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FREEDOM OF RELIGION IN PUBLIC SCHOOLS IN GERMANY AND IN THE UNITED STATES

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To my parents

Hans-Joachim und Bärbel Mühlhoff

“You don’t need many heroes if you choose carefully”

— John Hart Ely
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I. INTRODUCTION.

At first men had no kings save the gods, and no government save theocracy. They reasoned like Caligula, and, at that period, reasoned aright. It takes a long time for feeling so to change that men can make up their minds to take their equals as master, in the hope that they will profit by doing so.

From the mere fact that God was set over every political society, it followed that there were as many gods as peoples. Two peoples that were strangers the one to the other, and almost always enemies, could not long recognize the same master: two armies giving battle could not obey the same leader. National division thus led to polytheism, and this in turn gave rise to theological and civil intolerance, which, as we shall see hereafter, are by nature the same.¹

Throughout world history the conflict between religious groups has been one of the major battlegrounds for the social and cultural development of countries. The crusades in the early Middle Ages, the persecution of the religious dissenters throughout Europe in the 15th and 16th Century and the persecution of the Jews by the Nazis from 1935-45 are only a few examples of how fatal and dangerous the consequences are when religion is too closely related to the government. Because the attitudes of the different religions towards each other are mainly hostile, even armed conflicts are not rare. The war in Yugoslavia, for example, broke out because of the different religious beliefs of Serbs and Croats. Followers of the Dalai Lama are persecuted by the Chinese government, and the French government has held the activities of Scientology to be criminal acts.² In all these cases the government is not neutral towards the religious groups, but favors or discriminates against a certain religion. A religiously neutral government, on the other hand, would decrease the conflicts between the different religious groups within its country.

²See Peter Gruber, Religionsfreiheit. FOCUS, December 15, 1998 at 246-249.
Unfortunately this strict neutrality is almost impossible to reach and most countries that have adopted such a principle still face religious conflicts. However, these conflicts have shifted from armed conflicts to legal conflicts and battles of words, which offer at least a more peaceful way to fight. One major battleground for these religious conflicts concerns the role of religion in the public school system. That battleground is the subject of this paper.

My discussion of how religion should be treated in the public school system will be based on a comparison between Germany and the United States. While the United States adheres to the principle of strict separation of church and state, the German Basic Law has connected church and state in some respects. A comparison of how both countries deal with religious freedom in public school will thus enable the reader to decide for himself which of the two systems balances the religious freedom of the school children and the proper interests of the state in a better way.

Before considering the role of religion in public schools it is necessary to provide some basic background about the relationship between religion and state in both countries. This background will be provided for the United States in part II and for Germany in part III.

Part IV will focus on the main topic, the role of religion in public schools. After offering a brief summary of the school systems in both countries, Part IV offers a comparative account of American and German law on three main issues: (1) prayer in public schools, (2) the use of religious symbols in public schools, and (3) the free exercise rights of teachers in public schools.

The last part of the paper, Part V, explores historical, textual and sociological reasons that explain the differing approaches to religion in the public school systems of both countries. It also addresses the basic question whether the United States or Germany has developed a better approach to protect religious freedom in public schools.
II. CONSTITUTIONAL PROTECTION OF RELIGION IN THE UNITED STATES.

A. Overview.


"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." The short and simple opening passage of the First Amendment contains the two major principles that guarantee religious freedom in the United States. The first clause is commonly referred to as the "Establishment Clause," and it provides freedom from government interference in religious matters. In contrast, the second clause protects the individual's freedom of religious belief and practice. It is generally referred to as the "Free Exercise Clause." The First Amendment, thus, provides dual protections: it guarantees government neutrality towards religion and the individual's liberty in choosing and practicing a religion.

Aside from the First Amendment, only Article VI of the U.S. Constitution is directly related to religion. Section 3 of Article VI prohibits the use of religious tests as a requirement for the "Qualification to any Office or public Trust under the United States." On its face, this section applies only to the federal government. If the states attempted to apply such tests for their public offices, however, such state action would

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3 U.S. CONST. amend. 1.
4 For the purpose of this paper this provision is not relevant. As a result, I will refrain from further analysis of Article VI. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §14-2, at 1155 n.1 (2d ed. 1988), for a more intensive analysis of article IV of the United States Constitution.
5 U.S. CONST. art. VI, § 3.
clearly violate the First Amendment. Requiring religious tests for public offices is therefore unconstitutional for both federal and state governments.

2. Applicability Of The First Amendment To The States

The commands of the First Amendment are directed exclusively to the U.S. Congress. Therefore, one might assume that only the federal government is bound by them. Indeed, for a long time, judicial protection under the First Amendment was only applied to actions of the national government. The U.S. Supreme Court and lower federal courts simply rejected cases in which actions by state governments were challenged on the basis that they would violate the First Amendment.

Beginning in 1925 with *Gitlow v. New York*, however, the Supreme Court applied First Amendment protections of freedom of speech and press to the states based on the incorporation of those freedoms into the due process clause of the Fourteenth Amendment. Two years earlier, in *Meyer v. Nebraska*, the Court had held that the Fourteenth Amendment should also protect the freedom “to worship God according to the dictates of his own conscience.” In 1940 the Court explicitly stated that the Free Exercise Clause of the First Amendment applied to the states and, seven years later, the Court explicitly incorporated the Establishment Clause into the Fourteenth Amendment.

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7 See Alpheus Thomas Mason & William M. Beane, American Constitutional Law 516 (6th ed. 1978) (“The Justices were not yet willing to become censors of state legislation.”).  
8 Id. at 666.  
9 Gitlow v. New York, 268 U.S. 652 (1925) (holding that the freedom of speech and the freedom of the press are among the fundamental rights protected by the Due Process Clause of the Fourteenth Amendment).  
10 Id. at 666.  
12 Id. at 399.  
13 See Cantwell v. Connecticut, 310 U.S. 296 (1940) (invalidating a state statute that required a permit for solicitors for religious or charitable reason).  
14 See Everson v. Board of Education, 330 U.S. 1,15 (1947) (“There is every reason to give the same application and broad interpretation to the ‘establishment of religion’ clause”).
In all of the following decisions, the Court regularly applied the two First Amendment clauses to the states. Today, it is no longer questioned that the states are bound by the religious guarantees of the First Amendment just like the national government.\(^{14}\)

**B. The Establishment Clause.**

The First Amendment states that "Congress shall make no law respecting an establishment of religion . . . ." But what kind of law would constitute such an "establishment"? Does the clause only prohibit the government from establishing a certain religion, or is it sufficient that the government action favors or discriminates against a certain religion? And, what if the government favors or disfavors all religions? One of the most difficult issues to resolve with respect to the Establishment Clause has been how to define the term "establishment." Consequently, before analyzing the different doctrines the Supreme Court has used to determine Establishment Clause violations, it is necessary to give the term "establishment" a clearer and more understandable meaning.

1. What Is "Establishment"?

The First Amendment does not define the non-establishment principle in a detailed manner. Because there are no "precisely stated constitutional prohibitions" in this area, the Supreme Court must "draw lines" to define the scope of protection of the Establishment Clause.\(^{15}\) The Court has done so in part by relying on historical documents that tend to reveal the framers' intent in enacting the First Amendment.

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\(^{14}\) See John E. Nowak & Ronald D. Rotunda, Constitutional Law § 17.3, at 1222 (5th ed. 1995) [hereinafter: Nowak/Rotunda] ("Although the original understanding of the drafters of the First and the Fourteenth Amendments may be unclear, a majority of Justices on the Supreme Court during the past 50 years consistently has held that the values protected by the religious clauses are fundamental aspects of liberty in our society and must be protected from both state and federal interference.") (footnote omitted).

\(^{15}\) Lemon v. Kurtzman 403 U.S. 602, 612 (1971).
Probably the most clear and intensive historical analysis was undertaken in *Everson v. Board of Education*. In this case the Court was faced with the question whether a government subsidy for the bus transportation of parochial school children to their schools would constitute an "establishment of religion" under the First Amendment. In order to define the meaning of "establishment," Justice Black, writing for the majority, analyzed the historical reasons for enacting the Establishment Clause. Many of the early settlers who came to the United States had feared or experienced the danger of religious persecution in Europe. They did not, however, try to avoid these dangers by separating the church from the state. The religious sects maintained "[the] absolute power and religious supremacy" they had had in Europe in the new colonies and, as a result, religious persecution and the payment of taxes for church support were present in almost every colony. These practices raised concerns and protests among some "freedom-loving colonials." This protest finally led to the enactment of the Virginia Bill of Religious Liberties, a document that prohibited religious persecution and taxation for church support. The author of the Virginia Bill of Religious Liberties, Thomas Jefferson, was mainly influenced by James Madison and his Memorial and Remonstrance against the law, a document that was mainly addressed against Virginia's tax law which allowed the levy of taxes for church support. The Court in *Everson* found that because Jefferson and Madison had leading roles in the drafting and adoption of the Virginia Bill of Religious Liberties as well as later in United States Constitution, the objectives and goals of the two documents must have at least been similar or even the same.

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17 Id. at 8-11.
18 Hening, Statutes of Virginia 84 (1823); Commager, Documents of American History 125 (1944).
19 Historical documents show that Jefferson was not present at the time of the drafting and enactment of the United States Constitution. His influence in the drafting and adoption of the Constitution can therefore only be seen in his previous documents and writings, such as the Virginia Bill of Religious Liberties. See 16 The New Encyclopedia Britannica 323 (15th ed. 1994).
20 *Everson v. Board of Education*, 330 U.S. 1, 13 (1947)(referring to prior Court decisions which confirm the holding).
Court finally concluded that, according to all three documents, the Establishment Clause should “mean[] at least” that:

Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect a wall of separation between church and State.\(^1\)

According to this definition the Establishment Clause prohibits much more than the creation of a church or a religion by the government. It potentially prohibits almost every government action that has an impact on religion. In *Everson* itself, however, the Court also said that the non-establishment principle “does not require the state to be [the] adversary”\(^2\) of religion. Instead, the Establishment Clause requires the state to be as neutral as possible towards religion and religious practices. “State power is no more to be used so as to handicap religions than it is to favor religion.”\(^3\) This attitude is best described by the term “strict separation,” which requires the government to be as neutral as possible in order to maintain the “wall of separation” that was intended by the Framers of the Constitution. It is important not to confuse this strict separation with strict neutrality. Under the latter concept “government would be forbidden to utilize religion as a standard for action or inaction because the religious clauses prohibit classification in

\(^1\) *Id.* at 18 (emphasis omitted).

\(^2\) *Id.* at 18.

\(^3\) *Id.* at 18.
terms of religion either to confer a benefit or to impose a burden.\textsuperscript{24} The Supreme Court has never adopted this concept, mainly because of its incompatibility with the Free Exercise Clause.\textsuperscript{25} Under the concept of strict neutrality, government would not be permitted to grant religious exemptions, which are, however, sometimes authorized, and perhaps even mandated, by the Free Exercise Clause.\textsuperscript{26} Certainly, the Court has narrowed the opportunity to obtain religious exemptions from generally applicable laws in Employment Division, Department of Human Resources \textit{v.} Smith (Smith II),\textsuperscript{27} but it has not totally given up the possibility of religious exemptions. The Court in Smith II recognized at least a possible free exercise right to constitutionally mandated exemptions in two areas.\textsuperscript{28} It also observed: “But to say that a nondiscriminatory religious-practice exemption is permitted, or even desirable, is not to say that it is constitutionally required.”\textsuperscript{29} According to the Court, the question whether an exemption should be granted or not is left to the government. Thus, the holding in Smith II does not indicate an approach of the Court towards strict neutrality.

As we will see, over the years, the Court has moved away from the principle of strict separation towards a more open approach of neutrality and accommodation between

\textsuperscript{24} Tribe, \textit{supra} note 4, §14-7, at 1188 (emphasis omitted) (footnote omitted).
\textsuperscript{25} Tribe, \textit{supra} note 4, §14-7, at 1189.
\textsuperscript{26} See Wallace v. Jaffree, 472 U.S. 38, 82 (1985) (O'Connor, J., concurring) (“It is difficult to square any notion of complete neutrality with the mandate of the Free Exercise Clause that government must sometimes exempt a religious observer from an otherwise generally applicable obligation”) (emphasis omitted); McDaniel v. Paty, 435 U.S. 618, 639 (1978) (Brennan, J., concurring) (“Government may take religion into account when necessary . . . to exempt, when possible, from generally applicable governmental regulation individuals whose religious beliefs and practices would otherwise thereby be infringed . . . ”). See generally Tribe, \textit{supra} note 4, §14-7 at 1188-89 (providing a more detailed analysis of the concept of strict neutrality).
\textsuperscript{27} Employment Division, Department of Human Resources \textit{v.} Smith, 494 U.S. 872 (1990) (upholding the denial of unemployment benefits to a drug counsellor who was fired because his drug consumption at a religious ceremony); See infra Part II.C.2.b.iii., for an more detailed analysis of Smith II.
\textsuperscript{28} Id. at 877 (referring to Sherbert \textit{v.} Verner, 374 U.S. 398 (1963), a case in which the Court held that government may not regulate “religious belief as such”) and id. at 881 (referring to Wisconsin \textit{v.} Yoder, 406 U.S. 205 (1972), a case which involved not only the Free Exercise Clause but also “other constitutional protections”).
\textsuperscript{29} Id. at 890.
church and state. Nonetheless the Court still frequently refers to the basic definition of establishment created by the Court in *Everson*.

2. The Judicial Doctrines Developed In Establishment Clause Cases.

The "wall of separation" constructed in *Everson* cannot be an absolute one. Otherwise, government would not even be allowed to provide police or fire protection to religious institutions, an idea which the Court expressly rejected in *Zorach v. Clauson*. Thus, in all Establishment Clause cases, the Court has to draw lines between government actions that constitute an establishment and those that do not. In order to perform this task the Supreme Court has established a variety of doctrines that have shifted over time.

*a. Strict Separation (1947-1970).*

The doctrine of strict separation was first applied by the Supreme Court in *Everson v. Board of Education*. Everson, a taxpayer in New Jersey, challenged a state statute that allowed school boards to subsidize bus transportation of parochial school students. The Supreme Court affirmed the judgment of the lower courts to the effect that the statute did not violate the First Amendment. Even though there has to be a "high and impregnable" wall of separation between church and state, the statute did not breach this wall,

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30 See infra Part II.B.2.a. and b. The change in the interpretation of establishment is closely related to the doctrinal change in the Court's jurisdiction.
32 *Zorach v. Clauson*, 343 U.S. 306, 312 (1952); See also infra Part II.B.2.b.ii. (explaining in more detail the reasons for which the Court found that the Establishment Clause did not prohibit the denial of generally available public services to religious institutions or practitioners).
33 The Court has only decided a few cases concerning the freedom of religion prior to 1947. The analysis of the doctrines in this paper will therefore only cover the doctrines established after 1947. See NOWAK/ROTUNDA, supra note 14, §17.7, at 1290-92, for an analysis of the cases prior to 1947.
34 The dates in parentheses are only rough indications.
36 *Id.* at 3-5.
according to the Court. The Court reasoned that the New Jersey statute was not meant to advance religion in any way but to provide general benefits "to all its citizens regardless of their religious belief." Since transportation benefits were provided to public and private school children alike. Denying these benefits solely to students of parochial schools would create a disadvantage for these students in relation to other students. Some of the students would be forced to choose another school simply because of the denial of these benefits. As a consequence it would become more difficult for church schools to operate. To produce such an effect, the Court concluded, was "obviously not the purpose of the First Amendment." The governing principle required the government to be neutral towards religion, and here that principle was not violated, particularly because the money was provided directly to the parents and not to any school. Holding that the "legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools," the Court found that the statute did not constitute an establishment of religion by the government.

In later cases, the doctrine of strict separation was applied by the Court to decide several cases that involved time release programs in public schools. In order to give students time for religious education, some public schools had granted students time away from school classes during the regular school day. In Illinois ex rel. McCollum v. Board of Education, the Court held such a program to be unconstitutional because the public school building itself was "used for the dissemination of religious doctrines" and because the public school provided the pupils for this program "through the use of the

38 Everson v. Board of Education, 330 U.S. 1, 16 (1947).
39 Id. at 18.
40 Id. at 18.
41 Id. at 18.
State's compulsory public school machinery.\textsuperscript{44} Once again the Court reaffirmed the principle of strict separation: "The First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."\textsuperscript{45} Only four years later, in Zorach v. Clausen,\textsuperscript{46} however, the Court upheld a time release program. This decision did not overrule McCollum. Instead Justice Douglas, writing for the majority, found that the facts in Zorach were distinguishable from the facts in McCollum, so that the latter was not a binding precedent.\textsuperscript{47} Unlike in McCollum, the religious instruction in Zorach took place outside the public school buildings and no government funds or other support were used to finance this religious activity. All costs were paid by the religious organizations.\textsuperscript{48} Although the First Amendment "reflects the philosophy that Church and State should be separated,"\textsuperscript{49} the Court found the program in Zorach to be consistent with this principle of separation because it did not constitute "a law respecting the establishment of religion within the meaning of the First Amendment."\textsuperscript{50} According to the Court the First Amendment did not require a strict separation in "every and all respects." but "[r]ather . . . defines the manner, the specific ways, in which there shall be no concern or union or dependency one on the other."\textsuperscript{51} Therefore government can encourage religious

\textsuperscript{44} Id. at 212.
\textsuperscript{45} Id. at 212.
\textsuperscript{46} Zorach v. Clauson, 343 U.S. 306 (1952).
\textsuperscript{47} Id. at 315 ("We cannot expand it [the McCollum Case] to cover the present released time program . . . "). Justice Jackson, one of the three dissenters, on the other hand, found the distinction between the two cases "trivial, almost to the point of cynicism." Id. at 325. Instead, just like the two other dissenters, he pointed out that the two cases were very similar and comparable. Both programs did not offer an active alternative for non-believers. Both programs bore the risk of discriminating against those religions that did not participate in the program and in both programs it was in the discretion of the school officials to choose which religions were allowed to participate. Id. at 320, 325.
\textsuperscript{48} Id. at 308-09.
\textsuperscript{49} Id. at 312 ("There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated.").
\textsuperscript{50} Id. at 312. Because of this more open approach towards religious accommodation Zorach is sometimes seen as the beginning of the accommodation approach. Such an interpretation of Zorach is not correct because the Court reaffirmed the principle of strict separation several times in this decision. See David Felsen, Comment: Developments in approaches to the Establishment Clause analysis: Consistency for the future. 38 Am. U.L. Rev. 395, 402 n. 48 (1989).
\textsuperscript{51} Id. at 312.
instruction as long as it does not finance or provide religious instruction by its own agencies or in its own institutions, and as long as government acts neutrally towards religion, in the sense that it does not favor one religious belief over another. 52 Because the religious instruction was not held by public school teachers on public school property and because the costs were paid by religious organizations, the Court concluded that the degree of accommodation of religion in Zorach was not prohibited by the First Amendment. 53

The most important cases under the strict separation doctrine were decided by the Court in the years 1962 and 1963. In 1962, in Engel v. Vitale, 54 the Court invalidated a New York statute that required public schools to have a non-denominational prayer at the beginning of each school day. One year later, in School District of Abington Township v. Schempp, 55 the Court banned the practice of Bible readings in public schools for religious reasons. 56 In Engel, Justice Black, who wrote the majority opinion, relied on historical evidence to conclude that "[t]he First Amendment . . . tried to put an end to government control of religion and of prayer." 57 By composing an official school prayer the government had violated this fundamental purpose for the enactment of the Establishment Clause and thus breached the wall of separation between church and state. 58 In Schempp the Court expressly held that the First Amendment places the government in a position of neutrality which "stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and

52 Id. at 314.
53 Id. at 314-15.
56 The Court did not hold that the reading of the Bible for historical reasons would also be prohibited. See id. at 225-226. Nevertheless, because the assumption that the Bible reading was done for religious purposes is relatively convincing it would be very difficult to prove that the Bible was only read for historical reasons.
58 Id. at 424; see also id. at 443 (Douglas, J., concurring) (stating that "[t]he First Amendment leaves the government in a position not of hostility to religion but of neutrality" and that a government composed prayer would violate this principle because it would enforce religious practice).
religious functions . . . .“ In order to be considered neutral, government action has to have a secular purpose. Additionally, it must create a primarily neutral effect, meaning that the government’s action must neither advance nor discriminate against religion. The Court found that by requiring the reading of a verse from the Holy Bible or the recitation of the Lord’s Prayer, the statutes at issue were enacted to advance religion, without any secular legislative intent. Hence, the statutes clearly breached the principle of neutrality. Moreover, the Court observed:

[I]t is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and . . . it is proper to take alarm at the first experiment on our liberties.

In conclusion, it appears that the Court espoused the principle of strict separation between church and state for over 20 years. At the same time the Court realized that at least in some areas, a total separation of church and State was not possible to achieve. As a result, from 1947 to 1970 the Court did not commit to one specific criterion upon which to determine the line of separation between church and state, but rather decided the Establishment Clause cases on a case by case basis. This ad hoc approach to strict separation led to perceptions of inconsistencies in the resulting body of law. Responding to these perceptions, the majority, beginning with Schempp and Engel developed two unifying criteria for evaluating Establishment Clause cases which focused on the purpose and the effect of the challenged government action. These two

60 Id. at 222.
61 Id. at 225 (emphasis omitted) (citation omitted).
64 See Walz v. Tax Commission, 397 U.S. 664, 668 (1970) (“The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been to sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles.”).
considerations, together with a third one, developed in *Walz v. Tax Commission*.\(^6\) were merged into the three-part *Lemon* test in 1971.\(^6\)


Although the Court had emphasized several criteria in assessing Establishment Clause challenges before 1971, the Court did not expressly tie these doctrines together in one single test until *Lemon v. Kurtzman*.\(^6\) Beginning with *Lemon*, however, the Court’s newly invented three-part test was used to decide almost all of the Establishment Clause cases until the early 1990s.\(^6\)

In *Lemon*, the Court struck down two statutes that provided financial aid to church-related schools. Both statutes sponsored the teaching of secular subjects in religious schools by allowing the state to either pay money directly to the teacher\(^6\) or by having the state reimburse the schools for their actual expenses for teachers and textbooks.\(^6\) Delivering the opinion for the majority, Chief Justice Burger began with an overview of the previous decisions in which the Court had developed three different tests to determine Establishment Clause violations. He combined these criteria into one single test that a statute\(^6\) had to pass in order to be in line with the Establishment Clause: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster


\(^6\) See *Lemon v. Kurtzman*, 403 U.S. 602, 657-58 (1971) (Brennan, J., concurring) (“The common ingredient of the three prongs of the test *set forth at the outset of this opinion is . . . *”) (emphasis added).


\(^6\) *Id* at 609 (The Pennsylvania Statute).

\(^\) In the mid 1980s, the Court expanded the application of the *Lemon* test to any governmental practice. See Committee for Public Ed. & Religious Liberty v. Nyquist, 413 U.S. 756. 773 (1973) (stating that “to satisfy the Establishment Clause a governmental action must . . . ”); *Lynch v. Donnelly*, 464 U.S. 668, 680 (1984) (citing cases in which the Court has “invalidated legislation or governmental action on the ground that a secular purpose was lacking”).
an excessive government entanglement with religion."\textsuperscript{72} The statutes at issue in the case violated the third prong, because "the cumulative impact of the entire relationship arising under the statute in each state involve[d] excessive entanglement between government and religion."\textsuperscript{73} In Rhode Island the sole beneficiary was the Roman Catholic elementary school which, according to the Court, had a "substantial religious character" and the governmental support provided by the statute would necessarily have led to an excessive entanglement of government with religion.\textsuperscript{74} In order to ensure that the governmental money was only given to teachers for teaching plainly secular subjects it would have been necessary for the government to supervise and to inspect the teacher and the way he holds his classes in a "comprehensive, discriminating, and continuous" way.\textsuperscript{75} "These prophylactic contacts" the Court argued, "will involve excessive and enduring entanglement between state and church."\textsuperscript{76} Because the educational system in Pennsylvania was "very similar to the one existing in Rhode Island," the Court found that this statute also fostered an excessive entanglement between government and religion.\textsuperscript{77} Thus, since both statutes already failed the third prong of the Lemon test, Chief Justice Burger saw the need neither to examine the legislative intent nor to decide whether the statute's primary effect was to advance religion.\textsuperscript{78} Later cases, however, clarified the meaning of both the purpose and the effects prongs, as well as the prohibition on excessive government entanglement.

\textsuperscript{72} Lemon v. Kurtzman, 403 U.S. 602, 632 (1971).
\textsuperscript{73} Id. at 613 (emphasis omitted.).
\textsuperscript{74} Id. at 616-17.
\textsuperscript{75} Id. at 619.
\textsuperscript{76} Id. at 619.
\textsuperscript{77} Id. at 620-21.
\textsuperscript{78} Id. at 613-14.
i. Secular Purpose.

To avoid a conflict with the Establishment Clause, the governmental action must have a clear secular purpose. 79 The term “secular” has been interpreted by the Court very broadly. 80 A narrow interpretation, allowing purposes to be deemed secular only if they neither help nor hinder religion, would make almost every governmental action invalid. 81

To decide whether the purpose is secular, Justice O’Connor suggests that the decision should be made from the viewpoint of an “objective observer, acquainted with the text, legislative history, and implementation of the [challenged] statute.” 82 The Court itself has generally followed this way of determining the statute’s purpose. 83 In Board of Education v. Allen, 84 for example, the Court considered a statute that required local public school authorities to lend textbooks for free to all students, regardless of the kind of school they were attending. This statute was said to have a clearly secular purpose, namely the “furtherance of the educational opportunities available to the young.” 85

It is not sufficient for the government just to assert a secular purpose. On the contrary, the Court may question the asserted purpose and reach its own conclusion whether the state’s actual purpose is secular or not. Indeed, there are cases in which the Court has

79 See Board of Education v. Allen, 392 U.S. 236, 243 (1968) (upholding a statute that allowed local school boards to loan textbooks to non-public schools. The underlying governmental purpose, “the furtherance of educational opportunities available to the young”, was considered to be a clearly secular legislative purpose).
80 Professor Laurence H. Tribe points out that the Court in Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos even has “suggested that the purpose inquiry does not demand that the law’s purpose must be unrelated to religion. Instead, the requirement aims at preventing the relevant governmental decisionmaker from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters.” TRIBE, supra note 4, §14-9, at 1212 (footnote omitted) (emphasis omitted). Professor Tribe criticizes this interpretation as “going too far” and, instead, prefers Justice O’Connor’s “objective observer” approach. See id. §14-9, at 1212.
81 See TRIBE, supra note 4, §14-9, at 1205 (giving the example of laws against murder which would violate the fifth commandment of the Mosaic Decalogue).
83 See TRIBE, supra note 4, §14-9, at 1205.
85 Id. at 243.
invalidated a law because it lacked a clear secular purpose, even though the government explicitly asserted one.\(^{86}\)

In conclusion, the "purpose test" asks whether the challenged action was mainly motivated by a secular goal or if its purpose was solely "to endorse or disapprove of religion."\(^{87}\) If the action clearly lacks a secular purpose or if it is obviously only intended to advance or to disfavor religion, it is considered to be unconstitutional under the First Amendment.\(^{88}\)

ii. Neutral Primary Effect

Closely related to the secular purpose test is the second part of the \textit{Lemon} test. Government must not only have a clear secular purpose for its actions, but its actions must also have a neutral primary effect on religion. The distinction between the first prong and the second involves the question of government's underlying intention for the action. Under the first prong if the government intends to affect religion, the challenged action is invalid.\(^{89}\) The second test, in contrast, looks at the effect the action creates, whether or not this effect was intended. Thus, even though government has a legitimate secular purpose, the challenged action will still be unconstitutional if it creates an either positive or negative effect on religious groups.

\(^{86}\) \textit{See} Epperson v. Arkansas, 393 U.S. 97 (1968) (invalidating a statute that prohibited the teaching of evolution in public schools. As there were no records about the reasons for the statute's enactment, the Court concluded that the law was enacted to protect certain religious beliefs and without any secular purpose); Stone v. Graham, 449 U.S. 39, 41 (1980) (invalidating a statute that required the posting of the Ten Commandments in the public schools, based on the conclusion that the posting of the Ten Commandment, as a "sacred text", lacked a secular purpose but was "plainly religious"); Wallace v. Jaffree 472 U.S. 38, 56 (1985) (invalidating an Alabama statute which required a moment of silence for prayer in public school at the beginning of each school day, because the statute was not motivated by any clearly secular purpose).


\(^{88}\) In the cases, in which the Court has not extensively analyzed the governmental purpose, the challenged action always failed at least one of the other two prongs of the \textit{Lemon} test. Thus, there was no need to intensify the inquiry into the purpose of the challenged action when it was easier for the Court to determine the violation of the other parts of the \textit{Lemon} test. \textit{See} Lemon v. \textit{Kurtzman}, 403 U.S. 602, 614 (1971).

\(^{89}\) Of course this would also be a violation of the second prong of the \textit{Lemon} test. \textit{See Tribe, supra} note 4, \textit{§}14-10 at 1215 ("[A]ny non-secular [has to] be remote, indirect and incidental.").
The question that arises under the second prong of *Lemon* is how to define "primary neutral effect." Does the word "neutral" mean that there must be no effect at all on religion? Such an interpretation would go too far for, as we have seen, a total separation between church and state is impossible to attain.\(^9\) Many governmental actions, such as the regulation of building and zoning and the provision of police and fire protection, have an effect on religion even though the effect is unintentional.\(^1\) A principle that denies generally available public services to religious institutions or practitioners would not only conflict with the Free Exercise Clause; it would be impossible to implement. How, for example, could a policemen, helping an old women to cross the street, know if she is on the way to church or to the supermarket?

Having recognized that "some relationship between government and religious organizations is inevitable."\(^2\) the Court has not demanded that government action must have purely secular effects. Instead, the term "primary neutral effect" means that the secular effects must outweigh the non-secular effects in such a way that the overall effect is deemed secular.\(^3\)

Except for some areas in which the secular and non-secular effects are obvious, "primary effect" analysis sometimes involves a very intensive and fact-sensitive analysis.\(^4\) In these types of cases the Court first has to gather all the facts concerning the

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\(^{9}\) Zorach v. Clauson, 343 U.S. 306 (1952).

\(^{1}\) *Id.* at 312 ("The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather it studiously defines the manner, the specific ways, in which there shall be no concern or union or dependency one on the other . . . Otherwise the state and religion would be aliens to each other - hostile, suspicious, and even unfriendly.").

\(^{2}\) *Id.* at 312.

\(^{3}\) Lynch v. Donnelly, 465 U.S. 668, 681 (1984) (holding that the creche’s display had a primary secular effect. The Court reached this decision by comparing the effects created by the creche display to the effects produced by textbook loans to parochial schools or by the expenditure of public funds for school bus transportation for parochial school students. According to the Court, the display of a creche could not have a greater effect on religion than the other benefits to religion which the Court had found to be non-violative of the Establishment Clause.).

\(^{4}\) See e.g., Agostini v. Felton, 521 U.S. 203 (1997) (upholding a New York program under which public school teachers were sent into parochial schools during regular school hours to provide remedial education to disadvantaged children). In the decision the Court very intensively analyzed whether the program would create the impermissible effect of advancing religion. See *id.* at 231-253. See Board of Education v. Allen, 392 U.S. 239, 243-48 (1968); Meek v. Pittenger 421 U.S. 349, 360-73 (1975); Wolman v. Walter, 433 U.S. 229, 236-55 (1977), for further cases in which the Court has undertaken an intensive analysis of the second prong of the *Lemon* test.
possible effects that may arise from the challenged action. In a second step, the Court weighs these effects against each other in order to find the overall tendency. In Wolman v. Walter,\textsuperscript{95} for example, the Court had to decide about the constitutionality of an Ohio statute that, among other things, authorized the expenditure of public funds to provide speech, hearing and psychological services in non-public schools.\textsuperscript{96} The appellants argued that the speech and hearing staff and the psychological diagnosticians “might engage in unrestricted conversation with the pupil and, on occasion, might fail to separate religious instruction from secular responsibilities” and thus create the effect of advancing religion.\textsuperscript{97} The Court, however, rejected this argument and held that “the provision of health services to all school children - public and nonpublic - [did] not have the primary effect of aiding religion.\textsuperscript{98} Justice Blackmun, who wrote the majority opinion, stated that diagnostic services were not as closely related to the “educational mission of nonpublic schools” as other core services like teaching or counseling. Hence, he concluded that the “pressure on the public diagnostician to allow the intrusion of sectarian views [was] greatly reduced.”\textsuperscript{99} In addition, the contact between the children and the diagnosticians was also sufficiently limited that the Court reached the conclusion that providing these services would “not create the impermissible risk of the fostering of ideological views.\textsuperscript{100}

For an effect of government action to matter it is not important whether the effect was specifically intended by the government or not. The only requirement is that the effect must be created directly by the government action.\textsuperscript{101} Like in the first prong of the Lemon

\textsuperscript{95} Wolman v. Walter, 433 U.S. 229 (1977).
\textsuperscript{96} Id. at 241.
\textsuperscript{97} Id. at 242. Concerning the employment situation of the speech and hearing staff the Court noted “that the personnel (with the exception of physicians) who perform the services are employees of the local board of education; that physicians may be hired on a contract basis; that the purpose of these services is to determine the pupil’s deficiency or need of assistance; and that treatment of any defect so found would take place off the nonpublic school premises.” Id. at 241.
\textsuperscript{98} Id. at 242.
\textsuperscript{99} Id. at 244.
\textsuperscript{100} Id. at 244.
\textsuperscript{101} Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 48 U.S. 327, 337 (1987) (“For a law to have forbidden effects under Lemon it must be fair to say that the government itself has advanced
test, the Court has refrained from simply relying on official government statements concerning possible effects. Instead, especially when the action obviously also created non-secular effects, the Court has undertaken a more intensive analysis. For example, in one of its school prayer cases, *School District of Abington Township v. Schempp*, the Court recognized as a secular effect the achievement of "the promotion of moral values, the contradiction to the materialistic trends of our time, the perpetuation of [the American] institutions and the teaching of literature." But in the end the Court concluded that the non-secular effects of Bible reading without comment clearly outweighed the practice's admitted secular effects.

In summary, the second prong of the *Lemon* test asks if the overall effect the government action will most likely create is a secular or neutral effect. If this is the case, the challenged action has passed the second test, and the Court will move on to the last prong of the *Lemon* test.

### iii. No Excessive Government Entanglement.

In *Lemon* the Court explained:

In order to determine whether the government entanglement with religion is excessive, we must examine the character and purpose of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.

The third prong of the *Lemon* test perhaps corresponds most closely with the Framers' intent in creating the First Amendment. History teaches us that church and state

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2. *Id.* at 223.
3. *Id.* at 224 (“But even if its purpose is not strictly religious, it is sought to be accomplished through readings, without comment, from the Bible.”).
should not interfere in each other's "respective spheres of choice and influence." Because total separation is impossible, the requirement of non-entanglement necessarily involves matters of degree. Only when the government interferes in an extensive way with religion is the action is unconstitutional. But how intense must this entanglement be to fail this test?

To answer this question it is helpful to distinguish between the different ways in which government might interfere in religious spheres. Professor Laurence H. Tribe has identified five different kinds of entanglement. Two of these forms of entanglement are relevant to the issue of religion in public schools, and this paper will focus on them.

First, government may become entangled with religion when it delegates some of its power to religious institutions. There can be no doubt that this kind of entanglement is excessive. To allow such delegations would not only breach the "wall of separation" between church and state; it would more likely tear it down. It is in the very purpose of religion that each action motivated by it reflect religious doctrine. The difficulty is that the exercise of government powers would reflect religious viewpoints if they were exercised by religious institutions. This outcome would threaten the core purpose of the First Amendment and the Framers' intent to separate church and state. Thus, the Court has held that giving churches such a place in the "process of government" would be an "offensive violation of the spirit of the Constitution."

Another category of unconstitutional entanglement is excessive administrative entanglement. This kind of entanglement may arise when the government intends to provide aid for a secular purpose. To achieve this goal the government often has no

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106 Tribe, supra note 4, §14-11, at 1226.
107 See Tribe, supra note 4, §14-11, at 1226-31.
108 See Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) (striking down a Massachusetts law that granted to religious institutions the right to veto applications for liquor licenses for sites located within 500 ft. of the institution).
109 Id. at 127.
110 See Tribe, supra note 4, §14-11, at 1228.
choice but to monitor the operations of the religious organization. But by doing so the government interferes with the organization's autonomy. In some cases, government aid to religious organizations, even though it passes the first two parts of the Lemon test, will fail the third prong for this reason. On the other hand, there are ways to provide governmental aid to religious institutions without offending the non-entanglement rule. Lending textbooks for secular subjects to parochial students and paying subsidies for their bus transportation to school, for example, are not considered by the Court to create an extensive entanglement. On the other hand, paying the salaries of the teachers of secular subjects in parochial schools was considered to be an excessive entanglement because government officials had to visit the school -- perhaps extensively -- to verify that the subject and the way the teacher taught it were genuinely non-religious.

Of all three parts of the Lemon test, the most criticized part has been the entanglement test. In his dissenting opinion in Wallace v. Jaffree, Justice Rehnquist suggested that the Court should abandon the Lemon test completely and decide the Establishment Clause cases in a more restricted way based on the intent of the Framers of the First Amendment. He agreed with Justice White, who, in his concurrence in Roemer v. Board of Public Works of Maryland, pointed out that the entanglement prong created "an insoluble paradox" when it is separated from its original context. According to Justice White, this would be true especially in school aid cases. If the government provides aid to parochial schools, it generally has to supervise the secular use of this aid

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111 See generally Wolman v. Walter, 433 U.S. 229 (1977) (writing for the majority, Justice Blackmun gives a good overview about the Court's decisions concerning governmental aid to non-secular schools).
112 Lemon v. Kurtzman, 403 U.S. 602, 619 (1971) ("A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and that the First Amendment otherwise respected.").
115 Id at 112-13.
in order to pass the effect prong of the Lemon test. This close supervision, however, frequently creates an excessive entanglement with religion and makes the aid unconstitutional. According to Justice Rehnquist "[t]his type of self-defeating result," however, is "certainly not required to ensure that states do not establish religions."\(^\text{117}\)

Justice O'Connor, on the other hand, would not "abandon all aspects" of the Lemon test, but instead would redefine it. Instead of deciding each case separately, based on historical and textual evaluation of the First Amendment, Justice O'Connor prefers a single standard principle that is applicable to all conflicts.\(^\text{118}\) In her concurrence in Lynch v. Donnelly,\(^\text{119}\) she stated that the standard to determine Establishment Clause violations should be whether government has endorsed religion.\(^\text{120}\) This endorsement test would combine the first two criteria of the Lemon test by asking "whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement."\(^\text{121}\) Concerning the third prong of the Lemon test -- the excessive government entanglement inquiry -- Justice O'Connor found that the factors the Court has used to determine whether an entanglement is excessive have been the same as the factors the Court has used to determine whether the effect of the challenged action was primarily neutral.\(^\text{122}\) Hence, she concluded that the excessive entanglement issue should be treated "as an aspect of the inquiry into a statute's effect."\(^\text{123}\)

iv. Is The Lemon Test Still Valid?

The Lemon test has encountered severe criticism. The decision itself was not unanimous, and many subsequent opinions have distinguished Lemon\(^\text{124}\) or criticized

\(^{118}\) Id. at 68-69.
\(^{120}\) Id. at 687-689.
\(^{123}\) Id. at 257.
it. Justice O'Connor, for example, has said that a strict application of the test "may sometimes do more harm than good." Despite widespread criticism, the *Lemon* test was cited by the Supreme Court in "virtually all Establishment Clause cases between the early 1970s and the 1990s." However, in the late 80's and early 90's, without expressly rejecting or overruling the *Lemon* test, the Court started to move away from applying it.

Does this mean that the *Lemon* test has ceased to be valid? The answer must be no. The Supreme Court has never explicitly abandoned *Lemon*, and the doctrine of stare decisis requires the lower courts to take a precedent as binding as long as it has not been overruled. "[O]nly the Supreme Court may overrule one of its own precedents and until such occurs, precedent is still good law."  

c. Modern Doctrines

In the late 1980s and early 90s the Court seemed to move away from applying the *Lemon* test by basing its decisions on two other criteria: (1) whether the government had endorsed religion and (2) whether government had coerced religious practice. Not many Establishment Clause cases have been brought before the Supreme Court since 1990, however, so that analysis of these two new criteria is basically limited to two major cases.

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i. Endorsement Of Religion.

The Supreme Court applied the "endorsement" test for the first time in 1989 in County of Allegheny v. American Civil Liberties Union. In this case the Court had to decide the constitutionality of a Christmas display. In contrast to its decision in Lynch v. Donnelly, five years earlier, the Court found the Christmas display violated the Establishment Clause.

Writing for the majority, Justice Blackmun, started with an overview of previous Establishment Clause cases and the doctrines the Court had applied in these cases. Concerning the recent cases he found that the Court had "paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of ‘endorsing’ religion. . . ." Referring to previous decisions he provided a definition for endorsement: government action is considered to be endorsing if it "convey[s] or attempt[s] to convey a message that religion or a particular religious belief is favored or preferred." Justice Blackmun then analyzed the logic of Lynch. Finding the "rationale of the majority opinion in Lynch . . . none too clear." he concluded that the concurrence of Justice O’Connor in that case supplied a "sound analytical framework for evaluating governmental use of religious symbols." According to Justice O’Connor government should be prohibited from any endorsement of religion, because it "send[s] a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored

134 Id. at 589-593.
135 Id. at 592.
136 Id. at 593 (citing Wallace v. Jaffree, 472 U.S. 38, 70 (1984) (O’Connor, J., concurring)).
137 Id. at 594.
138 Id. at 595.
members of the political community." The four dissenters in *Lynch* had agreed with Justice O’Connor on the application of the endorsement test, but had come to a different conclusion when they applied the test. Because five Justices had applied the criteria of “endorsement” as the decisive element in *Lynch*, Justice Blackmun in *Allegheny* concluded that “government’s use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government’s use of religious symbols depends on its context.” Because the county’s display of a creche was without other secular symbols, but instead was accompanied by a sign saying that the creche was provided by a Roman Catholic organization, the Court found government endorsement of religion to be present. The majority’s application of the non-endorsement principle, however, was drawn into question just three years later when Justice Kennedy wrote for the Court’s majority in *Lee v. Weisman*.

### ii. Coercion.

In *Lee v. Weisman* the Court had to rule on the constitutionality of a non-denominational prayer that was delivered by a clergy member at a public school graduation ceremony. While four Justices wanted to uphold this practice, five Justices found the prayer to be unconstitutional. The five Justices who made up the Court’s majority, reached this result using a variety of analytical techniques.

Justice Kennedy based the majority opinion mainly on the element of coercion that he found present in this case. The graduation ceremony plays such an important part in a student’s life, that the argument that the students were free to leave the ceremony “lacks

140 *Id.* at 717 (Brennan, J., dissenting).
144 *Id.* at 579.
all persuasion" does not rest on "pure formalism," in reality graduating students were effectively coerced to participate in religious ceremonies. In addition to this element of coercion, Justice Kennedy recognized an excessive involvement of the government in the religious exercise. The graduation ceremony is a public school ceremony held on school property, and the prayer had to follow certain guidelines, established by school officials. According to Justice Kennedy, all these "dominant facts mark and control" the decision to invalidate the prayer.

The "coercion" test seems to ask whether government directly or indirectly coaxes people to favor a certain religion. In Lee v. Weisman itself, however, four of the Justices preferred to decide the case on the basis of other criteria. Justice Blackmun, who was joined by Justice O'Connor and Justice Stevens, based his concurrence on the "endorsement" test. Moreover, Justice Souter, joined by Justice O'Connor and Justice Stevens, openly expressed doubts about the "coercion" test by stating that none of the precedents can "support the position that a showing of coercion is necessary to a successful Establishment Clause claim." Thus, the importance and relevance of the "coercion" test in future cases may very well be doubted.

d. Doctrinal Development After Lee v. Weisman.

In the major Establishment Clause cases that followed Lee v. Weisman, the Court has not based its decision on the Lemon test. In Board of Education of Kiryas Joel Village

145 Id. at 595.
146 Id. at 595.
147 Id. at 586.
148 Id. at 619.
149 Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993) (upholding the constitutionality of a state law that required the government to provide a sign language interpreter for a deaf student who attended a parochial school); Board of Education of Kiryas Joel School District v. Grumet, 512 U.S. 687 (1994) (holding that New York statute that created a public school district along the lines of a village in which all inhabitants were members of the Satmar Hasidic sect would violate the Establishment clause); Agostini v. Felton, 521 U.S. 203 (1997) (upholding a New York City program under which public school teachers were sent into parochial schools to provide remedial instruction for disadvantaged children).
School District v. Grumet the Court did not even mention the Lemon test but instead, based its decision on the principle of government neutrality. In the most recent Establishment Clause case, Agostini v. Felton, the Court had to decide about a New York City program under which public school teachers were sent to parochial schools during regular school hours to provide remedial education for disadvantaged children. By a five-to-four vote the Court upheld the program and overruled in principal part its prior decisions in Aguilar v. Felton and in School District of Grand Rapids v. Ball. Writing for the majority, Justice O’Connor, began with a brief summary of the Court’s holdings in Aguilar and Ball. In both cases one of the major arguments for the invalidation of the programs has been the danger that the public employees “might subtly (or overtly) conform their instruction to the pervasively sectarian environment in which they taught.” This proposition, as Justice O’Connor noted in Agostini, had never been proven. “[T]here [was] no reason to presume that, simply because she enters a parochial school classroom, a full-time public employee . . . will depart from her assigned duties and instructions . . . .” Justice O’Connor enumerated the three criteria the Court “currently use[s] to evaluate whether governmental aid has the effect of advancing religion.” In order to be consistent with the Establishment Clause governmental aid

151 The fact that the Court did not mention Lemon in its decision led Justice O’Connor to conclude that the Court has departed from using the Lemon test. In her eyes this departure from Lemon was a step forward. Id. at 721. Justice Blackman, on the other hand, did not consider the Court’s decision in Grumet as a departure from the Lemon test. He argues that although the Court does not apply the Lemon test it nevertheless refers to decisions which “explicitly rested on the criteria set forth in Lemon.” Id. at 710.
152 Id. at 696-97.
153 Agostini v. Felton, 521 U.S. 203 (1997) (upholding a New York City program under which public school teachers were sent into parochial schools to provide remedial instruction for disadvantaged children).
154 Aguilar v. Felton, 473 U.S. 402 (1985) (invalidating a program that used federal funds to pay the salaries of public school teachers who provided remedial instruction to non-public school students).
155 School District of Grand Rapids v. Ball, 473 U.S. 373 (1985) (invalidating a released time program that provided remedial instruction to non-public schools students at public expenses on private school premises and a program that required government to pay parochial school teachers who taught “community education” in a wholly secular manner after class in parochial schools) In Agostini the Court only overruled the first program.
156 Id. at 234. (emphasis omitted) (citation omitted).
157 Id. at 246.
158 Id. at 261.
should not (1) result in governmental indoctrination of religion, (2) define its beneficiaries based on religion, or (3) create an excessive entanglement with religion.\textsuperscript{159} In \textit{Agostini}, the Court did not find any of these circumstances to be present and therefore upheld the program.

In conclusion, the Court has not overruled \textit{Lemon}. Thus, although the Court has refrained from applying it during the past 10 years, the \textit{Lemon} test is basically still applicable. However, because of all the inconsistencies within the test and the criticism it has received, it is doubtful whether the Court will ever use the \textit{Lemon} test again. Justice O’Connor has said that return to the \textit{Lemon} test “would likely be futile.”\textsuperscript{160} In her opinion a “less unitary approach [would] provide[] a better structure for analysis.”\textsuperscript{161} by adapting Establishment Clause analysis to particular contexts in which Establishment Clause problems arise.\textsuperscript{162} In this light, \textit{Agostini} can be seen as an attempt to define new criteria for deciding Establishment Clause cases concerning the constitutionality of governmental aid to religious schools.

\textbf{C. The Free Exercise Clause.}

\textbf{1. Overview.}

The Free Exercise Clause of the First Amendment states that “Congress shall make no law . . . prohibiting the free exercise” of religion.\textsuperscript{163} The term “free exercise” not only embraces the freedom to act, but it also encompasses the freedom to believe.\textsuperscript{164} Further, the Free Exercise Clause protects the right of individuals who chose not to believe in any religion or not to engage in any religious practice because, “just as the right to speak and

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\textsuperscript{159} \textit{Id.} at 261.
\textsuperscript{161} \textit{Id.} at 721.
\textsuperscript{162} \textit{Id.} at 721.
\textsuperscript{163} See U.S. CONST. amend. I.
\end{flushleft}
the right to refrain from speaking”, the right to believe and the right not to believe are “complementary components.”\(^{165}\)

To what extent may the government burden the free exercise of religion? The Court held in 1879\(^{166}\) that the freedom to believe is considered to be absolute. Upholding a Congressional statute that prohibited the practice of polygamy, the Court held that, while the Free Exercise Clause prevented Congress from interference “with mere religious belief,” it could well interfere with religious practice.\(^{167}\) In *Cantwell v. Connecticut*,\(^{168}\) the Court reaffirmed this distinction and added that religious conduct might be regulated insofar as the regulations would not unduly “infringe the protected freedom.”\(^{169}\) Accordingly, some infringement on religious conduct may be allowed, while some is clearly prohibited. The problem becomes how to draw the line.

2. Judicial Doctrines In Free Exercise Clause Cases.

The best way to draw the line between permissible and impermissible regulation of religious conduct is to first distinguish between laws that burden religion directly, and laws that are religiously neutral. The court has developed different doctrines to deal with these different categories of laws,\(^{170}\) applying strict scrutiny if the law burdens religion directly and minimal scrutiny if the law is neutral. The following discussion gives an overview of the development of these doctrines.

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166 Reynolds v. United States, 98 U.S. 145, 162 (1879).
167 Id. at 166.
168 Cantwell v. Connecticut, 310 U.S. 296 (1940) (invalidating a state statute that required a permit for solicitors for religious or charitable reason).
169 Id. at 304.
170 See generally NOWAK/ROTUNDA, supra note 14, § 17.6, at 1278-90 (providing a very good overview over the two classifications and their treatment by the Court).
a. Laws That Are Not Religiously Neutral.

Laws that are not religiously neutral are those that encroach on religious belief or impose burdens on people simply because of their religious beliefs. Such laws presumptively violate the Free Exercise Clause. In *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, for example, the Court invalidated a law that prohibited animal slaughter. Although the law was in principle generally applicable, it contained so many exemptions that under the surface it was directed only towards a particular sect. Writing for the majority, Justice Kennedy noted that “[t]he challenged law had an impermissible object; and in all events the principle of general applicability was violated because the secular ends asserted in defense of the law, were pursued only with respect to conduct motivated by religious beliefs.” As a result, it makes no difference if a law is *per se* discriminatory or if it was originally enacted as a generally applicable law with the purpose of burdening a religion. In both cases the law is unconstitutional. The burden of proof rests with the person or the group that feels discriminated by the law. They have to prove that the “legislative purpose was the promotion of religious beliefs or the suppression of the religious practice of a religious sect.” Such a law is then subject to strict judicial scrutiny, meaning that, in order to uphold the law, the government must prove a compelling government interest and that the law is “narrowly tailored to advance that interest.”

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171 *See* NOWAK/ROTUNDA, *supra* note 14, § 17.6. at 1278 (noting that “[a] law would be invalid if the legislature passed the law prohibiting some type of activity only because of the religious belief displayed by the activity or only because the government wished to burden a particular religion.”).
173 *Id.* at 532.
174 NOWAK/ROTUNDA, *supra* note 14, § 17.6. at 1278.
b. Religiously Neutral Laws.

Religiously neutral laws are generally applicable laws that only incidentally burden a certain religious belief or a religious practice. A state statute that required compulsory school attendance for all children until the age of 16 was such a general applicable law.\(^\text{176}\) The purpose for the state to enact such a statute is certainly not to burden religion, but to provide children a better education and to foster their “development as citizens and members of the society.”\(^\text{177}\) Nevertheless the statute may burden religious groups who believe that school education after a certain age would be contrary to their religious principles.\(^\text{178}\) Hence, in this case a law -- although generally applicable and enacted without the intend to burden religion -- nevertheless conflicts with the religious principles of the adherents of some religious sects by making it difficult or impossible for them to comply with the law and their religious beliefs at the same time.

In some cases the Supreme Court has formally distinguished between generally applicable laws that burden religion directly and laws that burden religion only indirectly.\(^\text{179}\) Many states, for example, prohibit the consumption of drugs.\(^\text{180}\) Some religious sects, however, consume drugs during their religious ceremonies. The prohibition of drug consumption by law burdens religion directly by making the use of the drug in the religious ceremony illegal. A law would burden religion indirectly, on the other hand, if it would make religious exercise more difficult for their practitioners, instead of “regulating a religiously motivated practice as such.”\(^\text{181}\) Sunday closing laws,

\(^{176}\) See Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding a state statute unconstitutional that required compulsory school attendance for Amish school children after the eight grade).

\(^{177}\) NOWAK/ROTUNDA, supra note 14, § 17.8, at 1302.

\(^{178}\) See e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972). The Court found that the state by mandating further school education for the Amish children would endanger the fundamental religious principles of the Amish people who lived their daily lives according to these principles.

\(^{179}\) NOWAK/ROTUNDA, supra note 14, § 17.6, at 1280.

\(^{180}\) See e.g., CAL. [HEALTH & SAFETY] § 11350 (West 1999); ARK. CODE ANN. § 5-64-40 (Michie 1997); MISS. CODE ANN. § 41-29-139 (1998) (prohibiting the possession of certain drugs).

\(^{181}\) NOWAK/ROTUNDA, supra note 14, § 17.6, at 1280 (adding that religious practice is usually burdened by of imposing additional economic costs on the practitioners. Faced with these additional costs the believers would probably refrain from religious practice.).
for example, indirectly burden Sabbatarians, who refrain from working for religious reasons on Saturdays. In order to comply with their religious belief Sabbatarians must close their shops two days a week and thus have to face additional economic costs.\textsuperscript{182} Today, however, the Court applies the same doctrines and guiding principles for generally applicable laws whether they directly burden religion or indirectly burden religion.\textsuperscript{183}

Generally applicable laws cannot be challenged as being unconstitutional with the argument that they solely favor or disfavor religion. In most cases, instead, the plaintiff must seek an exemption from the law because of his religious beliefs. In general, the Court tends to deny such exemptions from generally applicable law.\textsuperscript{184} Nevertheless, there have been some cases in which the Court has provided an exemption under the Free Exercise Clause.\textsuperscript{185} The following discussion provides a brief overview of these decisions and the level of scrutiny the Court has applied in each case.

i. Free Exercise Clause Cases Prior To 1963.

The judicial protection of the free exercise of religion prior to 1963 was relatively weak, and religious minorities suffered the most from this weakness.\textsuperscript{186} For example, the Court upheld several laws that restricted the practice of the Mormons, especially polygamy.\textsuperscript{187} In the 1940's and 1950's the Court provided more protection to religion.

\textsuperscript{182} See e.g., McGowan v. Maryland, 366 U.S. 420 (1961) (upholding a state law that required business closures on Sunday); Braunfeld v. Brown, 366 U.S. 599, 606-07 (1961) (upholding Pennsylvania's Sunday Closing law although it imposed an "indirect burden on religious exercise" because of its legitimate purpose to create a uniform "family day of rest.").

\textsuperscript{183} NOWAK/ROTUNDA, supra note 9, §17.6, at 1280 (stating that "the distinction between direct and indirect burdens does not have any legal significance").


\textsuperscript{186} See NOWAK/ROTUNDA, supra note 14, §17.6, at 1281-84, 1290-93.

\textsuperscript{187} See Reynolds v. United States, 98 U.S. 145 (1879); Davis v. Baeson, 133 U.S. 33 (1890); State v. Barlow, 324 U.S. 891 (1945).
However, the decisions were not or at least not mainly based on the Free Exercise Clause, but on the right of free speech, also provided by the First Amendment.188


This era could probably be described best as the "balancing era" because the Court applied a two step balancing test during this period in order to determine whether a person had the right to an exemption for her religious beliefs from a generally applicable law.189 First, the person had to show that the challenged law actually imposed a burden on his religious practice. Then, in a second step, the Court required the government to demonstrate a compelling governmental interest for burdening this religious practice and for not granting an exemption. The Court thus balanced the interest of the government in not granting an exception with the burden on the free exercise right of the individual. According to this balancing test,

[a] statute may stand only if the law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means.190

Although this may seem to be an unusually high requirement for the government to meet, in most of these cases the government interest did outweigh the individual's burden, and the exemption was denied.191 In United States v. Lee,192 for example, the Court found that the society's interest in having a functioning Social Security system outweighed the interest of an Amish worker in avoiding contributions to this system

188 See Canwell v. Connecticut, 310 U.S. 296 (1940) (invalidating a statute that required a permit for solicitors for religious or charitable reason); West Virginia Bd. of Education v. Barnette, 319 U.S. 624 (1943) (invalidating a statute that required students to take part in the daily flag salute at school); See NOWAK/ROTUNDA, supra note 14, § 17.7, at 1292 n.11, for further examples.
189 See NOWAK/ROTUNDA, supra note 14, § 17.6, at 1280-83, §17.7, at 1293 (describing the balancing test).
191 See NOWAK/ROTUNDA, supra note 14, §17.6, at 1290 (“But, during the quarter century in which the Court used that test, it almost always ruled in favor of the government”) (footnote omitted).
because of his religious belief. The Court reasoned that the reliability and the functioning of this system depends on the contributions of everybody and that granting exemptions from these contributions would severely endanger its functioning.

The Court found the same to be true in taxation cases as well. In fact, there were only two areas in which the Court granted exemptions from generally applicable laws for religious beliefs. One was the area of compulsory school education for Amish children and the other was the area of unemployment compensation.

Unemployment regulation statutes frequently deny unemployment benefits to workers if they leave their jobs voluntarily. The reason for such a regulation is to prevent the misuse of the system by workers "as a type of paid vacation." In Sherbert v. Verner, the Court for the first time required government to make an exemption for people who voluntarily refused to work, but whose refusal was genuinely based on their religious belief. In a series of later unemployment compensation cases the Court continued to adhere to this rule.


Employment Division Department of Human Resources of Oregon v. Smith. (Smith II) was decided by the Court in 1990 and makes a sharp break from the Court's earlier

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193 Id. at 261.
194 Id. at 259.
195 See NOWAK/ROTUNDA, supra note 14, § 17.6. at 1285, for further examples.
196 See Wisconsin v. Yoder, 406 U.S. 205 (1963) (requiring government to grant an exemption from compulsory school attendance for Amish children, because of their religious belief).
197 See e.g., Sherbert v. Verner, 374 U.S. 398 (1963) (granting unemployment benefits to a worker, who refused to take an offered job to work on Saturday, because of his religious belief).
198 See NOWAK/ROTUNDA, supra note 14. § 17.6. at 1282 (explaining the purpose of this government regulation in more detail).
199 Sherbert v. Verner, 374 U.S. 398. 420 (1963) (granting unemployment benefits to a worker, who refused to take an offered job to work on Saturday, because of his religious belief).
200 See also Thomas v. Review Board. 450 U.S. 707 (1981) (granting unemployment benefits to a person who had quit a job in a factory making parts for tanks and other weapons for religious reasons); Hobbie v. Unemployment Appeals Commission of Florida. 480 U.S. 136 (1987) (holding that there must be an exception from the general denial of unemployment benefits if the person loses his job because of his refusal to work on Saturdays).
willingness to consider requiring religious exemptions from generally applicable laws. Smith was employed as a drug counsellor with a private drug rehabilitation facility. He was fired because of consumption of peyote, a narcotic, at a religious ceremony. Since he lost his job for "good reason," the Employment Division Department denied the payment of unemployment benefits. The Supreme Court upheld the denial on the ground that, by using peyote, he had violated a general applicable criminal law. His dismissal from the job resulted directly from his consumption of drugs. Because this criminal law was constitutional, it was also "consistent with the Free Exercise Clause" to deny the unemployment compensation. The Court held that government may grant such an exemption from a general applicable criminal law, but the government is not required to do so. Justice Scalia, who wrote the majority opinion, began with a summary of previous Free Exercise Clause cases. From these cases he developed two major principles how to decide Free Exercise Clause cases: (1) Government is not allowed to regulate religious belief and (2) a religiously neutral law would violate the Free Exercise Clause if the infringement on the free exercise right was intended by the government.

The respondents argued that according to the balancing test that was first applied in Sherbert v. Verner, the Court had to balance the interests of society and the interests of the individual in order to resolve the case. The majority found the Sherbert test inapplicable because it "was developed in a context that lent itself to individualized government assessment of the reasons for the relevant conduct." Further this test was only applied in the context of the denial of unemployment benefits because the dismissal of Oregon to decide whether there was an exemption from the criminal law that would have allowed drug consumption for sacramental purposes. The Supreme Court of Oregon decided that there was no exemption.

202 Id. at 874.
203 Id. at 874-75.
204 Id. at 890.
205 Id. at 877.
206 Id. at 877-78.
207 Sherbert v. Vemer, 374 U.S. 398 (1963)
208 Employment Divisions Department, Human Resources v. Smith, 494 U.S. 872, 884 (1990)
was for "good cause." This good cause standard created a "mechanism for individualized exemptions."\textsuperscript{209} For dismissal from a job because of the violation of a criminal law, however, the application of the Sherbert test would have fatal consequences for subsequent cases: "To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling' - permitting him, by virtue of his beliefs, 'to become a law unto himself.'... - contradicts both constitutional tradition and common sense."\textsuperscript{210} The Court also distinguished its earlier discussion in Wisconsin v. Yoder.\textsuperscript{211} in which the Court had given a religious exemption to Amish students from a compulsory school attendance law. According the Court in Smith, the plaintiffs in Yonder based their claim not only on the Free Exercise Clause but also on the "rights of the parents to direct the religious upbringing of their children."\textsuperscript{212} These two rights together did outweigh the government interest in mandating further education after the eighth grade in Yoder. Because Smith II did not present such a "hybrid situation," but was solely based on a Free Exercise claim, the Court did not consider Yoder to be a binding precedent in this case.\textsuperscript{213} Moreover, the Court concluded that it should not be in the discretion of the judicial branch to determine either the compelling interest of the society or the "centrality" of the religious belief in evaluating Free Exercise claims to religious exemption.\textsuperscript{214} Such a determination should rather be made in the political process:

But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving the accommodation to the

\textsuperscript{209} Id. at 884.
\textsuperscript{210} Id. at 885 (footnote omitted).
\textsuperscript{211} Wisconsin v. Yoder, 406 U.S. 205 (1972).
\textsuperscript{212} Id. at 233.
\textsuperscript{213} Employment Divisions Department, Human Resources v. Smith, 494 U.S. 872, 875 (1990).
\textsuperscript{214} Id. at 887.
political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.\textsuperscript{215}


According to Smith II, religiously neutral laws are only unconstitutional if the challenger can prove the intent of the government to impinge on free exercise of religion. In response to this holding, the U.S. Congress passed in 1993 the Religious Freedom Restoration Act. Briefly said, the Act was intended to restore the principle of strict scrutiny and the compelling interest test, applied in Sherbert and Yoder, to the full range of Free Exercise cases.

In City of Boerne v. Flores\textsuperscript{216} the Court, however, held that the RFRA exceeded the legislative power and infringed on the powers of the judicial branch of the states. As the Court explained:

Congress' discretion is not unlimited. . . . and the courts retain the power, as they have since Marbury v. Madison, to determine if Congress has exceeded its authority under the Constitution. Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.\textsuperscript{217}

Thus today, a case challenging the constitutionality of a state law in light of the Free Exercise Clause would be decided under the principles established in Smith II.

\textsuperscript{215} Id. at 889.
\textsuperscript{216} City of Boerne v. Flores, 521 U.S. 507 (1997).
\textsuperscript{217} Id. at 557.
D. Function And Purpose Of The Religion Clauses.

The Framers of the constitution intended the two clauses to work together in order to ensure complete religious autonomy. Nevertheless, there are cases in which fulfilling the command of non-establishment and providing free exercise rights at the same time is not possible. If, for example, government grants exemptions from generally applicable laws for religious reasons, it accommodates religion in a way that may constitute an establishment of religion at the same time. Hence, the two clauses sometimes conflict. When the two clauses operate in this way the doctrines used by the Court to determine the violation of one clause are also relevant for the determination of a possible violation of the other clause. Sunday closing laws, for example, were challenged on the grounds that they violated both religion clauses. The government’s selection of Sunday as a uniform day of rest was challenged as a violation of the Establishment Clause and a Free Exercise Clause violation was claimed by business owners who due to their religious beliefs were forced to close their business on an additional weekday and thereby suffer economic loss. The Court, however, concluded that the secular purpose behind the statute, namely the establishment of an uniform day of rest, was sufficient to justify the laws under both clauses.

Potential conflicts between the two religious clauses abound. A federal statute providing chaplains for the armed forces, for example, seems clearly to threaten an establishment of religion by the federal government, but the refusal to provide such chaplains would most likely violate the Free Exercise Clause. In such cases arguments that justify government action under the Free Exercise Clause frequently are the same

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218 According to the Court’s holding in Smith II the availability of such exemptions from generally applicable laws lies solely within the discretion of governments. See supra Part II.C.2.b.iii.

219 Tribe, supra note 4, §14-2, at 1157.


that justify the Establishment Clause violation. Because people should have the opportunity to exercise their religion even when they are in the armed forces a chaplain should be provided, but on the other hand, the payment of all these chaplains with federal funds would violate the taxpayer's right that the government not establish religion. Hence, the only possible solution in these cases, according to the Court, is to balance the competing values against each other in order "to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."²²³

III. CONSTITUTIONAL PROTECTION OF FREEDOM OF RELIGION IN GERMANY.

A. Overview.

1. The Relationship Between Church And State.

In contrast to the Framers of the United States Constitution, the Parliamentary Council, which drafted the Basic Law, did not intend a strict separation between church and state. Instead the Parliamentary Council wanted to give religion a “special role in the Nation’s public life.”224 Hence, the relationship between church and state in Germany is a compromise between separation and connection which can be best described as “limping separation.”225

Although church and state are basically independent226 from each other, the state grants some privileges to religious communities, which necessarily leads to a cooperation between church and state in some areas.227 All religious communities, for instance, are eligible for certain state subsidies, and they can organize themselves as corporations under civil law.228 In addition, the Basic Law states that some religious holidays are official national holidays.229 The main churches,230 which have the status of corporate

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226 See Appendix, Grundgesetz [Constitution] [GG] art. 140 and Weimarer Reichsverfassung [Constitution of 1919] [WRV] art. 137 (1) (“There shall be no state church”).
228 See Appendix, Grundgesetz [Constitution] [GG] art. 140 and Weimarer Reichsverfassung [Constitution of 1919] [WRV] art. 137 (3), (5) and 138.
229 See Appendix, Grundgesetz [Constitution] [GG] art. 140 and Weimarer Reichsverfassung [Constitution of 1919] [WRV] art. 139.
230 Main churches are the “Evangelische Kirche Deutschlands” (German Evangelical Church) and the “Katholische Kirche Deutschlands” (German Catholic Church).
bodies under public law, are even allowed to levy taxes upon their members. Because of the cooperative relationship between state and church, the churches do not need to collect the taxes themselves. Instead, the Federal Government collects the church taxes together with the income tax and then transfers the former to the churches. Other areas in which church and state cooperate very closely with each other are, for instance, the compulsory religious education in public schools, which has to be paid for by the state or the rights of the church to decide about the employment of professors for the theology department at public universities.

In exchange for these privileges, the state has the right of supervision and control over the religious community within the framework of existing legislation. Religious communities are, however, allowed to regulate and administer church affairs independently without government interference. They can enact binding regulations or guidelines concerning, for example, the time and place of religious exercise, the qualifications and vocational training of their employees as well as the hierarchy among religious officials. The state may supervise actions only outside of this area of internal church affairs. In addition, the Federal Constitutional Court has given the term “internal church affairs” a very broad meaning. As a result the right of control and supervision of the state has become smaller over the years. Thus, under current law, the state may require a new church building to comply with general building and fire protection regulations and insist that church employees not work more hours than the

231 See Appendix, Grundgesetz [Constitution] [GG] art. 140 and Weimarer Reichsverfassung [Constitution of 1919] [WRV] art. 137 (6).
233 See Appendix, Grundgesetz [Constitution] [GG] art. 7 (3). See also infra Part IV. A.2 b. (providing more detailed information about religious instruction in public schools).
235 See MAUNZ/ZIPPELJUS, supra note 225, at 237 (explaining different the rights of supervision and control).
236 In Germany the Federal Constitutional Court is called the Bundesverfassungsgericht.
237 E.g. Entscheidungen des Bundesverfassungsgerichts [Federal Constitutional Court] [BVerfGE] 18, 385 (386) and Entscheidungen des Bundesverfassungsgerichts [Federal Constitutional Court] [BVerfGE] 19, 78 (133).
238 See MAUNZ/ZIPPELJUS, supra note 225, at 238.
employment law allows them to work; the state may not, however, question the decision of a religious community concerning the employment or dismissal of employees.\textsuperscript{239}

Early on, the Federal Constitutional Court held that, outside constitutionally specified areas of cooperation, the government has to be neutral not only towards religion but also towards all kinds of ideologies.\textsuperscript{240} By analyzing the structure and content of all provisions of the Basic Law dealing with religion, the Court found that in particular Article 3 (3) which requires equal treatment for people of different religious beliefs, and Article 4, which provides for freedom of religion in general, support the conclusion that the state has to (1) tolerate religion and religious belief (principle of tolerance).\textsuperscript{241} and (2) treat all people equal regardless of their religious or ideological belief (principle of equal treatment of religion).\textsuperscript{242} As a result the government may not, for instance, provide subsidies or other financial contributions to one religion without giving the same to the others.\textsuperscript{243} Moreover, the principle of neutrality towards religion also prohibits the state from identifying itself with certain religious beliefs or displaying religious symbols in state buildings as a sign of identification with a particular religion. Nevertheless, one can still find governmental reference to religion in German public life, for instance the display of a cross in each German courtroom or the phrase “So help me God” in the oath for public offices. These governmental references to the Christian religion, however, do not violate the principle of neutrality. Because of their longstanding tradition in German public life they are not considered as governmental identification with religion but merely

\textsuperscript{239} Id. at 238-39 (providing further examples for internal church affairs and state’s right of supervision.).

\textsuperscript{240} See Entscheidungen des Bundesverfassungsgerichts [Federal Constitutional Court] [BVerfGE] 12. 1 (4); BVerfGE 18, 385 (386); BVerfGE 19, 206 (216); BVerfGE 24, 236 (246). In all these cases the Court stressed the need for neutrality towards every ideology. This principle of neutrality, the so called weltanschauliche Neutralität, was derived from an analysis of the structure and the content of all constitutional provisions that deal with religion.

\textsuperscript{241} See Ulrich Scheuner, \textit{Die Religionsfreiheit im Grundgesetz; Die öffentliche Verwaltung} [DOV] 67, 585, 592 1966 (using the German term Toleranzgebot).

\textsuperscript{242} Entscheidungen des Bundesverfassungsgerichts [Federal Constitutional Court] [BVerfGE] 19, 206 (216). See also THEODOR MAUNZ & GUNTHER DURIG, \textit{Kommentar zum Grundgesetz} Article 140, at 23 (1998) [hereinafter MAUNZ/DURIG] (citing further provions of the Basic Law to explain the principle of neutrality).

\textsuperscript{243} MAUNZ/ZIPPELIUS, supra note 225, at 241.
as a reference to the important role the Christian religion has played in the historical and cultural development of Germany.\textsuperscript{244} When the religious oath or the display of the religious symbol conflicts with the freedom of religion of an individual the latter prevails: People who are eligible for public office are not required to include the religious affirmation in their oath and if somebody objects to the cross in the court room it has to be removed.\textsuperscript{245}

In conclusion, the state and church are basically separated, but by granting some privileges to religious communities the state favors religious communities more than secular organizations. With respect to these privileges there is a necessary connection between church and state, which makes cooperation between church and state in some areas inevitable. Aside from these areas of cooperation, however, the government has to be neutral towards religion in the sense that it tolerates religion and religious beliefs and does not favor one religion over another.


The German Grundgesetz (Basic Law)\textsuperscript{246} has a more complex system of provisions protecting religious freedoms than the United States Constitution. Aside from Article 4, the Free Exercise provision of the Basic Law. Article 140 incorporates five articles of the old Weimar Constitution of 1919.\textsuperscript{247} which deal with religion and religious

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\item[244] PETER SCHADE, GRUNDGESETZ MIT KOMMENTIERUNGEN, 239 (4th ed. 1997).
\item[245] See e.g., Entscheidungen des Bundesverfassungsgerichts [Federal Constitutional Court] [BVerfGE] 35, 375 (holding that a cross must be temporarily removed from the courtroom because a Jew objected to litigating under the cross).
\item[246] The term Grundgesetz or Basic law stems from the fact that it was originally only considered to be a provisory Constitution. See DONALD P. KOMMERS, supra note 224, at 35 (1989) (“Under the circumstances of a divided nation, the founders decided, pending Germany’s reunification, to write a basic law instead of a constitution. A constitution in the German understanding of the term is a framework for the permanent organization of a particular nation-state.”) (footnote omitted) (emphasis omitted). Although Germany is now reunited neither the Grundgesetz itself nor its name has been replaced. As it has proved so useful over all the years, instead of making a new constitution the new “Länder” have simply been added to the preamble of the Basic Law. See generally MAUNZ/ZIPPELIUS, supra note 225, at 4-16 (providing a good overview of the constitutional history in Germany).
\item[247] The Weimar Constitution was the Constitution of the German Reich enacted on August 11, 1919. This Constitution was replaced by the Grundgesetz in 1949.
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communities, into the Basic Law. In order to understand this strange and unusual incorporation of old Constitutional Law into the new Constitutional Law it is necessary to look at the drafting and enacting history of the Basic Law.\textsuperscript{248} The Basic Law was drafted by the Parliamentary Council on the island of Herrenchiemsee. While the intention to provide freedom of religion as a fundamental right was unanimous, there was much dispute over how to shape the relationship between Church and State. The main churches wanted a regulation of this relationship aside from Article 4 of the Basic Law. The political parties, on the other hand, did not want to regulate this relationship in detail because of its complexity. This conflict ended with a compromise decision simply to incorporate some provisions of the old Constitution of 1919 into the Basic Law.\textsuperscript{249}

In addition to these provisions, several other Articles of the Basic Law, “prohibiting discrimination based on religious belief,”\textsuperscript{250} can be found throughout the Basic Law. Examples include Articles 3 (3), 33 (3) and 7. Article 3 (3) provides for equal treatment of all people regardless of their religious beliefs.\textsuperscript{251} Article 33 guarantees this equal protection, especially for public office or civil service, by stating that “the enjoyment of civil rights, eligibility for public office, and rights acquired in the public service shall not depend on a person’s denomination.”\textsuperscript{252} Paragraphs (2) and (3) of Article 7 deal with religious instruction in public schools.\textsuperscript{253} Finally, there are several provisions that permit persons, elected for public offices, to swear the oath of office “without a religious affirmation.”\textsuperscript{254}


\textsuperscript{249} See Axel Freiherr von Campenhausen, §136 Religionsfreiheit, in \textit{HANDBUCH DES STAATSTRECHTS DER BUNDESREPUBLIK DEUTSCHLAND} 384 (JOSEF ISENSEE & PAUL KIRCHHOF eds., 1989) [hereinafter: von Campenhausen], for a more detailed historical analysis.

\textsuperscript{250} KOMMERS, \textit{supra} note 224, at 445.

\textsuperscript{251} See Appendix. Grundgesetz [Constitution] [GG] art. 3 (3).

\textsuperscript{252} See Appendix. Grundgesetz [Constitution] [GG] art. 33 (3).

\textsuperscript{253} See Appendix. Grundgesetz [Constitution] [GG] art. 7 (2) and 7 (3).

\textsuperscript{254} See Appendix. Grundgesetz [Constitution] [GG] art. 56, 64 (2) and art. 140 in connection with Weimarer Reichsverfassung [Constitution of 1919] [WRV] art. 136 (4).
B. Article 4 Of The Basic Law

1. Overview

Article 4 can be seen as the core provision guaranteeing the free exercise of religion.\(^{255}\) The religious rights granted are not connected to citizenship and, as a result, anyone, even a foreign citizen, can claim these rights against all three branches of government. Moreover, Article 4 is part of the fundamental rights of the Basic Law.\(^{256}\) As a result, the amendment process of Article 4 is very difficult\(^{257}\) and because of Article 19 (2) it is impossible to infringe upon the essential basis of the rights provided by Article 4. The first 18 articles of the Basic Law contain the fundamental rights, the so-called *Grundrechte.*\(^{258}\) These rights represent the "substantive values of the Basic Law" and they are therefore extremely important in the interpretation of the Basic Law.\(^{259}\) In order to preserve the "substantive values of the Basic Law" represented by these articles, Article 19 (2) declares that "in no case may the essence of a basic right be encroached upon."\(^ {260}\) It is therefore impossible for the German government to eliminate the rights and values that are protected by the first 18 Articles. With regard to Article 4, Article 19 (2) clearly prohibits the elimination of freedom of religion, the free exercise right and the rights of the conscientious objectors of Article 4 (3).\(^ {261}\) In addition, Article 19 (2) hinders the elimination of the principle of government neutrality towards religion, because it is

\(^{255}\) See Appendix, Grundgesetz [Constitution] [GG] art. 4.

\(^{256}\) The fundamental rights are found in article 1 to 18 of the Basic Law.

\(^{257}\) See Appendix, Grundgesetz [Constitution] [GG] art. 79 (regulating the amendment process. According to paragraph two an amendment must be carried by two thirds of the members of the Bundestag and two third of the votes of the Bundesrat.).

\(^{258}\) See KOMMERS, supra note 224, at 37 (referring to these fundamental rights as the Bill of Rights.).

\(^{259}\) See KOMMERS, supra note 224, at 37. See also Entscheidungen des Bundesverfassungsgerichts [Federal Constitutional Court] [BVerfGE] 6, 40 (1957) (holding that the Basic Law constitutes an objective order of values.). See KOMMERS, supra note 224, at 324, for an analysis of this case in English.

\(^{260}\) See Appendix, Grundgesetz [Constitution] [GG] art. 19 (2) ("In no case may the essence of a basic right be encroached upon.").

\(^{261}\) BODO PIEROTH & BERNHARD SCHLINK, GRUNDBRECHTE 76-77 (9th ed. 1993) [hereinafter PIEROTH/SCHLINK].
derived from an interpretation of different basic rights and thus also reflects a "substantive value of the Basic Law."\textsuperscript{262}

Article 4 itself is divided into three paragraphs, each of them protecting a different aspect of religion. While the first paragraph deals with the freedom of faith and conscience, the second paragraph provides the right of undisturbed practice of religion. The third paragraph deals with conscientious objection to military service, declaring that "no one may be compelled against his conscience to perform service in war involving the use of arms."\textsuperscript{263} This constitutional protection of the possibility for conscientious objectors to refuse military service is unique in the world.\textsuperscript{264}


Unlike many other constitutional provisions, Article 4 contains neither a reservation clause\textsuperscript{265} nor any other restriction. That does not mean, however, that the protections of Article 4 are unlimited. Early in the history of the Federal Republic, the Federal Constitutional Court held that conflicting fundamental rights of others may limit the freedoms provided by Article 4.\textsuperscript{266} This reasoning is based on the theory that the Basic Law constitutes an "objective order of values,"\textsuperscript{267} which was developed by the Court in the \textit{Elfes} Case\textsuperscript{268} in 1951. According to \textit{Elfes} the Basic Law is not an accumulation of constitutional provisions, but rather an expression of the "basic value choices of the

\textsuperscript{262} Johannes Rux, \textit{Bekenntnisfreiheit in der Schule}, DER \textit{STAAT} 523, 550 n.121 (1996).
\textsuperscript{263} See Appendix, Grundgesetz [Constitution] [GG] art. 4 (3).
\textsuperscript{264} See KOMMERS, supra note 224, at 462. Because this provision is not relevant for this paper, I will refrain from further examination. For more information about article 4(3), see KOMMERS, supra note 224, at 462.
\textsuperscript{265} A reservation clause is a clause in the article itself that allows government to regulate or to restrict the constitutional freedom provided by this article. See e.g., article 12 (1)("The practice of an occupation or profession may be regulated by or pursuant to a law.")
\textsuperscript{266} Entscheidungen des Bundesverfassungsgericht [Federal Constitutional Court] [BVerfGE] 28, 243 (260-61) (the German original reads as follows: "Nur kollidierende Grundrechte Dritter und andere mit Verfassungsrang ausgestattete Rechtswerte sind mit Rücksicht auf die Einheit der Verfassung und die von ihr geschützte Wertordnung ausnahmsweise imstande, auch uneinschränkbare Grundrechte in einzelnen Beziehungen zu begrenzen.").
\textsuperscript{267} This is the term Professor Kommers uses for the German expression \textit{objektive Wertordnung des Grundgesetzes}. See KOMMERS, supra note 224, at 55.
\textsuperscript{268} Entscheidungen des Bundesverfassungsgerichts [Federal Constitutional Court] [BVerfGE] 6, 40 (1957); see KOMMERS, supra note 224, at 324, for an analysis of this case in English.
Consequently, an interpretation of one provision of the Basic Law must always take into account the structure and intent of the Basic Law as a complete document. “[E]ach constitutional clause is in a definite relationship with all other clauses, and . . . together they form an entity.”270 By applying this theory to Article 4, the court has concluded that the framers did not consider Article 4 to be more important than the other fundamental rights, such as the right of free speech271 or the freedom of action.272 In cases where other constitutional rights conflict with the exercise of the freedoms of Article 4, the Court must use a balancing test to weigh which right takes precedence in order to find an acceptable solution. In order to decide whether a church could be required to refrain from ringing their bells on Sunday morning the court has to balance the free exercise right of the religious community against the right of personal freedom of other people who live next to the church and feel disturbed by the noise.273 The Court is limited in its discretion to balance conflicting constitutional rights in that neither of the rights in question may encroach on the “core essence” or “basic value” of other constitutional rights.274 In the above mentioned example the court found an acceptable solution by allowing the churches to ring their bells for religious reasons at any time, whereas ringing of the bells for secular reasons, as for example to tell the time, could be regulated by law. In making such a distinction the court ensured that the free exercise right was guaranteed and that, on the other hand, the rights of private freedom of the

269 Kommers, supra note 224, at 56.
270 Kommers, supra note 224, at 53 citing Justice Leibholz (emphasis omitted) (footnote omitted).
271 See Appendix, Grundgesetz [Constitution] [GG] art. 5.
272 See Appendix, Grundgesetz [Constitution] [GG] art. 2 (1).
273 See Entscheidungen des Bundesverwaltungsgericht [Highest Administrative Court] [BVerwGE] 86,62 (holding that the church may ring their bells for religious reasons at any time. On the other hand, ringing the bells for secular reasons, like for example after the passing of each hour can be prohibited during nighttime.).
274 Entscheidungen des Bundesverfassungsgerichts [Federal Constitutional Court] [BVerfG] 28, 243 (261) (the German original reads as follows: “Dabei auftretende Konflikte lassen sich nur lösen, indem ermittelt wird, welche Verfassungsbestimmung für sich für die konkret zu entscheidende Frage das höhere Gewicht hat. Die schwächere Norm darf nur soweit zurückgedrängt werden, wie das logisch und systematisch zwingend erscheint; ihr sachlicher Grundwertgehalt muß in jedem Fall respektiert werden”).
church neighbors were also not unduly burdened. The court would have encroached upon the “core essence” of this right of private freedom if it would have granted the churches the right to ring their bells unregulated at any time, because such a holding would have completely ignored the right of personal freedom.

In summary, although the wording of Article 4 provides no explicit restrictions, the freedom of religion may be limited by other conflicting basic rights. In order to decide such fundamental right conflicts, the Court must weigh and balance the affected rights against each other.

3. Article 4 (1).

a. The Meaning Of The Enumeration Of Different Rights.

The first paragraph of Article 4 enumerates different kinds of freedom: the freedom of faith. the freedom of conscience, the freedom of religious creed and the freedom of ideological creed. The reason for this unusual and seemingly strange enumeration can be found in the historical development of the freedom of religion. While today, these freedoms are all protected by the freedom of religion, there was actually a difference in the protection until the enactment of the Weimar Constitution in 1919.

In the 16th and 17th Century only the Catholic and the Lutheran creeds were considered under the law to be religious beliefs. But even for these two churches religious freedom in fact did not exist. At that time, the religious beliefs of subjects was determined for them by their sovereign under the principle cuius regio - eius religio, a Latin expression meaning that the person who reigns determines the religion of his servants. Moreover, the sovereign had not only the power to establish the official religion but also the power to prohibit all other religions and sects and to expel their

275 See Entscheidungen des Bundesverwaltungsgericht [Highest Administrative Court] [BVerwGE] 86.62.
followers (*ius reprobandi*). As a result, religious persecution was very common at that time.

At the end of the 18th century this viewpoint began to change. Following adoption of the Virginia Bill of Rights in 1776 and the French Revolution in 1789, many of the German States recognized freedom of religion in their constitutions. Freedom of religion, however, was still only granted to the two main churches and not to other religions and ideologies. This different treatment of the religions was finally overcome with the enactment of the Weimar Constitution in 1919. For the first time in Germany freedom of religion was guaranteed to all religions: Article 135 guaranteed the freedom of faith, conscience and creed to every citizen of the German Reich.

Unfortunately unlimited freedom of religion was only temporary. With Hitler’s seizure of power in 1933, the freedom of religion was again limited to its “very narrowest essence.” Under the pretense of fostering a national Christian religion the Nazis interpreted the term religion in the very narrow sense that it only embraced those religious beliefs that were closely related to National Socialism. Although the Weimar Constitution was still technically valid under the new National Socialist regime, Article 135 was soon displaced and superseded by new regulations and laws. Under the pretense that the government and public life should be freed from religious interference, the Nazis narrowed the freedom of faith and conscience to protect only Protestants and Catholics and placed severe restraints on the belief and the free exercise of all other religions.

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276 Of course, the sovereign could also tolerate other religion (*ius tolerandi*) or allow people with different beliefs to emigrate (*ius emigrandi*). However, not many sovereign, especially not those who were Catholics, have used these two possibilities. See Martin Heckel, *Ius reformandi*, Evangelische Staatsrechtlehre [ExStL], 11. 1415.


278 Weimarer Reichsverfassung [Constitution of 1919] [WRV] art. 135 (1).

279 von Campenhausen, *supra* note 249, at 389 (the German original reads as follows: “Spätestens seit 1936 war die Kirchenpolitik ganz auf die Einschränkung des Grundrechts auf einen innersten Kern ausgerichtet.”) (citations omitted).

280 The freedom of religion under Article 135 was one of the constitutional rights that could not be suspended in case of emergency by the President of the Reich. Thus, it is frequently questioned today whether Article 135 was still valid under the National Socialism. See generally Jörg Winter, *Die Wissenschaft vom Staatskirchenrecht im Dritten Reich*, pp. 29 (1979) and von Campenhausen, *supra* note 249, at 388-89, for this dispute.
The seemingly strange collection of different rights in Article 4 (1), therefore, is the result of a strong reaction against the restraints on the freedom of religion under the Nazi regime. The post-war framers of the Basic Law sought to eliminate the possibility that the government could formally recognize freedom of religion, but then limit some forms of religious beliefs or expression, by giving the term "freedom of religion" a very narrow meaning. They relied upon cumbersome constitutional language in order to ensure the permanence of the fundamental rights.

Thus, the enumeration of different freedoms of belief in Article 4 (1) -- originally intended to clarify the protections that had become distorted in the time of National Socialism -- today, has no importance in constitutional interpretation: The Federal Constitutional Court currently considers the different freedoms to be synonyms for each other; instead of using the term freedom of faith, the Court, for example, uses the term freedom of creed.

b. The Freedom Of Faith And Creed.

The freedom of faith and creed, the basis of the religious freedoms, is expressly protected by the first paragraph of Article 4. This provision protects not only the freedom to have a certain distinct belief, but also the freedom to have no belief at all. According to the Federal Constitutional Court, it does not even matter if the non-believer is indifferent to all religious creeds, or does not want to think about it or if he/she simply has not made up her mind with respect to religious matters. Moreover, Article 4 not only protects religious belief or non-belief, but also the freedom of ideological creed. Thus, Marxism,

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281 Entscheidungen des Bundesverfassungsgericht [Federal Constitutional Court] [BVerfGE] 24, 236 (245).
282 von Campenhausen. supra note 249, at 392.
283 Entscheidungen des Bundesverfassungsgericht [Federal Constitutional Court] [BVerfGE] 12, 1 (4). See also von Campenhausen, supra note 249, at 392 n. 105 (providing further examples).
284 von Campenhausen, supra note 249, at 395 (stating that the freedom of faith and creed is the centerpiece of the freedom of religion).
285 MAUNZ/DURIG, supra note 242, Article 4 at 23.
for example, is protected by Article 4, even though it has no religious content at all.\textsuperscript{286} This rule blocks the persecution of people on the basis of their ideological creed as well as their religion.

The interpretation of freedom of faith and creed in Article 4 (1) is very extensive, protecting almost every kind of belief\textsuperscript{287} or non-belief. As a result, when referring to the freedom of faith and creed that is protected by Article 4 (1), the Federal Constitutional Court often uses the term \textit{forum internum}, which includes the whole internal system of thought concerning faith and creed.\textsuperscript{288} The protection of this \textit{forum internum} is absolute, and government cannot infringe upon it in any way.\textsuperscript{289}

4. Article 4 (2).

\textbf{a. The Right Of Free Exercise.}

The second paragraph of Article 4 provides: “The undisturbed practice of religion shall be guaranteed.”\textsuperscript{290} If taken literally, one might conclude that only the free exercise of religion would be protected and not the exercise of non-religious belief. Such a conclusion, however, would be a mistake. The theory behind the Basic Law as an “objective order of values” requires not only the interpretation of one basic right in the light of the whole Constitution but also the evaluation of one single paragraph with respect to the rest of the Article. Thus, the second paragraph must be read in connection with the first. There would be no real freedom of faith or creed if the Constitution did not

\textsuperscript{286} von Campenhausen, supra note 249, at 396.
\textsuperscript{287} Problems in this area arise mainly with the new sects. Freedom of faith does not protect any opinion, but only those which are based on religious, ethical or metaphysical grounds. In determining whether a certain belief fulfills these criteria the government has to look at neutral criteria, without judging the content or the dogmas of the belief. See von Campenhausen, supra note 249, at 396.
\textsuperscript{288} MAUNZ/DURIG, supra note 242. Article 4 at 27. von Campenhausen, supra note 245, at 395, PIEROTH/SCHLINK, supra note 261, at 133.
\textsuperscript{289} von Campenhausen, supra note 249, at 395 (stating that this freedom is unlimited) See also Entscheidungen des Bundesverfassungsgerichts [Federal Constitutional Court] [BVerfGE] 17, 302 (305).
\textsuperscript{290} Appendix, Grundgesetz [Constitution] [GG] art. 4 (2).
also protect the possibility of refusing to lead a life according to faith or creed.\textsuperscript{292} In fact, the Federal Constitutional Court has never made a distinction between religious and non-religious practice.\textsuperscript{293} As a result, living in a kolkhoz, or a collective farm, would be protected under Article 4 as free exercise and practice of an ideological belief. Indeed, the Court has even found the right of free exercise to be guaranteed not only by Article 4 (2), but also by Article 4 (1).\textsuperscript{294} Although Article 4 (1) speaks only about freedom of faith, conscience and creed, it must logically also incorporate the right to carry this faith to the outside by religious exercise, proselytizing, or propaganda.\textsuperscript{295} As a consequence of this holding, the narrow wording of Article 4 (2), with its reference only to the “practice of religion.” has now become irrelevant. The first paragraph in effect supersedes the second, so that the latter now only has a confirming and clarifying meaning.

\textit{b. Restraints On The Free Exercise Right.}

As concluded in the preceding section, free exercise is considered to be the right of everybody to live in compliance with his faith and to act according to his inner conviction.\textsuperscript{296} This right is guaranteed against all three branches of government. The branches are not allowed to infringe the free exercise right without having a good reason. A court may not, for example, schedule a trial hearing for a Jew on a religious holiday.\textsuperscript{297}

\begin{footnotesize}
\textsuperscript{292} von Campenhausen, \textit{supra} note 249, at 401.
\textsuperscript{293} PIEROTH/SCHLINK, \textit{supra} note 261, at 133.
\textsuperscript{294} Entscheidungen des Bundesverfassungsgerichts [Federal Constitutional Court] [BVerfGE] 24, 236 (245) (stating that the free exercise right is already included in the freedom to believe).
\textsuperscript{295} Entscheidungen des Bundesverfassungsgerichts [Federal Constitutional Court] [BVerfGE] 12, 1 (3f) (the German original reads as follows: “Dieser Begriff umfasst nämlich - gleichgültig, ob es sich um ein religiöses Bekenntnis oder eine religionsfremde oder religionsfreie Weltanschauung handelt - nicht nur die innere Freiheit, zu glauben oder nicht zu glauben...sondern ebenso die Freiheit des kultischen Handelns, des Werbens, der Propaganda.”).
\textsuperscript{296} Entscheidungen des Bundesverfassungsgerichts [Federal Constitutional Court] [BVerfGE] 32, 98 (106) (the German original reads as follows: “sein gesamtes Verhalten an den Lehren seines Glaubens auszurichten und seiner inneren Glaubensüberzeugung gemäß zu handeln”.
\textsuperscript{297} Bundesgerichtshof [Supreme Court] [BGH] in: \textit{NEUSTE JURISTISCHE WOCHENZEITSCHRIFT} [NJW] 1959, 1330 (1330).
\end{footnotesize}
and the legislature may not prescribe the denial of unemployment benefits to workers who refuse to work on their religious holidays.\(^{298}\)

In some limited circumstances, however, it may be necessary to limit the free exercise right if it conflicts with the fundamental rights of others.\(^{299}\) The fundamental rights system ensures that within the community everybody has the right to live and the right to self-fulfillment in so far as they do not violate the rights or interests of other citizens.\(^{300}\) Along those lines, the Federal Constitutional Court has concluded that behaviors that question essential principles of the legal community or the proper existence of the legal community itself cannot be protected by the Constitution.\(^{301}\)

According to this principle, those religious practices that conflict with criminal law or regulations considered to benefit the whole society are very often restricted or not allowed. In the 1970s, for example, some people had refused to pay the total amount of their electricity bills as a means of protesting against the generation of atomic energy. Even though their refusal was based on ideological belief, the Federal Constitutional Court denied the protection of this practice by Article 4.\(^{302}\) Five years later, the Court reached the same conclusion in rejecting claims by persons who refused to pay taxes and to make other contributions because of religious or ideological reasons.\(^{303}\) To allow such a practice, concluded the Court, would endanger the whole social system, which is based on the contributions of all citizens.\(^{304}\)

\(^{298}\) Entscheidung des Bundessozialgerichtshofes [Supreme Social Insurance Court] [BSGE] 51, 70 (73).

\(^{299}\) See supra Part III.B.2, for the necessity of a restriction of the freedom of religion.

\(^{300}\) von Campenhausen, supra note 249, 405 (the German original reads as follows: “Sie sollen vielmehr innerhalb der Rechtsgemeinschaft dem einzelnen das Leben und die freie Entfaltung seiner Persönlichkeit gewährleisten, unbeschadet entgegenstehender Interessen und Standpunkte anderer Staatsbürger”).

\(^{301}\) Entscheidungen des Bundesverfassungsgerichts [Federal Constitutional Court] [BVerfGE] 33, 23 (29) (the German original reads as follows: “Daher können Verhaltensweisen die tragende Grundsätze der Rechtsgemeinschaft oder gar die Rechtsgemeinschaft selbst in Frage stellen, keinen grundrechtlichen Schutz beanspruchen.”).


\(^{303}\) See Entscheidungen des Bundesverfassungsgerichts [Federal Constitutional Court] [BVerfGE] 67, 26 (37); Bundessozialgericht [Supreme Social Insurance Court] [BSG] in NEUESTE JURISTISCHE WOCHENZEITSCHRIFT [NJW] 1987, 702 (703).

\(^{304}\) Entscheidungen des Bundesverfassungsgerichts [Federal Constitutional Court] [BVerfG] 67, 26 (39).
In some cases a person's free exercise right might conflict with the free exercise rights of other people. This conflict can arise in two ways. There can be a conflict that involves people of different beliefs or a conflict that arises between non-believers and believers. According to the Federal Constitutional Court, in both types of conflicts the courts have to find a neutral solution by balancing the competing rights against each other.\textsuperscript{305} This result seems obvious in cases that deal with a conflict involving people of different beliefs. If, for instance, a public school teacher is teaching in his religious garb, the court has to balance his free exercise right against the competing religious freedom of the children to receive a religiously neutral secular education.\textsuperscript{306} On the other hand, requiring such a balancing process for conflicts involving believers and non-believers might not, at first sight, seem to be a satisfying solution. One might conclude that the free exercise right of the non-believer gives him the right to be free from exposure to religious practice. This, however, is not the case. The free exercise right of the non-believers goes as far as that of the believers. If the believers have the right to practice their religion, the non-believers have the right not to practice religion. But neither believers nor non-believers may insists that others refrain from their religious practice.\textsuperscript{307} In the \textit{School Prayer} case,\textsuperscript{308} for instance, the Federal Constitutional Court held that a student who did not want to participate in a prayer contrary to his religious belief could not prevent his fellow students from praying.\textsuperscript{309}

\textsuperscript{305} Entscheidungen des Bundesverfassungsgerichts [Federal Constitutional Court] [BVerfGE] 41, 29 (pp. 49); BVerfGE 41, 65 (78ff); BVerfGE 44, 196 (1991); BVerfGE 52, 223 (223); BVerfGE 93, 15 (15ff)

\textsuperscript{306} See infra Part IV.d.2. (analyzing this kind of conflict and its solution in more detail.)

\textsuperscript{307} MAUNZ/DURIG, supra note 242. Article 4 at 24; von Campenhausen, supra note 249, 427-28; PIEROTH/SCHLINK, supra note 261, at 135,141.

\textsuperscript{308} Entscheidungen des Bundesverfassungsgerichts [Federal Constitutional Court] [BVerfGE] 52, 223. See KOMMERS, supra note 224, at 499-72, for a translation of this case.

\textsuperscript{309} Id. at 251.
5. Conclusion.

Freedom of religion, according to Article 4, means first of all the freedom to choose, to have, or to refrain from choosing or having, a certain religious or non-religious faith. The definition of faith is extensive and covers the whole of one’s inner convictions, the so-called forum internum. If a person’s inner conviction has no direct effect on others, this freedom of faith is protected absolutely under Article 4 of the Basic Law.

Additionally, the freedom of religion provides the right of free exercise. Contrary to the narrow wording of the second paragraph of Article 4, this free exercise right is guaranteed for every kind of belief, religious or ideological. The free exercise right, however, is not unlimited. It can be subject to regulation if a religious practice would violate the fundamental rights of other people or if it endangers the fundamental order of the German Constitution.

C. Article 140 Of The Basic Law In Connection With Articles 136-139, 141 Of The Weimar Constitution.

Article 140 of the Basic Law states that “[T]he provisions of Articles 136, 137, 138, 139 and 141 of the German Constitution of 11 August 1919 shall be an integral part of this Basic Law.”

Through this incorporation process, five provisions of the Weimar Constitution have become a part of the Basic Law, with the same rank as all other constitutional provisions of the Basic Law itself. As a consequence these provisions must also be interpreted in the light of the “substantive values of the Basic Law.” Because all five provisions deal with the relationship between Church and State, the courts frequently have to interpret the meaning of these provisions in connection with Article 4. According to the Federal

310 Appendix. Grundgesetz [Constitution] [GG] art. 140.
311 MAUNZ/DURIG, supra note 242, Article 140 at 6.
312 See supra Part III.B. 1 and 2.
Constitutional Court. conflicts arising between these five constitutional provisions and Article 4 should be solved by balancing the values each provision will affect. Because Articles 136-139 and 141 of the Weimar Constitution are not very relevant for the issue of religion in public schools the following paragraph will only provide a brief summary of these provisions.

Articles 136-139 and 141 of the Weimar Constitution regulate mainly the relationship between Church and State. They can be compared to the establishment clause of the First Amendment of the United States Constitution, although the relationship between church and state differs in the two countries. Article 136 deals mainly with the protection of the individual's freedom of religion. As these protections are already guaranteed by other Basic Law provision, such as Articles 4 and 33 (3). Article 136 of the Weimar Constitution is frequently seen as only having a clarifying meaning. Article 137 can be seen as the most important of these five articles because it sets forth the basic principles that govern the church-state-relationship in Germany. The first paragraph of Article 137 prohibits the establishment of a state church, whereas the other seven paragraphs regulate the relationship between the church and the state in more detail and grant some privileges to religious communities. Articles 138 and 139 grant further privileges to religious communities, like the right to own property and the recognition of Christian holidays as national holidays. Finally, Article 141 permits religious organizations to provide religious service and pastoral work in the military service, hospitals, prisons or other public institutions.

314 See supra Part III.A.1.
315 Maunz/Dürig, supra note 242. Article 140 at 33.
316 See Appendix. Weimarer Reichsverfassung [Constitution of 1919] [GG] art. 137.
317 See supra Part III.A.1. (explaining the church-state relationship and the privileges of the religious communities in more detail.).
318 See Appendix. Weimarer Reichsverfassung [Constitution of 1919] [GG] art. 138 (2) and 139.
IV. FREEDOM OF RELIGION IN PUBLIC SCHOOLS.

An exploration and discussion of all aspects of the relationship between religion and public schools would exceed the limits of this paper. As a result, the following discussion is limited to three specific areas of particularly significant conflict: (1) the constitutionality of prayer in public schools, (2) the question whether religious symbols are allowed in public schools and (3) the proper scope of free exercise rights of teachers in public schools. Before a comparison of cases in these three areas can take place, it is necessary to offer an overview of how the public school system is organized in both countries and to contrast the roles that religion plays in the public school systems of the United States and Germany.

A. The Relationship Between Public Schools And Religion In General.

1. Public Schools And Religion In The United States.

a. The Public School System In The United States.

Unlike the German Basic Law, the United States Constitution does not address the issue of school education. Additionally, the Supreme Court has held that education is not considered to be a fundamental right that can be claimed against the federal government. As a result, education is a matter left primarily to the discretion of the states. All state constitutions include clauses that concern education. Some state constitutions are very general on this matter, while others are more specific. All of them.

319 See infra Part IV.A.2.
however, have incorporated at least two fundamental aspects in their public school system: First, public schools education is made available free of charge. Second, there are virtually no limitations on access to public schools.\textsuperscript{322} Aside from certain areas in which federal legislation supersedes the states’ legislative power,\textsuperscript{323} it is the state legislature that establishes rules for employment, curriculum and exam regulation.\textsuperscript{324} Because it would be almost impossible for the state to regulate the school system to the very last detail, the states have delegated this power to the local school boards. In order to implement the general regulations which the states have set, local school boards adopt policies, rules and regulations which have the force of law.\textsuperscript{325}

\textit{b. The Role Of Religion In Public Schools.}

In the United States the relationship between church and state is primarily governed by the Establishment Clause of the First Amendment, which requires government neutrality towards religion. The basic principle of separation between church and state also governs the relationship between religion and the public school. Any introduction of religion into a public school is considered to be unconstitutional when it constitutes an establishment of religion by the school authorities. Hence, a state statute prescribing religious instruction in public schools would be unconstitutional.\textsuperscript{326} Similarly, a state may not ban the teaching of evolution from the biology curriculum\textsuperscript{327} or try to “compensate”

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{322} \textit{Id. at} 81-84. \textit{See also} Paulson v. Minidoka County School District No 331, 96 Idaho 469, 472 (Idaho 1970); Hartzell v. Connell, 679 P.2d 35 (Cal. 1984); Cardiff v. Bismarck Public School District, 263 N.W.2d 105 (N.D. 1978) (providing an overview of state’s constitutional provisions and cases that deal with the issue of school fees).
\item\textsuperscript{323} The employment law, for example, contains a lot of federal regulations that supersedes or replace contradictory state legislation. In addition to the federal legislation, the individual rights and freedoms guaranteed by the Federal Constitution also influence state legislation because of their general applicability.
\item\textsuperscript{324} \textit{Id. at} 13.
\item\textsuperscript{325} \textit{Id. at} 13.
\item\textsuperscript{326} \textit{See e.g.}, Illinois ex. rel. McCollum v. Board of Education, 333 U.S. 203 (1948) (holding that religious instruction in public schools under a released time agreement by private teachers is unconstitutional under the First Amendment); Zorach v. Clauson, 343 U.S. 306 (upholding a released time program in which the students received religious instruction outside the school property).
\item\textsuperscript{327} \textit{See} Epperson v. Arkansas, 393 U.S. 97 (1968) (invalidating a statute that prohibited the teaching of evolution and the use of textbooks that suggested that “mankind ascended or descended from a lower order of animal”)
\end{itemize}
\end{footnotesize}
the teaching of evolution by requiring the teaching of creationism every time evolution is taught, because such choices inject religious doctrines into the curriculum.\textsuperscript{328}

In conclusion, religion must be separated from the public school system to the same degree as it is from the state in general. The wall of separation between church and state prohibits not only religious instruction in public schools, but it also means that in principle no religious belief may be advanced or disfavored by the school. There are, however, exceptions to this rule of strict separation. One such exception concerns the combination of religious holidays with school holidays. Christmas and Thanksgiving are generally seen not only as religious holidays but also as national holidays based on historical American traditions.\textsuperscript{329} Thus, the state can declare school holidays on these occasions. Good Friday, on the other hand, has no such secular connotation according to at least one court. A state statute declaring it to be official school holiday would therefore constitute a violation of the Establishment Clause.\textsuperscript{330}

2. Public Schools And Religion In Germany.

a. Overview.

Secondary education in Germany comes in diverse forms and has been fairly characterized as multidimensional and complex.\textsuperscript{331} States, municipalities, religious organizations, and even private persons can create or open new schools as long as the founding entity takes on legal responsibility for the school. Hence, there are many different types of schools from which students can choose. \textit{Ersatzschulen, Rudolf-}

\textsuperscript{328} See Edwards v. Aguillard, 482 U.S. 578 (1987) (invalidating a Louisiana statute which required that the teaching of evolution must be accompanied by the teaching of creation science because it clearly advanced a religious doctrine).

\textsuperscript{329} See e.g. Lynch v. Donnelly, 465 U.S. 668, 674 (1984) (describing the process by which Thanksgiving became a National Holiday “more than one century ago.”).

\textsuperscript{330} See Metzl v. Leininger, 850 F. Supp. 740 (Ill. 1994) (stating that a statute that required Good Friday to be one of the twelve official school holidays would be unconstitutional).

\textsuperscript{331} MAUNZ/DURIG, supra note 242. Article 7, at 13.
Steiner-Schulen, Waldorfschulen and vocational schools provide just a few examples. The reason for this diversity of school types lies not only in the historical development of the school system in Germany but also in the fact that most of the legislative power to regulate the school system is delegated to the Länder, the German equivalent to the American states. Aside from certain limited areas which have to be regulated by the federal government the Länder are, in principle, free to regulate the school system within their territories. Länder have the right to establish and even to eliminate certain schools. Länder may choose where and what type of school has to be established and define the curriculum and exam regulations. This extensive regulatory power is only limited by Article 7 of the Basic Law, which provides certain guidelines which the Länder must take into account.

b. Article 7 Of The Basic Law.

In six paragraphs Article 7 of the Basic Law sets forth the constitutional principles for the school system in Germany. Beyond the requirements imposed by Article 7, the Länder are free to provide a more detailed framework for the school system in their territory. As in the United States. the Länder delegate regulatory power for final details to administrative bodies. These administrative bodies are free to perform their tasks

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332 Ersatzschulen are private schools which may replace the public schools. Rodolf-Steiner-Schulen are schools that were founded by the Theosophist Rudolph Steiner and Waldorfschulen base their curriculum mainly on arts and science. Unlike many other schools the Waldorfschule does not grade their pupils.
333 See MAUNZ/DURIG, supra note 242, Article 7, at 13 (stating that the diversity in the schools system is based on historical, ideological, pedagogical and sociological reasons).
334 See Grundgesetz [Constitution] [GG] art. 70 (1). According to this article “[t]he Länder have the right to legislate in so far as this Basic Law does not confer legislative powers on the Federation.” Concerning the area of education and schools the legislative powers are not conferred on the Federation. The legislative power remains, therefore, with the Länder.
335 E.g., the regulation of educational grants, of the length of compulsory school education and the regulation of the enrollment age. See MAUNZ/DURIG, supra note 242, Article 7, at 11, 23-24.
336 Public schools can be established as denominational, interdenominational or as non-denominational schools.
337 See infra Part IV.A.2.b.
338 As only the first three paragraphs are dealing with public schools, the overview will be restricted to those paragraphs. See MAUNZ/DURIG, supra note 242, Article 7. 47-53. for a further analysis of Article 7.
according to their own administrative guidelines with the exception of certain limitations discussed below.

The first paragraph of Article 7 restricts the general autonomy of the school administration by stating that "[t]he entire school system shall be under the supervision of the state." Since private schools are also a part of the comprehensive school system of Germany, they are subject to state supervision. This state supervision, however, is more limited than the supervision of the public schools, because Article 7 (3) grants the private schools certain regulatory freedoms. The Federal Constitutional Court has given Article 7 (1) a very broad meaning by holding that Article 7 (1) gives the states also the right to regulate certain educational issues on a statewide or even nationwide basis.

According to the Court, Article 7 (1) gives the states the regulatory power to organize and structure the school system in a centralized way in order to assure that all students can receive the kind of education that best reflects their abilities. Basic regulations are thus established at a state level and include, for example, the determination of the curriculum and the identification of compulsory subjects. States also determine whether a school may be established, significantly changed or eliminated. Article 7 (3) provides that "[r]eligious instruction shall form part of the curriculum in state schools except non-denominational [state] schools." Non-denominational state schools are public schools that are neutral towards all religious denominations in the sense that they neither provide religious instruction nor show any affiliation to a religions

339 See Appendix. Grundgesetz [Constitution] [GG] art. 7 (1).
340 See MAUNZ/DURIG, supra note 242, Article 7. 17-22 (providing details for the graded supervision according to the type of school).
341 See Entscheidungen des Bundesverfassungsgerichts [Federal Constitutional Court] [BVerfGE] 26, 222.
342 See Entscheidungen des Bundesverfassungsgerichts [Federal Constitutional Court] [BVerfGE] 26, 222, 228 (the German original reads as follows: "Zur staatlichen Aufsicht über über die Schulen gehört die Befugnis des Staates zur zentralen Ordnung und Organisation des Schulwesens mit dem Ziel. ein Schulsystem zu gewährleisten, das allen jungen Bürgern gemäß ihren Fähigkeiten die dem heutigen gesellschaftlichen Leben entsprechenden Bildungsmöglichkeiten eröffnet. Dem Staat steht die Schulplanung und die Möglichkeit der Einwirkung auf Errichtung und Aufhebung der einzelnen öffentlichen Schulen zu.").
343 See Appendix. Grundgesetz [Constitution] [GG] art. 7 (3).
sect. Non-denominational public schools, however, are extremely rare in Germany, and only a few Länder have established their entire public school system on a non-denominational basis. Another type of public school is the public denominational school. Unlike the United States, the German Länder may establish denominational public schools in which the education in all subjects is closely linked to a certain religious belief. Although the constitutionality of the state established religiously affiliated schools is unquestioned in Germany, denominational public schools are very rare today. In Bavaria, for instance, it was mandated by law that each public elementary school had to be established as a denominational school. In 1967, however, the passage of a referendum forced the Bavarian government to change most of the denominational schools into Christian interdenominational schools, the third type of public school that exists in Germany. The Christian interdenominational school, also called Gemeinschaftsschule, is the most common public school type in Germany. As with non-denominational public schools, Christian interdenominational schools are open for children of all religious beliefs. Nevertheless, they differ from the non-denominational schools in the sense that they are (1) affiliated with the Christian faith, and (2) constitutionally required to provide religious instruction.

344 Some non-denominational schools provide a general and neutral instruction in the different religious and ideological beliefs. This instruction, however, is not considered to be religious instruction according to Article 7 (3) of the Basic Law. See Maunz/Dürig, supra note 242, Article 141, at 11.
345 E.g., Berlin and Bremen. These two Länder do not provide religious instruction in public schools at all. Some schools provide a general non-denominational instruction in the different religious and ideological beliefs. This instruction, however, is not considered to be religious instruction according to Article 7 (3) of the Basic Law.
347 Johannes Rux, Bekenntnisfreiheit in der Schule. DER STAAT 523, 528 (1996) (stating that the constitutionality of this school type is derived from a historical interpretation of Article 7 (5) of the Basic Law. This provision allows the establishment of denominational, non-denominational, or alternative private schools only when no state school of that type exists locally. From the wording of this Article it can be therefore concluded that the framers of the Basic Law wanted to allow a public denominational school.); See also Peter Badura. Das Kreuz im Klassenzimmer. BAYRISCHES VERWALTUNGSBLATT [BayVBl.] 71, 73 (1996).
349 Professor Kommers translate the German Gemeinschaftsschule into Christian interdenominational schools. See Kommers, supra note 224, at 473.
The religious affiliation with the Christian faith is obvious in the secular school subjects because the teacher of such subjects in a Gemeinschaftsschule may refer to the Christian faith as a main factor for the cultural and educational development in Germany. The development of the Lutheran-Protestant religion and its effects on Germany’s social development, for example, is part of the regular curriculum in these interdenominational schools. Hence, the religious affiliation of the Gemeinschaftsschulen allows them to place an emphasis on the Christian tradition and on the Christian faith, whereas the non-denominational schools have to be neutral towards religion. Religious affiliation does not mean, however, that Gemeinschaftsschulen are allowed to proselytize the pupils by setting the Christian faith as being absolute. By doing so, the state, which maintains the public school system, would violate the principle of neutrality towards religious beliefs set forth in Articles 4 and 140 of the Basic Law. Even an interdenominational school like the Gemeinschaftsschule is not allowed to influence the students towards a certain religious belief outside the area of religious instruction: “Thus, the school may not be a missionary school and may not demand commitment to Christian articles of faith. Also it must remain open to other ideological and religious ideas and values.”

According to Article 7 (3) interdenominational public schools are required to provide religious instruction. Although the Gemeinschaftsschulen are based on the Christian faith, religious instruction in these schools is not only given in the Christian faith, but also in all other religious beliefs for which there are enough students to form a class for religious instruction. Religious instruction is to be taught according to the guiding principles of

351 Id. at 3354 (the German original reads as follows: “In der Sache heißt das, daß in den profanen Fächern der christliche Charakter in erster Linie durch die Anerkennung des Christentums als prägender Kultur- und Bildungsfaktor bestimmt wird, wie er sich in der abendländischen Kultur herausgebildet hat.”) (emphasis omitted). See also Kommers, supra note 220, at 477 (citing a Federal Constitutional Court decision).
352 See supra Part III A.1 and C. 2., for an explanation of the principle of neutrality.
353 Kommers, supra note 224, at 477 (citing a decision of the German Constitutional Court)
354 As a result many German public schools offer also religious education for Muslim or Jewish children. See Rolf Schieder, Zwang zum Unterricht in staatlicher Weltanschauung, SÜDDEUTSCHE ZEITUNG, April 16, 1996, at 3.
the particular religious belief and by a certified teacher.\textsuperscript{355} All expenses and costs have to be carried by the state.\textsuperscript{356} Moreover, the right of religious instruction is not only a simple constitutional statement, but rather a guarantee for parents, children and religious communities to receive religious instruction in every public school except for non-denominational public schools.\textsuperscript{357}

The right to receive religious instruction does not mandate children to attend religious instruction contrary to their religious belief. Paragraph two of Article 7 grants parents the right "to decide whether children receive religious instruction."\textsuperscript{358} This provision can be seen as \textit{lex specialis} to the general right of Article 6 (2) of the parents for the "care and upbringing of children"\textsuperscript{359} because, according to the \textit{Gesetz über religiöse Kindererziehung}, the law governing religious education for children, the parents have the right to decide about the participation of their child in the religious instruction until the child becomes 14 years old.\textsuperscript{360} From age 14 on, the child can determine by herself whether she wants to receive religious instruction. Reasons for refusing to participate do not have to be given. Until the summer of 1998, the main problem that arose in the context of Article 7 (2) was the question whether participation in ethics classes could be required as compulsory for students who do not participate in religious instruction, or if Article 7 (2) also allowed the parents, or the child, to object to participation in such classes. In the summer of 1998, the highest administrative court in Germany resolved this question by holding that students who object to participation in religious instruction could be required to participate in ethics classes instead.\textsuperscript{361} Arguing that Article 7 (1) grants the state the power to regulate important school issues, the court concluded that the

\textsuperscript{355} Maunz/Durig, \textit{supra} note 242, Article 7 at 32-34.
\textsuperscript{356} Maunz/Durig, \textit{supra} note 242, Article 7 at 33.
\textsuperscript{357} Maunz/Durig, \textit{supra} note 242, Article 7 at 32 (providing further reference for this interpretation of Article 7 (3)).
\textsuperscript{358} See Appendix, Grundgesetz [Constitution] [GG] art. 7 (2).
\textsuperscript{359} See Appendix, Grundgesetz [Constitution] [GG] art. 6 (2).
\textsuperscript{360} See Gesetz über religiöse Kindererziehung [Law governing the religious education of children] [RelKErzG] § 5, second sentence.
\textsuperscript{361} Entscheidungen des Bundesverwaltungsgerichts [Highest Administrative Court] [BVerwGE] 6C1197 (June 1998).
state may not only regulate the content of the curriculum and determine the compulsory subjects along traditional lines, but that the state may also establish completely new compulsory subjects, like an ethics class for students who do not participate in religious instruction. As long as ethics is instructed in a religiously and ideologically neutral fashion, ethics can be a compulsory subject in lieu of religious instruction. The ethics curriculum in almost every German Land is defined as a general overview of the different religious and non-religious beliefs and ideologies and the teacher chosen to give ethics generally tends to be only minimally committed towards a certain religious belief or ideology. Thus, the danger that ethics is taught in a non-neutral fashion, favoring either a religious or an ideological belief, is as minimal as it is for other secular subjects, like history or economy.

c. Conclusion.

Article 7 of the Basic Law provides the foundation for the school system in Germany. According to the first paragraph, the whole school system is subject to state supervision. This right of supervision has been interpreted very broadly by the Federal Constitutional Court in the sense that it is not only a right of supervision but also a right to regulate certain important educational issues on a state or even nationwide basis. The third paragraph of Article 7 guarantees the right of religious instruction in public schools. Religious instruction is therefore provided in almost every public school. It is part of the standard curriculum, and it is graded. Paragraph 2 of Article 7 gives parents the right to decide whether the child shall receive religious instruction and, according to the law that governs religious education for children, a child can decide by herself about participation in religious instruction at the age of 14.

362 id. at 15.
363 Of course the students are not graded according to their belief or their religious practice. Instead, the grade is based on the student's general knowledge in the particular religion. See MAUNZ/DURIG, supra note 242, Article 7 at 53.
In summary, unlike in the United States, religion plays an important role in the public school system in Germany. Religious instruction is part of the regular curriculum according to Article 7 (3), and most public schools are interdenominational schools based on the Christian faith. Even though their organization and structure is based on Christian faith, the schools are not allowed to favor religion in a proselytizing manner in secular subjects. Teachers in these schools may refer to the Christian faith as a "formative cultural and educational factor which has developed in Western civilization" because such a reference contains no message about the "truth of the belief." The main task German courts have to perform in this area is therefore to draw the line with regard to the question of when a historical reference to the traditional role of Christianity in the Western civilization becomes proselytizing. This distinction between permissible affirmation of Christianity and missionary work is, as the cases discussed below will show, not an easy task for the courts.

B. The School Prayer.

1. The School Prayer Issue In The United States.

In the United States the constitutionality of prayer in public schools has always been controversial. Beginning in the early 1960s, courts in the United States faced challenges to government composed prayers held at the beginning of each school day, daily moments of silence, and non-denominational prayers at graduation ceremonies. These challenges produced several U.S. Supreme Court decisions, which will be analyzed individually in the following sections of this paper.

364 Kommers, supra note 224, at 477 (translation of a decision of the German Constitutional Court).

i. Engel v. Vitale.

Prior to the 1960s the daily morning prayer constituted the most common form of practicing religion in public schools.\(^{365}\) Daily morning prayers in public schools existed even before the Civil War\(^{366}\) but it was not until 1962 that the Supreme Court in *Engel v. Vitale*\(^{367}\) was faced with determining their constitutionality. Engel, together with nine other parents, challenged a New York statute that allowed a daily prayer in public schools and the reliance on this statute by a local school district. At the beginning of each school day, every class had to recite the following prayer, which was composed by the State Board of Regents in order to increase moral and spiritual training in public schools:\(^{368}\)

"Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."\(^{369}\)

The lower courts,\(^{370}\) as well as the New York Court of Appeals,\(^{371}\) upheld the statute and the school board's practice on the ground that the pupils were not forced to join the prayer if they or their parents objected to it. The Supreme Court, in contrast, found this option not sufficient and concluded that this "clearly religious activity" violated the Establishment Clause.\(^{372}\) Writing for the majority, Justice Black relied on historical evidence to conclude that "[t]he First Amendment . . . tried to put an end to government control of religion and of prayer."\(^{373}\)

Because government power to regulate religion is

\(^{365}\) William E. Griffiths, Religion, the Courts, and the Public Schools 1 (1966).

\(^{366}\) See id. at 3 (referring to two cases in which the legality of these religious exercises in public schools had been challenged).


\(^{368}\) Id. at 422-23.

\(^{369}\) Id. at 422.


\(^{373}\) See id. at 425-437.
always accompanied by dangers of religious persecution.\textsuperscript{374} the Framers of the Constitution intended to erect a wall between the church and the state. As “[t]here can be no doubt that New York’s state prayer program officially establishes the religious beliefs embodied in the Regents’ prayer,” the prayer was unconstitutional despite its denominational neutrality and the opt-out feature. Justice Black also rejected the respondents’ argument that invalidation of the prayer expressed an impermissible hostility toward religion.\textsuperscript{375} In his view there was no hostility in saying “that each separate government in this country should stay out of the business of writing or sanctioning official prayers.”\textsuperscript{376} Instead, such an interpretation of the Establishment Clause properly left the responsibility for religious exercises “to the people themselves and to those the people choose to look to for religious guidance.”\textsuperscript{377}

The sole dissenter in \textit{Engel}, Justice Stewart, found that the Court had “misapplied” the principle of the Establishment Clause.\textsuperscript{378} Tracking the rationale of the New York Court of Appeals,\textsuperscript{379} Justice Stewart referred to the many references to God and religion by government actors, including the Declaration of Independence, the inauguration speeches of almost all Presidents of the United States, and the expression “In God we trust,” which has been engraved in American coins since 1865.\textsuperscript{380} These acts of government did not constitute an establishment of religion, and the prayer at issue did not either. According to Justice Stewart, religion is not established by simply “letting those who want to say a prayer say it.”\textsuperscript{381} He added that “to deny the wish of these school

\textsuperscript{374} \textit{Id.} at 432.
\textsuperscript{375} \textit{Id.} at 434.
\textsuperscript{376} \textit{Id.} at 435.
\textsuperscript{377} \textit{Id.} at 435.
\textsuperscript{378} \textit{Id.} at 445 (Stewart, J., dissenting).
\textsuperscript{381} \textit{Id.} at 445.
children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our nation."\(^{382}\)


One year later in *School District of Abington Township v. Schempp*,\(^{383}\) the Court ruled on the constitutionality of two school-prayer statutes, one from Maryland and one from Pennsylvania. The Pennsylvania statute required that "at least ten verses from the Holy bible shall be read, without comment, at the opening of each public school on each school day"\(^{384}\) and permitted pupils to be excused from this religious exercise upon the written request of their parents.\(^{385}\) The Maryland statute, in contrast, did not prescribe the reading of the Bible as mandatory but provided a legislative basis for the local Boards of Education to adopt rules for religious opening exercises in public schools. Mrs. Murray and her son\(^{386}\) challenged the adoption of such a rule for religious opening exercises by the Board of Education of Baltimore City, which prescribed to open each school day "by the reading, without comment, of a chapter the Holy Bible and/or the use of the Lord's prayer."\(^{387}\)

The Supreme Court found that these religious practices violated the Establishment Clause.\(^{388}\) Justice Clark, who delivered the majority opinion, conceded that "religion has been closely identified with [the] history and government"\(^{389}\) and is therefore "strongly

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\(^{382}\) *Id.* at 445.


\(^{384}\) *Id.* at 205 (citations omitted).

\(^{385}\) This exemption was part of the statute when the plaintiffs challenged the statute for the first time in *Schempp v. School District of Abington Township*, 177 F.Supp. 398 (DC Pa. 1959). While the appeal of this decision was pending at the Supreme Court, Pennsylvania added the exemption. The Supreme Court, therefore, vacated judgment and remanded the case to the district court for further proceeding. The District Court found again for the plaintiffs (*Schempp v. School District of Abington Township*, 201 F.Supp. 815 (DC Pa. 1962) and the District, its officials and the Superintendent appealed again to the Supreme Court. See *School District of Abington Township v. Schempp*, 374 U.S. 203, 206 n.1 (1963) and *GRIFFITHS, supra* note 361, at 14-15 (providing more details about the case history).

\(^{386}\) From the book William J. Murray has written, it becomes clear that he actually did not want to challenge the prayer himself, but that it was his mother who initiated everything. See *WILLIAM J. MURRAY, LET US PRAY* 1-28 (1995).


\(^{388}\) *Id.* at 227.

\(^{389}\) *Id.* at 212.
imbedded in public and private life." But he also reaffirmed the need for strict protection of religious freedom, which has an equally important role in "public and private life" as religion itself. Seeking to resolve this conflict, he declared that the government has to be neutral towards religion and articulated a two-part test: "[T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary neutral effect that neither advances nor inhibits religion." Applying this test to the statutes at issue, the Court concluded that, even though the state had stated a secular legislative purpose, the principal purpose was clearly a religious one. The fact that the attendance was not mandatory, and that an excuse from the religious exercise was possible upon request was, according to the Court, irrelevant. Unlike in Free Exercise Clause cases coercion was not required for an Establishment Clause violation.

As in Engel, Justice Stewart was the only dissenter. He refused to "assume that the school boards lack the qualities of inventiveness and good will" to achieve "a system of religious exercises that would meet the constitutional standard."


It was not until 1985 that the Supreme Court in Wallace v. Jaffree again encountered the constitutionality of a religious exercise in public schools at the beginning of each day. Jaffree, on behalf of his children, challenged an Alabama statute that

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390 Id. at 214.
391 Id. at 214 (stating that religion "has not been so identified with [the Nation’s] history and government that religious freedom is not likewise as strongly embedded in our public and private life.").
392 Id. at 215 (referring to an opinion by Judge Taft about the ideal relationship between government and religion).
393 Id. at 222 (citation omitted).
394 Id. at 224 ("[T]he state’s recognition of the pervading religious character of the ceremony is evident from the rule’s specific permission of the alternative use of the Catholic Douay version as well as the recent amendment permitting nonattendance at the exercise.").
395 Id. at 223.
396 Id. at 320.
398 It is therefore not correct to say that Court in this case had decided about the constitutionality of a moment of silence statute. Only one of the three statutes that were originally challenged at the trial court established a moment of
allowed public schools to begin each school day with "a period of silence for meditation or voluntary prayer."\(^{399}\) Probably because of the "remarkable conclusion" of the District Court that the First Amendment of the United States Constitution would not block Alabama from establishing a state religion,\(^{400}\) the Supreme Court deemed it necessary to recall some basic principles of the freedoms protected by the First Amendment and their applicability to the states.\(^{401}\) Applying the Lemon test\(^{402}\) the Court held that the statute was invalid because it clearly lacked any secular legislative purpose.\(^{403}\) The record showed that the statute was "an effort to return voluntary prayer to the public schools."\(^{404}\)

This clear evidence for the plainly religious purpose of the statute made it unnecessary for the Court to rule on whether a statute which simply provides a moment of silence without any religious reason would be possible under the First Amendment. Justice Stevens, who wrote the majority opinion, pointed out that the Court’s holding did not prohibit students from praying for themselves during the school day.\(^{405}\) Additionally, Justice O’Connor\(^{406}\) and Justice Powell\(^{407}\) emphasized in their concurring opinions that a statute allowing a moment of silence with no religiously motivated purpose could be constitutional. It is therefore possible to conclude that a "true moment of silence law" would be upheld by the Court.\(^{408}\)

silence at the beginning of each school day. This statute, which was held to be constitutional by the trial court was challenged neither in the Court of Appeals nor in the Supreme Court. See Wallace v. Jaffree, 472 U.S. 38, 40-48 (1985); NOWAK/ROTUNDA, supra note 14, §17.5, at 1269-70.


\(^{400}\) Jaffree v. Board of Education, 554 F.Supp. 1104 (S.D.Ala.1983) (holding the Alabama statute that allowed prayer in public schools to be constitutional, because the First Amendment of the U.S. Constitution would be inapplicable to the states.) This holding was overturned by the Court of Appeals in Jaffree v. Wallace, 705 F.2d. 1526, 1535 (11th Cir. 1983). See also NOWAK/ROTUNDA, supra note 14, §17.5, at 1269-70.

\(^{401}\) Wallace v. Jaffree, 472 U.S. 38, 48-55 (1985). The Court stated that although the First Amendment was originally "adopted to curtail the power of Congress" it became applicable to the states with the enactment of the Fourteenth Amendment. Thus, the state of Alabama is now as bound to grant and protect the freedoms of the First Amendment as is the Congress of the United States.

\(^{402}\) Id. at 55: See also supra Part II.B.2.b. (providing a detailed analysis of the Lemon test).

\(^{403}\) Id. at 56.

\(^{404}\) Id. at 56. (emphasis omitted) (citation omitted).

\(^{405}\) Id. at 59.

\(^{406}\) Id. at 73-74.

\(^{407}\) Id. at 62.

\(^{408}\) NOWAK/ROTUNDA, supra note 14, §17.5, at 1270-71; TRIBE, supra note 4, § 14-5, at 1186.
iv. Conclusion.

In summary, statutes that provide a moment of silence without any religious allusion would most likely be constitutional. On the other hand, the First Amendment clearly prohibits religious exercises in the form of a daily prayer in public schools. As the Supreme Court has adhered to this view over the years, it is unlikely that it will change in the future. Thus, the only possibility to establish daily prayers in public schools would be through an amendment of the United States Constitution. Indeed, after the Court's decisions in Schenck and Engel, forty-nine states demanded such a constitutional amendment. Even though there was never enough support for such an amendment in Congress, the idea of a school-prayer amendment has continued to attract attention.

b. The Constitutionality Of Prayers At Graduation Ceremonies.

A shared characteristic of the three cases analyzed above is that each case involved a prayer that occurred on a daily basis during the entirety of the student's education. As a result, some school officials and religious groups concluded that a prayer at one single occasion - namely the graduation ceremony - would be deemed constitutional notwithstanding Engel and Schenck. In 1992, however, the Supreme Court rejected this argument with its ruling in Lee v. Weisman. By a five-to-four vote, the Court held that a school policy permitting prayers at a graduation was unconstitutional because it violated the Establishment Clause.

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409 Even in Lee v. Weisman, 505 U.S. 577 (1992), the case that can be seen as doctrinal turning point in Establishment Clause cases (see supra Part II.B.2.c), the Court has referred to Engel and Schenck (See e.g., Lee v. Weisman, 505 U.S. 577, 588, 590, 596 (1992)).


412 Id. at 599.
Daniel Weisman, the father of a girl who attended a public high school in Providence, Rhode Island, challenged the school's practice of having a prayer at the graduation ceremonies in public middle and high schools. According to the local school board's policy, the school principal was required to invite a member of the clergy to deliver an invocation and a benediction at the graduation ceremony. The clergy member was instructed by the principal to proceed according to an official booklet containing guidelines on how the prayer should be conducted. He was also instructed that the prayer had to be non-sectarian. The District Court applied the Lemon test and found it violated. The prayer, although non-sectarian, had a religious character and thus had an impermissible advancing effect on religion. The Supreme Court, by contrast, did not rely on Lemon, but instead, based its ruling on the facts that (1) the government's involvement with the prayer was so pervasive that it created "a state-sponsored and state directed religious exercise in a public school," and (2) the student's attendance at the ceremony was in a "fair and real sense obligatory" so that participation in a religious exercise was in effect coerced. The petitioners' argument that the student's attendance at the ceremony was not mandatory was rejected by the Court as being too formalistic:

Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term "voluntary," for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years.

\(413\) Id. at 580-86; See also Thomas A. Schweitzer, The progeny of Lee v. Weisman: Can student-invited prayer at public school graduations still be constitutional? 9 BYU Pub. L. 291, 292-293 (1995).
\(415\) See id. at 71 -72. According to the Court, the school board's practice of including prayers in a graduation ceremony, even if they were non-sectarian, created the impression of governmental identification with the religious practice. This effect would endorse or even advance religion and thus violate the Establishment Clause.
\(416\) Id. at 577, 587.
\(417\) Id. at 577, 586.
\(418\) Id. at 577, 595.
In his dissenting opinion, Justice Scalia sought to place the issue of prayers at graduation ceremonies in historical context. Referring to the fact that even the Framers of the Constitution had tolerated prayers at ceremonies of all three branches of government, he concluded that they would also have tolerated prayers at graduation ceremonies. To support his position, Justice Scalia referred to Marsh v. Chambers in which the Supreme Court had held that prayers at the opening of legislative sessions were constitutional because this practice was "[f]rom our Nation’s origin a prominent part of governmental ceremonies and proclamations." The majority opinion did not consider Marsh a controlling precedent because of the differences that marked legislative sessions and public school systems particularly in light of the youth and impressionability of students. Moreover, in the majority’s view, a close examination of the historical facts revealed that the Framers most likely would have opposed a graduation prayer at a public school.

ii. The Aftermath Of Lee v. Weisman.

Because of the Court’s narrow and fact-based holding, the decision in Lee did not solve the question whether any kind of prayer at high school graduation ceremonies is unconstitutional. As a result scholars today disagree about the constitutionality of prayers

419 Id. at 631-632.
420 Id. at 633-35.
421 Id. at 532 (referring to Marsh v. Chambers, 463 U.S. 783 (1983)).
422 Id. at 633.
423 Id. at 620-627 (Souter, J., concurring); See generally Myron Schreck, Balancing the right to pray at graduation and the responsibility of disestablishment, 68 Temp. L. Rev. 1869, 1871-1872 (1995), for an analysis of the debate over the intent of the framers in this case. See also Michael Swomley, Myths about voluntary school prayer, 35 Washburn L.J. 294, 294-295 (1996) (examining the intent of the fathers of the declaration of independence).
424 Lee v. Weisman, 505 U.S. 577, 586 (1992) ("These dominant facts mark and control the confines of our decision").
at graduation ceremonies. and the body of case law in the lower courts on this issue is inconsistent.

In *American Civil Liberties Union of New Jersey v. Black Horse Pike Regional Board of Education,* for example, the Court of Appeals for the Third Circuit had to deal with a school board policy that allowed students to decide on (1) the way a graduation-prayer would be conducted, (2) the content of the prayer if the class decided to have one and (3) who should deliver the prayer. In 1993, a referendum led to the following result: 128 students voted for a prayer, 120 voted for a moment of silence, and 20 voted to have neither. The Third Circuit found that the school board’s policy violated the Establishment Clause because the freedom of religion protected by that clause could not be determined by a majority vote: “The First Amendment does not allow the state to erect a policy that only respects religious views that are popular because the largest majority cannot be licensed to impose its religious preferences upon the smallest minority.” In addition, the Third Circuit found that the policy to allow the students to vote was just a way to elude the consequences of the Supreme Court’s decision in *Lee.* Judge McKee, who wrote the majority opinion, applied the same criteria on which the Supreme Court had based its holding in *Lee,* and found that the state’s control of the graduation ceremony as well as the students’ coerced participation was also present in this case. Also applying the *Lemon* test, the court also found that the sole purpose of the policy was

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425 See Thomas A. Schweitzer, The Progeny of *Lee v. Weisman: Can student-invited prayers at public school graduation ceremonies still be constitutional?*, 9 BYU J. Pub. L. 291 n. 4 & 5 (1995) (referring to various articles in which the authors had concluded that the Court in *Lee* had “outlawed any form of prayer at public school graduations.”). Professor Schweitzer himself believes that “graduation school prayer can be constitutional under carefully controlled circumstances.” Id. at 306.


427 *American Civil Liberties Union of New Jersey v. Black Horse Pike Regional Board of Education,* 84 F. 3d 1471 (3rd Cir. 1996).

428 Id. at 1474-76.

429 Id. at 1488.

430 Id. at 1478-83 (finding, among other things, that the delegation of this delicate aspect of the graduation ceremony to the students neither released the school board from the duties set forth in the Establishment Clause nor eliminated the presence of state control at the ceremony).
not to provide the students with more rights to free speech, but to elude the certain unconstitutionality of prayers at graduation which were ordered by school officials.\textsuperscript{431} Thus, the policy lacked a secular purpose. In addition, the challenged policy had the effect of advancing religion and therefore violated the principle of governmental neutrality.\textsuperscript{432} Because the policy neither passed the \textit{Lemon} test nor the principles of endorsement or coercion established in \textit{Lee}, the Third Circuit concluded that the policy must be unconstitutional under the Establishment Clause of the First Amendment.\textsuperscript{433}

\textit{Jones v. Clear Creek Independent School District},\textsuperscript{434} presented facts similar to those in \textit{Black Horse Pike} but produced a different result. Just like in \textit{Black Horse Pike}, the school board resolution (1) allowed the senior class to decide on whether they wanted to have a prayer and (2) required that the prayer should be delivered by a student volunteer.\textsuperscript{435} Viewing the Establishment Clause analysis as a “delicate and fact sensitive one,”\textsuperscript{436} the Fifth Circuit applied all five tests\textsuperscript{437} that the Supreme Court has used in its Establishment Clause cases and found that under all five tests the resolution was in line with the Establishment Clause. Using the \textit{Lemon} test, the court found a secular purpose in the school board’s intent to solemnize the graduation ceremony\textsuperscript{438} and held that the primary effect of the resolution was not to advance religion but to solemnize the ceremony. In addition, the Fifth Circuit found that there was no endorsement of religion by the school officials, just as there was no endorsement when a public school allowed a Christian club to meet on school property after class along with all other student

\begin{footnotes}
\item[431] \textit{Supra} note 51 at 1484-1485.
\item[432] \textit{Id.} at 1488 (finding that a policy that “seeks to accommodate the preferences of some at the expense of others and thereby crosses the required line of neutrality.”).
\item[433] \textit{Id.} at 1488.
\item[435] \textit{Id.} at 965.
\item[436] \textit{Id.} at 966 n.8 (citing \textit{Lee v. Weisman} and \textit{Lynch v. Donelly}).
\item[437] The court here split the \textit{Lemon} test into three parts (secular purpose, primary effect and entanglement) and added the two criteria used in \textit{Lee v. Weisman} (coercion and endorsement).
\item[438] 977 F.2d 963, 966 (5th Cir. 1992).
\end{footnotes}
organizations.\textsuperscript{439} The Fifth Circuit found neither a coercion nor an excessive entanglement of the government in religious matters. Unlike in \textit{Lee}, the decision about the prayer was made by the senior class. As to government entanglement, the court stated: “[T]he resolution keeps Clear Creek free of all involvement with religious institutions.”\textsuperscript{440} Finally the Court found that there was “less psychological pressure on the student than ... in \textit{Lee}” because the prayer was delivered by a fellow student and because the students had the right to vote on that issue.\textsuperscript{441} Because the School board policy passed all five possible Establishment Clause tests, the Court concluded that “a majority of students can do what the state acting on its own cannot do.”\textsuperscript{442} that is, they could not conduct a religious exercise at an official public school event.

In conclusion, even though both decisions were based on nearly the same facts, the end result was completely different. Other courts in the United States have likewise disagreed about whether graduation prayers are constitutional\textsuperscript{443} or invalid.\textsuperscript{444} In 1993, the Supreme Court denied \textit{certiorari} in \textit{Jones}.\textsuperscript{445} but this decision under governing rules neither indicates approval of the result of \textit{Jones} nor transforms \textit{Jones} into a binding precedent for all national courts.\textsuperscript{446} Thus, the constitutionality of prayers at public school graduation ceremonies remains unresolved and is treated differently across the nation.

\textsuperscript{440}\textit{Id}. at 968.
\textsuperscript{441}\textit{Id} at 971.
\textsuperscript{442}\textit{Id} at 972.
\textsuperscript{446}The Court itself has often emphasized that the denial of \textit{certiorari} can neither be seen as a decision on the merits nor does it establish a binding precedent. \textit{See United States v. Carver}, 260 U.S. 482, 490 (1923); Maryland \textit{v}. Baltimore Radio Show, 338 U.S. 912, 917-19 (1950); \textit{See generally} P. BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1855 (3d ed. 1988).
2. School Prayer In Germany.

While in the United States the issue of prayer in public school has been disputed for a long time and still remains unsolved today, the Federal Constitutional Court in Germany resolved this issue in 1979 in a clear and comprehensive manner that contrasts sharply with the United States Supreme Court's approach. In its decision, the Federal Constitutional Court combined two lower court decisions, both of which dealt with the constitutionality of a prayer held outside of religious instruction in compulsory state schools.

The first case was brought by a father whose children attended a public interdenominational school in the state of Hesse. It was customary in this school to start each school day with an interdenominational prayer which was recited by the children and their teachers. The Hesse Constitutional Court found this practice to be constitutional unless a parent or pupil objected to it. Since the freedom of religion not only includes the freedom to believe and to practice religion, but also the freedom of not believing or not practicing religion, a pupil would be deprived of his religious freedom if he were required to pray despite his beliefs.

The German Constitutional Court, however, reversed this decision. According to the Court the freedom of religion has two components, both of which are equally protected and restricted: The freedom not to have any religious belief and not to practice religion has the same scope of protection as the freedom to believe and to practice religion. The former freedom, however, may not prevent the exercise of the latter

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447 Entscheidungen des Bundesverfassungsgerichts [Federal Constitutional Court] [BVerfG] 52, 223 (1979) For a translation of this case, see KOMMERS, supra note 224, at 466-472.
448 See supra Part IV.B.1.
449 Id. at 224. (The Federal Constitutional Court can, just as the Supreme Court, combine lower court cases that have a similar factual background and that are dealing with the same constitutional issues in one single decision. See e.g., School District of Abington Township v. Schempp, 374 U.S. 203 (1963) (deciding about School District v. Abington Township v. Schempp, 201 F.Sup. 815 (DC Pa. 1962) and about Murray v. Curlett, 179 A.2d 698 (Md. 1962)).
451 Id. at 235.
452 Id. at 251.
freedom. In order to solve this conflict, it is necessary to balance the competing freedoms and to find an acceptable scope for each of them. The Court found that it would easily be possible for the pupils who do not want to pray to remain silent and not to participate in the prayer or to leave the classroom to avoid any encounter with religion. Even though there might theoretically be the danger that such behavior could put a pupil in an outsider position, the Court did not consider this danger to be concrete enough to outweigh the rights of the pupils who wished to pray. For this reason the Federal Constitutional Court reversed the judgment of the Hesse Constitutional Court and held that a prayer in interdenominational public schools is constitutional, even if the parents or a pupil object to it, so long as they are free to decide about their own participation in the prayer.

The second case that the Federal Constitutional Court decided in this combined decision arose out of a complaint brought by a father whose daughter objected to a prayer conducted at a public interdenominational school in Aachen. Responding to the claim both the Administrative Court of Aachen and the Court of Appeals of North-Rhine/Westphalia prohibited the prayer based on the "negative freedom of confession." The highest administrative court of Germany, however, reversed the judgment on the ground that the "negative freedom of confession" would not hinder a prayer at a interdenominational state school, and the Federal Constitutional Court upheld this judgment. The Federal Constitutional Court emphasized that Article 7 (3) of the Basic Law gives the state a broad right to establish different types of schools, including interdenominational schools. Because a prayer is not part of the official

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453 Id. at 251 (stating that a balance between both conflicting rights must take into account the basic principle of tolerance).
454 Id. at 223 (the German original reads as follows: "Das Schulgebet ist grundsätzlich auch dann verfassungsrechtlich unbedenklich, wenn ein Schüler oder dessen Eltern der Abhaltung des Gebets widersprechen; deren Grundrecht auf negative Bekenntnisfreiheit wird nicht verletzt, wenn sie frei und ohne Zwänge über die Teilnahme am Gebet entscheiden können.").
455 Id. at 229-230.
458 Id. at 236 (referring to the former decisions: BVerfGE 41, 29; BVerfGE 41, 65 and BVerfGE 41, 88).
curriculum of these schools. The participation is voluntary and not compulsory.\textsuperscript{459} By including the prayer as a part of the regular school day, the state identifies itself with a certain religious belief. Article 7 of the Basic Law, however, allows a connection between state and church in the educational system to a certain degree.\textsuperscript{460} If the parents, students and teacher, therefore, wish to exercise their religious freedom by beginning each school day with a prayer, they may do so.\textsuperscript{461} The "negative freedom of confession" of objectors may not prevent the prayer unless the objector has to face an unbearable burden by being exposed to the prayer or will encounter adverse consequences because of her non-participation.\textsuperscript{462} A student may get into an outsider position because of his non-participation in the prayer. Unlike the United States Supreme Court, the Federal Constitutional Court did not consider discrimination against non-participating students as very likely to occur if the prayer is only held at the beginning of each school day.\textsuperscript{463} According to the Court, in most cases it is sufficient that the teacher explains to the other children the reason why the student does not want to pray and that his behavior is not "strange."\textsuperscript{464} Moreover, the court continued, the dangers for a student to become an outsider if he does not participate in the prayer are the same as the consequences he encounters when he does not to participate in the religious instruction and in the latter case the Constitution specifically permits the non-participation.\textsuperscript{465} It must also be taken into account that today in many classes the religious affiliation of the students is so diverse that non-participation in religious instruction and in the school-prayer is a common phenomenon. Thus, it is very unlikely that only one student will be placed in an

\textsuperscript{459} Id. at 239.
\textsuperscript{460} See supra Part IV.A.2.
\textsuperscript{461} Entscheidungen des Bundesverfassungsgerichts [Federal Constitutional Court] [BVerfG] 52, 223 at 240-41.
\textsuperscript{462} Id. at 249.
\textsuperscript{463} Id. at 249.
\textsuperscript{464} Id. at 251.
\textsuperscript{465} Id. at 252 (the German original reads as follows: "Der nicht am Schulgebet teilnehmende Schüler wird regelmäßig auch den Religionsunterricht nicht besuchen. Hier setzt das Grundgesetz in Art. 7 Abs. 2 ersichtlich voraus, daß es . . . zu keiner Diskriminierung kommt.")
outsider position where he has to face severe consequences. Nevertheless, the Federal Constitutional Court recognized that there may be rare cases in which the prayer may unduly burden a student -- for example, if the student is emotionally weak and the teacher is not able to successfully mediate between the student and the class. In these rare cases, according to the Court, it is necessary to prohibit the prayer in order to protect the "negative freedom of religion" of the individual student.

C. Religious Symbols In Public Schools.

1. Religious Symbols In Public Schools In The United States.

The debate over whether the display of religious symbols in public schools is constitutional has not been dealt with as extensively as the issue of prayers at public schools, so that there are far fewer cases dealing with this issue. This paper will limit its analysis to the only case the Supreme Court has decided in this area, the 1980 decision in Stone v. Graham. There the Supreme Court invalidated a Kentucky statute that required the posting of a copy of the Ten Commandments on the wall of each public school classroom. Contrary to the holdings of the trial court and the Supreme Court of Kentucky, a majority of the Supreme Court justices found, in a per curiam opinion, that the statute lacked a secular purpose and thus violated the first part of the Lemon test. The statute required that each copy of the Ten Commandments had to bear the following explanatory notation: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the

466 Id. at 252.
467 Id. at 253.
468 Id. at 253.
469 Various books and articles, for example, deal with the issue of prayer at public school, while almost no article can be found about the display of religious symbols in public schools. For a list of relevant articles and books see the Bibliography at the end.
473 Id. at 43.
Common Law of the United States." 474 This simple notification, however, was not enough proof for a majority of the Justices that the statute had a secular purpose. Referring to Schempp, the Court concluded that “[t]he pre- eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature” because “[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths.” 475 The dissenters, on the other hand, saw the legislative notification in another light. While Chief Justice Burger and Justice Blackmun would have given the case plenary consideration, 476 Justice Stewart dissented from the summary reversal of the lower courts’ decisions because he found that, according to the facts presented to the Supreme Court, “the courts of Kentucky . . . [had] applied wholly correctly constitutional criteria in reaching their decision.” 477 In a separate dissent, Justice Rehnquist pointed out that the Court had never before rejected the legislature’s clearly stated secular purpose in such a simple and superficial manner. 478 Referring to Schempp and other precedents, he pointed out that the Court had always either accepted the stated secular legislative intent or had questioned it in a more detailed manner. 479

2. Religious Symbols In Germany’s Public Schools.

Unlike in the United States, the display of religious symbols in public schools in Germany recently has led to heated discussions. 480 The issue gained much attention in 1995, when the Federal Constitutional Court invalidated a Bavarian law which required

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474 Id. at 39 n.1.
475 Id. at 41.
476 Id. at 43 (Burger, Ch.J. and Blackmun, J., concurring).
477 Id. at 43.
478 Id. at 43.
479 Id. at 43-47.
480 John E. Coons points out that very few decisions of the Federal Constitutional Court have received so much media attention as the Crucifix Case. See John E. Coons, Of Crucifixes and Community, in VERFASSUNGSTAATLICHKEIT, FESTSCHRIFT FÜR KLAUS STERN ZUM 65. GEBURTSTAG 927, 928 (Joachim Burmeister et al. eds., 1997). See also, e.g. Jürgen Busche, Das Kruzifix - mehr als ein Wandschmuck, SUDDEUTSCHE ZEITUNG, August 11, 1995, at 4; Hans Holzhaider, Heftige Reaktionen auf das Karlsruher Kruzifix-Urteil, SUDDEUTSCHE ZEITUNG, August 11, 1995 at 25; Axel von Campenhausen, Furcht vor Signalwirkung, FOCUS, August 14, 1995 at 42-44.
the posting of a cross or crucifix\textsuperscript{481} on the wall of each public school classroom.\textsuperscript{482} On behalf of their three children, a married couple challenged this law, arguing that the display of a cross (or, even more pointedly a crucifix because of its portrayal of a suffering man) would influence their children’s perception of the Christian faith in a proselytizing way. The plaintiffs filed their action in the Administrative Court of Regensburg seeking a preliminary injunction that the cross should be removed from the classroom during the pendency of the action. The administrative court, however, denied this injunction for two reasons.\textsuperscript{483} First, it is said that because the cross was only a symbol on the wall and not part of the regular classes, it had no proselytizing function. Second, the Court emphasized that religion and education are not strictly separated in Germany. The court reasoned in particular that because it is constitutional for the state to establish interdenominational schools,\textsuperscript{484} which are not required to act with complete neutrality towards religion, these schools may put up religious symbols in classrooms.\textsuperscript{485} Referring to the principle of tolerance and the holding of the Federal Constitutional Court in the \textit{School Prayer} case,\textsuperscript{486} the administrative court found that the plaintiffs’ right to remove the cross from the classroom, based on a “negative freedom of confession”, could not be superior to a “positive freedom of religion” of other students who wanted the cross in the classroom.\textsuperscript{487}

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\textsuperscript{481} The difference between a cross and a crucifix is that the latter is a portrayal of Jesus Christ dying on the cross.
\textsuperscript{482} Entscheidungen des Bundesverfassungsgerichts [Federal Constitutional Court] [BVerfGE] 93, 1 (1995).
\textsuperscript{484} See e.g. Entscheidungen des Bundesverfassungsgerichts [Federal Constitutional Court] [BVerfGE] 41, 29 (constitutionality of interdenominational public schools in Baden-Württemberg); 41, 65 (constitutionality of interdenominational public schools in Bavaria); 41, 88 (constitutionality of interdenominational public school in North-Rhine/Westphalia).
\textsuperscript{486} Entscheidungen des Bundesverfassungsgerichts [Federal Constitutional Court] [BVerfGE] 52, 223. See Part IV.B.2., for an analysis of this case.
\end{flushright}
While the court of appeals affirmed the administrative court's decision, the Federal Constitutional Court reversed the judgment by a 5 to 3 margin. The Court reasoned that in combination with compulsory attendance in school, the display of a cross in the classroom violated the children's right of negative religious freedom, that is the right to believe in nothing. This right, according to the Court, outweighed the "negative freedom of belief" of the others for a variety of reasons.

First, the Court reasoned that the children were exposed to the cross for a long and intense period because they must spend much of their daily time in the classroom. While it is often possible to avoid confrontation with religious symbols in day-to-day life, it is impossible for children to avoid confrontation with a cross in a classroom. Hence, the display of a cross in a classroom rendered the "positive freedom of belief" superior to the "negative freedom of belief" in a way that unduly burdened the plaintiffs' freedom of religion.

Second, by enacting a statute that required the posting of a cross in every school room, the state had overstepped the line of permissible accommodation of religion in the school system set forth by Article 7 of the Basic Law. Even though interdenominational schools may refer to the Christian faith as a major factor for the cultural and educational development of Germany, they may not post Christian symbols for a merely proselytizing reason. The cross is generally seen as a distinctive and representative sign of the Christian religion and the erection of a cross often represents

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490 Id. at 18.
491 Id. at 22-24.
492 Id. at 18 (distinguishing this situation from an earlier decision in which the Court had held the display of a cross in the court room to be constitutional).
493 Id. at 19.
494 Id. at 16-17 and 19.
495 Id. at 19 (the German original reads as follows: "Das Kreuz gehört nach wie vor zu den spezifischen Glaubenssymbolen des Christentums. Es ist geradezu sein Glaubenssymbol schlechthin.").
a symbol of identification with the Christian religion. Thus, the display of a cross in a
classroom will convey a message of the school’s identification with the Christian
religion, which the Court found to constitute impermissible proselytizing.496

The three dissenting judges, on the other hand, found that the cross was not only a
sign of the Christian religion, but also a symbol reflecting German tradition.497 According
to them, the display of a cross in a classroom was not proselytizing, but simply a
reference to the Christian tradition of Germany.498 Thus, according to the dissent, the law
requiring the posting of a cross in every classroom was constitutional.

This decision of the Federal Constitutional Court to invalidate the Bavarian law that
required the posting of a cross raised a great deal of criticism. Many scholars and
politicians accused the Federal Constitutional Court of having misinterpreted
fundamental constitutional principles by providing absolute protection to the “negative
freedom of religion” and thus rendering the “negative freedom of religion” superior to the
“positive freedom of religion.”499 Others expressed their fear that the Federal
Constitutional Court would abandon the fundamental church-state relationship and
emphasized that the Nazis began their disestablishment of the church-state relationship
with the removal of the crosses from all public school rooms. 54 years earlier.500 Only
four months after the decision of the Federal Constitutional Court was rendered, the
Bavarian government adopted a new law, in order to keep the crosses within the public
schools.501 This new law also mandated the posting of a cross at the classroom wall, but,

496 Id. at 20 (arguing that the students would be more likely to follow the Christian belief if the school identifies itself
with the Christian faith).
497 Id. at 32.
498 Id. at 33 (the German original reads as follows: “Die Schüler werden durch das Kreuz auch nicht in
verfassungsrechtlicher unzulässiger Weise missionarisch beinflußt.”).
499 Jörg Müller-Vollbehr, Positive und negative Religionsfreiheit, JURISTISCHE ZEITUNG [JZ] 996, 999 (1995); Peter
Badura, Das Kreuz im Klassenzimmer, BAYRISCHES VERWALTUNGSBLATT [BayVBl.] 71, 75 (1996); See also Axel von
Campenhagen, Furcht vor Signalwirkung, FOCUS. August 14, 1995, at 42-44 (providing further references).
500 Heribert Prantl, Gottes Gericht. Die Kampagne gegen die Bundesverfassungsrichter, SÜDDEUTSCHE ZEITUNG
501 Gesetz zur Änderung des Bayrischen Gesetzes über das Erziehungs- und Unterrichtswesen [Law amending the
unlike the law that was invalidated by the Federal Constitutional Court, it states that if children or parents object to the cross the cross it must be removed. The constitutionality of this law already has been challenged, but the Bavarian Constitutional Court and the Highest Administrative Court of Germany upheld the law because of the option it gives to non-believers to remove the symbol.\(^{502}\)

In summary, the mandatory display of a cross in public schools in Germany is considered to be unconstitutional, unless there is a possibility for removal in case students or parents object to the display.\(^{503}\) The result would be the same for all other religious symbols that can be considered to have a proselytizing effect. Thus, a case like Stone v. Graham,\(^{504}\) would have had the same outcome in Germany. Just as in the German Crucifix case, the Kentucky state statute required the posting of religious symbols in public schools without granting an exemption to parents or students who wished to remove them. Faced with such a case the Federal Constitutional Court would have invalidated the law on the same grounds on which it had invalidated the Bavarian law that required the posting of the cross.\(^{505}\)

Indeed, even the dissenters in the Crucifix case would have joined in the majority opinion. The reason for their dissent was been that the cross has played an important role in historical and cultural development.\(^{506}\) Thus, they argued, the display of a cross in the public school room was not proselytizing, but only a reference to the important role the Christian faith had played in German historical development. The Ten Commandments.

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\(^{503}\) The only exception from this general principle is the denominational public school, which would allow every identification of the school with the religious belief. See Johannes Rux, Bekenntnisfreiheit in der Schule, Der Staat 523, 533 (1996).


\(^{505}\) See John E. Coons, Of Crucifixes and Communities, in Verfassungsstaatlichkeit, Festschrift für Klaus Stern zum 65. Geburtstag, 927, 931 (Joachim Burmeister et al. eds., 1997) (making the argument vice versa that the Supreme Court would have decided the Crucifix Case the way they decided Stone v. Graham).

however, have not had a significant role in the historical development of Germany. From a German point of view the posting of the Ten Commandments is considered to have an even more proselytizing character than the posting of a cross: The cross is sometimes seen as a sign of peace and blessing or as a sign of charity, as is the case with the Red Cross.\textsuperscript{507} whereas the Ten Commandments on the other hand do not have such a perceived secular meaning at all. As a result, a law requiring the mandatory posting of the Ten Commandments without an exemption for cases in which students or parents object to the display would be unconstitutional under the German Basic Law. A voluntary unanimous decision by students, parents and school authorities to post the Ten Commandments, on the contrary, would be constitutional in Germany, even though probably unacceptable in the United States. The same would be true for all other religious symbols even if they are not symbols of the Christian faith. According to the Federal Constitutional Court, the public schools -- regardless of whether they are non-denominational or Christian interdenominational -- have to be neutral towards other religious beliefs in the sense that they tolerate these other religious beliefs.\textsuperscript{508} Hence, if most students in a class are Muslims the school may post a picture of Mekka on the classroom wall, so long as no one objects to it.\textsuperscript{509}

In the light of the \textit{Crucifix} case, the general principle concerning the posting of religious symbols in public schools can be stated as followed: If everybody -- parents, their children, and the school authorities -- agree on the permanent display of a religious symbol in the public school classroom, they may do so. In contrast, in the United States, while jurisdictional rules might complicate a challenge to such a practice, the agreed-to

\textsuperscript{508} Entscheidungen des Bundesverfassungsgerichts [Federal Constitutional Court] [BVerfGE] 41, 29. See also KOMMERS, \textit{supra} note 224, at 477 (providing a translation of the German decision).
\textsuperscript{509} See Wolfgang Huber, \textit{Christliche Kirchen habe keinen Monopolanspruch}, \textit{SUDDEUTSCHE ZEITUNG}, August, 17. 1995. Bishop Huber suggests that in a public school in Berlin where most of the students are Muslims a picture of Mekka should be placed next to the cross to show the school’s acceptance of both religions.
display of religious symbols in public schools would be unconstitutional under the Establishment Clause.

D. Free Exercise Right Of Teachers In Public Schools.

1. Free Exercise Rights Of Teachers In U.S. Public Schools.

The government may impede the free exercise of religion by teachers primarily in two ways. The first is by prescribing to the teacher what he/she should teach or not teach. If a biology teacher’s religion, for example, disfavors birth control in general, a conflict with his religious belief will arise if he has to discuss the different methods of birth control with his class. In such a situation, however, the teacher certainly may not change the content of the curriculum according to his religious beliefs. To give him such a power over the curriculum “would make the teacher the ultimate arbiter” of the performance of his duties and of what the children will learn. Thus, his professional and contractual duties clearly outweigh any personal religious based right to determine the curriculum.

There is, however, a second question: Can the teacher, while not seeking to change the curriculum, seek to be excused from teaching certain material in violation of personal religious mandates. This question whether a public school teacher should be obliged to teach contrary to his religious beliefs is more difficult to solve and cases in this area are very complicated and fact-sensitive. Nevertheless the proper answer in the majority of cases, concerning the question whether a teacher is required to teach contrary to his

510 For other situations in which a conflict between the free exercise right of the teacher and the school may arise see, Griffith, Religion, The Courts, and The Public Schools 197-203 (1966).
512 Id. at 58-59.
513 Id. at 59. See also e.g., Webster v. New Lenox School District, 917 F.2d 1004 (7th Cir. 1990) (holding that a teacher’s First Amendment rights were not violated when he was prohibited from teaching a non-evolutionary theory of creation).
religious belief, will most likely be a negative one. The essential principle – although subject to some limitations – is that: “Public employment cannot be predicated on the surrender of the individual’s constitutional rights.” Following this principle, the Second Circuit has held that a school teacher is excused from participation in patriotic activities because of his religious convictions. The court referred to decisions of the United States Supreme Court, which in a related context had held that a teacher would not be compelled to relinquish his First Amendment rights simply because of his position as a public school employee. The court, however, also recognized the teacher’s important function in the educational process of the children and the school’s interest in maintaining the flag salute program. The exercise of First Amendment rights by the teacher should therefore not be likely to “threaten the essential functions” of the school system. Thus, it is necessary to balance the legitimate state interest in maintaining the flag salute program against the First Amendment freedoms of the individual. In balancing these interests the court found that the school board had the right to enforce regulations which were intended to secure the success of the flag salute program, but that “such regulations must be narrowly drawn for precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.” In this case the Second Circuit found that the Board of education had failed to provide such narrow regulations and as a result had not “met the test of constitutional exactness required by the First Amendment.” The behavior of the teacher during the flag salute – she was standing in respectful silence with her hand at her sides – did not endanger the state’s flag

514 Id. at 67 (citing Abood v. Detroit Bd. of Education, 431 U.S. 209 (1977)).
517 Id. at 633.
518 Id. at 631.
519 Id. at 632. (referring to the Supreme Court’s decision in United States v. Robel, 389 U.S. 268 (1967).
520 Id. at 632 (emphasis omitted) (citation omitted).
521 Id. at 633.
salute program in any way.\textsuperscript{522} As a result, her dismissal was unjustified and violated her First Amendment rights.\textsuperscript{523} There is a serious question whether the result in this case would change in light of the Supreme Court's decision in \textit{Smith}.\textsuperscript{524} It is quite possible, however, that the \textit{Smith} rule does not control this situation. Rather, as with \textit{Yoder},\textsuperscript{525} the case may present a "hybrid" free-exercise-and-free-speech problem that permits recognition of a religious exemption to a generally applicable rule.

The same arguments can be made for the teachers who refuse to teach contrary to their religious convictions. In these cases however, the furtherance of the students's education and the students right of education according to the curriculum set forth by the state\textsuperscript{526} are strong and legitimate governmental interests which may well outweigh the teacher's First Amendment rights in some cases. If it is possible for the local school board to replace the teacher for this particular subject, the importance of the First Amendment rights would certainly require such an action.\textsuperscript{527} On the other hand, in some cases, it might be necessary for the teacher to continue teaching even contrary to his religious belief if the governmental interest outweighs his Free Exercise Right. Because cases in this area are very fact sensitive, it is not possible to provide one clear and comprehensive solution. Instead these cases must be decided on a case by case basis, balancing the governmental interest in the furtherance of the education of the children against the teacher's free exercise rights.

In addition, it is beyond doubt that a teacher may neither give religious instruction nor incorporate religious statements into his regular lessons.\textsuperscript{528} Because a teacher, in the eyes

\textsuperscript{522} \textit{Id} at 633.
\textsuperscript{523} \textit{Id} at 633.
\textsuperscript{524} Employment Divisions Department, Human Resources v. Smith, 494 U.S. 872, 875 (1990).
\textsuperscript{525} Wisconsin v. Yoder, 406 U.S. 205 (1972).
\textsuperscript{526} This right is based on the "right to know" which was granted to the students in many court decisions. See Hunter, supra note 511, at 34 n.141.
\textsuperscript{527} Hunter, supra note 511, at 69.
\textsuperscript{528} See GRIFFITH, RELIGION, THE COURTS, AND THE PUBLIC SCHOOLS at 194-95 (1966) (referring to two lower court decisions which prohibited the teacher from engaging in religious activities while performing his public-school duties).
of the pupils, represents the school, a religious statement would be seen as a religious statement of the government. The wall of separation between church and state, however, prohibits the identification of government with a religious belief, and therefore the principle of non-establishment would supersede the teachers free exercise right in these cases.

Another context in which conflicts between the free exercise right of the teacher and the neutrality of the public school system towards religion may arise concerns the wearing of religious garb. The Supreme Court of Oregon, for example, reversed a decision of the Court of Appeals that had set aside the revocation of the teaching certificate of a teacher who wore, in compliance with religious dictates, white clothes and a white turban. The revocation of the license had been based on an Oregon statute that prohibited teachers from wearing religious dresses “while engaged in the performance of duties as a teacher” and also stated that the violation of this prohibition shall lead to the suspension and the revocation of the teacher’s teaching certificate. The Supreme Court rejected the respondent’s argument that the law was unconstitutional under the Free Exercise Clause of the First Amendment. Even though the Oregon statute was not religiously neutral but rather discriminatory against certain religions that required specific dress code, the compelling government interest in securing the children’s free exercise right and the neutrality of the public schools towards religion was superior. Moreover, as the prohibition on wearing religious dress applied only to the exercise of teaching functions, the Supreme Court of Oregon concluded that the statute did “not impose an impermissible requirement for teaching in the public schools.”

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529 Cooper v. Eugene School District No. 4J, 723 P.2d. 298 (Or. 1986).
530 Id. at 300 (citation omitted).
531 Id. at 309-310.
532 Id. at 311.
A similar case was decided in 1990 by the Court of Appeals for the Third Circuit.\textsuperscript{533} Like Oregon, Pennsylvania had enacted a statute that prohibited teaching in religious dress in public schools.\textsuperscript{534} Alima Delores Reardon, a Muslim, was employed as a substitute teacher in the Philadelphia school district. Beginning in 1984, she was told by the school principals that she could not teach in her religious clothes. Upon her refusal to comply with this requirement she was not allowed to teach. According to the Court of Appeals, the preservation of religious neutrality in public schools was a compelling government interest that justified the enactment of a religiously discriminatory law.\textsuperscript{535}

In conclusion, the wearing of religious garb can be prohibited by state statute, according to the lower court authorities that have addressed this question. The free exercise right of the teacher is subject to strict limitations in this area because of the need for strict neutrality in public school systems, where young children often take their teacher as an example. Thus, just as a teacher may not provide religious instruction while performing his school duties, the teacher may be banned from sending out a religion-affirming message by wearing religious dress while teaching.

2. The Free Exercise Right Of Teachers In Public Schools In Germany.

Article 7 (3) of the Basic Law provides for religious instruction in public schools. Therefore, in contrast to the situation in the United States, a teacher in Germany is allowed to provide religious instruction.\textsuperscript{536} This "positive" right to teach religion logically corresponds to the "negative" right of refusal to teach religious material. Although the right of the teacher to refrain from religious teaching can be derived from the general right of religious freedom, the Basic Law expressly states in Article 7 (3) that

\textsuperscript{533} United States v. Board of Education for the School District of Philadelphia, 911 F.2d 882 (3\textsuperscript{rd} Cir., 1990).
\textsuperscript{534} Id. at 885.
\textsuperscript{535} Id. at 893.
\textsuperscript{536} See MAUNZ/DÜRIG, supra note 242, Article 7, at 33.
"[t]eachers may not be obliged to give religious instruction against their will." A discrimination against the teacher because of this refusal would thus be unconstitutional. It is possible, however, to transfer the teacher who refuses to engage in religious teaching to another school for organizational reasons.

The right to teach religion is limited to religion classes. Thus, outside of religion classes a teacher may not offer religious instruction. He may for cultural or historical reasons refer to certain religious beliefs, but he may not advocate a certain religious belief or influence the pupil in a proselytizing manner. The freedom of religion also allows the teacher not to participate in any religious activity, such as a school prayer.

Whether a teacher may wear religious garb while performing his official school duties has already been decided for the religious garb of the Bhagwan sect, a red dress and a necklace with the picture of Baghwan Shree Rajnesh, the so-called Mala. In 1986 the court of appeals in Munich and Hamburg held that the wearing of such a dress in a public school would be unconstitutional. According to the courts, the teacher's free exercise right is limited when he is performing his duties as a elementary public school teacher. Public schools have to be neutral towards all religions, and they are not allowed to proselytize their pupils. The teacher, as a representative of the school must also act neutrally towards all religions. This was found to be especially true for elementary public schools, because very young pupils frequently tend to take their teacher as an example.

537 See Appendix, Grundgesetz [Constitution] [GG] Article 7 (3).
538 See Entscheidungen des Bundesverwaltungsgericht [Highest Administrative Court] [BVerwGE] 17, 17, 267 (1964).
539 See supra Part IV A.2.b.
540 See Entscheidungen des Bundesverfassungsgerichts [Federal Constitutional Court] [BVerfGE] 41, 29.
541 See MAUNZ/DURIG, supra note 238, Article 7, at 43.
544 See supra Part IV A.2.b.
and try to imitate him.\textsuperscript{545} The courts found that the guiding principles of the Bhagwan sect itself stated that the dress was not only worn for religious reasons, but also in order to attract people towards the sect and to proselytize them.\textsuperscript{546} Moreover, the Bhagwan sect did not mandate the wearing of the dress but made it voluntary: The main purpose for wearing the Bhagwan dress is that its simplicity creates less distraction for the followers and thus makes it easier for them to meditate.\textsuperscript{547} The courts reasoned that in class a public school teacher has to teach and not to meditate, and thus, there is no need for him to wear the dress while he is teaching.\textsuperscript{548} These decisions were affirmed by the Highest Administrative Court two years later in 1988, but the Court added that the decision whether a teacher should be allowed to wear religious dress depends mainly on the particular facts, especially the nature of the dress and the impression the dress creates on outsiders.\textsuperscript{549} Because a uniform and comprehensive solution for this problem is not possible the question of the constitutionality of a teacher’s religious garb remains subject of much dispute. In Wuppertal, for instance, a Muslim deputy mistress of a public school was allowed to wear her religious garb at school, whereas in the same school district, but in another public school, a Muslim teacher was prohibited to wear her scarf at school by the school principal.\textsuperscript{550} In order to decide about the constitutionality of the wearing of a religious garb the courts have to balance the free exercise rights of the teacher against the requirement of neutrality of the public school, by taking into account the specific facts of

\textsuperscript{545} Johannes Rux, \textit{Bekenntnisfreiheit in der Schule}, \textit{DER STAAT} 523, 533 (1996) (referring to the two court decisions).


\textsuperscript{549} Bundesverwaltungsgericht [Highest Administrative Court] [BVerwG] in \textit{NEUSTE VERWALTUNGRECHTSZEITUNG} [NVwZ] 938 (1988).

\textsuperscript{550} Hartmut Kirstenfeger, \textit{Augst vor dem Kopftuch}, \textit{FOCUS}, August, 4, 1997, at 49-49.
the case.\textsuperscript{551} For instance, a court must take into account if the guiding principles of the teacher's religion dictates the wearing of the religious garb as part of the religious exercise or if the wearing is only voluntarily, as, for example, the wearing of a cross is for most Christians or the wearing of a red dress and the Mala for the followers of Bhagwan. In addition the courts have to evaluate if the teacher in wearing this religious dress creates a proselytizing effect on the pupil.\textsuperscript{552} The Bhagwan dress, for example, is considered to be much more proselytizing that the wearing of a Muslim scarf.\textsuperscript{553}

In 1998 the denial of the employment of a Muslim elementary teacher who refused to teach without her scarf gained much attention.\textsuperscript{554} The government of Baden-Württemberg based its decision on the conclusion that the freedom of religion of the children would supersede the freedom of religion of the teacher.\textsuperscript{555} The teacher, Fereshta Ludin, has now filed an action in the Administrative Court of Stuttgart, but no decision has been rendered. Because this area is very fact-sensitive and the courts have to balance the constitutional rights at issue on a case by case basis, it is very difficult to predict the outcome of this case. In its decision the court will need to consider, for example, how long and how extensively the children are exposed to the religious garb, if Fereshta Ludin is wearing the religious garb solely for religious reasons, and how she might explain the reasons for her appearance to the children.

In conclusion, as in the United States, the German cases that deal with whether a teacher is allowed to wear a religious garb are fact-sensitive and often difficult. The courts need to take into account the teacher's free exercise right, the free exercise rights of the students and the principle of neutrality that requires the public schools to “remain

\textsuperscript{551} Johannes Rus, \textit{Bekenntnisfreiheit in der Schule} (last modified Nov. 23, 1998) <http://www.Bekenntnisfreiheit in der Schule.html>

\textsuperscript{552} Hartmut Kirstenfeger, \textit{Angst vor dem Kopftuch}, \textit{FOCUS}, August, 4, 1997, at 49.

\textsuperscript{553} \textit{Id.} at 85.


\textsuperscript{555} See Wulf Reimer, \textit{supra} note 554.
open to . . . ideological and religious ideas and values." and to not proselytize the pupil. Because the operation of these factors differs from case to case, a general principle has never been established as to whether the wearing of a religious garb by a public school teacher is constitutional. Instead, decisions in this area are rendered on a case by case basis.

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556 Kommers, supra note 224, at 477 (citing a decision of the Federal Constitutional Court.).
V. CONCLUSION.

Even though there is a fundamental difference in the relationship between church and state in Germany and the United States, the treatment of religion in public schools is in many ways similar in both countries. Both the United States and Germany do not permit public schools to have a proselytizing effect on the students. They also do not permit schools to identify themselves with a certain religious belief and, as a consequence, lose their neutrality. Hence, the German Crucifix case and Stone v. Graham reached a similar outcome insofar as they both prohibited the display of a religious symbol if the display creates the impression that the public school identifies itself with a particular religion. The main difference between the two decisions, was that the United States Supreme Court held that such an identification of the school with a certain religion would create an impermissible establishment of religion, whereas the German Federal Constitutional Court considered the mandatory display of the cross to violate the general principle of governmental neutrality. This German principle of religious neutrality is in some aspects broader and in some aspects more narrow than the American non-establishment principle. Unlike the American non-establishment principle, the German neutrality concept embraces not only neutrality towards any religious belief, but also neutrality towards any ideological belief. It is therefore wider in its application than the American principle. On the other hand, the principle of neutrality does not hinder the government’s ability to favor or accommodate religion unless the government only favors a particular religion. The German government may, for instance, favor religion by

557 The only exemption to this principle of public school neutrality towards religion is the German denominational public school. Today, this school type, however, is very rare in Germany. Most of the German Länder have replaced it by interdenominational or non-denominational public schools, which have to be neutral towards religion.
providing subsidies to the religious communities.\(^{558}\) whereas such government subsidies to religious organizations would be an impermissible violation of the American non-establishment principle. As a consequence, the German neutrality concept allows a certain degree of accommodation of religious activities in public schools which is impermissible in the United States.

The use of voluntary school prayer and the giving of religious instruction on a voluntary basis are examples of the types of religious accommodation in public schools that is common in Germany but unconstitutional in the United States. However, the German principle of neutrality towards religion also puts some restraint on the government that has to be acknowledged. Under no circumstances are school authorities or teachers allowed to influence students in a proselytizing manner. Thus, as we have seen, a statute that requires that each public school classroom have a cross on the wall is considered to have an impermissible proselytizing effect on children. Such religious exercise is therefore unconstitutional not only in the United States, but also in Germany.

The main reason for the different relationship between church and state in the two countries can be seen in the historical development of each country. Many of the citizens of colonial America had left their native countries because of religious persecution. Nevertheless, many of these colonists favored the establishment of an official religion.\(^{559}\) Religion played an important part in the civil and political life of the colonists and by the time of the American revolution, ten of the thirteen colonies had established official churches.\(^{560}\) As Alexis de Tocqueville observed in 1830, religion also played a major role

\(^{558}\) See Appendix, Grundgesetz [Constitution] [GG] art. 140 and Weimarer Reichsverfassung [Constitution of 1919][WRV] art. 138. See also MAUNZ/DIRIG, supra note 242, Article 140 at 64-65 (providing more detail about the possibility of subsidies and financial contributions to the religious communities.).

\(^{559}\) See CHURCH AND STATE IN AMERICAN HISTORY xv (John F. Wilson & Donald L. Drakeman, eds. 2d ed., 1987)(pointing out that even though many of the colonists officially were against the establishment of religion, they nevertheless took certain types of establishment for granted).

\(^{560}\) See Stephen B. Epstein, Rethinking the Constitutionality of Ceremonial Deism, 96 Colum. L. Rev. 2083, 2099 (1996) (providing a very good historical overview over the role of religion in early American history).
in school education because every child was "taught the doctrines and the evidences of his religion, the history of his country, and the leading features of its constitution."^{561}

At the end of the Civil War, however, it became clear that the diversity of religious beliefs in the United States would make a close connection between church and state almost impossible, and by the beginning of the 20th century the need for independence of church and state was widely recognized all over the United States.^{562} As a result, the "wall of separation" approach - which was expressly embraced by the Court in Everson - has commanded much support for more than 50 years.^{563}

In Germany, on the other hand, the relationship between church and state developed in a different way. Just like in the United States religious toleration was not a common feature in the historical development of Germany. The citizens of German states frequently had to follow the religious belief of their sovereigns.^{564} Moreover, religious toleration and the separation of church and state did not take hold in Germany until the enactment of the Weimar Constitution in 1919. Unlike the United States Constitution, the Weimar Constitution did not mandate a total separation of church and state, but connected the two institutions in a unique way.^{565} Even though the head of state was no longer a dignitary of the church, the church retained some privileges and the state could exercise supervision over some clerical matters. The German relationship between church and state under the Weimar Constitution could best be described as a system of cooperation, and religion remained at that time a part of the public school life in the forms of religious instruction and daily prayer.^{566}

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^{562} See CHURCH AND STATE IN AMERICAN HISTORY, supra note 559, at 121-22, 161-62.
^{563} See supra Part III.A.1.
^{564} See ErNST CHRISTIAN HELMREICH, RELIGIOUS EDUCATION IN GERMAN SCHOOLS 53-79 (1959).
At the beginning of the National Socialism era, in 1933, Hitler proclaimed his affiliation with the Christian faith and promised to “establish a German Reich built on a Christian basis and supported by ethical and moral force.”\textsuperscript{567} Especially in the educational sector Hitler stated that he would “allow and secure to the Christian Confessions the influence which is their due in both the school and in education.”\textsuperscript{568} These statements led both main churches – the Lutheran-Protestant church and Roman Catholic church – to “initially welcome” and support “the advent of the Third Reich.”\textsuperscript{569} Very soon after the Nazis’ seizure of power, however, both churches came to realize that Hitler did not intend to favor the Protestant or the Roman Catholic church, but rather to establish a new kind of Christian religion tied to the Nazi regime.\textsuperscript{570} The only purpose of this type of Christian religion was to provide spiritual support for National Socialism. Under the pretense of freeing the state from harmful church interference, the Nazis started to narrow the role of the churches and of religion in public life.\textsuperscript{571} In all public buildings, such as courtrooms and government offices, for example, crosses were replaced by swasticas. This separation between church and state in favor of an incorporation of the National Socialist principles into public life became most obvious in Hitler’s reorganization of the school system.\textsuperscript{572} The practice of daily school prayer was replaced by the Nazi salute and a meditation on a word of the Führer. The number of religious holidays were cut down, with the result that Reformation Day, All Souls’ Day and Corpus Christi Day were no longer recognized as national holidays. Both the curriculum of religious instruction and the teacher who would offer that religious

\textsuperscript{567} Frederic Spotts, The Churches and Politics in Germany 27 (1973).
\textsuperscript{568} Id. at 154.
\textsuperscript{569} Frederic Spotts, supra note 567, at 7 & 27.
\textsuperscript{570} Id. at 7 (stating that with Hitler’s assistance it was possible “to establish a Nazified ‘German Evangelical Church’ with a National Socialist, Ludwig Müller, as Reich bishop.”).
\textsuperscript{571} von Campenhausen, supra note 249, at 388-89.
\textsuperscript{572} Helmreich, supra note 566, at 153 & 162-207 (providing detailed information about the reorganization of the school system in the Third Reich).
instruction were determined by the government. Thus, the government and not religious organizations chose the teacher, who was not a clergy member but a National Socialist able to teach religion in a way that reconciled it with the Nazi ideology. “Surely there were many instructors now . . . who taught anything but religion in their classes, and these teachers often used bible stories as a basis for government propaganda.”

The curriculum was also modified, with the result that the hours of class for religious instruction were reduced and that religion classes should be taught “during the first or last period of the morning,” which made it more convenient for students who did not take religion to be excused from these classes.

By the time the churches realized that the ideas and goals of the Nazis, such as the goals reflected in euthanasia and sterilization programs, were contrary to fundamental religious principles, they had already lost too much of their influence in public life. Thus it was impossible for them to stop the Nazis. Nevertheless, many clergy members of both churches openly criticized the National Socialists and their ideology as violating fundamental religious principles. For this criticism many of them faced severe punishment and persecution by the Nazis: “Altogether during 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.”

Although the churches lost a lot of influence during the National Socialist period, they regained their power in the aftermath of the war and the occupation era. Being the only institutions left in Germany after the war, the churches had to organize not only the religious, but also the political and social life in Germany:

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573 Id. at 162-209 (providing a very good overview of the role of religion in public schools under National Socialist rule).
574 Id. at 185.
575 Id. at 172.
576 SPOTTS, supra note 567, at 27.
577 Id. at 9.
In the absence of organized political parties, the churches were simply the only bodies in a position to address a communication to an Allied authority and to maintain contacts outside Germany. In towns and villages the pastor, priest, or both became the social focal point, the person to whom most people turned for advice, assistance, and leadership. In the chaos following the collapse, churchmen became civil authorities of great popular influence. . . . Until a German government was reestablished in 1949, the churches constituted the most powerful and articulate voice of the German people.\textsuperscript{578}

Because of the influence the two main churches had at the time of the framing of the Basic Law they were successful in insisting on a constitutional protection of their role in Germany public life. While some of the political parties wanted a broad and comprehensive constitutional protection of the churches, other political parties opposed a constitutional regulation of the church-state relationship because of the complexity and difficulty such a regulation would necessarily bring along.\textsuperscript{579} After long discussions in parliament, a compromise was reached by incorporating into the Basic Law those articles of the Weimar Constitution which dealt with the relationship between church and state. In addition, the right of religious instruction was recognized in the Basic Law because of the negative experiences under the National Socialist regime.

In conclusion, the modern day treatment of religion in public life in Germany and in the United States, especially in public schools, is mainly based on the history of the struggle between church and state in both countries. The negative experience of religious persecution led the United States to embody a strict separation of church and state in the Constitution, whereas Germany tried to provide compensation for the negative influence of the Nazi regime on religion by providing for a “special” church-state-relationship in the Basic Law. Unlike in the United States, where many believers had experienced

\textsuperscript{578} Id. at 51 (providing additional information about the role of the churches in the aftermath of the war and the Occupation era).

\textsuperscript{579} von Campenhausen, supra note 249, at 391.
religious persecution by other religious groups. In Germany during the Third Reich believers were persecuted by "non-believers" because their religious belief endangered the state's ideology of National Socialism. While in the United States religious persecution occurred because the government was connected to religion, religious persecution in Germany occurred under a government that had separated itself completely from religion. Both countries compensated for that failure of religious protection: The United States did so by separating church and state, and Germany did so by providing a closer connection between church and state than was provided for under National Socialism.

Another cause for the differing treatment of religion in public life in Germany and in the United States is the variety and structure of religious organizations in both countries. Due to historical developments, the people of the United States are faced with a variety of religious beliefs and religious organizations.\textsuperscript{580} Aside from the three main confessions, Protestantism, Judaism and Roman Catholicism, there are many other religious groups, such as Mormons, Hindus and Moslems.\textsuperscript{581} The sort of connection between church and state that exists in Germany would be almost impossible to achieve in such circumstances. In particular, a "cooperative" approach could lead to much confusion and administrative effort as government sought to ensure equal government treatment for all denominations. If, for instance, a country with such a variety of religious beliefs as the United States adopted the German "cooperative" approach, it would need many more government employees than the German government currently has in order to ensure the fair and equal treatment of all religious beliefs by the government. Thus, the

\textsuperscript{580} See William J. Murray, \textit{Let Us Pray} 139 (1995) (stating that there are over seven hundred nonconventional religious denominations).

administrative costs for a cooperative relationship between church and state would be very high in a country with a variety of diverse religious beliefs. Providing religious instruction in public schools, for example, would be very costly for the government. In order to ensure the equal accommodation of the different religions, religious instruction would have to be provided in almost every religious belief and as a result, the government would have to employ teachers for all these different religion classes. Thus, the German connection between church and state can only function properly in a country where religious belief is not as diverse as it is in the United States. In Germany most of the people are either Protestant or Roman Catholic. Apart from these two major churches, very few other religious groups can be found in Germany with a membership that enables them to exercise political influence. It is therefore much easier for the German government to ensure equal treatment of all religious organizations than it would be for the United States government. The reality of religious diversity, however, has slowly begun to surface in Germany in the last couple of decades. People from all over the world come to Germany seeking asylum and, because they are not predominately Protestant or Catholic, the religious diversity in Germany has greatly increased over the past 20 years. Hence, the issue whether Scientology should be accepted as a religious organization, and the question of whether the state should provide religious instruction for Muslim school children by a Muslim teacher according to Muslim guidelines, are both hotly debated issues in Germany today. It may be only a question of time before Germany needs to separate the church from the state in a more rigid way in order to ensure equal treatment of all religious beliefs by the state.

582 See Ernst Christian Helmreich, supra note 566, at 228-29 (providing a table about religious affiliation in Germany in 1951); Frederick Spotts, supra note 567, at 221 (providing a table about vocational and confessional distribution in Germany in 1961).

583 See Dieter Schmidtchen, Markt und Wettbewerb in Gottes Welt, Frankfurter Allgemeine Zeitung [FAZ] November, 1, 1997 at 17 (discussing the Scientology problem); Peter Schütt, Wie verfassungstreu sind Muslime in Deutschland?, Frankfurter Allgemeine Zeitung [FAZ] April 19, 1995 at 10 (discussing the problem of Muslim religious instruction and the question of who should organize the curriculum).
In summary, the textual, historical and sociological differences in Germany and the United States make a different treatment of religion in public schools necessary in some cases, like for example cases concerning voluntary school prayer. Both systems, however, ensure that public school education has no proselytizing effect on the children. Because teachers are not allowed to influence their pupils, the right to proselytize children is in both countries left to the parents and the religious organizations. Also public schools have to be neutral towards religion in both countries. However, unlike public schools in the United States, German public schools have to provide religious instruction. In addition, they may include religion also in the secular education by referring to it as an important factor in the historical development of Germany. This is why in German public school classrooms the posting of a cross is generally allowed unless somebody objects to it. In the United States, a statute requiring the posting of religious symbols in public schools would be prohibited by the First Amendment, even if it contained the sort of opt-out feature the new Bavarian law contains. The differences in the legal treatment of religion in public school becomes therefore most obvious in cases in which the government initiates the introduction of religion into the public school life by, for example, posting religious symbols or providing for school prayer. This, however, does not mean that both countries differ significantly concerning the treatment of these religious issues in reality. In fact, some public schools in the United States still have the Ten Commandments posted on the classroom wall or have prayers at graduation ceremonies, because no one objects to these practices or files a constitutional claim against the local school board to seek a prohibition. Moreover, "[o]pinion polls show that a majority of American Citizens believe that their children should have the right to pray in school."584 Other schools, however, have come to the conclusion that any form of religious expression is forbidden in public schools. This has led to the enactment of strict

school policies prohibiting, for example, students from singing religious songs in school or to gather by themselves for a voluntary prayer. In order to clarify the issue of allowed and prohibited religious acts in public schools guidelines were suggested by President Clinton, the American Civil Liberties Union and many other public policy groups. These guidelines, however, are not binding and only suggest how the school boards, principals and teachers should handle certain religious issues that arise in public schools. Thus, the treatment of religion in public schools still differs from school district to school district.

Which one of the two countries provides a better approach to protect religious freedom in public schools? After having compared the German and the American approach to religion in the public school system, this is the final question that arises. Both countries have established a public school system that tries to give maximum protection to the student's freedom of religion. The teacher's freedom of religion can be limited in order to protect both the student's religious freedom and the state's interest in public school education. With respect to the protection of free exercise rights of public school teachers, both countries therefore provide a similar protection: Both countries require their teachers to teach in a neutral way without proselytizing. The right of the teacher to refrain from teaching secular subjects that conflict with his religious beliefs, as well as his right to wear a religious garb in class, is decided on a case by case basis in both countries.

On the other hand, the two countries differ greatly concerning the issue of possible accommodation of religion in public schools. While Germany allows accommodation of

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585 Id. at 133-140 (citing additional examples).
586 LA MORTE, supra note 321, at 67 (providing also an overview of the content of these guidelines).
587 A very popular example for this different treatment of religion can also be seen in the hotly debated school voucher programs that some states provide for their citizens. See e.g., Harlan Loeb & Debbie Kaminer, God, Money, and School: Voucher Programs Impugn the Separation of Church and State, 30 J. Marshall L.Rev. 1 (1996); Suzanne Bauknight, The Search for Constitutional School Choice, 27 J.L. & Educ. 525 (1998).
588 See supra Part IV.D.1. for the United States and Part IV.D.2. for Germany.
589 The only exception where a teacher may proselytize is during religion classes in Germany.
religion to a certain degree. The Establishment Clause of the United States Constitution mainly hinders such an accommodation of religion in public schools. In Germany it is, under certain circumstances,\(^{590}\) possible to have a school prayer and a cross in the classroom whereas in the United States such practices would be a violation of the Establishment Clause. Hence, in this particular area, the approach of the United States seems to provide a clearer and more reliable protection of religious freedom in public schools than does the German system. Because the German system allows the accommodation of religion in public schools to a certain degree, German courts very often have to draw the line between permissible accommodation and impermissible violation of the principle of neutrality towards religion. As we have seen in the *Crucifix* case, the outcome in these cases often depends on only a few criteria, and a minimal factual change may lead to a different outcome. The Federal Constitutional Court invalidated a Bavarian law because it mandated the display of a cross in each public school classroom, without any exemptions. Four years later the Highest Administrative Court of Germany upheld a new Bavarian law that also mandated the display of a cross but, unlike the old law, provided an exemption from the mandatory display. Hence a relatively small detail, namely the inclusion of a possible exemption in the statute, made an enormous difference in the outcome of the case. In the United States even this small change would not have changed the outcome: The law requiring the posting of a cross would still have been held unconstitutional.\(^ {591}\) But does the United States system really provide a clearer and more reliable approach? If we only consider this question from a legal point of view, perhaps, but, as already stated above, the reality in the United States is different. As the present-day debate about school voucher programs shows, there is

\(^{590}\) The posting of a cross and the school prayer are only constitutional if they do not unduly infringe on the religious rights of the objecting students. Therefore it must be provided that in case of objection the cross must be removed and that the student does not have to participate in the prayer. *See supra* IV.B.2. and C.2.

\(^{591}\) See John E. Coons, *Of Crucifixes and Communities*, in VERFASSUNGSSTAATLICHKEIT, FESTSCHRIFT FÜR KLAUS STERN ZUM 65. GEBURTSTAG, 927, 931 (Joachim Burmeister et al. eds., 1997).
actually a lot of uncertainty about how far religious accommodation in school education is possible. Religious symbols, like the Ten Commandments, although unconstitutional can be found in public school rooms whereas in other schools it is prohibited for students to gather voluntarily for prayer. Of course, in Germany as well the reality differs from the legal point of view. Children, for example, who do not want to participate in religious instruction are not so easily excused from that subject if there is no alternative class, like ethics, offered for them. If there is no obligation for the student to participate in an alternative class, many students will ask to be excused from religious instruction simply to have fewer classes and more leisure time.

In summary, in both countries the legal treatment of religion in public schools differs from the actual relationship between religion and public schools. As long as no one openly objects or files an action against a certain religious practice, the school boards and school officials determine the actual role of religion in public schools. Nevertheless, by providing a possibility to challenge governmental actions in court based on a constitutional violation, both countries have given more protection to the freedom of religion than many other countries, like China or Iraq, where religious persecution is still not unusual. By giving the individual the possibility to judicially challenge governmental acts, both countries clearly do not only state “empty” principles in their constitutions, but grant enforceable rights to their citizens, and thus making both countries modern constitutional states. Even if the judicial protection may not be a perfect one, because of the difficulties concerning constitutional litigation in both countries, if somebody is willing to challenge a religious practice in public schools, he will be able to do so. Thus, as long as at least the courts remain independent from church

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593 See Peter Gruber, Religionsfreiheit, FOCUS. December 15, 1998 at 246-249.
interference, both states provide a meaningful protection of the freedom of religion in public schools.
APPENDIX: EXTRACT FROM THE GERMAN BASIC LAW.¹

PREAMBLE

Conscious of their responsibility before God and humankind, animated by the resolve to serve world peace as an equal part of a united Europe, the German people have adopted by virtue of their constituent power, this Basic Law.

The Germans in the Länder of Baden-Württemberg, Bavaria, Berlin, Brandenburg, Bremen, Hamburg, Hesse, Lower Saxony, Mecklenburg-Western Pomerania, North Rhine/Westphalia, Rhineland-Palatinate, Saarland, Saxony, Saxony-Anhalt, Schleswig-Holstein and Thuringia have achieved the unity and freedom of Germany in free self-determination. This Basic Law is thus valid for the whole German Nation.

Article 1 [Protection of human dignity]

(1) The dignity of man is inviolable. To respect and protect it shall be the duty of all public authority.

(2) The German people therefore uphold human rights as inviolable and inalienable and as the basis of every community, of peace and justice in the world.

(3) The following basic rights shall bind the legislature, the executive and the judiciary as directly enforceable law.

Article 2 [Personal Freedom]

(1) Everybody has the right to self-fulfilment in so far as they do not violate the rights of others or offend against the constitutional order or morality.

Article 4: [Freedom of faith, conscience and creed]

(1) Freedom of faith and conscience as well as freedom of creed, religious or ideological, are inviolable.

(2) The undisturbed practice of religion shall be guaranteed.

(3) Nobody may be forced against their conscience into military service involving armed combat. Details shall be the subject of a federal law.

Article 6: [Marriage and family, children born outside marriage]

(1) Marriage and family shall enjoy the special protection of the state.

(2) The care and upbringing of children are a natural right of parents and a duty primarily incumbent on them. It is the responsibility of the community to ensure that they perform this duty.

Article 7 [School education]

(1) The entire school system shall be under the supervision of the state.

(2) Parents and guardians have the right to decide whether children receive religious instruction.

(3) Religious instruction shall form part of the curriculum in state schools except non-denominational schools. Without prejudice to the state’s right of supervision, religious instruction shall be given in accordance with the doctrine of the religious community concerned. Teachers may not be obliged to give religious instruction against their will.

(4) The right to establish private schools shall be guaranteed. Private schools as alternatives to state schools shall require the approval of the state and be subject to land legislation. Such approval shall be given where private schools are not inferior to state schools in terms of their educational aims, their facilities and the training of their teaching staff and where it does not encourage segregation of pupils according to
the means of their parents. Approval shall be withheld where the economic and legal status of the teaching staff is not adequately secured.

(5) A private elementary school shall be approved only where the education authority finds that it meets a special educational need or where, at the request of parents or guardians, it is to be established as a non-denominational, denominational or alternative school and no state elementary school of that type exists locally.

(6) Preparatory schools shall remain abolished.

**Article 19 [Restriction of basic rights]**

(1) In so far as a basic right may, under this Basic Law, be restricted by or pursuant to a law the law shall apply generally and not merely to one case. Furthermore, the law shall specify the basic right and relevant Article.

(2) In no case may the essence of a basic right be encroached upon.

(3) The basic right shall also apply to domestic legal persons to the extent that the nature of such rights permits.

(4) Where rights are violated by public authority the person affected shall have recourse to law. In so far as no other jurisdiction has been established such recourse shall be the ordinary courts. The second sentence of paragraph (2) of Article 10 shall not be affected by the provisions of this article.

**Article 20 [Political and social structure, defense of the constitutional order]**

(1) The Federal Republic of Germany shall be a democratic and social federal state.

(2) All public authority emanates from the people. It shall be exercised by the people through elections and referendums and by specific legislative, executive and judicial bodies.

(3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.
(4) All Germans have the right to resist anybody attempting to do away with this constitutional order, should no other remedy be possible.

**Article 33 [Equal civil status, professional civil service]**

(1) All Germans in every Land have the same civil rights and duties.

(2) All Germans are equally eligible for any public office according to their aptitude, qualifications and professional ability.

(3) The enjoyment of civil rights, eligibility for public office, and rights acquired in the public service shall not depend on a person’s religious denomination. Nobody may suffer disadvantage by reason of their adherence or non-adherence to a denomination or their other convictions.

**Article 56 [Oath of office]**

On taking office the Federal President shall answer the following oath before the assembled Members of the Bundestag and the Bundesrat:

> “I swear that I will dedicate my efforts to the well-being of the German people, enhance their benefits, save them from harm, uphold and defend the Basic Law and the laws of the Federation, perform my duties conscientiously, and do justice to all. So help me God.”

The oath can be sworn without the religious affirmation.

**Article 64 [Appointment of Federal Ministers]**

(2) On taking office the Federal Chancellor and the Federal Ministers shall swear before the Bundestag the oath provided in Article 56.

**Article 79 [Amendments to the Basic Law]**

(2) Such law must be carried by two thirds of the Members of the Bundestag and two thirds of the votes of the Bundesrat.
(3) Amendments to this Basic Law affecting the division of the Federation into Länder, their participation in the legislative process, or the principles laid down in Article 1 and 20 shall be prohibited.

Article 140 [Rights of religious communities]

The provisions of Articles 136, 137, 138, 139 and 141 of the German Constitution of 11 August 1919 shall be integral part of this Basic Law.

Extract from the German Constitution of 11 August 1919 (Weimar Constitution)

Religion and religious communities

Article 136

(1) Civil and political rights and duties shall be neither dependent on nor restricted by the exercise of religious freedom.

(2) Enjoyment of civil and political rights and eligibility for public office shall be independent of religious denomination.

(3) Nobody shall be obliged to disclose their religious convictions. The authorities may not inquire about their membership of a religious community except where rights or duties depend on such information or a statutory statistical survey makes such enquiry necessary.

(4) Nobody may be compelled to perform any religious act or ceremony or to participate in religious practices or to use a religious form of oath.

Article 137

(1) There shall be no state church.

(2) Freedom to form religious communities shall be guaranteed. The uniting of religious communities within the territory of the Reich shall not be subject to any restrictions.
(3) Every religious community shall regulate and administer its affairs independently within the limits of the law valid for all. It shall confer its offices without the participation of the state or the civil community.

(4) Religious communities shall acquire legal capacity according to the general provisions of civil law.

(5) Religious communities shall remain public corporations if they have enjoyed that status hitherto. Other religious communities shall be granted like rights upon application where their constitution and the number of their members offer an assurance of their permanency. Where several such public religious communities form one organization it too shall be a public corporation.

(6) Religious that are public corporations shall be entitled to levy taxes in accordance with Land law on the basis of the civil taxation list.

(7) Associations which foster non-religious belief shall have the same status as religious communities.

(8) Any further legislation as may be required for the implementation of these provisions shall lie within the jurisdiction of the Länders.

**Article 138**

(1) State contributions to religious communities based on law or contract or special legal titles shall be redeemed by means of the Land legislation. The principles for such redemption shall be established by the Reich.

(2) The right to own property and other rights of religious communities or associations in respect to their institutions, foundations and other assets intended for purposes of worship, education or charity shall be guaranteed.
Article 139

Sundays and feast-days recognized by the state shall remain legally protected as days of rest from work and of spiritual edification.

Article 141

To the extent that there exists a need for religious service and pastoral work in the army, hospitals, prisons or other public institutions, the religious communities shall be permitted but in no way compelled to perform religious acts.