Free Exercise of Religion in Germany and the United States

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In this Article, Professor Edward Eberle provides a comparative overview of constitutional safeguards affecting religious freedom in Germany and the United States. Specifically, the author analyzes the German and American approaches to the free exercise of religion within their respective constitutional systems. The result is an illuminating exposition that provides much insight for comparative and constitutional scholars.

In the years following the Second World War, religious freedoms in Germany developed along similar, individualist paths to those found in the United States Constitution. However, unlike the Constitution, the Basic Law's *provisions touching on religious liberty are detailed and quite elaborate and, further, arise from a cultural milieu characterized by cooperation between church and state. Recently, America has witnessed an evolution in the way the United States Supreme Court treats the free exercise of religion--from a fundamental right, protected as such by the courts through the employment of an exacting review of impinging legislation, to a value that is to be considered in the democratic process but which may, ultimately, yield to neutral legislation.*

Professor Eberle posits that an analysis of developments in Germany in the post-World War II period yields valuable insight into the remarkable shift in jurisprudence that has occurred in the United States. The author first describes the nature of free exercise rights within the German constitutional order before turning to relevant case studies to illuminate the exercise of religious liberties in Germany. The Article then compares the United States Supreme Court's reasoning in Sherbert v. Verner *to its decision in* Employment Division, Department of Human Resources v. Smith*, exposing the shift in the Court's thinking over the course of recent decades. Noting the different approaches between the German and American courts, Professor Eberle offers comparative observations concerning the nature of free exercise freedoms in the two countries and concludes that such liberties are more vibrant and protective of minority rights under the German constitutional system. His study is valuable in illuminating the purpose, utility, and value of a free exercise right within constitutional government.*

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German religious freedoms center on the free development of human capacity as it relates to spirituality and exploration of the transcendent and metaphysical dimension to human life. Grounded in a historically cooperative relationship between church and state, religious freedoms have been recalibrated along distinctly more separationist and individualist paths in the post-World War II fundamental compact that is known as the Basic Law (*Grundgesetz*). Contemporary German religious freedoms posit a wide expanse for the individual exercise of religious freedom and a further expanse where citizens can enlist the state to facilitate religious practice through provision of such services as religious instruction in the public schools, the grant of public corporate status to religious organizations, and the collection and administration of taxes for churches, synagogues, or other religious organizations.

Stated in terms of American law, German religious freedoms can be broadly grouped into the familiar lexicon of Free Exercise and Establishment Clause freedoms.[2] This lexicon provides a ready rubric within which to compare the two laws. Notwithstanding this similarity, German freedoms are significantly more elaborate and detailed in the text of the Basic Law, giving rise to a more comprehensive body of law than that found in America.

There are many questions of religious freedom that make for a worthy comparison in the two laws. Especially insightful would be evaluation of the relationship between church and state, teaching of religion in the public schools, and the role of religion in society more generally. However, for considerations of focus and scope, this Article evaluates one aspect of contemporary German religious freedoms—namely, free exercise of religion. The focus of this Article is on the two countries' treatment of free exercise freedoms.

There are several reasons why this comparative exercise is valuable. First, it is remarkable how religious freedom has evolved in

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

the United States during the last twenty years under the leadership of Chief Justice Rehnquist. We have seen an evolution of free exercise freedoms from treatment as a fundamental right protected by courts under conventional strict scrutiny analysis appropriate generally to rights under the methodology of *Sherbert v. Verner*[3] to treatment as a value to be considered in the democratic process that might be eclipsed by the applicability of general, neutral laws under the methodology of *Employment Division, Department of Human Resources v. Smith*.[4] The religious freedoms protected by the Establishment Clause have likewise undergone a similarly dramatic shift from a distinctly separationist stance in the relations of church and state[5] to a posture of accommodation of church by state.[6] These are seismic shifts in the architecture of the constitutional design, on par with the Rehnquist Court's mark in federalism[7] and state sovereign immunity.[8] In view of these dramatic developments, it makes sense to gain some perspective on them, viewing them from outside the setting of American legal culture through the lens of another law. Sometimes the best way to understand native culture is by observing how it compares to another culture. "For only by making comparisons can we distinguish ourselves from others and discover who we are, in order to become all that we are meant to be."[9]

Second, there are lessons to be learned from German law. German law accords wider scope to individual free exercise freedoms

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3. 374 U.S. 398 (1963).

4. 494 U.S. 872, 890 (1990) ("Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process.").

5. The approach of the United States Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 602-71 (1971), would be emblematic of the separationist approach.

6. The recent decision in *Zelman v. Simmons-Harris*, 536 U.S. 639, 639-41 (2002), dramatically signals this shift, authorizing state support of religious schooling through tuition vouchers and tutorial aid. For public taxpayers objecting to this plan, there would appear to be coercion of conscience, as people are being forced to pay for religious indoctrination against their will.

Coercion of conscience of this type was decried famously by Thomas Jefferson, *see* THOMAS JEFFERSON, VIRGINIA BILL FOR RELIGIOUS LIBERTY (1785), *quoted in* Everson v. Bd. of Educ., 330 U.S. 1, 13 (1947) ("[T]that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical . . . ."), and James Madison, *see* JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in Everson*, 330 U.S. app. at 63-64, 66 (Rutledge, J., dissenting).

7. *See, e.g.*, Printz v. United States, 521 U.S. 898, 898-900 (1997).

8. *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 62-65, 78-81 (2000).

9. Thomas Mann, *Joseph in Egypt* (1933), *translated in* DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY, at v (1994).

than American law. It is more common the case that a person sincerely motivated by religion will be accommodated from the constraints of generally applicable neutral laws. German free exercise law is much more in accord with *Sherbert* than *Smith*. Under the cooperative church-state relations existent in Germany, the state acts neutrally, nondiscriminatorily, and with tolerance to all beliefs in providing, for example, public school rooms as forums for students to receive instruction in the religion of their choice. It is interesting to note that the accommodationist approach championed by Chief Justice Rehnquist, most notably recently in *Zelman v. Simmons-Harris*,[10] is a major step in the direction of German law. Thus, German and American law are alike and unlike in ways. Specifically, the scope of free exercise of religion is wider in Germany while Germany and the United States seem in closer accord over church-state relations.

Third, Germany is a good choice to compare with the United States. Like the United States, Germany is a highly developed, industrial, democratic society committed to constitutional government and situated within the Western cultural tradition. The German Constitutional Court has developed a sophisticated and comprehensive body of higher law through its adjustment of society to the Basic Law by application of independent judicial review in a way similar to the effect of the Supreme Court on American society. The two Courts are among the leading exemplars of governing society by higher law. Both Courts have carved out significant spheres of individual liberty in the post-World War II era.[11] Like the United States, Germany has increasingly become a pluralistic society.[12] Thus, gauging how Germany responds to pluralism in maintaining its balance between the aspirations of individual freedom and the demands of the social order is a valuable exercise for us as we observe how the United States is on the path to an ever more pluralistic society as well. Finally, for the topic under discussion—free exercise of religion—German freedoms

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10. 536 U.S. at 639.

11. For studies tracing these developments, see CURRIE, *supra* note 9, at 174-237; EDWARD J. EBERLE, DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES 79-110, 125-53 (2002); Peter E. Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 247, 247-349 (1989).

12. Roughly eight percent of the German population is minority in relation to the majority German population. The largest minority group is Turkish. Roughly three percent of the German population is Islamic. EBERLE, *supra* note 11, at 49. Germany is expected to become even more pluralistic in the future, especially in view of declining native German birthrates. The need for a talented workforce will increase the demand for immigration of skilled labor.

are roughly comparable to American freedoms as a matter of text, historical understanding, and constitutional design. Thus, there is ready and fertile ground upon which to compare religious principles. Through comparative methodology, we can help clarify the meaning and purpose of a Free Exercise Clause in constitutional democracy.

To accomplish these goals, the Article proceeds as follows. First, it is necessary to obtain some background in the German constitutional order. Part I describes the content and contours of German religious freedoms, both individual and church-state guarantees, and their anchoring in the German constitutional order. Part II evaluates free exercise of religion in Germany with an eye toward comparing it to its counterpart in the United States. Evaluation of German law forces consideration of the religious and social values at issue in a Free Exercise Clause. Part III pursues this inquiry through consideration of whether the approach of a Court in *Sherbert* (preferencing religion over law) or *Smith* (preferencing law over religion) seems more appropriate under constitutional government. Finally, Part IV concludes with comparative observations about the nature of free exercise freedoms in Germany and the United States. My study shows that German free exercise freedoms are both more vibrant and more protective of minority religious practices than American.

I. GERMAN RELIGIOUS FREEDOM AND THE CONSTITUTIONAL ORDER

A. German Basic Law

The German Basic Law enumerates religious freedom in far greater detail than the United States Constitution. The key provision for individual freedom is Article Four, which protects explicitly freedoms of faith, conscience, and religious or philosophical creed [*Weltanschauung*].[13] Freedoms of faith, conscience, and creed, of course, lie at the root of religious freedom. Article Four further protects "the undisturbed practice of religion."[14] These guarantees are analogous to the Free Exercise of religion guarantee of the First Amendment. Notable in Germany is the explicit extension of freedom to profess creed to ideological, nonreligious belief, as well as religious belief. Belief in nature or philosophical or existential belief could fall within the ambit of Article Four. German protections are thus designed much more broadly than American protections, which

13. GRUNDGESETZ [GG] [Constitution] art. 4(1) (F.R.G.).
14. *Id.* art. 4(2).

generally have been restricted to religious belief, based on the text of the First Amendment.[15] Finally, Article Four expressly sets out for sanctuary conscience-compelled resistance to military service.[16] The Basic Law was the first modern constitution to so do, with several countries now following this model.[17]

Further notable is that Article Four protections are textually without limitation. Under principles of German constitutionalism, textually unbounded protections may only be limited by values of a constitutional dimension, such as human dignity, the ultimate value of the German social order,[18] or the fundamental rights of other people. Such an absolute guarantee of basic rights is exceptional. Most German rights are stated with express textual reservation in keeping with the European tradition that rights are to be exercised within the parameters of a social community.[19]

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15. The Framers substituted the language "free exercise of religion" for "rights of conscience" in adopting the First Amendment. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1488-89 (1990). It seems most plausible, therefore, that the Framers intended the freedoms to cover religious activity.

Supreme Court case law would seem to bear this original understanding out. *Compare* Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972) (holding that, "to have the protection of the Religion Clauses, the claims must be rooted in religious belief," and extending First Amendment protection to the Amish because their life was grounded in a theocratic view "of deep religious conviction, shared by an organized group, and intimately related to daily living"), *with* Welsh v. United States, 398 U.S. 333, 333-74 (1970) (extending protection of a congressional statute granting exemption from military service to nonreligious, secular beliefs). *Welsh* and *United States v. Seeger*, 380 U.S. 163 (1965), are the only two cases in which the Supreme Court accommodated nonreligious beliefs from law.

16. GG art. 4(3) (F.R.G.).

17. DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 458 (2d ed. 1997) (noting that the Basic Law is alone among modern constitutions in protecting conscientious objection); *see also* KONST. RF art. 59, *translated in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: THE RUSSIAN FEDERATION 10 (Gisbert H. Flanz ed., 2002); PORT. CONST. art. 41, *translated in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: THE PORTUGUESE REPUBLIC 27 (Gisbert H. Flanz ed., 1999).

18. This theory is attributable to the Constitutional Court's landmark case on freedoms of communication, *Lüth*, Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] 7, 198, 205 (1958). In *Lüth*, the Court interpreted the Basic Law to posit a basic value order at the apex of which stands human dignity. Basic rights are emanations of human dignity, and constituent elements of the value order.

19. *See, e.g.*, GG art. 5(2) (F.R.G.) ("Expression rights shall find their limits in the provisions of general laws, in provisions for the protection of young people, and in the right to personal honor."); Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 9(2), 213 U.N.T.S. 221 ("Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public . . . order, health or morals, or for the protection of the rights and freedoms of others.").

The main outline of the relationship between church and state is centered on Article 140, which incorporates as an organic whole the provisions of the 1919 Weimar Constitution (Articles 136, 137, 138, 139, 141) describing that relationship. The relationship is a cooperative one. Religion and church play a prominent role in German society, which these provisions facilitate.[20] The Weimar provisions set out a detailed and complicated scheme of church-state cooperation.

Article 136 of the Weimar Constitution secures civil and political rights, including eligibility for public office; freedom from dependence or restriction based on religious belief or exercise; protection against coerced disclosure of religious conviction, coerced performance of religious acts or ceremonies, and coerced taking of religious oaths; and prohibits government from inquiring into membership in a religious body, except for statistical purposes.[21]

Article 137 of the Weimar Constitution, in its first clause, states, "[T]here shall be no state church."[22] In comparison to the broad, albeit disputed, meaning of the American prohibition on "an establishment of religion," the German clause has a more commonly accepted simple meaning. It means there is to be no established state church and nothing more. The clause does not mean strict separation of church and state.[23] The numerous remaining provisions of Article 137 guarantee, among other things, the freedom of association to form religious bodies to "regulate and administer its affairs autonomously within the limits of the law,"[24] guaranteeing their independence from the state;[25] the ability to constitute religious bodies to "acquire legal capacity according to the general provisions of civil law,"[26] including as "corporate bodies under public law,"[27] which corporate status

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20. KOMMERS, *supra* note 17, at 443. Cooperation between distinct groups is a trait of German society, perhaps reflecting and infusing the communitarian bent of the society. Note the compromise between capitalists and workers resulting in the social welfare state achieved during the Bismarck era. Today, one might look to the sharing of power between management and labor present in the co-determination corporate model formed after World War II.

21. WEIMAR REICHSVERFASSUNG [WRV] [Weimar Constitution] art. 136 (F.R.G.).

22. *Id.* art. 137.

23. CURRIE, *supra* note 9, at 245.

24. WRV art. 137(3) (F.R.G.).

25. *Compare id.*, *with* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 345-46 (1987) (exempting a church from federal antidiscrimination laws so that the church may run autonomously its affairs).

26. WRV art. 137(4) (F.R.G.).

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

allows them "to levy taxes in accordance with Land [state] law."[28] These provisions are completely without parallel in American law. Official granting of charters to religious bodies was a major objection of James Madison,[29] and it is hard to imagine such a turn in American law.

Even though the recent *Zelman* case represents the culmination of a dramatic movement toward church-state cooperation in the delivery of public services, the form of church-state cooperation described in Article 137 surely states an impermissible reach under American Establishment Clause law. Under the more pervasive approach of German law, the state provides the legal framework for religious bodies to operate and then offers the machinery of government to administer and collect taxes for religious purposes. In keeping with the neutral, nondiscriminatory nature of German law, these benefits are available to associations of a "philosophical persuasion" as well as a religious one.[30]

In practice, the main beneficiaries of governmental aid are dominant religious bodies, such as Protestant, Roman Catholic, and Jewish groups. Because church and state tend to consist of overlapping majoritarian configurations, church-state cooperation has been a comfortable fit. Church and state have tended to share the same basic values. In post-World War II Germany, the consensus on values includes promotion of democracy and tolerance,[31] which has helped to reinforce the social order, an important concern in the aftermath of the war. In a sense, the structure of church-state cooperation operates as de facto establishments. The cooperative model has functioned well in a society of relative religious homogeneity. It will likely be harder to implement the model as religious groups become more diverse.[32]

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

29. CURRIE, *supra* note 9, at 245 (citing 22 ANNALS OF CONGRESS 982-85 (1811)) (viewing federal incorporation of the Episcopal church in Washington, D.C., as establishment of religion); *see also* Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1587 (1989). It is fair to point out that most religious organizations today are incorporated as nonprofit corporations and receive tax-exempt status.

30. WRV art. 137(7) (F.R.G.).

31. Ingrid Brunk Wuerth, *Private Religious Choice in German and American Constitutional Law: Government Funding and Government Religious Speech*, 31 VAND. J. TRANSNAT'L L. 1127, 1140, 1145 (1998).

32. Inke Muehlhoff, *Freedom of Religion in Public Schools in Germany and in the United States*, 28 GA. J. INT'L & COMP. L. 405, 488-89 (2000).

The Seventh-Day Adventist Church, Church of Jesus Christ of Latter-Day Saints, Baptist Church, New Apostolic Church, Pentecostal communities, Christian Scientists, Mennonites, and the Salvation Army, among others, have achieved recognition as public law corporations.[33] Other minority religions have had some difficulty achieving official recognition. This may in part be due to differences in held values. For example, Jehovah's Witnesses have historically been denied official privileges because the sect does not allow its members to vote and participate in the democratic process.[34] Authorities thus viewed the sect as animated by values antithetical to the social order and, accordingly, a danger to society.[35] However, recently Jehovah's Witnesses acquired recognition as a public corporation in a significant Constitutional Court case,[36] signaling an important evolution in German thought toward toleration.

Under the system, employers withhold the monies and submit them to the state, which then distributes them to the religious denominations in a percentage equal to their membership. Churches and religious bodies use the money to build seminaries, churches, synagogues, hospitals, and nursing homes and train teachers, among other purposes. These arrangements are a way by which religion secures its place as a main actor within society, if not a preferred one. Conversely, state support of religion allows government to exert some control over religion, including the set of values to be inculcated, such as promotion of morality, democracy, and tolerance.[37] The tax is between 8-10% of a person's income.[38] Any person whose name is on the church or religious body's register is automatically subject to the tax.[39] A person must formally withdraw from the church or religious body to be relieved from the tax.[40] While state collection of church

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33. Gerhard Robbers, *Religious Freedom in Germany*, 2001 BYU L. REV. 643, 649-50.

34. *Id.* at 650.

35. Gerhard Besier & Renate-Maria Besier, *Jehovah's Witnesses' Request for Recognition as a Corporation Under Public Law in Germany: Background, Current Status, and Empirical Aspects*, 43 J. CHURCH & ST. 35, 37 (2001).

36. Jehovah's Witness, BVerfGE 102, 370 (2000) (ruling that a state cannot condition the granting of public corporate status on the basis of failure to vote; alternative ways must be pursued to assure loyalty to democratic order).

37. Wuerth, *supra* note 31, at 1140, 1145-46.

38. KOMMERS, *supra* note 17, at 479.

39. *Id.*

40. *Id.* at 480.

taxes is constitutional, it has nevertheless given rise to significant litigation.[41]

Article 138 guarantees religious bodies rights, including the right to own property.[42] Article 139 recognizes Sunday and other public holidays "as days of rest from work and of spiritual edification,"[43] expressly resolving an issue that has proved vexing to American law.[44] Article 141 provides for the rendering of religious services and spiritual care to the army, hospital, prisons, or other public institutions.[45]

In addition to these express provisions that address religion, the Basic Law protects religion in a number of articles that cover other subjects as well. For example, the basic equality provision, Article Three, specifically singles out faith and religious opinion as inappropriate subjects to target.[46] Article Six guarantees parental rights in the raising of their children, subject to state supervision.[47] Parental rights come into play most dramatically in connection with their children's education, which rights are guaranteed in Article Seven.[48] Of notable concern to an American is the determination, in Article 7(3), that "religion classes shall form part of the ordinary curriculum in state schools, except in secular (*bekenntnissfrei*) schools . . . religious instruction shall be given in accordance with the tenets of the religious communities."[49] Teaching religion in the schools is relatively uncontroversial.[50] However, the German constitutional system is careful to protect against coercion of conscience. Article Seven further provides "the persons entitled to bring up a child shall have the right to decide whether the child shall attend religious classes."[51] And "no teacher may be obliged against his will to give religious instruction."[52]

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41. CURRIE, *supra* note 9, at 247; KOMMERS, *supra* note 17, at 484-89.
42. WRV art. 138 (F.R.G.).
43. *Id.* art. 139.
44. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420, 449-53 (1961) (rejecting an Establishment Clause challenge to a Sunday closing law on the ground that Sundays were now secular days of rest, even though originally they were conceived as days of repose for religious reasons).
45. WRV art. 141 (F.R.G.).
46. GG art. 3 (F.R.G.).
47. *Id.* art. 6(2).
48. *Id.* art. 7.
49. *Id.* art. 7(3).
50. KOMMERS, *supra* note 17, at 471.
51. GG art. 7(2).
52. *Id.* art. 7(3).

Like the Article 137 provisions, the guarantees for religious instruction in public schools represent again the German idea of church-state cooperation in certain essential social services. And there are yet other provisions of the Basic Law addressing religion.[53]

Having described this complex of law, we can see that the German charter is indeed far more detailed and comprehensive in its treatment of religion than the United States Constitution. There are advantages to the German detail. The German charter expressly resolves many issues that called for Supreme Court resolution in parsing out the sparser language of the First Amendment. For example, Article Four resolves the status of conscientious objection to military service, an issue that proved thorny for the Supreme Court.[54] Further, Article 7 resolves significantly the role of religion in public schools, an issue of great contention in the United States.[55]

Notwithstanding the greater detail and specificity of the German text, the scope of German religious freedoms call for significant judicial interpretation by the Constitutional Court. In performing the judicial function, the position of the Supreme Court and the Constitutional Court is quite similar: both Courts exercise significant judicial judgment in interpreting their respective charters. It is worthwhile to note that the United States Supreme Court is not the only practitioner of judicial activism. Comparing the stances of the two Courts can help illuminate the role of an independent court in constitutional democracy, particularly in the realm of individual religious freedom.

The greater detail of the German charter also addresses many issues that have no parallel in American law. Prominent among these is the granting of public corporate status to religious bodies and their use of state machinery to collect and administer the church tax.[56] Yet, there is also enough convergence in the freedoms of the two charters to make comparison a fruitful exercise. Notable here is the topic under discussion, free exercise of religious freedoms. The text, tenor, and historical understanding of the countries' Free Exercise Clauses are

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53. *See, e.g.*, *id.* art. 56 (stating that the federal president shall assume office upon taking oath, with or without reference to God); *id.* art. 64(2) (same regarding federal chancellor and federal ministers).

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

55. GG art. 7 (F.R.G.).

56. WRV art. 137(A) (F.R.G.).

roughly comparable, facilitating especially fruitful comparative examination and, perhaps, cross-fertilization.

Constitutional text is just one part of a country's constitution. History, Framers' intent, and constitutional structure are other indispensable elements of constitutional law. Not surprisingly, German history and constitutionalism differ from American. We need a brief overview of these issues to understand the context and dynamics of German law.

B. German History

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

Second, for much of German history, altar and throne have been united.[57] The alliance between the ruler and the church further fortifies this cooperative relationship. The Reformation led by Martin Luther played a role in this as well. Luther relied on the protection of tolerant German princes from Catholic authorities to safeguard his life and teachings. Reliance on state power to protect religion is another factor leading toward a cooperative church-state relationship. Related to this is the long history of governmental accord with religious authorities, in formal treaties called concordats, over issues involving religious education, social services, and the like. Church and religion have played a much more active public role in German life than in American life, and these factors influence the modern German idea of church-state cooperation.[58] Unlike England or France, however, Germany has never had an official, established state church, although

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57. KOMMERS, *supra* note 17, at 489.
58. *See id.* at 485-87.

Lutheranism effectively functioned as a de facto established church in large parts of Germany over a long period of time.[59]

Third, German society has historically been very homogenous. In the crucial early time when religious ideas and tradition were formed, Germans shared much in common. Today, German society is becoming a more pluralistic society. Still, Germany is yet more homogenous than the United States.[60]

Fourth, religious tolerance came late to Germany. Until the Weimar Constitution of 1919, church-state relations were close and religious discrimination was widespread. With Lutheranism effectively operating as the official church in much of the German Reich, in the nineteenth century, Roman Catholics (who comprised one-third of the population) and Jews were officially barred from high positions in the Reich government. Historically, German constitutions distinguished between dominant churches (Lutheran and Roman Catholic) and minor sects.[61]

Fifth, the Basic Law is framed specifically against the horrors of the Hitler time. Most notable is the securing of the social order on the premise of the inviolability of human dignity. This centers the society around the human person and her flourishing. Religious freedoms, in particular, are indispensable to this vision because the spirituality of religion or ideal is a core element of the development of human personality. Only with the lessons learned from the Hitler time did Germany secure freedom from coercion of conscience, the essence of religious freedom discovered and elaborated on centuries earlier by Roger Williams,[62] John Locke,[63] and James Madison.[64] Development of religious freedom in Germany was thus a late affair.

In the post-World War II era, the framers of the Basic Law continued the tradition of church-state cooperation. The churches were poised especially well to help in the reconstruction of Germany, as they were less tainted than other institutions in their association with

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

60. *See supra* note 12 and accompanying text.

61. KOMMERS, *supra* note 17, at 444-45.

62. ROGER WILLIAMS, THE BLOODY TENENT, OF PERSECUTION, FOR CAUSE OF CONSCIENCE (Samuel L. Caldwell ed., 1867) (1644).

63. JOHN LOCKE, A LETTER CONCERNING TOLERATION (Prometheus Books 1990) (1689).

64. MADISON, *supra* note 6, *reprinted in* Everson v. Bd. of Educ., 330 U.S. 1 app. at 63 (1947) (Rutledge, J., dissenting).

Hitler. This was an additional factor in facilitating the major role of church and religion in German society.[65]

All of this German history provides a very different background than the familiar American story of the crucial developments in Virginia, led first by Thomas Jefferson and then by James Madison, where freedom of conscience and faith were secured and separation of church and state were instituted in the influential period just prior to the adoption of the United States Constitution. Experience in Virginia was the main model for the framing of American religious protections.[66]

On the other hand, Germany and the United States share an important link in history: the flowering of religious liberty, through judicial protection, occurred in the post-World War II era. The Basic Law is a 1949 document framed in reaction to the abuse of governmental power exercised in the Hitler time. Interestingly, however, so might we observe that state governments' curtailment of liberties led to the incorporation of the Bill of Rights into the Fourteenth Amendment so that federal rights would be applicable to the states as well. Included in incorporation were the Free Exercise Clause in 1940[67] and the Establishment Clause in 1947.[68] Modern Establishment Clause jurisprudence began with *Everson v. Board of Education* in 1947.[69] The first successful Free Exercise claim was made in 1963 in *Sherbert*.[70] Thus, the main development of constitutionally directed religious freedom in the United States, like Germany, occurred after World War II.

C. German Constitutional Order

The German constitutional order revolves around three ideas quite distinct from American law. These are, first, that basic rights have an objective or positive dimension that animates the value structure as well as the subjective or negative dimension that they share with American law; second, that the Basic Law affects all legal relationships, public and private; and, third, that duties as well as rights comprise part of the constitutional order. A brief description of these

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65. KOMMERS, *supra* note 17, at 490.

66. McGowan v. Maryland, 366 U.S. 420, 437 (1961); *Everson*, 330 U.S. at 11-13. See also the authorities collected in Adams & Emmerich, *supra* note 29, at 1572 n.54.

67. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

68. *Everson*, 330 U.S. at 8.

69. *Id.*

70. 374 U.S. 398 (1963).

ideas is important to understand better the operation of German freedoms within the constitutional order.

First, Germans define objective rights to mean society's most fundamental values, which the state is obligated to achieve by creating the proper conditions in society so that rights might be realized as basic norms.[71] The idea of objective rights is the most fundamental difference between the American and German constitutions.[72] The objective dimension of basic rights is tied to the value-ordered nature of the German constitutional scheme, obligating government to realize in society the set of objective values embodied in the Basic Law.[73] "This value-system, which centers upon human dignity and the free unfolding of the human personality within the social community, must be looked upon as a fundamental constitutional decision affecting all areas of law, public and private."[74] By interpreting basic rights as establishing an "objective" ordering of values centered around human dignity, the Constitutional Court transformed those values into principles so important that they must exist "objectively," as an independent force, separate from their specific manifestation in a concrete legal relationship.[75] So conceived, objective rights form part of the fundamental legal order, the *ordre public*, thereby becoming part of the governing principles of German society.[76]

A second contrast to the American Constitution involves the German theory of third-party effect (*Drittwirkung*), under which the constitutional order affects private legal relationships as well as public ones.[77] The theory flows from the famous *Lüth* case, where the Constitutional Court reasoned that because basic rights are essential to the public good as part of the objective order of fundamental principles that rule society, basic rights must affect private legal relationships as

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71. This section is derived from and elaborated on in more detail in EBERLE, *supra* note 11, at 25-32; Edward J. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 UTAH L. REV. 963, 967-71.

72. EBERLE, *supra* note 11, at 25.

73. *Id.*

74. *Id.* (translating Lüth, BVerfGE 7, 198 (205) (1958)). The principle of the Constitution being anchored to this value system was confirmed with respect to Article Four religious freedoms in *Tobacco Atheist*, BVerfGE 12, 1 (1960). In *Tobacco Atheist*, the Court upheld the denial of parole to an inmate who attempted to bribe fellow inmates by offering to forswear religion. The Court ruled that Article Four rights to proselytize were protected only to the extent consistent with the dignity of others. *Id.* at 2-3.

75. EBERLE, *supra* note 11, at 25.

76. *Id.*

77. *Id.* at 27.

well as public ones.[78] The Court determined that the Basic Law should apply indirectly to private law. By indirect application, the Court meant that constitutional norms influence rather than govern private law norms.[79]

A third contrast to the American Constitution is that the Basic Law also sets forth certain duties incumbent upon citizens or government to perform.[80] The idea of coupling rights with duties is a European one, going back to the first continental rights declaration, the 1789 French Declaration of the Rights of Man and the Citizen.[81] The Basic Law continues this tradition. For example, Article 6(2) provides that "the care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty."[82] Articles Six and Seven have a profound influence on education and religious schooling in Germany. According to Article 7(1), "[t]he entire schooling system shall be under the supervision of the state."[83]

With this background, we now have a better sense of the constitutional context within which free exercise freedoms operate.

II. FREE EXERCISE OF RELIGION

The German constitutional order accords broad scope to the freedom to believe or not believe in God or a philosophical tenet, and the freedom to act on such belief through free exercise of religion. In part, this follows from the clear textual mandate of the Basic Law, which as we have seen, states that "freedom of faith . . . conscience . . . and creed . . . shall be inviolable [and] the undisturbed practice of religion is guaranteed."[84] German constitutional law thus solves straightforwardly central religious protections along lines that required Supreme Court elaboration in the United States.[85] Explicit protection

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78. BVerfGE 7, 198 (205) (1958).

79. *Id.* (explaining that the Basic Law "influences obviously also civil law; no civil law provision may contradict the Basic Law; all [legal provisions] must be interpreted consistent with its spirit. . . . A certain intellectual content 'flows' or 'radiates' from the constitutional law and into the civil law and affects the interpretation of existing civil law rules"); *see* Quint, *supra* note 11, at 263.

80. EBERLE, *supra* note 11, at 31.

81. *Id.*

82. *Id.* (translating GG art. 6(2) (F.R.G.)).

83. GG art. 7(1) (F.R.G.).

84. *Id.* art. 4.

85. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 402 (1963) ("Government may neither compel affirmation of a repugnant belief nor penalize or discriminate against individuals or

of the undisturbed practice of religion was a new development for Germany, different from the situation under Weimar, where religious practice could be limited by law.[86] The movement toward natural, inalienable rights is attributable to the reaction against Hitler. By anchoring the social order to natural principles of justice, the Framers hoped to better contain the vagaries of human passion.[87] These principles animate the broad construction of religious freedoms.

Religious freedoms have a very preferred position in the constellation of values that comprise the constitutional order. The preference for religion is due in part to textual mandate, as the Basic Law places no constraint on Article Four freedoms. The Constitutional Court has facilitated this position of high rank as well. Given that the architectonic value of the Basic Law is human dignity, and the unfolding of human personality in accordance with it, human values and human capacity stand at the very heart of the constitutional order, as elaborated on by the Constitutional Court.[88] Human spiritual development and transcendence are indispensable elements of personal growth. Fortified by these principles, the Constitutional Court has accorded broad scope to free exercise freedoms.

The preferred position of religion and the correspondingly broad scope accorded it are notable characteristics of the German constitutional order. When faced with interests of the general law or social order asserted in limitation of religious freedoms, the Constitutional Court has generally preferenced religiously motivated actions. This dynamic has resulted in a pattern of general accommodation for people of faith, excusing them from the constraints of the general law. The Constitutional Court has not interpreted such freedom as an invitation to disobey the law. The Court's motivation, rather, is to relieve a person from the dilemma of trying to obey claims of conscience that conflict with claims of law. The Court has been careful to limit accommodation to sincerely motivated religious conduct, and to carve out relief in ways that complement social order.

It is worth observing that the broad, preferred position that religious claims have in German society stands in sharp contrast to the state of affairs in the United States under the Supreme Court's

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groups because they hold religious views abhorrent to the authorities nor employ the taxing power to inhibit the dissemination of particular religious views." (citations omitted)).

86. Denial of Witness Oath, BVerfGE 33, 23 (29-30) (1972).

87. EBERLE, *supra* note 11, at 18.

88. *Id.* at 41-42.

controversial ruling in *Smith*.[89] Under *Smith*, obligations of the general law prevail over sincerely motivated religious actions.[90] The two countries' contrast over the scope of personal religious freedom is one of the greatest differences between the laws. We will pursue this contrast later.

First, we need to get a better sense of the scope of German law. German free exercise law has three dimensions. First, German law recognizes personal free exercise liberty which consists of the right to act on chosen tenets. Here we will concentrate on situations where religiously motivated conduct clashes with claims of the general law in order to evaluate an essence of religious freedom and to obtain a sharp contrast with American law. Second, German law expressly recognizes conscientious objection from military service,[91] an area not directly addressed by American law. Conscientious objection law is detailed and complicated, and will not be pursued here.[92] Third, German law further accommodates religious organizations from claims of the general law on the ground that they have a right to run their own affairs autonomously.[93] Religious organizations enjoy a broad right of autonomy over their affairs. For example, a Catholic hospital could fire a doctor who took a public position on abortion contrary to official Catholic doctrine and not suffer the consequences normally required by labor law.[94] Or a Protestant church could relieve from his duties a pastor because he had been elected as a political representative, a status ordinarily protected by law from impairment.[95] The autonomy of religious bodies to run their affairs is highly developed in Germany and is generally in accord with the development of American law.[96] For considerations of space and scope, we will concentrate mainly on personal free exercise, discussed against the backdrop of American law. Further, while the range of free

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89. 494 U.S. 872 (1990).

90. *Id.* at 877-82.

91. GG art. 4(3) (F.R.G.).

92. Conscientious objectors must perform alternative service for a period equivalent to military service. They might work, for example, in hospitals, schools, or other aids to society. The clause has given rise to significant litigation. See the authorities collected in CURRIE, *supra* note 9, at 250 n.36.

93. WRV art. 137 (F.R.G.).

94. Catholic Hosp. Case, BVerfGE 70, 138 (139) (1985).

95. Bremen Pastor Case, BVerfGE 42, 312 (1976).

96. *See, e.g.*, Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 345-46 (1987) (exempting the church from federal antidiscrimination laws so that it may run autonomously its affairs).

exercise rights in a society can be rich and varied—consisting of people's daily practices, social conventions, as well as court cases at all levels—our lens on free exercise rights will be restricted to the leading decisions of the countries' Supreme Courts.

A. Rumpelkammer

The leading case establishing the scope of Article Four freedoms is the 1968 case of *Rumpelkammer*.[97] The controversy concerned a Roman Catholic youth organization that actively sought to practice its faith as a missionary in society, trying to realize the ideal of daily life lived by good deed. At issue was the group's collection of used clothes, paper, and other recyclable goods for the purpose of raising money, which it then donated to charitable causes dedicated to the relief of hunger and misery in underdeveloped countries.[98] To further this effort, the group enlisted the pulpit, calling on priests to urge parishioners to donate to the cause. These activities raised the ire of a commercial rag dealer, who complained that the group's activities illegally competed with his business, which suffered.[99] The lower courts agreed, enjoining the youth organization from engaging in its clothing drive.

The Constitutional Court disagreed, overturning the injunction on the basis that it was a violation of the group's Article Four religious guarantees. Freedom to act and practice religion is central to religious belief.

> The Article Four guarantees of religion—irrespective if the creed is rooted in religious or nonreligious ideological belief—entail not only the inner freedom to believe or not believe, that is to profess a particular creed, or to remain silent or disavow a previously held creed and profess a new one, but also the freedom to engage in ritual acts, to proselytize, and to propagandize. . . . Religious exercise has central meaning for each faith, and in view of its historical content, must be interpreted broadly. It includes not only ritualistic acts, like adherence to religious practices such as worship services, church collections, prayer, receipt of the sacrament . . . but also religious education, religious and atheistic celebrations and other practices of religious or nonreligious life.[100]

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97. BVerfGE 24, 236 (1958).

98. *Id.* at 237.

99. The rag dealer argued that enlisting the authority of the Catholic Church in support of the collection was an unfair business practice. *Id.* at 238-39.

100. *Id.* at 245-46.

The broad scope of religious freedom elaborated on by the Court has its roots especially in the history of religious persecution under Hitler, the Court observed.[101]

The wide berth of religious freedom is available on equal terms to all faiths and philosophies, not just to Christian churches, which are dominant in Germany.[102] In practice, German jurisprudence has primarily entertained religious belief. The principle of equality follows from the command of religious and ideological neutrality, which the state is bound by, and the principle of parity of church and creed.[103] Under these tenets, the state cannot favor or disfavor any religion over another, or religion over nonreligion. Rather, under the principle of parity, all beliefs are to be treated equally.[104] Official neutrality and parity of faith and creed are indispensable to the guarantee of religious freedom and are especially pertinent given the increasingly pluralistic nature of German society. An open, pluralistic democratic society is the context envisioned for the exercise of basic rights, including religious rights.[105] In these respects, German society mirrors the nature of American society. Both Courts pitch rights philosophies against the social background of an open, pluralistic, democratic society. The movement toward pluralism will put German religious rights to the test.

Religious freedoms apply to groups as well as to individuals, and protections further encompass organizations such as the youth group at the middle of the *Rumpelkammer* case, which "do not completely, but only partially further the religious or ideological goals of its members."[106] Decisive for the Court is that religion be a primary motivation. "The condition [for applicability of Article Four freedoms] . . . is that the purpose of the organization is directed at the achievement of such [a religious or ideological] goal."[107] In American law, religious rights are one of the few areas where a group dimension

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101. *Id.* at 245.
102. *See id.* at 246-47.
103. *See id.* at 246.
104. *See id.* at 246-47. The principles of neutrality and parity follow from the Weimar period. These principles are even more firmly entrenched in the pluralistic society envisioned in the Basic Law.
105. *See id.* at 248.
106. *Id.* at 246-47.
107. *Id.* at 247.

to rights is evident.[108] It is much more common the case that rights are conceived in personal terms in the United States. By contrast, the group dimension to rights is more characteristic of German law,[109] and European law more generally.

Having set out these broad parameters for religious freedoms, the Court next had to apply them to the facts at hand. The Court found religious exercise broad in practice, as it had in principle. The key question for determination was whether the charitable activity, and its solicitation by pulpit, were religious activities. Because the activities were economic, they were farther afield of conventional religious acts, such as taking of the sacrament, worship, or prayer. Decisive for the Court was the religious motivation that inspired the conduct. Collecting clothes and material for charitable purposes, and their solicitation by pulpit, was religious, according to the Court, supported by Biblical and Christian teaching.[110] Religion is not just a spiritual exercise. Religion includes the freedom to influence the world around you as well, to act outwardly in accordance with the dictates of your creed.[111]

Necessarily, these determinations entailed a judgment by the Constitutional Court that religious motivation lies at the base of the charitable activity. The Court's approach seems quite sensible, for how else is a body to determine whether religious/ideological freedoms are at issue other than by determining whether the actions under review are religious/ideological? The Constitutional Court has straightforwardly gone about the business of determining what is or is not religious. The matter-of-fact course of the Constitutional Court contrasts with that of the Supreme Court, which has often expressed discomfort at judging what is or is not religious.[112]

The Court saw its obligation as assessing religion or ideological acts on their own terms. To do this, the Court applied neutral,

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108. *See, e.g.*, Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 345-46 (1987) (exempting the church from federal antidiscrimination laws so that it may run autonomously its affairs).

109. *See, e.g.*, Auschwitz Lie Case, BVerfGE 90, 241 (251-53) (1994) (holding that the identity of the Jewish people is bound with the Holocaust as a constituent element of their human dignity and that, accordingly, such dignitarian rights can limit publication of the assertion that the Holocaust never occurred).

110. *Rumpelkammer*, BVerfGE 24 at 248.

111. *Id.*

112. *See, e.g.*, Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 887 (1990) ("[W]e have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.").

generally applicable constitutional criteria. However, the Court emphasized that fair consideration must be given to the understandings of the believers at issue.[113] This is all the more important in a pluralistic society, where a range of disparate beliefs are practiced. If the religious or ideological belief under review is not evaluated on its own terms, there is a danger that its vision will be lost among the multitude of voices apparent in pluralistic democracy. Further, there is danger that the vision will be drowned by the hegemony of dominant views that are likely to crystallize as social convention or norms, making it difficult to get one's tenets communicated or respected. Viewing religion or ideology from the perspective of the believer is an important tenet of religious liberty. It is a perspective not notably present in American law.

The Court determined the activities to be religious and therefore within the ambit of Article Four protection. Being able to act on one's beliefs is an important part of religion. "Religious exercise has central meaning for every faith and creed, and must be broadly interpreted in view of its historical content."[114] Engaging in charitable activities is one way of realizing faith in daily life. For the Court, this was decisive, even if such charitable activities might be viewed as standing somewhat at the outer bound of Article Four freedoms, beyond more conventional religious rites. For its purposes, the Constitutional Court deliberately left open determination of the bounds of religious freedoms, preferring to determine what is protected on a case-by-case basis, an approach more in keeping with the vicissitudes of an open, pluralistic society.[115] There is always danger in judging freedoms by the past. Looking backwards can distort views of the present. With respect to religion, this might have a suffocating effect on new views of the world beyond.

Having determined that the charitable activities were protected, the Court next moved to the second part of its methodology, that is, application of a general balancing of interests test. This test involves a review of the lower court's decision to ascertain whether the lower court has given due regard to the rights at issue. Because religion is defined as an integral component of the constitutional order, it must be given especially significant weight. The Constitutional Court does not

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113. *Rumpelkammer*, BVerfGE 24 at 247-48. "The self-understanding of the religious and ideological group should not be disregarded in determining, in the individual case, what qualifies as the exercise of religion and ideology." *Id.* at 247.

114. *Id.* at 246.

115. *Id.* at 249.

like to substitute its judgment for that of the lower court's. It prefers to review the lower court decision only to see whether appropriate weight was given to constitutional values. However, to the extent the Court performs a balance or emphasizes the worth of a constitutional value, some second guessing is inevitable. Under all circumstances, the lower court must reperform the general balancing of interests upon remand in accordance with the Court's instructions.

Performing this balance, the Court compared the claims of religion against the competing demands of the businessman faced with unwelcome competition to determine which was weightier in the circumstance. It was no contest. The preferred value of religion in the constitutional order took precedence. Hence, the Court lifted the injunction on the charitable activities. The marketplace had to yield to the preferred value of religion and adjust accordingly. No person has a right to participate in the market as they would like.[116]

Our review of *Rumpelkammer* reveals the main principles of German law. First, Article Four freedoms are broadly construed. Inner freedom protects the interior world of the spirit. Outer freedoms guarantee the ability of a person to act on faith. The ability to influence the world through religiously motivated action is central. Second, the protections of religious freedoms are equally open to all, religious or nonreligious belief, majority or minority creeds. Official neutrality and parity of creed help to assure fair consideration of religion/ideology on its own terms and also helps assure a level playing field in the competition among beliefs for influence. Third, the Constitutional Court must determine, through constitutional interpretation, what is or is not religious or ideological for purposes of Article Four. Fourth, once an activity is determined to be religious and the claimant's exercise thereof is burdened, religious rights must be balanced against the claim or claims of the social order asserted in limitation. In performing this balance, the Court gives wide preference to religion consistent with its place as a preferred value in the constellation of values that comprise the constitutional order. Fifth, it is thus clear that religious activities will be presumptively protected and that their accommodation will generally occur in the social order as a sign of due respect for their importance. This methodology has wide implications.

Viewed in comparison to American law, the methodology of *Rumpelkammer* is much more akin to the approach of the Supreme

116. *Id.* at 251.

Court under *Sherbert*[117] than *Smith*.[118] Similar to *Rumpelkammer*, the Supreme Court under *Sherbert* must first determine that the activities at issue are religiously motivated and that the legal measure under review burdens the exercise of those freedoms. Once it is determined that religious freedoms are at issue and that they are burdened, then they are to be preferred and ordinarily will prevail unless the state can demonstrate an overriding or compelling reason. Under the German methodology, this balance is achieved pursuant to the general balancing of interests test. Under *Sherbert*, the Court employs strict scrutiny analysis.[119] While the methodologies of the two Courts are thus similar, the Courts differ in the range of their application of the methodologies. Under *Sherbert*, the Supreme Court has only rarely granted an accommodation.[120] The Constitutional Court has been far more accommodating of religion, as we shall see.

As in the sharp contrast in approach between *Sherbert* and *Smith*, the approach of the Constitutional Court aligns much more with *Sherbert* than *Smith* for essentially the same reasons that the two Supreme Court cases differ. First, unlike *Smith* and like *Sherbert*, the Constitutional Court accords religious freedom preferred status through the methodology it employs to gauge the relative importance of the values at issue. Because religious freedoms are valued as preferred manifestations of human dignity, the Constitutional Court is unwilling to subject them to the vagaries of the political process. By contrast, the *Smith* Court is willing to allow the political process to

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117. 374 U.S. 398 (1963).

118. 494 U.S. 872 (1990).

119. *Sherbert*, 374 U.S. at 403, 406-08 (holding that burdens on free exercise of religion "may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate'" and that "no alternative forms of regulation would combat such abuses without infringing First Amendment rights") (citations omitted & alteration in original)). Justice O'Connor expressed the qualities of strict scrutiny aptly. *Smith*, 494 U.S. at 894 (O'Connor, J., concurring) ("[W]e have respected both the First Amendment's express textual mandate and the governmental interest in regulation of conduct by requiring the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest.").

120. As the rule of *Sherbert* was crafted in the context of a state unemployment scheme, several cases addressing unemployment likewise resulted in accommodation under the *Sherbert* approach. *See* Frazee v. Ill. Dep't of Employment Sec., 489 U.S. 829, 834-35 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 143-45 (1987); Thomas v. Review Bd., 450 U.S. 707, 719-20 (1981). In addition, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), employed generally the *Sherbert* approach in deciding that the old world Amish could be excused from sending their children to school beyond the eighth grade despite Wisconsin state law requiring attendance through high school. *Id.* at 219-36.

arbitrate the range of permissible, religiously grounded action because conduct, religious or otherwise, is subject to the limitations of the general laws.[121] Thus, general laws circumscribe religious freedom.

Second, because religious freedoms are preferred in Germany, the general law must yield and the social order must accommodate religious practices. Thus, under the methodology of the Constitutional Court, there is no place for application of neutral, generally applicable laws over and above religious freedom, the approach of *Smith*. There is a world of difference between an approach that carves out religious freedom as a haven amidst the wide expanse of general laws and one that insists upon obedience to general laws, notwithstanding the demands of inner conscience.

We might say the German approach accords high respect to the dictates of conscience, whereas the *Smith* approach forces a conflict between the demands of law and faith. John Locke posed the conflict in a way similar to Justice Scalia in *Smith*.[122] And Locke had a decisive influence on Thomas Jefferson, who largely echoed the position of Locke concerning accommodation of religious conduct.[123]

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121. 494 U.S. at 890:

> It may be fairly said that leaving accommodation to the 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.

122. Like Roger Williams, Locke attempted to protect religious liberty by separating the jurisdictions of government from religion to the extent possible so that the two would not intrude upon the realm of the other. "I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion and to settle the just bounds that lie between the one and the other." LOCKE, *supra* note 63, at 18; *see id.* at 18-19, 32, 47, 56. However, when faced with a conflict between the two, government would prevail. "[T]he private judgment of any person concerning a law enacted in political matters, for the public good, does not take away the obligation of that law, nor deserve a dispensation." *Id.* at 59.

> [T]hose things that are prejudicial to the commonwealth of a people in their ordinary use, and are therefore forbidden by laws, those things ought not to be permitted to churches in their sacred rites. Only the magistrate ought always to be very careful that he do not misuse his authority, to the oppression of any church, under pretense of public good.

Id. at 48-49. For careful consideration of the thought of John Locke, see Timothy L. Hall, *Roger Williams and the Foundations of Religious Liberty*, 71 B.U. L. REV. 455, 490-95 (1991); McConnell, *supra* note 15, at 1430-36. For careful consideration of the thought of Roger Williams, see Edward J. Eberle, *Roger Williams' Gift: Religious Freedom in America*, 4 ROGER WILLIAMS U. L. REV. 425, 438-63 (1999).

123. "[T]he opinions of men are not the object of civil government, nor under its jurisdiction . . . it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order . . . ."

Like Locke and Jefferson, Justice Scalia envisions religious freedoms as encompassing the freedom to believe what you like.[124] However, religiously grounded conduct is limited by law. When faced with that situation, Locke advocated that a person should follow his or her conscience and accept the consequences of breaking the law.[125] *Smith* is an outcropping of Lockean thought.

No doubt, the specific textual mandate of religious freedom in the two constitutions reasonably preferences religion. Thus, a person acting pursuant to religious conviction should be excused from trying to satisfy claims of law and conscience, as James Madison argued.[126]

THOMAS JEFFERSON, *A Bill for Establishing Religious Freedom*, *in* THOMAS JEFFERSON, WRITINGS 346, 347 (Merrill D. Peterson ed., 1984) [hereinafter JEFFERSON, WRITINGS]. "The legitimate powers of government extend to such acts only as are injurious to others." THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 159 (William Peden ed., Univ. of N.C. Press 1955) (1787). "[T]he legislative powers of government reach actions only, and not opinions . . . [M]an . . . has no natural right in opposition to his social duties." Letter from Thomas Jefferson to Nehemiah Dodge and Others, a Committee of the Danbury Baptist Association, in the State of Connecticut (Jan. 1, 1802), *reprinted in* JEFFERSON, WRITINGS, *supra*, at 510, 510. Jefferson largely conceived freedom as belief and opinion, and not acts, which civil government was free to regulate.

Based upon Jefferson's distinction between beliefs (protected) and actions (unprotected), the Supreme Court decided *Reynolds v. United States*, 98 U.S. 145, 164 (1878), holding that Mormons were not excused from polygamy laws. For careful consideration of Jefferson's thought, see Hall, *supra* note 122, at 495-505; McConnell, *supra* note 15, at 1430-31, 1449-52.

124. *Smith*, 494 U.S. at 877 ("[F]ree exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires.").

125.

> [O]bediance is due in the first place to God, and afterwards to the laws. . . . "What if the magistrate should enjoin any thing by his authority, that appears unlawful to the conscience of a private person?" . . . I say, that such a private person is to abstain from the actions that he judges unlawful; and he is to undergo the punishment, which is not unlawful for him to bear; for the private judgment of any person concerning a law enacted in political matters, for the public good, does not take away the obligation of that law, nor deserve a dispensation.

LOCKE, *supra* note 63, at 59. "Who shall be judge between them? I answer God alone; for there is no judge upon earth between the supreme magistrate and the people. . . . You will say then the magistrate being the stronger will have his will, and carry his point. Without doubt." *Id.* at 61.

126. According to James Madison:

> The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. . . . It is unalienable also; because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty [to the Creator] is precedent both in order of time and degree of obligation, to the claims of Civil Society. . . . We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society. . . .

The approach of *Sherbert* and the German Constitutional Court is in line with Madisonian thinking. There is much more to say about these general approaches to claims of conscience. But we are getting ahead of ourselves. We need to examine further German law to gain greater insight into its contrast with American law.

B. Blood Transfusion

The degree to which German law is willing to accommodate a person's exercise of religious freedom is perhaps best illustrated by the *Blood Transfusion* case.[127] The facts are heart-rending, posing a stark choice between the claims of conscience and law. A married couple were members of a dedicated evangelical brotherhood that relied on God to take care of all their worldly problems. Consistent with this belief, the group refused medical treatment as a practice, putting their faith in God. After the wife had her fourth child, she had severe blood loss. A blood transfusion was recommended. After discussion among themselves and consultation with doctors, the couple decided to forego the blood transfusion, placing their faith in God to heal her. The woman was fully conscious and understood the consequences of her decision up until the moment she died, due to loss of blood.[128]

The husband did not act to hospitalize or otherwise seek medical treatment for his wife. He wanted to respect his wife's wishes. The state brought charges of neglect against the husband. He was convicted and was sentenced to eight months in prison.[129]

The stark question for the Constitutional Court was whether such obviously religiously motivated action could be limited by concerns of health and life, mediated here by the criminal law. As with *Rumpelkammer*, *Blood Transfusion* is a landmark case, and it is worthwhile to study the Court's construction of religious freedom.

MADISON, *supra* note 6, *reprinted in* Everson v. Bd. of Educ., 330 U.S. 1 app. at 64 (1947) (Rutledge, J., dissenting). At times, Madison expressed quite radical positions. Early in his public life, Madison posited that government should be able to limit religious liberty only when "the preservation of equal liberty and the existence of the state are manifestly endangered." TIMOTHY L. HALL, SEPARATING CHURCH AND STATE: ROGER WILLIAMS AND RELIGIOUS LIBERTY 135 (1998) (internal quotations omitted). Later in life, Madison expressed similar thoughts. Religious rights should prevail "in every case where it does not trespass on private rights or the public peace." Letter from James Madison to Edward Livingston (July 10, 1822), *in* 9 THE WRITINGS OF JAMES MADISON 98, 100 (Gaillard Hunt ed., 1910). For a detailed consideration of Madison's thought, see Hall, *supra* note 122, at 505-13; McConnell, *supra* note 15, at 1453-55, 1464.

127. BVerfGE 32, 98 (1971).

128. *Id.* at 99.

129. *Id.*

Religious freedoms are particularly valued manifestations of human dignity and, therefore, are to be broadly construed in the German constitutional order, as we have learned.

> In a state anchored to human dignity as the ultimate value, and in which individual self-determination is likewise acknowledged as a common value, freedom of belief guarantees individuals a protected sphere against state incursion, in which people can freely form their lives according to their beliefs. In this way, freedom of belief is more than religious tolerance, i.e., mere tolerance of religious or nonreligious conviction. Religious freedoms embrace not only the inner freedom to believe or not believe, but also the outer freedom to manifest faith in life, to profess, and to proselytize. Also included is the right of individuals to orient their whole lives on the lessons of faith and their inner convictions.[130]

The Constitutional Court's estimation of the value order as centered on human dignity facilitates the central focus of German law: nourishing the ideal of men and women as self-responsible, free personalities developing within the social order.[131] The role of religious rights within this strategy is to enable people to unfold human capacity according to the needs of inner conviction and spirit. Religious rights are especially valued in this regard, as they constitute some essential part of the innermost soul of men and women.

The high valuation of religious freedom can be acknowledged in another regard as well. Unlike most of the basic rights contained within the Basic Law, Article Four religious freedoms are textually unbounded, a status few rights have.[132] Thus, as a matter of constitutional architecture, individual religious freedoms constitute part of the very essence of the constitutional value order.[133] Under this construct, the interests of the general law will ordinarily yield to the preferred constitutional value of religion.

In view of these principles, the result of *Blood Transfusion* is predictable. There was no real question that the husband's conduct (and for that matter the wife's) was religiously motivated and, therefore, within the ambit of Article Four religious freedoms.

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130. *See id.* at 106.

131. *Id.* at 107-08.

132. Note again that the main communication freedoms of Article Five are limited by "the provisions of general laws, . . . protection of young persons, and the right to personal honor." GG art. 5(2) (F.R.G.). By contrast, artistic and scientific freedoms, like religion, are unlimited by the text. *Id.* art. 5(3) (F.R.G.).

133. *Cf.* BVerfGE 32 at 108.

Contrapoised against the preferred value of religion was the limitation of the criminal law. The Court recognized that this placed the husband in a difficult, seemingly irresolvable, conflict of conscience. "He was put in a situation that tested the limits, in which the general legal order posed a conflict with the command of his personal beliefs, and he felt the obligation here to follow the higher command of conscience."[134] In view of the centrality of man and woman developing freely according to the dictates of human dignity, precisely such a conflict is one that the constitutional order is designed to remove:

> All state power must respect to the utmost degree religious conviction. . . . Thus, criminal law must yield, when its application leads to a concrete conflict between . . . legal obligations and a command of conscience that places the person in mental distress over being labeled a criminal that predominantly stigmatizes him socially and therefore violates his human dignity.[135]

Accordingly, the requirements of criminal law must be suspended in situations where they pose direct conflicts with religious convictions.[136]

Applying these teachings, the Constitutional Court released the husband from any criminal sanction, finding that the lower court had not adequately respected the freedoms of Article Four. The couple appreciated the physical danger the wife was in. Nevertheless, they believed God would take care of them. Their religious conviction must be respected.[137] Moreover, the decision was one the wife made with full awareness; it was unfair to punish the husband for her decision. "A marriage consists of two autonomous people each with the right to free unfolding of personality."[138] Ultimately, the decision was hers, and hers alone, to make.

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134. *Id.* at 109. The United States Supreme Court framed the relevant conflict similarly. "The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." Sherbert v. Verner, 374 U.S. 398, 404 (1963).

135. BVerfGE 32 at 109.

136. Despite the Constitutional Court's statements that criminal laws must be suspended in the face of religious conviction, it is doubtful such will always be the case. Criminal laws yet apply to religious actors, and it is unrealistic to think that all criminal laws will be suspended in favor of conscience motivated action. *See* 1 DAS BONNER GRUNDGESETZ: PRÄAMBEL, ARTIKEL 1 BIS 19, 519-20 (Christian Starck ed., 1999).

137. BVerfGE 32 at 110.

138. *Id.*

Measured against American law, *Blood Transfusion* is a sharp contrast with prevailing American authority[139] and also with the Supreme Court's approach in *Smith*. *Blood Transfusion* and American cases pose exactly the same conflict: religious conviction juxtaposed against life. *Blood Transfusion* and *Smith* pose essentially the same conflict: religious conviction juxtaposed against obligations of the criminal law. The Constitutional Court resolves the conflict exactly opposite of the Supreme Court and most American lower courts. The weight of American authority overrides religious conviction in favor of life. In *Smith*, the Supreme Court determined that religious conviction is no excuse for disobeying the law, especially the criminal law.[140] Thus, the Supreme Court brushed over the religious motivation of the conduct, fearing otherwise that "conscience [will be] . . . a law unto itself."[141] The Court seems to prefer law and order—security and predictability—to the unpredictable and disruptive influence that exercise of religious rights can have.[142] Consistent with the position of John Locke, the general law should prevail over religious conviction in the social order. As a matter of personal choice, a religious person should follow the dictates of conscience and pay the price for disobeying the law. In essence, the message is: go to jail for conscience, as the husband in *Blood Transfusion* was prepared to do.

By contrast, we can now see that the Constitutional Court unravels the conflict exactly opposite. In situations of conflict, religious freedoms are to be preferred to the extent possible over the obligations of the general law, including those of the criminal law, so that a person can freely pursue his destiny as empowered by his inalienable rights. Contrasted with *Smith*, *Blood Transfusion* is all the more remarkable in that the nature of the conduct sought to be

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139. *See, e.g.*, *In re* President & Dirs. of Georgetown College, Inc., 331 F.2d 1000, 1010 (D.C. Cir. 1964) (allowing a hospital to administer a blood transfusion to a Jehovah's Witness, over her and her husband's objections for religious reasons); John F. Kennedy Mem'l Hosp. v. Heston, 279 A.2d 670 (N.J. 1971) (authorizing the state to perform an operation and blood transfusion on a Jehovah's Witness, despite lack of consent, to save a life), *overruled by In re* Conroy, 486 A.2d 1209, 1224 (N.J. 1985). *But see* Pub. Health Trust v. Wons, 541 So. 2d 96, 101-02 (Fla. 1989) (holding that the state violated the religious rights of a Jehovah's Witness in administering a blood transfusion over that person's objections).

140. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 879 (1990).

141. *Id.* at 890.

142. Thomas Jefferson feared the irrationality and zeal of religion as well. He preferred rational religion, like Unitarianism, his ideal of sensible religion. McConnell, *supra* note 15, at 1450. He called the idea of the holy trinity "unintelligible Athanasian jargon." Letter from Thomas Jefferson to Wells and Lilly (Apr. 1818), *in* JEFFERSON, WRITINGS, *supra* note 123, at 1413, 1413.

discouraged was so much more severe. A human death, albeit resulting from the victim's own will and nonaction of the actor, is far more serious than a man's use of peyote. We might use this contrast to illustrate the lengths to which German law is willing to accommodate religious conviction, especially when viewed against the weight of American authority. Conversely, we might observe how skittish the Supreme Court seems over giving religion its proper due, perhaps fearing too much the disorder that might be unleashed within society by religious conscientious objection.

In all respects, *Blood Transfusion* fits the pattern of German law and brings into central focus the conflict that can arise between claims of conscience and claims of law. As a matter of methodology, a claimant must show that his or her religion is burdened. Once a burden on religion is demonstrated, accommodation must be made within society unless strong considerations suggest otherwise. In *Rumpelkammer*, the accommodation affected the marketplace. In *Blood Transfusion*, accommodation affected the criminal law. We will soon review other illustrations of accommodating religious conviction, including with respect to judicial process, political qualification, and laws respecting animals. Suspension of the general law illuminates the point of German law: human beings are to be accorded high respect in the pursuit of their dignity—which they fundamentally determine—especially over affairs of the soul. Respect of the human being is one essence of constitutional democracy.

C. Denial of Oaths

The pattern of granting people motivated by religious conviction accommodation from requirements of the general law is further evident in a set of cases where people refused to take oaths that ordinarily were required as qualifications to perform duties under the law. In *Denial of Witness Oath*, an evangelical priest refused to be sworn in as a witness to a court proceeding because of his conviction that the Bible prohibited the taking of oaths.[143] To swear an oath was to blaspheme God. In a similar manner, in the *Bavarian Official Oath* case a man elected as an alternate representative to local government in Bavaria refused to be sworn in under the required oath because of his religious conviction as well.[144] In both cases, the Constitutional Court accommodated the objectors, realizing that compelling the oath

143. BVerfGE 33, 23 (1972).
144. BVerfGE 79, 69 (1988).

constituted coercion of conscience. The approach of the Court is along the lines of the seminal Supreme Court case of *West Virginia State Board of Education v. Barnette*, where the Court recognized, upon second thought,[145] that forcing the pledge of allegiance on unwilling believers was a cardinal violation of a free democratic order.[146]

Protection against compelled oaths is built into the architecture of the Basic Law, as in the United States Constitution.[147] The design of both charters grants broad relief from the requirement of taking oaths, usefully obviating a case-by-case assessment of these issues. Article 140 of the Basic Law incorporates the Weimar constitutional provision that no one can be compelled to render a religious oath against his or her will.[148] Articles 56 and 64(2) of the Basic Law declare that the Federal President, Chancellor, and federal ministers, respectively, assume office upon taking an oath, but that the oath can be religious or nonreligious. Release from the taking of prescribed oaths is thus very much in accord with the design of the Basic Law.

1. *Denial of Witness Oath*

In *Denial of Witness Oath*, there was no doubt that the pastor's refusal to take the oath was religiously motivated. The pastor felt that taking the oath was a violation of Jesus' teaching in the Sermon on the Mount.[149] The Constitutional Court thus had little difficulty in determining that his decision not to take an oath was a central aspect of religious freedom guaranteed in Article Four.

The conflict posed was between religious conviction and assurance of truth, solemnity, and fairness in the judicial process, which the required oath was designed to facilitate.[150] The interests of civil justice are unquestionably important. Yet, the Court concluded

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145. *See* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

146. 319 U.S. at 633-34.

147. *See* U.S. CONST. art. VI, cl. 3 ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."); Torcaso v. Watkins, 367 U.S. 488, 494-95 (1961) (ruling it unconstitutional for Maryland to deny an official notary public office for refusing to take an oath affirming belief in God, as required by the Maryland constitution). The issue of exempting religiously motivated people from required oaths arose in early, preconstitutional America. This is especially notable in that there were few occasions testing the scope of free exercise freedoms. Most colonies allowed religious exceptions to oath requirements. McConnell, *supra* note 15, at 1466-68.

148. GG art. 140 (F.R.G.) (incorporating WRV art. 136(4) (F.R.G.)).

149. BVerfGE 33 at 28.

150. *Id.* at 30.

that the values of religious conviction are more important. Thus, the Court, in a five-to-two decision,[151] ruled that religious objectors must be exempted from the necessity of taking oaths. "The state must allow an exception here, in order to fulfill the guarantee of the [Article Four] right, to avoid placing the person in an unavoidable conflict in his spiritual-moral existence as an autonomous person between state commands [of law] and commands of faith."[152]

The exemption is available to anyone motivated by genuine religious or ideological conviction. "The state is not qualified to judge the correctness or falsity of anyone's religious conviction."[153] Rather, the state must be neutral and tolerant with respect to claims of religion or ideology. "The command of official tolerance in questions of faith and ideology applies especially to minorities and sects, which experience shows are not ordinarily given much due."[154] Thus, the Court ordered the legislature to enact a law allowing for conscience-motivated exemptions.

In its methodology and result, *Denial of Witness Oath* fits the pattern of German law, as we have observed. Once the Court determined that the motivation of the pastor was religious, it identified the conflict as one between religious freedom and obligations of the law. With the conflict in full view, the Court takes the next step and accommodates religious practice against the claims of the general law. In the case, the pastor must be exempted from the general requirement that witnesses in judicial proceedings render an oath prior to testifying in order to relieve the pastor from the conflict. Freed of the conflict, the pastor can then act fully on the dictates of conscience.

2. *Bavarian Official Oath*

The *Bavarian Official Oath* case builds on the principle of *Denial of Witness Oath*. Like that case, the elected official felt commanded by religious scripture not to participate in an oath that was required as part of the ceremony to assume political office.[155] He had been

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151. The dissent reasoned that the rendering of an oath was an indispensable element of the constitutional order, binding the oath-taker and the state to principles of justice and God, and therefore necessary to the administration of justice. Taking of the oath was thus to be preferred over the religious convictions of the pastor. Only those sects that had a long-standing history of dispensation from the taking of oaths should be excused. *Id.* at 35-42.

152. *Id.* at 32.

153. *Id.* at 30.

154. *Id.* at 32.

155. The Court had no difficulty determining his religious conviction. Bavarian Official Oath, BVerfGE 79, 69 (76) (1988).

elected to serve as an alternate representative to a Bavarian state office. He wanted to serve in office, but was denied that privilege because of his refusal to take the oath.[156]

The Constitutional Court resolved the dilemma, on a five-to-three basis, along the lines of its resolution in *Denial of Witness Oath*. It is a cardinal violation of the German Constitution to place a person in the position of choosing fidelity to conscience or law. Animated by the seminal value of human dignity, the only reasonable course is to remove the dilemma by suspending the legal requirement that caused it, allowing the person to follow freely the claims of conscience. Accordingly, the requirement of taking the oath prior to assuming office must be suspended so that the man can follow his conscience and his political career. Besides, alternative means were available to attest to a representative's belief in the constitutional order.[157] Thus, granting an accommodation was not difficult.

D. Ritual Slaughter

Ritual Slaughter involved a Turkish citizen of Sunni Orthodox Muslim faith who had lived in Germany for the last twenty years as one of the many guest workers (*Gastarbeiter*) who populated Germany during its labor shortage after World War II and contributed to the economic miracle of West Germany.[158] He was descended from one of these guest workers (as well), inheriting a butcher shop from his father.[159] Free exercise rights are not confined to citizens, but apply to aliens as well. He desired to practice his craft of butchering according to his belief in Islamic slaughter rites for which he had a dedicated clientele. According to his belief, it is necessary to slaughter animals quickly and painlessly. The Islamic rite is akin to kosher butchering (*Schächten*).[160]

The problem for the butcher was that the craft of butchering, like so many aspects of German and European Union life, was heavily regulated. The German law reflected high regard for the welfare of

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156. *Id.* at 70-71. American law comes out similarly. *See* McDaniel v. Paty, 435 U.S. 618, 629 (1978) (striking down a law prohibiting ministers from serving as delegates to the constitutional convention).

157. The representative was prepared to confirm the substance of the oath in a ceremonial way, without actually having to take the oath. *See Bavarian Official*, BVerfGE 79 at 77.

158. BVerfGE 104, 337 (2002).

159. *Id.* at 340.

160. *Cf. id.* at 338.

animals, if such a thing may be said about the act of slaughtering.[161] Under the German law, animals were to be stunned first and then killed as a way of making death as painless as possible. The Turkish butcher refused to comply with the law, viewing it to be contrary to Islamic teaching.

The law had contemplated just such circumstances, carving out exceptions for those motivated by religion. The people contemplated by such accommodation, in fact, were Jewish and Islamic believers.[162] However, to get such an accommodation, it was necessary first to acquire permission from relevant religious authorities. The Turkish butcher had no such official permission.[163] Evidence indicated that prevailing Sunni opinion did not require that meat be prepared according to the rite the Turkish butcher practiced.[164] Lacking official

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161. Germany recently incorporated into the Basic Law a provision empowering the state to protect natural foundations of life, including animal life. The provision, Article 20(A) of the Basic Law, provides: "Mindful also of its responsibility toward future generations, the state shall protect the natural bases of life by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order." GG art. 20(A) (F.R.G.).

162. Kosher butchering (*Schächten*) was previously widely exempted from the general law in Germany that animals first be stunned prior to being slaughtered. With the rise of Nazism, these exemptions were removed as part of the persecution of Jews. After World War II, there was only piecemeal, state-by-state regulation of slaughter, although the practice was widely tolerated. The federal law of 1986 at issue in *Ritual Slaughter* was the first countrywide treatment of the issue in modern times. *See Ritual Slaughter*, BVerfGE 104 at 338.

163. The Turkish butcher had obtained permits in the past to engage in ritual butchering. However, these permits were granted before the law went into effect and before the decision of the Federal Administrative Court enjoining the practice. Under the law, accommodations could be granted when religious authorities determined that the ritual was mandatorily required by the religion. In this altered legal situation, officials would not grant the permit. *Id.* at 339-41.

164. *Id.* at 340-41. The Federal Administrative Court deferred to a lower appellate administrative court opinion, which relied on the opinion of a Sunni expert in Cairo for its determination that the rite desired by the Turkish butcher was not required as a matter of faith. According to this expert, Muslims consumed meat whether or not prepared pursuant to the ritual. According to the Muslim council in Germany, however, the rite was required. The Muslim council in Germany believed that the proper interpretation of the expert from Cairo was that the rite could be dispensed with in an emergency.

Muslims do not organize themselves into a hierarchical structure which can set and manage policy for the religion as a whole. The lack of organizational hierarchy makes it difficult for European countries, like Germany and France, which are accustomed to negotiating with representatives of a religion, to reach accords. Katherine Pratt Ewing, *Legislating Religious Freedom: Muslim Challenges to the Relationship between "Church" and "State" in Germany and France*, DAEDALUS, Fall 2000, at 31, 35-40. In Germany, a representative of the religion is needed to form a public corporation, determine religious instruction in the public schools or other religious matters. Robbers, *supra* note 33, at 657.

permission, German authorities and courts enjoined the butcher from practicing his craft according to his chosen creed.

Ritual Slaughter thus raised a number of important issues for religious freedom in Germany. First, the case is among the most recently decided major cases of the Constitutional Court, and thus illustrates how free exercise freedoms are conceived in contemporary Germany. Second, the case involved the practice of Islam, a growing force in Germany, but yet a minority religion in relation to the predominantly Christian character of the country. Third, the case also involved a diversity of views within the Islamic community, forcing the Constitutional Court to confront a range of beliefs over what Islam is. In view of the increasingly pluralistic nature of German society, these were extremely crucial questions in need of an answer.

Because enjoining his craft in his chosen way impeded his personal freedom, Article Two personality rights were at issue as well as Article Four free exercise claims. Article Two personality rights are always available as a catchall for dimensions of personal freedom not captured by more specific basic rights.[165] Likewise, because the prohibition impacted on his profession, Article Twelve occupational freedoms were at stake as well. However, the Constitutional Court applied the plain language of the Article to hold that occupational freedoms applied only to Germans.[166]

Centrally, however, *Ritual Slaughter* concerned free exercise rights, and that is how the Constitutional Court evaluated it. The Court cut to the chase. At issue here was the ability of the Muslim butcher to practice his creed according to his belief. Individual exercise of religious belief is a core manifestation of the personal vision of human existence that emanates from the ultimate constitutional value of human dignity. So viewed, what is important is that the personal vision prevail, not technical legal requirements. Thus, for the Court it was less significant that the butcher had not obtained required permissions from religious authorities. More significant was the underlying religious motivation for the butcher's actions.

Further, preparation and consumption of meat prepared according to this Islamic rite was a central religious experience for a whole

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165. The case of *Eppler* cemented the view that Article Two always exists as a reserve of personal freedom to protect activities that do not fit in the more particular enunciation of freedoms in the Basic Law. BVerfGE 54, 148 (153) (1980). For development of this idea, see EBERLE, *supra* note 11, at 62-63.

166. *Ritual Slaughter*, BVerfGE 104 at 346. Instead, the Court valued the occupational freedom issue under the Article Two personality right catchall.

community of believers formed by the butcher and his customers. The butcher and his customers fervently believed in this ritual butchering as central to their daily lives. It was important to recognize the religious convictions of these believers so that they might live life according to their creed, even if other Muslims believed differently. In so doing, the Constitutional Court recognized a diversity of belief within the Islamic community.[167]

Recognition of alternative, and competing, communities of faith, even within a particular religion, is an important principle of religious freedom. First, the principle acknowledges the validity of belief from the perspective of the believer, as compared to the body that hierarchically or organizationally may stand to administer the faith. The orientation toward individual belief seems more in keeping with principles of religious freedom and individual rights. Second, providing for the possibility of competing communities of faith facilitates an open contest for multiple claims of truth and conviction to set forth their tenets. The success on earth of any creed will be determined by how many adherents it attracts. Third, competition between communities of faith is, by definition, open to the new and the different. Minorities or dissenting voices thereby encounter a more hospitable environment. They have a better chance of advancing their claims and achieving success by the strength of their creeds. This is in keeping with the origins of religion, most of which had their start in a position of dissent, gaining success later. In these respects, the Constitutional Court has designed an approach sensitive to minorities' exercise of religious liberty.

Facilitation of diversity of religious faith logically serves to protect religious freedom as well. Guaranteeing every person the ability to believe what they like and to act on such belief engenders broad respect for religious liberty. Vigorous religious rights will act as a bulwark against government, as citizens will voice objection to government curtailment of liberty. In a country of diverse religious beliefs, it will be hard for any one group to impose its beliefs on another.[168] James Madison advocated diversity in religious belief as security for civil rights and as security for peace and stability in a republic.[169]

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167. *Id.* at 354.

168. McConnell, *supra* note 15, at 1515-16.

169. "A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source." THE FEDERALIST NO. 10, at 60

It was not always so in Germany. Authorities sometimes treated Islam as a threat to society because of their perception that the religion was fundamentalist, antidemocratic, and hostile to human rights, especially the equality of women. Germans feel especially vulnerable to perceived threats in view of their past history of political instability during the Weimar democracy, which aided the rise of totalitarian Nazism. These perceptions may help explain the authorities' reluctance to facilitate public practice of Islam, such as the building of recognizable mosques, public broadcasting of calls to prayer through loud speakers, and freedom of Muslim women and girls to cover themselves.[170] Yet, courts have also accommodated Muslims from social strictures. For example, courts have allowed Muslim women and girls to wear head scarves in the classroom (unlike in France and Turkey) and exempted girls from compulsory school activities like gym and swimming classes.[171] The Constitutional Court has also recently ruled that a woman of Islamic faith cannot be denied a position as a public school teacher because she desires to wear a head scarf while teaching, as discussed more fully next.[172] The integration of Muslims into German society is a forefront issue.

Within this context of historical German and European treatment of Islam, *Ritual Slaughter* stands out in bold relief as a landmark case on religious liberty, recognizing the principle of religious equality—that liberty applies equally to majority and minority practitioners, in deed as well as in word. Similar trends are apparent with respect to Jehovah's Witnesses[173] and the Baha'i.[174] Each of these religions is somewhat exotic when viewed against the traditional Christian culture. Their favorable treatment attests to the growing climate of hospitality

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(James Madison) (E.H. Scott ed., 2002). Madison repeated the idea in *The Federalist No. 51*: "In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects." THE FEDERALIST NO. 51, at 288 (James Madison) (E.H. Scott ed., 2002). Madison's theory for protection of religious liberty thus parallels his theory for protection of the republic against factions, as he famously developed in *The Federalist No. 10*.

170. Ewing, *supra* note 164, at 3-4, 7-8. The experience is much the same in France. *Id.*

171. *Id.*; *see also* Wuerth, *supra* note 31, at 1200-01.

172. Islamic Teacher's Headscarf, 2 BvR 1436/02 (BVerfGE Sept. 24, 2003), http://bverfg.de/entscheidungen/rs20030603_2bvr143602.html.

173. Jehovah's Witness, BVerfGE 102, 370 (2000) (ruling that the religion could not be denied public corporation status under article 137 of the Weimar Constitution on the ground that participation in voting was not requisite to prove loyalty to the democratic order).

174. Baha'i, BVerfGE 83, 341 (1991) (ruling that Article Four self-autonomy allows the Baha'i religion to rule itself as it likes, even when supreme religious authorities outside Germany order affairs differently than communities within Germany).

toward minority creeds and the correspondingly vigorous state of religious liberty in Germany. On the other hand, Germany still views Scientology with suspicion, treating it as a cult and a commercial enterprise, not a religion.[175]

The German principles of respect for diverse beliefs had immediate application in the case. Whether a practice is absolutely required as a matter of religious belief is less a question to be determined by religious officials. The question is much more likely to be answered within the context of a concrete community of believers.[176] Mere subjective belief is insufficient. The community must demonstrate to the court's satisfaction that the practice is required by their beliefs.[177] Given their sincerity and dedication to ritual slaughter, the Court was well satisfied that the butcher and his customers constituted a community that acted according to creed.

Posing the question in this fashion, the Court resolved it in the now common pattern of free exercise law that we have become familiar with. Given the clash between exercise of religious freedom and the constraints of the general law, the proper resolution is recognition and respect of religious practices even if that requires accommodation of the general laws. It is improper for the state to deny legitimate religious claims just because they deviate from accepted practice.[178] The Constitutional Court was careful to note the important state interest in preventing needless cruelty to animals. Animals are accorded high respect in Germany. The purpose of the law was to recognize animals as mutually living beings, not just

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175. The German position is similar to that formerly held by the Internal Revenue Service, which revoked Scientology's tax exemption for a period of over thirty years because "even if religious in nature [it was operated] for the enrichment of specific private individuals." Michael Browne, Comment, *Should Germany Stop Worrying and Love the Octopus? Freedom of Religion and the Church of Scientology in Germany and the United States*, 9 IND. INT'L & COMP. L. REV. 155, 191 (1998) (citation omitted); *see* Arthur C. Helton & Jochen Münker, *Religion and Persecution: Should the United States Provide Refuge to German Scientologists?*, 11 INT'L J. REFUGEE L. 310, 311 (1999).

Recently, the German Office of Finance exempted Scientology from taxes on the basis of a treaty on double taxation with the United States. German authorities were careful to observe that the tax ruling did not imply recognition of Scientology as a religion. However, Scientology officials viewed the ruling as a first step in setting Scientology on the same plane as other religions in Germany. *Steuerbefreiung für Scientology*, FRANKFURTER ALLGEMEINE ZEITUNG, Feb. 4, 2003, at 2; *Scientology ab sofort steuerfrei*, SPIEGEL ON-LINE, Feb. 3, 2003, *at* http://www.spiegel.de/wirtschaft;0,1518,233557,00.html. Thus, some change in thinking is apparent concerning Scientology.

176. Ritual Slaughter, BVerfGE 104, 337 (354) (2002).

177. *Id.* at 354-55.

178. *Id.* at 355.

objects.[179] Ethical treatment was the goal. However, the religious practice at issue had to be given fuller consideration than had been the case by the lower courts under the general balancing of interests test. The impact of the law was severe. Without any exception, the butcher would not be able to practice his craft according to his creed. His customers would also have difficulty obtaining meat sanctified according to chosen ritual. Thus, the Constitutional Court concluded, Article Two personality rights, in conjunction with the more specific protections of Article Four, had been violated.

In a sense, accommodation of the Turkish butcher was less of a leap than in the cases previously reviewed. The law recognized a range of exceptions from the general requirement that a person first stun animals before killing them, most of which were geared to Jewish and Islamic believers. Accommodating the butcher could as well fit within the pattern already recognized within the law.[180]

But in another sense the case did represent a leap. The Constitutional Court had the prescience to recognize the inherently personal nature of the convictions at issue. The Court respected the choices of the Turkish butcher and his customers on their own terms as they defined their belief. Recognition of such personal conviction was more important than belief as defined by religious or secular authorities. Validating the personal quest for faith is central. Thus, we can see the approach of the Court is one especially sensitive to the dilemma of individual existence, including the demands of conscience.

Ritual Slaughter contrasts with *Smith* over the process of accommodation of religion. In *Smith*, the Supreme Court viewed the democratic process as the main avenue for accommodation of religious belief.[181] Viewing *Ritual Slaughter* under this construct, one would be led to argue that democratic decision makers had made all the accommodations they desired in the law already enacted. The Federal Administrative Court evaluated the case on this basis. Hence, the Turkish butcher ought to seek political relief, not judicial relief, as in *Smith*. In contrast to the Supreme Court, however, this solution was not adequate to the Constitutional Court. Religious freedoms are too precious, and arguably too fragile, to be entrusted to the political

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179. *Id.* at 351.

180. Moreover, the Court noted that the authorities could have given fuller consideration to the second alternative listed in the law, which granted some discretion to parties trying to fulfill the aims of the law in making death as painless and quick as possible. *Id.* at 351-52.

181. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 890 (1990).

process. It is instead the core of the judicial function to safeguard these rights, especially when exercised by minorities. Minorities, more than majorities, need judicial solicitude precisely because minorities operate under laws made by majorities. Minorities are thus much more likely to run afoul of convention than majorities. In view of these concerns, the Constitutional Court's decision was all the more remarkable in that it further carved out religious freedom in the polity notwithstanding the significant accommodation already rendered in the statute.

Notably, German law has been stable and consistent for well over a thirty-year period, in contrast to the ebb and flow of American law, from *Sherbert* to *Smith*. Fidelity in service of basic human rights is desirable in a world undergoing severe change caused by forces like computerization, globalization, multiculturalism, and terrorism. A second lesson of *Ritual Slaughter* is that these freedoms apply to all, minority religions as well as majority. In this respect, the case is notable in its solicitude for the Turkish minority in Germany, which has often felt like second-class citizens. Indeed, the Turkish butcher was a minority believer within a minority faith. Looking forward, *Ritual Slaughter* would seem to signal that Germany is equipped to deal with the demands of minorities to equal religious liberty. In these respects, Germany seems more attuned to demands of a multicultural society, a likely product of globalization. By contrast, *Smith* would seem to signal the opposite, recognizing that minority religions will likely suffer under democratic rule while majority religions prosper.[182]

E. Islamic Teacher's Head Scarf

As this Article was going to press, the Constitutional Court rendered an important decision on free exercise freedoms, ruling five to three in a hotly contested case that an Afghani-born woman of acquired German citizenship, Fereshta Ludin, could not be denied a teaching position in the public schools because of her religious conviction to wear a head scarf while performing her duties.[183] *Islamic Teacher's Head Scarf* is a long and complicated decision, involving a constellation of rights that include Article Four religious rights of students and parents, Article Six parental rights, Article Seven educational rights, and Article Thirty-three guarantees of equality in

182. *Id.*

183. Islamic Teacher's Head Scarf, 2 BvR 1436/02 (BVerfGE Sept. 24, 2003), http://bverfg.de/entscheidungen/rs20030603_2bvr143602.html.

qualification and treatment (including with respect to religion or philosophical view) as a civil servant, in addition to the prospective teacher's Article Four free exercise rights. Because of the recent disposition and complexity of the case, I can only summarily discuss it. Yet, because *Islamic Teacher's Head Scarf* further substantiates the Constitutional Court's proactive empowerment of free exercise freedoms, especially in relation to Germany's rising minority Islamic population, it is in keeping with trends evident in *Ritual Slaughter* and merits some explanation.

The basis for the Constitutional Court's decision was that religiously compelled dress, such as the wearing of a head scarf, was a matter of personal free exercise of religion which government, therefore, could not use as a basis to deny qualification to the civil service (public school teachers are part of the civil service) under Article Thirty-three, at least in the absence of an underlying law that appropriately took into account the range of rights and considerations at stake in this complicated issue.[184] In this respect, *Islamic Teacher's Head Scarf* underscores the continuing flowering of free exercise freedoms in Germany, especially with respect to minority religions such as Islam, a major concern of the Court.[185] On this point, *Islamic Teacher's Head Scarf* is of a similar tenor to *Ritual Slaughter* and also of another recent decision in which the Constitutional Court ruled that a Turkish shop assistant had been wrongly dismissed for expressing a desire to wear a head scarf, again for religiously compelled reasons, at work in the perfume section of a department store.[186] Yet, because the Court predicated its ruling on the technical point that no law undergirded the authorities' decision to deny Ludin the teaching position and further stated that a law that properly considered relevant rights and interests at issue could result in denial of teaching positions to people wearing religiously compelled dress, *Islamic Teacher's Head Scarf* was a quite limited victory for religious freedom, although a victory indeed for Ludin.[187]

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184. *Id.*

185. *See id.* ("A regulation that prohibits teachers from displaying overtly their membership in a particular religious community or adherence to beliefs . . . is clearly in tension with especially pronounced growing diversity of religion in society.").

186. *See* Turkish Sales Clerk's Head Scarf, 1 BvR 792/03 (BVerfGE July 30, 2003).

187. In fact, Baden-Württemberg has since enacted a law prohibiting the wearing of religious garb by public school teachers in classrooms. Tony Szuczka, *German State Bans Head Scarf: Law Bars Teachers from Wearing It.*, COM. APPEAL (Memphis), Apr. 2, 2004, at A9. the law of Baden-Württemberg is likely to be the subject of a court case testing its constitutionality.

The mixed nature of the decision can perhaps best be read as a tentative attempt to resolve this contentious issue in respect to the far-reaching role of Islam in Western German society. Islam is relatively new to Germany, and more broadly Europe, and occidental society is adjusting to this new phenomenon. Many Germans are anxious about Islam, not knowing quite how to integrate people of Middle Eastern faith with Western culture. Germany is in the process of working out how Islamic minorities can express their identity in secular Western European society. Germans' multifaceted view of Islam is reflected in the different perceptions as to what wearing a head scarf represents. Wearing a head scarf could be interpreted variously as a political expression of Islamic fundamentalism, especially in contrast to the secular West; a cultural statement of ethnic identity expressing longing for the distant homeland; a traditional dress that honors familial ties; a modern statement of self-determination and identity; a symbol of subordination of women to men under Islamic law; or a religious observance.[188] The Court chose the latter, valuing the dress as religiously compelled based upon Ludin's association of the head scarf with her Islamic identity.[189]

The disputed nature of the ruling left the Court open to heavy criticism, with justification.[190] While it is beneficial for constitutional

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188. *Islamic Teacher's Headscarf*, 2 BvR 1436/02 at 13-14. The dissent viewed wearing of the head scarf as mainly a symbol of subordination of women to men and, therefore, inconsistent with the equality guarantee of Article Three. *Id.* at 29.

189. *Id.* at 3, 8. In rejecting Ludin's application for a teaching position, school officials of Baden-Württemberg reasoned that display of a head scarf was a political symbol of cultural separation from western society as well as a religious symbol. Ludin instead valued the head scarf as an expression of her personality and of her religious faith. *Id.* at 3.

190. It is quite possible that the Constitutional Court acted timidly out of respect for the democratic process, not wanting to substitute its judgment for democratic deliberation and decision over such a newly emerging issue as the role of Islam in German society. It is also possible the Court was meek in reaction to serious and sustained criticism unleashed in response to the Court's controversial decisions in *Soldiers are Murderers II*, 22 EUROPÄISCHE GRUNDRECHT ZEITSCHRIFT [EuGRZ] 443 (1995) (protecting freedom of expression to call soldiers murderers), *affirming in substance* Soldiers are Murderers I, 45 NJW 2943 (2944) (1994) (chamber decision), and *Krucifix II*, BVerfGE 93, 1 (1995) (holding the Bavarian-required display of crucifixes in public schools unconstitutional in the face of a complaint). The Court distinguished the case from *Krucifix II* on the basis that *Islamic Teacher's Head Scarf* involved an individual's exercise of religion (and therefore was also less likely to be attributed to state sponsorship) in comparison to the state sponsorship of religion in *Krucifix II*, and on the basis that a head scarf could be subject to multiple interpretations, only being a religious symbol when worn by a believer, in comparison to the cross, which always had the religious meaning of Christianity. *Islamic Teacher's Head Scarf*, 2 BvR 1436/02 at 13. Not surprisingly, this distinction was not convincing to the dissent. *Id.* at 27.

In fact, while the majority made the case for distinguishing the two decisions, the decisions were much alike. First, in both cases students had no choice but to be confronted

democracy to engage its citizens through democratic deliberation over the meaning of the constitution as much as possible, fundamental rights are not ordinarily thought to be subject to the majoritarian process of democracy. In this respect, *Islamic Teacher's Head Scarf* approximates the line of thinking present in *Smith*.[191] Given the complex of rights at stake in *Islamic Teacher's Head Scarf*, however, there may be greater justification for caution and deference in the case as compared to *Smith*.

The majority's recognition of the prospective teacher's free exercise freedoms seemed to be based on an attempt to understand the spiritual world of Islamic believers. Recognition of Islamic belief acknowledges the emerging role Islam now plays in German society. In turn, these developments led the Court to reassess civil service rules and state neutrality obligations in religious affairs. Left open was how multiculturalism would change church-state relations.

Traditionally, the state is under an obligation of neutrality in matters of religion out of concern that state support of particular religious/ideological views will be coercive to individuals partaking of state benefits. This principle of neutrality and corresponding posture of official restraint animates the German civil service. The German civil service is conceived as an intermediary between the state and citizens, a facilitator of citizens' rights under the positive dimension of freedom characteristic of the German constitutional order. For these reasons, civil servants are traditionally viewed as neutral agents of the legal order and, therefore, not able to exercise full basic rights in their official capacity. Proactive exercise of rights by civil servants, it is feared, would coerce or undermine citizens' exercise of their freedoms. On this view, Ludin could justifiably be denied a position as a teacher, for her exercise of free exercise rights would fundamentally violate civil service norms of neutrality and restraint, as the dissent argued.[192]

But the majority saw it differently. Requiring abstinence from religiously compelled dress out of concern that display of religious conviction would coerce students and undermine parental choice was asking too much of Ludin. She did not totally sacrifice her religious freedoms at the school door. These freedoms are fundamentally to be determined from the perspective of the religious community she is a

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with the symbols. Second, a teacher's display of plausibly religious dress might reasonably be attributed to state sponsorship as well, although indirectly. Third, many observers would view a head scarf as a religious symbol.

191. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 890 (1990).

192. *Islamic Teacher's Head Scarf*, 2 BvR 1436/02 at 20-25.

part of, echoing the fundamental principle of *Ritual Slaughter* that religious freedoms are to be judged from the perspective of the believer's community of faith.[193] Her community of belief viewed wearing head scarves as religiously compelled. It was therefore untenable to place her in a position of choosing her religion or her job.[194]

These principles follow from the growing diversity among religions in German society and the way such diversity affects the classroom.[195] School is the place for exposure to a marketplace of ideas and beliefs.[196] Learning to appreciate difference, respect alternative beliefs, and achieve toleration as building blocks to realization of integration of diverse people within society are important objectives in constitutional democracy.[197] True, overt display of religious observance in the classroom, especially controversial dress such as the display of a head scarf, could create conflict between teachers and students, or among students, or among students and parents. But to the mind of the Court, it was better to see whether, in fact, such conflict develops and then resolve it, as compared to presuming it will occur and prohibiting such dress out of such fear.[198]

Underlying the Court's reasoning would appear to be acknowledgment of Islam as a religion, which the Court seemed especially eager to respect given its minority status in Germany. Because Islam is a minority faith, there might be less danger that overt displays of its observance in classrooms would coerce students. These

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193. *Id.* at 11; *accord* Ritual Slaughter, BVerfGE 104, 337 (354).

194. *Islamic Teacher's Head Scarf*, 2 BvR 1436/02, at 10-11; *accord* Sherbert v. Verner, 374 U.S. 398, 404 (1963) (stating that this ruling forces one to choose between religious precepts and work).

195. *Islamic Teacher's Head Scarf*, 2 BvR 1436/02 at 16.

196. *Id.* at 6 ("Schools are no refuge, in which eyes are to be closed from the reality of a pluralistic society. Rather, schools have the mission to prepare youth for what they will encounter in society.").

197. *Id.* at 11-12.

198. *Id.* at 17. The Court reasoned that if conflicts over the wearing of religious garb in schools arise, it makes sense to require proof that wearing religious garb influences students. *Id.* at 14-15. The dissent valued the situation differently, viewing the display of a head scarf as fraught with such conflict. *Id.* at 25-26; *see* Lee v. Weisman, 505 U.S. 577, 588 (1992). In *Lee v. Weisman*, the United States Supreme Court noted:

> The potential for divisiveness is of particular relevance here [prayer after graduation] . . . because it centers around an overt religious exercise in a secondary school environment where . . . subtle coercive pressures exist and where the student had no real alternative which would have allowed her to avoid the fact or appearance of participation.

Lee, 505 U.S. at 588.

factors seem to be an implicit basis by which the majority distinguished *Krucifix II*. There is something fundamentally different between official accommodation of a minority belief within a majoritarian Christian culture (*Islamic Teacher's Head Scarf*) as compared to state sponsorship of the majority faith (*Krucifix II*), or so the Court seemed to be saying.

Necessarily, the Court's emphasis on personal freedom and sectarian diversity, even within public classrooms, called for some reconception of the role the state plays with respect to religion and, derivatively, civil service obligations. Rather than strict separation of church and state, more characteristic of the laciest tradition in France, the Constitutional Court envisioned the state role to be "not a distant, absent role . . . but rather a respectful, nourishing neutrality"[199] that accords "equality to the beliefs of all believers, understanding the attitudes advanced [by people] on equal terms."[200] Thus, even schools are "open for religious activity under the principle of an . . . overlapping, open and respectful neutrality."[201] Concretely in the case, this meant that a prospective teacher could not be refused a position out of hand for religious conviction to wear certain dress. Likewise, this more flexible principle of neutrality filtered into civil service obligations.[202]

Yet, the Court also recognized that the phenomenon of multiculturalism might result ultimately in a stricter separation of church and state in order to prevent discord in society.[203] Whether this would come to be or not would depend on how events unfolded. The contingencies at play in the issue would appear to be a factor in the Court's preference to have the democratic process be the forum initially to forge some workable accommodation of the competing rights and interests at stake. In the case, the absence of such a law determined the outcome.[204] Thus, at bottom, we can see that *Islamic Teacher's Head Scarf* is a tentative step in determining the role of

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199. *Islamic Teacher's Head Scarf*, 2 BvR 14363/02, at 4.

200. *Id.* at 11.

201. *Id.* at 6.

202. *Id.* at 10. Not surprisingly, the dissent took issue with the majority's conception of neutrality in church-state relations, and how this affected civil service obligations. *Id.* at 20-24.

203. *Id.* at 16-17.

204. Baden-Württemberg, the German Land at issue in the case, had considered but determined not to enact such a law. *Id.* at 30 (dissent). Baden-Württemberg has since enacted a law banning the wearing of religious garb by public school teachers in classrooms. Szuczka, *supra* note 187, at A9.

Islam in Germany. The case does not resolve definitively the issue of permissible religious garb in official forums, an additional point of contention to Court observers.

III. THE MEANING OF FREE EXERCISE

The difference in approach apparent in contemporary German and American law over the reach of Free Exercise guarantees forces a consideration of the freedoms protected by a Free Exercise Clause and their place in constitutional democracy. Since German law is more akin to *Sherbert* than *Smith*, the comparison of German law to current American law mirrors the contrast between *Sherbert* and *Smith*. The debate has been controversial and one with large repercussions.

The debate can be easily summarized. The approach of the Supreme Court under *Sherbert* and the German Constitutional Court can be considered one of advocating Free Exercise freedoms. Religious claims of conscience are anterior to society.[205] They are based on God. In the German view, conscience more generally is transcendent. Claims of the divine are superior to claims of society. Thus, the scope of Free Exercise rights is defined by religious duties, not laws of society.[206] Viewed this way, the Free Exercise Clause preserves the ability of a person to exercise religion pursuant to his or her conscience. The express enumeration of Free Exercise rights is a limitation of government in this regard. We might envision Free Exercise rights to be an essence on which the social contract is formed, like other essentials, such as free speech, equality, or separation of powers.

Based on this philosophy, the realm of religious belief is indisputably inviolate. A person may believe or not believe or alter belief on any creed he or she deems appropriate. Because the role of

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205. The idea has a long lineage:

> The civil sword (therefore) cannot rightfully act either in restraining the souls of the people from worship or in constraining them to worship, considering that there is not a title in the New Testament of Christ Jesus that commits the forming or reforming of His spouse and church to the civil and worldly power.

PERRY MILLER, ROGER WILLIAMS: HIS CONTRIBUTION TO THE AMERICAN TRADITION 133 (1965) (quoting Roger Williams). "[C]onscience. . . . [is] a persuasion fixed in the mind and heart of man, which enforceth him to judge . . . and to do so and so with respect to God, His worship." *Id.* at 158-59 (quoting Letter from Roger Williams to Major Endicott, Governor of Massachusetts (Aug. 1651)). Liberty of conscience is "precedent, both in order of time and degree of obligation, to the claims of Civil Society." MADISON, *supra* note 6, *reprinted in* Everson v. Bd. of Educ., 330 U.S. 1 app. at 64 (1947) (Rutledge, J., dissenting).

206. McConnell, *supra* note 15, at 1512-13.

government is limited in this respect, government must be tolerant of all beliefs and neutral with respect to them, treating them all equally. *Smith* would advocate this approach as well.

The controversy lies over the reach of religiously grounded conduct. Here the approaches of *Sherbert*/German and *Smith* diverge. *Sherbert*/German advocates protection of religiously inspired action to the extent it does not threaten important social interests such as health, safety, welfare, and the like. The *Sherbert*/German approach does not advocate absolute religious freedom. Absolute religious freedom could threaten the social order because of the disorder it might engender. (For example, religiously inspired pogroms, subordination of infidels, refusal to recognize civil authority or, to take an infamous historical example, the capturing of the town of Münster, Germany, by Anabaptists in 1534, who then persecuted and drove out those who would not conform to their strict religious order modeled on early Christianity, striking fear throughout Europe). Rather, religious freedom is bounded by the social order. Religious values stand at one end of a pole opposite social interests. Neither has an absolute claim over the other. Instead, each can make a claim on the other, and we must figure out a way to determine which will predominate over the other in the particular circumstance.

To accomplish the proper accommodation of religious freedom in relation to society, it is sensible to balance values of religious freedom against the significance of social interests, which ordinarily take form in society's laws. Because neither religious freedom nor social order can be absolute, a form of balancing the two values is logical. The Courts in the United States and in Germany have demonstrated how such balancing can be accomplished. The approaches are generally similar. The Supreme Court employs strict scrutiny analysis.[207] The Constitutional Court employs a general balancing of interests test, familiar enough from our review of German law. The German test gives due regard to the values of the constitutional order, of which religious freedom is an integral part, and then considers carefully the claims of society in relation to religion.

Both the American and German approach accord a preferred position to religion in this weighing based upon the assumption that claims of conscience rooted in religion are superior to claims of society. Where possible, a claim of conscience should prevail over obligations of the law when the two conflict. Claims of law can

207. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 403, 407 (1963).

predominate also. However, legal claims must be demonstrated to be important and crucial to the particular circumstance under review. Established case law of America and Germany demonstrates amply how sound accommodations can be reached, accommodations that sometimes favor religion[208] and sometimes society.[209] As a general rule of law, it is less important whether religion or social claims predominate in any case. More important is that due regard is given to religious freedom, as the polity determines the appropriate place for religion in a charter committed to religious freedom. Social interests are always likely to be given serious consideration given the centrifugal forces of majoritarian rule. It is easier to conform to law than to oppose it. Thus, on the whole, religious freedoms are in need of greater solicitude than social interests.

The approach of *Smith* differs over how to treat religiously induced conduct. Such conduct is permissible only to the extent it is within the scope of the law. When religiously inspired action collides with generally applicable neutral laws, neutral laws predominate.[210] Under the rule of *Smith*, therefore, the scope of religious action is determined by the democracy through the enactment of its laws. Law controls more than religion, an approach opposite of *Sherbert*. In fact, we can now see a difference in perspective. The approach of *Sherbert*/German is oriented toward the believer; religious duties control more than the law. *Smith* is oriented toward the law; law determines the range of religious freedom. The scope of religious freedom depends significantly on which perspective controls.

Under *Smith*, personal religious freedom can fairly accurately be calibrated along a dichotomy of belief (protected)/action (unprotected), unless allowed by the polity. The *Smith* rule thus tends toward being categorical; protection or nonprotection depends largely on whether the religious exercise is characterized as belief or action.[211] In this

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208. *See, e.g.*, *id.*; Rumpelkammer, BVerfGE 24, 236 *et seq.*(1968).

209. *See, e.g.*, United States v. Lee, 455 U.S. 252, 260 (1982) (holding that the government need to assure fiscal integrity of Social Security outweighs an Amish claim for exception). See also Wuerth, *supra* note 31, at 1200 n.479, and the authorities cited within for a description of German lower courts' rejection of accommodations for Muslims desiring to slaughter animals without anesthetization (now permitted by the rule of *Ritual Slaughter*) and for a Christian student desiring exception from swimming lessons.

210. *Smith* is in line with *Reynolds v. United States*, 98 U.S. 145 (1878), and also the famous position of neutrality advocated by Philip Kurland. *See* PHILIP B. KURLAND, RELIGION AND THE LAW OF CHURCH AND STATE AND THE SUPREME COURT 112, 115 (1962).

211. *Smith* thus follows the thought of Thomas Jefferson. *See* sources cited *supra* note 123.

respect the *Smith* rule promotes clarity in the law, in comparison to the messiness sometimes associated with balancing regimes. Under the particular balancing regimes of *Sherbert* and the German Constitutional Court, however, the rule of law has been fairly predictable. Thus, the benefits of a categorical rule in promoting stability in the law are not demonstrably better than that of the balancing regimes under review in this matter.

Another factor worth considering in assessing approaches to Free Exercise is promotion of the legal value at issue. Here the legal value is the constitutionally guaranteed right of religious freedom. Comparing the scope of freedom under *Sherbert*/German as compared to *Smith*, it is fair to say that the *Sherbert*/German approach is more protective of religious freedom. Naturally this would follow from an approach that protects actions as well as belief, as compared to an approach that largely protects only belief.

Conversely, it is also illuminating to measure the approaches from the perspective of how well they facilitate freedom's opposite: social order. Consideration of order is a relevant concern because constitutional democracy protects ordered liberty,[212] not liberty per se. Religion is fundamentally a spiritual, mystical phenomenon over which the believer has little, if any, control. If God commands, there is little to do but obey. Each person's conscience—the path to God—has the potential to be a law unto itself, as Justice Scalia aptly observed in *Smith*.[213] Multiplying conscience by people, any society would have difficulty securing common peace when faced with a multitude of consciences. These motivations were a factor in *Smith*.[214] It is fair to say that the rule of *Smith* favoring religious actors' compliance with generally applicable law favors order more than the *Sherbert*/German regime where elements of disorder are inevitable—the disorder resulting from religiously inspired conviction. However, while

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212. *See* Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969).

213. "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." Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 885 (1990) (citation omitted).

214. "Any society adopting such a system [strict scrutiny regime] would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them." *Id.* at 888. Early Americans were concerned that accommodations would lead to anarchy as well. McConnell, *supra* note 15, at 1447.

concern that promotion of disorder will unravel society is sound as a theoretical matter, in practice this has been a diminished concern under the particular regimes of *Sherbert* and the German Constitutional Court. Few Free Exercise challenges have been successful under *Sherbert*, resulting in minimal conscientious objection.[215] While the German Court has been more hospitable toward accommodation, no discernible disorder is apparent in German society. Thus, we might conclude that these two societies have been successful in containing the chaos sometimes resulting from religious fervor. Perhaps the countries might serve as a model as to how constitutional democracy can contain religious zeal.

Moreover, it is an open question whether tolerance of a certain disorder is a fair price to be paid for religious freedom. Both German[216] and United States[217] societies have illustrated well that such a price is worth paying for free speech. Thus, we might ask, if speech, why not religion?

Because the language of Free Exercise protects straightforwardly free exercise of religion, the purpose of the clause would seem self-evidently to guarantee religious practice. While allowing religious practice consistent with the law is better than the alternative, it is not much of a step for the democracy to tolerate religious exercise consistent with its general laws. Democracy controls more than religion. Obviously, both *Sherbert*/German and *Smith* promote this. In constitutional democracy, however, democracy does not control all. The Constitution does. The acid test of Free Exercise, accordingly, is to what extent it protects religious practice when such practice conflicts with legal obligations. This dilemma poses for society the hard question of which of the two is preferable.

Sherbert and *Smith* offer alternative solutions to this dilemma. Under *Sherbert*/German, legal obligations can be suspended in favor

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215. In fact, American law has settled on accommodation in only two sets of cases. One instance is the unemployment context, which has resulted in several cases under the *Sherbert* approach. *See* Frazee v. Ill. Dep't of Employment Sec., 489 U.S. 829, 832 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 140 (1987); Thomas v. Review Bd., 450 U.S. 707, 713 (1981). The other instance is suspension of compulsory high school attendance in *Wisconsin v. Yoder*, where the Court employed generally the *Sherbert* methodology. *See* 406 U.S. 205, 215, 220-21 (1972).

216. *E.g.*, *Soldiers are Murderers, II*, 22 EuGRZ 443, 456 (1995) (holding that calling soldiers murderers may be protected expression).

217. *E.g.*, Texas v. Johnson, 491 U.S. 397, 402-20 (1989) (burning a flag is protected speech).

of religious practice.[218] Freed from the obligations of the law, a person is then free to act upon God's will. We can see again that the *Sherbert*/German approach is rooted in the view that God's claims are superior to society's. Accordingly, the proper role for a society based on religious freedom is to get out of the way and defer to a person's pursuit of divine will. We might say the purpose of Free Exercise, in this view, is to recognize and empower a person to act on the liberty to follow religious conviction. Free exercise rights, like other rights, delimit democracy.

Smith comes out oppositely. Under *Smith* the dilemma of whether to follow conscience or law is resolved by mandating submission to the law over conscience. We might recall that the *Smith* approach follows the tenets of John Locke[219] and Thomas Jefferson.[220] Under this view, the role of the polity is to be tolerant and equal. All faiths are to be tolerated. All faiths are to be treated equally by officials. All faiths are equal because they are open to all people, and all people, no matter what faith, must comply with the law. People of faith are equal to people of nonfaith. No exceptions are to be made from the law.

However, *Smith* additionally advocates that the law itself might reasonably favor or disfavor one religion over another or religion over nonreligion, although on formally neutral terms. Whatever official favoritism exists must be manifest in effect, not language. *Smith* advocates formal neutrality, not substantive neutrality. This is the meaning of Justice Scalia's statement that

> [i]t may fairly be said that leaving accommodation to the 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

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218. The best example of this in American law is *Yoder*, where the Court excused the Amish from mandatory high school attendance. *Yoder*, 406 U.S. at 229-34.

219. *Smith*'s idea of nondiscrimination is grounded in Locke.

> Whatsoever is lawful in the commonwealth, cannot be prohibited by the magistrate in the church. Whatsoever is permitted unto any of his subjects for their ordinary use, neither can nor ought to be forbidden by him to any sect of people for their religious use. . . . But those things that are prejudicial to the commonwealth of a people in their ordinary use, and are therefore forbidden by laws, those things ought not to be permitted to churches in their sacred rites.

LOCKE, *supra* note 63, at 48-49.

220. *See* sources cited *supra* note 123.

> conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.[221]

Under *Smith*, religious majorities are likely to profit through the power they hold in the political process. Political representatives will tend to curry favor with dominant elements of their constituency. The law will tend to reflect the interests of these majorities. Thus, it is less likely religious majorities will be placed in the position of choosing conscience or law. (For example, the common exemption from prohibition laws for Catholics performing the communion ritual.) That fate is one to be faced mainly by religious minorities, who lack the clout to influence the political process.

Viewed another way, we can see clearly that the choice between *Sherbert* and *Smith* is one between a society preferring conscience or a society preferring law. The choice, starkly, is between religion or order. Under *Sherbert*/German, religion is king. Under *Smith*, law is king.[222] Law circumscribes religious freedom. Viewed differently, *Sherbert*/German places a premium on liberty whereas *Smith* emphasizes the equality obtaining from subjecting everyone to generally applicable neutral laws. *Smith* is ultimately grounded in law and order. We might think of law and order as the price to be paid for religious tolerance, in a manner similar to John Locke.[223]

Interpretatively, there are plausible reasons for either the approach of *Sherbert* or *Smith* under the Constitution. Textually viewed, however, the evidence favors *Sherbert* because the American text specifically enumerates Free Exercise. The language choice is not toleration, belief, or equality. Rather, the text singles out religious exercise as a preferred freedom.[224] The language "free exercise" strongly connotes action, not mere belief. The Framers deliberately choose the language "free exercise" over "rights of conscience," which

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221. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 890 (1990).

222. "The civil power can either change everything in religion, according to the prince's pleasure, or it can change nothing." LOCKE, *supra* note 63, at 49.

223. Locke desired to separate affairs of the church from state as much as possible to minimize discord in society. He advocated toleration of all beliefs, except for Roman Catholics (because of their allegiance to the Pope) and atheists (because they could not be trusted to keep their word), as a way further of defusing the tension between church and state. However, he advocated parliamentary supremacy as the way to resolve disputes between church and state and he did not favor accommodation of religiously grounded action. Thus, we might observe that advocacy of toleration was as far as Locke was willing to go for the cause of religious liberty. He advocated a much more moderate position than Roger Williams or James Madison. Likely, Locke feared pushing the cause of religious freedom too far, out of concern it would trigger a backlash. *See id.*

224. *Smith*, 494 U.S. at 901-02 (O'Connor, J., concurring).

more naturally would suggest only thought or belief.[225] The Constitution itself does not distinguish between belief or action. A generally applicable neutral law can impinge on religious freedom as much as a nonneutral law targeting religion.[226] American law demonstrates both varieties.[227] The German text is even clearer; both belief and action are specifically enumerated.[228] Thus, in Germany there is stronger textual support for a broad scope to religious freedom, one that encompasses both faith and deed.

Under *Smith*, the Court reads the text to protect belief and action to the extent action is not circumscribed by the law. Because generally applicable laws apply to all equally, religion is no more a subject of neutral laws than status, gender, or speech. Thus, any effect on religion is incidental, which the Court is willing to accept as a price to be paid for adherence to a system of formally neutral laws.[229]

Whether the rule of *Sherbert* or *Smith* obtains has consequences for the role of a Court in constitutional democracy as well. The *Sherbert* rule demands a more delicate and complicated judicial role. It is much more demanding to determine whether an accommodation is required (*Sherbert*) than to refuse accommodation as a matter of policy (*Smith*). Before a court can determine whether an accommodation is required, moreover, it must first decide whether the actions at issue are religious and, if so, whether they are burdened.

The rule of *Smith* tactfully avoids most of these difficult inquiries. Under *Smith*, the main judicial determinant is whether the law at issue is neutral. If it is, then it will be upheld. If it is not, then the law will be presumptively unconstitutional because it targets religion. Thus, we can see how the *Smith* rule insulates a court from

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225. McConnell, *supra* note 15, at 1488-89.

226. *Smith*, 494 U.S. at 894; Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) ("A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.").

227. *Compare* Sherbert v. Verner, 374 U.S. 398, 404 (1963) (holding that a neutral state unemployment compensation law violates religious freedom by placing the believer who refused on religious grounds to work Saturdays in the position of choosing his religion or his job), *with* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533-40 (1993) (holding that the city's ban on animal sacrifice for ritualistic purposes targeted the Sanskrit religion).

228. GG art. 4 (F.R.G.).

229. *Smith*, 494 U.S. at 877-78. *But see* Frederick Mark Gedicks, *The Normalized Free Exercise Clause: Three Abnormalities*, 75 IND. L.J. 77, 84 (2000) (arguing that *Smith* adopts a rational basis standard of review and thus "contradicts the Court's Speech Clause doctrine governing . . . incidental burdens on speech occurring as the result of otherwise legitimate government regulations of conduct or the time, place, or manner of expression").

most of the hard questions. This is a major impetus for the rule of *Smith*. In fact, the rule of *Smith* would seem to be grounded in a desire to minimize the role of the judiciary. By avoiding balancing tests in favor of categorical rules, judicial discretion is minimized. Cabining judicial discretion likely lies at the root of *Smith*. Interestingly, *Smith* is grounded in a view of legislative supremacy, not unlike John Locke.[230] However, we must also consider that the American republic is constituted on a separation of powers delegated among three coequal branches, not on the supremacy of the legislature. In this respect the rule of *Smith* may be better suited to America's mother country, England.

All things being equal, it is of course desirable that the court, like any institution, have an easier job to perform as compared to a harder one. Degree of difficulty, however, is not the proper question, for better or worse. The relevant question, rather, is what the constitution requires. The constitution determines the judicial role.

In the American charter, the text specifies Free Exercise.[231] Reasonably construed, Free Exercise specifies religion as a preferred activity, as we have observed. Unavoidably, therefore, the Court must determine what is religious for purposes of the First Amendment, not of course for purposes of theology. Necessarily, what is religion is a difficult judgment. Some relief is offered by virtue of the fact that many cases present little question that actions are sincerely based on religion.[232] However, other cases present difficult judgments, offering judges the opportunity to earn their money. Judgments in these hard cases map out the border of religious freedom.

It is worth noting, moreover, that *Smith* does not completely avoid these questions. Under *Smith* the Court must determine what is religious as well, although this may be done implicitly as the Court focuses on whether the law is neutral or not. The Court's inquiry into neutrality forces consideration of whether the law targets religion or not. This inquiry necessarily involves some evaluation of religion. Luckily, we do not have to search the sky for answers to these questions. If we did, much ink would have to be spilled. Established Free Exercise law points the way toward solution.

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230. McConnell, *supra* note 15, at 1435.

231. U.S. CONST. amend. I.

232. *E.g.*, Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972); Sherbert v. Verner, 374 U.S. 398, 404 (1963).

First, the Supreme Court itself has already mapped out the contours of the existential question of what is religious under the First Amendment.[233] We might think of ways the Court's exercise can be improved.[234] But the parameters of the task are set out. The hard question is understanding the proper judicial role. Determining whether an activity is religious for purposes of coming within the ambit of the First Amendment is a different question than determining the religion itself. The former question must necessarily be answered as a matter of constitutional law. Determining whether an activity is "religious" is no different in principle than determining whether an activity is "speech" for purposes of the Free Speech Clause or "commerce" for purposes of the Commerce Clause. But the latter question is inappropriate for judicial resolution. Because the Free Exercise Clause marks out religion as a special activity, it limits governmental power over religion. Government is powerless and incompetent to determine the propriety of particular conceptions of the divine.[235] The Court should avoid inquiries into "the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretation of those creeds,"[236] or the like. It is no more appropriate for a court to judge the importance of a religion than to judge the importance of an idea.[237]

The appropriate judicial position is one of neutrality—of not judging the merits or demerits of particular religious claims. Both the United States and German constitutional orders understand this, requiring official neutrality in matters of faith. As a matter of comparative law, the German idea of neutrality is more far-reaching than the American for the simple reason that all claims of

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233. *Compare Yoder*, 406 U.S. at 216 (recognizing Amish belief as religious because it was a theocratic view "of deep religious conviction, shared by an organized group, and intimately related to daily living"), *with* United States v. Seeger, 380 U.S. 163, 176 (1965) (defining the standard for a Congressional exemption from military service as "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by . . . God").

234. For a useful discussion of authorities exploring the definition of religion, see Adams & Emmerich, *supra* note 29, at 1663-69. *See also* McConnell, *supra* note 15, at 1491 n.420.

235. McConnell, *supra* note 15, at 1516.

236. Hernandez v. Comm'r, 490 U.S. 680, 699 (1989).

237. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 886-87 (1990) ("It is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the free exercise field, than it would be for them to determine the 'importance' of ideas before applying the 'compelling interest' test in the free speech field.").

conscience—religious, nonreligious, and antiwar—are respected according to the charter of Article Four. German law thus avoids the further question apparent in American law, under the Establishment Clause, over whether respect only of religious claims is nonneutral in respect of nonreligious claims. Proper understanding of the relationship of Free Exercise freedoms to constitutional democracy aids understanding of the proper judicial role.

Second, established Free Exercise law likewise demonstrates how careful consideration of religious and social interests can be made in the context of concrete cases, as we have reviewed in both United States and German law.[238] While these questions are difficult, they are not insurmountable. Difficult questions call for careful judgment, as in any constitutional question. But after all, that is why we have judges: to decide hard cases.

These questions must be asked and answered in German constitutional law as well. We might learn something from the Germans. The German Constitutional Court straightforwardly goes about the business of performing the judicial role in the manner described above. As our review of German law demonstrates, the German Court first judges whether the actions at issue are sincerely conscience based for purposes of Article Four. This inquiry is much easier in German law because the textual mandate of Article Four privileges all conscience-based claims—religious, ideological, and war based. The text thereby reduces the difficulty of judging the ambit of Free Exercise claims. Once these questions are settled affirmatively, the Constitutional Court then performs the sensitive job of ascertaining whether a conscience-based accommodation is merited in the circumstance.

Notably, the Constitutional Court does not exhibit the doubt about making these judgments sometimes evident in Supreme Court decision making.[239] Perhaps the greater confidence of the Constitutional Court is attributable to the stronger textual mandate of Article Four. Or perhaps the *Smith* Court exaggerates the difficulty of courts' rendering of judgments where accommodation is merited.[240] Further, the German constitutional order quite clearly preferences religion—as part of its value order. The strong rooting of religion in

238. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 403-05 (1963); Rumpelkammer, BVerfGE 24, 236 *et seq.* (1968) (discussing the consideration of religious and social interests).

239. *See, e.g.*, *Smith*, 494 U.S. at 887.

240. Wuerth, *supra* note 31, at 1201.

the German Constitution facilitates the judicial role. Yet, we might observe, can we seriously argue that the American scheme does not take religion seriously? Even if it might be argued that the First Amendment lacks the certitude of Article Four, American history, early American leaders' and Framers' intentions,[241] and Supreme Court pronouncements[242] should reasonably buttress the text to make clear that religion is a highly preferred value in the American constitutional order as well.

Supreme Court decision making is limited by an additional constraint as well, not evident in the German scheme. Under American law, Free Exercise freedoms are textually limited by Establishment Clause freedoms.[243] The relationship between these religious freedoms has proved to be among the most thorny in American law, and cannot be resolved here. However, we need to reach some basic understanding over the appropriateness of accommodation of Free Exercise in this more complicated American constitutional setting.

A plausible concern is that any accommodation of Free Exercise claims is itself a favoring of one religion over another or religion over

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241. Consider the statements of these early Americans. George Washington stated:

> In my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard to the protection and essential interests of the nation may justify and permit.

City of Boerne v. Flores, 521 U.S. 507, 562 (1997) (O'Connor, J., dissenting) (internal quotations omitted) (quoting Letter from George Washington to the Religious Society Called Quakers (Oct. 1789), *in* GEORGE WASHINGTON ON RELIGIOUS LIBERTY AND MUTUAL UNDERSTANDING 11 (E. Humphrey ed., 1932).

Oliver Ellsworth, a framer of the First Amendment and later Chief Justice of the United States, stated that government could interfere with religion only when required "to prohibit and punish gross immoralities and impieties; because the open practice of these is of evil example and detriment." *Id.* at 562-63 (O'Connor, J., dissenting) (internal quotations omitted) (quoting Oliver Ellsworth, Landholder, No. 7 (Dec. 17, 1787), *in* 4 THE FOUNDERS' CONSTITUTION 640 (Philip B. Kurland & Ralph Lerner eds., 1987)).

Future Supreme Court Justice James Iredell, in defending the Oath Clause stated "as one of the strongest proofs that could be adduced, that it was the intention of those who formed this system to establish a general religious liberty in America." Adams & Emmerich, *supra* note 29, at 1578 (internal quotations omitted) (quoting 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 193 (J. Elliot ed., 2d ed. 1836) (1788). While Iredell speaks to the Oath Clause, and not the Free Exercise Clause, his statement attests to the high value Americans placed on religion.

242. *See, e.g.*, *Boerne*, 521 U.S. at 548 (O'Connor, J., dissenting); Wisconsin v. Yoder 406 U.S. 205, 214 (1972) ("The values underlying [the Religion Clauses] have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance.").

243. U.S. CONST. amend. I.

nonreligion.[244] No doubt, any official favoring of religion has the potential to violate Establishment Clause freedoms. However, just as Establishment Clause freedoms limit Free Exercise freedoms, Free Exercise freedoms logically limit Establishment Clause freedoms as well. We have tended to read these clauses as antagonistic to one another. Since both are designed to secure religious freedom, it makes much more sense to view them as mutually supportive. Each secures elements of religious freedom. Establishment Clause freedoms secure a person's right to be free from coercion of conscience.[245] Free Exercise freedoms empower a person to act on his or her belief in the divine. The Religion Clauses thereby limit official power in this regard.

Because government is powerless to act, people are free to act on Free Exercise. Government too is subordinate to God,[246] just as government is subordinate to inalienable rights. In this view, therefore, government acknowledgment of Free Exercise is nothing more than the positive duty of government to recognize the limitation of its power inherent in religious freedom.[247] There is a difference in quality between official recognition of an inalienable right and proactive governmental action in support of religion, which may be coercion of conscience. For example, it is one thing to accommodate religious belief by suspending a law requiring parents to send their children to public school through high school contrary to their creed.[248] It is quite another matter altogether for government to establish a school district for a particular religious creed.[249]

Viewed from another perspective, it cannot be any other way. To interpret the Establishment Clause as prohibiting any governmental accommodation of Free Exercise is essentially to render the Free Exercise Clause meaningless. What Free Exercise claim could ever

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244. *See* McConnell, *supra* note 15, at 1420 n.42; *see also* Jesse H. Choper, *The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments*, 27 WM. & MARY L. REV. 943, 949-50 (1986) ("Not only was South Carolina's denial of unemployment compensation to Sherbert not a violation of the free exercise clause, it was a violation of the establishment clause for the Court to require the State to grant it to her."). According to Judge McConnell, it is historically unsound to argue that Free Exercise accommodations violate the Establishment Clause. McConnell, *supra* note 15, at 1511-12.

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

246. McConnell, *supra* note 15, at 1516.

247. Sherbert v. Verner, 374 U.S. 398, 415-17 (1963) (Stewart, J., concurring).

248. Wisconsin v. Yoder, 406 U.S. 205, 229-34 (1972).

249. Bd. of Educ. v. Grumet, 512 U.S. 687, 705-08 (1994) (holding that creating a separate school district for Satmar Hasidic Jews singles out a particular religious sect for special treatment).

meet this test? No word in the Constitution can be without meaning.[250] Thus, whatever the relationship between these sets of religious freedoms, the Establishment Clause cannot be so encompassing as to suffocate the Free Exercise Clause.[251] Like so many issues of American constitutional law, the appropriate judicial response to this difficulty should be caution—in interpreting the range of accommodation under Free Exercise—not abandonment.[252]

Based upon this summary review of the textual evidence, and of the utility and purposes of a Free Exercise Clause, the evidence would seem to favor the approach of *Sherbert* over *Smith*. Textually, the singling out of religious practice as a preferred freedom is more in accord with *Sherbert* than *Smith*. Textual evidence points to protection of religiously grounded conduct. In German law, textual evidence strongly supports religious practice. Historically, *Sherbert* is more in line with Madison, *Smith* with Locke and Jefferson.[253] Utility wise, the *Sherbert* approach favors religion over order and yet is able to constrain disorder so that society may well function. Purposefully, *Sherbert* captures better the point of Free Exercise by facilitating the ability of people to practice religion within society.

Yet, whether the desirable approach is one or the other perhaps matters less on issues of constitutional interpretation or utility. Which is suitable to a social order may be more about a constitutional order and its priorities than anything else. A society that is willing to recognize religion on its own terms, accepting conscience as man's path to God, and then respect it by allowing a person to give God his or her due, is a society that places religion at the fore of its

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250. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect . . . .").

251. One approach to resolving this dilemma is offered by the Supreme Court in *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327, 334-40 (1987). At issue in *Amos* was whether the Church could require its employees to be members of the Church without violating federal civil rights laws. The Court concluded that the Church could act pursuant to its tenets despite the requirements of the law. *Id.* at 338-40.

252. Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977) (plurality opinion) (holding that over substantive due process, "history counsels caution and restraint. But it does not counsel abandonment").

253. The historical record seems equivocal. Judge McConnell argues that history favors *Sherbert* more than *Smith*. In his review, the early history of pre-Constitutional America favors *Sherbert*; the early post-Constitutional period is more equivocal. McConnell, *supra* note 15, at 1466-73, 1511-14. Others dispute McConnell's findings. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 537-44 (1997) (Scalia, J., concurring); Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 916-33 (1992). Further review of the historical record would be worthwhile.

constitutional priorities. The rule of *Sherbert* accords religion this high, preferred place in the American constitutional value structure. Since the essence of Free Exercise is a claim for liberty—the liberty to practice religion—*Sherbert* is broadly in line with the architectonic principle of the United States, liberty.[254] Likewise, with its estimation of religion as integral to human dignity, the ultimate value of the constitutional order, the German charter values personal religious liberty as a high priority, which also is in line with the architectonic principle of the German charter, dignity. Both the American and German rules place a premium on religious freedom, not confining it to belief, but facilitating its free scope according to its need, including the ability to act upon it. Both laws accord primacy to conscience, suspending claims of law not of overriding magnitude in order to relieve people from the anguish of choosing religion or law. By contrast, the rule of *Smith* estimates religion correspondingly less. A rule of law that circumscribes religion by the breadth of the general law retards religious freedom to that extent.

IV. COMPARATIVE OBSERVATIONS

Our review of Free Exercise rights in Germany and the United States has led us to clarify the values underlying a Free Exercise Clause and the purposes it serves in constitutional democracy. Comparative law has a useful role to play in clarifying constitutional values and tenets of public philosophy. Fundamentally, a Free Exercise Clause empowers a person to act freely on affairs of the soul within the constraints of society. The clause recognizes a dilemma of human existence within constitutionally organized society: what to do when faced with competing claims of conscience and law. Should a person follow affairs of the soul—"soul liberty"[255]—or the demands of society?

Our review of the two laws discloses different ways of unraveling this dilemma. German law is very empowering. Viewing the conflict between conscience and legal obligation as one requiring an individual to pay an unacceptably high price, German law unravels the dilemma by strongly favoring claims of conscience over claims of law. On the whole, German law is willing to grant wide accommodation to the realm of faith based activities—including suspending legal claims that ordinarily would apply (even when

254. For elaboration of this theme, see EBERLE, *supra* note 11, at 13-17.

255. Eberle, *supra* note 122, at 442 (describing Roger Williams's thought).

generally applicable)—so that a person may be free, legally and spiritually, to act on conscience. The goal of German law is to empower a person to live according to chosen tenets relatively unimpeded. German law strives to so accommodate conscience in ways that complement social order. The German solution thereby demonstrates a way of how balance between religious liberty and social order may be achieved.

American law solves the dilemma exactly opposite of German law. For the most part, conflicts between conscience and law are resolved by demanding obedience to the law over conscience. Great danger is seen in "each conscience [becoming] . . . a law unto itself."[256] Yet, there is danger to religious liberty in overemphasizing order as well. Under the rule of *Smith*, Free Exercise rights consist only of the right to believe, act on such belief pursuant to ritual or worship, and claims to fair treatment under a principle of nondiscrimination whereby the social order may not disfavor religion in relation to other activities.[257] This rule of *Smith* largely follows the position of John Locke, of the seventeenth century, and eclipses the earlier position of the Court expressed in *Sherbert*. On this review of the law, American law is unwilling as a matter of right to grant accommodation to religiously motivated actors except as noted above or by majoritarian grace. We might therefore characterize American law as rather restrictive of Free Exercise rights. American law makes only minimal effort to achieve equilibrium between religious liberty and social order, instead reflexively deferring to authorities' demands for order.

A further notable contrast between the two laws is the breadth of accommodation present in German law. German law presumptively favors conscience-based actors faced with constraints imposed by the social order. Accommodation is the rule, not the exception. Pursuant to this methodology, the German Constitutional Court has suspended general legal requirements concerning rules of the marketplace,[258] criminal negligence,[259] the rendering of oaths,[260] and requirements of

256. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 890 (1990).

257. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531-35 (1993).

258. *See* Rumpelkammer, BVerfGE 24, 236 (1968).

259. *See* Blood Transfusion, BVerfGE 32, 98 (1971).

260. *See* Bavarian Official Oath, BVerfGE 79, 69 (1988); Denial of Witness Oath, BVerfGE 33, 23 (1972).

the slaughter of animals[261] in just our short survey of the law. This pattern of law, predictably favoring accommodation, reveals a rich mosaic of people's chosen acts of conscience forced to the brink by social requirements.

The broad accommodation of religion manifest in German law contrasts again with American law. Under *Smith*, obviously, accommodation no longer exists as a matter of constitutional right. The forum for accommodation is the democratic process. However, even under the prior rule of judicial accommodation in *Sherbert*, exemption was an extremely rare occurrence. Recall again that accommodation occurred in only two instances: unemployment compensation[262] and mandatory high school attendance.[263] It was more common the case that accommodation was denied than granted.[264]

An additional contrast between the two laws is who, among members of society, has been granted accommodation. A country's commitment to religious liberty is especially revealed in how it treats minority sects. Religious liberty is always popular from the viewpoint of majorities. Whether equal rights are accorded minorities is an acid test of religious liberty.

Here too we can observe that German law evidences certain solicitude toward minorities. First, accommodation of Christian fundamentalists, in *Blood Transfusion*, *Denial of Witness Oath*, and *Bavarian Official Oath*, is noteworthy. Evangelical Christians are considered as outside the mainstream in Germany, viewed with suspicion, notwithstanding the predominantly Christian orientation of the country. Granting of public corporation status to Jehovah's Witnesses[265] is further evidence of this toleration. Second, apart from these cases involving Christians, notable further is accommodation of minority sects, as concerning Muslims in *Ritual Slaughter*, *Islamic Teacher's Head Scarf*, and *Turkish Sales Clerk's Head Scarf*, and

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261. Ritual Slaughter, BVerfGE 104, 337 (2002).

262. *See, e.g.*, Frazee v. Ill. Dep't of Employment Sec., 489 U.S. 829 (1989); Sherbert v. Verner, 374 U.S. 398 (1963).

263. Wisconsin v. Yoder, 406 U.S. 205 (1972).

264. *See, e.g.*, Lyng v. N.W. Indian Cemetery Protective Ass'n, 485 U.S. 439, 453-55, 457-58 (1988); O'Lone v. Estate of Shabazz, 482 U.S. 342, 350 (1987); Bowen v. Roy, 476 U.S. 693, 722-23 (1986); Goldman v. Weinberger, 475 U.S. 503, 506-10 (1986); United States v. Lee, 455 U.S. 252, 259-60 (1982); Braunfeld v. Brown, 366 U.S. 599, 600-10 (1961) (applying a methodology that evolved into the rule of *Sherbert*).

265. Jehovah's Witness, BVerfGE 102, 370 (2000).

Jews,[266] and recognition of religious autonomy rights for the Baha'i.[267] Thus, German law evidences certain accommodation of minority sects, consistent with a principle of religious equality. It is also fair to observe that most of the German cases involve accommodation of the dominant Christian group.

By contrast, American law does not exhibit solicitude toward minorities. First, we must observe again that American law has been quite restrictive generally of Free Exercise rights, granting accommodations only in two instances, unemployment compensation and mandatory high school attendance.[268] In the latter instance, the Court made a point of emphasizing that the Old World Amish were law abiding citizens. Further, it is worth observing that these accommodations were granted to Christians only. Minority sects have never been granted an accommodation in Supreme Court case law.[269] On the other hand, in view of the pattern of presumptive rejection of accommodation of religious actors, it is fair to say that predominant Christian beliefs have fared only marginally better than minority sects.

These developments point to the conclusion that individual Free Exercise rights are accorded much broader scope in Germany than in the United States. In a sense, this observation is somewhat startling. A person would not ordinarily expect personal religious freedoms to be more vibrant in Germany than in the United States, at least as viewed from the standpoint of accommodation within society of religiously motivated actors. Upon further consideration, it is perhaps less startling that Germany has strong religious liberty. Under the Basic Law, the Federal Republic is constituted as a social democratic state

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266. Cross in Court Room, BVerfGE 35, 366 (1973) (ruling that a cross displayed in a court room must be removed in view of an objection from a Jewish lawyer).

267. Baha'i, BVerfGE 83, 341 (1991).

268. *Yoder*, 406 U.S. at 222 ("[T]he Amish community has been a highly successful social unit within our society, even if apart from the conventional 'mainstream.' Its members are productive and very law-abiding members of society; they reject public welfare in its usual modern forms."). In *Sherbert v. Verner*, the Court similarly observed that the claimant was a good citizen. 374 U.S. 348, 410 (1963). "This is not a case in which an employee's religious convictions serve to make him a nonproductive member of society." *Id.* Perhaps Americans overemphasize order in religious matters.

269. The Supreme Court has rejected accommodations for Jews, Muslims, and Native Americans. *See* Lyng v. N.W. Indian Cemetery Protective Ass'n, 485 U.S. 439, 447-58, 453-55 (1988); O'Lone v. Estate of Shabazz, 482 U.S. 342, 350 (1987); Goldman v. Weinberger, 475 U.S. 503, 506-10 (1986); Braunfeld v. Brown, 366 U.S. 599, 600-10 (1961). The treatment accorded practitioners of the Santeria religion in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* was not an accommodation, of course, but rather discrimination under the rule of *Smith*. 508 U.S. 520, 537-38 (1993).

committed to human dignity and human rights. Capturing the transcendent nature of the human condition, Free Exercise rights are an integral part of this central focus on the human person. Free Exercise rights, like other rights, are tangible radiations of human dignity that facilitate realization of human capacity. Human rights stand at the fore of a dignitarian vision searching to gird society to higher principles of justice and human fulfillment. Given such a constitutional order, it is quite natural that Free Exercise rights will be highly preferred.

It is more surprising that American personal religious liberty pales in comparison to German. America was founded on principles of religious liberty more than 350 years ago, with Rhode Island being the first settlement founded on religious liberty in the Western world. In view of such history, it is surprising that the impulse of American law is to constrain religious liberty rather than empower it.

Viewed this way, there is much American law could learn from the dignitarian focus of German law. For one thing, focusing on individual dignity would not likely lead to excessive deference to majoritarian rule as a means to constrain religion. Instead, a dignitarian focus would accord greater regard to human needs. Human needs require acknowledgment of the importance of the spiritual and transcendent dimension to life that Free Exercise rights capture. Being more attuned to the needs of the believer, as the German Constitutional Court shows, and less attuned to the exigencies of law and order would help.

Second, the Constitutional Court demonstrates how an independent court can judge the boundaries of religious freedoms without impugning religion or courting anarchy. The point is partly one of methodology. Weighted balancing favoring religion (as in Germany and under *Sherbert*) is more likely to give religion its due than a categorical rule protecting belief but not action (*Smith*). And the point is partly one of judgment. The Constitutional Court shows how to cut to the heart of a Free Exercise claim, explicate the relevant considerations—assessing the demands of religion as they relate to the social claim—and then formulate a clear, workable rule of law that respects religion without undermining society.

Looking outside our borders has allowed us to gain insight into the purpose and utility of a Free Exercise Clause as it functions in a constitutional democracy. The Constitutional Court serves as an alternative standard by which to measure the work of the Supreme

Court. Comparative law has a useful function to perform in holding native ways up to the light of another way, and seeing how native ways compare and also, when viewed in this more detached manner, how they compare with the design of native law and traditions. With this broader visage, we can gain perspective on whether we are true to our best intentions or whether we stray. In the case of Free Exercise rights, the comparison in approach of the two Courts is so dramatic, notwithstanding similarities in text and constitutional design, that perhaps it ought to give us pause to ponder whether the rule of *Smith* is appropriate.