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Religion in the Classroom in Germany and the United States

Edward J. Eberle*

In this Article, Professor Eberle evaluates the relationship of religion in the classroom in Germany and the United States, as formulated by the countries' highest courts, the German Constitutional Court and the United States Supreme Court. Pursuant to the German model of church-state cooperation, public funds are channeled to religious organizations, such as, for example, using the machinery of the state to raise and disperse tax monies to religious organizations. Religious groups may then use the tax monies collected to support religious education in the public schools. However, pursuant to guidelines announced by the German Constitutional Court, teaching of religious tenets can only occur in religion class and ample opportunity must be given to 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 exercise; no religious indoctrination may occur on public school premises outside of religion class.

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 still largely applies with respect to public schools. However, the formal neutrality advanced by the Rehnquist Court reconceives church-state relations along distinctly more accommodationist grounds concerning private, parochial schools. Employing a core doctrine of (1) neutrality and (2) private, genuine choice—principles that resonate partly with German doctrine—substantial public aid has been dispensed to private, religious schools, as we will examine. In this way, religious institutions can be accommodated in society on the same basis as secular institutions. 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 a much different historical understanding and constitutional language.

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I. INTRODUCTION

The relationship between religion and state remains a central question today, notwithstanding centuries of deliberation and strife over the proper calibration of the two powers. The community of believers that is a church, synagogue, or mosque is a self-associated people of faith. The state is the politically authorized agent of the society. We might say that a church (to pick a common term) is the domain of religion, the state the domain of government.

In modern Western society, Martin Luther's inspired Protestant Reformation (1517-1545) reverberated throughout much of Europe, challenging the long-standing alliance between one, universal Catholic Church and its delegation of secular authority to a ruling prince under a theory of the divine right of kings.¹ This epoch of European history formed an important influence in the evolution of German religious freedoms.

The fight over religion dramatically influenced England in the next century as well. England descended into civil war (1642-1645) over the role and locus of power—Crown versus Parliament—and the role of religion—Church of England versus Catholicism versus

1. See Edward J. Eberle, *Roger Williams on Liberty of Conscience*, 10 ROGER WILLIAMS U. L. REV. 289, 308-09 (2005). Luther's revolution of the Reformation divided those yet faithful to the Catholic Church from dissenting believers who became known as Protestants. *Id.* 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* (literally "who is ruler, is religion," meaning that the religion of a territory or people shall be that of its ruler), which was established in the Religion Peace of Augsburg, in 1555, as a compromise between German princes advocating the cause of Catholicism or Lutheranism. *Id.*; Treaty of Westphalia, Oct. 24, 1648, 1 Consol. T.S. 198. Mandatory belief in the sovereign's religion was the standard European solution to achieving social harmony in religious matters. Eberle, *supra*, at 308-09. Germans took note of the fact that the religious dissension decimated one-third of the population. *See id.*

separatist Protestant denominations such as the Puritans.² This moment of English history formed what became the great American experiment in the relationship between church and state, which gestated uniquely into a “livlie experiment” of separation of church and state begun in Providence colony, in 1638, by Roger Williams.³

Church-state relations remain contentious in the United States, despite or because of our “livlie experiment.” The separationist stance previously championed by the Warren Court has been diluted, in part, by a variety of formal neutrality advanced by the Rehnquist Court.⁴ Under formal neutrality, religious groups are to be treated under the same terms as nonreligious groups with respect to the distribution of public benefits.⁵ Pursuant to formal neutrality, public funds have been dispensed to religion for sign interpreters,⁶ remedial education,⁷ and parochial school tuition,⁸ among other purposes. Such overt support of religion would have been unthinkable under the separationist regime of the Warren Court.

2. See SYDNEY E. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* 361 (1972).

3. CHARTER OF RHODE ISLAND AND PROVIDENCE PLANTATIONS OF 1663, *reprinted in THE FEDERAL AND STATE CONSTITUTIONS: COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA* 3211, 3212 (Francis Newton Thorpe ed., 1909) (“[T]o hold forth a livlie experiment, that a most flourishing civill state may stand and best bee maintained . . . with a full libertie in religious concernements.”).

4. See *Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963) (holding that no state or school could require that passages from the Bible be read at the beginning of a school day). *But see Zobrest v. Caterna Foothills Sch. Dist.*, 509 U.S. 1, 13-14 (1993) (holding that the state may dispense public funds to provide a sign interpreter to a deaf child in a sectarian school).

5. I am describing the Rehnquist Court’s approach to public funding issues under the Establishment Clause as “formal neutrality.” This categorization is a form of the concept developed famously by Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 96 (1961), and then reworked by Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 999-1001 (1990). I use interchangeably the term “accommodation” or “accommodationist” to describe the Rehnquist Court approach. By accommodationist, I mean accommodating religious institutions within society in ways equal to secular institutions. Another way of describing the same judicial approach would be nonpreferentialism, meaning government may not prefer or disfavor one particular religion over another, or religion over nonreligion. Many people associate nonpreferentialism as meaning, simply, the inability of government to prefer or disfavor one religion over another, which is why I have chosen not to so describe the approach of the Rehnquist Court (which clearly is not that).

6. See *Zobrest*, 509 U.S. at 13-14.

7. See *Mitchell v. Helms*, 530 U.S. 793, 801 (2000).

8. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 643-44 (2002); *Mueller v. Allen*, 463 U.S. 388, 390 (1983).

To obtain some perspective on church-state relations,⁹ and especially the evolution of Establishment Clause doctrine¹⁰ under the Rehnquist Court, we will look outside American borders to another important constitutional democracy, Germany. We will examine in 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 democracy, including the degree to which a state supports religion, the overt display of religious symbols in the public square or school,¹¹ 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, preuniversity schools. Focusing on elementary and secondary schools makes sense because schools are primary forums for society's inculcation of 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 role of government in promoting religion can be important in this regard. Conceiving religion as a source of salvation, or as a source of ethics, can be useful personally or socially. Moreover, judging society by its charter to determine if it remains true to or strays from the ideals therein inscribed is also an important lesson of citizenship to impart to students. These matters speak to the capacity of a constitution to direct

9. Apart from the contrast between the Warren Court (separationism) and the Rehnquist Court (accommodationism), there might be other ways of conceiving church-state relations as well. We might consider, for example, mergings of religion and state, as in Iran and Pakistan; 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.

10. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

11. Compare *Lee v. Weisman*, 505 U.S. 577, 599 (1992) (holding that prayer at a middle school graduation ceremony is unconstitutional), with *Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 16, 1995, 93 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1(1) (F.R.G.)* (holding the Bavarian requirement to display a crucifix in public school classrooms unconstitutional).

society. Staying true to a charter's religious ideals is, of course, difficult.

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 to religious organizations, for example, by using the machinery of the state to raise and disperse tax monies to religious organizations.¹² Religious groups may then use the tax monies collected to support religious education in the public schools. However, pursuant to guidelines announced by the German Constitutional Court, teaching of religious tenets can only occur in religion classes and ample opportunity must be given to students and parents (when their children are under fourteen years of age) to choose or not choose the type of religious instruction they desire.¹³ 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 exercise; no religious indoctrination may occur on school premises outside of religion class.¹⁴ Moreover, with the emerging challenge of pluralism in German society, as in other European societies, German religious freedoms have been extended to embrace minority religions on essentially equal terms to majority religions under principles of toleration, neutrality, and equality.¹⁵

By contrast, the language and Enlightenment background of the American Establishment Clause reasonably suggests a more separationist approach to church-state relations.¹⁶ It is fair to say that a separationist approach still largely applies with respect to public schools. However, the formal neutrality advanced by the Rehnquist Court reconceives church-state relations along distinctly more accommodationist grounds concerning private, parochial schools.¹⁷ As we will examine, by employing a core doctrine of (1) neutrality and (2) private, genuine choice—principles that resonate partly in German doctrine—substantial public aid has been dispensed to private,

12. See DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 443 (2d ed. 1997).

13. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [Federal Constitution] art. 7(2) (F.R.G.) (granting parents the right to decide whether children receive religious instruction).

14. See KOMMERS, *supra* note 12, at 470.

15. For a study of this in relation to Free Exercise freedoms, see Edward J. Eberle, *Free Exercise of Religion in Germany and the United States*, 78 TUL. L. REV. 1023, 1067-68, 1085 (2004).

16. See U.S. CONST. amend. I.

17. See Kurland, *supra* note 5, at 72.

religious schools.¹⁸ In this way, society can accommodate religious institutions on the same basis as secular institutions.

We can see that recent American Establishment Clause doctrine has unfolded in a way somewhat characteristic of German church-state relations with respect to public support for religious teaching in schools. For comparative purposes, it is striking that American doctrine has so evolved notwithstanding its very different history and constitutional language. So, we stand in the interesting position where American church-state relations are more similar to German church-state cooperation than to Providence- or Virginia-influenced church-state separation 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 II) and American (in Part III) religious protections. It is important to understand the historical context of both countries' religious freedoms in order to appreciate their development. Next, in Parts IV (Germany) and V (America), we will turn to the topic at hand: examining the degree of state support of religion in schools. We will then, in Part VI, assemble the observations we have drawn by comparing German to American law.

II. GERMAN CONSTITUTIONAL TEXT AND TRADITION

A. *German Text*

The main outline of the relationship between church and state centers on Article 140 of the Basic Law, which incorporates as an organic whole the provisions of the 1919 Weimar Constitution (Articles 136 through 139 and 141) describing that relationship.¹⁹ The relationship is a cooperative one. Religion and church play a prominent role in German society, which these provisions facilitate.²⁰ The Weimar provisions set out a detailed and complicated scheme of church-state cooperation that is interpreted in the light of Article 4 of

18. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002).

19. See VERFASSUNG FÜR DIE WEIMAR REICHS [VERF. WEIMAR] [Weimar Constitution] arts. 136-139, 141 (F.R.G.); Inke Muehlhoff, *Freedom of Religion in Public Schools in Germany and in the United States*, 28 GA. J. INT'L & COMP. L. 405, 442 (2000).

20. See generally KOMMERS, *supra* note 12 (discussing the role of the church in Germany). Portions of Parts II.A through II.C of this Article appear in Eberle, *supra* note 15. Use of those portions of that article is with permission of the *Tulane Law Review*.

the German Constitution free exercise of religion protections, which protect explicitly freedoms of faith, conscience, and philosophical creed.²¹ The tendency today is to interpret Articles 4 and 140 as reciprocal religious protections.²²

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.²³ It also prohibits the government from inquiring into membership in a religious body, except for statistical purposes.²⁴

Article 137 of the Weimar Constitution, in its first clause, states that “there is no state church.”²⁵ 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 meaning. It forbids (1) institutional interconnection between church and state and (2) identification of the state with a specific religion.²⁶ The clause does not mean strict separation of church and state.²⁷ The numerous remaining provisions of Article 137 guarantee the freedom of association to form religious bodies and to “regulate[] and administer [their] affairs independently within the limits of the law,”²⁸ to constitute religious bodies to “acquire the legal capacity according to the general provisions of civil law,”²⁹ and to constitute “corporations under public law,”³⁰ allowing them “to levy taxes . . . in accordance with Land [state] law.”³¹ This last provision is completely without parallel in American law.³²

21. See GG art. 4.

22. See Muehlhoff, *supra* note 19, at 451 (describing the interplay of Articles 4 and 140).

23. See VERF. WEIMAR art. 136.

24. *Id.*

25. *Id.* art. 137(1).

26. See *id.*

27. See DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 245 (1994).

28. VERF. WEIMAR art. 137(3).

29. *Id.* art. 137(4).

30. *Id.* art. 137(5).

31. *Id.* art. 137(6).

32. James Madison strongly objected to officially granting charters to religious bodies. See CURRIE, *supra* note 27, at 245 & n.7 (citing 22 ANNALS OF CONG. 982-85 (1811)) (viewing federal incorporation of the Episcopal Church in Washington, D.C., as an establishment of religion); see also Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1587 (1989) (explaining that James Madison

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 “philosophical creed” as well as religious ones.³³

In practice, the main beneficiaries of governmental aid are dominant religious bodies such as Protestant and Roman Catholic groups.³⁴ Because church and state tend to consist of overlapping majoritarian configurations, church-state cooperation has been a comfortable fit.³⁵ In a sense, the structure of church-state cooperation operates as a de facto establishment. The cooperative model has functioned well in a society of relative religious homogeneity.³⁶ Since the cooperative model was developed in 1919 with an eye to

demonstrated his commitment to separation of church and state by vetoing bills incorporating the Episcopal Church in Washington, D.C. and reserving federal land for a Baptist Church).

Before the turn of the nineteenth century, Virginia outlawed religious corporations, a prohibition still in place in West Virginia. See W. VA. CONST. art. 6, § 47. This prohibition was also in place until 2002 in Virginia. See *Falwell v. Miller*, 203 F. Supp. 2d 624, 632 (W.D. Va. 2002) (finding that Article four, section fourteen, of Virginia’s Constitution violates the Free Exercise Clause); see also John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 385 (1996) (stating that the Virginia legislature prohibited religious corporations before the turn of the nineteenth century). It is fair to point out that most religious organizations today are incorporated as nonprofit corporations and receive tax-exempt status and, thus, bear some similarity to German religious corporations.

33. See VERF. WEIMAR art. 137(7).

34. The 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. See Gerhard Robbers, *Religious Freedom in Germany*, 2001 BYU L. REV. 643, 649-50. 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. *Id.* at 650. Authorities thus viewed the sect as animated by values antithetical to the social order and, accordingly, a danger to society. Gerhard Besiar & Renate-Maria Besiar, *Jehovah’s Witnesses’ Request for Recognition as a Corporation Under Public Law in Germany: Background, Current Status, and Empirical Aspects*, 43 J. CHURCH & ST. 35, 37 (2001). 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. See BVerfG Dec. 19, 2000, 102 BVerfGE 370 (371) (Jehovah’s Witness Case); Eberle, *supra* note 15, at 1031.

35. See Ingrid 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) (noting that in post-World War II Germany, church and state have promoted a consensus of values that includes promotion of democracy and tolerance).

36. See Muehlhoff, *supra* note 19, at 488-89 (observing that the church-state cooperative model may be harder to implement as religious groups become more diverse).

pluralism,³⁷ it is possible the model will continue to function well under new circumstances of emerging religious diversity. The model was designed for all religious groups, not just the big churches of Roman Catholicism and Protestantism.³⁸

Under the system, employers withhold the monies collected as taxes and submit them to the state, which then distributes them to the religious denominations in a percentage equal to their membership.³⁹ The churches pay the costs of administration. Religious groups use the money collected to build seminaries, churches, hospitals, and nursing homes, and to train teachers.⁴⁰ These arrangements are a mainstay by which religion secures its place as a main, if not a preferred, actor within society. 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.⁴¹ The tax is between eight and ten percent of a person's state income tax.⁴² Any person whose name is on the church or religious body's register is automatically subject to the tax.⁴³ A person must formally withdraw from the church or religious body to be relieved from the tax.⁴⁴ Nonchurch members are not assessed the tax.⁴⁵

Article 138 of the Weimar Constitution guarantees religious bodies rights, including the right to own property.⁴⁶ Article 139 recognizes Sunday and other public holidays "as days of rest from work and of spiritual edification,"⁴⁷ expressly resolving an issue that has proved vexing to American law.⁴⁸ Article 141 provides for the

37. *Id.* at 439, 442, 446.

38. *See* KOMMERS, *supra* note 12, at 440-41; Conversation with Dr. Hans Michael Heinig, Heidelberg, Germany (July 2005).

39. Eberle, *supra* note 15, at 1031.

40. *Id.*

41. Wuerth, *supra* note 35, at 1140, 1145-46.

42. KOMMERS, *supra* note 12, at 485.

43. *See id.*

44. While state collection of church taxes is constitutional, it has nevertheless given rise to significant litigation. *See* CURRIE, *supra* note 27, at 247; KOMMERS, *supra* note 12, at 484-89.

45. KOMMERS, *supra* note 12, at 485-86.

46. VERF. WEIMAR art. 138.

47. *Id.* art. 139.

48. *See, e.g.,* McGowan v. Maryland, 366 U.S. 420, 433-34 (1961) (rejecting an Establishment Clause challenge to a Sunday closing law because Sundays were secular days of rest, even though they originally were conceived as days of repose for religious reasons).

rendering of religious services and spiritual care to the army, hospital, prisons, or other public institutions.⁴⁹

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, quite relevant is Article 6 of the German Constitution, which guarantees parental rights in the raising of children, subject to state supervision.⁵⁰ Parental rights come into play most dramatically in connection with their children's education, the rights of which are guaranteed in Article 7.⁵¹ Also notable to us is the determination, in Article 7, section 3, that "[r]eligious classes [shall] form[] part of the regular curriculum in state schools, with[in] the exception of (secular (*bekennnisfrei*)) schools [R]eligious instruction shall be given in accordance with the tenets of the religious communit[ies]."⁵² Teaching religion in the schools is relatively uncontroversial.⁵³ However, the German constitutional system is careful to protect against coercion of conscience. Article 7 further provides, "The persons entitled to bring up a child shall have the right to decide whether the child shall attend religious classes."⁵⁴ Further, "No teacher may be obliged against his will to give religious instruction."⁵⁵

Because setting educational policy is a matter for the German states (*Länder*) under German principles of federalism, the *Länder* determine what is appropriate educationally.⁵⁶ Article 141 of the Basic Law preserves the historical right of *Länder* to determine if religion is

49. See VERF. WEIMAR art. 141.

50. GG art. 6(2) ("[T]he 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.").

51. See *id.* art. 7.

52. *Id.* art. 7(3). The State has supervisory obligations concerning education too, as set forth in Article 7(1): "The entire school system shall be under the supervision of the State." *Id.* art. 7(1). These ideas flow from the German theory of assigning duties to official power to secure civil peace, aid conceptions of freedom, and concretize the core values of the Basic Law. Under German constitutionalism, the idea is made manifest in the conception of basic rights, which 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. A further important contrast between the two constitutions is 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 EDWARD J. EBERLE, DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES 25-32 (2002).

53. See KOMMERS, *supra* note 12, at 471.

54. GG art. 7(2).

55. *Id.* art. 7(3).

56. See KOMMERS, *supra* note 12, at 471.

to be offered at all.⁵⁷ Under the principle of Article 141, the German states of Bremen and Berlin do not offer religious instruction in the schools.⁵⁸ Likewise, Brandenburg does not offer religious instruction in the schools, although it is unclear whether this follows from the principle of Article 141.⁵⁹ Like the Article 137 provisions, the guarantees of religious instruction in public schools represent once more the German idea of church-state cooperation in certain essential social services.⁶⁰ There are yet other provisions of the Basic Law addressing religion.⁶¹

We can see that the German charter is indeed far more detailed and comprehensive in its treatment of religion than the U.S. charter. There are advantages to the German detail. The German charter expressly resolves many issues that in the United States have called for Supreme Court resolution in parsing out the sparse language of the First Amendment. For example, Article 4 resolves the status of conscientious objection to military service,⁶² an issue that has proved thorny for the Supreme Court.⁶³ Article 7 significantly resolves the role of religion in public schools,⁶⁴ an issue of great contention in the United States.⁶⁵ It is noteworthy that there are far fewer decisions on church-state relations issued by the German Constitutional Court than 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 the canons

57. See VERF. WEIMAR art. 141.

58. Article 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." *Id.* 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 former East German state of Brandenburg became part of the Federal Republic of Germany. See Wuerth, *supra* note 35, at 1152, 1154. These states omitted mandatory teaching of religion. For a discussion of this, see *infra* text accompanying note 224.

59. See Wuerth, *supra* note 35, at 1152, 1154.

60. See Muehlhoff, *supra* note 19, at 439-40.

61. See, e.g., GG art. 3(3) (providing that faith and religious opinion are inappropriate subjects to target under the basic equality norm); *id.* art. 56 (providing that the federal President shall assume office upon taking oath, with or without reference to God); *id.* art. 64(2) (providing the same regarding the federal Chancellor and federal ministers).

62. *Id.* art. 4.

63. See, e.g., *Welsh v. United States*, 398 U.S. 333, 343-44 (1970) (plurality opinion); *United States v. Seeger*, 380 U.S. 163 (1965).

64. See GG art. 7.

65. See *infra* Part V.

of American constitutional methodology. Not surprisingly, German history and constitutionalism differ from their American counterparts. Under German constitutionalism, decisive in methodology is the text and structure of the charter and its applicability to contemporary social conditions.⁶⁶ Framers' intent is not dispositive in achieving results, but may be consulted as an auxiliary aid to interpretation.⁶⁷ We need a brief overview of these issues to understand the context and dynamics of German law.

B. *German History*

As a European country, Germany shares a common and deep cultural heritage with its continental neighbors. First, notable for us is the long-standing influence of the Catholic Church. The Catholic Church helped preserve learning during the early Middle Ages, especially before the renaissance of Roman law and its systematic study in a university forum in Bologna at the end of the eleventh century.⁶⁸ 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.⁶⁹ The deep association of the Catholic Church with learning is a factor in the cooperative relationship that has developed between church and state over education.

Second, for much of German history, altar and throne were united.⁷⁰ The alliance between the ruler and the church further fortified 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.⁷¹

Reliance on state power to protect religion is another factor leading toward a cooperative church-state relationship. Protestantism was also the crucial force in the literacy campaign of this time. Protestants founded schools so every child could read the Bible, the defining focus of Luther's Reformation.⁷² Reading allowed a person to

66. Edward J. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 UTAH L. REV. 963, 969-71.

67. *Id.*

68. *See* Eberle, *supra* note 15, at 1034.

69. *See id.*

70. *See* KOMMERS, *supra* note 12, at 489.

71. *See* Eberle, *supra* note 15, at 1034.

72. *See* Richard Gawthrop & Gerald Strauss, *Protestantism and Literacy in Early Modern Germany*, 104 PAST & PRESENT 31 *passim* (1984); *cf.* JOHN WILLIAM PERRIN, THE

understand scripture by his or her own lights, facilitating direct communication with God.

Related to this is the long history of governmental accord with religious authorities, reached by formal treaties called concordats, which governed issues involving religious education, social services, and the like.⁷³ Church and religion have played a much more active public role in German life than in American life, and these factors influence the modern German idea of church-state cooperation. However, unlike England or France, Germany has never had an official, established state church, although Lutheranism or other forms of Protestantism effectively functioned as *de facto* established churches in several of the German states before unification in 1871.⁷⁴

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 more homogenous than the United States.⁷⁵

Fourth, religious tolerance came late to Germany. Until the Weimar Constitution of 1919, church-state relations were close and religious discrimination was widespread. With Protestantism effectively operating as the official church in much of the Prussian-dominated German Reich during the nineteenth century, Roman Catholics, who were one-third of the population, were often barred from high positions in the Reich government, and Jews were routinely excluded from public service and the army.⁷⁶ Historically, German constitutions distinguished between dominant churches (Lutheran, other Protestant, and Roman Catholic) and minor sects.⁷⁷

Fifth, the Basic Law is framed specifically against the horrors of the Hitler era.⁷⁸ Most notable is the securing of the social order on the premise of the inviolability of human dignity.⁷⁹ This centers the society

HISTORY OF COMPULSORY EDUCATION IN NEW ENGLAND (Meadville, Pa., Chautauqua-Century Press 1896).

73. See Eberle, *supra* note 15, at 1034.

74. *Id.* at 1035. Germany 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. *Id.*

75. Roughly eight percent of the German population is composed of minorities. The largest minority group is Turkish. Roughly three percent of the German population is Muslim. See EBERLE, *supra* note 52, at 49.

76. See Eberle, *supra* note 15, at 1035.

77. See KOMMERS, *supra* note 12, at 444-45.

78. See Eberle, *supra* note 15, at 1035.

79. See *id.*

around the human person and her flourishing. Religious freedoms, in particular, are indispensable to this vision because the spirituality of religion or belief in some other ideal is a core element of the development of human personality. Only with the lessons learned from the Hitler era did Germany secure freedom from coercion of conscience, the essence of religious freedom discovered and elaborated on centuries earlier by Roger Williams,⁸⁰ John Locke,⁸¹ and James Madison.⁸² Thus, development of religious freedom along these Enlightenment lines in Germany was a late affair.⁸³

In the post-World War II era, the framers of the Basic Law continued the tradition of church-state cooperation. The churches were poised to help in the reconstruction of Germany, as they were less tainted than other institutions by an association with Hitler.⁸⁴ This was an additional factor that facilitated the major role of church and religion in German society.⁸⁵

All of this German history provides a very different background than the familiar American story of the influential period just prior to the adoption of the United States Constitution, during which Thomas Jefferson and James Madison led crucial developments to secure freedom of conscience and faith and to institute separation of church and state. This experience in Virginia provided the main model for the framing of American religious protections.⁸⁶

On the other hand, Germany and the United States share an important link in history: The flowering of religious liberty, through judicial protection, occurred after World War II. The Basic Law is a 1949 document framed in reaction to the abuse of governmental power

80. See ROGER WILLIAMS, *THE BLOODY TENENT OF PERSECUTION FOR CAUSE OF CONSCIENCE* (Richard Groves ed., Mercer Univ. Press 2001) (1644).

81. See JOHN LOCKE, *A LETTER CONCERNING TOLERATION*, reprinted in JOHN LOCKE: *A LETTER CONCERNING TOLERATION IN FOCUS* 12, 40 (John Horton & Susan Mendus eds., 1991).

82. See Letter from James Madison to the Honorable the General Assembly of the Commonwealth of Virginia: A Memorial and Remonstrance (Oct. 1785), in *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 8 (Marvin Meyers ed., 1973) [hereinafter Letter from Madison, A Memorial and Remonstrance] (“[Liberty of conscience is] precedent both in order of time and degree of obligation, to the claims of Civil Society.”).

83. Of course, the forces at work before and after the 1648 Treaty of Westphalia formulated important religious protections. See *supra* text accompanying note 1.

84. See Eberle, *supra* note 15, at 1034-35.

85. See KOMMERS, *supra* note 12, at 490.

86. See *McGowan v. Maryland*, 366 U.S. 420, 437 (1961); *Everson v. Bd. of Educ.*, 330 U.S. 1, 11-13 (1947); see also Adams & Emmerich, *supra* note 32, at 1572 n.54 (collecting authorities).

exercised during the Hitler era.⁸⁷ Interestingly, however, we also 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 this incorporation were the Free Exercise Clause in 1940⁸⁸ and the Establishment Clause in 1947.⁸⁹ Modern Establishment Clause jurisprudence began with *Everson v. Board of Education* in 1947.⁹⁰ The first of very few successful Free Exercise claims was made in 1963 in *Sherbert v. Verner*.⁹¹

III. UNITED STATES CONSTITUTIONAL TEXT AND TRADITION

A. *American Text*

In contrast to the detail of the German Basic Law, the U.S. Constitution enumerates religious liberty in only two places: the First Amendment⁹² and Article VI, Clause 3, which provides, “[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”⁹³ 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 also continued in the colonies and early states.⁹⁴ The practice of requiring religious tests through mandated oaths stubbornly persisted until 1961, when the Supreme Court declared it unconstitutional, illustrating how social reality can often lag behind a constitutional ideal.⁹⁵ There is little other jurisprudence under the Religious Test Clause, as most issues relating to religion have involved interpretation of the First Amendment religious freedoms.

87. See Eberle, *supra* note 15, at 1036.

88. See *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940).

89. See *Everson*, 330 U.S. at 18.

90. *Id.*

91. 374 U.S. 398, 401-02 (1963).

92. U.S. CONST. amend. I.

93. *Id.* art. VI, cl.3.

94. See Adams & Emmerich, *supra* note 32, at 1576-77. American colonists commonly used English test oaths to support Anglican and Congregational establishments. *Id.* Early state constitutions commonly required test oaths as preconditions to hold public office. *Id.* This history was a main motivation for prohibiting mandated religious oaths in Article VI of the Constitution. See *id.* at 1577-78.

95. See *Torcaso v. Watkins*, 367 U.S. 488, 494-96 (1961) (holding that a Maryland constitutional provision requiring state officials to declare belief in God was unconstitutional).

Textually, the First Amendment singles out religion in two ways. The Establishment Clause delimits governmental⁹⁶ power over religion by prohibiting it from establishing religion. 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.⁹⁷ So, we can see there is an interesting relationship, if not tension, between the Establishment Clause and the Free Exercise Clause.⁹⁸ The Establishment Clause would appear to single out religion for some form of official inaction; the Free Exercise Clause would seem to single out religious activity for some form of favored treatment.

There are both similarities and differences between the two religion 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, notably expressed by a guarantee of liberty of conscience and its concomitant guard against coercion of conscience.⁹⁹ We might say liberty of personal conscience is the common, core ideal of the two Clauses. However, the two Clauses differ over strategy. The Establishment Clause is primarily institutionally based; that is, it delimits governmental power over religion and safeguards the voluntariness of individual and group

96. With the incorporation of the Establishment Clause into the Fourteenth Amendment, 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. *See* *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947). In this Article, I address only the postincorporation 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 preincorporation state of affairs. *See, e.g., Van Orden v. Perry*, 125 S. Ct. 2854, 2865 (2005) (Thomas, J., concurring) ("I have previously suggested that the [Establishment] Clause's text and history 'resis[t] incorporation' against the States."); *see also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 46 (2004) (Thomas, J., concurring) (arguing the same principle); *Zelman v. Simmons-Harris*, 536 U.S. 639, 677-80 (2002) (Thomas, J., concurring) ("[I]n the context of the Clause, it may well be that state action should be evaluated on different terms . . .").

97. *See* U.S. CONST. amend. I.

98. *See, e.g., McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722, 2746 (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. 712, 718 (2004) ("These two Clauses, the Establishment Clause and the Free Exercise Clause, are frequently in tension . . . [but] 'there is room for play in the joints . . .'").

99. *See* U.S. CONST. amend. I.

choice over religion.¹⁰⁰ 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.¹⁰¹ This Article cannot work out the difficult tension between these clauses, a tension produced by an Establishment Clause that constrains government with respect to religion and a Free Exercise Clause that empowers religious exercise. Appropriate is Justice Kennedy's observation that the limits of the Free Exercise Clause lie in the Establishment Clause, in contrast to the structural protection of free speech.¹⁰²

Turning more directly to the Establishment Clause, it seems fair to say the United States Supreme 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 constraint is required. Perhaps 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 the Establishment Clause's 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 a workable standard of law. For example, at the end of the 2004-2005 term, 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 twenty-one other historical markers and seventeen other monuments of various types and, therefore, it seemed more "historical" than "religious."¹⁰³ However, a Kentucky courtroom 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.¹⁰⁴ We can see that it is hard to reach agreement on what the Establishment Clause means.

100. *See id.*

101. *See id.*

102. "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).

103. *See Van Orden v. Perry*, 125 S. Ct. 2854, 2862-64 (2005).

104. *See McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722, 2730-32, 2745 (2005).

Since the Court started applying the Establishment Clause vigorously in 1947,¹⁰⁵ it has vacillated uneasily between separationist and accommodationist stances. In *Everson*, all nine members of the Court employed separationist rhetoric, but the Court split 5-4 in applying the doctrine to the facts, upholding state-supported bussing of Roman Catholic schoolchildren.¹⁰⁶ The Court analogized state-provided bussing to other safety and welfare services, like police or fire protection.¹⁰⁷

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.¹⁰⁸ American religious history is more complicated than commonly thought, and consists, at least, of a contest between separationism and accommodationism. This contest is long-running and continues to percolate quite strongly today.

The crucial developments in Virginia led first by Thomas Jefferson, and then, during the Assessment controversy of 1784-1786, by James Madison, Patrick Henry, and George Mason,¹⁰⁹ 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.¹¹⁰ We might say an originalism of jurisprudence followed an influential strand of originalist history.

For Thomas Jefferson and James Madison, Enlightenment ideals drove their version of civic republicanism.¹¹¹ They advocated separation of church and state as the proper institutional relationship.¹¹² For Jefferson, deeply influenced by French thought,¹¹³ separation was

105. See *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

106. See *id.* at 15-16, 18, 28, 31-32.

107. *Id.* at 17-18.

108. See Adams & Emmerich, *supra* note 32, at 1582-83.

109. See *id.* at 1572.

110. See, e.g., *McGowan v. Maryland*, 366 U.S. 420, 437 (1961); *Everson*, 330 U.S. at 11-13; see also Adams & Emmerich, *supra* note 32, at 1572 n.54 (collecting authorities). Today, the Court of the Vinson-Warren era is roundly criticized for looking at history too cursorily, considering only this Virginia experience. See, e.g., Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2108-09 (2003).

111. See Adams & Emmerich, *supra* note 32, at 1583-87.

112. See *id.*

113. See *id.* at 1584. Jefferson served the United States as minister to France from 1785-1789. *Id.* Thomas Paine, author of the leading revolutionary tract, *Common Sense* (1776), was also a confirmed Francophile. Thomas Paine, *Common Sense*, reprinted in

mainly a strategy to protect the fragility of the experiment in civic republicanism, and perhaps an argument for secularism.¹¹⁴ For Madison, separation was designed to protect politics and religion; Madison believed both in the value of the civic-republican experiment and the purity and preciousness of religion.¹¹⁵ Jefferson and Madison were probably the main architects of the First Amendment religious guarantees.¹¹⁶

Religious evangelicals (most prominently Baptists) aligned themselves with Enlightenment separatists to support separation of

THOMAS PAINE: REPRESENTATIVE SELECTIONS 3 (Harry Hayden Clark ed., rev. ed. Am. Century Series 1965) (1944). Paine aided the French in drafting the famous *Declaration of Rights of Man and the Citizen* (1789), which also secured religious freedoms. See Adams & Emmerich, *supra* note 32, at 1584. 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* (pt. 1) 56 (Heritage Press 1961) (1791).

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 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. See Francis Cardinal George, *Civil Liberties vs. National Security: The Enduring Tension*, 19 NOTRE DAME J.L. ETHICS & PUB. POL’Y 219, 222 n.8 (2005); Alien and Sedition Act of 1798, ch. 66, 2 Stat. 577.

For other classifications of early influences on the First Amendment religious protections, see Adams & Emmerich, *supra* note 32, at 1583-95 (distinguishing between separatists, political centrists, and pietistic separatists); Witte, *supra* note 32, at 377-88 (distinguishing between Puritan, evangelical enlightenment, and civic-republican views).

114. Jefferson’s famous statement of the “wall of separation” is drawn from his letter to Nehemiah Dodge and others. See Letter from Thomas Jefferson to Messrs. Nehemiah Dodge and Others, a Committee of the Danbury Baptist Association, in the State of Connecticut (Jan. 1, 1802), in THOMAS JEFFERSON: WRITINGS 510 (Merrill D. Peterson ed., 1984); see also Letter from James Madison to Edward Livingston (July 10, 1822), in 9 THE WRITINGS OF JAMES MADISON 98, 102 (Gaillard Hunt ed., 1910) (“[A] perfect separation between ecclesiastical and civil matters” is the best course to ensure that “religion [and government] will both exist in greater purity, the less they are mixed together.”). Madison, however, was not always so absolute in his view of separatism. He 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 (1832), in 9 THE WRITINGS OF JAMES MADISON, *supra*, at 484, 487 [hereinafter Madison’s Letter to Rev. Adams]. In later life, Madison returned to a view of complete separation of church and state. Adams & Emmerich, *supra* note 32, at 1587.

115. See Witte, *supra* note 32, at 377-78.

116. See *Everson Bd. of Educ.*, 330 U.S. 1, 11-13 (1947) (describing and observing the leading role played by Jefferson and Madison in formulating the values and drafting the religious protections of the First Amendment); see also *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (discussing the adoption of the First Amendment). It is hard to determine who actually drafted the First Amendment, although most people credit Madison. See Adams & Emmerich, *supra* note 32, at 1581. They credit him for good reason: Madison sponsored the Bill of Rights as part of the compromise in Virginia leading to the state’s ratification of the Constitution, and he then labored mightily to craft the Bill of Rights to achieve consensus. See *Wallace v. Jaffree*, 472 U.S. 38, 97-99 (1985) (Rehnquist, J., dissenting).

church and state.¹¹⁷ In part, their motivation included their own self-interest and the interest of the community.¹¹⁸ As minorities, Baptists were worried that dominant political and religious power would inhibit them and other similarly situated groups.¹¹⁹ Separation of church and state was a way to get the state out of their—and other minorities’—way.¹²⁰

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 institution best by protecting the purity and integrity of each against the inevitable tensions arising from one infringing on the domain of the other.¹²¹ Roger Williams, after all, was the original source for the “wall of separation” metaphor.¹²² Many people view the evangelicals as advocating separation of church and state in order to protect the purity of religion as a voluntary, noncoerced exercise, but much evangelical thought was deeper than that, arguing also for political independence and a theory of the state.¹²³

The separationist argument, at heart, asserts that religion is a private, voluntary matter between only people and God.¹²⁴ There can be no intrusion into this inviolate sphere of a person’s spirit.¹²⁵ 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.¹²⁶ Moreover, entangling government in religion, or religion in government, leads to great divisiveness in society as religion or its particular sects will inevitably be favored or disfavored in official policies. This leads to overconfidence or arrogance in those

117. See Witte, *supra* note 32, at 381-82.

118. See *id.*

119. See *id.*

120. See *id.*

121. See *id.* at 381.

122. See Edward J. Eberle, *Roger Williams’ Gift: Religious Freedom in America*, 4 ROGER WILLIAMS U. L. REV. 425, 427 (1999) (citing Roger Williams, Mr. Cottons Letter Lately Printed, Examined and Answered (1644), *reprinted in* 1 THE COMPLETE WRITINGS OF ROGER WILLIAMS 313, 392 (Perry Miller ed., 1963)). It is possible Jefferson used the wall of separation metaphor to converse in the language of the Baptists, who were well acquainted with Williams’s metaphor. See Witte, *supra* note 32, at 400 n.144.

123. See, e.g., Eberle, *supra* note 122, at 456-60.

124. See Witte, *supra* note 32, at 399-400.

125. See *id.*

126. “[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.” Letter from Madison, A Memorial and Remonstrance, *supra* note 82, at 12.

avored and hostility and rejection in those disfavored, whether religious or not.¹²⁷ Thus, evangelicals, like Enlightenment civic republicans,¹²⁸ desired that religious bodies be free from state favors like “tax exemptions, civil immunities, property donations, and other forms of state support for the church.”¹²⁹ The Baptist minister John Leland, echoing John Locke, put the matter bluntly: ““The notion of a Christian commonwealth should be exploded forever.””¹³⁰

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 *entrée* into policing the border between church and state, following Jefferson’s metaphor of a “wall of separation.”¹³¹ Much of Establishment Clause law that has followed, such as the two recent Ten Commandment cases, has been a battle over whether a “wall of separation” is the proper rubric within which to view church-state relations.¹³²

The American experiment in separationism was unique, being the first of its kind in the world, with Roger William’s experiment in Providence colony, in 1638, being the very first.¹³³ Even today, there are few experiments in strict separation of church and state. France¹³⁴ and Turkey¹³⁵ provide two other notable experiments.

127. See Witte, *supra* note 32, at 399–400.

128. As Madison observed: “[A] perfect separation between ecclesiastical and civil matters [is best for] religion [and government which] will both exist in greater purity, the less they are mixed together.” Letter from James Madison to Edward Livingston, *supra* note 114, at 102. 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, is the best guard against faction, which could thereby better preserve liberty. See THE FEDERALIST Nos. 10, 51 (James Madison).

129. See Witte, *supra* note 32, 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 32, at 1593.

130. JOHN LELAND, THE WRITINGS OF THE LATE ELDER JOHN LELAND 118 (New York, G.W. Wood 1845), *cited in* Witte, *supra* note 32, at 382. As recounted by Professor Feldman, Locke said: “[T]here is absolutely no such thing, under the Gospel, as a Christian commonwealth.” Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 387 (2002) (citing LOCKE, *supra* note 81, at 40).

131. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 16, 18 (1947); *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

132. See *Van Orden v. Perry*, 125 S. Ct. 2854 (2005); *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722 (2005).

133. See Eberle, *supra* note 122, at 449.

134. 1958 CONST. art. 2 (Fr.) (“*La France est une République indivisible, laïque, démocratique et sociale.*” [“France is an indivisible, secular, democratic, and social Republic.”]).

135. TURK. CONST. art. 24.

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.¹³⁶ But Puritans also advocated cooperation between church and state to aid religion and support the State.¹³⁷ Under Puritanism, government could support religious education, pay the salaries of clergy, provide land to churches, grant tax exemptions to religious organizations, and provide other aid.¹³⁸ Of course, only Christian churches—primarily the Congregational Church (the successor to the Puritans)—received such state benevolence.¹³⁹ Church officials, in turn, aided the state by hosting town assemblies, political rallies, and educational instructions, acting as libraries, “preaching obedience to the authorities,” and more general encouragement of right and lawful conduct in citizens.¹⁴⁰

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.¹⁴¹ 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 establishment.”¹⁴² These sets of values—free conscience, free exercise, pluralism, separationism, disestablishment, and equality—are what we

136. See Witte, *supra* note 32, at 378-79. Puritans conceived church and state as “two seats of Godly authority in the community.” *Id.* at 379. The role of the church is to tend to matters spiritual; the role of the state is to maintain peace and order. See *id.*

Church officials were prohibited from holding political office, serving on juries, interfering in governmental 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.

Id.

137. See *id.*

138. *Id.* at 379-80.

139. See *id.*

140. *Id.* at 380.

141. *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.” AHLSTROM, *supra* note 2, at 124.

142. Witte, *supra* note 32, at 386.

might call a core of “essential rights and liberties of [religion].”¹⁴³ But in contrast to their Enlightenment counterparts, they desired and encouraged a common religious ethic.¹⁴⁴ George Washington, for example, observed that “Religion and Morality are the essential pillars of Civil society.”¹⁴⁵ Religion promotes morality, and morality is important to the teaching of right 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.¹⁴⁶ 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.¹⁴⁷ They “endorsed tax exemptions for church properties and tax support for religious schools, charities, and

143. *Id.* at 388 (quoting 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. See 1 ANNALS OF CONG. 784 (Joseph Gales, Sr. ed., 1834).

144. Witte, *supra* note 32, at 386. The civic-republican religious ethic was, of course, less stringent and intolerant as compared with the Puritan ethic. Dissenters from Puritan ideology, such as Roger Williams and Anne Hutchinson from Massachusetts Bay, were banished. See Eberle, *supra* note 1, at 320.

145. Letter from George Washington to the Clergy of Different Denominations Residing in and Near the City of Philadelphia (Mar. 3, 1797), *in* 35 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745-1799, at 416 (John C. Fitzpatrick ed., 1931). Washington’s Farewell Address of September 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 men and citizens.” George Washington, President of the United States, Farewell Address to the People of the United States (Sept. 17, 1796), *quoted in* Adams & Emmerich, *supra* note 32, at 1605. John Adams similarly observed: “[W]e 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 Massachusetts (Oct. 11, 1798), *in* 9 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 229 (Charles Francis Adams ed., 1854). 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.” *Id.*

146. As Madison observed in The Federalist Number 55:

As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form.

THE FEDERALIST NO. 55 (James Madison).

147. See Witte, *supra* note 32, at 386-87.

missionaries; donations of public lands to religious organizations; and criminal protections against blasphemy, sacrilege, and interruption of religious services.¹⁴⁸ In practice, these official favors were accorded only to Protestants; “Quakers, Catholics, and the few Jewish groups about were routinely excluded.”¹⁴⁹ 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.”¹⁵⁰ Massachusetts was the prime example of this more accommodationist approach.¹⁵¹ The Supreme Court has recognized some of this early history in sustaining the constitutionality of opening legislative sessions with a state-paid chaplain,¹⁵² tax exemptions for churches,¹⁵³ and establishing Sunday as a uniform day of rest.¹⁵⁴ There is, in fact, much historical work arguing that the First Amendment supports such an accommodationist approach.¹⁵⁵

However, the historical record discloses an important qualification attached to state 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.”¹⁵⁶

148. *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 32, at 1571. 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. *See* Lee v. Weisman, 505 U.S. 577, 623 (1992) (Souter, J., concurring). 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. *See id.* at 623-26; Adams & Emmerich, *supra* note 32, at 1585, 1587.

149. Witte, *supra* note 32, at 387.

150. *Id.* at 386.

151. *See id.* at 387.

152. *Marsh v. Chambers*, 463 U.S. 783, 795 (1983).

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

154. *Braunfeld v. Brown*, 366 U.S. 599, 608-09 (1961); *McGowan v. Maryland*, 366 U.S. 420, 451-52 (1961).

155. *See* *Wallace v. Jaffree*, 472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting) (arguing that Madison and other members of Congress saw the First Amendment as prohibiting the establishment of a national religion and perhaps the preference of one religious sect over another, but not as requiring the government’s neutrality between religion and nonreligion); Adams & Emmerich, *supra* note 32, at 1579 n.88 (collecting authorities).

156. Feldman, *supra* note 130, 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*. *See* 330 U.S. 1, 21-23 (1947) (Jackson, J., dissenting); *see also* Douglas Laycock, “Nonpreferential” Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875, 900-01 (1986) (discussing problems in the application of the tax waiver).

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.¹⁵⁷

Thus, if we were following a constitutional theory of originalism, Justice Scalia is quite right to observe that “[w]ith respect to public acknowledgment of religious belief, it is entirely clear from our Nation’s historical practices that the Establishment Clause permits . . . disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.”¹⁵⁸ Justice Story captured this sentiment by famously (or infamously) observing that the Establishment Clause was designed “not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects.”¹⁵⁹ In fact, Justice Story and others of the nineteenth century commonly thought that “Christianity is a part of the common law.”¹⁶⁰ 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 the time?

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 non-Christian belief systems. There

157. See Feldman, *supra* note 130, 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.

158. *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722, 2753 (2005) (Scalia, J., dissenting) (observing further that George Washington’s Thanksgiving Proclamation and the Ten Commandments are monotheistic, embracing Christianity, Judaism, and Islam). *But see id.* at 2744-45 (majority opinion) (“[T]he dissent says that the deity the Framers had in mind was the God of monotheism, with the consequence that government may espouse a tenet of traditional monotheism. This is truly a remarkable view.”).

159. ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* 13 (1988) (quoting 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 629 (Melville M. Bigelow ed., Boston, Little, Brown & Co., 5th ed. 1891) (emphasis omitted)). Chief Justice John Marshall “also believed that religion was essential for the survival of the republic,” and noted the close relationship between Christianity and the United States. Adams & Emmerich, *supra* note 32, at 1590.

160. See Witte, *supra* note 32, at 407. “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 32, at 1590 (quoting STORY, *supra* note 159, at 629).

was overt discrimination against other sects and belief systems. Both countries effectively evidenced de facto state establishments of religion in certain states. Some states established Christianity, and others specifically established Protestantism. A clear difference between American and German history is that some states in early America also adhered to a different strand of church-state relations: separationism. Rhode Island was the first experiment in separationism,¹⁶¹ and the Virginia experience in separationism was, as previously noted, perhaps the decisive influence in framing the First Amendment. With this look at the countries' religious history, let us now evaluate their approach to public support of religious education.

IV. PUBLIC SUPPORT OF RELIGION IN GERMAN SCHOOLS

The deep tradition of church sponsorship of learning is a major reason why the traditional form of school in Germany was a confessional school, which was designed to teach religion alongside core secular topics.¹⁶² The movement away from confessional schools began with the liberal movement of the nineteenth century, inspired by the French Revolution, which occurred mainly in southern areas like the southwestern state of Baden.¹⁶³ The nineteenth-century liberalization of parts of Germany led to a process of secularization throughout society, including the school system.¹⁶⁴ In place of 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.¹⁶⁵ The open community school (an interdenominational school with a distinct Christian orientation presenting a range of religious and ideological views) thereby became the main model for schools in Germany. The Weimar Constitution essentially confirmed this school arrangement, which the Basic Law ratified as well.¹⁶⁶

Further confirmation of the 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

161. See Eberle, *supra* note 122, at 449.

162. See BVerfG Dec. 17, 1975, 41 BVerfGE 29 (57) (*Baden-Württemberg Christian Cmty. Sch. Case*).

163. See Muehlhoff, *supra* note 19, at 457.

164. ERNST CHRISTIAN HELMREICH, RELIGIOUS EDUCATION IN GERMAN SCHOOLS: AN HISTORICAL APPROACH 37-41 (1959).

165. See BVerfGE 41, 29 (57) (*Baden-Württemberg Christian Cmty. Sch. Case*).

166. See GG arts. 4, 7(3), 140.

issued on the same day. While we might say that 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 its own educational policy.¹⁶⁷ Three cases we now consider reflect this variation: *Baden-Württemberg Christian Community School Case*,¹⁶⁸ *Bavarian Christian Community School Case*,¹⁶⁹ and *North-Rhein Westphalia Christian Community School Case*.¹⁷⁰ We will primarily consider the *Baden-Württemberg Christian Community School Case*, the main case.

A. Baden-Württemberg 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.¹⁷¹ In religion class, authorities from the major religions—Catholicism, Lutheranism, or other Protestantism—select teachers and materials to instruct in their faith.¹⁷² In this sense, the school is interdenominational. Recently, Islam has achieved a toehold to do the same.¹⁷³ Religion class is a regular and required part of the school curriculum.¹⁷⁴ Parents (or students when they reach ages of fourteen or sixteen) decide which religious instruction to receive.¹⁷⁵ They can also decide to receive no religious instruction and be relieved from the requirement.¹⁷⁶ The school is also interdenominational in that there must be a provision for a format for presentation of a range of religious and ideological views.¹⁷⁷ Outside of religion class, Christianity can only be mentioned as an historical or cultural force, but not as a chosen

167. See *id.* art. 7(1).

168. BVerfGE 41, 29.

169. BVerfG Dec. 17, 1975, 41 BVerfGE 65 (*Bavarian Christian Cmty. Sch. Case*).

170. BVerfG Dec. 17, 1975, 41 BVerfGE 88 (*N.-Rhein Westphalia Christian Cmty. Sch. Case*).

171. Article 7 codifies this arrangement of the Weimar era. See GG art. 7(3).

172. See Muehlhoff, *supra* note 19, at 458.

173. Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court] Feb. 23, 2005, 9 Entscheidungen des Bundesverwaltungsgerichts [BVerwGE], available at <http://www.bundesverwaltungsgericht.de> (holding that the teaching of Islam in North-Rhein Westphalia cannot be rejected out of hand because Islam is not organized as a legal corporation, as is the usual case, and finding further proceedings necessary to determine whether Islam has the characteristics necessary to qualify as a legal religious order).

174. See GG art. 7(3).

175. *Id.*; KOMMERS, *supra* note 12, at 471.

176. See GG art. 7(2).

177. See Muehlhoff, *supra* note 19, at 458.

tenet of faith.¹⁷⁸ All classes, apart from religion, are shared commonly by students, the ideal of the nineteenth-century liberal experiment.¹⁷⁹

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, and Brandenburg.¹⁸⁰ 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.¹⁸¹

Christian community schools did not resolve all constitutional issues, despite the long-standing school practice. The question in the *Baden-Württemberg Christian Community School Case* was a recent Baden-Württemberg 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.¹⁸² A father filed a constitutional complaint that the change in school to a more Christian orientation violated his Article 4 free exercise and Article 6 parental rights because it would be harder for him to raise his child in a nonreligious environment, as he desired.¹⁸³ Of course, under Article 7 of the Basic Law, it was the province of the *Land* legislature to determine the appropriate form of school for the region, upon taking into consideration the full range of varied interests at stake.¹⁸⁴ Still, only the Constitutional Court could determine the permissible circumference of constitutionality within which the legislature could work, which it proceeded to do. The Court found the complaint unfounded, which had the effect of confirming the constitutionality of a Christian community school.¹⁸⁵

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 4 free exercise rights (interference with his choice or religion or ideology)

178. See *id.* at 457.

179. See BVerfG Dec. 17, 1975, 41 BVerfGE 29 (58) (*Baden-Württemberg Christian Cmty. Sch. Case*).

180. See Muehlhoff, *supra* note 19, at 456.

181. For a discussion of the role of religion in schools in Bremen, Berlin, and Brandenburg, see *infra* text accompanying notes 222-228.

182. BVerfGE 41, 29 (36) (*Baden-Württemberg Christian Cmty. Sch. Case*).

183. *Id.* at (44). His wife did not join in the complaint. *Id.*

184. GG art. 7; BVerfGE 41, 29 (46-48) (*Baden-Württemberg Christian Cmty. Sch. Case*).

185. BVerfGE 41, 29 (44) (*Baden-Württemberg Christian Cmty. Sch. Case*).

and his Article 6 parental rights (interference with his right to raise his child according to desired religious or ideological views).¹⁸⁶ However, his assertion of rights could only go so far. In the German constitutional order, rights' holders are not isolated individuals or, as is sometimes the case in American law, lone rangers. Instead, German rights' holders operate within a social community that instills values and responsibilities in its 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 be quite satisfied with the form of the school as it is.¹⁸⁷ It is fair to say that no parent can demand a certain kind of school.¹⁸⁸

Further, the German conception of religious rights is different than the American conception, reflecting more of an orientation of development and assertion of personality rather 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.¹⁸⁹ The outer dimension to German religious rights are far more pronounced than in American law, especially with the movement from *Sherbert v. Verner*¹⁹⁰ to *Employment Division, Department of Human Resources v. Smith*.¹⁹¹ The German movement toward holistic personhood has its roots in the architectonic principle of human dignity and the accompanying free unfolding of personality that animates the German constitutional order. The transcendent

186. *Id.* at (36-37).

187. *Id.* at (50).

188. *Id.* at (46).

189. Belief and freedom of faith encompass 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 4, section 1, and Article 2 of the Weimar Constitution comprise not only defensive rights, which prohibit the state from entering the highly personal area of individuality, but also endow a positive sense, that guarantees room for the active conviction of faith and the realization of the autonomous personality in the religious or ideological arena. *Id.* at (49).

190. 374 U.S. 398 (1963) (noting that free exercise claims are judged by the courts under conventional strict scrutiny analysis).

191. 494 U.S. 872 (1990) (noting that free exercise claims are judged not by strict scrutiny but by inquiry into whether law in effect is generally applicable and neutral). For discussion of this difference, see Eberle, *supra* note 15, at 1023.

dimension of human personality captured by religion and 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. This is essentially what the Constitutional Court instructed.¹⁹²

The struggle, moreover, was not just among contending parents; the state had supervisory duties over education as well.¹⁹³ 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.¹⁹⁴

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.¹⁹⁵ The choice of school form appropriate for the community, however, was to be determined by the 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 in Germany.

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.¹⁹⁶ Under German law, the legislative judgment would involve concordance (*Konkordanz*), seeking an equilibrium to balance the contending rights and interests.¹⁹⁷ Inevitably, this will be a compromise.

Yet, the legislative judgment cannot be simply the product of majority vote. If it were, the majority would always get its way.

192. BVerfGE 41, 29 (50) (*Baden-Württemberg Christian Cmty. Sch. Case*) (holding that 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 is likely to be limited by other parents' exercise of the same rights; thus, communities must search for a compromise addressing all views).

193. See GG arts. 6(2), 7(1).

194. See *id.* arts. 1(1), 20(2).

195. See *id.* art. 28(2) (outlining a *Land's* right to regulate local affairs); BVerfGE 41, 29 (37) (*Baden-Württemberg Christian Cmty. Sch. Case*).

196. BVerfGE 41, 29 (47) (*Baden-Württemberg Christian Cmty. Sch. Case*).

197. *Id.* at (50-51).

Special regard must also be given to minority views.¹⁹⁸ A careful look at the constitutional principles set down by the Court provides insight into the German solution of how to address religion in common schools.

In setting out guidelines governing the role religion can play in the Christian community school, the Constitutional Court emphasized the need to minimize any coercion of conscience.¹⁹⁹ First, any religious instruction must be done with a minimum of forced persuasion; there can be no insistence on the truth of Christianity.²⁰⁰ Second, there can be no religious instruction or proselytization in school except in religion class.²⁰¹ Students who desire not to participate in religion class must be excused from doing so as a matter of free exercise of conscience.²⁰² Third, outside of religion class, Christianity, as the dominant religion, can only be referred to as an historical or cultural force, not as religious doctrine.²⁰³ The more privileged position of Christianity reflects its dominance as a cultural force, not its truth as doctrine.²⁰⁴ Fourth, schools must be open and tolerant of other beliefs.²⁰⁵ The role of the school is to offer a variety of religious and ideological perspectives as a forum for learning.²⁰⁶ There can be no discrimination against other religious or ideological views.²⁰⁷ In the view of the court, these constraints on the role religion plays in common schools should afford parents adequate room to impart or inculcate religious and ideological views to their children as they deem fit, without coercion of conscience.²⁰⁸

For those parents yet unhappy with this arrangement for their children, further options are available. First, a child may be excused from religious class.²⁰⁹ Second, a child can attend a secular school in communities where that option is available.²¹⁰ Third, where no secular schools are available, a child can attend a private school, secular or

198. *Id.* at (47-48).

199. *Id.* at (54).

200. *Id.* at (51).

201. *Id.* at (51-52).

202. *Id.*

203. *Id.* at (52).

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at (51-52).

209. *Id.* at (45).

210. *Id.*

religious, according to choice.²¹¹ We can thus see that a *Land* is obligated to provide parents and students a wide range of religious and ideological opportunities.

Notable about the German community school model is its transparently Christian orientation, reflective of the predominant Christian roots of the society. Yet, the role of religion is more constrained than the model would suggest. Religious instruction or indoctrination can only occur in religion class for those freely willing to participate. 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.²¹² In this regard, Christianity is to be treated like any other belief system under a school that is designed to be open to and tolerant of all views. In this aspect, the state acts somewhat neutrally, not taking sides on religious views and, instead, offering the school as a forum for the different communities of faith to teach their tenets.

B. Bavarian Christian Community School Case

The prohibition on teaching religious tenets in schools was put to the test in the *Bavarian Christian Community School Case*,²¹³ which involved 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.²¹⁴ The churches had published their pedagogical inclinations in their official publications.²¹⁵ Catholic and Lutheran sets of parents unsuccessfully sought to enjoin the practice because they believed this would convert the Bavarian school from an interdenominational school to a confessional one.²¹⁶

The Court attributed the choice of introducing this more distinctly Christian program to the churches themselves, and not the state.²¹⁷ Thus, the Court had no constitutional objections.²¹⁸

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

212. "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).

213. BVerfG Dec. 17, 1975, 41 BVerfGE 65.

214. *Id.* at (70).

215. *Id.* at (68-70).

216. *Id.* at (71, 77).

217. *Id.* at (85).

218. *Id.*

The guidelines were published in church papers, not official ones.²¹⁹ The guidelines were only helpful aids; they were not binding on the schools or the state.²²⁰ Moreover, any overt confrontation with Christianity can be dealt with by the fundamental constitutional norms announced in *Baden-Württemberg Christian Community School Case*: noncoercion, toleration, and nondiscrimination.²²¹ Concretely, this meant that the community school had to allow presentation of other religious and ideological views as well, unlike a confessional school. No person could be made to feel isolated.²²² The Bavarian choice illustrates the wide options of school form available under German federalism.²²³ 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.

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.

C. Brandenburg Cases

Eastern regions of Germany that were formerly under Soviet occupation and then became part of the German Democratic Republic are, not surprisingly, distinctly less religious than their counterparts who belonged to the Federal Republic of Germany before unification.²²⁴ The eastern states tended to carry over the more

219. *Id.*

220. *Id.*

221. *Id.* at (85-86).

222. *Id.* at (83).

223. The Court noted that a community could decide to have even a confessional school, as long as provisions—likely taking the form of a separate school—were made for dissenters. *Id.* at (86). However, the Court also decided, on the same day, that no parent can demand a confessional school. See BVerfG Dec. 17, 1975, 41 BVerfGE 88 (*N.-Rhein Westphalia Christian Cmty. Sch. Case*). Thus, the cases hold that no parent can demand a certain form of religious school, whether more religious (*North-Rhein Westphalia Christian Community School Case*) or more secular (*Baden-Württemberg Christian Community School Case*). Yet, it seems fair to observe that communities can tilt schools along more secular or sectarian lines.

224. See Wuerth, *supra* note 35, at 1152-54.

distinctly antireligious orientation when they joined the reunited Federal Republic.²²⁵

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, which was the standard course in the school curriculum.²²⁶ 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.²²⁷ This met with stiff resistance from the churches, who felt threatened by and displeased with the antireligious orientation of the instruction and asserted their authority as guardians of the faith in an attempt to preserve the domain of the believers.²²⁸ 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.²²⁹

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.²³⁰ 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 to do so.²³¹ 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 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

225. *See id.*

226. BVerfG Oct. 31, 2002, 106 BVerfGE 210 (211-15) (*Brandenburg IV*).

227. *Id.*

228. *Id.* at (211).

229. The 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 of the course. *Id.*; BVerfG July 28, 2002, 1 Verfahren über den Erlass einer einstweiligen Anordnung [BvQ] 25/02 (*Brandenburg III*); BVerfG, Apr. 23, 2002, 105 BVerfGE 235 (*Brandenburg II*); BVerfG, June 26, 2001, 104 BVerfGE 305 (308) (*Brandenburg I*).

230. BVerfGE 104, 305 (308) (*Brandenburg I*).

231. *See id.* at (308).

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. 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 in those classes and, upon request, reasonably creating options more suitable to their religious or 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 or 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 our next topic.

V. PUBLIC SUPPORT OF RELIGION IN AMERICAN SCHOOLS

A. *Public Schools*

It is strange, in a sense, to speak of public support of religion in American schools in the twenty-first century. With the dawn of modern Establishment Clause jurisprudence, the 1947 case *Everson v. Board of Education* launched the idea of separation of church and state, with mixed effect in Supreme Court jurisprudence, but with deep effect in the American psyche.²³² 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.²³³ One clear principle of

232. See 330 U.S. 1, 16 (1947) (“In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between church and State.’” (quoting *Reynolds v. United States*, 94 U.S. 145, 164 (1878))). 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. *Id.* 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. *Id.* at 17-18. The dissent disagreed, finding this to be a violation of separation of church and state under a more absolutist application of this principle. *Id.* at 63 (Rutledge, J., dissenting). Through the course of the Warren Court and into the early Burger Court, the Court understood the Establishment Clause to dictate 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. Compare *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971) (holding that a supplement paid to teachers in nonpublic schools and a reimbursement for purchases for nonpublic schools were unconstitutional), with *Walz v. Tax Comm’n*, 397 U.S. 664, 676, 680 (1970) (holding that property tax exemptions to religious organizations was constitutional).

233. See Eberle, *supra* note 120, at 478-79.

separationist philosophy is that there can be no public support of religious instruction in schools.²³⁴ 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 the lending of secular text books.²³⁵ Because the public school is the forum for inculcation of democratic and constitutional values, adherence to separationism, as influenced by Enlightenment tradition, made sense as a plausible interpretation of constitutional text.

Most American students attend public schools, where religious instruction does not occur as part of the public school curriculum, as is the norm in German schools. A case like *Epperson v. Arkansas*²³⁶ 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 “prohibit[ed] the teaching in its public schools and universities of the theory that man evolved from other species [i.e., evolution]” because it was “tailored to the principles or prohibitions of any religious sect or dogma.”²³⁷ 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.²³⁸

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, in contrast to the United States. There are, of

234. *See id.*

235. *Bd. of Educ. v. Allen*, 392 U.S. 236, 238-39 (1968) (finding it permissible to lend textbooks on secular topics). The pathbreaking case was *Mueller v. Allen*, 463 U.S. 388, 394-96 (1983), in which the Court sustained a Minnesota state tax deduction for tuition, textbook, and transportation expenses, ninety-six percent of the benefits of which went to religious schools.

236. 393 U.S. 97 (1968).

237. *Id.* at 98, 106; *see also* *Edwards v. Aguillard*, 482 U.S. 578, 593-94 (1987) (invalidating a Louisiana statute requiring teaching of “creation science” on constitutional grounds because such curricular choice advanced a religious viewpoint).

238. *Compare Zorach v. Clauson*, 343 U.S. 306, 312-13 (1952) (holding that students can constitutionally be dismissed from school premises to attend religious education conducted in nonschool buildings while nonparticipants must remain in school), *with* *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 2037 (1948) (holding it unconstitutional to release public school students from regular classes to attend religious instruction on public school premises, while nonparticipants were required to stay in regular school classes). *Good News Club v. Milford Central School* held that prayer and Bible lessons could be conducted after school hours, on public school premises, for students who attended the public schools. 533 U.S. 98, 119-20 (2001). *Good News* is distinguishable from *Zorach* on the ground that the religious instruction occurred outside the regular school curriculum and day, but certainly it is a dramatic move in the direction of public support for religious instruction.

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. It is also possible for communities in other *Länder* to have secular, nonreligious schools.²³⁹ In the United States, off public school premises time-release programs allow religion to be taught, and religious instruction may also occur after school hours at public schools.²⁴⁰ Thus, neither country is absolutist in its decision to teach or not teach religion in public schools.

B. *Private Religious Schools*

The forum for public support of religion in the United States shifted dramatically after *Mueller v. Allen*²⁴¹ was decided in 1983, moving from public schools to private, religious schools under the leadership of Chief Justice Rehnquist. The Rehnquist Court treated public accommodation of religion as an equal claimant on the public treasury. Religious accommodation ranks with other notable accomplishments of the Rehnquist Court, such as diminished Free Exercise rights,²⁴² enhanced attention to federalism,²⁴³ and enhanced police powers with respect to criminal due process rights.²⁴⁴ At war with the stricter separationist direction of Establishment Clause jurisprudence shepherded by prior Courts (most notably the Warren Court), the Rehnquist Court reworked Establishment Clause doctrine away from a separationist orientation (represented most prominently by *Lemon v. Kurtzman*²⁴⁵) toward an approach of formal neutrality,

239. See *supra* Part III.

240. See, e.g., *Good News Club*, 533 U.S. at 102; *Zorach*, 343 U.S. at 314-15.

241. 463 U.S. 388 (1983).

242. E.g., *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 890 (1990) (holding that application of state drug laws to users of peyote for religious purposes did not violate the Free Exercise Clause).

243. E.g., *United States v. Lopez*, 514 U.S. 549, 567-68 (1995) (holding that congressional power under the Commerce Clause did not extend to crimes insubstantially impacting interstate commerce).

244. See, e.g., *Illinois v. Caballes*, 543 U.S. 405, 409-10 (2005) (holding that police can allow a trained dog to sniff a stopped car for drugs without any need for suspicion of a narcotics violation).

245. 403 U.S. 602, 606-07 (1971). Under *Lemon*, the Court synthesized various strands of Establishment Clause jurisprudence employed by the Warren Court to ask first, whether the measure had a secular purpose; second, whether its main effect neither advanced nor inhibited religion; and, third, whether it fostered an excessive government entanglement with religion. *Id.* at 611-15. Some current Justices on the Court decry the test, none more notably than Justice Scalia. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398-99 (1993) (Scalia, J., concurring). However, the Court has not yet formally

which holds that government must treat religion on terms equal to other, nonreligious institutions with respect to the distribution of public benefits.²⁴⁶ Stated a different way, government may not favor one religion over another or over nonreligion, nor disfavor any particular religion or nonreligion, although the government may support religion generally on the same terms as it supports secular institutions.²⁴⁷

It is this concept of formal neutrality we want to compare to German law. Some caveats are in order. First, there is little constitutional authorization of public support for religion in American public schools, which most American students attend.²⁴⁸ Secondly, formal neutrality 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 Catholic schools constituting about fifty-five percent of these religious institutions.²⁴⁹ Thus, the degree of national public support for religion in school is, relatively speaking, small. Third, our focus is one 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 formal neutrality into a rule of law consists of two main inquiries. Government may aid religion when the "government . . . program is [(1)] neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools [and (2) do so] wholly as a result of their own genuine and independent private choice."²⁵⁰ 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 formal neutrality. The driving force of the idea is to

repudiated *Lemon*. See *id.* at 395 n.7 (citing the *Lemon* test approvingly in the majority opinion).

246. See Witte, *supra* note 32, at 428-29.

247. See GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1495 (5th ed. 2005) (describing the theory of nonpreferentialism that is reworked in this Article).

248. See Muehlhoff, *supra* note 19, at 452-54.

249. See COUNCIL FOR AM. PRIVATE EDUC., FACTS AND STUDIES, <http://www.capenet.org/facts.html> (last visited Nov. 1, 2006).

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

discourage government hostility to religion as seemed the case, to some, of the approach of separationism.²⁵¹ Moreover, publicly supporting religion increases its ability to advocate for 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, formal neutrality is rooted in Puritan philosophy, as it influenced the more accommodationist civic-republican views of those individuals in the Framers' generation 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.²⁵²

There is certainly an equality component to religious protection,²⁵³ as with other rights, such as free speech²⁵⁴ or privacy.²⁵⁵ In fact, an equality component may underlie most, if not all, human rights. Every person has an equal claim to basic rights. But the source for church-state relations in the United States Constitution is the Establishment Clause, which provides that 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.²⁵⁶ 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.²⁵⁷ If

251. Laycock, *supra* note 5, at 993.

252. See Adams & Emmerich, *supra* note 32, at 1579 n.88; Witte, *supra* note 32, 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).

253. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 66 (citing Letter from Madison, A Memorial and Remonstrance, *supra* note 82, at 8).

254. See *Police Dep't 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." (footnote omitted)).

255. See *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.").

256. U.S. CONST. amends. I, XIV.

257. See Witte, *supra* note 32, at 388. "[W]hen Madison . . . spoke of 'equal' rights of conscience, he did not mean to invoke equality as an independent reason for religious liberty." Feldman, *supra* note 130, at 351 n.26 (citing Letter from Madison, A Memorial and Remonstrance, *supra* note 82, at 8). "Rather, he meant that religious liberty was a right that ought to extend to every person." *Id.* (citing Letter from Madison, A Memorial and Remonstrance, *supra* note 82, at 8). The Court itself has acknowledged that inquiry into neutrality is an Equal Protection norm. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) ("In determining if the object of a law is a neutral one under the Free Exercise Clause, we can . . . find guidance in our equal protection cases.");

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 be justified by a persuasive reason.²⁵⁸ Equal protection would seem equipped to handle 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.²⁵⁹ By comparison, however, a free speech claim fundamentally relies on tests more derivable from textual authority.²⁶⁰ The point, simply stated, is that free speech, as other constitutional provisions, has a main test to gauge its infringement derived from textual authority and relies on equality interests as important, yet supplemental, support. By contrast, formal neutrality does not center around the textual enumeration of the Establishment Clause, but instead drafts an equality component as a main part of the test. In this respect, the neutrality inquiry 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 directly address the Establishment Clause textual prohibition on governmental establishment of religion. The language choice of the Establishment Clause, after all, delimits governmental authority over religion. Government “shall make no law respecting an establishment of religion,” not an establishment of politics, economics, or postmodernism.²⁶¹ The focus, therefore, should more appropriately center around governmental choices with respect to religion. For example, does government establish, promote, aid, favor, disfavor, inhibit, or impede religion, to name a few possibilities. In this respect,

Walz v. Tax Comm’n, 397 U.S. 664, 696 (1970) (Harlan, J., concurring) (“Neutrality in its application requires an equal protection mode of analysis.”).

258. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (“[W]e 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 & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 344, 365 (1949).

259. See *Mosley*, 408 U.S. at 96.

260. For 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. City of St. Paul*, 505 U.S. 377, 382 (1992) (“The First Amendment generally prevents government from proscribing speech . . . because of disapproval of the ideas expressed.”).

261. U.S. CONST. amend. I.

the three-part *Lemon* test has a stronger textual tether in that the three questions posed concern themselves with the degree of governmental support for religion.²⁶²

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, religious or nonreligious.²⁶³ The Court does not engage in a more intense scrutiny of the substance of neutrality, as is more characteristic of free speech²⁶⁴ or equal protection²⁶⁵ questions.

A review of several of the measures upheld under formal neutrality 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 that "may not exceed \$500 [for students] in grades [kindergarten] through [sixth grade] and \$700 [for students] in grades [seven to twelve]" for tuition, textbooks and transportation expenses.²⁶⁶ In *Zelman v. Simmons-Harris*, the Court upheld an Ohio pilot program designed to aid the Cleveland schools by providing tuition aid for students in kindergarten through third grade to attend public or private schools and tutorial aid for students who remain in public schools.²⁶⁷ On their face, both measures apply evenhandedly 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 monies to religious, 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 as ninety-six percent.²⁶⁸ In *Zelman*, ninety-six percent of the

262. See sources cited *supra* note 245.

263. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002) ("[W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens . . . the program is not readily subject to challenge under the Establishment Clause."). To follow Professor Laycock's dichotomy, the Rehnquist Court's formal neutrality doctrine would constitute formal neutrality, not substantive neutrality. See Laycock, *supra* note 5, at 999-1003. Formal neutrality has great appeal in its "simplicity and apparent even-handedness." *Id.* at 999. But it also has drawbacks, as I explain in this Article.

264. See, e.g., *Gooding v. Wilson*, 405 U.S. 518, 527-28 (1972) (holding a fighting-words statute unconstitutional because of overbreadth in application).

265. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (holding a facially neutral ordinance unconstitutional because it was selectively applied negatively against Chinese).

266. 463 U.S. 388, 391 & n.2 (1983).

267. See *Zelman*, 536 U.S. at 645.

268. See *Mueller*, 463 U.S. at 401.

students participating in the pilot program were enrolled in religious schools and eighty-two percent of the private schools participating in the program were religious schools.²⁶⁹ Certainly statistics may be misleading.²⁷⁰ But any fair assessment of the evidence reasonably discloses that the substance of the measures approved in *Mueller* and *Zelman* disproportionately favor religion. At a minimum, these measures constitute indirect official subsidies of religion.²⁷¹ 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 does not examine the underlying motivations of legislators.²⁷²

Nor does the Court examine the empirical data resulting from the programs.²⁷³ As stated 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 of private citizens claimed benefits under the law."²⁷⁴ The point is simple: the inquiry into neutrality is merely facial, and it has the effect of favoring religion, which, in fact, may be the point. Public schools, of course, are directly funded by tax monies and, accordingly, do not need to participate in these aid programs. In fairness, parents of parochial school students already pay taxes to support the public schools.²⁷⁵ Receiving the benefits of some tax dollars for religious educational costs could certainly be viewed as only fair. Still, regardless of the equities, our focus must be on the constitutional question.

269. *Zelman*, 536 U.S. at 647.

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

271. *See Mueller*, 463 U.S. at 404 (Marshall, J., dissenting) (finding that a Minnesota tax statute has the "direct and immediate effect of advancing religion").

272. *See United States v. Pub. Utils. Comm'n*, 345 U.S. 295, 319 (1953) (Jackson, J., concurring).

273. *See, e.g., Mueller*, 463 U.S. at 401 (stating that the court should not consider statistical evidence indicating that the effect of tax deductions was to benefit parents of children enrolled in sectarian schools). The failure to employ effects analysis is in contrast to other constitutional domains, such as dormant commerce clause, where effects analysis is a primary inquiry into the constitutionality of measures. *See, e.g., Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333 (1977) (holding a facially neutral North Carolina statute unconstitutional because its practical effect burdened the sale of Washington state apples).

274. *Mueller*, 463 U.S. at 401.

275. PETER F. DRUCKER, *MANAGEMENT: TASKS, RESPONSIBILITIES, PRACTICES* 142 (1974).

The second element of formal neutrality involves breaking the direct link between government and the church by making monies available to people, who then exercise “genuine and independent private choice” to spend the monies as they like, including on religious education if they so desire.²⁷⁶ In this way, the choice to support religion is made by the individual and not the government.²⁷⁷

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 decision making is different than government decision making. No doubt, reasonable people will differ. 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 individual behavior. Personal choices are quite irrelevant to the Establishment Clause.²⁷⁸ 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 it should 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 facial review employed under formal neutrality. The significant amount of aid and its transparently primary effect of benefiting religion under formal neutrality would suggest tilting more on the side of finding an establishment of religion.

It is certainly an open question as to what constitutes an “establishment.” Is an establishment to be judged by text, originalism, accommodationism, separationism, or some combination of all or some of them? We would first need to set forth a plausible theory of the Establishment Clause, which institutes a principled standard of law,

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

277. *See Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481, 488 (1986).

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

in order to make this judgment. That endeavor, however, is well beyond the scope of this Article.

At bottom, we can see that the Court applies a facial review of these formally neutral governmental programs that has the effect of indirectly supporting religion. We can also see that formal neutrality is a far cry from the separationist approach of the Warren Court and of the philosophy of Thomas Jefferson and James Madison. Instead, formal neutrality is more in accord with the aspects of the Puritan tradition that encouraged and advanced official support of religion and influenced the religious orientation of notable civil republicans like George Washington and John Adams.²⁷⁹ In this respect, formal neutrality has more in common with the Massachusetts experience than the 1784-1786 Virginia one.²⁸⁰

In sum, as a matter of constitutional methodology, formal neutrality 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.²⁸¹ Certainly, formal neutrality, with its appeal to equality, can draw upon one of the main “essential rights and liberties” of religion.²⁸² Further, formal neutrality, consistent with accommodationist, civic-republican thought, can draw upon a long history of government accommodation of religious practice.²⁸³ As a matter of constitutional methodology, formal neutrality is on weakest ground as a matter of text, it is on strongest ground as a matter of tradition, and it is on solid ground as a matter of the Puritan-influenced strand of historical practice. Thus, we can see that the debate between separationism and accommodationism is itself a titan struggle over constitutional methodology: text; the intent of Framers such as

279. There is some evidence that evangelicals, such as Isaac Backus, would willingly accept official support of religion, insofar as it did not interfere with the core concern of liberty of conscience. MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 11 (1965) (“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 . . .”); Adams & Emmerich, *supra* note 32, 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.”).

280. See *supra* text accompanying notes 107-114, 135-136; Witte, *supra* note 32, at 378-80, 383-87.

281. Witte, *supra* note 32, at 388.

282. See *id.*

283. Adams & Emmerich, *supra* note 32, at 1629-30.

Jefferson, Madison, Adams, and Washington; and the historical practice of Virginia or Massachusetts.²⁸⁴

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, and second, determining how American church-state law on this question compares to German law. A third objective, to be pursued later, is what we can learn from this comparative analysis.

The Court's change in doctrine from separationism to formal neutrality has resulted in a decisive shift toward state support of religion. The shift is brought out dramatically by observing the state of affairs prior to formal neutrality. Under a separationist approach, it was unconstitutional to aid nonpublic (mainly religious) schools by reimbursing parents for portions of tuition costs,²⁸⁵ engaging public school teachers in remedially educating parochial students,²⁸⁶ lending instructional materials and equipment,²⁸⁷ or paying the costs of field trips for purposes related to secular courses.²⁸⁸ Today, these forms of state support of religion are constitutional under formal neutrality.²⁸⁹

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.²⁹⁰ So, we might say that even in the pre-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

284. *Id.*

285. *See, e.g.*, *Sch. Dist. v. Ball*, 473 U.S. 373, 379-98 (1985); *Sloan v. Lemon*, 413 U.S. 825, 834-35 (1973).

286. *See, e.g.*, *Aguilar v. Felton*, 473 U.S. 402, 414 (1985), *overruled by* *Agostini v. Felton*, 521 U.S. 203, 209 (1997).

287. *See, e.g.*, *Wolman v. Walter*, 433 U.S. 229, 255 (1977), *overruled by* *Mitchell v. Helms*, 530 U.S. 793, 835-36 (2000); *Meek v. Pittenger*, 421 U.S. 349, 367-73 (1975), *overruled by* *Mitchell*, 530 U.S. at 835-36.

288. *See, e.g.*, *Wolman*, 433 U.S. at 230-31, *overruled by* *Mitchell*, 530 U.S. at 835-36.

289. *See, e.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639, 643-44 (2002) (authorizing state support of religious schooling through tuition vouchers and tutorial aids).

290. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971) ("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, the government could support religious schools by busing parochial students. *See* *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947). Also, a government could lend textbooks on secular topics to religious schools. *See, e.g.*, *Bd. of Educ. v. Allen*, 392 U.S. 236, 238 (1968). Finally, the government could reimburse religious schools for the costs of state-mandated and state-composed testing requirements. *See* *Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 661-62 (1980).

secular matters and sectarian matters.²⁹¹ It was considered absolutely off limits for government to aid religion in core religious matters,²⁹² and it was irrelevant whether the nature of official support was accomplished directly or indirectly.²⁹³ Moreover, the Court in the pre-Rehnquist era tended to agree on doctrine.²⁹⁴ Most of the Justices of this era were committed to separation of church and state as stating the proper relationship.²⁹⁵ Their disagreements were over how strictly to apply separationism to particular factual settings.²⁹⁶

By contrast, under formal neutrality significant amounts of public aid have been directed to religion. Although the aid was formally available to all claimants on a neutral basis, the vast majority of the recipients were religious schools.²⁹⁷ The most dramatic sums of public aid directed to religious institutions include subsidization of parental costs of parochial school tuition;²⁹⁸ supply of computer, media, laboratory, library, and teaching aids;²⁹⁹ and provision of public school remedial education.³⁰⁰ Let us examine some of these cases more carefully.

In *Mitchell v. Helms*, the Court sanctioned the federal provision of educational materials to religious schools.³⁰¹ The provisions included library and media materials, computer hardware and software, and instructional materials such as books, movie projectors,

291. See, e.g., *Everson*, 330 U.S. at 17-18 (holding that state support of bussing of parochial students is neutral social welfare aid, analogous to police and fire protection).

292. See, e.g., *Lemon*, 403 U.S. at 617 (invalidating a state subsidy of religious teachers and observing that “[w]e 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 pre-college education”).

293. See *Sch. Dist. v. Ball*, 473 U.S. 373, 393-94 (1985).

294. So observes Justice Souter in his recounting of the history of the Establishment Clause. See *Mitchell v. Helms*, 530 U.S. 793, 876 (2000) (Souter, J., dissenting).

295. See, e.g., *id.*

296. See, e.g., *id.*

297. Of the participating schools in the year in question evaluated in *Mitchell*, forty-one of forty-six (eighty-nine percent) were religious. See *id.* at 803. This percentage is close to other cases, like *Zelman* (eighty-two percent) and *Mueller* (ninety-six percent). See *Zelman v. Simmons-Harris*, 536 U.S. 639, 641 (2002); *Mueller v. Allen*, 463 U.S. 388, 409 (1983).

298. See *Zelman*, 536 U.S. at 646 (stating that public funds support ninety percent of parochial school tuition costs for severely poor students); *id.* at 708 (Souter, J., dissenting) (noting that the “sheer quantity” of aid is unprecedented); *Mueller*, 463 U.S. at 388 (noting that the state tax deduction for parochial school tuition costs up to \$500 or \$700, depending on the case).

299. See, e.g., *Mitchell*, 530 U.S. at 803.

300. See *Agostini v. Felton*, 521 U.S. 203, 218 (1997).

301. See 530 U.S. at 802-03.

and overhead projectors.³⁰² *Mitchell* breaks ground in one notable respect. The plurality simply brushed aside the clear diversion of the public aid from secular to sectarian purposes.³⁰³ Perhaps the Court was reluctant to scrutinize recipients' use of moneys. But we might more plausibly understand this as simply a consequence of formal neutrality. The real point of formal neutrality is 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 also lead to the official support of nonreligion if the social reality of statistical configurations were different.

In *Agostini v. Felton*, the Court approved the provision of federally funded remedial education 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 provisions were unconstitutional.³⁰⁴ The symbolic presence of public school employees rendering services to parochial schools was no longer relevant in determining whether an official endorsement of religion had occurred.³⁰⁵ Likewise, it was no longer relevant whether an excessive entanglement of the state in religion occurred by reason of the significant monitoring by government of religion of the uses of the aid for secular purposes as required by the statute.³⁰⁶ The contrast in approach between *Agostini* and *Aguilar v. Felton* simply illustrates the difference in approach between formal neutrality and separationism, as would a comparison of almost any case decided before or after the advent of formal neutrality.

302. *Id.* at 803.

303. *Id.* 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 . . . the 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.” (citation and footnote omitted)). *But see id.* at 840 (O'Connor, J., concurring) (“I also disagree with the plurality's conclusion that actual diversion of government aid to religious indoctrination is consistent with the Establishment Clause.”).

304. 521 U.S. 203, 209 (1997).

305. *See id.* at 234.

306. *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. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), and *Rosenberger v. Rector*, 515 U.S. 819 (1995). *Agostini*, 521 U.S. at 243 (O'Connor, J., concurring). These decisions undermined *Aguilar v. Felton*, 473 U.S. 402 (1985), and *School District v. Ball*, 473 U.S. 373 (1985). *Agostini*, 521 U.S. at 243-45. Accordingly, the Court overruled them. The Court observed that the financial costs associated with compliance with *Aguilar* were significant and burdensome. *See id.* at 213.

For our purposes, what is relevant to observe is the quite substantial channeling of governmental aid to religious schools accomplished through the indirect route of formal neutrality. 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.³⁰⁷ So blessed, therefore, is the official provision of tuition relief,³⁰⁸ library and teaching aids,³⁰⁹ remedial educational services,³¹⁰ and learning³¹¹ and vocational aids.³¹²

The direct or indirect role of government in funding religion is the doctrinal line the Court is drawing at present. The endpoint of formal neutrality, for now, is reached by the recent case *Locke v. Davey*, in which the Court upheld Washington's prohibition of direct funding of pastoral education.³¹³ Such open, overt official funding of the religious mission went too far, at least for some.³¹⁴ And so we are left again with a distinction between direct governmental funding of religion (unconstitutional), and indirect funding (constitutional).

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 insofar as it forces any dissenting taxpayers to fund religious education against their will. Most formally neutral programs do not provide opportunity for opt-out provisions for dissenters, in contrast to early American practice and current German practice.³¹⁵ The conception of

307. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002).

308. See, e.g., *id.*; *Mueller v. Allen*, 463 U.S. 388, 390-91 (1983).

309. See, e.g., *Mitchell v. Helms*, 530 U.S. 793, 801 (2000).

310. See, e.g., *Agostini*, 521 U.S. at 208-09.

311. See, e.g., *Witters*, 474 U.S. at 489.

312. See, e.g., *Zobrest*, 509 U.S. at 10.

313. 540 U.S. 712, 715 (2004). Even though it was decided on Free Exercise grounds, *Locke* represents the same type of program, considered under formal neutrality, as *Rosenberger*, which was decided under free speech grounds. See *id.*; *Rosenberger v. Rector*, 515 U.S. 819, 819-21 (1995).

314. See *Locke*, 540 U.S. at 725. Chief Justice Rehnquist wrote the 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, allowed in *Zelman*. *Zelman v. Simmons-Harris*, 536 U.S. 639, 643-44 (2002). Justices Thomas and Scalia would have found the funding constitutional, relying in part on *Witters*. See *Locke*, 540 U.S. at 729-30 (Scalia, J., dissenting).

315. See CURRIE, *supra* note 27, at 247.

liberty of conscience forms the core of Establishment Clause protections, both historically³¹⁶ and today.³¹⁷

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.³¹⁸ As stated by Thomas Jefferson, coercion of conscience is inconsistent with true belief because “no man shall be compelled to frequent or support any relig[i]ous Worship place or Ministry whatsoever.”³¹⁹ Official support of religion leads to its corruption; and that opinion, including religious opinion, is not within the jurisdiction of government.³²⁰ 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 by force or violence.”³²¹ 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.”³²² For Madison, forced payment of tax monies in support of religious education constituted an establishment of religion.³²³

Viewed from the lights of Thomas Jefferson, James Madison, and other Enlightenment authority,³²⁴ the variety of formal neutrality advanced by the Rehnquist Court, most notably in cases like *Zelman*³²⁵

316. See Feldman, *supra* note 130, at 346, 398.

317. See *Lee v. Weisman*, 505 U.S. 577, 591-92 (1992).

318. See WILLIAMS, *supra* note 80, at 11.

319. THOMAS JEFFERSON, A BILL FOR ESTABLISHING RELIGIOUS FREEDOM (1779), reprinted in 5 THE FOUNDERS' CONSTITUTION 77 (Philip B. Kurland & Ralph Lerner eds., 1987).

320. See *id.*

321. Letter from Madison, A Memorial and Remonstrance, *supra* note 82, at 8.

322. *Id.*

323. See *id.* at 10 (stating that a 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*, Justices Thomas and Souter debated the meaning of Madison’s Memorial and Remonstrance. See *Rosenberger v. Rector*, 515 U.S. 819, 855-59, 868-72 (1995). 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 that the government must discriminate against religious adherents by excluding them from more generally available financial subsidies.” *Id.* at 855-57 (Thomas, J., concurring). Thomas then pointed to historical examples of state funding of religion, such as electing chaplains to Congress, granting tax exemptions for religious bodies, and selling land reserved by Congress to support religion. See *id.* at 858-59. Justice Souter, by contrast, read Madison to oppose aid to religion and to advocate strict separation of church and state. See *id.* at 868-72 (Souter, J., dissenting).

324. See Adams & Emmerich, *supra* note 32, at 1572.

325. 536 U.S. 639, 643-44 (2002).

and *Mueller*,³²⁶ would appear to be at odds with these core American religious principles. First, not all taxpayers would agree to apply their monies in support of religious education.³²⁷ For these uncooperative, dissenting taxpayers application of their tax monies in support of religious education would seem to constitute coercion of conscience. Forcing conscience is likely to induce resentment and hostility in those coerced. This resentment is likely to lead to divisiveness in the body politic, already abundant.³²⁸ Some form of opt-out provision for dissenting taxpayers is necessary to ameliorate the concern of coercing conscience, as was done in early America and in contemporary Germany.³²⁹

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.³³⁰ These first steps are evident in *Zelman*.³³¹ A condition of participating in the pilot program is that religious schools may not “discriminate on the basis of . . . religion.”³³² Being obligated to follow a nondiscriminatory policy is likely to dilute the purity of religion and involve government in supervision of religion.³³³ In these respects, religion may become beholden to government, a root concern of separationism.³³⁴

326. 463 U.S. 388, 390-91 (1983).

327. See *Zelman*, 536 U.S. at 655-56. In 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 children to religious schools . . .” *Id.* 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.* 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 do not approve of public funding of religious schools are being coerced against their conscience to support them, as would appear in *Zelman*. Accord *Everson v. Bd. of Educ.*, 330 U.S. 1, 22-25 (1947) (Jackson, J., dissenting) (stating that it is unconstitutional to tax those unwilling to expend their monies for religious purposes); *id.* at 36-37 (Rutledge, J., dissenting).

328. See Letter from Madison, A Memorial and Remonstrance, *supra* note 82, at 8.

329. See *Zelman*, 536 U.S. at 639.

330. See *supra* note 126 and accompanying text.

331. *Zelman*, 536 U.S. at 712-13 (Souter, J., dissenting).

332. *Id.* at 712.

333. See *id.* at 712-13. As 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.*

334. See *id.* at 712.

As we conclude our assessment of formal neutrality, we can discern the design of constitutional guideposts for the public funding of a parallel, religious school education. 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 formal neutrality approximates—operating indirectly, but without mirroring—the more direct German system of public support for religious education, which is our next topic.

VI. COMPARATIVE OBSERVATIONS

As we assemble what we have gathered from our comparative examination of German and American law, we are left with this observation: 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 throughout Western culture. In this respect, German law is moving somewhat in a separationist direction. Conversely, American nonpreferentialism is moving distinctly 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 that the relationship is less connected. 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 and 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.³³⁵

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

335. See *supra* Part II.

day,³³⁶ and religious instruction can occur on public school premises after school hours.³³⁷

Outside of religious class in Germany, there can be no dissemination of religious tenets or proselytization. Teaching of religion is confined to religion class.³³⁸ 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.³³⁹ These elements resonate partly with American law as well.³⁴⁰

Beyond these elements of overt religious exercise, government is to be neutral, tolerant, and nondiscriminatory concerning all religious and ideological beliefs, particularly those not in a dominant position. The community school is obligated to facilitate a dialogue of pluralistic religious and ideological views to expose and develop students' intellectual and spiritual capacities. In recognition of the increasingly pluralistic composition of German society, the Constitutional 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.³⁴¹ Commitment to these values of neutrality, tolerance, and nondiscrimination are also substantially in accord with American and, indeed, international norms of religious

336. See *Zorach v. Clauson*, 343 U.S. 306, 313-15 (1952).

337. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119-20 (2001).

338. See *supra* Part IV.

339. See *supra* Part IV.

340. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 685 (1984) (holding that a Christmas crèche was a symbol of culture of the Christmas holiday, not a religious message); *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968) (“[S]tudy 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”); *Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963) (holding that a Bible can be read in public schools as a work of literature or culture).

341. See, e.g., BVerfG Sept. 9, 2003, 108 BVerfGE 282 (310) (*Muslim Teacher’s Head Scarf*) (“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. *Id.* at (298-99). 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.*

freedom.³⁴² There is a certain resonance of core values that comprise a human right to religious freedom.

German law evinces further similarity with American law in that the Basic Law sets down detailed principles of institutional separation of church and state. For example, recall that Article 137 of the Weimar Constitution prohibits a state church.³⁴³ Religious bodies are authorized to regulate their own affairs within the limits of the law and, under Article 136, government is prohibited from inquiring into memberships of religious bodies, except for statistical purposes.³⁴⁴ 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 formal neutrality, neutrality and nondiscrimination are central elements of Establishment Clause doctrine.³⁴⁵ 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 and Protestantism—to teach their tenets in the public schools.³⁴⁶ Opportunities are expanding, as Islam too may soon achieve the same benefit.³⁴⁷ There is, thus, some surprising overlap in core values of both countries' jurisprudence.

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 by making it a regular part of the public school curriculum. It is

342. See Michael J. Perry, *A Right to Religious Freedom? The Universality of Human Rights, the Relativity of Culture*, 10 ROGER WILLIAMS U. L. REV. 385, 395-400 (2005) (discussing the 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 32, at 433-43.

343. See VERF. WEIMAR art. 137.

344. Compare BVerfG June 4, 1985, 70 BVerfGE 138 (*Catholic Hospital Case*) (noting that a Catholic hospital can fire a doctor who took a 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 its affairs autonomously).

345. See generally discussion *supra* Part V.

346. See generally discussion *supra* Part IV.

347. See *supra* text accompanying note 172.

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 monies 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, minimal coercion of conscience, as dissenters may opt out of funding religious education with which they disagree.

By contrast, the American approach involves indirect funding of religious education through subsidization of private, parochial school education under formal neutrality. In this respect, the American approach accomplishes indirectly what the Germans accomplish directly. 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 monies thus go to religious schools through the conduit of individual exercise, even those monies of taxpayers who may dissent from funding religious education; American programs do not normally have opt-out provisions to guard against coercion of conscience. In essence, the American program uses government as a conduit through which tax monies pass to religion, as the German program allows religions to use the apparatus of the state to raise and administer the monies to support religious education. A major difference in the German program is that monies are collected only from members of particular sects for the benefit of that sect; nonmembers are not taxed. In fact, it would appear that the German scheme is more solicitous of the core value of liberty of conscience. On the other hand, there is a big difference in the scale of aid disbursed. Public funding of religious instruction is the norm in Germany, while it is clearly a small part of the American education system.

Assessing the programs of both countries more carefully, it seems fair to acknowledge that they constitute, in essence, *de facto* establishments of religion. The significant expenditure of public monies 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 in the Court³⁴⁸ and in scholarly literature.³⁴⁹ 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, it creates a problematic outcome given the lack of textual authority and the contested history between separationism and accommodationism. In contrast to German law, American formal neutrality 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 and Protestantism are taught in German public schools. And, again, this is not problematic given the German church-state cooperative model. American formal neutrality 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.³⁵⁰ In fact, the Rehnquist Court has largely succeeded in converting important components of First Amendment religious protections into vessels of community, democratic control.³⁵¹

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 tending toward a model of more open and welcoming accommodation of minorities in recognition of the increasing diversity of German society. Commitment to values of neutrality, nondiscrimination, and tolerance are marks of this. There is, thus, a

348. Compare, for example, the positions of the majority and dissent in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

349. Compare, e.g., Feldman, *supra* note 130, at 418 (arguing that governmental funding of religion is unconstitutional), with Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 693 (1992) (noting that the historical record indicates that nonpreferentialism is constitutional).

350. Nat'l Ctr. for Educ. Statistics, Welcome to the NCES, <http://www.nces.ed.gov> (last visited Nov. 1, 2006).

351. Compare *Zelman*, 536 U.S. at 639, with *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990) (holding that Free Exercise rights are circumscribed according to norms of generally applicable neutral laws of the democratic process).

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. In other areas, especially in 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,³⁵² than one of separation. Certainly formal neutrality is a paradigm of the church-state cooperative model. Other examples would be granting tax exemptions to religious bodies³⁵³ and funding legislative chaplains.³⁵⁴

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 where 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 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 it thrives like in no other Western country. The question we must now face is: Are we losing one of the unique traits that has characterized the American “livlie experiment” (separationism) and, if so, at what cost and for what benefit?³⁵⁵ Is a European model of church-state cooperation better suited to American shores?

352. See, e.g., STEPHEN V. MONSMA & 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 32, at 440 (arguing that most international norms suggest church-state cooperation and that separation of church and state is exceptional); John M. Hall, *Religious Education and the Globalised Economy*, <http://www.studyoverseas.com/re/jmh.htm> (last visited Nov. 1, 2006) (noting state-funded religious education in Canada, Greece, Italy, Spain, and United Kingdom.) However, in the United Kingdom, the purpose of religious education is to deepen and enlighten students' awareness of values associated with religion, not to indoctrinate or proselytize. MONSMA & SOPER, *supra*, at 136-44.

353. See, e.g., *Walz v. Tax Comm'n*, 397 U.S. 664, 677-80 (1970).

354. See, e.g., *Marsh v. Chambers*, 463 U.S. 783, 794-95 (1983).

355. See *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722, 2746 (2005) (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?”).