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Defining Religious Tolerance: German Policy Toward the Church of Scientology

Emily A. Moseley

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Defining Religious Tolerance: German Policy Toward the Church of Scientology

ABSTRACT

Members of the Church of Scientology face persecution from the German government and its citizens, raising international concern over the rights of religious minorities in a country determined to overcome its Nazi past. The German Constitution provides many protections for religious freedom and also allows a relatively close relationship between church and state. Historically, the German state has been closely intertwined with the traditionally dominant churches, and today Germans enjoy a great deal of freedom of religion. Until very recently, however, the Federal Constitutional Court has not upheld the similar freedom from religion guaranteed by the "establishment clause" in the German Constitution. This large degree of church involvement in the public realm may have led to a narrowing of many Germans' understanding of what constitutes a religion deserving of constitutional protection. In a recent and controversial case, however, the Federal Constitutional Court ordered the removal of crosses and crucifixes from Bavarian classrooms. The Court held that a state policy mandating their presence in all public school classrooms violated the rights of non-Christians to freedom from religion, although the Court did not rely on the "establishment clause" in its holding. This case suggests that, if presented with a case arising from the current treatment of Scientologists, the Federal Constitution Court may defend the Church's right to freedom from majoritarian domination. Nevertheless, this Note suggests that the Court must give a meaningful interpretation of the "establishment cause" to protect the freedom of religious minorities in Germany.

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Only—can religion, must religion mean the same thing to every man? When you look at our vast world, you see thousands to whom it does not mean these things, thousands to whom it never will, whether it be preached to them or not. Must it therefore mean these things to me?

—Johann Wolfgang von Goethe, *The Sorrows of Young Werther*¹

I. INTRODUCTION: GERMANY'S SCIENTOLOGY PROBLEM

As a society founded on the sacredness of human dignity and under shadow of the Holocaust, Germany prides itself in its strong protection of religious liberty.² The Church of Scientology, however, labeled a cult by some and a legitimate religion by others, strains the boundaries of German tolerance of minority religious sects.³ While both the German government and private citizens attack and ostracize Scientologists, Germany's "Scientology problem" suggests that the protections afforded religious minorities may be inadequate to guard against majoritarian domination.

The German Constitution protects freedom of religion by guaranteeing free exercise of religion, banning the establishment of a state church, and providing some forms of affirmative governmental support to religious and ideological organizations.⁴ However, the German government has decided that the Church of Scientology is not a legitimate religion. Thus, the government nullifies the constitutional protections that would otherwise apply to the Scientologists.⁵ The Helmut Kohl government considers the Church of Scientology a cult that brainwashes its members

1. Johann Wolfgang von Goethe, *THE SORROWS OF YOUNG WERTHER* 93 (Catherine Hutler trans., Signet 1962).

2. "Ever since [the implementation of the Constitution of the Weimar Republic in 1919 and Constitution of 1949, or Grundgesetz] the fundamental principles of German law on church and state have been separation, secularity of the state, freedom of religion, and equal rights for all religions and religious communities within a pluralistic system." Martin Heckel, *Religious Human Rights in the World Today: A Report on the 1994 Atlanta Conference: Legal Perspectives on Human Rights: Religious Human Rights in Germany*, 10 *EMORY INT'L L. REV.* 107, 107 (1996).

3. This Note analyzes the current German debate over Scientology to highlight German legal issues. In so doing, the author neither advocates nor condemns Scientology as a religion. Additionally, while the Holocaust necessarily must be part of any discussion of freedom of religion or church-state relations in Germany, the author does not suggest that the current situation of the Scientologists in Germany is similar to that of German Jews during the Third Reich.

4. See *infra* notes 122-45 and accompanying text.

5. The executive and legislative branches of the German government seem to have reached this conclusion without any formal judicial review.

and absconds with their money. German officials worry that the teaching of Scientology borders on totalitarianism and that the group ultimately seeks the domination of Germany.⁶ Labor Secretary Norbert Blum describes Scientology as "a giant octopus . . . that will stop at nothing in its desire to spread its blind ideology."⁷

Colorful rhetoric aside, such charges against Scientology are not unique to Germany. Other countries, including the United States,⁸ France,⁹ and Great Britain,¹⁰ have struggled over how to

6. See *infra* notes 13-19.

7. Kohl cabinet member Claudia Nolte explained that the Scientologists "aim at world domination and the destruction of our society." *Germany at War With Scientology*, EDMONTON J., Sept. 29, 1996, at F4, available in 1996 WL 5149573.

8. See *Review & Outlook: The Scientology Problem*, WALL ST. J., Mar. 25, 1997, at A18. For example, the U.S. Internal Revenue Service (hereinafter IRS) has resisted providing the Church of Scientology tax advantages given to other religious organizations by labeling the group a commercial enterprise. The IRS reversed its 25-year policy on October 8, 1993, after a major campaign by Scientologists. See generally Douglas Frantz, *Scientology's Puzzling Journey From Tax Rebel to Tax Exempt*, N.Y. TIMES, Mar. 9, 1997, at A1 (an overview of U.S. treatment of the Church of Scientology and Scientologists' campaigns for tax exemptions and broader societal legitimacy).

9. See generally Sarah O'Hara, *Europe: Scientologists Fight in the Streets and Courts of Europe*, Inter Press Service, June 11, 1997, available in LEXIS, News Library, INPRES File. France recently prosecuted French Scientology leaders in connection with a member's suicide, allegedly committed after the member discovered he needed thirty thousand francs for a purification treatment. See Alex D. Smith, *Cult Watchers Await Verdict*, GUARDIAN (London), Oct. 8, 1996, available in LEXIS, News Library, GUARDN File. "Much of the trial has been taken up with argument on whether scientology should be classified under French law as a church or a cult. A French parliamentary report in January included it in a list of 173 cults and among 28 groups accused of recruiting children." *Id.* See also *Prosecution Seeks Suspended Sentences in Scientologists' Trial*, Agence Fr.-Presse, Oct. 8, 1996, available in LEXIS, News Library, AFP File. The court ordered the Scientologists jailed for 18 months. Thomas W. Lippman, *U.S. Chastises Germany on Scientology*, INT'L HERALD TRIB., Jan. 28, 1997, at 1, available in LEXIS, News Library, IHT File. A French appeals court acquitted nine of the Scientologists and reduced the sentences of six others, explaining, "the Church of Scientology can rightfully claim to be a religion." *France Won't Recognize Scientology*, SAN DIEGO UNION-TRIB., Aug. 1, 1997, available in LEXIS, News Library, SDUT File. However, Interior Minister Jean-Pierre Chevènement rejected the court's holding and stated that he would not recognize the church as a religion. See *id.*; see also *French Court Throws Out Some Convictions in Scientology Case*, AP, July 28, 1997, available in LEXIS, News Library, AP File.

Italy jailed 29 Scientologists for "criminal association." See *Italian Scientologists Jailed*, Agence Fr.-Presse, Jan. 18, 1997, available in LEXIS, News Library, AFP File. A Greek judge closed a Scientology center in Athens, finding the group "an organization with medical, social, and ethical practices that are dangerous and harmful." Anthee Carassava, *Gee Court Orders Closure of Scientology Mission*, AP, Jan. 17, 1997, available in LEXIS, News Library, AP File.

10. "They have been rebuffed repeatedly by the Charity Commission which insisted as recently as last year that they could not be considered a religion under

characterize the group for legal purposes. Founded in 1954 by science fiction writer L. Ron Hubbard, Scientology strives to help members reach their full spiritual potential by overcoming their "individual history of pain."¹¹ However, many of the close-knit nontraditional techniques of the Church of Scientology, such as reliance on an "electropsychometer" (E-meter) to track such pain, and its recruiting of new, often wealthy members, worry cult-watchers.¹²

Scientologists face hostility from both the German federal government and the governments of the German Lands, or states. On October 22, 1996, the Christian Democratic Party of Chancellor Helmut Kohl proposed surveilling members of the Church of Scientology and banning its members from the civil service.¹³ On December 21, 1996, the Christian Democratic Party

British law." Madeline Bunting, *Church That Ron Built*, GUARDIAN (London), Aug. 29, 1996, available in 1996 WL 4041220.

11. *Id.*

12. *See id.*

13. The German government strives to keep Scientologists out of any sensitive or influential governmental or civil service position. Most proposals do not bar Scientologists from such positions per se; instead they create a rebuttable presumption of unsuitability. However, given current animus against Scientologists, it appears unlikely any Scientologists will meet the required standard.

See Kohl's Party Seeks Surveillance, Limits on Church of Scientology, CHI. TRIB., Oct. 22, 1996, at 6. "The resolution calls on the interior ministry to draw up employment contract rules to ensure Scientologists are 'kept out of the public service, and particularly from the security domain, teaching and training.'" *Kohl Party Decides to Ban Scientologists from German Public Service*, Agence Fr.-Presse, Oct. 21, 1996, available in 1996 WL 13162475. The Christian Democratic Union explained in a resolution, "To belong to the Scientology organization and the public service is incompatible." *Kohl Party Wants to Ban Scientologists From Public Service*, Agence Fr.-Presse, Oct. 11, 1996, available in 1996 WL 12155643.

The conservative state of Bavaria quickly followed Kohl's lead and instituted a similar ban. Bavaria detailed its proposed ban as follows:

All state employees [would] fill out a questionnaire detailing any tie to the Church of Scientology. The state chancellery said all applicants for state jobs, including teachers and police officers, would not be hired if they refused. Those already employed would face disciplinary measures if they declined.

Bavaria Asks Disclosure of Scientology Ties, N.Y. TIMES, Oct. 30, 1996, at A6.

"Scientology members will not be automatically disqualified from civil service jobs, but will have to convince the potential employer in a follow-up interview of his or her suitability, according to the new rules[.]" *Bavaria to Ask Applicants for State Jobs if They Are Scientologist*, AP, Oct. 29, 1996, available in 1996 WL 4446388; *Scientologists Banned from Public Service in Bavaria from Friday*, Agence Fr.-Presse, Oct. 29, 1996, available in 1996 WL 12167965.

Some German officials later suggested that a proposed ban was not the best way to counter Scientology influence. *See, e.g., Bavaria Ban on Church "Was Wrong"*, INDEP. (London), Nov. 2, 1996, available in 1996 WL 13499516.

purged three Scientologists from its ranks while creating a national office to coordinate its proposed ban.¹⁴ Shortly thereafter, Germany's federal and regional governments formulated a joint plan to combat Scientology.¹⁵ In addition, fifteen of Germany's sixteen states currently monitor the Church of Scientology and its members.¹⁶ German officials placed the Church of Scientology under nationwide surveillance by the Office for Protection of the Constitution in June 1997, citing the alleged anti-democratic aims of the church.¹⁷

The State Intelligence Agency now operates a confidential telephone number which concerned citizens may use to report the activities of the Church of Scientology. The use of a hotline, which relies on private citizens' motivation to report Scientologists, suggests that the anti-Scientology movement may not be restricted to a few powerful German government officials, but rather may entail a larger popular attack against Scientologists. A survey by one German Institute suggests that ninety percent of Germans supported the decision to place the Church of Scientology under surveillance.¹⁸ German employment

14. *German Party Throws Out Three Scientologists*, ST. PETERSBURG TIMES, Dec. 21, 1996, at 9, available in 1996 WL 11958878. A state court held that Kohl's party did not violate the rights of the Scientologists because Scientology teachings clash with Christian Democratic philosophy. "The court said Scientology views the 'socially weak' as useless people who deserve to be 'pushed to the edges of society' [and] L. Ron Hubbard's writings use 'language that is very aggressive and indicates a readiness for violence.'" *Scientology Loses Battle in Germany*, SUN-SENTINEL (Ft. Lauderdale, Fla.), July 10, 1997, at 21A, available in 1997 WL 11391111.

15. *Leaders Seek More Scientology Data*, CHI. TRIB., Oct. 27, 1996, at 6; *Germany Agrees On Measures Against Scientology*, Reuters N. Am. Wire, Dec. 18, 1996, available in LEXIS, News Library, REUNA File.

16. *Scientologists to Hold Mass Protest in Berlin*, Agence Fr.-Presse, Sept. 5, 1997, available in 1997 WL 13390208, reporting that the interior ministers of all German states agreed in June that domestic intelligence agencies would monitor the church with an evaluation after one year. However, the state of Schleswig-Holstein decided not to implement the monitoring plan because it violated state legislation. Its interior minister, Ekkehard Weinholtz, explained that "state intelligence agents can act only when organizations take 'an actively combative and aggressive stance towards the constitutional system as it exists.'" *German State Rules Out Monitoring of Scientologists*, Agence Fr.-Presse, Aug. 26, 1997, available in 1997 WL 13383876 (quoting the article).

17. *German Agency to Conduct Surveillance on Scientology*, L.A. TIMES, June 7, 1997, at A11. "The move places Scientologists on a list of potential enemies of the state, such as neo-Nazis, and clears the way for agents in the Office for the Protection of the Constitution, or Verfassungsschutz, to infiltrate Scientology." Elizabeth Neuffer, *Germany Puts Scientologists on Notice*, ORANGE COUNTY REG. (Cal.), June 7, 1997, at A31, available in 1997 WL 7426649.

18. *Hotline Set Up for Information about Scientology*, Agence Fr.-Presse, June 17, 1997, available in 1997 WL 2135908. The states of Rhineland-Palatinate and Baden-Wuerttemberg have also set up hotlines. A spokesman for

agencies mark the files of Scientologists with an "S."¹⁹ Bavaria blacklisted jazz pianist and Scientologist Chick Corea from performing at state-subsidized events,²⁰ and the youth-wing of the Christian Democratic Party protested outside the opening of Scientologist Tom Cruise's film *Mission Impossible*.²¹

Although not approaching the manner or severity of the tactics of the Third Reich,²² current German discrimination against Scientologists raises international concerns²³ over the protections afforded religious minorities in the country that exterminated six million Jews²⁴ less than sixty years ago.²⁵ The U.S. Department of State criticized Germany for its "campaign of harassment and intimidation," while simultaneously rejecting "the Scientologists' terror tactics,"²⁶ a reference to the explosive rhetoric in Scientology counter-attacks. German officials argue that the United States fails to understand the impact of its experience with totalitarianism or Scientology's "murky aims" and

the latter stated that "initially the telephone didn't stop ringing" and that the hotline received calls from three hundred people in four months. *Id.* See also *Anti-Scientology "Hot-Line" Set Up in Germany*, Agence Fr.-Presse, Jan. 31, 1997, available in LEXIS, News Library, AFP File.

As this Note suggests, the German Constitution's free exercise clauses and its ban on a state church theoretically should protect minority religious groups from this kind of majoritarian repression.

19. See Neuffer, *supra* note 17.

20. Ed Enright, *A Target of Religious Discrimination*, DOWN BEAT, Oct. 1, 1996, at 6, available in 1996 WL 9441577.

21. See *Germany at War with Scientology*, *supra* note 7. The German ministry for family affairs screened the film *Phenomenon*, starring John Travolta, for references to his religion, Scientology. *Religion: Germans to Scutinize*, HOUSTON CHRON., Sept. 14, 1996, at 2, 1996 WL 11564553. These celebrities have not ignored these attacks on their religion. See *infra* note 29.

22. But see Andrew Gray, *Germany Vows to Hold Line on Scientology*, Reuters N. Am. Wire, Jan. 31, 1997, available in LEXIS, News Library, REUNA File (Scientologists allege that current tactics approach the manner of severity of the tactics of the Third Reich).

23. "[H]ow does the nation that devised the Holocaust define the very notion of tolerance?" Alan Cowell, *The Test of German Tolerance*, N.Y. TIMES, Sept. 15, 1996, at 6. "Members of the UN Human Rights Committee meeting here have criticized official German discrimination against Scientologists . . ." *Germany Taken to Task on Discrimination Against Scientologists*, Agence Fr.-Presse, Nov. 6, 1996, available in 1996 WL 12173229.

24. R.R. PALMER & JOEL COLTON, *A HISTORY OF THE MODERN WORLD* 819 (6th ed.1984).

25. "Whatever the reason, there is something troubling about Germans once again treating a marginalized group as being outside the German community—whether it is a religion, sect or purported business enterprise. Germany wants very much to be treated as a normal nation. Trouble is, it does not have a normal past." Richard Cohen, *Germany's Odd Obsession With Scientology*, WASH. POST, Nov. 15, 1996, at A31.

26. Thomas W. Lippman, *U.S. Chastises Germany on Scientology*, INT'L HERALD TRIB., Jan. 28, 1997, at A1, available in LEXIS, News Library, IHT File.

its use of "psycho-terror."²⁷ The United States concluded that despite the crackdown on Scientology, the "German Government fully supports religious freedom."²⁸ The Church of Scientology, however, continues to fight Germany's attacks through public protests and international advertising campaigns, comparing their situation to that of German Jews in the early 1930s.²⁹ Leaders in the German Jewish community object to the comparison.³⁰

27. Gray, *supra* note 22.

28. Norman Kempster, *Albright Promises to Make Human Rights a Priority*, L.A. TIMES, Jan. 31, 1997, at A6. The U.S. State Department reported that Germany respects religious freedom despite the Scientologists' charges. *Id.* "Numerous religious groups are active in Germany; many organizations, including many Christian groups, enjoy tax-exempt status." *U.S. Gives Germany Good Marks on Religious Freedom*, Agence Fr.-Presse, July 23, 1997, available in LEXIS, News Library, AFP File.

29. Thirty-four non-Scientologists in the film industry signed an advertisement in the *International Herald Tribune* criticizing German policy. Some were motivated by concern over German religious intolerance, others out of concern they would alienate powerful movie stars such as Tom Cruise. Russell Watson, *Don't Mess With Tom*, NEWSWEEK, Jan. 20, 1997, at 41. For an example of an early advertisement, see *Practicing Religious Intolerance*, N.Y. TIMES, Oct. 17, 1996, at A9. Part of this advertisement reads:

You may wonder why German officials discriminate against Scientologists. There is no legitimate reason, but then there was none that justified the persecution of the Jewish people either. . . .

....

If it sounds impossible that a supposed democracy would deny the bona fides of a genuine religion in order to persecute it, let's not forget that the Nazis did precisely that to the Jewish people in the 1930s. . . .

. . . Had voices been raised in 1930, some would have scoffed, but had they been loud and long enough, it might have made a difference.

Id.

Scientologists have held marches protesting their religious persecution. One in Frankfurt reportedly drew fifteen hundred demonstrators. *Germany: Scientologists Hold Protest*, STAR TRIB., July 22, 1997, available in LEXIS, News Library, BUSDTL File. Others estimate five hundred participated in the march. *Scientologists Urge Religious Freedom in Frankfurt Protest*, Agence Fr.-Presse, July 21, 1997, available in LEXIS, News Library, AFP File. International Scientology leaders hope a march in Berlin planned for October 27, 1997, will draw ten thousand. Some protests are extreme: On a visit to Australia, Chancellor Helmut Kohl was greeted by Scientologists dressed in Nazi uniforms. *German Chancellor Confronted by Protestors in Nazi Uniforms*, Agence Fr.-Presse, May 6, 1997, available in LEXIS, News Library, AFP File.

30. "The Jews, understandably, were underwhelmed by the comparison. Ignatz Bubis, the leader of Germany's Jewish community, accused the Scientologists of falsifying history. The advertisement, he said was 'an insult to German politicians and especially disparages remembrance of the suffering' endured by his people." Imre Karacs, *Scientologists Declare War on 'Nazi' Germany*, INDEP., Oct. 19, 1996, available in 1996 WL 13496621. The United States, which had criticized German treatment of the Scientologists, said, "it bears no resemblance to the facts of what's going on there. The language used is needlessly provocative and not constructive, given the history of Germany." *Id.*

Although probably driven more by rhetoric than historical accuracy, the advertisements highlight why any degree of religious intolerance by German political leaders raises serious concern.

Part II of this Note contains a historical overview of church-state relations in Germany. A brief analysis of the importance of the German Constitution, or Basic Law, as a framework of normative values for Germany and its protections of religious freedom follows in Part III. In Part IV, an analysis of several Federal Constitutional Court cases illustrates how German treatment of Scientologists may violate constitutional norms, increasingly interpreted to protect minority religious groups from majoritarian domination. Yet, this possibly unconstitutional treatment of the Scientologists continues to be culturally and politically acceptable.

Part V posits two explanations for Germany's Scientology dilemma. First, church and state historically coexisted in a comparatively symbiotic relationship, continued by the Basic Law and benefitting traditional churches. More significantly, the Basic Law textually separates its sections guaranteeing freedom of religion from its sections regulating church-state relations. The Federal Constitutional Court, reflecting broader cultural norms, continues to read the Basic Law's two religion sections separately. This Note argues that these sections must be closely linked to be meaningful. The problems with separating the two are not merely semantic. As long as German constitutional debate is framed in terms of free exercise, without checks on the establishment of a national religion, minority religious interests will not receive sufficient protection from majoritarian domination.

II. A BRIEF HISTORY OF GERMAN CHURCH-STATE RELATIONS

Religion has historically encompassed every aspect of German cultural and political life, and church-state relations have been closely intertwined.³¹ "Despite the radical political

Bubis' response sparked a reply from the Reverend Heber Jentsch, president of the Church of Scientology International. *Open Letter from Church of Scientology to German Jewish Leader*, Agence Fr.-Presse, Oct. 21, 1996, available in 1996 WL 12162640.

31. For several reasons, this discussion of church-state relations in Germany focuses exclusively on Christianity and does not address the impact of Judaism on German society. First, German political leaders, i.e., the state, historically were Christian, and the Christian church dominated German cultural life. Second, while the legacy of the Holocaust has a profound impact on German consciousness, as reflected in the Basic Law's commitment to religious freedom, the subject of why the Holocaust occurred is too complex to discuss in this Note. It should be noted, however, that the Basic Law extends to the German Jewish

changes Germany has undergone since the Reformation, German society has in many respects been highly stable, and this has especially been the case in the church-state sphere."³² German churches survived the collapse of three Reichs, two world wars, foreign occupation, and the division and reunification of Germany.³³ Moreover, the Christian churches' vital social and spiritual role in German life ensures their continued cultural dominance. While the Weimar Constitution and the Basic Law ended the policy of *cuius regio, cuius religio*,³⁴ the church and state remain in a strong partnership to this day. The Basic Law maintains the traditional role of churches in the socio-political realm.³⁵ This constitutional connection between church and state reflects larger social norms,³⁶ establishing the context for constitutional interpretation and judicial decision-making.

religious community many of the benefits historically awarded to traditionally dominant churches. See *infra* note 134 and accompanying text.

However, it is interesting and problematic that most texts on German church-state history do not attempt to integrate a discussion of Judaism or the Holocaust with the study of German church-state relations. This may be a reflection of the inappropriateness of the category "church-state" in a discussion of contemporary religious issues. "Church and state" may have been comprehensive in earlier historical periods in which there truly was a "church" and a "state." "Religion and politics" may be a more appropriate epistemological approach. For example, the recent debate between Jews and Catholics over the presence of a convent on the grounds of a concentration camp does not fit comfortably in the purview of "church and state." Nevertheless, this Note will discuss "church and state" in part because much of its conclusion focuses on German civil religion, which by definition centers on majoritarian religion.

32. FREDERIC SPOTTS, *THE CHURCHES AND POLITICS IN GERMANY*, at x (1973).

33. Spotts explains: "In short, throughout historical circumstances the churches enjoyed a position in German society that was more prestigious and more secure than that of any other institution The churches alone survived the collapse of three Reichs, several catastrophic wars, an accident prone republic, foreign occupation, and the dismemberment of the country." *Id.*

34. This phrase translates as "Whose is the kingdom, whose is the religion."

35. Ecclesiastically, the Basic Law continues privileges granted to the churches by the Weimar Constitution. "In the guidelines alone the churches enjoy a favored position in the state that is probably unique in the world, while admitting no political authority over themselves in return. The churches regard this arrangement, moreover, not as a *concession*, but as a *recognition* of their rightful status in society." SPOTTS, *supra* note 32, at 190. Legally, the Basic Law includes an internal inconsistency which dramatically complicates church-state relations. While granting churches special privileges, it also bans the establishment of a state church. *Id.*

36. Spotts argues: "Neither the role the churches play in German social and political life nor the decisive influence they exert on the intellect and psychology of the German nation is widely appreciated outside Germany." *Id.* at x.

A. *The Protestant and Catholic Churches: From the Reformation to the Third Reich*

Any discussion of German church-state relations must begin with the impact of Martin Luther and the Reformation on the German nation and its people.³⁷ As Friedrich Nietzsche explained, "The fundamental fact of German history is Martin Luther."³⁸ Luther launched a massive social, political, and theological revolution when he nailed his 95 Theses to the door of the Castle Church in Wittenberg.³⁹ The Reformation established the Protestant Church, which spawned a number of German denominations, including Lutheranism and the Reformed Churches of Germany.⁴⁰ Three tenets drove Protestant reform: "the authority of the Word, justification by faith alone, and the priesthood of all believers."⁴¹ Luther did not advocate the political application of his religious reformation.⁴² However, in theocratic Germany, any challenge to existing religious bodies was a

37. For general discussion of German church-state history, see John G. Francis, *The Evolving Regulatory Structure of European Church-State Relationships*, 34 J. CHURCH & ST. 775 (1992).

38. SPOTS, *supra* note 32, at 3 (quoting Nietzsche). As any student of Nietzsche will recall, Nietzsche often commented on the centrality of Luther to the German psyche. For example, in *The Genealogy of Morals*, Nietzsche writes: "[W]e are still young. Luther is still our last event; our last book is still the Bible." FRIEDRICH NIETZSCHE, *THE GENEALOGY OF MORALS*, 213 (Horace B. Samuel trans., Russell & Russell 1964) 1887.

39. 7 ENCYCLOPEDIA OF PHIL. 99 (Paul Edwards ed., 1967).

40. The reformation itself was a broad movement, as "[t]he sixteenth century was the age of reformation (or of reformations, in the plural), not just of the Reformation" *Id.*

41. "The Word of God was understood chiefly as an effective proclamation of the Gospel, based on the Scriptures, which evokes faith and sustains a fellowship of believers each of whom is priest to his brothers. The heart of this proclamation is the promise of free forgiveness, (justification) through Christ, which needs only to be accepted by . . . faith" *Id.* at 100.

The Reformation directly challenged the authority of the Catholic Church, which taught that each individual's relationship with God must be mediated through the Church, its clergy, and its rituals.

42. Luther argued that the Law, as the foundation of political society, and the Gospel, the word of God, must be separate. The Law must govern society, not the Gospel. Likewise, the Law must not be placed between the conscience and God. While God rules over all dimensions of man's life, the two realms of Earth and Heaven must remain distinct. 5 ENCYCLOPEDIA OF PHIL. 110 (Paul Edwards ed., 1967). This doctrine parallels St. Augustine's distinction between the City of God and the City of Man.

Interestingly, Luther studied the law before a spiritual crisis directed the focus of his intellectual and personal life to theology. *Id.* at 109. However, not only did Luther not intend for this teaching to have revolutionary political application, but his own political views were far from revolutionary. For example, princes had the power to put down peasant revolts, as God had established them as rulers and the peasants as "rodents."

challenge to the state.⁴³ Thus, Luther was forced to seek the protection of friendly princes when the Catholic Emperor Charles V objected to Luther's teachings.

Despite the Catholic Emperor's efforts, Protestantism took hold in Germany. Under the 1555 Treaty of Augsburg, each imperial prince could choose whether he and his subjects would be Catholic or Protestant.⁴⁴ Germany divided between the Catholic and Protestant Churches when each region's prince selected a religion for his reign.⁴⁵ Religious balkanization grew with the establishment of different denominations of Protestantism, increasing confessional diversity.⁴⁶ The Reformation determined the course and character of German history. "The course of the Reformation and the political developments of the age . . . were consequently responsible for some of the central features of modern German history: the deep religious division of the nation, the confessional-geographic pattern of society, and the intermingling of religion and politics."⁴⁷ Protestantism, the faith of the majority of Germans and their leaders, grew to enjoy a large degree of state support. When, to the dismay of Protestant leaders,⁴⁸ the Empire fell in

43. "Despite the frequent tension between church and state authorities in the Middle Ages, there was between the Holy Roman Emperor and the Pope an essential identity of outlook and interests. A challenge to one was therefore a challenge to the other, and in defying the Church of Rome, Luther at the same time ignited the latent mass of national feeling." SPOTTS, *supra* note 32, at 3.

44. *Id.* at 4.

45. The Protestant church did not remain unified, however, and has never completely unified. For example, Calvinism developed into a significant form of German Protestantism, despite being exempted from the Treaty of Augsburg and the slight decline of Lutheranism in the late sixteenth century. *Id.* at 4-5.

46. John Madeley, *Politics and Religion in Western Europe*, in *POLITICS AND RELIGION IN THE MODERN WORLD* 28, 59 (George Moyers ed., 1991). Germany, with three primary confessions, was one of the most religiously diverse European nations.

Catholics, Lutherans, and Calvinists have all had areas of local dominance in what was until the nineteenth century a veritable patchwork of small states. . . . This basic confessional diversity was furthermore increased rather than decreased in the early nineteenth century when the (originally Calvinist) Hohenzollern monarchy forced through an ecclesiastical union of Lutherans and Calvinists in its territories. Nor did the cross-confessional phenomenon of revivalism do anything to simplify the picture; rather, it added a degree of internal diversity to the existing confessional communities which articulated new tensions between liberal elitist and more orthodox, popular religious traditions.

Id. at 53-54.

47. SPOTTS, *supra* note 32, at 5.

48. For example, one church official bewailed, "The glory of the German Empire, the dream of our fathers, the pride of every German is gone. The Evangelical Church of the German Reformation is closely associated with this

1918, the Weimar Constitution continued many of the Protestant church's privileges.⁴⁹

The Reformation transformed the relationship between the Catholic Church and the German state. Catholics dwindled into a religious minority, and Catholicism lost its political power and cultural dominance. Moreover, as political energy became increasingly directed toward intrachurch politics, Catholicism's high degree of clericalism deepened the divide between the church and the state.⁵⁰

"The sum effect of the Reformation and subsequent political developments was to leave Catholics as a body disadvantaged, leaderless, and insecure—a position that was intensified throughout the nineteenth century."⁵¹ Discriminated against and removed from the bases of socio-political and economic power,⁵² Catholics became politically and culturally isolated from the Protestant majority.⁵³ Catholic separateness, however, eventually provided a locus for political action.⁵⁴ The Protestant-driven Kulturkampf⁵⁵ united Catholics and metamorphosed the Catholic Center Party into one of the most powerful parties throughout the Wilhelmian era and during the rise of the Third Reich.⁵⁶

B. National Socialism, World War Two, and Allied Occupation

The Protestant Church, dismayed by the collapse of the Empire in 1918, "initially welcomed the advent of the Third Reich and in statement after statement enthusiastically described

collapse." *Id.* at 6, n.4 (quoting Fritz Fischer, "Der deutsche Protestantismus und die Politik im Jahrhundert," *HISTORISCHE ZEITSCHRIFT* 502 (1951)).

49. The Basic Law adopts many of these protections. See *supra* notes 33-39 and accompanying text.

50. SPOTTS, *supra* note 32, at 22.

51. *Id.* at 23.

52. As Lutheranism increasingly dominated the German political realm, Catholics faced more and more discrimination and were excluded from high-ranking *Reich* governmental positions. Likewise, Jews were barred from the public service and the army. DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 446 (1989) [hereinafter KOMMERS, *CONSTITUTIONAL JURISPRUDENCE*].

53. See generally SPOTTS, *supra* note 32, at 22-24.

54. *Id.* at 24.

55. The Kulturkampf was characterized by Protestant attacks on Catholicism and its independence. *Id.* at 24.

56. *Id.* The Protestant majority had little need for a religiously based political party and Lutheranism reinforced the separation of the religious from the political. For a brief discussion of the development of confessional political parties, see Madeley, *supra* note 46, at 55.

Hitler's rise to power as a divine miracle."⁵⁷ However, in July 1933, the National Socialists founded the "German Evangelical Church" as a pseudo-Protestant church.⁵⁸ The church's creation shocked Protestant clergy and spurred many, but not all, into resisting the Nazi movement and state interference in ecclesiastical affairs.⁵⁹ The close of World War Two provided an opportunity for the Protestant Church to reflect on its relationship with the state and its earlier nationalism.⁶⁰ At a general conference in Treysa in August 1945, the Protestant Church issued a controversial acknowledgment of guilt for the crimes of the Third Reich.⁶¹ Thus, German Protestantism established a new moral duty of Protestants to the state, mandating active judgment of the state's actions.⁶²

Although the Catholic Church presented a united front against direct Nazi infiltration of the church hierarchy,⁶³ the church aided Hitler's rise.⁶⁴ The Catholic Center Party gave Hitler dictatorial power, unanimously approving the Enabling Act on March 24, 1933.⁶⁵ Shortly thereafter, the Vatican and the German government entered into a concordat.⁶⁶ While the Vatican may have been motivated by the need to protect German Catholicism, its relationship with the National Socialist Party helped legitimize the Nazi regime,⁶⁷ although some clergy resisted the Nazis and the Catholic Church fought any state interference in internal church affairs. Ultimately, the Catholic Church survived World War Two. Although weakened, it was largely intact and, unlike the Protestant Church, never issued a collective acknowledgment of guilt for the Third Reich's crimes against humanity.⁶⁸

57. Spotts, *supra* note 32, at 7.

58. Only a third of the Protestant pastorate joined. *Id.* at 7-8.

59. *Id.* at 8. Clergy fell into three general categories: "German Christians" and other pro-Nazis; members of the "Confessing church," influenced by Karl Barth and arguing that the supremacy of the Scriptures and their meaning could not be altered by contemporary social politics; and those who fell in the middle. "[D]uring the Third Reich 3,000 pastors were arrested, at least 125 were sent to concentration camps, and 22 are known to have been executed for their beliefs." *Id.* at 9.

60. Daniel R. Borg, *German National Protestantism as a Civil Religion*, in *INTERNATIONAL PERSPECTIVES ON CHURCH AND STATE* (Menachem Mor ed., 1993).

61. Spotts, *supra* note 32, at 10-12.

62. *Id.* at 12.

63. *Id.* at 27.

64. *Id.* at 28.

65. *Id.* at 27.

66. *Id.* at 28.

67. *Id.* at 29.

68. *Id.* at 29-30.

During Allied Occupation the Protestant and Catholic churches played an instrumental role in rebuilding a shattered Germany. "As the principal element of stability in the post-war chaos and as the main source of values for a spiritually starved people, the churches found themselves at the war's end in a position of unique authority."⁶⁹ The churches' most urgent duties were pastoral, a task post-war migration made almost impossible. This migration destroyed the long-standing confessional-geographical patterns of society, opening the traditionally closed Catholic or Protestant society and leading to the increased secularization of German life.⁷⁰ Thus, German society became less stratified along Protestant and Catholic lines. Nevertheless, the Protestant and Catholic churches retained much of their cultural authority during Allied Occupation.

The process of rebuilding Germany during Allied Occupation strengthened the social role of churches. Although Allied policy toward German churches was in a perpetual state of flux,⁷¹ the Allies resolved not to upset traditional church-state norms.⁷² The Allied military authorities concluded that "moral rehabilitation would be the churches' business while economic, political, and social reconstruction was the concern of the occupational authorities."⁷³ While the churches helped fill a moral vacuum, Allied policy, at least initially, ignored the churches' vital role in education, food distribution, and general social welfare. Not surprisingly, the Basic Law, drafted during Occupation, continued the traditional partnership between church and state.⁷⁴

C. Contemporary German Church-State Relations and Civil Religion

The Christian churches continue to be fundamental to German culture and are deeply involved in social issues. However, religion's ecclesiastical role in German society has waned since 1945. Fewer and fewer Germans actively participate

69. *Id.* at 47.

70. *Id.* at 48. *See generally id.* at 47-50 (describing the shift in religious-geographic identification and larger societal shifts in post-war Germany).

71. *See generally id.* at 51-111 (describing the Allied Occupation and the rebuilding of Germany after World War Two and the role played by German churches).

72. *Id.* at 59.

73. The churches' role in moral rehabilitation was complicated by the ever-shifting Allied approach to de-Nazification. However accurate, there nevertheless was a sense that clergy were the least likely to have been Nazis. The basis of this belief is questionable, considering the creation of the German Christian Church, its impact on the Protestant Church, and the Catholic Church's political support of National Socialism. SPOTTS, *supra* note 32, at 59.

74. Madeley, *supra* note 46, at 56-57.

in traditional religious activities.⁷⁵ The Protestant and Catholic Churches nevertheless remain significant political and social forces,⁷⁶ and the churches enjoy a very close relationship with the state. The churches' political power and impact on social consciousness has been described as follows:

As part of the play of power, agencies and individuals outside the state seek to affect the nature of the collective decisions—public policies—as they are made. Indeed, some achieve a status that can rival and even overshadow officially designated institutions. This necessarily extends the scope and complexity of the relationship between religion and politics.⁷⁷

The Basic Law was drafted to continue the traditionally close partnership between church and state without re-establishing a

75. *Id.* See also Francis, *supra* note 37, at 791. This statement may be misleading, as degrees of religiosity vary throughout the different German regions. Protestant areas of the former West Germany are marked by a higher degree of secularization, whereas areas such as Bavaria and parts of the Rhineland have been characterized as "Europe's religious heartland where levels of orthodox religious observance have been historically very high." *Id.* at 54.

Bavaria's high degree of religiosity helps account for that region's leadership in restricting the influence of the Church of Scientology, as well as the political debate, currently being resolved in the Federal Constitutional Court, over the placement of crucifixes in public areas such as schools and courtrooms. See *infra* notes 190-204 and accompanying text.

That degrees of religiosity continue to vary according to geographical region also calls into question theses such as Spott's that the end of World War Two and the accompanying migration undermined the geopolitical influence of the Protestant and Catholic Churches.

76. In the years following Allied Occupation, Protestants and Catholics became more politically united, as recognition of common experience and values replaced earlier separatist ideology. This political movement culminated with the formation of the cross-confessional West German Christian Democratic Union, which united a wide array of Christian political forces. Despite a decline in power in the late 1960s, the party today enjoys a large degree of electoral support. Madeley, *supra* note 46, at 56-61.

The author explains, however, that "[t]he resurgence of the Christian Democrats owed most to the factors unrelated to developments in the religious sphere; it was certainly not a consequence of some latter-day revival of religion. On the other hand, it was not hindered by the fact that left-liberal proposals for reform occurred in areas of particular sensitivity to the Churches and caused more widespread conservative reaction." *Id.* at 60-61.

For an analysis of the social and political role of the Protestant Church in East Germany before and after unification, see John P. Burgess, *Theologians and the Renewal of Democratic Political Institutions in Eastern Germany*, 37 J. CHURCH & STATE 87 (1995); John S. Conway, *The "Stasi" and the Churches: Between Coercion and Compromise in East German Protestantism 1949-89*, 36 J. CHURCH & STATE 725 (1994).

77. Madeley, *supra* note 46, at 6.

theocracy. Thus, German law must be read and interpreted within the context of this religious history.⁷⁸

III. THE BASIC LAW AND "SUPRA-POSITIVE VALUES": THE NORMATIVE FRAMEWORK FOR GERMANY

The *Grundgesetz* (hereinafter Basic Law), creates the structural and normative framework of the modern German state;⁷⁹ the German Constitution seeks a "perfect bonding between text and polity," and the "normativity of the constitution and the existentiality of the political reality."⁸⁰ Created by the Allies at the end of World War Two, the Basic Law strives to ensure democracy, federalism, and fundamental rights.⁸¹

Three fundamental principles of the Basic Law undergird the German state.⁸² First, Article I dictates: "[T]he dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority."⁸³ Second, Article 20 provides for a democratic and social federal state. Third, all agencies and officials are bound by law and justice. Germany is simultaneously a *Rechtsstaat* or "state governed and bound by law," a *Sozialstaat* or welfare state, a *Parteienstaat* with political parties competing in free and open elections, and a militant democracy.⁸⁴ Thus, the Basic Law combines Germany's democratic tradition with forceful guarantees of basic human rights and political freedom.⁸⁵

The Basic Law breaks from traditional German legal theory by creating a state that exceeds the *Rechtstaat*, combining positive rights with a moral code for the nation. In a *Rechtstaat*, or state of positive law,⁸⁶ the state creates law as "a closed system of logically arranged and internally coherent rules."⁸⁷ Although

78. For a brief analysis of the relationship between religion and the state in Germany, see Klaus Obermayer, *State and Religion in the Federal Republic of Germany*, 17 J. CHURCH & STATE 95 (1975).

79. Thus, the Basic Law is Germany's Constitution. "A 'constitution' in the German understanding of the term is the framework for the permanent organization of a particular nation state." KOMMERS, CONSTITUTIONAL JURISPRUDENCE, *supra* note 52, at 35.

80. *Id.* at 45.

81. DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 9 (1994). See *id.* at 1-10 for a succinct overview of German political history from 1871 to the close of World War Two.

82. KOMMERS, CONSTITUTIONAL JURISPRUDENCE, *supra* note 52, at 36.

83. *Id.*

84. *Id.* at 42.

85. *Id.*

86. See Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L. J. 837, 846 (1991) [hereinafter Kommers, *Prolegomenon*].

87. KOMMERS, CONSTITUTIONAL JURISPRUDENCE, *supra* note 52, at 273.

driven by reason and logic, the *Rechtstaat* is not amoral or value-neutral. A properly reasoned answer in the *Rechtstaat* will be both morally and legally sound. As one scholar explains:

Der Staat is more than the body politic. It represents . . . the perfect synthesis between individual freedom and the objective authority of the law and . . . a moral organism in which individual liberty finds perfect realization in the unified will of the people⁸⁸

Thus in the *Staat*, the ethical validity of a legal answer is grounded in the state and its government. Moreover, individual liberty is derived from the state: The state does not protect liberty, it provides it. However, Germany's Nazi past painfully illustrated to the framers of the Basic Law the inability of the *Staat* to ensure individual liberty.⁸⁹ In the *Staat*, individual liberty is conditioned on "believing in, and willing that which is common to the whole."⁹⁰ Conversely, while the Basic Law encompasses communitarian values, it "subjects positive law to a higher moral order."⁹¹

The Basic Law creates a normative system of ethics for the German state and its citizens;⁹² the unsurpassable value of human dignity provides "supra-positive"⁹³ ethical and legal norms for Germany. The Federal Constitutional Court has interpreted the Basic Law as containing an "objective order of values"⁹⁴ and "a unified structure of substantive values."⁹⁵ Rather than merely describing what a society believes to be right or wrong, normative values state what objectively is right or wrong. These normative values are intrinsic to the constitutional structure of Germany,⁹⁶ as "it subjects positive law to higher moral order."⁹⁷ Every right the Basic Law guarantees has a corresponding objective moral

88. *Id.* at 39.

89. *Id.*

90. *Id.*

91. *Id.*

92. In generating ethical principles in such a system, "many ethical questions are asked, but they can be subsumed under three general questions: (1) What is right and wrong? (2) What is blameworthy and praiseworthy? (3) What is desirable or worthwhile?" 3 ENCYCLOPEDIA OF PHIL. 121 (Paul Edwards, ed., 1967). Ethical norms are prescriptive, mandating conforming action, rather than merely descriptive, or describing what action is taken by an individual.

93. See Kommers, *Prolegomenon*, *supra* note 86, at 846.

94. *Id.* at 843.

95. *Id.* at 858.

96. "The Basic Law's framers believed, quite clearly, that the best way to realize human dignity, now and in the future, is to freeze certain principles of governance into the constitutional structure itself." *Id.* at 846-47.

97. KOMMERS, CONSTITUTIONAL JURISPRUDENCE, *supra* note 52, at 39.

value because these values have an independent reality under the Basic Law.⁹⁸

Liberty is vested in man, by nature; consequently the constitution is laid down to guarantee liberty, not to grant it. . . . In this respect compared with the former German constitutions, the Basic Law evidences important differences in its assessment of the State, which is no longer seen as a value in itself, but which obtains its value by securing the liberty of the people.⁹⁹

Hence, positive rights are grounded in the moral order inherent in the Basic Law, not in the state itself.

Once a provisional document, the Basic Law possesses the political power of a formally ratified constitution,¹⁰⁰ despite lacking ratification through popular referendum. The Federal Constitutional Court has interpreted the Basic Law as possessing inherent, as opposed to formal, legitimacy arising from the "correspondence between the will of the people and the intentions of the Constitution."¹⁰¹

The recent unification¹⁰² of East and West Germany prompted a re-examination of the Basic Law. The Joint Constitutional Committee could have proposed substantial modifications in the Basic Law or a new constitution, but instead left the Basic Law largely intact. The decision of the Joint Constitutional Committee to retain the Basic Law may be seen as *de facto* popular ratification. Moreover, it may be argued that the German people continue to accept the Basic Law's normative values. As one commentator noted:

The difference between ordinary legislation and constitution making can be explained by the substance of constitutional norms.

98. See Kommers, *Prolegomenon*, *supra* note 86, at 859.

99. Eckert Klein, *The Concept of the Basic Law*, in *THE MAIN PRINCIPLES OF THE GERMAN BASIC LAW* 16 (Christian Starck ed., 1983).

100. Professor Kommers explains:

[T]he "provisional" nature of the Basic Law and the manner of its creation have given rise to a debate in Germany over the Constitution's legitimacy. In German democratic theory, only a constitutional assembly chosen by the people in [a] free and open election can establish itself as a constituent power. In 1949, however, state legislatures, not the whole German people, chose the delegates to the Parliamentary Council, just as they and not the people Constitution. For these reasons, some legal scholars have suggested that the Basic Law lacks formal legitimacy in German constitutional theory What validates the Basic Law in the prevailing German view is the existing correspondence between the will of the people and the intentions of the Constitution.

KOMMERS, *CONSTITUTIONAL JURISPRUDENCE*, *supra* note 52, at 35-36.

101. *Id.*

102. On March 18, 1990, East Germans voted to end the division of Germany. Kommers, *Prolegomenon*, *supra* note 86, at 837.

They refer to the fundamental values or principles of a social order or of public policy, and they constitute institutions and rules which guide the decisions of the political actors.¹⁰³

This continued acceptance of the Basic Law reaffirms its constitutional hegemony and directive power over German society and law.¹⁰⁴

A. *The Federal Constitutional Court: Guardians of the Basic Law*

The Federal Constitutional Court gives life to the Basic Law and serves as *Hüter der Verfassung*, Guardians of the Constitution and its values.¹⁰⁵ The court relies on interpretative schools ranging from "linguistic analysis to the invocation of 'suprapositivist' norms reputedly underlying the Basic Law."¹⁰⁶ The Federal Constitutional Court possesses sole jurisdiction over constitutional issues arising from the Basic Law,¹⁰⁷ which governs the federal state and the sixteen German Lands.¹⁰⁸ Other courts must certify constitutional questions to the Federal Constitutional Court,¹⁰⁹ helping ensure a uniform body of constitutional law.

Cases arise most frequently as constitutional complaints or *Verfassungsbeschwerden*: "a challenge to executive, judicial, or legislative action by a person claiming infringement of his

103. Arthur Benz, *A Forum of Constitutional Deliberation? A Critical Analysis of the Joint Constitutional Commission*, in CONSTITUTIONAL POLICY IN UNIFIED GERMANY 99, 101 (Klaus H. Goetz & Peter S. Cullen eds., 1995).

104. The Basic Law now governs unified Germany and helped guide the nation through the process of unification. "The role of Basic Law during the unification process was pivotal. Unification confirmed the centrality of the Basic Law for the German polity." Klaus H. Goetz & Peter J. Cullen, *The Basic Law after Unification: Continued Centrality or Declining Force?*, in CONSTITUTIONAL POLICY IN UNIFIED GERMANY, *supra* note 106, at 5, 14. *Id.* However, Goetz and Cullen caution against interpreting the "dominance of constitutional argument in the political process with the capacity of the Basic Law effectively to shape 'the political and social life of the community' which its 'claim to a comprehensive validity' would suggest." *Id.* at 38.

105. "The Basic Law thus pushes the principle of judicial review pretty close to its logical conclusion: The Court is given all powers necessary to ensure it can function, in accord with the framer's intentions, as guardians of the Constitution (*Hüter der Verfassung*)." CURRIE, *supra* note 81, at 28.

106. KOMMERS, CONSTITUTIONAL JURISPRUDENCE, *supra* note 52, at 48. For an overview of the Federal Constitutional Court's interpretative approaches, see *id.* 48-60.

107. CURRIE, *supra* note 81, at 26.

108. The Lands carry out federal law; however, to the extent that power has not been allocated to the federal government, the Lands may create their own laws. *Id.* at 25.

109. *Id.* at 27.

constitutional rights.”¹¹⁰ However, the Federal Constitutional Court has no case or controversy requirement¹¹¹ and may review state or federal law in the abstract.¹¹² While the Court issues opinions in declaratory form,¹¹³ the power of abstract review establishes the Court as a forceful Guardian of the Constitution.

As Guardians of the Basic Law, the Court acts as an intermediary between the text and the polity. Judicial review is perceived as a political act that “prompted Germans to vest the power to declare laws unconstitutional in a special tribunal staffed with judges elected by parliament and widely represented by the political community.” Justices are appointed for a single twelve-year term and must retire at age sixty-eight, whether or not they have served their full term.¹¹⁴ The *Bundestag* and the *Bunderat* each elect one-half of the justices, alternating in selecting the Court’s president and vice-president.¹¹⁵

The actual selection of Federal Constitutional Court justices is highly politicized, with parliamentary parties exerting pressure on their members’ votes during the selection process.¹¹⁶ Thus, the justices on the Constitutional Court are likely to be representative of the majoritarian political community and its values. These values are influenced by Germany’s religious history and the traditional partnership between church and state, which is incorporated in the Basic Law. It is inevitable that the Federal Constitutional Court will, to some degree, reflect popular norms in its decisions involving religious issues arising out of the Basic Law.

B. Basic Law Provisions Guaranteeing Personal Liberty

The framers of the Basic Law created broad protections for personal liberty to guarantee the dignity of all individuals. Article I(1) of the Basic Law declares the dignity of man inviolable¹¹⁷ and

110. *Id.*

111. *Id.*

112. “Abstrakte Normenkontrolle” *Id.* at 28.

113. “It does not issue orders to government officials or involve itself in enforcing the Constitution.” DONALD P. KOMMERS, *POLITICS AND GOVERNMENT IN GERMANY, 1944-1994: BASIC DOCUMENTS* 57 (1994) [hereinafter KOMMERS, *BASIC DOCUMENTS*].

114. KOMMERS, *CONSTITUTIONAL JURISPRUDENCE*, *supra* note 52, at 24.

115. *Id.*

116. *Id.* at 25.

117. GRUNDGESETZ [Constitution] [GG] art. I(1), *translated in* KOMMERS, *CONSTITUTIONAL JURISPRUDENCE*, *supra* note 52, at 505 (throughout this Note all references to the German Constitution are to the Kommers translation). This guarantee echoes Kant’s categorical imperative that all individuals be treated as ends in themselves and not means to an end. Immanuel Kant, *GROUNDING FOR*

binds not only all state authority¹¹⁸ but also all German people. Neither the state nor individual citizens may act to infringe on the dignity or basic rights of others. "The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world."¹¹⁹ Article II ensures that each person shall "have the right to the free development of his personality." The free development of personality is limited by the moral order implicit in the Basic Law. Hence, no one may infringe on another's rights in the development of his or her personality. Under Article III, each person has equal rights regardless of "his sex, his parentage, his race, his language, his homeland and origin, his faith, or his religious or political opinions."¹²⁰

The Basic Law establishes the parameters for a society whose members have equal rights and dignity. To ensure that these rights are respected to the highest degree possible, Basic Law creates both negative and positive rights.¹²¹ The state may not infringe on a citizen's personal liberty and a citizen may make demands on the state as part of the realization of these liberties. Furthermore, none of the rights guaranteed by the Basic Law may be enjoyed at the expense of another's dignity.

C. Basic Law Provisions Guaranteeing Religious Freedom

The Basic Law guarantees a wide range of religious liberty, acknowledging the importance of religion to the individual and to society. Religious and philosophical beliefs warrant special constitutional protection because they constitute the most fundamental elements of individual identity.¹²² As one scholar explains:

If religion resides at the core of the human personality and furnishes the basis of connection to transcendent values—that is if it is an identity-defining attribute of personhood—then under the objective value order of the Basic Law the proper constitutionalist

THE METAPHYSICS OF MORALS 30 (James W. Ellington, trans.); Akademie edition at 421. It also reflects Christianity's edict of "[D]o unto others as you would have them do unto you." See Luke 6:31 (King James).

118. GG art. I(1).

119. *Id.* art. 2(1).

120. *Id.* arts. 3(1)-(3).

121. See Kommers, *Prolegomenon*, *supra* note 86, at 861.

122. "Religious expression is 'speech' and 'association' of a special kind; it rises above ordinary expression because it deals with the innermost convictions of the human person, and thus it merits special protection under the Basic Law." KOMMERS, CONSTITUTIONAL JURISPRUDENCE, *supra* note 52, at 445.

agenda is the creation of an environment that encourages persons to manifest their religious personalities.¹²³

Strong protection of religious freedoms combines with an approach to church-state relations that continues the historically strong partnership between church and state. Although the Basic Law mandates state neutrality toward religion, the German concept of religious neutrality is characterized more by state cooperation with religion than separation of the state from religion.

Article IV guarantees freedom of religious thought and practice.¹²⁴ "Freedom of faith, of conscience, and freedom of creed, religious or ideological (*weltanschaulich*) shall be inviolable The undisturbed practice of religion is guaranteed."¹²⁵ Moreover, constitutional scholars have noted free exercise is "undiminished by the reservation clauses that qualify other constitutional rights."¹²⁶ While Germany historically protected freedom of religious thought, freedom of faith did not necessarily entail the right to express that belief. Until 1849, freedom to publicly express religious beliefs was limited to

123. See Kommers, *Prolegomenon*, *supra* note 86, at 869.

124. Thus Article IV explicitly protects the two fundamental aspects of freedom of religion: belief and action based on those beliefs. Germany's protection of the freedom to act upon religious belief contrasts with United States First Amendment jurisprudence which protects absolutely the freedom of belief but which allows action based on belief to be constrained. *Brawnfield v. Brown*, 366 U.S. 599, 603 (1961). See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940) ("[Free exercise] embraces two concepts,—freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be."). But see *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (a facially neutral, generally applicable law which infringes upon the free exercise of a religious belief must be justified by a compelling state interest with no alternative regulatory forms); *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 877 (1990) ("The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires.") (a neutral, generally applicable law that directly infringes upon an individual's religiously motivated action does not offend the First Amendment). Cf. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) ("Although a law targeting religious beliefs as such is never permissible, . . . if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral; . . . and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.").

Thus, at present the U.S. Supreme Court permits some degree of accidental interference with religious practice, but forbids deliberate interference with religiously-motivated belief. Although German freedom to practice religion is not absolute, the Basic Law demonstrates a strong textual commitment to such freedom.

125. GG art. 4(1)-(2).

126. KOMMERS, CONSTITUTIONAL JURISPRUDENCE, *supra* note 52, at 444.

members of the dominant churches.¹²⁷ Thus, by assuring freedom of religious belief and practice to all individuals regardless of their creed, the Basic Law dramatically expanded the freedom of religion existing in earlier German states.¹²⁸

The Basic Law incorporates verbatim the Weimar Constitution's regulation of church-state relations.¹²⁹ Article 137

127. "[F]reedom of faith (*Freiheit des Glaubens*) in German history has not always implied the freedom corporately to express a creed, or, at the individual level, one's inner convictions. In addition, German constitutionalism distinguished historically between the dominant churches (e.g. Catholic, Evangelical, and Reformed) and minor religious sects. Prior to 1848 the right to the public expression of religion had not been extended to the former." *Id.* at 446.

128. The provisions of Basic Law provide for a separation between church and state, but not necessarily as distinct a separation as in other liberal democracies.

The Free Democratic Party published its Church Paper, "Free Church in a Free State" (*Freie Kirche im Freien Staat*), in which it proposed a more stringent separation of church and state than created by the Basic Law. Detlev Karsten translated and reproduced the 13 theses of this paper. The 10 that mark the greatest divergence from Basic Law provisions are excerpted below. Numbers 2-10 illustrate what privileges the Basic Law affords religion. Number 1 reflects the relationship between church and state as perceived by some Germans unhappy with the current partnership paradigm:

(1) Churches and ideological communities should make decisions about their own affairs independently of State influences. This requires the State to give up its remaining channels of influence

(2) The status of 'corporation under public law' is not applicable to religious or ideological groups like the churches because these bodies do not derive their duties from the State. On the other hand, the law regulating associations cannot do justice to the significance of the churches and other large communal bodies. A new law concerning such bodies has therefore to be developed which takes to account of their full meaning and public workings. . . .

(3) Churches and ideological communities should regulate their membership within the framework of the freedom of religion according to their own laws. . . .

(5) The existing church tax should be replaced by the churches' own contributory system. . . .

(6) The constitutional principle of ideological/ religious neutrality of the State should be applicable to the Lander constitutions and law, and rules and customs in public life. The religious convictions of individual groups may not be made binding for everyone. . . .

(9) Education, the care of the sick and social welfare should lie within the public domain. . . .

(10) The community school which is religiously and ideologically neutral should be the norm for a state school in the entire Federal Republic. . . .

Detlev Karsten, *Public Opinion: Interest Groups and the Media*, in KOMMERS, BASIC DOCUMENTS, *supra* note 113, at 371, 387-88.

129. "The Weimar Constitution's injunction: 'There shall be no state church' is the core of the Basic Law's non-establishment' provisions. As other church-state clauses show, however, the meaning of non-establishment in

declares, "there shall be no state church."¹³⁰ Before the Weimar Constitution, the theocratic doctrine of *cuius regio, cuius religio*¹³¹ dictated church-state relations, to the benefit of Lutheranism and to the detriment of other religious groups. The Weimar Constitution marked a change in church-state relations from one of unity to one of partnership. Thus, under the Basic Law, church and state must exercise their power in separate realms. Yet, the simplicity of the ban on a state church is misleading. The Basic Law formulates a complicated scheme of church-state relations that strives to balance the traditionally intimate relationship between church and state with the contemporary requirements of religious freedom.

The Basic Law continues to provide many of the privileges traditionally afforded religious bodies in Germany. While the state must be neutral in addressing religion, the Basic Law does not prevent the state from assisting religion. For example, the state will levy a tax on church members on behalf of the church.¹³² Although "[a]ssociations whose purpose is the cultivation of a philosophic ideology shall have the same status as religious bodies,"¹³³ the right to administer taxes has been extended only to major religious organizations. Furthermore, religion is not barred from many public realms, such as state-sponsored schools. As one scholar notes, "Collectively, these provisions recognize the important social role played by organized religious bodies in German public life The [G]erman theory of religious freedom does not imply . . . the state's total withdrawal from religion."¹³⁴ Indeed, an absolute separation between church and state would constitute a radical break from historical cultural norm, undermining the Basic Law's popular acceptance and political legitimacy.

Germany differs significantly from its meaning in the United States." KOMMERS, CONSTITUTIONAL JURISPRUDENCE, *supra* note 52, at 445.

130. GG art. 137(1).

131. See *supra* note 34.

132. Individuals may opt out of paying the tax, normally eight to nine percent of an individual's income, by leaving the church. Taxes are collected on behalf of the Lutheran and Catholic churches by state governments. Professional tennis player Steffi Graf recently made headlines when she left the Roman Catholic church, prompting speculation that the tax contributed to her decision. George Boehmer, *Germans Bolt From Mainstream Churches to Avoid Tax: Tennis Star Graf Leaves Catholicism, Avoids 8-9% Levy*, SEATTLE TIMES, Aug. 10, 1997, at A12, available in LEXIS, News Library, SEATTM File.

133. GG art. 137(1).

134. KOMMERS, CONSTITUTIONAL JURISPRUDENCE, *supra* note 52, at 218. The Nazi regime's massive attack on religion and the Basic Law's dedication to preventing such attacks in the future helps explain why "it does not erect an American-designed wall of separation between church and state." *Id.*

The Basic Law protects religious groups from state interference with their internal affairs. Religious groups may form and associate without any state restriction,¹³⁵ although Germany restricts these rights for other groups.¹³⁶ Article 137 guarantees religious groups' self-governance and administrative autonomy. Article 138 ensures religious and ideological groups the right to own property for worship, education, or charitable purposes.¹³⁷ Existing religious bodies are ensured continuing corporate and legal status, triggering many of the constitutional protections of religious freedom guaranteed by the Basic Law.¹³⁸ New religious groups may be granted similar status: "[O]ther religious bodies shall be granted like rights upon application, if their constitution and the number of their members offer an assurance of their permanency."¹³⁹ Thus, many constitutional rights depend on the government's categorization of the group as an ideological organization or religious body.

An individual's religious identity cannot affect his or her identity and rights as a citizen. Article 136 ensures that "[c]ivil and political rights and duties shall be neither dependent on nor restricted by the exercise of the freedom of religion."¹⁴⁰ Religious creed may not be a requirement for public office or the exercise of civil or political rights.¹⁴¹ No one may be required to disclose his or her religious belief and the state may not "inquire into a person's membership in a religious body except to the extent that rights and duties depend thereon or that a statistical survey ordered by law makes it necessary."¹⁴² Furthermore, "[n]o one may be compelled to perform any religious act or ceremony or to participate in religious exercises or to use a religious oath."¹⁴³ Additionally, the German Lands (hereinafter Lands) are bound by the Basic Law.¹⁴⁴ Article 33 explicitly requires religious freedom in the Lands: "Enjoyment of civil and political rights, eligibility for public office, and rights acquired in the public service shall be independent of religious denomination. No one may suffer any disadvantage by reason of his adherence or non-adherence to a

135. GG arts. 137(2)-(3).

136. The restrictive measures that may be placed on other groups are intended to prevent the rise of neo-Nazi groups and other organizations who seek to overthrow the Basic Law or democratic values. Thus, these measures provide the German state the tools to be a militant democracy.

137. GG art. 138(2).

138. *Id.* arts. 137(4), (6).

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

140. *Id.* art. 136(1).

141. *Id.* art. 136(2).

142. *Id.* art. 136(3).

143. *Id.* art. 136(4).

144. *Id.* art. 31: "Federal law shall override Land law."

denomination or ideology."¹⁴⁵ Thus, political rights may not be concomitant with religious affiliation.

If the German government recognized Scientology as a legitimate religious or ideological organization, the alleged persecution of its members by the government and individual citizens would violate Scientologists' rights under the Basic Law. The government would have an affirmative duty to protect Scientologists from measures infringing their religious and personal liberty. Article 4 would guarantee Scientologists' free exercise and profession of religious beliefs. Banning Scientologists from civil service would be blatantly unconstitutional.

The question becomes why Germany refuses to grant the Church of Scientology legal status as a religious or ideological organization. More importantly, could the Basic Law one day also fail to protect the freedoms of other religious minorities? The following analysis of case law suggests that the Federal Constitutional Court's interpretation of the Basic Law focuses on free exercise of religion guarantees rather than on the prohibition of a national church. State involvement with the traditionally dominant churches has resulted in a narrower definition of religion and, perhaps, a narrower scope of protection for religious freedom under the Basic Law.

IV. THE FEDERAL CONSTITUTIONAL COURT: DETERMINING THE BOUNDARIES OF RELIGIOUS FREEDOM

The Federal Constitutional Court decides few cases involving religion, perhaps because of widespread acceptance of the church-state relationship established by the Basic Law. The Federal Constitutional Court (hereinafter Court) has broadly interpreted the Basic Law provisions ensuring freedom of religion. Conversely, the Court has not emphasized the guarantee that "there will be no state church," thereby upholding strong state support of religion and a large degree of religiosity in public forums.

The Court's holdings suggest that the ban on a state church is precisely that: a ban on a state church. State-sponsored denominational schools, school prayer, and taxes levied to support churches have all been upheld under Article 4.¹⁴⁶ Such measures have not been held to lead to a de facto establishment

145. *Id.* art. 33(3).

146. *See infra* notes 157-73 and accompanying text; *see generally* KOMMERS, CONSTITUTIONAL JURISPRUDENCE, *supra* note 52, at 472-81 (summarizing the history, law, and cases on point); CURRIE, *supra* note 81, at 246-48 (church tax); *id.* at 248-49, 253-55 (public schools).

of a national church.¹⁴⁷ However, recent decisions concerning the appropriateness of crucifixes in courtrooms and classrooms suggest the Court's increasing willingness to protect religious minorities from domination by majoritarian religious groups.¹⁴⁸ Nevertheless, the traditional partnership between Christian churches and the state, continued by the Basic Law, may fail to protect minority religions from majoritarian pressures. This narrows the scope of religious freedom for those outside traditional cultural and religious norms.

A. *Interdenominational Public Schools and School Prayer*

The requirement of religious neutrality does not prevent a strong partnership between church and state in Germany. Two Federal Constitutional Court cases determining the role of religion in public schools illustrate this point.¹⁴⁹ The Basic Law provides for religious instruction¹⁵⁰ in state-sponsored primary and secondary schools.¹⁵¹ The Court held that barring religion from public schools would not further religious neutrality; instead it would create an impermissible bias for secularism.¹⁵² Under the Basic Law, each Land independently oversees its public schools, whether confessional, interdenominational, or secular.¹⁵³ Most schools are interdenominational, but even secular schools provide religion classes taught by volunteer adjunct faculty.¹⁵⁴ While under Article 7(2) parents have the right to educate their children in the religion of their choice, each Land's legislature determines the nature of its schools, and parents cannot demand that the legislature establish a school conforming to their religious beliefs.¹⁵⁵

147. See *infra* notes 168-70 and accompanying text; see also KOMMERS, CONSTITUTIONAL JURISPRUDENCE, *supra* note 52, at 446 (discussing the school prayer case and establishment issues); *id.* at 472-73 (German doctrine of neutrality).

148. See *infra* notes 189-201 and accompanying text (discussing the *Courtroom Crucifix Case* and the *Classroom Crucifix Case*).

149. *Id.*

150. KOMMERS, CONSTITUTIONAL JURISPRUDENCE, *supra* note 52, at 77.

151. *Id.*

152. *Id.* at 473.

153. *Id.* at 477-78.

154. *Id.* at 478.

155. *Interdenominational School Case*, 41 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] 29 (1975), translated and compiled in KOMMERS, CONSTITUTIONAL JURISPRUDENCE, *supra* note 52, at 473. The role of religion in public schools is now relatively uncontroversial, although some Lands have begun to question if and how minority religious groups should receive religious education in public schools. For example, North-

In the *Interdenominational School Case*, the Federal Constitutional Court held that parents' freedom *from* religion must be balanced against other parents' freedom to practice religion.¹⁵⁶ The state constitution of Baden-Wuttemberg exclusively established Christian interdenominational public schools. The protesting parents argued that this arrangement violated their rights to religious freedom and to raise their children according to their ideological choice. While acknowledging these rights, the Court explained that "no exclusive parental claim to the education and upbringing [of their child]" exists, and the state has an equal and independent "educational mandate."¹⁵⁷ Parents' interests in their children's education and the state's interest in educating its citizenry must be harmonized. The Land may establish any of three legally permissible types of schools: interdenominational, denominational, or ideological. If parents do not find a school that satisfies their ideological criteria, their child may attend a private school.¹⁵⁸

The Court's discussion focused on the right to free exercise of religion, not on the Basic Law's prohibition of the establishment of a state church: "Basic Law protects the negative as well as the positive manifestation of religious freedom against encroachment by the state."¹⁵⁹ The right to freedom *from* religion must be harmonized with the freedom to practice religion. Thus "the elimination of all ideological and religious references would not neutralize the existing ideological tensions and conflicts, but would disadvantage parents who desire a Christian education for their children"¹⁶⁰ Preserving a pluralistic society requires religious freedom to avoid infringing others' rights to the same freedom. Thus the Federal Constitutional Court established that freedom of religion encompasses both positive and negative rights and that each must be protected.

The Court held that the Land's legislature ultimately must resolve the tension between the freedom to pursue religion and the freedom to avoid its influence.¹⁶¹ The Basic Law gives state legislatures the power to strike this balance. Each Land "may pass differing regulations due to the differences in school traditions, the denominational composition of the population, and

Rhine Westphalia provides Islamic classes in its public schools, despite objections from traditional German churches and private schools. *Id.* at 479.

156. *Id.* at 473.

157. *Id.*

158. *Id.* at 474.

159. *Id.* at 475.

160. *Id.* at 476.

161. *Id.*

its religious roots."¹⁶² However, the Court cautioned that schools may not be missionary and children cannot be forced to attend religion classes. The right to a religious education was included in the guarantees of the Basic Law because it constituted a fundamental component of traditional German culture.

While it may have been necessary to continue religious education to ensure the Basic Law's popular support and cultural legitimacy, religious education in public schools may discriminate against the interests of minority religious groups. Under the paradigm established in the *Interdenominational School Case*, a Muslim family unable to afford a private school may be forced to send its child to a Catholic school. Even in a state with a population that is ten percent Muslim, the legislature, sensitive to the electoral power of the ninety percent who are non-Muslims, could create a school system hostile to Muslim beliefs. Judicial review could provide a check on the majoritarian religious groups' domination of the public schools. However, the Federal Constitutional Court held that balancing these interests is subject to majoritarian pressures via the state legislatures.

Four years after the *Interdenominational School Case*, the Court addressed the issue of prayer in public schools and the boundaries of free exercise in a state forum. *The School Prayer Case* combined two complaints, encompassing positive and negative dimensions of religious freedom.¹⁶³ In one case, a parent argued that the prohibition of school prayer violated his constitutional right to religion. In a separate case, a parent argued that the presence of school prayer violated his right of freedom from religion. The Court framed the question as "whether school prayer outside of religion class should be permitted in compulsory state schools when a pupil's parents object to the prayer,"¹⁶⁴ and held that non-compulsory school prayer was permissible.

Reaffirming its holding in *Interdenominational School Case*, the Court established that "the incorporation of Christian references is not absolutely forbidden when establishing public schools, even though a minority of parents may not desire religious instruction for their children and may have no choice but to send their children to the school in question."¹⁶⁵

As in the *Interdenominational School Case*, the Court focused on the freedom to pursue religion, arguably protected at the

162. *Id.*

163. *School Prayer Case*, 52 BVerfGE 223 (1979), translated and reprinted in KOMMERS, CONSTITUTIONAL JURISPRUDENCE, *supra* note 52, at 466.

164. *Id.* at 467.

165. *Id.* at 468.

expense of the freedom from religion. The Court reasoned that prayer in school was not per se unconstitutional. Prayer must be voluntary, and students must be given an option not to participate: "The state does not issue an order in this case, it makes an offer which the school class may accept."¹⁶⁶ A blanket ban on school prayer would violate the right to practice religion because "Article 4 of the Basic Law grants not only freedom of belief but also the external freedom publicly to acknowledge one's belief."¹⁶⁷ Students who do not wish to pray could find an appropriate way not to participate, such as leaving the classroom. While such actions may be difficult, the Court argued that it could not assume non-participation would lead to ostracism.¹⁶⁸ Additionally, the Court did not express concern that prayer in schools might favor one religion over another or religion over non-religion, leading to state endorsement of religion or the quasi-establishment of a state church.¹⁶⁹

B. *The Blood Transfusion Case: Religious Exemption from a Generally Applicable Law*

The Basic Law may require exemption from a generally applicable, facially neutral civil or criminal statute that accidentally infringes free exercise of religious belief. Exemption from such laws ensures that the majoritarian legislature will not inadvertently infringe a minority religious group's freedom. Thus, the Federal Constitutional Court reversed a criminal conviction of a man who honored his wife's refusal, on religious grounds, of a necessary blood transfusion.¹⁷⁰ The Court emphasized that

166. *Id.* at 469.

167. *Id.* at 470.

168. *Cf.* Lee v. Weisman, 505 U.S. 577, 587 (1992) (holding unconstitutional a voluntary school prayer at a graduation service of a public junior high school) ("The principle that the government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. . . .government may not coerce anyone to or support or participate in religion, or its exercise, or otherwise act in a way which 'establishes a state religion, or tends to do so'.").

169. "Thus, in 1979 when the Constitutional Court was asked to pass upon the constitutionality of voluntary prayer led by teachers in public schools, it measured them solely against the religious and parental rights protected by Article[s] 4, 6, & 7 of the Basic Law; the express prohibition of a 'state church' was not even mentioned." CURRIE, *supra* note 81, at 249.

170. *Blood Transfusion Case*, 32 BVerfGE 98 (1971), *translated and excerpted in* KOMMERS, CONSTITUTIONAL JURISPRUDENCE, *supra* note 52, at 451-56. The husband originally was convicted of negligent homicide. This conviction was reversed because the state did not prove that the cause of death was the lack of hospitalization. The Court overturned a second conviction for negligent failure to

freedom of religion includes not only freedom of belief but also freedom of religious practice, whether motivated by a religious imperative or merely by decisions shaped by religious belief.¹⁷¹

Freedom of religion has limits, but only the Basic Law may restrict its scope. The legislature cannot narrow the boundaries of religious freedom. Thus, it is the Court's duty to "resolve a conflict within the framework of the guarantee of freedom of religion in light of the Basic Law's value order and under consideration of the unity of this fundamental value system."¹⁷² Therefore, freedom of religious practice may be restricted when it conflicts with a constitutional value or fundamental right, but not at the discretion of a majoritarian legislature. While the Court's reasoning in the *Interdenominational School Case* appears to conflict with the holding of the *Blood Transfusion Case*, the two cases may not be incompatible. In the former, the legislative decision was impermissible because it foreclosed a religious practice. In the latter, the legislature created a forum, albeit only one, for free exercise.

In the *Blood Transfusion Case*, the Court explained that freedom of religious practice extends to minority religious organizations:

The exercise of religious freedom depends neither upon an association's numerical size nor upon its social relevance. This follows from the command binding the state to ideological and religious neutrality and from the principle of parity of churches and creeds.¹⁷³

Thus, Article 4 of the Basic Law, as interpreted by the Court, protects a wide array of religious and ideological beliefs and practices. The Court explained:

[F]reedom of belief is more than religious tolerance, i.e., the mere suffering of religious creeds or ideological convictions. It encompasses not only the internal freedom to believe or not to believe but also the external freedom to manifest, profess, and propagate one's belief. This includes the right of the individual to orient his conduct on the teachings of his religion and to act according to his internal convictions.¹⁷⁴

provide assistance. The spouses were members of the Association of Evangelical Brotherhood. *Id.* at 451-452.

171. *Id.* at 452.

172. *Id.* at 453. The Basic Law requires harmonizing conflicting values. The Court explained, "These community ties of the individual recognized by the Constitution impose formal limits on even those fundamental rights which are guaranteed unreservedly." *Id.*

173. *Id.* at 452.

174. *Id.* at 452-53.

This illustrates the high degree of religious freedom possessed by individuals in a country whose highest court is dedicated to protecting religious tolerance.

In the *Blood Transfusion Case*, the complainant was torn between the law and his faith; to follow the commands of both was impossible.¹⁷⁵ The requirement of Article 4 that the state respect religion leads to the conclusion that "the punishment labeling him a criminal would represent an excessive social reaction violate of his human dignity."¹⁷⁶ The Court focused on the strength and honesty of the complainant's belief and on the nature of the criminal wrong. If an individual's belief appears to be a sham or a serious criminal wrong results from the free exercise of that belief, Article 4 will not provide an excuse from a generally applicable law. Nevertheless, the Court relies on the Basic Law and a conflict between its values, not on a law the legislature passed.¹⁷⁷

C. The Church Tax Cases: *The Limits of Religious Neutrality*

The Basic Law's mandate of religious neutrality envisions a partnership between church and state, recognizing the important social role of religion in German society.¹⁷⁸ The declaration "there

175. The Court also points out that the complainant could not be expected to convince his wife to abandon their shared moral belief. *Id.* at 454.

176. The Court examined the ends of the criminal justice system (retribution, prevention, rehabilitation) and concluded:

The duty of all public authority to respect serious religious convictions, [as] contained in Article 4(1) of the Basic Law, must lead to a relaxation of criminal laws when an actual conflict between a generally accepted legal and duty and a dictate of faith results in a spiritual crisis for the offender that, in view of the punishment labeling him a criminal, would represent an excessive social reaction violate of his human dignity.

Id.

177. See *Tobacco Atheist Case*, 12 BVerfGEI, 4-5 (1960), translated and excerpted in KOMMERS, CONSTITUTIONAL JURISPRUDENCE, *supra* note 52, at 455, in which a prisoner who attempted to bribe fellow prisoners to leave Christianity with cigarettes was denied parole. "The Basic Law does not protect every manifestation of belief, but only those historically developed among civilized people on the basis of certain fundamental moral opinions. . . . It follows from the Basic Law's order of values, especially from the dignity of the human being, that a misuse is especially apparent whenever the dignity of another person is violated." *Id.*

178. "The state's neutrality with respect to religious matters is the central concept behind the Basic Law's church-state provisions. The neutrality, however, is one that emphasizes a cooperative rather than a separationist mode of church-state relations. The Weimar provisions carried over into the Basic Law . . . [acknowledge] the importance ascribed by the Constitution to the social role that religion plays in the life of society." KOMMERS, BASIC DOCUMENTS, *supra* note 113, at 310.

shall be no state church" bars religious organizations from exercising sovereign power over non-adherents and prevents the state from interfering in internal church affairs. However, government support of religion through fiscal or bureaucratic aid does not violate religious neutrality or lead to the establishment of a state church. In two cases¹⁷⁹ decided a year apart, the Court upheld the "church tax," in which state governments may levy a tax on church members on behalf of their church.¹⁸⁰

In *Church Tax Case I*, the Court explained that "there can be no state church under the system of church-state relations prescribed by the Basic Law."¹⁸¹ This ban on a state church is two-pronged. First, the federal government may not interfere with internal church affairs: "Every religious community has the right to order and administer its affairs independently within the limits of law applicable to all." Second, religious groups are granted corporate and public status,¹⁸² creating a special status within the state. However, when churches exercise power conferred by the state, they do so within a limited sphere, without full autonomy, and not in a manner or degree equal to the state.¹⁸³ While churches' internal operations are free from governmental surveillance or interference, this freedom is partially curtailed when churches enter the domain of the state.

The *Church Tax Case II* upheld the state's obligation to collect taxes from church members on behalf of the church: "The state is obligated to establish the conditions for the levying of such taxes, thus providing for the possibility of their compulsory

179. The two cases can be found at 18 BVerfGE 386 (1965) and at 19 BVerfGE 217 (1966), *translated and excerpted in* KOMMERS, BASIC DOCUMENTS, *supra* note 113, at 311-12.

180. The cases challenged "certain applications of the church tax. All wage earners are subject to a church tax ranging from eight to ten percent of their net taxable income. An employee must formally resign his or her church membership—as did 238,000 persons in 1975—to be exempted from the tax. Collected by state revenue officers, these taxes are distributed to the major denominations in amounts proportionate to their total membership." *Id.* at 310.

181. *Id.* at 311.

182. "Churches are defined by the constitution as corporate bodies under public law [Article 140 of Basic Law and Article 137 of the Weimar Constitution]." *Id.* at 311.

183. That status, while higher than that of religious societies organized under private law, does not subordinate the churches to the supreme authority of the state To the extent that they exercise power conferred by the state, adopt measures beyond their authority as church bodies, or intrude into the domain of the state, they indirectly exercise governmental authority; but in such cases their self-determination is limited

collection.”¹⁸⁴ The church and the state levy the tax in a partnership.¹⁸⁵ “Here the state makes its own administrative apparatus available to the church for the collection of the tax.”¹⁸⁶ The Court’s language foreshadows its use of offer and acceptance language in the *School Prayer Case*. If the state offers its administrative infrastructure to the church for the collection of the tax or offers its school rooms for prayer, freedom of religion is not violated. A state church is not established as long as no one is forced to accept the offer.

Religious neutrality precludes the state from governing churches and precludes the churches from exercising sovereign power.¹⁸⁷ The ban on an official state church means only that the government may not establish a state church: “No significance is to be derived from the historical fact that religious societies once held a privileged position under the law. State churches in the sense that they were formerly known no longer exist in the light of the prohibition against an official church.”¹⁸⁸ A close relationship between religion and the state does not violate constitutional norms.

D. *The Crucifix Cases: Establishing the Limits of Freedom to Pursue Religion*

The parameters of permissible religious exercise in a state forum are not absolute, because the Basic Law requires careful balancing of positive and negative religious rights. State involvement with religion and religious practice in a state forum are not always perceived as state establishment of religion. However, the Court has held, in two significant cases, that when the state supports or appears to support religion, the balance

184. *Id.*

185. The Court distinguished the tax levy from a church’s internal collection of fees from its members. “The levy of the church tax, on the other hand, is a common affair of both church and state.” *Id.*

186. *Id.* The Court explained that due to state involvement, the tax is subject to judicial review. *Id.*

187. The Court explained:

The state as the home of all citizens is bound by ideological and religious neutrality. The Basic Law prohibits the introduction of official religious forms as well as the granting of any privilege to a religious denomination. This requirement of religious and denominational neutrality means that the state is not permitted to confer on a religious society any sovereign authority over individuals who are not among its members. Religious societies exercise sovereign authority, however, when pursuant to state law they tax persons who are not among their members.

Id. at 312. Thus, churches may tax only their members.

188. *Id.*

between positive and negative rights becomes skewed. Thus, the protection of minority rights may require judicial intervention.

In the 1973 *Courtroom Crucifix Case*, the Federal Constitutional Court struck a careful balance between lower court judges' individual right to free exercise and litigants' right to appear in a court of a religiously neutral country.¹⁸⁹ Several administrative judges in Dusseldorf hung crucifixes in their courtrooms and a Jewish litigant objected to the crucifixes. Under the Basic Law, the judges' individual right to practice religion has to be harmonized with the litigant's right to freedom from religion. The Court explained, "The mere presence of a crucifix in a courtroom does not demand any identification with the ideas and institutions symbolically embodied therein or compel any specific behavior therein."¹⁹⁰ However, in this instance, the obtrusive placement of the crucifixes directly on the bench violated the litigant's rights and the Basic Law mandated the removal of the crucifixes. Nevertheless, the Court concluded that the mere presence of religious iconography in a courtroom did not lead per se to an imprimatur of state approval on a particular creed or lead to citizens' compulsion to adhere to those beliefs.

Twenty-two years later, in the *Classroom Crucifix Case*,¹⁹¹ the Court banned crucifixes from the classrooms of public schools in Bavaria. In a 5-3 decision, the Court held that the crucifixes violated the complainants' rights under Article IV. Significantly, the crucifixes violated the state's requirement of religious neutrality, imposing Christian symbolism on non-adherents and giving Christianity an impermissible degree of state endorsement.

The complainant, Ernst Selzer, claimed his young daughter was traumatized by the crucifix hanging in her classroom. As a non-Christian, the complainant's daughter had not been desensitized to the image of a "naked, blood-covered, dead man hanging in front of her nose."¹⁹² After much debate, the school replaced the crucifix with a simple wooden Protestant cross. However, the Selzers removed their children from the school because the school administration declined to assure the Selzers that this compromise would be kept when the children entered a new grade level. The children were placed in a private school, but only temporarily, due to the high cost of tuition.¹⁹³ After being cited for truancy, the children returned to the school, but their

189. KOMMERS, CONSTITUTIONAL JURISPRUDENCE, *supra* note 52, at 456.

190. *Id.*

191. *Classroom Crucifix Case*, 93 BVerfGE 1 (1995) translated by Birgit Decker-Howell (translation on file with author).

192. *Crossed Lines and Crucifixes*, ECONOMIST, Aug. 19, 1995, at 42.

193. *Classroom Crucifix Case*, 93 BVerfGE at 3.

sense; this contradicts their educational beliefs, especially their philosophy of life."¹⁹⁴

The Court reversed the resolution of the Bavarian Higher Administrative Court allowing the crucifixes or crosses. The Bavarian court had upheld school regulations requiring the installation of a cross in every classroom. The Bavarian court's opinion was summarized by the Court as follows:

[Discussing the Seler's freedom from religion and others' freedom to religion:] The resulting tension between positive and negative freedom of religion has to be solved under the considerations of the requirement for tolerance and after the principle of concordance. Thus the complainants can not request that their negative freedom of confession is superior than the positive freedom of confession of the students which are raised in a religious confession and profess to it.¹⁹⁵

Additionally, the Bavarian court reasoned that these crosses and crucifixes reflected general Christian and Western beliefs without communicating a particular denomination's religious beliefs:

The sight of a cross or crucifix is an insignificant strain because the children are also elsewhere confronted with this presentation The presentation of a cross as a synonym for the suffering and the reign of Christ is confrontation with a religious world view for the complainants. But the cross is not an expression of a confession to a denominational tied belief but an essential issue of the general Christian-occidental tradition and a common property of this culture.¹⁹⁶

Thus, the Bavarian court concluded that the state's policy of requiring a cross or crucifix in all classrooms respected the religious rights of Christians in the predominantly Catholic state without infringing the rights of non-Christians, such as the Selers.¹⁹⁷

194. *Id.* at 2.

195. *Id.* at 4.

196. *Id.* at 4-5.

197. The Court summarized the argument of the Bavarian Prime Minister in favor of the school policy. The Prime Minister argued that the Seler's rights had not been violated because their children were excused from religious education and prayer. Furthermore, the Bavarian people, through a popular referendum, voted for interdenominational schools. Thus, in some ways, the schools advanced Christian principles:

This includes values and morals, which are decisively formed by Christianity and which [have become] part of the western society. The Bavarian public schools educate in this sense through the attachment of crosses without getting involved in theological questions in a sense that would contradict the religious-ideological neutrality of the state.

Id. at 8-9.

The Catholic Church argued:

The Court concluded, however, that the installation of a cross or a crucifix in the classrooms of a compulsory public school violates Article IV. First, crosses and crucifixes are not religiously neutral symbols: "The installment of crosses and crucifixes in classrooms violates the duty of the state to religious and ideological neutrality. The cross is the distinctive symbol and representative sign of the Christian religion"198 Second, such iconography, when displayed in an area such as a school, can have a significant impact on children: "[C]hildren and juveniles are easily influenced; their ability to stand up for their beliefs and to form their own critical judgments is by far smaller than that of adults."¹⁹⁹ Thus, the Court recognized that in a religiously diverse society, religious symbols, even those seen by many as an innocuous part of general western culture, retain their religious significance.

Furthermore, Article IV protects minority religious groups from majoritarian domination. The state may not lend its authority to majoritarian groups at the expense of minorities' rights:

[Article IV] gives every single citizen a defensive right against the state; Article IV . . . serves as a protection for minorities. . . . [It is] incompatible to claim that the installment of symbols of a majority religion in public classrooms is part of the positive freedom of religion of a majority in the population.²⁰⁰

Although the Court did not overrule the *School Prayer Case*, it argued that state involvement in the expression of religious beliefs changes the nature of the expression and results in an impermissible imprimatur of state approval of that belief:

The installment of crucifixes or crosses in all classrooms . . . by the school administration leads to an incomparable stronger publicity and to an especially intensive religious influencing. [T]his is not an act of individual practice of religion by which a single person expresses his or her belonging to a certain religious community, but a religious publicity and influencing based on government authority.²⁰¹

The attachment of the crosses in classrooms does not express an identification of the state with Christian beliefs. . . . The regulation only means that the school encourages and supports the parents in the religious education of their children. Therefore the opinion of the complainants need to be understood as a plea for an atheistic school without any connections to religion at all.

Id. at 9-10. The Lutheran Church issued a similar statement in the case.

198. *Id.* at 6.

199. *Id.*

200. *Id.* at 6-7.

201. *Id.* at 7.

Thus, government advocacy of a particular religious belief may violate an individual's freedom from religion rights under Article IV. The state cannot grant privileges to certain beliefs while excluding others. It must remain neutral. When the state supports a particular religious group, delicately balancing an individual's positive and negative rights to and from religion, Article IV ensures that minority groups' rights will be protected from majoritarian dominance, even if judicial interference in governmental policy is required.

The Court's decision sparked public outrage. Chancellor Helmut Kohl called the Court's holding "incomprehensible" because the decision forced the removal of a symbol representing the "values of our western civilization."²⁰² Other Germans compared the decision to the 1942 Nazi decree that all crucifixes be replaced with pictures of Hitler.²⁰³ Bavaria's state premier, Edmund Stoiber, promised to put the Court's judgment into practice "as mildly as possible."²⁰⁴

This outpouring of public criticism suggests that the Court may be pushing the boundaries of the public's tolerance, or at least the tolerance of a vocal, politically powerful segment of the population. The Court's decision has not dramatically changed the relationship between church and state. Yet it has protected minority religious groups' right to freedom from traditionally dominant religion in the public realm through the careful balancing of religious rights. Nevertheless, the cultural legitimacy of the close partnership between church and state is illustrated by the resulting political controversy over this decision about religious iconography.

V. "THERE SHALL BE NO NATIONAL CHURCH"

Article 137, the "establishment clause" of the Basic Law, mandates, "there shall be no national church." In banning the establishment of a state church, the Basic Law and its Weimar predecessor revolutionized German church-state relations. Nevertheless, the Basic Law also continues many of the privileges traditionally enjoyed by historically dominant churches. Thus, while the "establishment clause" outlaws the establishment of a national church and requires state neutrality to religion, the

202. Edmund D. Cohen, *Church/State Separation in Germany—For Now This Wall Stays Up*, 15 *FREE INQUIRY* 59 (1995) (quoting Kohl) (arguing that "[i]n a period when church/state separation in the United States is being eroded, it is heartening to read of a landmark church and state case in another country where the highest court acts on principle and hands down an unpopular decision").

203. *Id.*

204. *Crossed Lines and Crucifixes*, *supra* note 192, at 42.

Basic Law creates a strong partnership between church and state. Religious minorities' freedom to practice religion and freedom from the majority's religion exists within this tension. The strong partnership between church and state, however, creates a de facto state church, resolving this tension in favor of the religious majority.

The constitutions of Germany and the United States have been interpreted by their respective courts as creating very different balances between church and state.²⁰⁵ The First Amendment of the U.S. Constitution requires that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."²⁰⁶ Theoretically, this First Amendment language could permit a partnership between church and state similar to that in Germany. However, the U.S. Supreme Court interprets this clause as requiring governmental neutrality toward religion and a "wall of separation between church and state."²⁰⁷

The U.S. Supreme Court argues that government support of religion could lead to the de facto establishment of a state church.²⁰⁸ State support of religion creates an imprimatur of state approval on religious bodies receiving state support. This coerces citizens' conversion to these religions to avoid socio-political alienation. Thus, the Supreme Court relies heavily on the First Amendment's Establishment Clause to prevent state endorsement of religion. This approach has been criticized as hostile to religion rather than merely neutral.²⁰⁹

Moreover, the U.S. Supreme Court has not consistently defended minority religious groups from majoritarian domination, as cases such as *Employment Div., Dep't of Human Resources v. Smith*.²¹⁰ Nevertheless, the U.S. approach to church-state relations illustrates the concern that governmental support of religion may lead to a perception of state endorsement of religion and the de facto establishment of a national church.

The Basic Law establishes a close partnership between church and state in which the government provides certain

205. See Kommers, *Prolegomenon*, *supra* note 85, at 868-69.

206. U.S. CONST. amend. I.

207. *Reynolds v. U.S.*, 98 U.S. 145, 164 (1879).

208. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985) (holding Alabama public schools' one minute period of silence for meditation or voluntary prayer unconstitutional).

209. See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (explaining that the majority decision holding a creche display at a courthouse to be unconstitutional misapplied the Establishment Clause and was excessively formalistic and hostile, rather than neutral, toward religion).

210. 494 U.S. 872, 876-82 (1990).

traditional religious bodies with state support and protects freedom to religion. The Basic Law, as historically interpreted by the Federal Constitutional Court, creates a perception of state favoritism of religion. However, state support of only certain kinds of traditional religious bodies narrows the scope of the Basic Law's general preference toward religion. The strong partnership between church and state leads to the perception that the state favors those religions it traditionally supports. Indeed, because the Basic Law establishes normative values for the German state, this preference is more than judicial policy or interpretations; it is objectively correct.

While the Basic Law guarantees the same freedom to religion for all religious and ideological groups, German church-state relations suggest that some religious groups deserve this freedom more than others. The Scientologists find themselves caught in this constitutional gap. A nontraditional religious group, their beliefs and practices fall outside cultural norms and definitions of religion. The political popularity of bashing Scientologists suggests the majority of Germans perceive Scientology as not fitting traditional religious norms and as perhaps unworthy of protection. As "outsiders," Scientologists face attacks that are politically unacceptable against more "legitimate" or traditional religious groups.

The Basic Law theoretically protects Scientologists' religious freedom. If the Court reviews German policy toward the Church of Scientology, it should hold that Scientologists' rights to religious freedom have been violated. But if the Court reviews the executive branch's policy toward the Church of Scientology, will it adequately defend the Scientologists' religious freedom?

Recent cases such as the *Classroom Crucifix* case and the *Blood Transfusion Case* illustrate the Court's readiness to protect minority sects' religious freedom. The Court's careful balancing of positive and negative rights, and its sensitivity to the role of the state's power within this balance, suggests that the Basic Law protects minority religious groups. However, earlier cases such as *The Interdenominational School* cases and the Court's decision permitting prayer in school suggest a degree of majoritarian bias inherent in the Basic Law and the Court's interpretation of Article IV freedom of religion. In any decision involving the Church of Scientology, the Court will be guided by the historically close connection, incorporated in the Basic Law, between traditional churches and the state. Nevertheless, the *Classroom Crucifix Case* may mark the beginning of increased protection of minority religious groups.

Furthermore, increased protection of religious minorities may signal a change in German cultural perceptions of religious minorities. Although to some degree a countermajoritarian

institution, the judiciary simultaneously incorporates and shapes majoritarian opinions and cultural mores.²¹¹ The outcry following the *Classroom Crucifix Case* suggests that the Court's decision may have strained the boundaries of religious tolerance of some Germans. A decision favoring the Church of Scientology would push these boundaries even further.

Nevertheless, "[c]ourts serve to facilitate and mold the national dialogue concerning the meaning of the Constitution Through this societal dialogue the document takes on meaning."²¹² Even a constitution theoretically grounded on independent objective norms exists in a state of flux. Its meaning changes as cultural norms change and judicial decisions reflect these changes. A decision protecting the Scientologists would spark public protest but could also help facilitate dialogue between the German people and their government about freedom of religion.

VI. CONCLUSION

The story of Scientology in Germany reveals a confluence of several conflicting streams of German views toward religion. The Basic Law strives to protect religious freedom and to establish a society tolerant of religious difference. As shown in the *Classroom Crucifix Case* and the *Blood Transfusion Case*, the judicial machinery is in place to ensure religious freedom. The Basic Law, however, includes internal inconsistencies that undermine religious freedom. Mandated state support of traditionally dominant churches undercuts the effectiveness of the establishment clause. In this context, it is essential that the Court remain above the tide of socio-political pressures and engage the polity in meaningful dialogue about the nature of religious freedom.

Ultimately, the Court must include a meaningful interpretation of the establishment clause in its approach to religion cases. Through this clause, Germany can find a balance between honoring the traditional close partnership between church and state and nurturing the rights of minority religious groups. Such compromise will alter church-state relations; however, unlike Goethe's protagonist Werther, Germany will not be shattered by a recognition of religious freedom. Germany can hear from within its religious tradition his cry for freedom. Unlike Werther in his Romantic crisis of conscience, today's German

211. Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 580-83 (1993).

212. *Id.* at 581-83.

judiciary possesses the constitutional means to reach a constructive solution and to help foster a religiously pluralistic society.

*Emily A. Moseley**

* J.D. Candidate, 1998, Vanderbilt University; B.A., Pomona College. The author wishes to thank her parents, James and Candace Moseley, for their patience, invaluable support, and editing skills; Robert Esther; the Vanderbilt University School of Law Office of the Dean for funding necessary translations; Birgit Decker-Howell for her translations; and the *Journal* staff for its tireless work.

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