continues to dominate in the United States, primarily because of the nature of the forum, the age of the children, and the inability of the state acknowledgments of religion in this setting to be seen as anything but active in both the government coercion and government relationship to a religious message sense of the word. Yet this view is in retreat outside of the school setting and being replaced in separationist circles by a softer No Endorsement view that allows some state recognition of religion in the non-school, public sphere.

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1300 Others have contended that the American schools of thought related to government acknowledgment of religion are three: non-proselytism - no actions that pressure citizens to join a particular religious activity; non-sectarianism - bars government actions or displays that favor a particular sect; and absolutist - no promotion or appearance of promotion in any manner. See Movsesian, 6 *Oxford Journal of Law and Religion* 1, 4-7 (2012); From a world perspective, it has been suggested that there are four schools of thought regarding state acknowledgment of religion (see Mancini/Rosenfeld, *Unveiling the Limits of Tolerance: Comparing the Treatment of Majority and Minority Religious Symbols In the Public Sphere*, Cardozo Legal Studies Research Paper No. 309 (2010) [ssrn.com/abstract=1684382](https://ssrn.com/abstract=1684382)): 1) militant separatism (France); 2) agnostic secularist (U.S.) "which seeks to maintain a neutral stance among religions but does not shy away from favoring religion over atheism and other non-religious perspectives"; 3) confessional secular (Germany) - "which incorporates elements of the polity's mainstream majority religion, primarily for identitarian purposes"; and 4) state church (England).

1301 Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion under the First Amendment*, 45 *Univ. of Chicago L.R.* 805, 811 (1978).

Today the prevailing “separationist” doctrine in the United States sees the wall metaphor as, at best, representing an ideal regulation while recognizing that “generalized governmental endorsements of monotheism are consistent with the Establishment Clause.”<sup>1302</sup> At the heart of this view is that government should not take actions that make individuals feel as though they are outsiders, while some also argue that “no endorsement” preserves the peace and advances the “no preference” doctrine. Keeping this final point in mind, some elements of convergence can be seen here as well in the way non-establishment principles in Germany are used to regulate how the state mediates when rights conflict (*Konkordanz*). Here the focus is also on the state's obligation to “create a home for all of its citizens” (no outsiders!), or not identify with a particular religion. In doing so, these principles in both jurisdictions operate as minority rights protections, especially in the school setting.

Yet the convergence here is narrow and heavily dependent on how the forum is characterized. In the German context, the more closed the forum is considered, the more necessary non-establishment principles become for protecting the individual. We saw this in all of the cases concerning the institutional public sphere. American separationists, on the other hand, apply these principles even in more open forums like town squares, as was seen in the *Allegheny* case where the Endorsement Test was used to remove a stand alone nativity scene from government property. The other factor that makes convergence in this “separationist” school of thought narrow is the remedy that courts will impose when finding a violation of non-establishment principles. In Germany, these principles allow the individual to avoid the government acknowledgment of religion, while in the United States they result in outright bans of such acknowledgments.<sup>1303</sup>

The other school of thought that enjoys a transatlantic acceptance by at least some scholars and jurists is what has been referred to throughout this work as accommodationist. Advocates of this view not only seek to provide space for religious expression in the public forum, but also believe that government may express itself in this forum to facilitate the free exercise rights of its inhabitants. For accommodationists in the United States, doctrinal reluctance to expressly advocate for something akin to state facilitation of positive religious freedom has posed a significant challenge.<sup>1304</sup> With that said, the concept of state facilitation of positive rights can implicitly be seen in opinions stretching from the beginning of modern American Establishment Clause jurisprudence<sup>1305</sup> to the more recent writings of Justices Scalia and Thomas. In these opinions one rarely, if ever, sees references to the state as a facilitator of rights, rather the focus is on giving the Establishment Clause a narrow enough interpretation that will

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1302 Shiffen, *The pluralistic foundations of the religion clauses*, 90 *Cornell Law Review* 9, 72 (2004)

1303 To be clear, these “bans” are not necessarily self enforceable. Instead, when government entities stray from these court imposed norms, legal actions or threat thereof, are often necessary to enforce the ban. Nevertheless, the expectation is different in the two jurisdictions. In Germany, the expectation is that the individual will be given protection from the state in a given case under given circumstances, while in the United States the expectation is that the limit placed on government by the Court will be followed by all government entities regardless of whether an individual raises a challenge to the government action.

1304 The term “strict accommodationist” is used here to distinguish it from aspects of Justice Kennedy's “no-proselytization” test.

1305 Justice Stewart's dissenting opinions in *Engel* and *Schmepp* being prime examples of this.

allow the state to acknowledge religion in the name of promoting free exercise rights or recognizing the role religion has played in United States history. Regardless of how it is characterized, the goal here is really no different than the one advanced by the German version of positive religious freedom.

A more stringent version of the accommodationist ideology in the United States, at least in the government acknowledgment of religion cases, holds that only in instances of force of law coercion should the negative rights found in the Establishment Clause to be applied. As for the other supposed purposes served by the Clause, none of them justify negative rights being used in a manner that prohibits the government from acknowledging religion. Finally, for these “strict” accommodationists, questions concerning the characterization of sphere or forum play no role. The only concern here is coercion, and if there is a discussion about the nature of the government's relationship with the message being conveyed by its acknowledgment of religion, it is only within the context of a coercion analysis.

It should be clear by now that almost all German jurists and commentators adopt the position that religious freedom “obligates the state to actively support religion and provide for the space religion needs to flourish,”<sup>1306</sup> or at the very least envisions a role for the state to be a facilitator of religious rights. Included in this view of positive religious freedom is the idea that there is nothing wrong with the state expressing itself in a manner that recognizes the role religion has played in the development of western civilization. In this respect German religious doctrine seems to mirror that of the American accommodationists. However, upon a closer look at the varying opinions expressed in Germany concerning some of the cases in Chapters 7 and 8, it becomes clear that the dominate German religious liberty doctrine is far more open to the application of non-establishment principles, albeit in a limited sense, than American accommodationists.

It is the similarities between the minority view in Germany and the American accommodationist view that are striking. German accommodationists, like their American counterparts, acknowledge the existence of a minority rights component to religious liberty, but argue that these rights can never take precedent over positive religious freedom rights.<sup>1307</sup> Martin Heckel expresses this view best when he argues that “neutrality” cannot be dictated by the minority, rather it must be open and give room for people to lead their religious life in the public sphere.<sup>1308</sup> Non-establishment principles do indeed exist, goes the argument, but they are limited to negative rights protecting individuals from the most extreme coercive government actions (i.e. force of law coercion!). Otherwise, they simply do not justify placing limits on the state's ability to foster individual religious development.

Focusing solely on the “strict” accommodationist doctrine, a convergence can be seen with jurists and commentators in Germany who are resistant to the incorporation of

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1306 Robbers, *Religion and Law in Germany* pg. 87.

1307 See Müller-Volbehr, *Positive und negative Religionsfreiheit*, pg. 999

1308 Heckel, *Das Kreuz im öffentlichen Raum*, pg. 473

non-establishment principles. Characterizing non-establishment as “negative secularism” and the application of such as “one-sided favoritism” is common on both sides of the Atlantic, as is the claim that a robust application of these principles will result in religion having to be entirely removed from the public sphere.<sup>1309</sup> To avoid this “one-sided favoritism” these accommodationists in both Germany and the United States argue that preventing government coercion alone is enough to protect the individual. Additionally, advocates of this view in both countries use similar contextual arguments to soften the message being conveyed by the government acknowledgment of religion and/or distance the state from any religious doctrine contained in the message. Advocates of this position in both jurisdictions can be seen making arguments that seek to downplay the religious nature of the cross, for instance, while stressing secular purposes that are advanced by the state's erection of this and other religious symbols in the public sphere. In short, here we see perhaps the strongest convergence, where government acknowledgment of religion is often characterized as being “passive,” and the other claimed purposes that are advanced by the application of non-establishment principles are downplayed or even dismissed.

The label “strict” that has been attached here to the accommodationist school of thought is not an effort to denigrate this view, but rather one that seeks to distinguish it from the other school of thought found in German religious liberty jurisprudence and commentary. What can be call “German Balancing” involves a view that believes the gradual incorporation of non-establishment principles into religious freedom dogma is sometimes necessary to ensure that a “true” balancing of rights is taking place. This view begins with the premise that there are competing rights when the state acknowledges religion in the public forum, and a compromise must be found that takes both rights into consideration. When applying non-establishment principles, the focus remains on the individual. The question here focuses on how the government's actions are harming that individual and what can be done to restore that individual's rights while taking the positive religious rights of others into consideration. In other words, how can one best balance negative and positive rights when, as is so often the case in government acknowledgment of religion cases, they conflict. Applying principles of *Konkordanz* and *Toleranz*, advocates of this view leave it to the state legislature to find a compromise and enshrine such into law. Pursuant to this process, total, across-the-board bans on government acknowledgments of religion are not viewed as compromises, and the usual solution involves a case by case remedy where the individual can avoid the acknowledgment. At this point, there really is no difference between the approaches of the German accommodationist and balancing schools of thought.

It is the inclusion of some of the identified non-establishment principles beyond simply preventing force of law coercion that distinguishes these two views. The balancing school acknowledges that there are some instances where the pressure from official viewpoint results in a kind of indirect coercion that cannot be avoided. Under such circumstances, true balancing sometimes requires basic, but limited,

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1309 See Toscano, *Dubious Neutrality: The Establishment of Secularism in the Public Schools*, A, 1979 *BYU Law Review* 177, 196

restrictions being placed on the state legislature's ability to find a compromise. These narrow restrictions almost always seek to advance the same non-establishment principles as those identified in American jurisprudence: no preference, avoiding strife, protecting minorities, etc.

In the cross case, for example, the indirect coercion present when the state hung a cross in every classroom was enough to allow students to remove the cross, albeit on a case-by-case basis, because there was no other way for students to avoid being confronted with this form of indirect state coercion. A legislative solution that did not contain the ability for students to avoid the cross was simply deemed as being an inadequate compromise under this balancing approach. Despite being framed differently, the teacher headscarf case provides another example of how this balancing works. There it wasn't the state seeking to directly express itself religiously, rather it was a teacher with individual positive religious liberty rights. Nevertheless, here the state claimed that by allowing teachers to wear religious dress, it was indirectly expressing a religious viewpoint in a manner that violated the negative rights of student and parents, as well as threatened the peaceful school atmosphere. With this in mind, the states believed that the only way to protect these negative rights from its indirect acknowledgment of religion was to enforce a complete ban on teachers' ability to exercise their positive religious freedom rights. This approach was rejected by the Constitutional Court, but the use of non-establishment principles in the balancing of rights in these cases most certainly was not. Here these principles could still be applied to justify a restriction of the positive rights of a teacher upon a concrete showing of a danger to the negative rights of students or a disruption to the school setting. In other words, government acknowledgment of religion, whether direct or indirect, was fine so long as it did not violate the minimal basic protections required by an application of non-establishment principles.

Again it must be stressed that even when non-establishment principles are used in this balancing approach they never result in situations where protection of negative rights justifies a blanket ban on the government's challenged acknowledgment of religion.<sup>1310</sup> The purposes being served are the same in both jurisdictions, but the remedy is different. It must also be stressed again that the role of state in Germany as facilitator of rights creates a situation that simply does not exist in American jurisprudence: the necessity of viewing state action not only as potentially violating rights but also as facilitating them.

Is there an American equivalent to this so-called "German Balancing" school of thought? Arguably many similarities can be seen between this view and the one

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<sup>1310</sup> Borowski explains why non-establishment is not used as a per se ban, like it is in the U.S: "Die Konfrontation mit religiösen oder weltanschaulichen Symbolen durch den Staat wirft vor dem Hintergrund des Trennungsgrundsatzes gem. Art. 140 GG i.V.m. Art. 137 Abs. 1 WRV sowie des ungeschriebenen Grundsatzes der religios-weltanschaulischen Neutralität die frage auf, ob nicht schon jenseits des Verstoßes gegen Grundrechte ein Verstoß gegen bloß objektives Verfassungsrecht vorliegt. Wollte man diese Frage klären, stellte sich das Problem, ob und inwieweit dieser ungeschriebene Grundsatz außerhalb der grundrechtlichen Tatbestände Anwendung finden kann." Borowski, Die Glaubens- und Gewissensfreiheit des Grundgesetzes, pg. 464 (put differently, some question whether an unwritten principle of religious liberty, in this case neutrality, should operate as a per se ban on religious symbols in the public sphere).

advocated by Justice Kennedy. We see this, for instance, in Justice Kennedy's *Town of Greece* decision where the word “positive rights” do not exist, but a narrow interpretation of the Establishment Clause allows the government to “accommodate” the religious needs of legislators before they engage in their work for the state. Furthermore, as was shown Chapter 9, it is not difficult to imagine German courts applying a version of Kennedy's “no-prostelyzation” test to government acknowledgments of religion in open public forums, or narrowing its passive/active acknowledgment analysis to one that only focuses on the coercive effect of the government's action in a more closed setting, as Justice Kennedy does. Furthermore, Kennedy's views on coercion seem to be consistent with those advocated by “German Balancing.” Force of law coercion is not the only kind of coercion prevented by the application of non-establishment principles. Being confronted by a cross in the classroom or a prayer at a high school graduation provide enough danger of improper government coercion for non-establishment principles to be applied in a manner that limits government action. As with the other examples of convergence, the one here is not perfect or complete by any means, but it is present.

In short, the comparison of cases undertaken in Chapters 7, 8 and 9 illustrate that not only does German jurisprudence recognize non-establishment principles, the factors used to apply these principles are also similar across the two jurisdictions. Furthermore, the comparison shows that convergences are taking place with regards to cases concerning government acknowledgment of religion in the public sphere; taking place at a “school of thought” level, to be sure, but taking place nonetheless.

Finally, it is clear that the biggest difference between the two jurisdictions regarding these cases concerns how non-establishment principles were incorporated into the existing religious liberty doctrine of each country. In Germany it was brought in to assist with a procedure where the state is charged with balancing competing rights. The primary focus of this balancing being the individual, with the remedy being one that can be applied on a case-by-case basis to meet the needs of the individuals involved. In the United States, it developed into a limitation on government power, where the actions of the government are the central focus, and the remedy is a ban on all similar government acts.

A comparison of both doctrine and factually similar cases shows how a country without an express equivalent to the American Establishment Clause has sought to provide all of its citizens with broad and full religious liberty protections. Non-establishment principles most certainly do have a place in German religious liberty doctrine, and in some respects these principles also seek to limit how government interacts with religion. The role of these principles in the overall German religious doctrine is more limited, to be sure, not only for historical reasons, but also because of the existing system into which these non-establishment principles were implemented. Furthermore, a close reading of the cases and literature exposes various schools of thoughts in each jurisdiction where arguments are taking place over how, or even if, these non-establishment principles should play a role in religious liberty doctrine.

The similar use of these principles as a limit on government in these two countries, as well as the convergences that have been shown across the various schools of thought, challenge the simple “separation” and “cooperation” labels that are often attached to religious liberty doctrine in the United States and Germany respectively. The labels imply a static doctrine, the reality is anything but. Separation is slowly giving way to “open neutrality” in the United States while in Germany cooperation now takes place within certain limits aimed at ensuring that it is done without sacrificing the rights of some of its citizens.

Transatlantic convergences are clearly present in the jurisprudence and commentary from these two countries. However, because of the different ways that the countries view the role of government--in the United States something to be limited, in Germany also something that can facilitate rights—a complete convergence at any level seems unlikely. Whether Blackmun's general proposition that non-establishment principles play a vital role in securing religious liberty is ultimately correct depends on the school of thought to which one belongs. But one thing is for sure, at this moment in time in the development of religious liberty doctrine, the dominate view in both the United States and Germany is that non-establishment principles have a role in providing its citizens with religious liberty protections. The role might be different in each but the principles exist.

Even in a country like Germany where the words “(government) shall make no law respecting the establishment of religion” are no where to be found in its constitution.

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