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Religion and State in the Classroom:
Germany and the United States

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The relationship between religion and state remains a central question for society. The community of believers that is a church, synagogue, mosque or other group is a self-associated people of faith. The state is the politically authorized agent of the society. We might say a church (to pick a common term) is the domain of religion, the state the domain of civil society.

The relationship between religion and state is a longstanding issue for society, particularly western society, and one that has often been thorny. In modern western society, we might date the crisis over church and state to Martin Luther's inspired Protestant Reformation (1517-45), which challenged the long-standing alliance in Europe between one, universal Catholic Church and its delegation of secular authority to a ruling prince under a theory of the divine right of kings. Luther's revolution of the Reformation divided those yet faithful to the Catholic Church and dissenting believers who became known as Protestants. The battle over how to align the relationship between church and state raged over the European continent as the Thirty Years War (1618-1648), ending in a type of peace with the Treaty of Westphalia (1648), which reaffirmed the principle of *cuius regio eius religio* (the religion of a territory shall be that of its ruler) established in the Religion Peace of Augsburg, in 1555, as a compromise between German princes advocating the cause of Catholicism or Lutheranism. Mandatory belief in the

¹Professor of Law, Roger Williams University School of Law (B.A., Columbia; J.D., Northwestern) Copyright 2005, by Edward J. Eberle. All rights reserved. I wish to thank Chris Davidson, Christian Walter and Jennifer Maio for their valuable comments and research assistance. All translations are mine unless otherwise noted.

sovereign's religion was the standard European solution to achieving social harmony in religious matters.² This epoch of European history formed an important influence in the evolution of German religious freedoms. Germans took note of the fact that religious dissension resulted in decimation of much of the population.

The England of this time (1642-45) similarly descended into civil war over the rule of the Crown versus Parliament; Church of England versus Catholicism versus Protestantism, including separatist denominations such as the Puritans; and the role of church and state, among other issues. This moment of English history formed the setting of what became the great American experiment in the relationship between church and state, which gestated uniquely into a "livlie experiment"³ of separation of church and state begun for the first time in Providence colony, in 1638, by Roger Williams. The Providence experiment of separation of church and state foreshadowed the similar experiment in Virginia and, later, the United States.

Today, church-state relations are yet a forefront, if not contentious, issue around the globe, in Europe, the Middle East and, of course, the United States. The separationist stance previously championed by the Warren Court has broken down and been replaced in large part by a nonpreferentialist approach trumpeted by the Rehnquist Court, by which religion is to be

²Edward J. Eberle, *Roger Williams On Liberty of Conscience*, 10 *Roger Williams Univ. L. Rev.* 289, 308-09 (2005).

³Charter of Rhode Island and Providence Plantations (1663)("to hold forth a livlie experiment, that a most flourishing civill state may stand and best bee maintained . . . with a full libertie in religious concernments").

treated under the same terms as other nonreligious groups in society with respect to the distribution of public benefits. Pursuant to nonpreferentialism, public funds have been funneled to religion for sign interpreters,⁴ remedial education,⁵ and parochial school tuition,⁶ among other purposes. Such overt support of religion would have been unthinkable under the separationist regime of the Warren Court.

To obtain some perspective on church-state relations,⁷ and especially the dramatic evolution of Establishment Clause⁸ doctrine under the Rehnquist Court, we will look outside American borders to another important constitutional democracy, Germany. We will examine in

⁴Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993).

⁵Mitchell v. Helms, 530 U.S. 793 (2000).

⁶E.g., Mueller v. Allen, 463 U.S. 388 (1983); Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

⁷Apart from the contrast between the Warren Court (separationism) and the Rehnquist Court (nonpreferentialism), there might be other ways of conceiving church-state relations as well. We might consider, for example, established state churches, as in Greece and the United Kingdom, *de facto* established churches, as in Spain or Portugal, or church-state cooperation, as in Germany, to name some other possibilities of arranging affairs of church and state in constitutional democracy.

⁸ The First Amendment provides: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .”

some detail how church-state relations are formulated in the charter of the German Basic Law and then how religious protections are formulated by the highest constitutional courts of the two lands, the United States Supreme Court and the German Constitutional Court.

There are, of course, many components to the complicated relationship between church and state in modern constitutional society, including the degree to which a state supports religion, overt display of religious symbols in the public square, accommodation of religious institutions within society, and the degree of autonomy allowed religious institutions to run their own affairs. A broad look at church-state relations would entail these components and more.

But our focus will be much narrower. We will concentrate on the role of the state in promoting religion in society's primary, pre-university schools. Focusing on elementary and secondary schools makes especial sense because schools are primary places by which a society transmits and inculcates the values and mores it wishes to instill in its younger, developing members. We might think of the school as the training ground for citizen participation in society. The influence of government in promoting religion has an important role to play in this capacity. Conceiving religion as a source of salvation or as a source of ethics can be useful, personally or socially. Judging society by its charter to determine if it remains true or strays from the ideals therein inscribed is also an important lesson of citizenship to impart to students and, moreover, to the capacity of a constitution to direct society. Staying true to a charter's religious ideals is, of course, a difficult enterprise.

As we examine the evidence under review, we may be surprised by what we find. Pursuant to the German model of church-state cooperation, German public funds are channeled directly to religious organizations, such as, for example, using the machinery of the state to raise

and disperse tax monies to religious organizations. With the emerging challenge of pluralism in German society, as other European societies, however, German religious freedoms have been extended to embrace minority religions on essentially equal terms to majority religions⁹ under principles of toleration, neutrality and equality.

By contrast, the language and Enlightenment background of the American Establishment Clause reasonably suggests a more separationist approach to church-state relations. It is fair to say that a separationist approach yet largely applies with respect to public schools. However, the nonpreferentialist approach championed under the Rehnquist Court reconceives church-state relations along distinctly more accommodationist grounds concerning private, parochial schools, in keeping with a Puritan-inspired cooperative church-state model. Employing a core doctrine of (1) neutrality and (2) private, genuine choice, principles that resonate partly with German doctrine, substantial public aid has been directed to private, religious schools, as we will examine.

We can see that recent American Establishment Clause doctrine has unfolded in a way somewhat characteristic of German church-state relations in respect of public support for religious teaching in schools. For comparative purposes, it is striking that American doctrine has so evolved notwithstanding much different historical understanding and constitutional language, as set out in the Establishment Clause. So, we stand in the interesting position where American church-state relations stand in a position more similar to German (and Massachusetts Bay and state) church-state cooperation than Providence or Virginia influenced church-state separation

⁹For study of this in relation to Free Exercise freedoms, see Edward J. Eberle, *Free Exercise of Religion in Germany and the United States*, 78 Tulane L. Rev. 1023 (2004).

with respect to state support of religion in private schools.

To explore these themes, this article will, first, examine the text of each country's constitution and then turn to an examination of the complicated nature of church-state relations in Germany, together with the historical backdrop of the framing of German (in Part I) and American (in Part II) religious protections. It is important to understand the historical context of the countries' religious freedoms in order to appreciate their development. Next, in Parts III (Germany) and IV (America), we will turn to the topic at hand: examining the degree of state support of religion in schools. In a broader survey, we could have examined prayer and other overt displays of religion in schools,¹⁰ but this would have added substantially to the length of this article. We will then, in Part V, assemble the observations we have drawn by comparing German to American law.

We will learn that religious instruction is a normal part of the school curriculum in Germany, reflecting the historical roots of German church-state cooperation. However, the German Constitutional Court has enunciated strict guidelines pursuant to which religion may be offered in public schools. These guidelines hold that teaching of religious tenets can only occur in religion classes and that ample opportunity must be given students to choose or not choose the type of religious instruction they desire. Apart from religion class, dominant Christianity is to be treated only as a part of the historical tradition of western civilization and not as a missionary

¹⁰*Compare*, for example, *Lee v. Weisman*, 505 U.S. 577 (1992)(prayer at ceremony of middle school graduation unconstitutional in face of complaint) *with* *Krucifix II*, 93 BVerfGE 1 (1995)(Bavarian required display of crucifix in public school classrooms unconstitutional in face of complaint).

exercise; no religious indoctrination may occur on school premises outside of religion class. There can, further, be no discrimination against religious or ideological beliefs different from Christianity.

It would be quite unthinkable to have such explicit state support of religion in American public schools. However, as we examine state support of private religious education in the United States, we can observe again that the American model is moving in the direction of German law by virtue of the significant amount of public aid provided parochial schools through nonpreferentialism. In this respect, notwithstanding different constitutional traditions and text, the two countries are moving in the same direction on state support of religion in schools.

I German Constitutional Text and Tradition

A. German Text

The main outline of the relationship between church and state is centered on article 140 of the Basic Law, which incorporates as an organic whole the provisions of the 1919 Weimar Constitution (articles 136, 137, 138, 139, 141) describing that relationship. The relationship is a cooperative one. Religion and church play a prominent role in German society, which these provisions facilitate.¹¹ The Weimar provisions set out a detailed and complicated scheme of church-state cooperation.

¹¹Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 443 (2d ed. 1997). Portions of Parts I A, B and C of this article appear in, Edward J. Eberle, *Free Exercise of Religion in Germany and the United States*, 78 *Tulane L. Rev.* 1023 (2004)(Copyright, *Tulane Law Review*. All rights reserved.). Use of those portions of that article is with permission of the *Tulane Law Review*.

Article 136 of the Weimar Constitution secures civil and political rights, including eligibility for public office; freedom from dependence or restriction based on religious belief or exercise; protection against coerced disclosure of religious conviction, coerced performance of religious acts or ceremonies and coerced taking of religious oaths; and prohibits government from inquiring into membership in a religious body, except for statistical purposes.

Article 137 of the Weimar Constitution, in its first clause, states “[T]here shall be no state church.” In comparison to the broad, albeit disputed, meaning of the American prohibition on “an establishment of religion,” the German clause has a more commonly accepted simple meaning. It means there is to be no established state church and nothing more. The clause does not mean strict separation of church and state.¹² The numerous remaining provisions of article 137 guarantee, among other things, the freedom of association to form religious bodies to “regulate and administer its affairs autonomously within the limits of the law,”¹³ guaranteeing their independence from the state;¹⁴ constitute religious bodies to “acquire legal capacity according to the general provisions of civil law;”¹⁵ including as “corporate bodies under public

¹²David P. Currie, *The Constitution of the Federal Republic of Germany* 245 (1994).

¹³Weimar Reichsverfassung (WRV) art. 137(3).

¹⁴*Compare with Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987)(exempting church from federal antidiscrimination laws so that church may run autonomously its affairs).

¹⁵WRV art. 137(4).

law;”¹⁶ which corporate status allows them “to levy taxes in accordance with Land [state] law.”¹⁷ These provisions are completely without parallel in American law. Official granting of charters to religious bodies was a major objection of James Madison,¹⁸ and it is hard to imagine such a turn in American law.

Under the more pervasive approach of German law, the state provides the legal framework for religious bodies to operate, and then offers the machinery of government to administer and collect taxes for religious purposes. In keeping with the neutral, nondiscriminatory nature of German law, these benefits are available to associations of a

¹⁶*Id.* art. 137(5).

¹⁷*Id.* art 137(6).

¹⁸Currie, *supra* note 11, at 245 *citing* 22 Annals of Congress 982-85 (1811)(viewing federal incorporation of Episcopal church in Washington, D.C., as establishment of religion). *See also* Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. Pa. L. Rev. 1559, 1587 (1989). Before the turn of the 19th century, Virginia outlawed religious corporations, a prohibition still in place in Virginia and West Virginia as of 1973. John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 Notre Dame L. Rev. 371, 385 (1996). It is fair to point out that most religious organizations today are incorporated as nonprofit corporations and receive tax-exempt status and, thus, bare some similarity to German religious corporations.

“philosophical persuasion” as well as a religious one.¹⁹

In practice, the main beneficiaries of governmental aid are dominant religious bodies, such as Protestant, Roman Catholic and Jewish groups.²⁰ Because church and state tend to consist of overlapping majoritarian configurations, church-state cooperation has been a comfortable fit.²¹ In a sense, the structure of church-state cooperation operates as *de facto*

¹⁹WRV art. 137(7).

²⁰The Seventh-Day Adventist Church, Church of Jesus Christ of Latter-Day Saints, Baptist Church, New Apostolic Church, Pentecostal communities, Christian Scientists, Mennonites and the Salvation Army, among others, have achieved recognition as public law corporations. Other minority religions have had some difficulty achieving official recognition. This may in part be due to differences in held values. For example, Jehovah’s Witnesses have historically been denied official privileges because the sect does not allow its members to vote and participate in the democratic process. Authorities thus viewed the sect as animated by values antithetical to the social order and, accordingly, a danger to society. However, recently Jehovah’s Witnesses acquired recognition as a public corporation in a significant Constitutional Court case, signaling an important evolution in German thought toward toleration. Jehovah’s Witnesses, 102 BVerfGE 370 (2000). Eberle, *supra* note 8, at 1031.

²¹Ingrid Brunk Wuerth, *Private Religious Choice in German and American Constitutional Law: Government Funding and Government Religious Speech*, 31 Vand. J. Transnat’l L. 1127, 1140, 1145 (1998)(in post-World War II Germany, church and state have promoted a consensus of values that includes promotion of democracy and tolerance).

establishments. The cooperative model has functioned well in a society of relative religious homogeneity. It will likely be harder to implement the model as religious groups become more diverse.²²

Under the system, employers withhold the monies and submit them to the state, which then distributes them to the religious denominations in a percentage equal to their membership. Churches and religious bodies pay the costs of administration. Churches and religious bodies use the money collected to build seminaries, churches, synagogues, hospitals and nursing homes and train teachers, among other purposes. These arrangements are a main way by which religion secures its place as a main actor within society, if not a preferred one. Conversely, state support of religion allows government to exert some control over religion, including the set of values to be inculcated, such as promotion of morality, democracy and tolerance.²³ The tax is between 8-10% of a person's income. Any person whose name is on the church or religious body's register is automatically subject to the tax. A person must formally withdraw from the church or religious body to be relieved from the tax.²⁴ Nonchurch members are not assessed the tax.

Article 138 of the Weimar Constitution guarantees religious bodies rights, including the right to own property. Article 139 of the Weimar Constitution recognizes Sunday and other

²²Inke Muehlhoff, *Freedom of Religion in Public Schools in Germany and in the United States*, 28 Ga. Int'l & Comp. L. 405, 488-89 (2000).

²³Wuerth, *supra* note 20, at 1140, 1145-46.

²⁴While state collection of church taxes is constitutional, it has nevertheless given rise to significant litigation. Currie, *supra* note 11, at 247; Kommers, *supra* note 10, at 484-89.

public holidays “as days of rest from work and of spiritual edification,” expressly resolving an issue that has proved vexing to American law.²⁵ Article 141 of the Weimar Constitution provides for the rendering of religious services and spiritual care to the army, hospital, prisons or other public institutions.

In addition to these express provisions that address religion, the Basic Law protects religion in a number of articles that cover other subjects as well. For our purposes, most relevant is Article six, which guarantees parental rights in the raising of their children, subject to state supervision.²⁶ Parental rights come into play most dramatically in connection with their children’s education, which rights are guaranteed in article seven. Of notable concern to us is the determination, in article 7(3), that “[R]eligion classes shall form part of the ordinary curriculum in state schools, except in secular (*bekennnisfrei*) schools. . . . religious instruction shall be given in accordance with the tenets of the religious communities.”²⁷ Teaching religion in the schools is relatively uncontroversial.²⁸ However, the German constitutional system is careful to protect against coercion of conscience. Article seven further provides “[T]he persons entitled to

²⁵*See, e.g.,* McGowan v. Maryland, 366 U.S. 420 (1961)(rejecting Establishment Clause challenge to Sunday closing law on ground Sundays were now secular days of rest, even though originally were conceived as days of repose for religious reasons).

²⁶GG art. 6(2).

²⁷GG art. 7(3).

²⁸Kommers, *supra* note 10, at 471.

bring up a child shall have the right to decide whether the child shall attend religious classes.”²⁹
And “[N]o teacher may be obliged against his will to give religious instruction.”³⁰

Because determination of educational policy is a matter for the German states (*Länder*) under German principles of federalism, the *Länder* determine what is appropriate educationally. Article 141 of the Basic Law preserves the historical right of *Länder* to determine if religion is to be offered at all. Under the principle of Article 141, the German states of Bremen, Berlin, and Brandenburg do not offer religious instruction in the schools.³¹ Like the article 137 provisions, the guarantees for religious instruction in public schools represent again the German idea of church-state cooperation in certain essential social services. And there are yet other provisions of the Basic Law addressing religion.³²

²⁹GG art. 7(2).

³⁰GG art. 7(3).

³¹Article 141 provides: “The first sentence of paragraph (3) of Article 7 shall not be applied in any Land in which different provisions of Land law were in force on 1 January 1949.” Article 141 is known as the Bremen Clause, because it acknowledged the historical omission of religion in the Bremen schools. After German reunification, in 1990, Berlin in its entirety and the formerly East German state of Brandenburg became part of the Federal Republic of Germany. These states were able to also omit teaching of religion under the principles of Article 141. For discussion of this, see *infra* text accompanying notes 129-30.

³²*See, e.g.*, GG art. 3(3)(faith and religious opinion are inappropriate subjects to target

Having described this complex of law, we can see that the German charter is indeed far more detailed and comprehensive in its treatment of religion than the United States charter. There are advantages to the German detail. The German charter expressly resolves many issues that called for Supreme Court resolution in parsing out the sparser language of the First Amendment. For example, article four resolves the status of conscientious objection to military service, an issue that proved thorny for the Supreme Court.³³ Article seven resolves significantly the role of religion in public schools, an issue of great contention in the United States. It is noteworthy that there are far fewer decisions by the Constitutional Court on church-state relations than is the case in the United States. The greater detail of the Basic Law would seem to make a difference.

Constitutional text is just one part of a country's constitution. History, Framers' intent, and constitutional structure are other indispensable elements of constitutional law, at least under canons of American constitutional methodology. Not surprisingly, German history and constitutionalism differ from American. Under German constitutionalism, decisive in methodology is the text and structure of the charter and its applicability to contemporary social conditions. Framers' intent is not dispositive in achieving results, but may be consulted as an auxiliary aid to interpretation. We need a brief overview of these issues to understand the context

under the basic equality norm); GG art. 56 (federal President shall assume office upon taking oath, with or without reference to God); GG art. 64 (2)(same regarding federal Chancellor and federal ministers).

³³*See, e.g.,* *Welsh v. United States*, 398 U. S. 333 (1970)(plurality); *United States v. Seeger*, 380 U.S. 163 (1965).

and dynamics of German law.

B. German History

As a European country Germany shares a common and deep cultural heritage with its continental neighbors. This has a number of consequences. Most notable is the long-standing influence of the Catholic church. The Catholic church preserved learning during the early Middle Ages before the rediscovery of Roman law. Reading, writing, mathematics, accounting, and the study of science and philosophy were some of the bodies of knowledge that found refuge and nurture within the Church. The deep association of the Catholic church with learning is a major factor in the cooperative relationship that has developed between church and state over education. Europeans became accustomed to looking to the Church for support and contribution to society.

Second, for much of German history, altar and throne have been united.³⁴ The alliance between the ruler and the church further fortify this cooperative relationship. The Reformation led by Martin Luther played a role in this as well. Luther relied on the protection of tolerant German princes from Catholic authorities to safeguard his life and teachings. Reliance on state power to protect religion is another factor leading toward a cooperative church-state relationship. Related to this is the long history of governmental accord with religious authorities, in formal treaties called concordats, over issues involving religious education, social services and the like. Church and religion have played a much more active public role in German life than American, and these factors influence the modern German idea of church-state cooperation. Unlike England or France, however, Germany has never had an official, established state church,

³⁴Kommers, *supra* note 10, at 489.

although Lutheranism effectively functioned as a *de facto* established church in large parts of Germany over a long period of time.³⁵

Third, German society has historically been very homogenous. In the crucial early time when religious ideas and tradition were formed, Germans shared much in common. Today, German society is becoming a more pluralistic society. Still, Germany is yet more homogenous than the United States.³⁶

Fourth, religious tolerance came late to Germany. Until the Weimar Constitution of 1919, church-state relations were close and religious discrimination was widespread. With Lutheranism effectively operating as the official church in much of the German Reich, in the nineteenth century, Roman Catholics (who were one-third of the population) and Jews were officially barred from high positions in the Reich government. Historically, German constitutions distinguished between dominant churches (Lutheran and Roman Catholic) and minor sects.³⁷

Fifth, the Basic Law is framed specifically against the horrors of the Hitler time. Most

³⁵Germany achieved unity as a country relatively late, only in 1871 under Bismarck. By this time, Lutheran, Catholic, and Jewish religions were well established in Germany.

³⁶Roughly 8% of the German population is minority in relation to the majority German population. The largest minority group is Turkish. Roughly 3% of the German population is Islamic. Edward J. Eberle, *Dignity and Liberty: Constitutional Visions in Germany and the United States* 49 (2002)(hereinafter “Dignity and Liberty”).

³⁷Kommers, *supra* note 10, at 444-445.

notable is the securing of the social order on the premise of the inviolability of human dignity. This centers the society around the human person and her flourishing. Religious freedoms, in particular, are indispensable to this vision because the spirituality of religion or ideal is a core element of the development of human personality. Only with the lessons learned from the Hitler time did Germany secure freedom from coercion of conscience, the essence of religious freedom discovered and elaborated on centuries earlier by Roger Williams,³⁸ John Locke,³⁹ and James Madison.⁴⁰ Development of religious freedom in Germany was thus a late affair.

In the post-World War II era, the framers of the Basic Law continued the tradition of church-state cooperation. The churches were poised especially well to help in the reconstruction of Germany, as they were less tainted than other institutions in their association with Hitler. This was an additional factor in facilitating the major role of church and religion in German society.⁴¹

All of this German history provides a very different background than the familiar

³⁸Roger Williams, *The Bloody Tenet, of Persecution, for Cause of Conscience* (Samuel L. Caldwell ed., 1867) (1644).

³⁹John Locke, *A Letter Concerning Toleration* (1689).

⁴⁰James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785)(Liberty of conscience is “precedent, both in order of time and in degree of obligation, to the claims of Civil Society.”), *reprinted as appendix*, *Everson v. Board of Education*, 330 U. S. 1, 28 app. at 63 (1947)(Rutledge, J., dissenting)(hereinafter “*Memorial and Remonstrance*”).

⁴¹Kommers, *supra* note 10, at 490.

American story of the crucial developments in Virginia, led first by Thomas Jefferson and then by James Madison, where freedom of conscience and faith were secured and separation of church and state were instituted in the influential period just prior to the adoption of the United States Constitution. Experience in Virginia was the main model for the framing of American religious protections.⁴²

On the other hand, Germany and the United States share an important link in history: the flowering of religious liberty, through judicial protection, occurred in the post-World War II era. The Basic Law is a 1949 document framed in reaction to the abuse of governmental power exercised in the Hitler time. Interestingly, however, so might we observe that state governments' curtailment of liberties led to the incorporation of the Bill of Rights into the Fourteenth Amendment so that federal rights would be applicable to the states as well. Included in incorporation were the Free Exercise Clause in 1940⁴³ and the Establishment Clause in 1947.⁴⁴ Modern Establishment Clause jurisprudence began with *Everson v. Board of Education* in 1947. The first successful (of very few) Free Exercise claim was made in 1963 in *Sherbert v. Verner*.⁴⁵

⁴²*McGowan v. Maryland*, 366 U.S. 420, 437 (1961); *Everson v. Board of Education*, 330 U. S. 1, 11-13 (1947). *See also* authorities collected in Adams & Emmerich, *supra* note 17, at 1572 n. 54.

⁴³*Cantwell v. Connecticut*, 310 U.S. 296 (1940).

⁴⁴*Everson v. Board of Education*, 330 U.S. 1 (1947).

⁴⁵374 U.S. 398 (1963).

Thus, the main development of constitutionally directed religious freedom in the United States, like Germany, occurred after World War II.

C. German Constitutional Order

The most relevant contrast to the American Constitution, for our purposes, is that the Basic Law sets forth certain duties incumbent upon citizens or government to perform.⁴⁶ The idea of coupling rights with duties is a European one, going back to the first continental rights declaration, the 1789 French Declaration of the Rights of Man and the Citizen. The Basic Law continues this tradition. For example, article 6(2) provides that “the care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty.” Articles six and seven have a profound influence on education and religious schooling in Germany. According to article 7 (1), “The entire schooling system shall be under the supervision of the state.” With this background, we now have a better sense of the constitutional context within which German freedoms operate.

II. United States Constitutional Text and Tradition

⁴⁶Other important contrasts in the two constitutions are that, under German constitutionalism, basic rights have an objective or positive dimension that animates the value structure as well as the subjective or negative dimension that they share with American law; and that the Basic Law affects all legal relationships, public and private under the theory of third-party effect (*Drittwirkung*). For elaboration of these theoretical differences, see Eberle, Dignity and Liberty, *supra* note 35, at 25-32; Eberle, Human Dignity, Privacy, and Personality in German and American Constitutional Law, 1997 Utah L. Rev. 963, 967-971 (hereinafter “Privacy and Personality”).

A. American Text

In contrast to the detail of the German Basic Law, the United States Constitution enumerates religious liberty in only two places: the First Amendment and Article VI [3], which provides “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.” The religious test clause was designed to prevent the bitter English experience of flushing out dissenters or those not loyal enough to the English Crown (mainly Roman Catholics, atheists or separatists), a practice which continued also in the colonies and early states before the Constitution.⁴⁷ The practice of requiring religious tests through mandated oaths did not end, stubbornly, until 1961, when the Supreme Court declared it unconstitutional.⁴⁸ There is little other jurisprudence under the religious test oath clause, as most issues relating to religion have involved interpretation of the First Amendment religious freedoms.

Textually, the First Amendment singles out religion in two ways. The Establishment Clause delimits governmental⁴⁹ power over religion by prohibiting it from establishing religion.

⁴⁷Adams & Emmerich, *supra* note 17, at 1576-77 (American colonist commonly used English test oaths to support Anglican and Congregational establishments. Early state constitutions commonly required test oaths as preconditions to hold public office). This history was a main motivation for requiring the prohibition of mandated religious oaths in Article VI of the Constitution. *Id.* at 1577-78.

⁴⁸ Torcaso v. Watkins, 367 U.S. 488 (1961)(Maryland constitutional provision requiring state officials to declare belief in God unconstitutional).

⁴⁹With the incorporation of the Establishment Clause into the fourteenth amendment,

The Free Exercise Clause highlights religion for preferred treatment by singling it out, over other topics--such as politics, commerce or property--as meriting freedom from governmental prohibition. So, we can see there is an interesting relationship, if not tension, between the Establishment Clause and the Free Exercise Clause.⁵⁰ The Establishment Clause would appear to

which extended its reach against state actions, it is more appropriate to speak of government, and not the First Amendment's chosen words of "Congress," as the object of the Clause. *Everson v. Board of Education*, 330 U.S. 1 (1947). In this article I address only the post-incorporation period of the Establishment Clause, where the Supreme Court is the main source of Establishment Clause values, not state government, as had been the case before the incorporation of the Establishment Clause. Interestingly, Justice Thomas has recently argued for broader deference to states over religious matters more in keeping with the pre-incorporation state of affairs. *See, e.g., Van Orden v. Perry*, 2005 WL 1500276, at p. 9, (June 27, 2005)(Thomas, J., concurring)("I have previously suggested that the [Establishment] Clause's text and history 'resist incorporation' against the States. *See Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 46 (2004) (concurring); . . . *Zelman v. Simmons-Harris*, 536 U.S. 639, 677-680 (2002) . . . If the Establishment Clause does not constrain the States, then it has no application here, where only state action is at issue.").

⁵⁰*McCreary County, Kentucky v. ACLU*, 2005 WL 1498988, at p. 20 (2005)(O'Connor, J., concurring)("Reasonable 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. By enforcing the Clauses, we have kept religion a matter for the individual conscience"); *Locke v. Davey*, 540 U.S.

single out religion for some form of disfavored official treatment; the Free Exercise Clause would seem to single out religious activity for some form of favored treatment.

There is both similarity and difference between the two religious clauses. Summarily stated, both the Establishment Clause and the Free Exercise Clause have in common a concern for protection of the individual voluntariness of religious choice and especially a guarantee of liberty of conscience and its concomitant guard against coercion of conscience. We might say liberty of personal conscience is a common religious ideal of the two Clauses. However, the two Clauses differ over strategy. The Establishment Clause is primarily institutional based; delimitation of governmental power over religion safeguards the voluntariness of individual and group choice over religion. The Free Exercise Clause is mainly individually based; people, not government, are empowered to choose and act on religious tenets as one of the score of natural rights enshrined in the Constitution. There is not time here to work out the difficult tension between these Clauses posed by an Establishment Clause that constrains religion and a Free Exercise Clause that empowers religious exercise. Justice Kennedy's apt observation seems appropriate that the limits of the Free Exercise Clause lie in the Establishment Clause, in contrast to the structural protection of free speech.⁵¹

712, 718 (2004) (“The Religion Clauses of the First Amendment . . . are frequently in tension. . . [but] ‘there is room for play in the joints.’”)(citation omitted).

⁵¹“The Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment, but the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions.” *Lee v. Weisman*, 505 U.S. 577, 591 (1992).

Turning more directly to the Establishment Clause, it seems fair to say the Court works with very limited textual authority. While we might all agree that the Establishment Clause constrains official actions concerning religion, there is no general consensus over exactly what degree and nature of constraining is required. Maybe we can only come up with this commonly accepted meaning: 1) there can be no established church; 2) there can be no preference of one religion over another religion; and 3) there can be no coercion of religious faith or practice. Still, given Establishment Clause constraint on governmental authority, the text would seem to signal a presumption against governmental involvement in religion.

Not surprisingly, the Court has had much difficulty translating this majestic generality into workable law. Just at the end of the 2004-2005 term, for example, the Court ruled, 5-4 each time, that Texas could display a large monument of the Ten Commandments with explicit religious inscription on its state capitol grounds because it was surrounded by 21 other historical markers and 17 other monuments of various types and, therefore, it seemed more “historical” than “religious;”⁵² but a Kentucky court room could not display a framed copy of the Ten Commandments, even when later surrounded by other historical material of religious meaning, because the display was too religious.⁵³ We can see that it is hard to reach agreement on what the Establishment Clause means.

Since the Court started applying the Establishment Clause vigorously, in 1947,⁵⁴ it has

⁵²Van Orden v. Perry, 2005 WL 1500276 (June 27, 2005).

⁵³McCreary County, Kentucky v. ACLU, 2005 WL 1498988 (June 27, 2005).

⁵⁴Everson v. Board of Education, 330 U.S. 1 (1947).

vacillated uneasily between separationist and accommodationist stances. We can see this even in *Everson*: all nine members of the Court spoke separationist rhetoric, but the Court split 5-4 in applying the doctrine to the facts, upholding state-supported bussing of Roman Catholic school children. The Court analogized state provided bussing to other safety and welfare services, like police or fire protection.

B. American History

A deeper look at American history, at the time of the Framing of the Constitution, reveals a similar plurality of differing views. It is true that the crucial developments in Virginia, led first by Thomas Jefferson and then by James Madison, Patrick Henry and George Mason, were perhaps the decisive influence in framing First Amendment religious protections. The Virginia experience resonated especially strongly in the early Establishment Clause jurisprudence of the Court.⁵⁵ We might say an originalism of jurisprudence followed a dominant view of originalist history.

Thomas Jefferson and James Madison were imbued with Enlightenment ideals, which drove their version of civic republicanism. They advocated separation of church and state as the proper institutional relationship. For Jefferson, who was deeply influenced by French thought,⁵⁶

⁵⁵*McGowan v. Maryland*, 366 U.S. 420, 437 (1961); *Everson v. Board of Education*, 330 U. S. 1, 11-13 (1947). *See also* authorities collected in Adams & Emmerich, *supra* note 17, at 1572 n. 54.

⁵⁶Adams & Emmerich, *supra* note 17, at 1584. Jefferson served the United States as minister to France from 1785-1789. *Id.* Thomas Paine, author of the leading revolutionary tract,

separation was mainly a strategy to protect the fragility of the experiment in civic republicanism, perhaps an argument for secularism.⁵⁷ For Madison, separation was designed to protect politics

Common Sense (1776), was also a confirmed Francophile. Paine aided the French in drafting the famous Declaration of Rights of Man and the Citizen (1789), which famously also secured religious freedoms. *Id.* Paine was an extreme separatist, once observing that the union of church and state bred “a sort of mule-animal, capable only of destroying, and not of breeding up.”

Thomas Paine, *The Rights of Man* (pts. 1 & 2)(London 1791), *cited in* Adams & Emmerich, *id.*

Other civic republicans were alarmed by the excesses of the French Revolution and sought to dampen the passion for excessive liberty. One infamous measure taken was, of course, the Alien and Sedition Act of 1798, ostensibly used to restrict the French ideology, but which the administration of John Adams used to jail political opponents.

For other classifications of early influences on the First Amendment religious protections, see Adams & Emmerich, *id* at 1583-95 (distinguishing between separatists, political centrists and pietistic separatists); Witte, *supra* note 17, at 377-88 (distinguishing between Puritan, evangelical enlightenment, and civic republican views).

⁵⁷Jefferson’s famous statement of the “wall of separation” lies, of course, in his letter to Nehemiah Dodge and Others, a Committee of the Danbury Baptist Association, in Connecticut (Jan. 1, 1802) [hereinafter Danbury Church Letter], *reprinted in* Thomas Jefferson: Writings 510 (1984). *Accord*, Letter from James Madison to Edward Livingston (July 10, 1822), in 9 Writings of James Madison 102 (Gaillard Hunt ed., 1910) “[A] perfect separation between ecclesiastical and civil matters” is the best course for “religion & Gov. will both exist in greater purity, the less they are mixed.” Madison, however, was not always so absolute in his view of separatism. He

and religion; Madison believed both in the value of the civic republican experiment and the purity and preciousness of religion.

Religious evangelicals (most prominently Baptists) aligned themselves with Enlightenment separatists to support separation of church and state. In part, their motivation was their own self-interest and the interest of the community. As minorities, Baptists were concerned that dominant political and religious power would inhibit them and other minorities. Separation of church and state was a way to get the state out of their--and other minorities'--way.

These evangelicals echoed the essential teaching of Roger Williams, America's original religious thinker, that separation of church and state served the interests of each best by protecting the purity and integrity of each against the inevitable tensions arising from one infringing into the domain of the other. Roger Williams, after all, was the original source for the "wall of separation" metaphor,⁵⁸ not Thomas Jefferson. Most people view the evangelicals as

also spoke of a wavering "line of separation between the rights of religion and the Civil authority" in certain "unessentials" of religion. Letter from James Madison to Rev. [Jasper] Adams, in 9 Writings of James Madison, *id.*, at 484, 487. In later life, Madison returned to a view of complete separation of church and state. Adams & Emmerich, *supra* note 17, at 1587.

⁵⁸Edward J. Eberle, Roger Williams's Gift: Religious Liberty in America, 4 Roger Williams L. Rev. 425, 427 (1999)(citing Roger Williams, Mr. Cotton's Letter Examined and Answered (1644)[hereinafter Cotton's Letter Examined], *reprinted in* 1 The Complete Writings of Roger Williams 313, 392 (Russel & Russel, Inc. 1963)[hereinafter Complete Writings]. It is possible Jefferson used the wall of separation metaphor to converse in the language of the Baptists, who were well familiar with the metaphor of Williams. Witte, *supra* note 17, at 400

advocating separation of church and state in order to protect the purity of religion as a voluntary, noncoerced exercise, but much of their thought was deeper than that, arguing also for political independence and a theory of the state.⁵⁹

At the heart of the separationist argument is that religion is a private, voluntary matter between only people and God. There can be no intrusion into this inviolate sphere of a person's spirit. Official support of religion only leads to its corruption as either government tries to control religion or religion tries to comport itself to curry favor with government.⁶⁰ Entangling government in religion, or religion in government, moreover, leads to great divisiveness in society as religion or its particular sects will inevitably be favored or disfavored in official policies, leading to overconfidence or arrogance in those favored and hostility and rejection in those disfavored, whether religious or not. Thus, evangelicals, like Enlightenment civic republicans,⁶¹ desired that religious bodies be free from state favors like "tax exemptions, civil

n.144.

⁵⁹See, e.g., Eberle, *id.* at 456-60.

⁶⁰"[E]xperience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. . . . [leading to] pride and indolence in the Clergy, ignorance and servility in the laity, in both, superstition, bigotry, and persecution." James Madison, Memorial and Remonstrance, para. 7, *Everson*, 330 U.S at 64.

⁶¹As Madison observed: "[A] perfect separation between ecclesiastical and civil matters" [is best for] "religion & Gov. will both exist in greater purity, the less they are mixed together." Letter from James Madison to Edward Livingston (July 10, 1822), in 9 *The Writings of James*

immunities, property donations, and other forms of state support for the church.”⁶² The Baptist minister John Leland, echoing John Locke, put the matter bluntly: “The notion of a Christian commonwealth should be exploded forever.”⁶³

Now, this experiment in separationism resonates with most Americans, positively or negatively. For it was the philosophy of separationism that marked the Court’s first entre into policing the border between church and state, following Jefferson’s metaphor of a “wall of separation.”⁶⁴ Much of Establishment Clause law that has followed has been a battle over whether a “wall of separation” is the proper rubric within which to view church-state relations, as

Madison 102 (Gaillard Hunt ed. 1910). Madison’s two main themes were separation of church and state, as mentioned, and that a multiplicity of religious sects, as a multiplicity of interests, was the best guard against faction, which could thereby better preserve liberty. Federalist No. 10 and No. 51.

⁶²Witte, *supra* note 17, at 382. However, some evangelicals did not object to some state support of religion. Isacc Backus, for example, was not against “Sabbath laws, teaching Calvinistic doctrine in the public schools, proscribing blasphemy, and conducting official days of fasting and prayer.” Adams & Emmerich, *supra* note 17, at 1593.

⁶³John Leland, *The Writings of the Late Elder John Leland* 118 (1845), *cited in* Witte, *supra* note , at 382. Locke had written: “there is absolutely no such thing, under the Gospel, as a Christian commonwealth.” *cited in* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U.L. Rev. 346, 387 (2002).

⁶⁴*Everson* 330 U.S. at 16, 18; *Reynolds v. United States*, 98 U.S.145, 164 (1879).

demonstrated by the two recent Ten Commandment cases.

The American experiment in separationism was unique, being the first such experiment in the world, with Roger William's experiment in Providence colony, in 1638, being the very first. Even today, there are few experiments in serious separation of church and state; France⁶⁵ and Turkey are probably the two other notable experiments.

But separationism was not the only early American philosophy to demarcate church-state relations. The Puritan tradition advocated separation of church and state in institutional matters so that the internal governance of church and state could be preserved.⁶⁶ But Puritans also advocated cooperation between church and state to aid religion and support the state. Under

⁶⁵Constitution of the French Republic, art. 2 (July 8, 1958): *La France est une République indivisible, laïque, démocratique et sociale.* (France is an indivisible, laic, democratic and social Republic).

⁶⁶John Witte, Jr., The Essential Rights and Liberties of Religion in the American Constitutional Experiment, 71 Notre Dame L. Rev. 371, 378-79 (1996). Puritans conceived church and state as “two seats of Godly authority in the community.” The role of the church is to tend to matters spiritual; the role of the state was to maintain peace and order. “Church officials were prohibited from holding political office, serving on juries, interfering in government affairs, endorsing political candidates, or censuring the official conduct of a statesman. Political officials, in turn, were prohibited from holding ministerial office, interfering in internal ecclesiastical government, performing sacerdotal functions of clergy, or censuring the official conduct of a cleric.”

Puritanism, government could support religious education, pay the salaries of clergy, provide land to churches and grant tax exemptions to religious organizations, among other aids.⁶⁷ Of course, only Christian, primarily Congregational (the successor to the Puritans) received such state benevolence. Church officials, in turn, aided the state by hosting town assemblies, political rallies, educational instructions, acting as libraries and “preaching obedience to the authorities” and more general encouragement of right and lawful conduct in citizens, among other aids.⁶⁸

And this Puritan tradition was carried forward by other prominent American civic republicans, such as George Washington, John Adams, Samuel Adams, Oliver Ellsworth and James Wilson.⁶⁹ Of course, these accommodationist civic republicans had elements in common with their enlightenment and evangelical counterparts. They advocated liberty of conscience for all and free exercise of religion, encouraged a plurality of religions, and discouraged “political intrusions on religion that rose to the level of religious establishments.”⁷⁰ These sets of values—free conscience, free exercise, pluralism, separationism, disestablishment and equality---are what

⁶⁷*Id.* at 379-80.

⁶⁸*Id.* at 380.

⁶⁹*Id.* at 385-86. Puritan thought “provided the moral and religious background of fully 75 percent of the people who declared their independence in 1776.” S. Ahlstrom, *A Religious History of the American People* 124 (1972).

⁷⁰*Id.* at 386.

we might call a core of “essential rights and liberties of religion.”⁷¹ In further contrast to their Enlightenment counterparts, they desired and encouraged a common religious ethic.⁷² George Washington, for example, observed that “Religion and Morality are the essential pillars of Civil society;”⁷³ religion promoted morality, and morality was important to the teaching of right

⁷¹Witte, *supra* note 17, at 388 *citing* Elisha Williams, *The Essential Rights and Liberties of Protestants: A Seasonable Plea for The Liberty of Conscience, and the Right of Private Judgment in Matters of Religion, Without any Controul from Human Authority* (1744). James Madison spoke similarly. 1 *Annals of Congress* 784 (Joseph Gales, Sr. Ed., 1834).

⁷²*Id.* The civic republican religious ethic was, of course, less stringent and intolerant as compared with the Puritan ethic. Dissenters from Puritan ideology were banished, such as Roger Williams and Anne Hutchinson from Massachusetts Bay. Eberle, *supra* note 57, at 432-33.

⁷³Letter from George Washington to the Clergy of Different Denominations Residing In and Near the City of Philadelphia (Mar. 3, 1797), in 36 *The Writings of George Washington, 1745-1799*, at 416 (John C. Fitzpatrick ed. 1931). Washington’s Farewell Address of Sept. 17, 1796 was another famous declaration of this thought: “Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism who should labor to subvert these great pillars of human happiness—these firmest props of the duties of man and citizens.” *cited in* Adams & Emmerich, *supra* note 17, at 1605. John Adams similarly observed: “We have no government armed with power capable of contending with human passions unbridled by morality and religion.” Letter from John Adams to the Officers of the First Brigade of the Third Division of the Militia of

conduct in citizens of a democracy, who, after all, are counted on more for civic virtue and proper governance than other forms of political organization. If nothing else, religion was valued for its utility in inculcating proper conduct. This ideal seems to be the one animating these more centrist civic republicans.

Accommodationist civic republicans thus tolerated official support and accommodation of religion, unlike their separationist contemporaries. They “endorsed tax exemptions for church properties and tax support for religious schools, charities, and missionaries; donations of public lands to religious organizations; and criminal protections against blasphemy, sacrilege, and interruption of religious services.”⁷⁴ In practice, these official favors were accorded only

Massachusetts (1798), in 9 *Life and Works of John Adams* 229 (1854), *both cited in* Witte, *supra* note 17, at 386. In 1798, Adams observed: “Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.” Letter from John Adams to a unit of the Massachusetts militia (Oct. 11, 1798), in 9 *Works of John. Adams* 229 (C. Adams ed. 1850-56 & reprint 1971) *cited in* Adams and Emmerich, *supra* note 17, at 1671.

⁷⁴*Id.* at 387. “[T]he Continental Congress authorized legislative and military chaplains, provided for the importation of Bibles, and proclaimed days of thanksgiving, prayer, and fasting.” Adams & Emmerich, *supra* note 17, at 1571. Of course, Thomas Jefferson, as President, refused to render a Thanksgiving Proclamation, or any official acknowledgment of religion, believing those to be contrary to the First Amendment. As President, James Madison buckled under the political pressure of the War of 1812, and rendered several Thanksgiving Proclamations, which he later regretted and disavowed. *Lee v Weisman*, 505 U.S. 577, 623-26 (1992)(Souter, J., concurring); Adams & Emmerich, *supra* note 17, at 1585, 1587.

Protestants; “Quakers, Catholics, and the few Jewish groups were routinely excluded.”⁷⁵ They also favored “government appointment of legislative and military chaplains, government sponsorship of general religious education and organization, and government enforcement of a religiously based morality through positive law.”⁷⁶ Massachusetts was the prime example of this more accommodationist approach.⁷⁷ The Supreme Court has recognized some of this early history in sustaining the constitutionality of opening legislative sessions with a state-paid chaplain,⁷⁸ tax exemptions for churches,⁷⁹ and establishing Sunday as a uniform day of rest.⁸⁰ There is, in fact, much historical work arguing that the First Amendment supports such an accommodationist approach.⁸¹

However, the historical record discloses an important qualification attached to state

⁷⁵Witte, *supra* note 17, at 387.

⁷⁶*Id.* at 386.

⁷⁷*Id.* at 387.

⁷⁸*Marsh v. Chambers*, 463 U.S. 783 (1983).

⁷⁹*Walz v. Tax Comm’n*, 397 U.S. 664, 677-80 (1970).

⁸⁰*McGowan v. Maryland*, 366 U.S. 420 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961).

⁸¹*See* authorities collected in Adams & Emmerich, *supra* note 17, at 1579 n. 88. *See also*, *Wallace v. Jaffree*, 472 U.S. 38, 91-114 (1985)(Rehnquist, J., dissenting).

support of religion. By the end of the eighteenth century, “almost no one in America thought that government legitimately could compel taxes for religious purposes without offering some possibility of formally opting out of the tax.”⁸² Freedom from compulsion, including forced taxation, was an essence of liberty of conscience. It was less clear whether taxes could be collected so that people could designate the church of their choice that they wanted to support.⁸³

Thus, if we were following a constitutional theory of originalism, Justice Scalia is quite right to observe that “With respect to public acknowledgment of religious belief, it is entirely clear from our Nation’s historical practices that the Establishment Clause permits . . . disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.”⁸⁴ Justice Story captured this sentiment by famously (or infamously) observing that the

⁸²Feldman, *supra* note 62, at 351. It was difficult, however, to obtain a waiver in practice, resulting in many taxpayers being taxed against their will. Justice Jackson adopted this position—finding unconstitutional forced taxation without waiver—in his dissent in *Everson*, 330 U.S. at 21-23. (Jackson, J., dissenting).

⁸³*Id.* at 416. George Washington, for example, thought that compelled taxation to support a church of a person’s choice was compatible with freedom of conscience, “so long as no one was obligated to support a religion with which he disagreed.” *Id.* at 394 n. 270

⁸⁴*McCreary County, Kentucky v. ACLU*, 2005 WL 1498988, at p.25, (Scalia, J., dissenting)(observing further that George Washington’s Thanksgiving Proclamation and 10 Commandments are monotheistic, embracing Christianity, Judaism and Islam). *Contra, id.* at p. 19 (Souter, J.)(“the dissent says that the deity the Framers had in mind was the God of

Establishment Clause was designed “not to countenance, much less to advance, Mahometanism, Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects.”⁸⁵ In fact, Story and others of the nineteenth century commonly thought that ‘Christianity is a part of the common law.’⁸⁶ Yet, if we were being true to originalism, we would have to ask: would we tolerate such overt, invidious discrimination as was commonly practiced at this time? (Would we be, as it were, original sinners?).

So, as we assess the Puritan influenced component of American religious history, we can see that it bears some striking resemblances to German history. Elements of both eighteenth and nineteenth century American and German history preferred Christianity to other religions, with both tending to prefer Protestantism over contrary Christian belief systems, and Christianity over monotheism, with the consequence that government may espouse a tenet of traditional monotheism. This is truly a remarkable view.”).

⁸⁵R. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 13 (1988). Chief Justice John Marshall “also believed that religion was essential to the survival of the republic,” and noted the close relationship of Christianity to the United States. Adams & Emmerich, *supra* note 17, at 1590.

⁸⁶Witte, *supra* note 17, at 407 (citations omitted). “Story disputed Jefferson’s contention that Christianity was not part of the common law,” observing that Christianity offered “the great basis, on which [the republic] must rest for its support and permanence.” Adams & Emmerich, *supra* note 17, at 1590 *citing* J. Story, *Commentaries on the Constitution* section 1867, at 724 (Boston 1833).

non-Christian belief systems. There was overt discrimination against other sects and belief systems. Both countries effectively evidenced *de facto* state establishments of religion—Christianity; indeed, Protestantism. A clear difference between American and German history is that parts of early America also adhered to a different strand of church-state relations in separationism. Rhode Island was the first experiment in separationism, and the Virginia experience in separationism was the decisive influence in framing the First Amendment, as previously noted. So, we can see that American religious history is more complicated than commonly thought and consists, at least, of a contest between separationism and accomodationism, itself a long-running, ongoing contest that percolates quite strongly today as well. With this look at the countries' religious history, let us now evaluate their approach to public support of religious education.

III. Public Support of Religion in German Schools

A. Christian Community Schools: the German Model

The deep tradition of church sponsorship of learning is a major reason why the traditional form of school in Germany was a confessional school, designed to teach religion alongside teaching of core secular topics.⁸⁷ The movement away from confessional schools began with the liberal movement of the nineteenth century, inspired by the French Revolution that occurred mainly in southern areas, like the southwestern state of Baden. The nineteenth century liberalization of parts of Germany led to a process of secularization throughout society, including the school system. French influence reverberated on both sides of the Atlantic. In place of

⁸⁷Baden Christian Community School Case, 41 BVerfGE 29, 57 (1975).

confessional schools, education was redesigned to take the form of “open” community schools, which sought to minimize religious influence in the schools by opening students’ minds to a range of influences, religious and otherwise, along more Enlightenment ways.⁸⁸ The open community school--interdenominational in that a range of religious/ideological views are to be presented, but with a distinct Christian orientation--thereby became the main model for schools in Germany. The Weimar Constitution essentially confirmed this school arrangement, which the Basic Law ratified as well.

Further confirmation of a Christian interdenominational community school as a general model for German schools came to the fore in a series of important rulings by the Constitutional Court, all issued on the same day. While we might say a Christian interdenominational community school is the general type of school present in Germany, there is, of course, variation in the characteristics of schools in different regions of Germany, given that each *Land* determines educational policy. And this variation is reflected by the three cases we now consider: *Baden Christian Community School Case*,⁸⁹ *Bavarian Christian Community School Case*⁹⁰ and *North-Rhein Westfalia Christian Community School Case*.⁹¹ We will primarily consider the *Baden Christian Community School Case*, the main case.

⁸⁸*Id.*

⁸⁹41 BVerfGE 29 (1975).

⁹⁰41 BVerfGE 65 (1975).

⁹¹41 BVerfGE 88 (1975).

1. *Baden Christian Community School Case*

The Christian community school at the heart of the case emphasized the Christian roots of German and European society, but strictly limited teaching of religion as gospel to religion classes.⁹² In religion class, the major religions--Catholicism, Lutheranism, other Protestantism and Judaism--select teachers and materials to instruct in their faith. In this sense, the school is interdenominational. Recently, Islam has achieved a toehold to do the same.⁹³ Religion class is a regular and required part of the school curriculum.⁹⁴ Parents (or students when they reach ages of 14 or 16) decide which religious instruction to receive. They can also decide to receive no religious instruction, and be relieved from the requirement.⁹⁵ The school is also interdenominational in that there must be provision of a format for presentation of a range of religious/ideological views. Outside of religion class, Christianity can only be mentioned as an historical or cultural force, but not as chosen tenets of faith. All classes, apart from religion, are

⁹²GG. art. 7 (3) codifies this arrangement of the Weimar era.

⁹³BVerwG, Nr. 9/2005 (Feb. 23, 2005)(teaching of Islam in North-Rhein Westfalia cannot be rejected out of hand because Islam is not organized as a legal corporation, as is the usual case. Further proceedings are necessary to determine whether Islam has the characteristics necessary to qualify as a legal religious order). www.bundesverwaltungsgericht.de (April 26, 2005).

⁹⁴GG art. 7 (3).

⁹⁵GG art. 7(2).

shared commonly by students, the ideal of the nineteenth century liberal experiment.⁹⁶

There can be other forms of school as well, as determined by the community. The alternatives to a Christian community school are a confessional, religious school (as formerly practiced widely in Germany) or a secular, nonreligious school, which is quite rare outside of Bremen, Berlin or Brandenburg. Confessional schools are most popular in more religious areas of Germany. In the German states of Bremen, Berlin and Brandenburg, the predominant school form is secular, not Christian.⁹⁷

Despite the long practice of Christian community schools, not all constitutional issues were resolved. The question in the *Baden Christian Community School Case* was a recent Baden-Wuerttemberg law that unified the school form in the state, but which had the effect of changing the form of community school in Baden to a distinctly more Christian orientation.⁹⁸ A father filed a constitutional complaint that the change in school to a more Christian orientation violated his article four free exercise and article six parental rights because it would be harder for him to raise his child in a nonreligious environment, as he desired.⁹⁹ Of course, under article seven of the Basic Law, it was the province of the *Land* legislature to determine the appropriate

⁹⁶41 BVerfGE at 58.

⁹⁷For discussion of Bremen, Berlin and Brandenburg, *see infra* notes 129-30 accompanying text.

⁹⁸41 BVerfGE at 36.

⁹⁹41 BVerfGE at 44. His wife did not join in the complaint.

form of school for the region, upon taking into consideration the full range of varied interests at stake.¹⁰⁰ Still, only the Constitutional Court could determine the permissible circumference of constitutionality within which the legislature could work, which it proceeded so to do. The Court found the complaint unfounded, which had the effect of confirming the constitutionality of a Christian community school.¹⁰¹

The constitutional issues are complicated, reflecting the principles of the German constitutional order. From the standpoint of the complaining parent, he could allege violations of his article four free exercise rights (interference with his choice of religion/ideology) and his article six parental rights (interference with his right to raise his child according to desired religious/ideological views).¹⁰² However, his assertion of rights could only go so far. In the German constitutional order, rights holders are not isolated individualists or, as is sometimes the case in American law, lone-rangers. Instead, German rights holders operate within a social community which instills values and responsibilities on social members. This had immediate consequences in the case. For at issue, according to the Constitutional Court, were not only the rights of the complaining parent, but the same set of religious and parental rights for other parents as well who might want a school to have a more distinctly Christian orientation or might

¹⁰⁰*Id.* at 46-48.

¹⁰¹*Id.* at 44.

¹⁰²41 BVerfGE at 36-37.

be quite satisfied with the form of the school as it is.¹⁰³ It is fair to say no parent can demand a certain kind of school.¹⁰⁴

Further, the German conception of religious rights is different than the American, reflecting more an orientation of development and assertion of personality than mere exercise of claims and interests. There is an inner dimension to a person's religious rights that captures matters of faith and belief, as in the United States. But there is also an outer dimension to these rights that facilitates the ability of a person to practice outwardly chosen faith.¹⁰⁵ The outer dimension to German religious rights are far more pronounced than in American law, especially

¹⁰³*Id.* at 50.

¹⁰⁴*Id.* at 46.

¹⁰⁵Belief and freedom of faith encompasses not only the inner freedom to believe or not believe, but also the outer freedom to manifest belief in the world, to confess and to spread the word. Included also is the right of the individual to orient his whole life according to his inner conviction. In this sense article four (1) and two comprise not only defensive rights, that prohibit the state from entering the highly personal area of individuality, but also endows a positive sense, which guarantees room for the active activity of conviction of faith and the realization of the autonomous personality in the religious/ideological arena.

Id. at 49

with the movement from *Sherbert v. Verner*¹⁰⁶ to *Employment Division, Department of Human Resources v. Smith*.¹⁰⁷ The German movement toward holistic personhood has its roots in the architectonic principle of human dignity and accompanying free unfolding of personality that animates the German constitutional order. The transcendent dimension of human personality captured by religion/ideology is part of the essence of being human.

The battle among competing parents is, as we might imagine, somewhat of a free-for-all, as any community of parents is likely to involve differing views as to the degree of religion desired in the community school. Only a compromise among contending views can achieve some equilibrium to this quandary; essentially that is what the Constitutional Court instructed.¹⁰⁸

The struggle, moreover, was not just among contending parents; the state had supervisory

¹⁰⁶374 U. S. 398 (1963).

¹⁰⁷494 U.S. 872 (1990)(free exercise claims judged not by strict scrutiny but by inquiry into whether law in effect is generally applicable and neutral). For discussion of this difference, see Edward J. Eberle, *Free Exercise of Religion in Germany and the United States*, 78 Tulane L. Rev. 1023 (2004).

¹⁰⁸41 BVerfGE at 50 (in today's pluralistic society, it is virtually impossible that any one parent can exercise religious rights without restriction; one parent's exercise of rights likely to be limited by other parents' exercise of same rights; thus, communities must search for a compromise addressing all views).

duties over education as well.¹⁰⁹ The positive duties of the state flow from the positive nature of the German constitutional order, which bestows both rights and duties on official authority to manifest the core values of the Basic Law.

Following the devolution principle applicable to education, the Constitutional Court determined quite naturally that the *Land* legislature had the ultimate authority to fix the nature of religious education, upon taking into consideration the wide ranges of religious and educational matters at issue in such a crucial decision. As instructed by the Court, the legislature was obligated to consider relevant values of the Basic Law, including parental rights and, most importantly, children's welfare.¹¹⁰ Under German law, the legislative judgement would involve Concordance (*Konkordanz*), by which an equilibrium is sought to balance the contending rights and interests.¹¹¹ Inevitably, this will be a compromise.

Yet, the legislative judgement cannot be simply the product of majority vote. If it were, the majority would always get its way. Special regard must also be given to minority views.¹¹² A careful look at the constitutional principles set down by the Court is in order as it provides useful insight into the German solution of how to address religion in common schools.

The choice of school form appropriate for the community is to be determined by the

¹⁰⁹GG art 6 (2) and 7(1).

¹¹⁰41 BVerfGE at 47.

¹¹¹41 BVerfGE at 50-51.

¹¹²*Id.* at 47-48.

community, in accord with *Land* law. Deference to local authority over schools is, as in the United States, attributable to federalism principles. Because of federalism, there can be no unified school system in Germany.¹¹³ The common choice of a Christian, community school, as here, is attributable mainly to historical and traditional reasons, as described above.

That being said, the Constitutional Court set out guidelines as to the role religion can play in community schools. First, and fundamentally, there can be no coercion of conscience. Second, there can be no religious instruction or proselytization in school except in religion class. Further, any religious instruction must be done with a minimum of forced persuasion; there can be no insistence on the truth of Christianity.¹¹⁴ Students who desire not to participate in religion class must be excused from doing so as a matter of free exercise of conscience. Third, outside of religion class, Christianity, as the dominant religion, can only be referred to as a historical or cultural force, not as religious doctrine. The more privileged position of Christianity reflects its dominance as a cultural force, not its truth as doctrine. Fourth, schools must be open and tolerant of other beliefs.¹¹⁵ The role of the school is to offer a variety of religious/ideological perspectives as forums for learning. There can be no discrimination against other religious/ideological views.¹¹⁶ These constraints on the role religion plays in common schools

¹¹³*Id.* at 45.

¹¹⁴*Id.* at 51.

¹¹⁵*Id.* at 52.

¹¹⁶*Id.*

should afford, in the view of the Court, parents adequate room to impart or inculcate religious/ideological views to their children as they deem fit, without coercion of conscience.¹¹⁷

For those parents yet unhappy with this arrangement for their children, further options are available. First, a child may be excused from religious class. Second, a child can attend a secular school in communities where that option is available. Third, where no secular schools are available, a child can attend a private school, secular or religion, according to choice.¹¹⁸ We can thus see that a *Land* is obligated to provide parents/students a wide range of religious/ideological opportunities.

Notable about the German community school model is its transparently Christian orientation, reflective of the predominant Christian roots of the society. Yet, upon closer evaluation, the role of religion is more constrained than the model would suggest. Religion instruction or indoctrination can only occur in religion class for those freely willing to participate, but not for the unwilling. Religion is a matter of choice, not obligation. Apart from religion class, Christianity can only be mentioned as a cultural force, not as a religious force.¹¹⁹ In this regard, Christianity is to be treated like any other belief system under a school that is designed to be open and tolerant of all views. In this aspect, the state acts somewhat neutrally,

¹¹⁷*Id.* at 51-52.

¹¹⁸*Id.* at 45. These options were part of the Weimar compromise that constitutionalized much of the German church-state relationship.

¹¹⁹“The approval of Christianity is attributable to acknowledgment of its role as dominant cultural and educational forces, not as to the truth of its belief system . . .” *Id.* at 64.

not taking sides on religious views and, instead, offering the school as a forum for the different communities of faith to teach their tenets.

2. Bavarian Christian Community School Case

The prohibition on teaching religious tenants in schools was put to the test in the *Bavarian Christian Community School Case*,¹²⁰ where what was at issue was an accord reached by Roman Catholic and Lutheran churches over the teaching of fundamental Christian gospel, such as the Ten Commandments, the Lord's Prayer and the Apostolic and Nicene creeds.¹²¹ The churches had published their pedagogical inclinations in their official publications. A Catholic and Lutheran set of parents sued to enjoin the practice because they believed this would convert the Bavarian school from an interdenominational to a confessional one, but lost.¹²²

The Court attributed the choice of introducing this more distinctly Christian program to the churches themselves, and not the state.¹²³ Thus, the Court had no constitutional objections. The guidelines were published in church papers, not official ones.¹²⁴ The guidelines were only

¹²⁰41 BVerfGE 65 (1975).

¹²¹*Id.* at 70.

¹²²*Id.* at 71, 77.

¹²³*Id.* at 85.

¹²⁴*Id.*

helpful aids; they were not binding on the schools or the state.¹²⁵ Moreover, any overt confrontation with Christianity can be dealt with by the fundamental constitutional norms announced in *Baden Christian Community School Case*: noncoercion; toleration and nondiscrimination.¹²⁶ Concretely, this meant that the community school had to allow presentation of other religious/ideological views as well, unlike a confessional school. No person could be made to feel isolated.¹²⁷ The Bavarian choice illustrates the wide options of school form available under German federalism.¹²⁸ Communities can reformat schools along distinctly more religious lines if there is a consensus to do so, as they can also do the same along more secular lines.

¹²⁵*Id.*

¹²⁶*Id.* at 85-86.

¹²⁷*Id.* at 83.

¹²⁸The Court noted that a community could decide to have even a confessional school, so long as room—likely by separate school—was made for dissenters. *Id.* at 86. However, the Court also decided, on the same day, that no parent can demand a confessional school. *North-Rhein Westfalia Christian Community School Case*. 41 BVerfGE 88 (1975). Thus, the cases hold that no parent can demand a certain form of religious school, whether more religious (*North-Rhein Westfalia Christian Community School Case*) or more secular (*Baden Christian Community School Case*). Yet, it seems fair to observe that communities can tilt schools along more secular or sectarian lines.

Viewed from afar, it would seem the complaining parents had a point. Orientation of education according to fundamental Christian teachings would seem to push, if not cross, the line from secular Christian orientation to religious indoctrination. It seemed that the schools did reformat along distinctly more Christian lines, quite likely crossing the neutrality border. There can be no doubt that German public schools allow more overt religious doctrine and influence than American public schools.

3. Brandenburg

Eastern regions of Germany that were formerly under Soviet occupation and then became the German Democratic Republic are, not surprisingly, distinctly less religious, due to antireligious, Communist influence, than many areas of western Germany that formed the earlier Federal Republic of Germany before reunification. The eastern states tended to carry over the more distinctly antireligious orientation when they joined the reunited Federal Republic.

These issues came to the fore in the state of Brandenburg, where the *Land* legislature introduced an ethics and religion course as a substitute for normal religious instruction as the standard course in the school curriculum. One major difference was that the ethics and religion course would not be taught or organized by the religions, as is normally the case in the German schools. This met with stiff resistance from the churches, who felt threatened and wanted to preserve their authority as guardians of the faith. But in a novel solution, the parties were able to bury their hatchets and reach agreement, which the Constitutional Court supervised as an arbitration settlement, itself a highly novel use of judicial authority.¹²⁹

¹²⁹The issue was contentious enough to go before the Constitutional Court four times. Each time the Court confirmed the arbitration settlement, despite the challenges to introduction

The terms of the agreement mirrored in reverse the constitutional solution reached in the trio of *Christian Community School Cases*. The ethics and religion class could be taught as a regular part of the school curriculum, but students who did not wish to take part had the right to be excused, a necessary condition of freedom from coercion of conscience. Students desiring to take religious instruction, as more common in other German *Länder*, could do so as well, provided there was a minimum of twelve students willing so to do.¹³⁰ The Brandenburg nonreligious school curriculum is similar to those in place in the German *Länder* of Berlin and Bremen and could be instituted because of, again, the principles underlying the famous Bremen Clause, article 141 of the Basic Law, and federalism principles that allow *Länder* to fix the content of their school curriculum.

What we see then as we turn to the United States for an evaluation of state support of religion in American schools is that the German model is very decentralized, with each *Land* determining the school curriculum. The idea of local control over education resonates in both countries. The Christian community school is the norm, but we have also observed how three German states are distinctly nonreligious, including the major population center, Berlin. Both schools containing religion or ethics as a normal part of the curriculum must accommodate dissenters—those students choosing not to participate—by excusing them from required attendance

of the course. *Brandenburg IV*, 106 BVerfGE 210 (2002); *Brandenburg III*, BVerfG, 1 BvQ 25/02 (July 28, 2002); *Brandenburg II*, 105 BVerfGE 235 (2002); *Brandenburg I*, 104 BVerfGE 305, 308 (2001).

¹³⁰*Brandenburg I*, 104 BVerfGE 305, 308 (2001)(Brandenburg school law, section 11, 2-4).

in those classes and, upon request, reasonably creating options for them more suitable to their religious/ideological beliefs. Further, in Christian community schools, teaching of religion must be restricted to religion class, and Christianity may be referred to, outside of religion class, only as a cultural or historical, but not religious, force. Finally, there can be no discrimination against other religious/ideological views. In these respects, we can see that German doctrine is following its own version of state neutrality, nondiscrimination and noncoercion. How these German doctrines compare to American doctrines is are next topic.

IV. Public Support of Religion in American Schools

A. Public Schools

It is strange, no doubt, to speak of public support of religion in American schools in the twenty first century. With the dawn of modern Establishment Clause jurisprudence, in the 1947 *Everson v. Board of Education*, the idea of separation of church and state was launched, with mixed effect in Supreme Court jurisprudence, but with deep effect in the American psyche.¹³¹

¹³¹330 U.S. 1, 16 (1947)(“In the words of Jefferson, the clause was intended to erect a ‘wall of separation between Church and State.’”)(quoting *Reynolds v. United States*, 94 U.S. 145, 164 (1879)). The *Everson* Court unanimously articulated a distinctly separationist approach to the Establishment Clause, although the Justices split five to four over application of separationist philosophy to the issue under review. The Court upheld provision of state supported bussing of Catholic students on the ground that provision of bussing was a neutral service, analogous to police and fire protection. The dissent disagreed, finding this to be a violation of separation of church and state under a more absolutist application of this principle.

For some time in the modern age marked by *Everson*, and even today, the Court and Americans believed in a model of separation of church and state.¹³² One clear principle of separationist philosophy is that there can be no public support of religious instruction in schools. Until 1983, the Court had never sustained any public support for religious instruction, being careful to approve state support for religion only over secular matters such as, for example, the lending of secular text books.¹³³ Since the public school is the forum for inculcation of democratic and constitutional values, adherence to separationism made sense as a matter of fidelity to constitutional text and Enlightenment tradition.

Most American students attend public schools. Even today, it is fair to say religious

Through the course of the Warren Court and into the early Burger Court, the Court understood the Establishment Clause to hold for separation of church and state, although application of the principle yielded mixed results, sometimes prohibiting state aid of religion, sometimes supporting state aid of religion.

¹³²It is fair to say that an approach of separation of church and state is a fairly radical and rare experiment for solving the issue of church and state in a democracy. Apart from the United States, the main experiments in separation of church and state are France and Turkey.

¹³³*Bd. of Educa. v Allen*, 392 U.S. 236 (1968)(permissible to lend textbooks on secular topics). The pathbreaking case was *Mueller v. Allen*, 463 U.S. 388 (1983)(Court sustained Minnesota state tax deduction for tuition, textbook and transportation expenses, 96% of the benefits of which went to religious schools).

instruction does not occur as a regular part of the public school curriculum, as is the norm in German schools. A case like *Epperson v. Arkansas*¹³⁴ would appear to place an insurmountable roadblock to public support for religious instruction in public schools. In *Epperson*, the Court held unconstitutional an Arkansas statute that prohibited “the teaching in its public schools and universities of the theory that man evolved from other species”[evolution] because it was “tailored to the principles or prohibitions of [any] religious sect or dogma.”¹³⁵ The closest the Court has come to allowing religious instruction in public schools during the school day are time-release programs for religious instruction, which must occur off public school premises.¹³⁶

¹³⁴393 U.S. 97 (1968).

¹³⁵*Id.* at 98, 106. *Accord*, *Edwards v. Aguillard*, 482 U.S. 578 (1987)(Louisiana statute requiring teaching of “creation science” alongside evolution unconstitutional because such curricular choice advanced a religious viewpoint.)

¹³⁶*Compare* *Zorach v. Clauson*, 343 U.S. 306 (1952)(students can constitutionally be dismissed from school premises to attend religious education conducted in nonschool buildings; nonparticipants must remain in school) *with* *McCullum v. Board of Education*, 333 U.S. 203 (1948)(unconstitutional to release public school students from regular classes to attend religious instruction on public school premises; nonparticipants required to stay in regular school classes). *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) held that prayer and Bible lessons could be held after school hours, on public school premises, for students who attended the public schools. *Good News* is distinguishable from *Zorach* on the ground that the religious

So, with respect to religious instruction in public schools, it seems fair to conclude that Germany and the United States diverge. The standard German model allows religion to be taught as a regular part of the school curriculum, whereas such is, so far, not possible in the United States. There are, of course exceptions. The German *Länder* of Berlin, Bremen and Brandenburg do not include religion as a regular part of the school curriculum, although the option is available.¹³⁷ It is also possible for communities in other *Länder* to have secular, nonreligious schools.¹³⁸ In the United States, off-public school premises time release programs¹³⁹ allow religion to be taught and religious instruction may also occur after school hours at public schools.¹⁴⁰ Thus, neither country is absolutist in its teaching or nonteaching of religion in public schools.

B. Private Religious Schools

The forum for public support of religion in the United States has shifted dramatically

instruction occurs outside the regular school curriculum and day, but certainly a dramatic movement in the direction of public support for religious instruction.

¹³⁷*See supra* text accompanying notes 129-30.

¹³⁸*See supra* text accompanying notes 95-96.

¹³⁹*Zorach v. Clauson*, 343 U.S. 306 (1952).

¹⁴⁰*Good News Club v. Milford Central School*, 533 U.S. 98 (2001).

since *Mueller v. Allen*,¹⁴¹ in 1983, from public schools to private, religious schools under the leadership of Chief Justice Rehnquist. Public accommodation of religion through its treatment as an equal claimant on the public fisc ranks with other notable accomplishments of the Rehnquist Court, such as diminished Free Exercise rights,¹⁴² federalism¹⁴³ and enhanced police powers under criminal due process rights.¹⁴⁴ At war with the stricter separationist direction of Establishment Clause jurisprudence shepherded by prior Courts (most notably the Warren Court), the Rehnquist Court has reworked Establishment Clause doctrine away from a separationist orientation (represented most prominently by *Lemon v. Kurtzman*)¹⁴⁵ toward an

¹⁴¹463 U.S. 388 (1983).

¹⁴²*Employment Division, Dept. of Human Services v. Smith*, 494 U.S. 872 (1990).

¹⁴³*Lopez v. United States*, 514 U.S. 549 (1995).

¹⁴⁴*See, e.g., Illinois v. Caballes*, 125 S. Ct. 834 (2005)(police can allow trained dog to sniff stopped car for drugs without any need for suspicion of a narcotics violation).

¹⁴⁵403 U.S. 602 (1971). Under *Lemon*, the Court synthesized various strands of Establishment Clause jurisprudence employed by the Warren Court to ask whether, first, the measure had a secular purpose, second, its main effect neither advanced nor inhibited religion and, third, did it foster an excessive government entanglement with religion. Many current Justices on the Court decry the test, none more notably than Justice Scalia, *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 398 (1993)(Scalia, J., concurring),

approach of nonpreferentialism, which holds that government may not favor one religion over another, nor disfavor any particular religion, but government may support religion generally.¹⁴⁶

It is this approach of nonpreferentialism we want to concentrate on as a focused basis of comparison to German law. Some caveats are in order. First, there is little constitutional authorization of public support for religion in American public schools, where most American students attend. Secondly, the nonpreferentialist approach to date has mainly been applied to nonpublic, primarily religious schools. Approximately eleven percent of American students attend private schools, and approximately eighty-seven percent of private school students attend religious schools, with Catholicism constituting about fifty-five percent of these religious schools.¹⁴⁷ Thus, the degree of national public support for religion in school is, relatively speaking, small. Third, our focus is one of following constitutional doctrine and jurisprudence. Thus, our concentration is on a comparative look at German and American doctrine on church-state relations in the schools. Let us now turn to an examination of American doctrine.

The Court's translation of nonpreferentialism into a rule of law consists of two main inquiries. Government may aid religion when the government program is [1] "neutral with

but the Court has not yet formally repudiated *Lemon*.

¹⁴⁶For this apt description of nonpreferentialism, see Stone, Seidman et. al. Constitutional Law 1495 (5th ed. 2005).

¹⁴⁷National Center for Education Statistics, at www.nces.ed.gov (visited June 2005); Council for American Private Education, at www.capenet.org/facts.html.

respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools [2] wholly as a result of their own genuine and . . . independent private choice.”¹⁴⁸ Neutrality and individual, private choice are the two ingredients of the test.

Unpacking these ideas, we can see, first, that the inquiry into neutrality is designed to place religious claimants on par with other claimants in society for governmental aid, as seems consistent with a doctrine of nonpreferentialism. The driving force of the idea is to discourage government hostility to religion as seemed the case, to some, by an approach of separationism. Moreover, publicly supporting religion increases its ability to advocate its values in the marketplace of ideas. For many believers, public articulation and acknowledgment of religion is an indispensably sacred part of their lives. Historically, nonpreferentialism is rooted in Puritan philosophy and the more accommodationist civic republican views of Framers like George Washington and John Adams, who advocated for the importance of religion as a source of morals in society and the two, together, as a prop for the promotion of civility in society.¹⁴⁹

Fine and good. There is certainly an equality component to religious protection,¹⁵⁰ as

¹⁴⁸Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002).

¹⁴⁹ Adams and Emmerich, *supra* note 17, at 1579 n. 88; Witte, *supra* note 17, at 386-87. Chief Justice Rehnquist developed his historical case for nonpreferentialism in his important dissent in *Wallace v. Jaffree*, 472 U.S. 38, 91-114 (1985)(Rehnquist, J., dissenting).

¹⁵⁰Memorial and Remonstrance, *cited in Everson*, 330 U.S. at 66.

with other rights, such as free speech¹⁵¹ or privacy rights.¹⁵² In fact, an equality component may underly most, if not all, human rights. But the source for church-state relations in the United States Constitution is the Establishment Clause, which provides government “shall make no law respecting an establishment of religion,” not the Equal Protection Clause, which more reasonably bestows textual authority for a norm of neutrality. The Establishment Clause itself does not self-evidently bestow an equality claim, although equality and neutrality are certainly core components of “the essential rights and liberties” of religion.¹⁵³ If questions concerning equal treatment of religion were raised under the Equal Protection Clause, it would make sense to inquire into neutrality, a driving force of Equal Protection under the rubric that similarly situated people or institutions must be treated similarly or, if dissimilar treatment is to be allowed, it must

¹⁵¹*Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 96 (1972)(“There is an ‘equality of status in the field of ideas,’ and government must afford all points of view an equal opportunity to be heard.”).

¹⁵²*Lawrence v. Texas*, 539 U.S. 558, 575 (2003)(“Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.”).

¹⁵³Witte, *supra* note 17, at 388. When Madison spoke of equal rights of conscience, “he did not mean to invoke equality as an independent reason for religious liberty.” Instead, “he meant that religious liberty was a right that ought to extend to every person.” Feldman, *supra* note 62, at 351 n. 26 (citing Memorial and Remonstrance).

be justified by a persuasive reason.¹⁵⁴ Equal protection would seem to handle well claims for equal treatment.

It may certainly be helpful to borrow equal protection components to buttress Establishment Clause arguments, as is done, for example, in free speech claims.¹⁵⁵ By comparison, however, a free speech claim fundamentally relies on tests more derivable from textual authority.¹⁵⁶ The point, simply stated, free speech, as other constitutional provisions, has a main test to gauge its infringement derived from textual authority and relies on equality interests as supplemental support. By contrast, nonpreferentialism does not center around the textual enumeration of the Establishment Clause but instead drafts an equality component as a

¹⁵⁴*Brown v. Board of Education of Topeka (Brown I)*, 347 U.S. 483, 495 (1954) (“we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.”). Joseph Tussman & Jacob ten Broek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341 (1949).

¹⁵⁵*Mosley*, 408 U.S. at 96.

¹⁵⁶For example, the prohibition on governmental abridgement of ideas has as its center a presumption against censorship or other official tampering with ideas, which seems consistent with a textual mandate that specifies government is to make no law abridging speech. *See, e.g.*, *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992) (“The First Amendment generally prevents government from proscribing speech [because] of disapproval of the ideas expressed.”).

main part of the test. In this respect, the neutrality inquiry of nonpreferentialism is a curious choice for the Court, at least based on a textual methodology.

The choice is also curious as a matter of text in that it does not rely on the Establishment Clause textual enumeration of prohibiting an establishment of religion. The language choice of the Establishment Clause, after all, singles out religion for disfavored treatment. Government may make no law respecting an establishment of religion, not an establishment of politics, economics or postmodernism. The focus, therefore, should more appropriately center around governmental choices in respect of religion. For example, does government establish, promote, aid, favor or disfavor religion, to name a few possibilities. In this respect, the three-part *Lemon* test has a stronger textual tether in that the three questions concern themselves with the degree of governmental support for religion.¹⁵⁷

Moving beyond text to substance, it is also notable that the Court's questioning of neutrality is simply a formal, facial one. The Court only looks to see if measures are designed to make benefits generally available to claimants.¹⁵⁸ The Court does not engage in a more intense

¹⁵⁷Under *Lemon*, 403 U.S. 602, 612-13 (1971), the Court asks "First, the statute must have a secular legislative [not religious] purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"

¹⁵⁸*See, e.g., Zelman*, 536 U.S. at 652 ("a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens . . .").

scrutiny of the substance of neutrality, as is more characteristic of free speech¹⁵⁹ or equal protection¹⁶⁰ questions.

A review of several of the measures upheld under nonpreferentialism illustrates the point. Focusing first on formal neutrality, the Court in *Mueller v. Allen* upheld a Minnesota statute that permitted taxpayers to deduct as expenses from gross income “amounts not exceeding \$500 [for students in grades kindergarten to sixth grade] and \$700 [for students in grades seven to twelve] for tuition, textbooks and transportation expenses.¹⁶¹ In *Zelman*, the Court upheld an Ohio pilot program designed to aid the Cleveland schools by providing tuition aid for students in K-3 to attend public or private schools and tutorial aid for students who remain in public schools.¹⁶² On their face, both measure apply neutrally to public and private school students. So far, so good.

As a matter of substance, however, there is a significant disparity between allocation of public moneys to religion as compared to nonreligious claimants. In the Minnesota program at issue in *Mueller*, the vast bulk of tax benefits were claimed by religious students, likely as high

¹⁵⁹*See, e.g.*, *Gooding v. Wilson*, 405 U.S. 518 (1972)(fighting words statute unconstitutional because applied overly broad by Georgia).

¹⁶⁰*See, e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 351 (1886)(facially neutral ordinance unconstitutional because selectively applied negatively against Chinese).

¹⁶¹463 U.S.388, 391 n. 1 (1983).

¹⁶²536 U.S. 639, 645 (2002).

as 96 percent.¹⁶³ In *Zelman*, 96 percent of the students participating in the pilot program were enrolled in religious schools and 82 percent of the private schools participating in the program were religious schools.¹⁶⁴ Certainly statistics may be misleading.¹⁶⁵ But any fair assessment of the evidence reasonably discloses that the substance of the measures approved in *Mueller* and *Zelman* impacts disproportionately favorably on religion. At a minimum, these measures constitute indirect official subsidies of religion.¹⁶⁶ Since most legislators are likely aware of the composition of their constituencies--including their general religious makeup and number of parochial schools-- the subsidies may even be more overt.

But the Court did not want to be bothered by empirical or effect analysis.¹⁶⁷ As stated

¹⁶³*Zelman*, 536 U.S. at 658; *Mueller*, 463 U.S. at 401.

¹⁶⁴536 U.S. at 647.

¹⁶⁵Chief Justice Rehnquist observed that school programs in other states, such as Maine or Utah, would likely result in a lesser percentage (perhaps less than 45 %) of the aid going to religious schools. *Id.* at 657-58.

¹⁶⁶*Mueller*, 463 U.S. at 404 (Marshall, J., dissenting).

¹⁶⁷The failure to employ effects analysis is in dramatic contrast to dormant commerce clause analysis, where effects analysis is a primary inquiry into the constitutionality of measures. *See, e.g.*, *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977)(North Carolina facially neutral statute unconstitutional because practical effect of measure is to burden

baldly by Chief Justice Rehnquist, “We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes or private citizens claimed benefits under the law.”¹⁶⁸ The point is simple: the inquiry into neutrality is cursory and has the effect of favoring religion, which, in fact, may be the point.

The second element of nonpreferentialism involves breaking the direct link between government and church by making monies available to people, who then exercise “genuine and . . . independent private choice” to spend the monies as they like, including for religious education if they so desire.¹⁶⁹ In this way, the choice to support religion is made by the individual, and not the government.¹⁷⁰

There is something to be said for this. Channeling money to people, not government, facilitates individual choice, which might plausibly break the link between government and religion. This is a point well worth considering. Private decisionmaking is different than government decisionmaking. No doubt, reasonable people will differ over this. Moreover, this doctrine has the added benefit of encouraging voluntary group-based religious value-formation, which can help animate a democracy and add a significant and worthy voice to public debate.

Yet, the Establishment Clause delimits governmental power; it does not speak to

Washington state apples).

¹⁶⁸*Mueller*, 463 U.S. at 401.

¹⁶⁹*Zelman*, 536 U.S. at 652.

¹⁷⁰*Witters*, 474 U.S. 481, 488 (1986).

individual behavior. Personal choices are quite irrelevant to the Establishment Clause.¹⁷¹ Thus, the relevant question would seem to be whether the governmental action constitutes an establishment of religion. Whether the governmental choice is accomplished by direct or indirect means should have some bearing on this question, but not be dispositive. The real question is whether a governmental choice to support religion, directly or indirectly, is an establishment of religion. There can be, no doubt, a difference of opinion on this.

To determine whether government is, indeed, supporting religion heavily enough to constitute an “establishment” should entail a probing examination of the purpose, background and effects of the measure. Certainly the seriousness of the question merits a careful review of such a measure, one more probing than the light-brush review employed under nonpreferentialism. The significant amount of aid and its transparently primary effect in benefitting religion under nonpreferentialism would suggest tilting more on the side of finding an establishment of religion.

So, at bottom, we can see that the Court applies a formal, cursory review of nonpreferentialist governmental programs that support religion. We can also see that nonpreferentialism is a far cry from the separationist approach of the Warren Court and of the philosophy of Thomas Jefferson and James Madison. Instead, nonpreferentialism is more in accord with the Puritan tradition and the religious orientation of some civil republicans, like George Washington and John Adams. In this respect, nonpreferentialism has more in common

¹⁷¹*Zelman*, 536 U.S. at 685-86 (Stevens, J., dissenting).

with the Massachusetts experience than the Virginia one.¹⁷²

In sum, as a matter of constitutional methodology, nonpreferentialism does not seem clearly rooted in the text of the First Amendment, but is firmly rooted in the Puritan tradition that carried over to influence important accommodationist civic republicans, like George Washington and John Adams. For sure nonpreferentialism—with its appeal to equality and neutrality—can draw upon one of the main “essential rights and liberties” of religion.¹⁷³ And nonpreferentialism, consistent with accommodationist civic republicans, can draw upon a long history of official United States accommodation of religious practice. As a matter of constitutional methodology, nonpreferentialism is on weakest ground as a matter of text; it is on strongest ground as a matter of tradition; and is on solid ground as a matter of the Puritan strand of historical practice. Thus, we can see that the debate between separationism and accommodationism is itself a titan struggle over constitutional methodology—text, Framers’ Intent (whose?), and original understanding (whose?).

For our purposes, we are concerned with two primary objectives. First, assessing the degree of public support for religion in schools in the United States. Second, how does American church-state law on this question compare to German law. A third objective, to be pursued later, is what we can learn from this comparative experience.

The Court’s change in doctrine from separationism to nonpreferentialism has resulted in a

¹⁷²*See supra* text accompanying notes 54, 76 .

¹⁷³Witte, *supra* note 17, at 388.

decisive shift to state support of religion. The shift is brought out dramatically by observing the state of affairs prior to nonpreferentialism. Under a separationist approach, it was unconstitutional to aid nonpublic (mainly religious) schools by reimbursing parents for portions of tuition costs;¹⁷⁴ engaging public school teachers in remedially educating parochial students;¹⁷⁵ lending instructional materials and equipment;¹⁷⁶ or paying the costs of field trips for purposes related to secular courses,¹⁷⁷ among other reasons. Today, all these forms of state support of religion are constitutional under nonpreferentialism.

Interestingly, however, we must observe that there has never been absolute or, perhaps, even strict separationism in the United States. Even under a separationist approach, government could support religious schools in certain respects.¹⁷⁸ So, we might say that even in the pre-

¹⁷⁴*Sloan v. Lemon*, 413 U.S. 825 (1973); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985).

¹⁷⁵*Aguilar v. Felton*, 473 U.S. 402 (1985) *o.r.*, *Agostini v. Felton*, 521 U.S. 203 (1997).

¹⁷⁶*Meek v. Piltgerger*, 421 U.S. 349 (1975) *and* *Wolman v. Walter*, 433 U.S. 229 (1977), *o.r.* *Mitchell v. Helms*, 530 U.S. 793 (2000).

¹⁷⁷*Meek*.

¹⁷⁸*Lemon*, 403 U.S. at 614 (“Our prior holdings do not call for total separation; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable.”). Under separationism, government could support religious

Rehnquist Court era, the Court vacillated somewhat uneasily between separationism and accommodationism. However, a major difference was that under this earlier approach of separationism, the Court distinguished between state support of religious schools over secular matters¹⁷⁹ and sectarian matters. It was absolutely off limits for government to aid religion in core religious matters,¹⁸⁰ and it was irrelevant whether the nature of official support was accomplished directly or indirectly.¹⁸¹ Moreover, the Court in the pre-Rehnquist Court era tended to agree on doctrine. Most of the Justices of this era were committed to separation of church and state as stating the proper relationship. Their disagreements were over how strict to apply separationism to particular factual settings.¹⁸²

schools by busing parochial students, *Everson*; lending textbooks on secular topics, *Bd. of Educa. v. Allen*, 392 U.S. 236 (1968); or reimbursing them for costs of state-mandated and state-composed testing requirements, *Comm. for Public Educa. v. Regan*, 444 U.S. 646 (1980).

¹⁷⁹*E.g.* *Everson*, 330 U.S. 1 (state support of bussing of parochial students is neutral social welfare aid, analogous to police and fire protection).

¹⁸⁰*E.g.*, *Lemon v. Kurtzman*, 403 U.S. 602, 617 (1971)(in invalidating state subsidy of religious teachers, Court observes: “We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of precollege education.”).

¹⁸¹ *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 393-94 (1985).

¹⁸²So observes Justice Souter in his recounting of the history of the Establishment Clause.

By contrast, under nonpreferentialism significant amounts of public aid have been channeled to religion. The most dramatic sums of public aid directed to religion include subsidization of parental costs of parochial school tuition;¹⁸³ supply of computer, media, laboratory, library and teaching aids;¹⁸⁴ and provision of public school remedial education.¹⁸⁵ In *Mitchell*, the plurality breezily dismissed its acknowledgment that public funds were openly diverted to religious purposes.¹⁸⁶ By openly approving governmental subsidization, albeit indirectly, of parochial school tuition costs, instructional materials and remedial education, and being wholly unconcerned as to the diversion of public aid for ostensible secular to openly

E.g., *Mitchell v. Helms*, 530 U.S. at 876 (dissenting).

¹⁸³*Zelman*, 536 U.S. 639 (2002)(public money supports 90% of parochial school tuition costs in instances of severely poor students), *id.* at 707 (Souter, dissenting)(“sheer quantity of aid unprecedented,” of which majority of Court wholly unconcerned); *Mueller v. Allen*, 463 U.S. 388 (1983)(state tax deduction for parochial school tuition costs up to \$500 or \$700, depending on case).

¹⁸⁴*Mitchell v. Helms*, 530 U.S. 793 (2000).

¹⁸⁵*Agostini v. Felton*, 521 U.S. 203 (1997).

¹⁸⁶530 U.S. at 824 (“A concern for divertibility, as opposed to improper content, is misplaced . . .”), *id.* at 834 n. 17; *contra, id.* at 840 (O’Connor, J, concurring)(“I also disagree with the plurality’s conclusion that actual diversion of government indoctrination is consistent with the Establishment Clause.”).

religious purposes, the Rehnquist Court has designed the constitutional guideposts for the public funding of a parallel, religious school education. The choice is up to federal and state legislatures as to whether to adopt and fund such a parallel school system. If that would occur, it is possible the United States would accomplish indirectly what the Germans do directly and transparently: publicly fund religious education.

Public subsidy of religious education is at odds with much of the early American theoretical writing on liberty of conscience and its protection from mixing of church and state that informed the framing of the First Amendment religious protections. It would appear to violate the fundamental norm of freedom from coercion of conscience in that it would force dissenting taxpayers to fund religious education. Most nonpreferentialist programs do not provide opportunity for opt-out provisions for dissenters, in contrast to early American practice and German practice.¹⁸⁷ The conception of liberty of conscience forms the core of Establishment Clause protections, both historically¹⁸⁸ and today.¹⁸⁹

As formulated by Roger Williams, for example, the integrity of freedom of conscience included a freedom from coercion of conscience as the essence of the religious experience and the basis for religious freedom.¹⁹⁰ As reworked by Thomas Jefferson, coercion of conscience is

¹⁸⁷Feldman, *supra* note 62, at 351.

¹⁸⁸*See, e.g.*, Feldman, *supra* note 62, at 346, 398.

¹⁸⁹*Lee v. Weisman*, 505 U.S. 577 (1992).

¹⁹⁰Roger Williams, *The Bloody Tenet, of Persecution, for Cause of Conscience* (1644).

inconsistent with true belief; “no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever”; official support of religion leads to its corruption; and that opinion, including religious opinion, is not within the jurisdiction of government.¹⁹¹ As reworked by James Madison, religion is a fundamental, natural right we owe to our Creator, and it “can be directed only by reason and conviction, not force or violence.” Religion is to be left “to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.”¹⁹² For Madison, forced payment of tax monies in support of religious education constituted an establishment of religion.¹⁹³

¹⁹¹Thomas Jefferson, A Bill for Establishing Religious Freedom (June 12, 1779)(reprinted in 5 *The Founders’ Constitution* 77 (Philip B. Kurland & Ralph Lerner eds 1987)).

¹⁹²James Madison, Memorial and Remonstrance Against Religious Assessments, *cited in* *Everson v. Bd. of Educ.*, 330 U.S. 1, app at 64.

¹⁹³*Id.* at 65-66 (violation for any “authority which can force a citizen to contribute three pence . . . of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever.”) In *Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819 (1995), Justices Thomas and Souter debated the meaning of Madison’s Memorial and Remonstrance. According to Justice Thomas, Madison simply saw the Establishment Clause “as a prohibition on governmental preferences for some religious faiths over others. . . . [T]here is no indication that at the time of the framing he took the [extreme] view

Viewed from the lights of Thomas Jefferson, James Madison and other Enlightenment authority, the dramatic outcropping of nonpreferentialism, most notably in *Zelman*, *Mueller*, *Agostini*, and *Mitchell* would appear to be dramatically at odds with core American religious principles protected by the Establishment Clause. First, not all taxpayers would agree to apply their monies in support of religious education.¹⁹⁴ For these uncooperative, dissenting taxpayers, that the government must discriminate against religious adherents by excluding them from more generally available financial subsidies.” *Id.* at 855-57. Thomas then pointed to historical examples of state funding of religion, such as elected chaplains to Congress, tax exemptions for religious bodies and sale of land reserved by Congress to support religion. *Id.* at 858-59. Justice Souter, by contrast, read Madison to oppose aid to religion and to advocate strict separation of church and state. *Id.* at 868-72.

¹⁹⁴In this respect, the Court would appear to miss the Establishment Clause question. “The Establishment Clause question is whether Ohio is coercing parents into sending their child to religious schools. . . .” *Zelman*, 536 U.S. at 655-56. The Court tries to save the point by observing that this question must be considered within the overall context of school choice available to parents, public or private. *Id.* at 656. But the real Establishment Clause question is not a focus on the parents sending children to religious schools. Of course, faced with a failing public school system, most parents will choose a better school system, religious or not. The real Establishment Clause question is whether taxpayers who don’t approve of public funding of religious schools are being coerced against their conscience to support them, as would appear in *Zelman*. *Accord, Everson*, 330 U.S. at 22-25 (Jackson, J., dissenting)(unconstitutional to tax

application of their tax monies in support of religious education would seem to constitute coercion of conscience. So forcing conscience is likely to induce resentment and hostility in those coerced. Nobody likes being forced against their will. The resentment is likely to lead to divisiveness in the body politic, already abundant. Some form of opt-out provision for dissenting taxpayers is necessary to ameliorate the concern of coercing conscience, as done in early America and in Germany.

Second, the mixing of church and state occasioned by indirect public subsidy of religion may lead to corruption of religion, as warned by separationist doctrine. These first steps are evident in *Zelman*. A condition of participating in the pilot program is that religious schools may not “discriminate on the basis of . . . religion.”¹⁹⁵ Being obligated to follow a nondiscriminatory policy is likely to dilute the purity of religion and involve government in supervision of religion.¹⁹⁶ In these respects, religion may become beholden to government, a root concern of

those unwilling to expend their monies for religious purposes); *id.* at 36-37 (Rutledge, J., dissenting).

¹⁹⁵*Id.* at 639, 712 (Souter, J., dissenting).

¹⁹⁶As Justice Souter observed, compliance with governmental requirements of nondiscrimination means that religious schools will not be able to give preference to members of the chosen faith; may not be able to choose members of their own clergy as instructors; and might be prohibited from teaching certain articles of faith dealing with faith, sinfulness or ignorance of others due to the official mandate of not teaching hate.” *Id.* at 712-13.

separationism.¹⁹⁷

A fair assessment of *Zelman* leads to the conclusion that the case is inconsistent with the separationist strategy championed by Jefferson and Madison, main architects of the First Amendment religious guarantees.¹⁹⁸ Starting with *Everson* in 1947, the Supreme Court largely followed the separationist strategy of the First Amendment, until the onset of nonpreferentialism, in 1983, in *Mueller v. Allen*. So, in these respects, nonpreferentialism is out of line with Enlightenment originalist thought of the First Amendment and original jurisprudence of the Court.

On the other hand, a look at other historical evidence offers plausible support for the nonpreferentialist strategy advocated by *Zelman*. The Puritan tradition in early America encouraged state aid of religion.¹⁹⁹ Some of the Framing generation, like George Washington and John Adams, stayed within this Puritan tradition by encouraging governmental support of religion. And there is some evidence that evangelicals, like Isaac Backus, would willingly accept

¹⁹⁷*Id.* at 712.

¹⁹⁸*Everson*, 330 U.S. at 11-13 (describing and observing leading role played by Jefferson and Madison in formulating the values and drafting the religious protections of First Amendment); *Reynolds*, 94 U.S. at 164. It is, of course, hard to determine who actually drafted the First Amendment, although most people credit Madison. Adams & Emmerich, *supra* note 17, at 1581.

¹⁹⁹Witte, *supra* note 17, at 379-80, 385-87.

official support of religion, insofar as it does not interfere with the core concern of liberty of conscience.²⁰⁰

So, we can fairly say that each of separationists and accommodationsists can draw upon certain historical support in aid of their cause. Still, candor would suggest that the separationists have the better of the arguments, both as to textual authorization given the plain limitation of governmental authority over religion and historical framers' intent; Jefferson and Madison are more persuasive figures—in ample and clearly developed thought on these important issues--than Washington and Adams.

Returning to a review of pertinent nonpreferentialist jurisprudence, in *Mitchell v. Helms*, the Court sanctioned, under nonpreferentialist grounds, federal provision of substantial educational materials to religious schools. The material included library and media materials, computers and computer software, and instructional materials such as books, movie projectors

²⁰⁰Mark Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* 11-12 (1985) (“The evangelical principle of separation endorsed a host of favoring tributes to faith [so] substantial that they have produced in the aggregate what may fairly be described as a de facto establishment of religion [in which] the religious institution as a whole is maintained and activated by forces not kindled directly by government “). *See also* Adams & Emmerich, *supra* note 17, at 1593 (“Backus expressed no opposition to Sabbath laws, teaching Calvinistic doctrine in the public schools, proscribing blasphemy, and conducting official days of fasting and prayer.”).

and overhead projectors.²⁰¹ Although the aid was formally neutrally available to all claimants, the vast majority receiving the aid were religious schools, as has been the pattern of nonpreferentialism.²⁰²

Mitchell breaks ground in one notable respect. The plurality simply brushed aside, with hardly a thought, the clear diversion of the public aid from secular to sectarian purposes.²⁰³ Perhaps the Court was simply reluctant to scrutinize recipients' use of moneys. But we might more plausibly understand this as simply an acknowledgment of the pretense of the empty formal constitutional requirement of neutrality. The real point of nonpreferentialism is simply equal treatment for religious groups as compared to nonreligious groups. Such equality of treatment leads, of course, to official support of religion, as it could to official support of nonreligion if the social reality of statistical configurations was different.

In *Agostini*, the Court approved provision of federally funded remedial education,

²⁰¹530 U.S. 793, 803 (2000).

²⁰²Of the participating schools in the year in question, 41 of 47% were religious (87%), a percentage close to other cases, like *Zelman* (96%) and *Mueller* (96%).

²⁰³*Mitchell*, 530 U.S. at 833-34 (“[W]e agree with the dissent that there is evidence of actual diversion and that, were the safeguards anything other than anemic, there would almost certainly be more such evidence. . . . In any event . . . evidence of actual diversion and the weakness of the safeguards against actual diversion are not relevant to the constitutional inquiry, whatever relevance they may have under the statute and regulations.”).

provided by public school teachers, to parochial students on the school premises of the religious schools, in direct contradiction of the Court's earlier finding that such was unconstitutional.²⁰⁴ In *Agostini*, the Court crossed two lines of separationist doctrine. First, the symbolic presence of public school employees rendering services to parochial schools was no longer relevant in determining whether such constituted an official endorsement of religion.²⁰⁵ Second, likewise, it was no longer relevant whether an excessive entanglement of state in religion occurred by reason of the significant monitoring by government of religion as to the uses of the aid for secular purposes required by the statute.²⁰⁶ The contrast in approach between *Agostini* and *Aguilar* simply illustrates the difference in approach between nonpreferentialism and separationism, as would a comparison of almost any case decided before or after nonpreferentialism.

²⁰⁴521 U.S. 203 (1997), *o.r.*, *Aguilar v. Felton*, 473 U.S. 402 (1985).

²⁰⁵*Id.* at 234-35.

²⁰⁶*Id.* at 233-34. The Court abandoned the presumption that any mixing of church and state meant religious indoctrination. *Id.* at 234. The Court acknowledged the change in Establishment Clause doctrine rendered by decisions like *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), *Witters v. Wash. Dept. Of Services for the Blind*, 474 U.S. 481 (1986) and *Rosenberger v. Rectors and Visitors of the Univ. Of Virginia*, 515 U.S. 819 (1995). These decisions undermined *Aguilar*, and *Ball*, 473 U.S. 373; accordingly, the Court overruled them. The Court observed that the financial costs associated with compliance with *Aguilar* were significant. 521 U.S. at 213.

For our purposes what is relevant is to observe the quite substantial channeling of governmental aid to religious schools accomplished through the indirect route of nonpreferentialism. As the Court frankly acknowledges, a governmental program that is neutral and operates by way of the private choice of people permits governmental aid to reach religious institutions.²⁰⁷ So blessed, therefore, is official provision of tuition relief;²⁰⁸ library and teaching aids;²⁰⁹ remedial educational services²¹⁰ and learning;²¹¹ and vocational aids.²¹² And that is just the types of aid constitutionally approved to date. Quite substantial other forms of official aid are likely to follow.

The direct/indirect role of government in funding religion is the doctrinal line the Court is drawing at present. The endpoint of nonpreferentialism, for now, is reached by the recent *Locke v. Washington*, where the Court upheld Washington's prohibition of direct funding of pastoral

²⁰⁷*Zelman*, 536 U. S. at 652.

²⁰⁸*Zelman; Mueller*.

²⁰⁹*Mitchell*.

²¹⁰*Agostini*.

²¹¹*Witters*.

²¹²*Zobrest*.

education.²¹³ Such open, overt official funding of the religious mission went too far, at least for some nonpreferentialists.²¹⁴ And so we are left again with a distinction between direct governmental funding of religion (unconstitutional), and indirect funding (constitutional).

Applying its cognates of neutrally and private choice to route aid indirectly to religion, we should probably recognize nonpreferentialism for what it is: an alternate public funding mechanism for religious schools. Whether this becomes a reality or not will depend on the democratic processes at work in federal and state legislatures. In this respect, we can see that nonpreferentialism approximates, but does not mirror, the German system of public support for religious education, which is our next topic.

V. Comparative Observations

As we assemble the observations we have gathered from our comparative examination of

²¹³540 U.S. 712 (2004). Even though decided on Free Exercise grounds, *Locke* represents the same type of programs considered under nonpreferentialism, as does *Rosenberger v. Rectors and Visitors of Univ. of Virginia*, 515 U.S. 819 (1995), decided under free speech grounds.

²¹⁴Chief Justice Rehnquist wrote then majority opinion sustaining Washington's constitutional prohibition on funding religious education. Perhaps he was motivated by federalism concerns; Washington could determine to prohibit what Ohio, for example, in *Zelman* allowed. Justices Thomas and Scalia would have found the funding constitutional, relying in part on *Witters. Locke*, 540 U.S. at 729-30.

German and American law, we are left with a rather startling discovery: German law is in distinct ways committed to religious values of neutrality, toleration and nondiscrimination, values we commonly associate with American law, but should not exclusively, as they resonate today as core religious values in western culture. In this respect, German law is moving somewhat in a separationist direction. Conversely, American nonpreferentialism is a distinct move in the direction of the church-state cooperative model in place in Germany. Let us look at this more carefully.

The German community public school model presupposes a Christian orientation and, in this respect, is well out of line with American law. Yet, a closer look at what role religion actually plays in German schools may suggest the relationship is less disconnected. First, pure instruction in religious tenets is restricted to religious class. Religious class itself is the domain of the religious community, which picks teachers and determines religious instruction. Thus, we might think of the public school as neutrally providing the forum for religious instruction, but otherwise staying out of the affairs of religion. Government is in all respects to be neutral concerning religious/ideological beliefs. Further, each student/parent can choose the religious instruction of choice, or none at all. We can thus see that ample consideration is given to liberty of conscience.

Aspects of American law approximate, but do not mirror, this element of German law. American students may be released from public school premises for religious instruction during the school day²¹⁵ and religious instruction can occur on public school premises after school

²¹⁵Zorach v. Clauson, 343 U.S. 306 (1952).

hours.²¹⁶

Outside of religious class in Germany, there can be no dissemination of religious tenets or proselytization. Teaching of religion is confined to religion class. There is room for experimentation in the laboratory of the *Länder*; some *Länder* are more overtly Christian than others, as most graphically indicated in the *Bavarian Community School Case*; some *Länder* are more secular, as in Bremen, Berlin and Brandenburg. Outside of religion class, Christianity is to be referred to only as a cultural and historical force, not a religious one. These elements resonate partly with American law as well.²¹⁷

Beyond these elements of overt religious exercise, government is to be neutral, tolerant and nondiscriminatory concerning all religious/ideological beliefs, particularly those not in a dominant position. The community school is obligated to facilitate a dialogue of pluralistic religious/ideological views to expose and develop students' intellectual and spiritual capacities. In recognition of the increasingly pluralistic composition of German society, the Constitutional

²¹⁶Good News Club v. Milford Central School, 533 U.S. 98 (2001).

²¹⁷Lynch v. Donnelly, 465 U.S. 668 (1984)(Christmas creche symbol of culture as Christmas holiday, not religious message); Epperson v. Arkansas, 393 U.S. 97, 106 (1968)(“study of religions and of the Bible from a literary and historic viewpoint, presented objectively as part of a secular program of education, need not collide with the First Amendment’s prohibition . . .”); School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963) (Bible can be read in public schools as work of literature or culture).

Court is recalibrating religious freedoms toward a distinctly more neutral position and one that identifies less with any dominant sect so that each religious community can more freely compete on a level playing field.²¹⁸ Commitment to these values of neutrality, tolerance and nondiscrimination are also substantially in accord with American and, indeed, international norms of religious freedom.²¹⁹ There is a certain resonance of core values that comprise a human right to religious freedom.

German law evinces further similarly with American law in that the Basic Law sets down in some detail principles of institutional separation of church and state. For example, recall that

²¹⁸*See, e.g., Muslim Teacher’s Head Scarf*, 108 BVerfGE 282, 310 (2003)(“A regulation that prohibits teachers from displaying overtly their membership in a particular religious community or adherence to beliefs . . . is clearly in tension with especially pronounced growing diversity of religion in society.”). The Court also recognized that acceptance of growing religious diversity in society might call for readjustment of legal concepts, such as stricter neutrality in the obligations of members of the civil service. The state role is to be “not a distant, absent role . . . but rather a respectful, nourishing neutrality” that accords “equality to the beliefs of all believers, understanding the attitudes advanced [by people] on equal terms.” *Id.* at 298-99.

²¹⁹*See Michael Perry, A Right to Religious Freedom? The Universality of Human Rights, The Relativity of Culture*, 10 R.W.U. L. Rev. 385 (2005)(discussing Universal Declaration of Rights, the International Covenant on Civil and Political Rights and the International Covenant of Economic, Social and Cultural Rights); Witte, *supra* note 17, at 433-43.

article 137 of the Weimar Constitution incorporated into the charter prohibits a state church; religious bodies are authorized to regulate their own affairs within the limits of the law, including the ability to run their affairs according to their tenets;²²⁰ and, under article 136, government is prohibited from inquiring into memberships of religious bodies, except for statistical purposes. These principles of institutional separation of church and state are broadly in line with American law, including the Puritan tradition. In these respects, German law is similar to American law.

Neutrality, nondiscrimination and tolerance are hallmarks of American law as well. Under nonpreferentialism, neutrality and nondiscrimination are central elements of Establishment Clause doctrine. The American idea of neutrality here is a formal, facial one which involves no substantive evaluation of the effects of government programs. But perhaps this more flexible, more malleable concept of neutrality has similarities to German doctrine as well. For, we can recall under German doctrine, the state acts somewhat as a neutral public forum in allowing the major religions—Roman Catholicism, Protestantism and Judaism—to teach their tenets in the public schools. Opportunities are in the process of being expanded, as Islam too may soon achieve the same benefit. There is, thus, some surprising overlap in core values of both countries' jurisprudence.

²²⁰*Cf.* Catholic Hospital Case, 70 BVerfGE 138 (1985) (Catholic hospital can fire doctor who took public position on abortion contrary to Catholic doctrine) *with* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos, 483 U.S. 327, 345-46 (1987)(exempting the church from federal antidiscrimination laws so that it may run autonomously its affairs).

There is also similarity in the nature of state support of religious education. Both Germany and the United States overtly fund religious education. German law straightforwardly funds religious education through making it a regular part of the public school curriculum. It is noteworthy here that the religious bodies mainly pay the administrative costs of the state taxes collected on behalf of religions that then go toward paying for the costs of religious education. The German government acts somewhat as a neutral conduit through which the moneys go to religion. And the religions can only tax members of their sect. Nonadherents of particular religions are exempted from the religious tax. There is, thus, a minimum of coercion of conscience, as dissenters may opt out of funding religious education they disagree with.

By contrast, the American approach involves indirect funding of religious education through subsidization of private, parochial school education under nonpreferentialism. In this respect, the American approach accomplishes indirectly what the Germans accomplish directly. But perhaps this difference is more formal than substantive. Under the American approach, private, individual choice is said to break the link between state and church. But individuals simply endorse the financial benefits over to religious schools of their choosing. Public moneys thus go to religious schools through the conduit of individual exercise, even those moneys of taxpayers who may dissent from funding religious education; American programs do not normally have opt-out provisions to guard against coercion of conscience. The German program allows religions to use the apparatus of the state to raise and administer the moneys to support religious education. But the moneys are collected only from members of particular sects for the benefit of that sect; dissenters may opt out. Thus, perhaps the two programs are more alike than different, although using different schemes. In fact, it would appear that the German scheme is

more solicitous of the core value of liberty of conscience.

Assessing the programs of both countries more carefully, it seems to fair to acknowledge that they constitute, in essence, *de facto* establishments of religion. The significant expenditure of public moneys to support religious education would seem to suggest this. Whether the American program is a formal, unconstitutional establishment of religion is, of course, a difficult and disputed inquiry highly contested on the Court²²¹ and in the scholarly literature.²²² Under German law, of course, no problem is presented even if the program is a formal establishment of religion given explicit German constitutional textual and historical authorization of such a church-state cooperative model. But under American law, such is a problematic outcome given the lack of textual authority and the contested history between separationism and accommodationism. In contrast to German law, American nonpreferentialism cannot point to definitive constitutional authority.

A further striking similarity between the two countries is that both programs effectively empower majoritarian political constituencies to fund their majoritarian religious counterparts. Majoritarian configurations of political and religious power work to support each other. Only the dominant religions of Roman Catholicism, Protestantism and Judaism are taught in German public schools. And, again, this is not problematic given the German church-state cooperative model.

²²¹Compare, for example, the positions of the majority, 536 U.S. at 634, and dissent, *id.* at 684, in *Zelman*.

²²²*See, e.g.,* Feldman, *supra* note 62.

American nonpreferentialism mainly funds Christian religious schools--the dominant religious groups--especially Catholicism, as Catholic schools are the main competitors to the public schools, given the long history and effective infrastructure and administration of the Catholic church.²²³ In fact, the Rehnquist Court has largely succeeded in converting First Amendment religious protections into vessels of community, democratic control.²²⁴

In conclusion, in capturing this snapshot of German and American religious protections, it seems reasonable to conclude that Germany's model of church-state cooperation is firmly rooted in constitutional authority and tradition. With that observation, however, Germany is trending toward a model of more open and welcoming accommodation of minorities in recognition of the increasing diversity of German society, including over religion. Commitment to values of neutrality, nondiscrimination and tolerance are marks of this. There is, thus, a discernible movement to values long associated with the American model of church-state relations.

By contrast, the United States yet evidences strong commitment to a model of separation of church and state in certain areas, most notably public school education. But in other areas,

²²³National Center for Education Statistics, at www.nces.ed.gov (visited June 2005); Council for American Private Education, at www.capenet.org/facts.html.

²²⁴*Compare Zelman with* Employment Division, Dep't of Human Services v. Smith, 494 U.S. 872 (1990)(Free Exercise rights circumscribed according to norms of generally applicable neutral laws of democratic process).

especially our topic of discussion—public funding of private religious education—the American approach is more in line with a church-state cooperative model, characteristic of Germany and most western nations,²²⁵ than one of separation. Certainly nonpreferentialism is a paradigm of the church-state cooperative model. Other examples would be granting of tax exemptions to religious bodies²²⁶ and funding of legislative chaplains.²²⁷

Viewed from the unique dimensions offered by comparative law—looking outside native borders to observe workings in other constitutional orders and then reflecting the insights learned on native law to see how we stand, for better or for worse—we seem left with this insight: A model of separation of church and state was uniquely instituted in the New World of America, in

²²⁵*See, e.g.,* Stephen V. Monsma and J. Christopher Soper, *The Challenge of Pluralism: Church and State in Five Democracies* 57, 67-69, 103-07, 136-44 (1977)(observing how the Netherlands, Australia and the United Kingdom all publicly fund religious education). Witte, *supra* note 17, at 440 (most international norms suggest church-state cooperation; separation of church and state is exceptional); *Religious Education and Globalised Economy*, at www.studyoverseas.com/re/jmh.htm (June 14, 2005)(noting state-funded religious education in Canada, Greece, Italy, Spain and United Kingdom. However, in United Kingdom, purpose of religious education is to deepen and enlighten students awareness of values associated with religion, not to indoctrinate or proselytize).

²²⁶*Walz v. Tax Comm'n*, 397 U.S. 664, 677-80 (1970).

²²⁷*Marsh v. Chambers*, 463 U.S. 783 (1983).

Providence colony, then Virginia, and then in the United States in essential respects. Operating under the model of separation, religion thrived in America in the past, and thrives today, perhaps like no other western country. The question we must now face: are we losing one of the unique traits that has characterized the American “livlie experiment”—separationism— and, if so, at what cost and at what benefit?²²⁸ Is a European model of church-state cooperation better suited to American shores?

²²⁸*McCreary*, 2005 WL 1498988 at p. 20 (O’Connor, J, concurring)(“Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?”).

